

Understanding and Addressing Harassment in the Workplace

**Wisconsin Technical College District Boards Association
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I. Preventing Inappropriate Behavior in the Workplace is a Never-Ending Challenge.

Ensuring that workplaces are respectful and harassment free takes persistence and consistent messaging, actions and reminders of acceptable and unacceptable behavior. The #MeToo movement has been a stark reminder that the issue of harassment in the workplace requires continuous attention both for legal compliance and for general morale and productivity.

- A. Harassment occurs in the public sector as well as in the private sector.
- B. It occurs in all industries.
- C. It occurs across all levels of employees.
- D. It occurs across all demographics of employees and third parties.
- E. It occurs across socio-economic strata.

II. Practical Effects of Harassment in the Workplace.

- A. Anxiety — concentration issues, fear for personal safety.
- B. Depression — isolation, loss of trust, loss of self-esteem.
- C. Harm to both work and personal relationships.
- D. Absenteeism.
- E. Reduced productivity.
- F. Workplace morale.
- G. Bad publicity.
- H. Departures of valued employees.

- I. Legal liability.

III. What Harassment and Abusive Behavior is Really About.

- A. Power and intimidation.
- B. Denial of respect and equality.
- C. Self-esteem or related issues of harasser/abuser.

IV. The EEOC Just Released Its Preliminary Fiscal Year Data on Sexual Harassment.

- A. The EEOC filed 66 harassment lawsuits, including 41 that included allegations of sexual harassment. That reflects more than a 50 percent increase in suits challenging sexual harassment over fiscal year 2017.
- B. In addition, charges filed with the EEOC alleging sexual harassment increased by more than 12 percent from fiscal year 2017.
- C. Overall, the EEOC recovered nearly \$70 million for the victims of sexual harassment through litigation and administrative enforcement in FY 2018, up from \$47.5 million in FY 2017.

V. Defining Key Terms.

- A. Illegal Harassment.

Harassment is a form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, the Wisconsin Fair Employment Act (WFEA) and local ordinances.

Illegal harassment is generally unwelcome verbal or physical conduct or other acts engaged in because of the recipient's protected class status (race, sex, age, disability, religion, etc.) when:

1. Submission to the conduct is a condition of employment or benefits;
2. The conduct unreasonably interferes with the recipient's work; or
3. Can reasonably be seen to create a hostile, intimidating, or offensive environment.

- B. Hostile Work Environment.

Many people refer to any unpleasant or abusive situation at work as a “hostile work environment.” For example, employees of both genders at a company may allege that their female boss degrades all of them, never gives them clear direction and takes credit for all of their successes. If the boss in fact treats all employees, regardless of protected class status, in this negative manner, such behavior is

likely poor management, but it is not a hostile work environment in the sense of illegal harassment because it is not linked to the employees' protected class status.

Hostile work environment harassment is verbal, nonverbal or physical behavior engaged in because of an individual's protected class status and which is sufficiently severe or pervasive to interfere with an employee's work performance or create an intimidating, hostile or offensive work environment. For example, a male boss calls the women in the office "little ladies," rates the female employees on their figures, and makes comments about what female celebrities he'd like to "know better." If this behavior is sufficiently severe or pervasive, it will constitute illegal harassment as creating a hostile work environment.

C. Bullying.

Bullying is a generic term often used to refer to abusive, undermining, degrading or other similar behavior in the workplace. If bullying is not linked to protected class status of those on the receiving end, it is not illegal harassment and does not give rise to legal claims of discrimination or otherwise.

There has been proposed legislation in Wisconsin to make illegal generalized bullying, but the proposed legislation has not been passed into law.

D. Respectful Workplace.

Respectful workplace is a term that encaptures a broader scope of behaviors than just illegal harassment. Respectful workplaces are generally environments that:

1. Embrace and appreciate diversity;
2. Are cordial and supportive;
3. Respect a variety of beliefs and approaches;
4. Support and develop employee potential;
5. Are free of abuse, bullying and humiliating or intimidating behavior; and
6. Are free of and actively prohibit discrimination and illegal harassment.

VI. Sexual and Other Harassment.

A. Harassment is unwelcome verbal or physical conduct or other acts engaged in because of the recipient's protected class status when submission to the conduct is a condition of employment or benefits, the conduct unreasonably interferes with the recipient's work or can reasonably be seen to create a hostile, intimidating, or offensive environment. Harassment can include:

1. Verbal or physical abuse.

2. Epithets, name-calling, slurs.
3. Threats or intimidating behaviors.
4. Vulgar, obscene or derogatory language.
5. Mimicry, mocking accents.
6. Lewd or offensive gestures or pranks.
7. Offensive jokes in any medium.
8. Offensive, threatening or hostile e-mails, text messages or other electronic communication.
9. Excluding or ignoring specific individuals.
10. Social media posts.

