

Harassment in the Workplace



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Introduction

- The potential for harassment exists in every workplace.
- Harassment is a costly proposition for employers, and can result in: low morale, absenteeism, reduced productivity, employee turnover, and damages and litigation costs.
- In light of all the recent media coverage over the last several months, some may feel that “harassment” means only “sexual harassment.” This view is clearly incorrect.

What is Illegal Harassment?

- Different treatment
- “Harassment” is defined by the Equal Employment Opportunity Commission as:

Unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where:

- 1) enduring the offensive conduct becomes a condition of continued employment, or
- 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

EEOC Harassment Definition cont.

- Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
- Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

EEOC Harassment Definition cont.

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Harassment Prohibited Under The Illinois Human Rights Act

- 775 ILCS 5/1-102(A)
- Human Rights Act provides freedom from discrimination “because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.”

Harassment Is Discrimination

- Sexual harassment is sex discrimination prohibited by Title VII.

(Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 2404 –2405 (1986)).

- EEOC has stated that the same basic standard of liability apply to all forms of unlawful harassment.

(EEOC Enforcement Guidance – Vicarious Employer Liability for Unlawful Harassment by Supervisors.)

Federal Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e *et seq.*)
- The Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 *et seq.*)
- Civil Rights Act of 1991 (42 U.S.C. § 1981 *et seq.*)
- Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*)

Important Supreme Court Cases

- *Meritor Saving Bank v. Vinson*, 477 US 57 (1986)
 - Vinson engaged in voluntary sexual relationship with supervisor, after relationship ended, she was terminated for time and attendance issues.
 - Court held voluntary does not necessarily mean welcome.
 - For sexual harassment to be actionable, it must be unwelcome and sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.
 - First recognition that hostile environment sexual harassment is actionable under Title VII.

Important Supreme Court Cases

- *Burlington Industries v. Ellerth*, 524 US 742 (1998)
 - Ellerth quit her job - alleged supervisor made numerous threats to retaliate against her if she denied him sexual liberties.
 - The threats were not carried out.
 - Ellerth knew that Burlington had an anti-harassment policy - but did not tell anyone in authority about the harassment.

Important Supreme Court Cases

- *Faragher v. City of Boca Raton*, 524 US 775 (1998)
 - Faragher resigned as a lifeguard - alleged that her two immediate male supervisors created a “sexually hostile atmosphere” at work.
 - Repeatedly subjected her and other female lifeguards to “uninvited and offensive touching”, lewd remarks, and speaking of women in offensive terms.
 - Faragher failed to complain about the harassment during her employment.

Ellerth and Faragher

- The EEOC has adopted the principles the Supreme Court set forth in *Ellerth and Faragher*.
- When sexual harassment by a supervisor results in tangible employment action against an employee, employer is automatically liable.
- If no tangible action taken, an affirmative defense is available, if the employer exercised reasonable care to prevent and correct promptly and sexually harassing behavior (has anti-harassment policy and complaint avenues).
- The employee unreasonably failed to take preventive or corrective opportunities provided by employer (failed to take advantage of complaint process).

EEOC Notice Concerning the Supreme Court's Decision in *Vance v. Ball State University*, 570 US 421, 133 S. Ct. 2434 (2013)

The standard for employer liability for hostile work environment harassment depends typically on whether or not the harasser is the victim's supervisor. An employer is vicariously liable for a hostile work environment created by a supervisor. In *Vance v. Ball State University*, 133 S. Ct. 2434 (2013), the Supreme Court rejected in part the EEOC's definition of "supervisor." The Court held that an employee is a "supervisor" if the employer has empowered that employee "to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" The Court stated that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." In assessing such negligence, the Court explained, "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." Also relevant is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed."



Harassment From Tangible Employment Actions

- Actionable harassment may arise from significant changes in an individual's employment status (e.g., hiring, firing, promotion, failure to promote, demotion, undesirable reassignment).

Harassment From Hostile Work Environment

- Comments or conduct that have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating or offensive working environment.
- Often more subtle than harassment that results in a tangible employment action, and is often more difficult to determine where the line falls between lawful and unlawful.
- The key issues are frequency and severity.
- "Reasonable person" standard governs.
- Anyone can commit this type of harassment - a management official, coworker or non-employee.

