

## HARASSMENT: THE NEXT GENERATION



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FEBRUARY 14, 2012

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### EVOLUTION OF HARASSMENT LAW

1. EEOC recognized harassment as a type of discrimination in 1980 (30+ years ago).
2. U.S. Supreme Court recognized harassment as a type of discrimination in 1986.
3. At that time, it only included sexual harassment where physical touching or overt propositions were involved.

### EVOLUTION OF HARASSMENT LAW

4. Over the years, the courts have recognized two types of harassment: (a) quid pro quo (now called "condition of employment"); and (b) hostile environment (where jokes, derogatory comments, labeling, and stereotyping can be unlawful).
5. Courts then expanded harassment liability to all other protected categories.

### EVOLUTION OF HARASSMENT LAW

6. In 1998, U.S. Supreme Court confirmed that strict liability applies to quid pro quo harassment, but that an affirmative defense is available for hostile environment claims (meaning no liability if employer can prove: (a) it exercised reasonable care to prevent and promptly correct harassment when it occurred; and (b) victim failed to take reasonable steps to avoid the harassment).

### EVOLUTION OF HARASSMENT LAW

7. As a result of the affirmative defense, employers developed "zero tolerance" harassment policies, provided training, conducted prompt investigations, and took corrective action when warranted.
8. As a result of increased awareness, condition of employment (quid pro quo) are now less common. Most harassment claims are hostile work environment claims.

### EVOLUTION OF HARASSMENT LAW

9. Employers generally reacted with fear and based their actions on a more expansive definition of "hostile work environment harassment" than what the law requires.
10. Many harassment policies and training programs now include too high and broad a standard of harassment, which is misleading to employees and to which jurors will hold the employer. Jurors also apply their own understanding of harassment (obtained through your policies and training).

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## EVOLUTION OF HARASSMENT LAW

11. As a result, employees think “unlawful harassment” includes more than it does; the terms “harassment” & “hostile environment” have become household terms.
12. Many employees now believe (incorrectly) that anything they perceive as “unfair” is “unlawful harassment.”
13. As a result, internal complaints of harassment based on “unfairness” rather than “unlawfulness” have increased.

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## EVOLUTION OF HARASSMENT LAW

14. Employees also don’t recognize their own obligations under the law to avoid being harassed because they are not trained on it.
15. Employees believe they are protected under the retaliation laws if they label any behavior as “harassment” and then complain about it.

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## THE BOTTOM LINE

1. Employers have done an exceptional job in adopting policies and training on harassment.
2. But employees now believe “unlawful harassment” covers everything they don’t like or think is unfair.
3. And employees don’t understand their obligation to avoid being harassed.

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## So...WHAT EXACTLY IS THE NEXT GENERATION OF HARASSMENT?

1. Educating employees not only on what unlawful harassment *is*, but also on what it *is not*.
2. Educating employees not only on their legal obligation *not to be a harasser*, but also on their legal obligation to *avoid being a victim*.

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## WHAT EXACTLY IS “UNLAWFUL HARASSMENT?”

Conduct that:

1. Is based on a protected category;
2. Is unwelcome;
3. Is severe or pervasive; *and*
4. Either:
  - a. Creates a hostile work environment; or
  - b. Is made a condition of employment with a tangible job consequence.

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## HOW CAN AN EMPLOYER DEFEND A HARASSMENT CLAIM?

1. Condition of Employment Harassment: No Defenses – Strict Liability
2. Hostile Work Environment Harassment:
  - a. Employee did not have a reasonable good faith belief that conduct in question was “unlawful” harassment.
  - b. Employee has not proven the conduct is “unlawful” harassment.
  - c. Employer has proven the affirmative defense:
    - 1) Took reasonable steps to prevent harassment, promptly addressed the situation, and took appropriate action;
    - 2) Employee failed to take reasonable steps to avoid being harassed.

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**SUCCESS WHEN PLAINTIFF  
DOES NOT PROVE HARASSMENT**

1. *Vajdl v. Mesabi Academy* (8th Cir. 2007)  
On hostile environment harassment claim, court held that employee had to prove that workplace is “permeated” with discriminatory intimidation, ridicule, and insult. Mere flirting is not enough, even though it may be offensive, juvenile, and inappropriate.

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**SUCCESS WHEN PLAINTIFF  
DOES NOT PROVE HARASSMENT**

2. *Fair v. Terrible Herbst* (D. Nev. 2007)  
On hostile environment harassment claim, court held that the harasser’s behavior wasn’t enough to be unlawful, even though he chased the plaintiff around the store, told improper jokes, touched her buttocks, gave her unwanted hugs, and put her paycheck down his pants.

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**SUCCESS WITH THE AFFIRMATIVE  
DEFENSE**

1. *Baldwin v. Blue Cross/Blue Shield* (11th Cir. 2007)  
Court held that requests to plaintiff to “blow” her supervisor; frequent references to women as “babe,” “slut,” and “tramp;” two occasions of unzipping pants when greeting plaintiff; and reference to men as “cocksuckers” and “peckerwoods” was enough to meet definition of “unlawful harassment.” But...employer wins on affirmative defense, as employee waited too long to report harassment (3+ months) and refused reasonable corrective measures.

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**SUCCESS WITH THE AFFIRMATIVE  
DEFENSE**

2. *Jackson v. County of Racine* (7th Cir. 2007)  
Court held that male supervisor’s conduct (comments that plaintiff had “great set of boobs,” asking if she could masturbate even though she had CTS, kissing her, sending sexual emails, stating that he likes watching her eat a banana, and inviting her to come to work in a bikini) was enough to meet definition of “unlawful harassment.” But...employer wins on affirmative defense, as employee waited too long to report harassment (4+ months), employer had policy, and investigated thoroughly/promptly.

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**COMMON BELIEFS ABOUT HARASSMENT**

1. True or False:  
Harassment policies should be “zero tolerance” policies.


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**FALSE**

- a. The law does not require a perfect workplace or a code of civility (*Faragher & Ellerth*).
- b. All employees must tolerate a nominal amount of inappropriate behavior (*Faragher & Ellerth*).
- c. If you impose a standard implying that you won’t tolerate *any* inappropriate behavior, you are committing yourself to maintaining a perfect workplace and leading employees to believe you are required to do so.


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### COMMON BELIEFS ABOUT HARASSMENT

2. True or False:  
Any unwelcome behavior involving a protected category that results in a hostile work environment or is made a condition of employment is unlawful harassment.

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### FALSE

a. The conduct also has to be severe or pervasive. One or occasional incidents or incidents spread out over a fair amount of time are usually not enough.

b. If your policy and training do not include the “severe or pervasive” requirement, you are implying that just one incident of inappropriate behavior is unlawful no matter the severity of the behavior.


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### COMMON BELIEFS ABOUT HARASSMENT

3. True or False:  
Any conduct that an employee believes is unfair, hostile, abusive, or intimidating constitutes unlawful harassment.

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### FALSE

a. Employees may think that any hostile or unfair conduct is harassment, but it’s not unless it is based on a protected category and meets the other prongs of the definition of “harassment.”

b. If your policy and training doesn’t distinguish between what is unlawful and what may merely be inappropriate, you are leading employees to believe that everything they don’t like is unlawful.


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### EXAMPLES OF INAPPROPRIATE, BUT NOT UNLAWFUL BEHAVIOR

1. Verbal abuse.
2. Derogatory comments that are not based on a protected category.
3. Isolated or infrequent instances of jokes or belittling comments based on a protected category.
4. Holding grudges/showing favoritism in most cases.

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### COMMON BELIEFS ABOUT HARASSMENT

4. True or False:  
The only obligation an employee has under the harassment laws is to report harassment.

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**FALSE**

- a. In hostile work environment cases, an employee must prove that he/she took reasonable steps to avoid being harassed.
- b. If your policy and training does not point out the menu of steps an employee can take, you miss an opportunity to help minimize claims and you will lead employees to believe that reporting is the only action required.

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**EMPLOYEE OBLIGATIONS TO AVOID HARASSMENT**

Employees must take reasonable steps to protect themselves, which could include:

1. *Promptly* reporting harassment.
2. Reporting without conditions attached.
3. Confronting harasser.
4. Not misleading harasser by laughing or smiling at offensive comments or jokes.
5. Not leading the harasser on by flirting or with sexual innuendo.

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**COMMON BELIEFS ABOUT HARASSMENT**

5. True or False:  
Training on harassment must be formal training (e.g., classroom, web-based, video).

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**FALSE**

- a. To defend a hostile environment claim, one of the things an employer must prove is that it took reasonable steps to prevent harassment.
- b. A policy and training are examples.
- c. The term training should really be "education."
- d. Includes orientation, posters, memos, informal meetings, group meetings, online training, handbook review, classroom training, etc.

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**COMMON STATEMENTS IN POLICIES AND TRAINING**

1. The Company is opposed to and strictly prohibits sexual harassment.

Acceptable      Not Acceptable


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**NOT ACCEPTABLE**

- a. All protected categories must be included. A policy prohibiting just "sexual" harassment is now not enough.
- b. Include and define the "workplace."

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

2. Unlawful harassment is any unwelcome behavior by an employee which is based on a protected category and that is made a condition of employment or creates a hostile work environment.

Acceptable    Not Acceptable


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**NOT ACCEPTABLE**

- a. Doesn't include the requirement that conduct be severe or pervasive.
- b. Only prohibits harassment by employees, when the employer must protect employees from harassment by both employees *and* non-employees.

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

3. The following are examples of unlawful harassment: (a) flirtation and requests for sexual favors; (b) derogatory or offensive jokes or comments about race, ethnic origin, age, disability, gender, or religion; (c).....

Acceptable    Not Acceptable


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**NOT ACCEPTABLE**

- a. Those acts are not necessarily unlawful unless they are also unwelcome, are severe or pervasive, and create a hostile work environment.
- b. Better to say "the following are examples of behaviors that are to be avoided because they might be unlawful if they meet the definition of harassment."