B. Sexual harassment is one category of harassment that can include the above as well as:

1. Sexual advances.
2. Requests for sexual favors.
3. Unwelcome physical contact, e.g., touching, rubbing or brushing against another, groping.
4. Display of offensive or graphic pictures, cartoons, jokes, photos.
5. Unwelcome social invitations.
6. Sexually-charged e-mails, text messages or other electronic communication.
7. Negative treatment when advances are rejected.

C. Types of sexual harassment.

1. Tangible Employment Action (Quid pro quo).
 - a. Promises a reward (job, promotion, raise) in exchange for sexual favors.
 - b. Threatens a penalty (firing, bad review) if sexual advances are rejected.
 - c. This type of sexual harassment is carried out by one who has some element of power over another.

Examples:

- A supervisor fires an employee who has refused to engage in a sexual relationship.
- A manager chooses not to send a subordinate to a coveted conference after the employee rejects “social outing” invitations.

2. Hostile Work Environment.

- a. Sexual behavior, comments, or actions of a sexual nature that "unreasonably interfere" with work or create an "intimidating hostile, or offensive" work environment.
- b. This type of harassment can be carried out by all levels of employees.

Examples:

- A group of employees make a point of telling sexual jokes to an employee who has clearly stated that such jokes are offensive.
- One employee continually leers at another employee and makes comments about that person's body.

VII. A Closer Look at Hostile Work Environment Harassment.

- A. Hostile work environment harassment is verbal, nonverbal or physical behavior that targets individuals because of their protected class status and is sufficiently severe or pervasive to interfere with an employee's work performance or create an intimidating, hostile or offensive environment.
- B. Between Whom May Hostile Work Environment Harassment Occur?
 1. By an employee toward another employee.
 2. By an employee toward a supervisor.
 3. By a supervisor toward an employee.
 4. By an employee toward any third party.
 5. By any third party toward an employee.
- C. What is "Severe and Pervasive" Harassment?
 1. The behavior must be offensive using a "reasonable person" standard.
 2. The behavior must also have been subjectively offensive to the complaining employee.
 3. There must generally be more than isolated incidents of behavior.
 4. One severe incident, especially of physical contact may be sufficient to create actionable harassment.
- D. Harassment Factors.
 1. Welcomeness of behavior is judged on the "totality of the circumstances" considering:

- a. The nature of the harassment;
 - b. The background and experience of the complainant, co-workers and supervisors;
 - c. The physical environment;
 - d. The “lexicon” of the workplace; and
 - e. The complainant’s “reasonable expectations.”
2. The perpetrator’s intent does not determine whether conduct is harassment.
 3. Tolerance of (or even some participation in) offensive conduct does not mean the conduct is welcome, or that harassment has not occurred.
- E. What Is Not Considered Harassment?
1. Welcome conduct, such as banter and jokes among friends who participate equally.
 2. Truly consensual relationships.
 3. Conduct or treatment that is not based on sex or other protected class status. This does not mean that inappropriate behavior is acceptable in the workplace.

VIII. Legal Liability Standards for Harassment.

- A. Two landmark U.S. Supreme Court cases in 1998 clarified an employer's liability for sexual harassment under federal law.
1. Employers are strictly liable for harassment by a supervisor or manager over a subordinate that results in a tangible employment action. (Go out with me or else...). Tangible employment action means a significant change in employment status, such as hiring, firing, failing to promote, reassigning to less desirable position, or a change to benefits. The focus is generally on economic harm.
 2. Absent a tangible employment action, the employer can avoid liability by showing:
 - a. It exercised reasonable care to prevent and promptly correct any harassing behavior; and
 - b. The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the

employer or to otherwise avoid harm.

- c. This is based on the U.S. Supreme Court cases that established these rules, and is widely known as the *Farragher/ Ellerth* "affirmative defense." These cases were brought under federal anti-discrimination law, Title VII, and the affirmative defense has helped employers avoid liability where they have taken appropriate steps to prevent and stop harassment.
3. "Reasonable care to prevent and promptly correct harassment" involves:
 - a. Effective anti-harassment policy.
 - b. Regular, periodic training.
 - c. Effective enforcement of the policy—it is not just a piece of paper.
 4. Correcting the harassment properly involves:
 - a. Effective investigation of complaints.
 - b. Effective responses to findings that harassment occurred.
 - c. Consistent enforcement across the organization.
 - d. Prohibition of retaliation.
 5. Wisconsin Harassment Law standards:
 - a. Employer prohibitions:
 - i. Engage in sexual harassment that is sufficiently severe to interfere substantially with an employee's work performance or to create an intimidating, hostile or offensive work environment.
 - ii. Implicitly or explicitly make or permit acquiescence in or submission to sexual harassment a term or condition of employment.
 - iii. Make or permit acquiescence in, submission to or rejection of sexual harassment the basis or any part of the basis for any employment decision.
 - iv. Permit sexual harassment to have the purpose or effect of substantially interfering with an employee's work performance or of creating an intimidating, hostile or offensive work environment.
 - b. Liability Standards. The Wisconsin Fair Employment Act recognizes three ways in which an employer may be liable for

