



The Post-Weinstein Workplace

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This presentation is meant to give you some basic information, and nothing in this presentation is intended to be relied upon as legal advice. If you have any questions, please contact your attorney or Pemberton Law.



What is sexual harassment?

The law defines sexual harassment as:

- Unwelcome sexual advances;
- Requests for sexual favors;
- Sexually motivated physical contact; or
- Other verbal or physical conduct or communication of a sexual nature;

When submission to this type of conduct is made a term or condition of employment, the submission to, or reject of the conduct is used as a factor in an employment decision, or the conduct has the purpose or effect of substantially interfering with an individual's employment.



Who does it apply to?

Sexual harassment applies to conduct between:

- Supervisor and subordinate
- Co-workers
- Employee (or member of the Board of Directors) and a member of the public seeking to obtain or use Employer services
- Board member and employee
- A third-party vendor, agent, or contractor and employee



Quid pro quo

“This for that”

QPQ harassment occurs where a plaintiff shows that a **tangible employment action** (for example, termination, demotion, pay cut) resulted from a refusal to submit to a supervisor’s sexual demands.



Hostile Work Environment

“Totality of the circumstances”

HWE harassment occurs where a plaintiff shows the conduct is **severe or pervasive** enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.



Welcome v. Unwelcome

- Conduct that is welcome is typically not sexual harassment.
- It can be extremely difficult to know whether conduct is welcome or not. Conduct can be welcome one moment and unwelcome the next.
- Conduct that is “uninvited and offensive” can give rise to a claim of sexual harassment.



Work Environment

- Protected characteristics under the law:
race, color, creed, religion, national origin, ancestry, sex (including pregnancy), sexual orientation (including gender identity), disability, age, marital status, familial status, membership of and activity in local human rights commissions, or status with regard to public assistance.



“That is just __ being __.”

- Communicate - Immediate, direct, and honest
- Offer help - Job coaching, mentoring, training
- Stay engaged – Follow-up
- Ramp up, if necessary – Progressive discipline
- Document – Keep thorough notes
- Lead by example



Supervisor → Subordinate

Boundaries

- Not just impropriety, but the appearance of it.
- Supervisors must be mindful of inherent position of authority and influence over an employee they supervise.



Employee Interaction

- Employees must exercise good judgment and professionalism in all relationships and communication with their co-workers, especially with employees they supervise.



Prevention - Training



Training Tips

- Don't read statutes
- Tell relatable stories and give employees tips on how to handle various situations
- Focus on workplace culture, rather than egregious conduct
- Tips on how to be an upstander versus a bystander
- Encourage employees to bring concerns to management, no matter how small they might seem
- Push kindness, civility, and respect



SAMPLE SLIDES FROM ALL-STAFF TRAINING



**SAVES SOMEONE'S LIFE
BY PERFORMING CPR**



**SUED FOR SEXUAL
HARASSMENT**



Can I compliment co-worker?



Can I ask co-worker on a date?



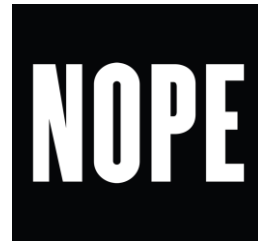
Can I tell a joke at work?



Can I send you an inappropriate joke and then repeatedly ask you if you liked what you saw, then corner you at your desk and stand over the top of you, and start rubbing your shoulders?



Can I use a bikini girl picture as my screensaver?



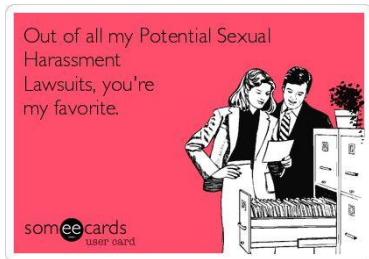
Can I hug a co-worker?



Can I put my arm around a co-worker in a group photo?



If it happens at happy hour, after work I'm OK, right?



Kindness and Civility

- Not all concerning workplace conduct is “harassment.”
- But, rudeness and incivility create a certain type of workplace culture.
- Employers should value an inclusive and respectful workplace.
- Kindness matters.



Bystanders vs. Upstanders

- Be an “upstander,” not a “bystander.”
- Do not need to confront harasser in the moment.
- Ask victim to come with you to some other location, tell a “white lie” to pull victim away.
- Drop a book, make a commotion.
- Say, “What would HR think of that?”



