

# Preventing Discrimination and Harassment in the Workplace

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# Federal Laws Against Discrimination and Harassment

- Title VII of the Civil Rights Act of 1964
  - Prohibits employment discrimination based on race, color, national origin, religion, sex (including pregnancy, gender, and gender nonconformity)
  - Also prohibits harassment based on these same characteristics.



# Three Forms of Discrimination

- Disparate Treatment = Intentional discrimination
- Disparate Impact = Neutral policies that result in a disproportionate impact on a protected class.
  - Example: Physical agility test that disproportionately screens out women.
    - Is it “job related and consistent with business necessity”?
    - Is there a less discriminatory alternative?
  - Retaliation = Taking adverse action against an employee because the employee engaged in protected activity.

# Age Discrimination in Employment Act of 1967

- Prohibits discrimination and harassment against individuals age 40 or older.
- For discrimination, claimant must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action versus just a “motivating factor.” Very high standard.



# The Americans with Disabilities Act of 1990

- Prohibits discrimination and harassment against qualified individuals on the basis of disability and those regarded as having a disability.
- Does the applicant or employee have a disability and, if so, can he or she perform the essential functions of the job with or without a reasonable workplace accommodation?



# Main Points to Remember Regarding ADA

- An employer cannot ask an applicant any questions about a disability before a conditional job offer has been made.
- After a conditional job offer has been made, an applicant can be required to undergo a pre-employment physical as long as this is required of all individuals entering the same job category.
- Employees can only be asked questions about disability or require a medical exam if it is job-related and consistent with business necessity.

# Harassment in the Workplace

- Workplace Harassment
- Unwelcome, unwanted or offensive conduct based on or because of an employee's protected class status.
- Sexual Harassment
- Unwelcome, unwanted, or offensive sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.

# Types of Harassment

- Harassment exists in two forms:
  - Quid pro quo.
  - Hostile work environment.

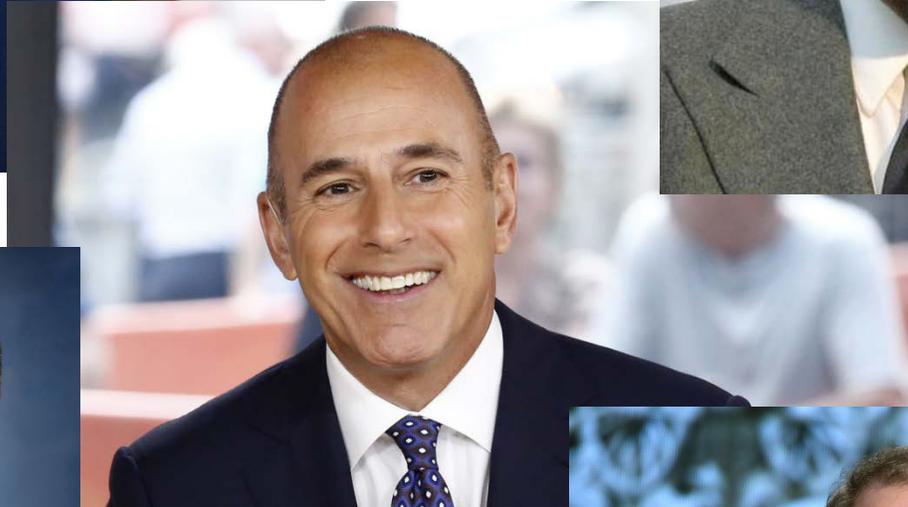
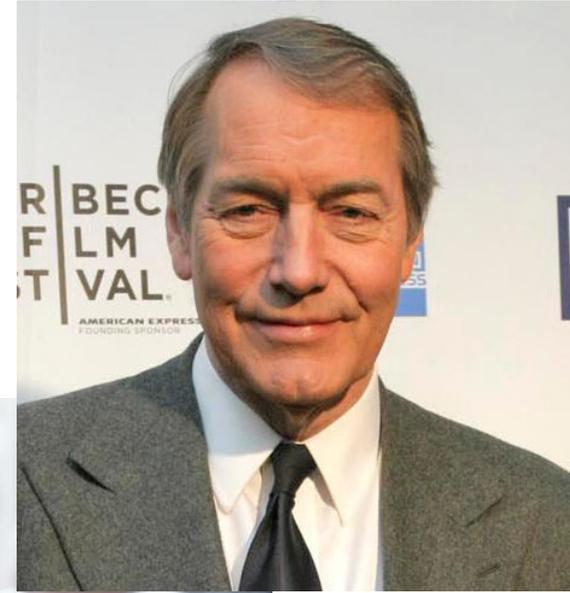


# Quid Pro Quo Harassment

- Quid pro quo is Latin and it means "this for that."
- Quid pro quo harassment applies where a supervisor seeks sexual favors either:
  - In return for a job benefit (for example, a promotion or raise).
  - To avoid a job detriment (for example, a demotion or pay cut).
- Quid pro quo harassment also occurs when an employee's reaction to an advance negatively affects his or her employment.
- Examples:
  - A manager tells her employee that she will give him a raise if he goes on a date with her.
  - An employee is passed over for a promotion after rejecting her supervisor's advances.