sexual harassment.

- i. Quid pro quo sexual harassment.
- ii. Hostile work environment. If the employer permits harassment to create a hostile work environment, the employer will be liable. Hostile work environment applies to the actions of co-workers who are not considered to be "agents" of the employer.
- iii. Harassment that is perpetrated by an owner or an agent of the employer who is in a position of responsibility such that it is appropriate to treat the actions of the agent as being the actions of the employer.

c. Who is an owner or agent? Courts look to the following:

- i. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees;
- ii. The authority to direct and assign the work force;
- iii. The number of employees supervised and the number of other persons exercising greater, similar or lesser authority over the same employees;
- iv. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees;
- v. Whether the supervisor is primarily supervising an activity or is primarily supervising employees;
- vi. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees; and
- vii. The amount of independent judgment and discretion exercised in the supervision of employees.

d. Owner or Agent Harassment.

The Farragher and Ellerth affirmative defenses under federal law described above do not apply to sexual harassment caused by an owner or an agent under Wisconsin law. If an owner or agent (high level manager) engages in harassing behavior, even if it is hostile work environment harassment and there is no tangible job action, the organization will likely be liable with no affirmative defense available.

IX. Necessary Inquiries and Steps to Prevent and Address Harassment in the Workplace.

- A. Do you set a tone, message and actions of respect for all from the top?
- B. Is your anti-harassment policy up-to-date and effective?
 - 1. Defines and gives examples of all categories of harassment.
 - 2. **Applies to all third parties** who have contact with your employees.
 - 3. **Applies to “off-the-job” conduct** that impacts workplace relationships or operations.
 - 4. Has an effective complaint mechanism — provides at least two channels to report conduct and preferably options to report to each gender.
 - 5. Does not require the victim to confront the harasser.
 - 6. States that reports of harassment will be investigated and addressed in a timely fashion (but does not tie the employer in to rigid timelines).
 - 7. States that reports of harassment will be maintained as confidential to the degree possible but does not guarantee confidentiality.
 - 8. Prohibits retaliation against any employee who has complained of harassment or who cooperated in an investigation of harassment.
 - 9. Does not lump *all* prohibited behavior into the policy — behavior that is prohibited but which is not illegal harassment based on protected class status (i.e. general bullying, general disrespectful or threatening behavior) should be addressed in a separate policy.
- C. Train and retrain your workforce and your managers.
 - 1. To avoid liability for harassment, you must be able to demonstrate that you took reasonable steps to prevent harassment in your workplace. If you are not training your workforce, you simply are not taking adequate reasonable steps.
 - 2. Managers need additional training to understand their heightened requirements under the law and **how to move swiftly and correctly when**

they sense harassment is occurring or they receive a report of harassment.

3. Orientation to your anti-harassment policy and training should be performed with all new hires.
- D. Address harassment issues timely, according to policy and as confidentially as possible.
1. When you receive a complaint of harassment, assess the situation, consult with legal counsel as appropriate, and determine who will investigate the matter.
 2. **Remember that there can be no “off the record” reports of harassment. Once you are aware of the concern, your organization is aware of the concern and must act.**
 3. Realize that those first few communications you have with the complaining employee set the tone for how they view the employer’s actions.
 4. Do not promise confidentiality, but treat the complaint as confidential.
 5. If you are documenting the complaint, report on the reported facts only. Do not editorialize. Do not speculate. Realize that there may be Open Records requests.
 6. Avoid promising deadlines for completion of investigations or specific outcomes to the complaining employee. Even asking the employee what the employee wants to have happen (especially from the outset) can create unreasonable expectations and bad feelings that create issues later.
 7. Get the matter investigated as timely but thoroughly as possible.
 8. Circle back to the complaining employee and the alleged wrongdoer with your conclusions and outcomes. Consult with legal counsel to determine how much information to share and what to avoid.
 9. Remind all parties of obligations of no retaliation.