

# Health Promotion Program Legal Updates (January 17, 2018)

*Barbara J. Zabawa, JD, MPH*



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## Agenda

- Sexual Harassment Legal Basics
  - Title VII
  - Workers' Compensation
  - ADA
- Sexual Harassment and Worker Well-being
- Workplace Wellness Tools
- Case Scenarios

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## #MeToo



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## Sexual Harassment Basics

- Simply put, sexual harassment is an expression of

• **POWER**

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## Sexual Harassment Basics

- Legal protection in the workplace stems from Title VII
- Title VII
  - Gender
  - Race
  - Ethnicity
  - National Origin
  - Religion

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## Sexual Harassment Basics

- Title VII applies to employers with at least 15 employees
- Title VII protects employees, not independent contractors
- State and local laws may cover smaller employers
  - Alaska
  - Colorado
  - DC
  - Hawaii
  - Maine
  - Michigan
  - Minnesota
  - Montana
  - New Jersey
  - North Dakota
  - Oklahoma
  - Oregon
  - South Dakota
  - Vermont
  - Wisconsin

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## Sexual Harassment Basics

### *What is it?*

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

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## Sexual Harassment Basics

- Two Types:
- Quid pro
- Hostile environment

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## Sexual Harassment Basics

- For both types, conduct must be "unwelcome"
- Employee does not solicit or incite the conduct and employee regards conduct as undesirable or offensive.



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## “Quid pro Quo”

### OCCURS WHEN:

- ★ an individual’s submission to or rejections of **unwelcome** sexual conduct is used as a basis for employment decisions affecting the individual.

### \*SUCH AS:

- ★ hiring, firing, promotions, awards, transfers, or disciplinary action.

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## “Quid pro Quo”

### TYPICAL EXAMPLES:

- 1) a supervisor coerces an employee into sexual relationship and then rewards the employee with a promotion;
- 2) a supervisor takes disciplinary action or denies a promotion to an employee because he or she rejected sexual advance from the supervisor.

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## "Hostile Environment"

Occurs when unwelcome sexual conduct unreasonably interferes with an individual's job performance or creates an intimidating, hostile, or offensive working environment.

This form of harassment, whether engaged in by a manager or an employee can constitute discrimination, even if there are no tangible economic job consequences.

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## "Hostile Environment"

TYPICAL EXAMPLES of misconduct which may constitute evidence of a hostile environment are:

- \* displaying "pinup" calendars or sexually demeaning pictures;
- \* making sexually oriented jokes or offensive remarks; or
- \* subjecting another employee to unwelcome sexual advances or touching.

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## Hostile Environment:

Anyone in the workplace may create a hostile work environment.

- \* Supervisor
- \* Co-worker
- \* Non-employee

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## Remember. . .

- \* Intentions do not matter if a person feels harassed or humiliated.
- \* Different people have different reactions to the same behavior and different interpretations

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## Workers' Compensation

- State-based laws
- "No-fault" insurance
  - Employees unable to sue for work-related injury
  - Pays for lost wages during period of disability and medical/rehabilitation costs
- Cases usually determine whether injury caused by work, including work-induced stress
  - Did work cause a "psychological injury?"

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## Workers' Compensation

- *Hibben v. Nardone*, 137 F.3d 480 (7<sup>th</sup> Cir. 1998)
  - Cherie Hibben began working at TLC, a trucking company based in Milwaukee, WI. Almost immediately, TLC's executive began sexually harassing her. His conduct consisted of vulgar and tasteless remarks directed at Hibben's personal appearance and sex life, his own sexual proclivities, and sexual propositions. As a result of this conduct, Hibben was embarrassed and humiliated, became depressed, and withdrew from her family. Hibben continued working for TLC for about year, after which she resigned and immediately went to work for another company. Hibben sued TLC for sexual harassment and retaliation under Title VII and both TLC and the executive for intentional infliction of emotional distress.

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## Workers' Compensation

- *Hibben v. Nardone*
  - Court found that Hibben was barred from bringing her intentional infliction of emotional distress claim against Nardone because of the "exclusivity" of workers' compensation for workplace injuries. But, Title VII claim was allowed to go forward (and Hibben won on that claim).

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## Workers' Compensation

- Lesson learned:
  - Sexual harassment can lead to both court actions and workers' compensation claims.

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## ADA

- Prohibits employers from discriminating against individuals who have, had *or perceived to have* a disability as to terms, conditions, privileges of employment.
- “Terms, conditions, privileges” can include wellness program participation.

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## ADA

- Disability is a physical or mental impairment that substantially limits one or more major life activities:
  - Caring for oneself
  - Performing manual tasks
  - Seeing
  - Hearing
  - Eating
  - Sleeping
  - Walking
  - Standing
  - Lifting
  - Bending
  - Speaking
  - Breathing
  - Learning
  - Reading
  - Concentrating
  - Thinking
  - Communicating
  - Working

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## ADA

- Disabilities can include:
  - Depression
  - Anxiety
  - PTSD
  - Panic attacks
- These disabilities can be caused by sexual harassment!

