

Responding to Claims of Sexual Harassment in the Era of



Miriam Van Heukelem
Attorney/Shareholder

Discrimination

Title VII and the ICRA prohibit discrimination on the basis of sex in all terms and conditions of employment.

Sexual harassment is conduct that falls within the prohibition of discrimination on the basis of sex.



Sexual Harassment

- Any unsolicited and unwelcome sexual advance, request for sexual favors, and other verbal or physical conduct of a sexual nature if it :
 - Becomes term or condition of employment;
 - Is used as the basis for employment decisions; or
 - Unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

Hostile Work Environment

1. Protected class;
2. Unwelcome conduct;
3. Causal connection;
4. Harassment is *severe and pervasive* enough to affect terms, conditions, or privileges of employment and create abusive working environment
 - Subjective and objective

Reasonable Person Standard

- If the challenged conduct would not substantially affect the work environment of a reasonable person, not actionable, unlawful harassment.
 - Still might violate employer's policy.
- Context is important.
 - Physical gestures
 - Verbal Comments



No Retaliation



- Retaliation is “adverse action” taken against an employee because s/he complained of harassment/discrimination or participated in an investigation.
 - Tangible action
 - Hostile work environment

Retaliation Claims



- Triggered when individual makes or participates in an internal complaint or files/participates in ICRC/EEOC/OCR complaint process
- EE must show protected activity and adverse action are linked
- Protection for good-faith complaints
- Documentation

Remedies



- Employee may obtain:
 - Job reinstatement
 - Back pay and benefits
 - Compensatory damages (out-of-pocket expenses)
 - Punitive damages (generally not available against public employers)
 - Liquidated damages
 - ATTORNEYS' FEES

Liabilities



- Employer and individuals can be held liable:
 - Personal liability for engaging in harassing behavior.
 - Supervisors can be personally liable for failing to take action when knew or should have known harassment was occurring.
 - Accused employee may required separate representation.

Current Climate:



Types of Unwelcome Harassing Conduct:

- Comments, Jokes
- Physical Contact
- Visual



Totality of the circumstances:

- Frequency;
- Severity;
- Physically threatening or intimidating;
- Interfering with an employee's ability to work.
- *Less likely*:
 - Sporadic, accidental, or single offensive utterance

Off-Duty Conduct

- Texts on personal devices, even outside of work hours, may require investigation
 - Review of offending messages
- Inter-office relationships
- Social Media



Recent Examples of Harassment Lawsuits in the News

Gass et al. v. City of West Des Moines and Chief of Police Shaun LaDue

Three female employees claimed ongoing discriminatory and harassing behavior based on sex, including:

- Unwarranted discipline
- Promoting less qualified men
- Restricting female employees' job and training opportunities

Gass et al. v. City of West Des Moines and Chief of Police Shaun LaDue

- Trial was covered daily in the *Des Moines Register*
- The City Council agreed to settle the cases mid-trial
- The Police Chief also resigned



Meyer v. the University of Iowa

- Plaintiff Jane Meyer was the Senior Associate Athletics Director at the University of Iowa from 2001 to 2014.
- She was the top-ranking female employee in the University Athletics Department.
- \$1.4 mil. jury verdict; \$6.5 mil. settlement



©Ahlers & Cooney, P.C. - All Rights Reserved

Anderson v. State of Iowa

- Lawsuit claimed termination was because of complaints about a “boys club” atmosphere, including inappropriate sexual comments and jokes.
- Retaliation allegations:
 - Unfounded criticism of her work performance.
 - Terminated within hours of submitting written complaint of sexual harassment.

\$2.2 mil. Jury verdict in Plaintiff’s favor

\$1.75 mil. settlement

The Flip Side: The *John Doe* Cases

- In recent years, there has been a backlash against the aggressive enforcement of Title IX in the higher education context, leading to:
 - *John Doe v. Univ. of Cincinnati* (6th Cir. 2017)
 - *John Doe v. Univ. of Michigan* (E.D. Mich. 2018)
 - *John Doe v. Penn. State Univ.* (M.D. Pa. 2018)
 - ...?

The Flip Side: The *John Doe* Cases

What does this all mean?

- The process must be fair and uniformly administered;
- Consider what due process may require based on your institution, identity of the parties;
- Consider and address explicit and implicit bias by investigator and decision-maker (e.g., assuming victim = female; harasser = male).

Elements of an Effective Policy

- Clear policy/goal statement;
- Describe expected and prohibited conduct;
- Duty of employees to cooperate;
- Set forth complaint and investigation process;
- Appeal process?
- Strong non-retaliation language;
- Contact information.