Key Elements of Harassment Complaints

- Conduct must affect a term, condition, or privilege of employment.
- Must be unwelcome.
- Can be based on race, color, religion, national origin, sex, sexual orientation, age, disability, or by likely extension any other class or characteristic protected by applicable law.
- Is severe or pervasive under a reasonable person standard.

Hostile Environment Harassment Examples

- Pressure for dates;
- Making offensive remarks about looks, clothing, body parts;
- Touches in a way that may make an individual feel uncomfortable;
- Telling sexual jokes, hanging sexual posters;
- Using racially derogatory words, phrases, epithets;
- Demonstrations of a racial or ethnic nature such as the use of gestures, pictures or drawing which would offend a particular racial or ethnic group.

Hostile Environment Harassment Examples

- Comments about an individual's skin color or other racial/ethnic characteristics;
- Negative comments about an employee's religious beliefs;
- Negative stereotypes regarding an employee's birthplace or ancestry;
- Negative comments an employee's age when referring to employees 40 and over;
- Derogatory or intimidating references to an employee's mental or physical impairment.

What is Harassment Otherwise?

- Teasing
- Picking on someone
- Singling an individual out
- Locker room talk

Protected Classes

Federal

- Age
- Race
- Sex
- National Origin
- Religion
- Disability
- Pregnancy
- Genetic Information

Protected Classes - Illinois

- Age
- Race
- Sex
- Pregnancy
- National Origin
- Religion
- Disability
- Marital Status
- Sexual Orientation
- Arrest Record
- Veteran Status

Illinois – Pregnancy Fairness

- Prior to January 1, 2015, Illinois laws did not protect pregnant women. (P.A. 98-1050).
- The Illinois Human Rights Act now protects both employees and applicants that are pregnant, have recently given birth, or have medical conditions related to pregnancy or childbirth.
- Applies to all employers with one or more employees – regardless of whether they are full-time, part-time, or probationary.
- Employers must provide reasonable accommodations to covered women, if it will not cause an undue hardship.
- Employers must provide/post a notice of Pregnancy rights in the workplace

Illinois – Pregnancy Fairness

In Illinois it is a civil rights violation for “an employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth. Women affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, regardless of the source of the inability to work or employment classification or status.”

(775 ILCS 5/2-102(I)).



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Local Human Rights Ordinances

- McLean County Code – Chapter 66 prohibits discrimination based on disability
- McLean County Code – Chapter 108 is part of the County personnel code prohibiting discrimination based on race, religion, color, national origin, sex, age, or disability.

Local Human Rights Ordinances

- Bloomington City Code – Chapter 22.2 establishes the Bloomington Human Relation Commission for ending discrimination based on race, color, sex, religion, age, national origin, marital status, familial status or physical or mental disability unrelated to ability.
- Normal Municipal Code – Chapter 24 establishes a Town Commission on Human Relations, and prohibits discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin or ancestry, disability, or matriculation, and with regard to housing, familial status.

Harassment Based on Age

- *Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675 (7th Cir. 2005)
- Held that a Plaintiff may make out a hostile work environment claim under the ADEA
- Plaintiff alleged co-workers repeatedly made comments that she “shouldn’t be working at her age,” and “if you were younger [you could do more]”
- Court rejected the Plaintiff’s claim, noting that she was replaced by an older worker, and that the co-workers’ comments, while “boorish,” were not severe or pervasive enough to create an objectively hostile work environment

Harassment Based on Disability

- *Flowers v. S. Reg'l Physician Services Inc.*, 247 F.3d 229 (5th Cir. 2001)
- Held that a cause of action for disability based harassment exists under the ADA
- Plaintiff was HIV positive. While previously close with co-workers and supervisor, after her HIV status was revealed she was ostracized, hospital president refused to shake her hand and would avoid her office. Plaintiff was required to take 4 random drug tests in a one-week period. Despite previous positive work reviews, after HIV status was revealed, Plaintiff was written up and placed on multiple 90-day probation periods, and finally discharged.
- Court affirmed verdict in favor of Plaintiff. Holding that employer was aware of conduct of supervisor and hospital president and that conduct of was so severe and pervasive that it unreasonably interfered with Plaintiff's job performance