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## ADA

- Workplace stress can affect one's ability to participate in major life activities.
  - Workplace stress could cause disability
  - Triggers reasonable accommodation requirement for employer
- Reasonable accommodations include:
  - Work environment modifications/adjustments
- Use ADA requirements to proactively design wellness programs that reduce stress (i.e., sexual harassment)

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## Sexual Harassment and Employee Well-being

- Research:
  - Sexual harassment leads to stress, depression, anxiety
    - Declines productivity
    - Increases absenteeism and tardiness
    - Increases sick leave and health claims and turnover
  - Sexual harassment undermines victim's well-being, increases psychological distress, causes greater physical illness and greater disordered eating.
  - Employees working in an organization perceived as hostile toward women also experience diminished well-being.
    - Merkin and Shah, *The impact of sexual harassment on job satisfaction, turnover intentions and absenteeism: findings from Pakistan compared to the United States* (2014).

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## World Health Organization

- Workers who are stressed are more likely to be:
  - Unhealthy
  - Poorly motivated
  - Less productive
  - Less safe at work
  - At risk for depression and anxiety disorders
- The organization is less likely to be successful



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## PREVENTION

Prevention is the best tool to eliminate sexual harassment in the workplace.

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## Tools

- Workplace wellness professionals must incorporate sexual harassment prevention into workplace wellness programming.
  - Include sexual harassment training as part of worker well-being initiatives
    - Provide all employees, including management, with tools to help discern appropriate behavior.



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Question	Rationale
1. Are employees at the same career level?	<b>Power</b> imbalances can lead a lower-status individual to feel compelled to assent, and can raise concerns about whether a relationship is genuinely consensual.
2. Have both parties clearly expressed a sexual or romantic interest in one another? Did those expressions of interest occur when the employees were sober?	The fact that one person finds another attractive or alluring isn't enough. Coworkers should not make a move unless they can articulate something specific that the other person has said or done at a time they were sober that demonstrates a sexual or romantic overture is welcome.
3. Are there any red flags, such as one person being married or in a committed relationship?	Adults can consent freely in any circumstance, but if red flags exist an employee should be especially sure their overture will be welcomed. (See question 2.)
4. Have overtures been rejected in the past?	No means no, and trying even a second time can result in a harassment claim.

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## Tools

- Assess how employees experience the organization's culture
  - Include cultural assessment questions in HRA?
    - Need robust privacy policies
  - Bring in outside entities/experts if necessary
  - Don't allow cultural assessment to be delegated to HR – leaders must own this assessment and then act on it based on results.
    - Leaders must clarify organizational norms and nip offensive behavior in the bud.
- Provide clear, multiple avenues to report potential claims
- Ensure that the sexual harassment policy is enforced
- Ensure no retaliation for reporting

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## Case Example #1

- Employee's past conduct showed that she used foul language and that she was the kind of person who could not be offended by sexually explicit comments. Therefore, it was argued that because employee engaged in such behavior in the past, that she welcomed those comments generally. However, employee told harasser to leave her alone.
  - Sexual harassment?

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## Answer

- Yes. The Fourth Circuit Court of Appeals held that employee's use of foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment. The proper inquiry is whether the employee welcomed the particular conduct in question from the alleged harasser.
  - *Swentek v. US AIR, Inc.*, 830 F.2d 552, 557 (4<sup>th</sup> Cir. 1987).

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## Case Example #2

- Employee claims that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged “advances” consisted of invitations to join a group of employees who regularly socialized at dinner after work.
  - Sexual harassment?

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## Answer

- No. According to EEOC Enforcement Guidance, the coworker’s invitations, viewed from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment. A “reasonable person standard” should be applied to the more basic determination of whether the challenged conduct is of a sexual nature. A reasonable person would not consider the coworker’s invitations sexual in nature, and on that basis no violation would be found.

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## Case Example #3

- Employee loses a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a consensual sexual relationship with their supervisor. The supervisor never subjected the complaining employee or any other employees to unwelcome sexual advances. Nevertheless, complaining employee is offended by the supervisor's conduct.
  - Sexual harassment?

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## Answer

- No. According to the EEOC's enforcement guidance, the EEOC would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders.

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## Case Example #4

- The supervisor of an office engaged in virtually daily horseplay of a sexual nature with female subordinates. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. The subordinates joined in and generally found the horseplay funny and inoffensive. The supervisor additionally engaged in consensual relations with at least two of his subordinates. None of the horseplay was directed at a complaining employee.
  - Sexual harassment?

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## Answer

- Yes. The court found that the supervisor's conduct interfered with the work performance of the employee and would have seriously affected the psychological well-being of a reasonable employee. Thus, pervasive sexual conduct can create a hostile work environment for those who find it offensive even if the targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim.
  - *Spencer v. GE*, 697 F.Supp. 204 (E.D. Va. 1988)

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## Case #5

- After an employee refused her supervisor's sexual advances, the supervisor dramatically increased her workload, denied her the opportunity to attend a professional conference, required her to monitor and discipline a coworker, and generally gave her undesirable assignments.
  - Sexual harassment?

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## Answer

- According to the 4<sup>th</sup> Circuit, no. The 4<sup>th</sup> Circuit ruled that the employee had not been subjected to a tangible employment action because she had not experienced a change in her employment status akin to a demotion or a reassignment entailing significantly different job responsibilities.
- The EEOC disagrees with this outcome. While minor changes in work assignments would not rise to the level of tangible job harm, the actions of the supervisor in this case were substantial enough to significantly alter the employee's employment status.
  - *Reinhold v. Commonwealth of Virginia*, 151 F.3d 172 (4<sup>th</sup> Cir. 1998).

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## Reminder...

The following Q&A session does NOT constitute legal advice and should not be used as such. It is for educational purposes only.

WELCOA Members should retain legal counsel to obtain definitive answers.

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## Questions?

- For more information, contact:  
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