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Harassment and Discrimination: Promoting a Respectful Work & Educational Environment

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Overview – Ahlers & Cooney, P.C.

For over 130 years,
Ahlers & Cooney has represented
educational institutions, municipalities,
and private entities.

Employment Law Practice Area
We have the knowledge and expertise
to advise clients on issues from
the typical to the unusual.



Disclaimer

Please note that this presentation is intended for informational and educational purposes and to provide general statements from federal law, state law, and agency guidance. Federal and state law may differ on particularized areas and this outline does not include all legal considerations.

Each situation varies based on the individualized facts and the law is constantly evolving.

Please consult with your attorney for specific legal information, advice, or individualized inquiries.

Work Environment



Realities...

- Civility toward others is waning
- Strong differences of opinion and viewpoints
- A lack of civility and heightened personal sensitivities leads to:
 - a more contentious overall climate
 - more volatility in relationships
- People are more susceptible to judgmental opinions or combative dialogue
- More litigious society – creates increased legal liability and risk

The Stakes are High – What Works?

- Civility – Mutual Respect
- When in doubt...don't say or do it!
- Report if inappropriate behavior occurs
 - Leadership takes reports seriously
 - Prompt investigations
 - Whistleblower protections
 - Legal protection from retaliation



Defining Discrimination and Harassment



- No one wants to be in an environment feeling uncomfortable, harassed, or under-appreciated
- Harmful, non-productive, & ILLEGAL
- Law guarantees a workplace and educational environment free from discrimination and harassment



Discrimination

Iowa Civil Rights Act: It shall be an unfair or discriminatory practice to refuse to hire, accept, classify, or refer for employment, to discharge any employee, or to *otherwise discriminate in employment based on a protected class.*

- Demotion;
- Discipline;
- Failure to Hire/Train/Promote;
- Force to Quit;
- Layoff;
- Reduced Hours/Pay;
- Unequal Pay

Protected Classes

- Disability
- Race, Color
- Religion, Creed
- Sex (including pregnancy)
- Age
- National Origin
- Military/Veterans
- Sexual Orientation
- Genetic Information (Employment)
- Gender Identity (Employment)



Harassment: Hostile Environment

1. Member of a *protected class*;
2. Subject to *unwelcome* harassment;
3. Harassment was the *result of/causally connected* to membership in the protected class;
4. Harassment is *severe and pervasive* enough to affect terms, conditions, or privileges of employment and create abusive working environment
 - Subjective and objective

Sexual Harassment

- Any unsolicited and unwelcome sexual advance, request for sexual favors, and other verbal or physical conduct of a sexual nature if:
 - