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# Creating and Maintaining a Workplace Free of Harassment & Discrimination

Laner Muchin, Ltd.  
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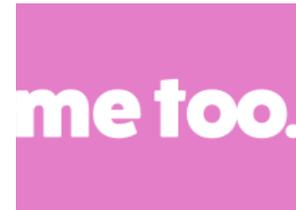


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# IN THE NEWS...

- ▶ Disgraced former DreamWorks Executive, John Lasseter, hired by Skydance Animation
- ▶ On January 14, 2019, President of Paramount's animation division announced publicly that she vehemently opposed Lasseter's hiring and assured her staff that not only would they not be required to work with Lasseter, they did not have to speak to him.

**TIME'S**<sup>™</sup>  
**==**  
**UP**



# WHAT IS DIVERSITY?

Similarities and differences we carry with us based on characteristics we were born with, experiences we have had, and choices we have made.



# DIVERSITY MEANS MANY THINGS

- Race
- Gender
- Place of birth
- Culture
- Age
- Religion
- Gender identity
- Education
- Work experience
- Military status
- Marital status
- Parental status
- Physical abilities
- Access to technology

...but mostly, diversity means different *perspectives*.

# MANY BENEFITS OF WORKPLACE DIVERSITY

- ▶ increase in creativity, and the ability to have a more diverse set of solutions to specific problems
- ▶ brings different talents together, all of them working towards a common goal using different sets of skills
- ▶ improves employee engagement: learn about other cultures from colleagues who come from a different background
  
- ▶ And many more!

# HOW TO CREATE A RESPECTFUL DIVERSE ENVIRONMENT

- Avoid generalizations; even those intended to be protective of the employee in question. For example, you find a female employee at the office working late and you say, “what are you doing here so late? It’s not safe for a young girl to be traveling home by herself at this hour.”
- Stereotype: to apply an attitude or belief about an entire group to all members of the group.
- Do not accept or use stereotypes.
- Getting to know the people around you and what makes them tick or what offends them is the best way to show respect.

# DISCRIMINATION BASICS

- Unlawful discrimination occurs when an employment decision is made because of an employee's protected characteristic.

# PROTECTED CHARACTERISTICS

## Federal Law

- Race
- Color
- Religion
- Sex and Gender
- Pregnancy
- National origin, ancestry, citizenship
- Age
- Disability
- Veteran Status
- Genetic Information

## State Law

- Marital and Civil Union Status
- Sexual Orientation
- Gender identity/transgenderism
- Arrest Record
- Military Discharge Status

# A NOTE ON RETALIATION

- ▶ Retaliation can range from subconscious, seemingly innocuous behaviors (ignoring someone or not selecting them for high-profile projects) to overt affirmative action (such as terminating the employment of an employee who complained about you)
- ▶ Retaliation was the most frequently filed charge at the EEOC last year.
- ▶ Retaliation is prohibited by Federal law, State law, and your policy.

# EEOC CHARGE FILING AND LITIGATION STATISTICS

- FY 2017 are the latest statistics
- Total charges filed = 84,254; down from 91,503 Charges filed in 2016
- Most commonly filed charge by far: **retaliation** 48.8% followed by race 33.9%
- 201 suits filed by EEOC in FY 2017, up significantly from 2016 (114 suits)
- \$42.4 million in monetary benefits recovered in suits filed by EEOC in FY 2017

# HYPOTHETICAL

- Hiring Manager Kelly is Caucasian and 37 years old. She recruits and hires employees primarily by finding candidates on LinkedIn. She finds that the most successful, “up-and-coming” candidates are on LinkedIn.
- Can this be unlawful discrimination?



# KEY ELEMENTS OF HARASSMENT

1. Based on a protected characteristic

2. Unwelcome

3. Offensive to the victim and the “reasonable person”

4. Is so severe or pervasive as to interfere with the victim’s ability to do his or her job

# UNWELCOME

Only behavior that is unwelcome is unlawful.

“Unwelcome” and “voluntary” are not the same.

Consensual joking, etc., is welcome.

Be professional and do not engage in or allow any inappropriate behavior, no matter how innocent or well intended. Remember: intent doesn't matter!

However, it is not easy to tell whether the other person “welcomes” this type of behavior.