Bystanders vs. Upstanders

- Talk to the harasser later, “Do you know how you sounded in that conversation?”
- Talk openly about inappropriate behavior in front of others, “Did that feel uncomfortable to you?”
- Talk to the victim and let them know they did not do anything wrong, and it is not their fault.
- Ask victim if they are OK or need help making a report.



Prevention – Policies and Handbooks

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Policies & Handbooks

- Every policy must include, at a minimum:
 - Description of sexual harassment
 - Clear reporting procedure with multiple avenues
 - A “conflict” provision
 - Anti-retaliation protections
 - Investigation process
 - Potential consequences for violations
- Disseminate policy (and keep proof)



Sexual Harassment

Wide range of unwanted and unwelcome sexually directed behavior. Can include:

- unwelcome sexual advances, request for sexual favors, sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature
- sexual jokes, sexually explicit posters, or repeated and unwelcome requests for dates or sexual favors



Reporting Procedures

- Employees should report conduct immediately to any of the following: Immediate Supervisor, Business Owner, or any member of the Board of Directors, if applicable.
- Employees should also document the occurrences of harassment and complaint in writing.
- Submit a complaint to a supervisor, Business Owner, or any member of the Board of Directors, if applicable.
- Document any further harassment or reprisals that occur after the initial complaint is made.



Employee Protection

- Employees who bring forward complaints are protected from harassment or retaliation because they reported.
- A report will not impact an employee's future employment.



Investigation

- All reports will be investigated.
- An investigation may include witness interviews, review of other evidence (emails, text messages, video camera footage, etc.).
- A written report will be prepared, and a determination made as to whether policy was violated.



Consequences

Discipline may result if the allegations are substantiated. Discipline can include:

- verbal reprimand;
- written reprimand;
- corrective action plan involving treatment, therapy or education on sexuality;
- withholding of salary increase;
- suspension;
- demotion or transfer, reduction in classification and /or salary; or
- termination



Practical Tips for Handling Realistic Scenarios

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The Bumbling Jokester

Man in his late 50s frequently approaches female coworkers after hours, typically, when they are alone or there are few people around. He tells them jokes about boobs, sex, and/or other types of off-color jokes that he tells them he got from Playboy magazine. He also frequently comments on female coworkers' appearances, telling them they are "beautiful," they "look like an angel," or are "hot." Female employees are often overheard calling him "creepy," but no formal complaints have been filed, and the general opinion around the office is, "Oh, that's just Joe. He's kinda weird and he says weird stuff. But he's harmless and people tolerate him."



The Social Media Meme Guy

Employee, mostly on the weekends, but sometimes in the middle of the workday, is posting all kinds of photos on various social media websites, publicly available, of bikini-clad women. He is friends with several employees on social media. Some of them are telling you they think it's "weird" and makes them "uncomfortable."



The CEO

The CEO, who has been with the company for 35 years, beloved by the board and the community and widely credited as being the sole reason for the company's enormous success over the past several decades, starts sending you, the human resources director, sexually suggestive messages, inappropriate pictures, etc. You don't respond. After a few weeks, you ask him to stop. The next day is your annual performance review meeting with him. He scores you 1s out of 5s in every category, and says you're not a "team player." That night, he starts sending you more inappropriate messages.



The "Gentleman"

Supervisor is very friendly with all of the office staff, holds doors open for them, etc., but also refers to them as "the front desk girls," and makes statements like, "Those front desk girls are quite competent," leaving the impression that he feels people would assume the "front desk girls" were not competent if he did not say that. He recently presented aprons with the company logo on them to all the "front desk girls," as a "thank you" for all their hard work.



The Good Old Boys Club

A group of male employees hangs out a lot after hours, on the weekends, at work, during lunch, breaks, etc. They frequently put together office pools for major sporting events and typically do not include the women in the office, other than the one woman who they are always saying, "Is just like one of the guys," and is "cool because she likes sports," etc. They always ask female employees to take notes at meetings because, "Your handwriting is better." Several of these men have sent emails to the entire office in a "joking" fashion commenting on female employees' appearances, clothing, and romantic relationships, among other things.



The Office Affair

Rumors are circulating that the company's two best employees, who work in the same division, with one supervising the other, are having an affair. They are both married and have grade-school-age children. Things are going great at work, and they both continue to be standout performers.



The “Lonely” Guy

Guy asks coworkers out on dates all the time. Sends them texts and private social media messages riddled with sexual innuendo and/or sometimes flat out propositioning coworkers for sex. Then backs off and says he was joking. But then keeps doing it, even if told to stop.



Common Sense?



Questions?



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