# Hostile Work Environment Harassment

- Involves harassment in the workplace that is:
  - Unwelcome.
  - Based on protected class status (race, color, religion, age, gender, disability, etc.).
  - Attributable to the employer (knew or should have known and failed to correct.)
  - Severe or pervasive (Title VII does not create a “general civility code.”)
- Need not be targeted at the offended individual to give rise to a hostile work environment claim.
- Example:
  - Turning work discussions into sexual or other offensive topics.



# Types of harassing behavior

- Verbal: derogatory comments, racial or sexual epithets, requests for sexual favors, sexual innuendos, offensive jokes or stories, repeated propositioning.
- Non-Verbal: staring, derogatory or suggestive gestures, winking, throwing kisses, shunning, and ostracizing.
- Visual: offensive pictures, photos, cartoons, posters, calendars, magazines or objects.
- Physical: unwelcome touching, hugging, kissing, patting, stroking, standing too close.
- Written: unwelcome personal letters, notes or emails.

# Inappropriate Workplace Conduct

- Using racially derogatory words, phrases, slurs;
- Verbal or physical conduct intended to threaten or intimidate another because of his/her race, color or ethnicity;
- Gestures, pictures or drawings that would offend a particular racial or ethnic group;
- Repeated requests for a date with someone who has not returned an interest or initiating unwelcome flirtations;
- Making offensive remarks about looks, clothing, body parts;
- Touching in a way that may make an individual feel uncomfortable;
- Telling sexual jokes or sending via email or phone;

## Additional 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 about an employee's age when referring to employees 40 and over;
- Derogatory or intimidating references to an employee's mental or physical impairment;
- Using expressions that can be belittling such as "honey," "dear," "sweetheart," or "handsome".

# Who Can Be a Harasser?

- Supervisors.
- Co-workers.
- Customers.
- Vendors.
- Individuals or groups doing business with a company or on the premises.



## Harasser's Intent is Irrelevant

- Sexual harassment may be unlawful even if not motivated by sexual desire.
- Gender is also irrelevant:
  - Men can harass women.
  - Women can harass men.
  - Men can harass men.
  - Women can harass women.



# Harassment Not Limited to the Workplace

- Sexual harassment can occur outside the workplace, for example during:
  - Annual meetings.
  - Business trips.
  - Holiday parties.
  - Sporting events.



# Employee Obligations and Reporting Procedures

- Complaints should be reported immediately so that the employer has an opportunity to address the situation. No employee should suffer in silence.
- Employees should have various avenues of reporting conduct that they feel is harassing, including informing either:
  - Their direct supervisor.
  - Another member of management.
  - Human Resources.

# What should be reported?

- A complaint may be made verbally or in writing and should include the following information:
  - What happened?
  - Who is the alleged harasser?
  - What did he/she do?
  - Where did the incident take place?
  - What did you do?
  - How many times has this happened?
  - Any witnesses?
  - Is there any documentation or written evidence?



# Important Points

- People have disagreements in the workplace
  - Key is to treat others with respect
  - Disagreements should be kept to work-related matters, not personal traits
- If harassment does occur, report it!
  - An employer can't take action unless it knows about bad conduct
  - Utilize internal procedures for making reports

# Hypothetical 1

- Until recently, Jeff, a staff person, and Terri, his female boss, were dating. However, Jeff is married to someone else. Jeff's wife found out about the affair and he ended it immediately. Terri was interested in continuing the relationship and finds time to bring it up privately with Jeff at work. Jeff has complained to HR, but Terri claims that because they were in a consensual relationship, her behavior does not rise to the level of sexual harassment.
- HR agrees with Terri and suggests that the two work this out themselves.
- Was this the right decision?



# Answer to Hypothetical 1

- No.
- The fact that the affair started out as consensual is irrelevant at this point. Now that it isn't, Terri's behavior is inappropriate.
- Work relationships where one person is a supervisor to the other are particularly problematic because the risk of quid pro quo claims is higher. Terri, as the supervisor, could fire Jeff because of his unwillingness to continue the affair, which would be a classic quid pro quo situation.
- Terri needs to stop bothering Jeff immediately and HR needed to intervene.

## Hypothetical 2

- Jane and Kyle have worked together for years. Jane knows that Kyle is having a 50th birthday so she wants to secretly plan a little celebration. She catches her supervisor, Paul, in the hall and asks if it is ok to celebrate Kyle's birthday. Paul says, "fine" and Jane fills Kyle's office with black balloons and funny "over the hill" signs. She also buys a big "black" cake.
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- Was Paul's approval appropriate?