Do not assume that someone welcomes inappropriate behavior.

# OFFENSIVE

SUBJECTIVE

Victim must actually feel offended.

OBJECTIVE

A reasonable person in the same situation would feel offended.

THE INTENT  
OF THE  
HARASSER IS  
NOT  
RELEVANT

An unintentional joke can still rise to the level of unlawful harassment.

# “OFFENSIVE” – PRACTICAL GUIDELINES

- If you don't want it seen in the local newspaper or on social media, don't do it.
- If you don't want your spouse, children, little brother or sister, parents, grandparents, etc. to know about it, don't do it or say it.
- If a hidden video camera were capturing your behavior, would you be comfortable if your boss, family, friends and/or spiritual advisor viewed it?

# HYPOTHETICAL

It is Melissa's 50<sup>th</sup> birthday. Jody pulls up a picture on her phone of a man who appears to be in his 20s and is laying at a pool in a revealing "Speedo" bathing suit. Jody says, "Happy Birthday, Melissa, from this guy," and Jody shows the picture to Melissa and other females in the office.

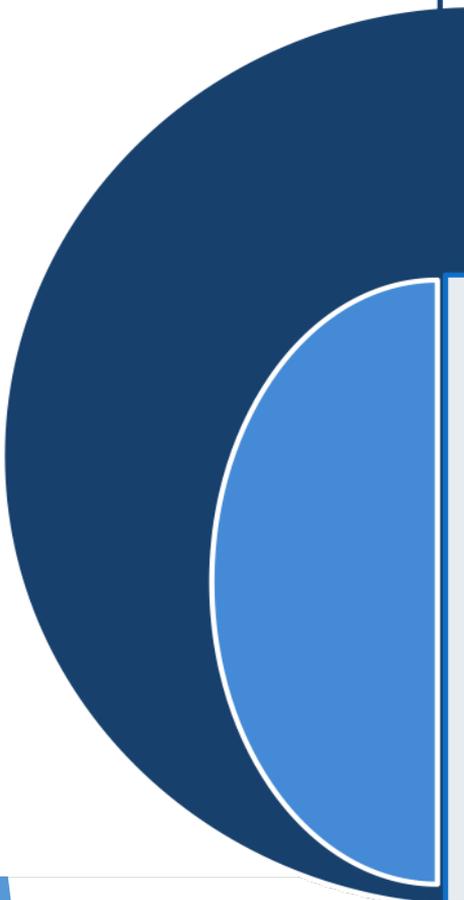
*Is this conduct offensive?*

# HYPOTHETICAL

Can you say, “You look nice today”...



# SEVERE OR PERVASIVE CONDUCT



**Inverse  
relationship:**

**Totality of the  
circumstances:**

- The less severe the conduct, the more frequently it must occur.
- The more severe the conduct, the less frequently it must occur.
- The frequency of the conduct;
- Whether the conduct was physical or verbal;
- Whether the conduct was humiliating or embarrassing;
- Whether the conduct unreasonably interfered with work performance;
- What were the complainant's actions and reactions; and
- Whether there is unequal power between the parties; co-workers or supervisor-employee.

# SEVERE OR PERVASIVE

- Bill asked Samantha, his co-worker, on a date once and she declined. Bill never asked her again.

*Severe or Pervasive?*

- Bill grabs Samantha's rear end once.

*Severe or Pervasive?*

- Bill asked Samantha on a date once a week for three months, and each time she says no.

*Severe or Pervasive?*

# SEXUAL HARASSMENT



**Quid Pro Quo:** A proposition for an “exchange” affecting terms and conditions of the victim’s employment that results in a tangible employment action



## **Hostile Work Environment:**

Conduct that unreasonably interferes with the victim’s work performance or creates intimidating, hostile or offensive work environment

# QUID PRO QUO

- Use of power to hire, fire, discipline, promote or recommend such actions as a means to induce someone to submit to sexual activity.
- This type of harassment can be committed only by someone who has the power to control the victim's future on the job.

# HOSTILE ENVIRONMENT

- Words or deeds of the harasser create severe and/or pervasively offensive conditions that alter the conditions of the victim's employment and create an abusive working environment.
- This type of harassment can be created by anyone in the workplace - a supervisor, a co-worker, a guest, member of the public, a vendor, etc.
- Not just sexual harassment.

