How to Handle Workplace Harassment

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PART ONE:
HARASSMENT AND DISCRIMINATION

A. Defining Harassment

Harassment is a form of discrimination involving unwanted physical or verbal behavior.

1. Quid Pro Quo Sexual Harassment ("Let's Make a Deal")

*Quid pro quo* is a Latin term that means "this for that" and implies an exchange. *Quid pro quo* sexual harassment occurs when submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting that individual.

Examples of *quid pro quo* harassment include:

- Demanding sexual favors in exchange for a promotion, a raise or other job benefits.
- Threatening to deny an employee's expected raise, promotion or other job benefit if the employee does not provide sexual favors.
- Demoting, disciplining or firing a subordinate who ends a romantic relationship.
- Changing job conditions or performance expectations after a subordinate refuses repeated requests for a date.

2. Hostile Work Environment Sexual Harassment

In 1986, the U.S. Supreme Court held that a hostile work environment can also be a form of sexual harassment if it is "sufficiently severe or pervasive [enough] to alter the conditions of the [victim's] employment and create an abusive working environment."

Determining what constitutes a hostile work environment has been a difficult task, because it involves drawing a line between mere vulgarity and sexual harassment, which is not always easy. On one side lie sexual assaults; other physical conduct, whether creepy or hostile, for which there is no consent; unwelcomed sexual solicitations; intimidating words or acts; obscene language or gestures; and pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo or a disparaging term, and/or co-workers who are just a little rough around the edges.

3. It's Not Just About Sex

Unlawful harassment and/or hostile environment discrimination is not just limited to conduct related to a person’s gender. The EEOC considers harassment and other unwelcome conduct unlawful if it is based on race, color, religion, national origin, age (40 or older), disability or genetic information. 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.
B. The Standard for Determining When Harassment Exists

The EEOC outlines a number of factors that should be considered in assessing whether a hostile workplace exists. They include:

- How frequently the conduct occurs;
- How severe the conduct is;
- Whether the conduct is physically threatening or humiliating;
- Whether the conduct unreasonably interferes with an employee's work performance;
- The effect of the conduct on the employee's psychological well-being;
- Whether the conduct was verbal or physical or both;
- Whether the conduct was hostile and patently offensive;
- Whether the alleged harasser was a co-worker or a supervisor;
- Whether others joined in perpetrating the harassment; and
- Whether the harassment was directed at more than one individual.


The dividing line between merely offensive conduct and a hostile work environment has become clearer based on a constantly growing public record of court decisions. Some of the key principles from these decisions include:

1. Harassment Consisting of Verbal Statements

- Generally, courts have held that sporadic offensive or vulgar comments alone do not create a hostile work environment.

- Thus, at one end of the spectrum are isolated crude jokes, rude comments and banter or innuendo that are deemed insufficient to create a hostile work environment.

- At the more extreme end of the verbal harassment spectrum are cases involving verbal statements that are explicit, offensive, highly derogatory, and humiliating because made publicly, as well as threats and intimidation based on a protected class characteristic.

- Verbal statements need not be explicitly about a person’s protected class to be actionable under Title VII. Rather the key issue is whether members of one protected class are exposed to disadvantageous terms or conditions of employment to which others are not exposed.

2. Harassment Involving Physical Contact

- Harassing conduct that consists of unwelcome physical touching is usually considered more offensive than mere verbal abuse.
• Where the offensive conduct consists of physical contact of a sexual nature, a fewer number of incidents may be necessary to establish that the conduct is sufficiently "severe or pervasive" to be actionable.

• The EEOC has stated that it will presume that a single incident of unwelcome physical contact with an individual's intimate areas is sufficient to create a hostile work environment.

• However, physical contact that is not overtly sexual in nature, is infrequent or is unaccompanied by verbal harassment may not be considered sufficiently severe or pervasive to create a hostile work environment.

3. Frequency of the Harassing Conduct

• A single incident or a few isolated instances of mildly offensive conduct or remarks generally will not be enough to create a hostile work environment.

• The more severe the harassing conduct, the less need there is to show a repetitive series of incidents.

• The courts use a "totality of the circumstances" test — viewing isolated incidents together rather than separately.

• Accordingly, a series of isolated instances when viewed together can form the basis for a hostile work environment claim.

4. Identity of the Harasser

• Courts consider the identity of the harasser a relevant factor in the evaluation of whether a hostile work environment exists.

• An employer will be held responsible for a hostile work environment committed by co-workers where the employer knew, or should have known (through its agents) of the conduct, unless the employer takes immediate and appropriate corrective action.

• Whether an employer will be liable for the conduct of non-employees who harass company employees is determined by how much knowledge the employer had of their actions and how much control the employer had over the harasser's conduct.