## Answer to Hypothetical 2

- Not without asking some additional questions like –
  - What kind of a party?
  - What kind of decorations?
  - Is Kyle ok with all the attention on his “big” birthday?
  - How about decorations and a cake without all of the focus on the employee’s age?

## Hypothetical 3

- Sam and a group of his male colleagues often gather in an office or break room and discuss sports, weekend activities and joke about some of their “crazy” customers. Sometimes the stories and jokes get a little “off color”; inappropriate content from phones is passed around and profanity is not uncommon. However, the group is careful to stop talking if a female walks into the room or joins the discussion.
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- Could this behavior create a hostile work environment?

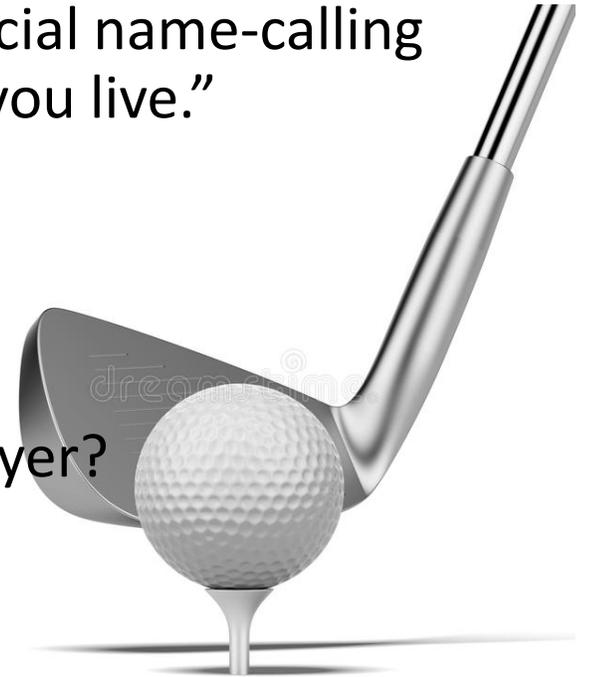


# Answer to Hypothetical 3

- Possibly.
- Repeatedly using offensive or suggestive language constitutes hostile work environment sexual harassment.
- Displaying suggestive or sexual content at work, through pictures, magazines or Internet sites, among other examples, also constitutes hostile work environment sexual harassment. This is true even where the party making the harassment claim was not the intended audience.
- While the group believes their conversations are never overheard by those outside the room, chances are high that this is not the case and others are aware of what they are discussing.

# Hypothetical 4

- A group of co-workers join a golf league that plays on Tuesday nights after work. Every week, there are a lot of drinks consumed. One night after golf in the clubhouse, two of the co-workers, George and Patrick, get into a heated exchange about Trump, illegal immigration and building of the “wall”. Racial name-calling occurs by George and Patrick angrily responds, “I know where you live.”
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- Is this harassment? By whom?
- What are the company’s obligations to address this?
- Does the answer change if the team is sponsored by the employer?



## Answer to Hypothetical 4

- Employers can be liable for harassment that takes place outside the workplace if the harassment has consequences within the workplace. Reminding the individual who made the racial slur that such language is not tolerated at work or towards any coworker outside of work is appropriate. Likewise, the response of “I know where you live” suggests physical violence and this must also be addressed as an inappropriate response.

## Example 5

- Chris' co-workers recently found out that he is gay. He then overhears some co-workers joking about his sexual orientation. On several occasions thereafter, the co-workers would call Chris "princess." Chris immediately reports the issues to a supervisor.

- Is this harassment?



## Sexual orientation/gender identity

- Depends. In some states, sexual orientation and gender identity are protected classes, but in others they are not. However, even in states where these are not protected classes, “gender stereotyping” claims are becoming more common and that is protected by Title VII. In addition, the actions of the other employees toward Chris in this case are clearly not conducive to a good working environment and could violate other company policies that address acting in a respectful manner toward coworkers. For clarity’s sake, the Omaha Municipal Code does protect gender identity.

# What must businesses do to help employees feel safe reporting discrimination, workplace harassment and sexual harassment?

- Sets an example of respectful workplace behavior.
- Has clear expectations that discrimination, workplace harassment and sexual harassment are not tolerated.
- Has a clear mechanism for reporting; including the ability to report to another member of management should the supervisor be the accused.
- Takes immediate steps to stop inappropriate behavior or conduct as it occurs or is reported.
- Will not retaliate.
- Will handle investigations as discretely and confidentially as possible.
- Will be sensitive to the feelings of all involved. It is not easy for the complainant, the accused or anyone participating in an investigation.

Questions?