# SEXUAL HARASSMENT: NON-VERBAL

- Staring at someone, or looking him/her up and down.
- Standing closer than appropriate or necessary -- invading a person's "space."
- Sexual gestures with hands and/or body movements, or blowing kisses.
- Sending or receiving sexually explicit e-mail, texts, or social media posts.
- Showing sexually suggestive cartoons, posters, calendars, videos, films, internet sites, etc.
- Bringing items into the workplace, such as hats, t-shirts, mugs, etc. that contain or display sexual comments or pictures.

# SEXUAL HARASSMENT: VERBAL

- Calling a person a honey, sweetie, babe, etc.
- Whistling, making “cat calls” or kissing sounds.
- Asking a person about their sex life, or sexual fantasies, preferences, or history.
- Making comments about a person's body.
- Making sexual comments or innuendoes.
- Telling sexual or dirty jokes.
- Repeatedly asking for a date when the person is not interested.

# SEXUAL HARASSMENT: PHYSICAL

- Touching a person's hair or body
- Hugging, kissing, patting, or stroking or brushing up against a person
- Indecent exposure
- Unsolicited shoulder or backrub



# OFF PREMISES CONDUCT



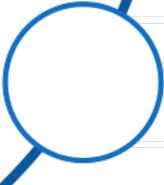
Our Policy Against Harassment applies to conduct among employees that takes place during non-work hours and outside of work.



After hours gathering - whether employer-sponsored or not, can give rise to liability, depending on the circumstances



All electronic messages on State owned/issued equipment; also Facebook, Pinterest, Twitter, Instagram, Snapchat, blogs, etc.



Text messaging and e-mails. Bottom line: if you don't want your grandma, mother, father, grandpa, sister, brother, son or daughter reading it - don't write it!

# OFF PREMISES CONDUCT

- You and your co-workers are traveling to Springfield for work. Everyone gathers for dinner and drinks at a local pub. Later in the evening, a co-worker writes his room number on a napkin and slides it across the table toward you.
  - What should you do?
  - What if a lobbyist did the same thing? Does that change the analysis?



# NOT LIMITED TO MEMBERS OF THE OPPOSITE SEX

- ▶ Same Sex - The U.S. Supreme Court has held that same-sex sexual harassment is actionable under Title VII even when none of the individuals involved are homosexual.
- ▶ While Title VII does not prohibit all verbal or physical harassment in the workplace, it does bar all forms of discrimination "because of" sex. Such discrimination, *whether motivated by sexual desire or not*, is actionable so long as it places its victim in an objectively disadvantageous working condition, regardless of the victim's gender.

# UNLAWFUL VS. INAPPROPRIATE

Just because behavior does not reach the level of “unlawful” harassment does not mean that it will be tolerated here.

The Organization raises the bar and does not tolerate inappropriate or unprofessional behavior - even if it does not rise to the level of unlawful harassment that a government agency or court (jury) would find unlawful.

# 5 KEY FEATURES OF THE POLICY AGAINST HARASSMENT

## 1) Multi-Channel Complaint Procedure.

- Immediately report the matter to the Chief Operating Officer/EEO Officer, any supervisor or member of management, the Ethics Officer, OEIG, or the Department of Human Rights (see policy for detailed contact information for IDHR)
  - you can report anonymously via the infoBANK
- Supervisors should immediately report to the Chief Operating Officer/EEO Officer.

# 5 KEY FEATURES OF THE POLICY AGAINST HARASSMENT

## 2) Detailed investigatory process.

- Complaints will be promptly and well-investigated by Human Resources.
- The investigation would normally include:
  - An interview with the complaining party;
  - Interviews with all witnesses or anyone who may have knowledge of the alleged incident(s);
  - An interview with the alleged harasser;
- A review of any other relevant information or evidence.



# 5 KEY FEATURES OF THE POLICY AGAINST HARASSMENT

3) **Disciplinary Action.** If it is determined that a violation of the Policy occurred, management will take appropriate disciplinary action against the offending party, up to and including discharge.