Harassment Based on Disability

- *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999)
- Police sergeant was diagnosed with severe sleep apnea, requested to work only on day shift and was given permanent day shift work
- Seventh Circuit noted that “Hostile work environment claims are typically associated with sexual harassment rather than disability claims,” but ultimately, found that a hostile work environment claim was cognizable under the ADA
- Plaintiff alleged he was harassed and verbally abused by supervisors and other officers; was given negative performance reviews; and was punished through such sanctions as being given no patrol cars or officers to supervise and being sent home to get his regulation shoes, and that he was subjected to vulgar comments about his disability
- Held that Plaintiff was required to establish his workplace was permeated with discriminatory conduct—intimidation, ridicule, insult—that was sufficiently severe or pervasive to alter the conditions of his employment
- Court affirmed summary judgment for employer where Plaintiff was given requested accommodation, suffered no adverse employment action, failed to report facts about harassment, and Plaintiff’s allegations did not show any ridicule, intimidation, or insults were sufficiently severe to alter his employment

Harassment Based on Religion

- *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265 (3rd Cir. 2001)
- Plaintiff was an Orthodox Jew, hired as a tenure-track associate professor
- Plaintiff was only Orthodox Jew in the School of Education and informed her Department Chair that she would not be able to work on Jewish Holidays
- Plaintiff received favorable reviews and treatment during her first 2 years of employment, beginning in her third year, Plaintiff's observance of Jewish Holidays and the Jewish Sabbath formed the basis of negative comments on her retention review. Additionally, Plaintiff was subjected to unprecedented monitoring, charged sick days for not working on Jewish Holidays, meetings were scheduled on Jewish Holidays, and Plaintiff was told that "The trouble with you is that it doesn't show that you are Orthodox."
- Appellate court reversed summary judgment for employer finding that a jury could find the treatment of the Plaintiff on account of her religion to be pervasive



Harassment Based on Religion

- *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3rd Cir. 2009)
- Case involved both harassment based on gender stereotypes and religion
- Plaintiff identified himself as an effeminate man and believed that his mannerisms caused him to not “fit in” with other men at his employer and that his conduct did not conform to the companies religious beliefs
- Plaintiff was repeatedly called derogatory names such as “Princess” and “Rosebud,” notes were left stating “Rosebud will burn in hell,” religious pamphlets were brought to work stating “the end is coming” and “have you come clean with your maker?” After Plaintiff was “outed” as being homosexual, he found notes indicating he was a sinner and anonymous prayer notes, and a co-worker commented “I hate him. They should shoot all the [homosexuals]”
- Plaintiff was ultimately terminated.
- Court rejected the Plaintiff’s religious harassment claim stating that he was not harassed because of *his* religion, and that his claim that he was harassed for failing to conform to his employer’s religion was just a repackaged claim of sexual orientation harassment

New Caselaw

Transgender Protected by Title VII

- Recently, on April 4, 2018, a Texas Federal District Court judge, in *Wittmer v. Phillips 66 Company*, Case No. H-17-2188, held that transgendered persons are a protected class under Title VII
- Relying on, among others, 7th Circuit authority (*Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017)), the court held that discrimination based on transgender status is a subset of sex discrimination
- Defendant made an offer of employment to Plaintiff which was subsequently rescinded after a background check revealed discrepancies in her prior work history
- Court held that although it was holding that transgender status is protected by Title VII, the Plaintiff failed to establish a *prima facie* case where the Defendant was only aware of Plaintiff's transgender status after the offer of employment was rescinded

Harvey Weinstein and #MeToo What Do Employers Do?