• A non-employee can create a hostile work environment for an employee, and should a non-employee engage in harassment or create a hostile environment for an employee, it is critical that conduct be promptly reported to management.
5. **Targets of the Harassment can be:**

- Male or female
- Employees or non-employees
- Customers, clients or patients
- Heterosexual or homosexual
- Third-party harassment victims
PART TWO:
HARASSMENT POLICY

A. Every Employer Must Have a Harassment Policy

Employers must adopt a harassment policy that is enforced and accessible to employees. Having an easy to understand, comprehensive, and enforced harassment policy is non-negotiable. It is the first step toward protecting employees from harassment, and toward minimizing employer liability.

B. EEOC Harassment Policy Checklist

The EEOC has provided a harassment policy checklist for employers. An employer’s harassment policy should include the following:

- An unequivocal statement that harassment based on any protected characteristic will not be tolerated.
  - The policy should include the federal protected classes, and any applicable state or local protected classes.

- An easy-to-understand description of prohibited conduct, including examples.

- A description of a reporting system – available to employees who experience harassment as well as those who observe harassment – that provides multiple avenues to report, in a manner easily accessible to employees.
  - Having multiple reporting avenues is very important. If one of the designated people to receive harassment reports happens to be the person allegedly engaging in harassment, then the individual who submits a report will have another person to report the conduct to, mitigating the risk of a report made directly to the accused being mishandled.
  - Some people to include as possible individuals to receive reports include: HR personnel, a supervisor, a manager, a designated hotline, etc.
  - Consider allowing employees to report harassment via e-mail or by phone, rather than only by a written report.

- A statement that the reporting system will provide a prompt, thorough, and impartial investigation.

- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation.

- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation.
❑ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred.

❑ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors.

❑ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately.

❑ Is written in clear, simple words, in all languages commonly used by members of the workforce.
PART THREE: 
ENFORCE THE HARASSMENT POLICY

A. Enforcement Is Key

Simply having a harassment policy is not enough. Rather, the employer must promptly, consistently, fairly, and impartially enforce the harassment policy.

Enforcing the harassment policy requires the employer to: (1) recognize a report of harassment; (2) take immediate action by investigating the report; (3) engage in appropriate discipline of the harassing party; and (4) monitor the workplace to ensure that the harassment has stopped.

B. Recognize a Report of Harassment

The standard for recognizing a report of harassment is that the employer knew or should have known that harassment was occurring.

For example, a report of harassment may be:

- An employee complains either orally or in writing about harassment toward them;
- Another employee who witnesses harassment complains either orally or in writing;
- A supervisor or other employee holding a management position observes harassment; and
- Any other conduct or observation that puts the employer on notice that harassment has occurred.

In addition, all manners of communication can convey a report of harassment. Thus, an employee has made a report, regardless of whether it is by:

- E-mail, text message, note, letter, or memo;
- Phone call, hotline call, or voicemail;
- Snapchat, or social media message or post;
- Sign language;
- Scribbles on a bathroom wall; or
- Other form of communication.

Remember, a report is substance over form. Even if an employer’s harassment policy only provides one method of reporting harassment, the employer must still take immediate action if the report comes to the employer in a manner other than requested in the policy.
C. Take Immediate Action by Investigating the Report

1. When Must an Employer Act

As soon as an employer receives a report of harassment, or is or should be aware that harassment has occurred, the employer must take immediate action by investigating the report.

The manner of investigation varies depending on the severity of the conduct alleged. For example, if an employee reports that another employee made a racist joke, the employer should find out if that actually happened, and will likely be able to resolve the issue effectively by simply having a quick conversation with the employee that made the joke.

However, if the report is about something more than just workplace banter, then the employer must engage in a more thorough investigation.

2. Investigation Objectives

Engaging in a prompt and effective investigation to resolve the report of workplace harassment is key. There are several investigation objectives for employers to keep in mind:

- Select an appropriate investigator;
- Gather policies and procedures;
- Collect facts and relevant evidence;
- Determine witnesses and involved individuals;
- Determine who, what, when, where, why, and how;
- Evaluate credibility;
- Identify and eliminate extraneous information; and
- Make a recommendation for appropriate corrective action.

3. Select an Appropriate Investigator

The integrity of a workplace investigation often hinges on whether the investigator selected is appropriate and effective.

When determining who to designate as an investigator for a particular report of harassment, the employer should select a person who is:

- **Analytical:** detail-oriented, able to gather and organize facts efficiently and effectively, and able to make recommendations
- **Credible:** trusted and skilled in investigative role, well-respected
• **Knowledgeable about discrimination/harassment**: understands legal implications and able to identify actionable conduct

• **Neutral**: no connections with parties, and outside of “chain of command”

• **Trusted**: handles confidential/sensitive information in appropriate and professional manner

• **Objective**: acknowledges own biases and avoids allowing them to affect judgment

• **Personable**: welcoming and listens to each person to share their side of the story

Sometimes, it may be more appropriate to use multiple investigators to investigate a report of harassment. There are pros and cons to having one investigator or multiple investigators.