# 5 KEY FEATURES OF THE POLICY AGAINST HARASSMENT

## 4) Confidentiality.

- Complaints of harassment will be investigated with care, and the privacy of the complaining party and the person accused of harassment will be respected *to the extent possible*.
- Management should not proceed with internal meetings until receiving direction from Human Resources.



# 5 KEY FEATURES OF THE POLICY AGAINST HARASSMENT

## 5) No Retaliation.

- Basic premise: you took an adverse action against me because I complained about discrimination/harassment or supported someone else's claim.
- Employees should not be treated differently after they have filed a complaint or charge or participated in the investigation of another's complaint or charge.
- They are not however, given a free pass to engage in inappropriate behavior. They should be treated just as they would be treated if they had not filed a complaint or charge or participated in an investigation.
- Employees are protected from retaliation pursuant to the State Officials and Employees Ethics Act, the Whistleblower Act and the Illinois Human Rights Act.
- Employees who knowingly make false allegations of discrimination or harassment may be subject to disciplinary action up to and including termination.

# DUTIES OF ALL EMPLOYEES



# HYPOTHETICAL

An employee advises a supervisor that she feels that she is being “sexually harassed,” but also says that she definitely does NOT want management to take her complaint any further.

Is it appropriate for management not to take any further action on the matter until advised differently by the complaining party?

THANK YOU! ANY QUESTIONS?

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# INDIVIDUAL LIABILITY

- Individuals (*i.e.*, supervisors/managers) like YOU may be liable for sexual harassment under Illinois law.
- In some cases, individuals may be liable for common law tort claims, such as assault, battery, and intentional infliction of emotional distress in addition to harassment liability.

# WHY SHOULD YOU CARE?

- Not only because you can be sued personally, but also because:
  - It's the right thing to do
  - It's good for the Organization
    - Improves morale and promotes respect
    - Ability to recruit top candidates
- Embarrassment
- Deposed and grilled under oath
- Lose your job
- Bad publicity/reputation

# WHEN IS AN EMPLOYER LIABLE?

- Under federal law, employers are liable for harassment by **supervisor/manager** when:
  - the harassment results in a tangible employment action, such as discharge, demotion or undesirable reassignment, the employer's liability is **absolute**.
  - there has been **no** tangible employment action, an employer can defend itself if it can prove **both** of the following:
    - That it has taken reasonable care to prevent and promptly correct any harassing behavior, such as adopting an effective policy with a complaint procedure; and
    - That the employee unreasonably failed to take advantage of any available preventive or corrective opportunities.

# WHEN IS AN EMPLOYER LIABLE?

- Under Illinois law, an employer's liability is absolute for harassment by any **supervisor/ manager**.
  - The Illinois Supreme Court has held that, under Illinois law, an employer's liability is absolute for harassment by **any supervisor**, not just an employee's direct supervisor.
- Employer liability for harassment committed by a co-worker or non-employee:
  - An employer is liable for harassment committed by a co-worker or non-employee when it knew or should have known about the harassment, and the employer fails to:
    - Promptly investigate the harassment; and
    - Take effective remedial action.

# WHAT IS AT STAKE HERE?

- Back pay;
- Compensatory and punitive damages based on number of employees;
- Reinstatement or, in the alternative, front pay;
- Plaintiff's attorneys' fees and costs (*i.e.*, the Organization would likely have to pay plaintiff's attorneys' fees **in addition** to its own defense fees if the court renders a verdict against the Organization);
- There is **no cap** on compensatory and punitive damages for state law claims;
- Potential individual liability.

# EFFECTIVE DOCUMENTATION

- Memorializes the incident or incidents at issue - if it is not written down, it did not happen.
- Aids in more effective communication with the employee.
- Provides a greater likelihood of rehabilitating the employee.
- Leads to smoother, more defensible discharges.
- Provides better exhibits for the attorneys and could, depending on the circumstances, mean the difference between winning and losing a lawsuit.
- Some documentation is almost always better than none!

# YOUR DUTIES REGARDING DISCRIMINATION AND HARASSMENT

- Managers/supervisors are the Organization's front line to ensure a work environment free from discrimination and harassment.
- Know the Policy Against Harassment.
- You must effectively address discrimination and harassment issues.
  - Report any potential violations of the Policy Against Harassment
- Lead by example.