Complaint Process

- Explain process to employees;
- Provide prompt, thorough, and impartial investigation of all complaints;
- Follow up with employees,
 - Even if behavior doesn't rise to the level of harassment.



Reporting Process

- Both individuals who have experienced or who have observed harassment
- Provide multiple persons that can receive complaints
- Initial report need not be in writing
- Encourage Bystander Intervention





Investigation

- The investigator must apply policy to the facts and determine whether or not the conduct occurred.
 - Depending on your agency's process, the decision of what should occur as a result of the investigator's findings may be made by the investigator or by another person/panel.
- The breadth of investigation depends on the accusation and circumstances.



First Steps

- Identifying the Investigator
- Receipt and review of complaint
- Review the employer's policy and procedure
- Statutory or contractual procedural requirements
- Interim measures
- Other related investigations (criminal)
- Determine limits of confidentiality

Conducting interviews

- The investigator should develop a general investigation plan:
 - Gather and review any relevant documents, policies, or other evidence;
 - Determine where interviews will take place (neutral, private, convenient);
 - Prepare pre-interview points;
 - Determine order of interviews;
 - Develop list of questions for each witness (WWW).

Obtaining Witness Statements

- Written in first person.
- Focus on facts, not conclusions (may include how the incident affected the individual).
- If the investigator writes the statement for the witness, get confirmation of accuracy.
- Consider having it notarized or including statement “based upon my personal knowledge, the above facts are true and correct.”

Handling Evidence

- Take immediate steps to preserve evidence:
 - Electronic data, including messages and social media;
 - Video footage;
 - GPS data.
- Beware chain of custody issues.
- Maintain comprehensive investigation file.

Making credibility determinations

- It is the investigator's responsibility to make to determine whether it is more likely than not that the alleged incident occurred.
- Simply saying "he said, she said = unfounded" will generally not suffice.
- Thus, when there are conflicting versions of events, the investigator must make credibility determinations to determine whose version is more reliable.

Making credibility determinations

- Is the individual's account consistent, or do they make conflicting statements on material issues?
- Does the individual appear to have a hidden agenda?
- Is the individual cooperative?
- Does the individual's account generally make sense?

Making credibility determinations

- Does the individual have a history of being especially honest and forthright? Or the opposite?
- Observe non-verbal cues.
- Ask the difficult questions.
- Challenge areas of inconsistency during the interview.

The Written report

- After conducting all interviews and receiving all evidence, the investigator should:
 - Review all evidence, witness statements, and interview notes
 - Make credibility determinations as appropriate
 - Determine whether complaint is founded or unfounded, using preponderance standard
- These determinations become the basis for your report

The Written report

Contents of the report

1. Summary of allegations
2. Summary of the investigation
3. Applicable policies and procedures
4. Summary of witness interviews and other information gathered and reviewed

The Written report

Contents of the report

5. Description of undisputed facts.
6. Findings on all relevant disputed facts.
7. Analysis and conclusion. Were the policies in question violated?
8. Recommended actions (if this is your role).

The Written report

The goal of the employer's response is to (1) stop the conduct, (2) prevent it from recurring, and (3) remedy any effects of the conduct on the target(s) of the conduct.

*** This may involve more than simply discipline-oriented actions.

Wrap up and follow up

- Notify complainant and respondent in writing of the outcome.
- Provide any due process required by law or policy/practice to respondent.
- If evidence is inconclusive despite a reasonably thorough investigation, appropriate supervisory personnel should continue to monitor the situation to avoid future violations.

Wrap up and follow up

- Remind both parties that retaliation is prohibited and how to report.
- Only notify other parties of disciplinary or remedial actions to the extent permitted by law or policy.
- Check in with complainant periodically to determine if there have been any further issues.

Consequences to Harasser

May include:

- Schedule changes;
- Transfer;
- No contact;
- Discipline;
- Termination.



Remedial Measures

- Assistance to victim may include:
 - Removing harasser from direct contact;
 - Job or schedule changes (if requested);
 - Employee assistance program;
 - Follow up re: harassment/retaliation.



Sexual Harassment Training

- Sexual Harassment is one of the most common employee complaints. Ongoing and meaningful training is a strong defense.
 - Investigator training
 - Supervisor training
 - Employee training
- Consider conducting employee climate and work culture surveys periodically.

Questions?



Miriam Van Heukelem

mvanheukelem@ahlerslaw.com