Having one investigator:

• Conserves financial resources;

• Avoids redundancy in small investigations; and

• Creates consistency in interviews and reviewing evidence.

However, using multiple investigators is helpful for:

• Complex issues or numerous parties/witnesses;

• Comparing impressions and gaining differing perspectives;

• Alleviating gender issues by gaining a male and female perspective;

• Obtaining corroboration and confirmation of information and evidence obtained during the investigation.

Finally, it may also be necessary to consider using a third party investigator. This is particularly crucial when:

• The person accused holds a high-level leadership position;

• The people who would typically investigate the complaint are either involved or cannot remain neutral; and/or

• The complaint involves issues that HR does not have the right experience and training to handle.

Determining the appropriate approach to an investigation depends on the circumstances, and when in doubt, employers should reach out to counsel to determine how to proceed.
4. **Gather Policies and Procedures**

Each time an employer receives a report of harassment, the employer should gather all relevant and applicable policies and procedures.

It is essential to keep copies of the policies and procedures in effect at the time of the incident/report. Why? Employers update their policies and procedures all the time, and may accidentally save over prior policies and procedures during that process. In the event of litigation, saving and having the correct version of the policies and procedures is useful.

The policies and procedures that employers should gather, at a minimum, include the:

- Discrimination policy
- EEO policy
- Harassment policy
- Whistleblower and retaliation policy
- Code of Conduct
- Union contracts (grievance procedures, conduct standards)

Depending on the employer, there may be other policies and procedures that the employer should gather.

5. **Collect Facts and Evidence**

Upon receiving a report of harassment, the employer should make sure that it collects the following types of evidence:

- Card access logs (showing entry/exit in certain locations)
- Security video footage
- Employer-owned electronics – e-mail, etc.
- Other relevant electronic data that a party gives access to:
  - *E.g.*, text messages, photos, social media posts, Snapchats, voicemails

6. **Interview Witnesses**

As part of the investigation, the following individuals should be interviewed:

- The person who was subjected to the alleged harassment;
• The alleged perpetrator of harassment;

• The person who reported the harassment (it might not be the same person as the one who was subjected to the alleged harassment);

• Any witnesses identified by the person alleging harassment and/or by the alleged perpetrator; and

• Any one else who witnessed the harassment.

7. Appropriately Conclude Investigation

To appropriately conclude the investigation, the employer must do the following:

• Evaluate statements by witnesses and other evidence to determine whether action must be taken

• Take appropriate action up to and including termination

• Inform the employee who was allegedly subjected to harassment that:
  1. Their complaint was taken seriously and investigated;
  2. That the employer took an appropriate action, or if no action was taken, why; and
  3. Encourage the employee to report any future instances of harassment

• Do not retaliate against the employee for reporting harassment

It is particularly helpful to workplace morale and in mitigating the risk of litigation that the employer update the employee once the investigation is concluded that appropriate action was taken, or if not, why. Proactively having these conversations with the employee helps avoid the employee feeling like their employer did nothing to help them and that their employer does not value them as a person.

8. Save Investigation Documents

After the investigation has concluded and an appropriate action has been taken, the employer should make sure that they keep documents, including:

• Policies and procedures gathered;

• Evidence obtained through the investigation;

• Witness statements; and

• Notes and conclusions.
In the event that litigation occurs, it is important to have records showing that the employer actually conducted a legitimate, thorough, and unbiased investigation of the allegations. This can help reduce the employer’s exposure to liability.

9. **Continue to Monitor the Workplace for Issues**

Even after an investigation has been conducted and appropriate corrective action has been taken, the employer must continue to monitor the workplace for issues. In the event that the harassment has not stopped, the employer must take appropriate corrective action.
PART FOUR: 
DO’S AND DON’TS FOR EMPLOYERS

A. What Employers Should Do

- Train employees and supervisors on what to do about harassment.
  - Don’t engage in the conduct (don’t even think about engaging in the conduct).
  - Employees:
    - If you are subject to the conduct say something if you are comfortable doing so, but more importantly, report the behavior.
    - If you witness the conduct, say something and report the behavior.
  - Supervisors:
    - If you witness or hear about the conduct, follow up.
    - Report behavior to HR.
  - Everyone:
    - Don’t tolerate retaliatory behavior by anyone.
    - Don’t ignore or trivialize inappropriate behavior.

- Adopt a harassment policy that is enforced and accessible to employees.

- Know what constitutes a report of harassment.

- Investigate reports of harassment promptly and appropriately, and take appropriate corrective action.

- Save investigation report and documents collected.

- Continue to monitor the workplace to ensure that the harassment has stopped.

B. What Employers Should Not Do

- Don’t fail to enforce harassment policy consistently, fairly, and appropriately.

- Don’t fail to put a stop to harassment in the workplace when the employer knows or should have known that harassment occurred.

- Don’t forget to regularly train employees, supervisors, HR, and management on what constitutes harassment, how to report harassment, and what to do to help stop harassment in the workplace.