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

4. If you feel you have been harassed, you must report the harassment to your supervisor or any member of management.

Acceptable    Not Acceptable


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**NOT ACCEPTABLE**

- a. Employees don't always know who is a "member of management." Better to include specific job titles for reporting harassment.
- b. Doesn't include requirement to report "immediately."
- c. Doesn't include other steps an employee can take to avoid being harassed (e.g., confronting the harasser, not contributing to harassment, reporting without conditions, etc.)

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

5. If an employee violates this policy, he/she will be subject to disciplinary action up to and including discharge.

Acceptable    Not Acceptable

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**NOT ACCEPTABLE**

a. An employer must take “appropriate action.” Better to say “Appropriate action will be taken, which could include discipline or discharge.”

b. You may want to discipline even if the behavior is not unlawful.

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

6. If an employee files a false complaint of harassment, he/she will be subject to disciplinary action up to and including discharge.

Acceptable    Not Acceptable

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**NOT ACCEPTABLE**

a. Best not to include such a threat. It puts a chilling effect on employees’ willingness to file complaints and will undermine your defense. Employees don’t know what “false” means. Use the term “good faith.”

b. Under the law, you can take action against an employee for filing a “knowingly false” complaint, but it is a rare case when you have sufficient proof to conclusively say it was “knowingly false.”

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**COMMON STATEMENTS  
IN POLICIES AND TRAINING**

7. An employee may file a complaint of harassment under this policy without any fear of retaliation.

Acceptable    Not Acceptable

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**NOT ACCEPTABLE**

a. Reporting harassment is not the only protection an employee has. Participating in an investigation as a witness is another one. Include it in your policy.

b. Ignores the possibility of the “knowingly false” complaint. Better to say “any employee who files a complaint in good faith or participates in any investigation will not be subjected to retaliation.”

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### COMMON STATEMENTS IN POLICIES AND TRAINING

8. Any report of harassment will be handled in a confidential manner.

Acceptable    Not Acceptable


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### NOT ACCEPTABLE

- a. Impossible to investigate and maintain total confidentiality.
- b. Misleads supervisors and employees into thinking they can keep reports of harassment confidential and not share with those who will investigate and take appropriate action.
- c. Better to say that "confidentiality will be maintained to the extent reasonably possible."


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### KEY POLICY PROVISIONS

1. Avoid "zero tolerance" statements.
2. Use an accurate definition of unlawful harassment.
3. Include a prohibition of "inappropriate" behavior even if it's not unlawful behavior."
4. Use state of the art language ("condition of employment," "tangible job consequence").


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### KEY POLICY PROVISIONS

5. List factors used to determine if behavior is "unwelcome."
6. Make it clear that one incident alone may not be enough; a pattern may be required.
7. Cover all protected categories, not just "sexual" harassment.


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### KEY POLICY PROVISIONS

8. Make it clear that harassment by employees *and* non-employees is prohibited.
9. Include examples of what "might" constitute unlawful harassment, not what "does."
10. Include examples for all protected categories, not just sexual harassment.

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### KEY POLICY PROVISIONS

11. Include examples of what is "inappropriate" but not necessarily "unlawful" behavior.
12. Include employees' obligations to avoid being harassed, and give examples.
13. Include supervisors' obligation to refer harassment complaints or info to HR.




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### KEY POLICY PROVISIONS

14. Include multiple forums for reporting and require immediate reporting.
15. Include employer's obligation to "promptly" address complaints.
16. Indicate that "appropriate action" will be taken if warranted, and examples of what that might be.


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### KEY POLICY PROVISIONS

17. Include statement that confidentiality will be preserved to the extent reasonably possible.
18. Include appropriate non-retaliation statement covering both good faith complaints and good faith participation in an investigation.


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### KEY POLICY PROVISIONS

19. Include flexible standard of review.
20. Define the "workplace."


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### KEY POLICY PROVISIONS

21. Avoid:
  - a. Threats for filing "false" complaints.
  - b. Requirement that complaint be in writing.
  - c. Deadlines for reporting and responding. ("Promptly" was "in X days")


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### KEY TRAINING CONSIDERATIONS

1. Train all employees; train supervisors and non-supervisors separately.
2. Include special supervisory obligations in supervisory training.
3. Train supervisors annual or bi-annually; train non-supervisors at least every 2 years.


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### KEY TRAINING CONSIDERATIONS

4. Be careful of what videos you use; some include inaccurate statements of law.
5. Use your own policy as a training handout. Make sure it accurately states the law and is otherwise sound before using it.


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## KEY TRAINING CONSIDERATIONS

6. Consider using examples as training handouts:
  - a. Examples of what might be harassment;
  - b. Examples of what is not unlawful harassment, but is still inappropriate;
  - c. Examples of what is acceptable behavior;
  - d. Examples of steps to take avoid being harassed.

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## KEY TRAINING CONSIDERATIONS

7. Avoid using any other handouts.
8. Use sign-in sheets; consider a separate form for each employee to acknowledge receiving the policy.
9. Consider using a post-training quiz to measure effectiveness of training.
10. Be careful answering questions; don't answer questions about specific situations.

## QUESTIONS?

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