Be Specific and Clear On Who Can Bring Harassment Complaints In the Workplace

- Incident of harassment is sufficient
- Harassment can be from a co-worker but can also be from a third party

Provide Options For Employee Reporting

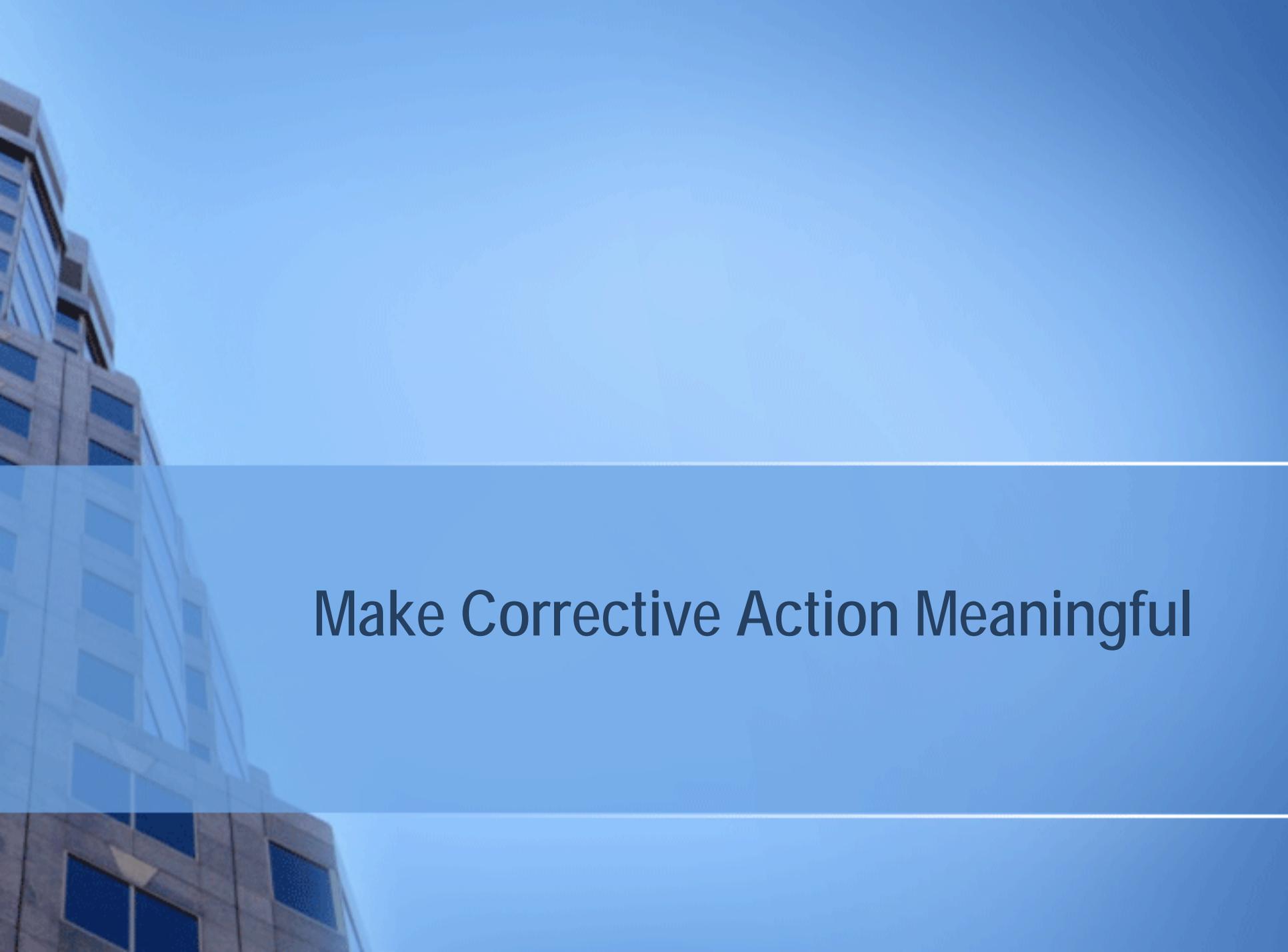
- People of both genders
- Anonymous reporting
- Reporting to third parties

Define In As Much Detail As Possible, Prohibited Conduct

- Includes behavior by employees and non-employees
- Could be via social media
- Could be at the workplace but also any company-related or sponsored events



Ensure There Is a Meaningful Retaliation Prohibition



Make Corrective Action Meaningful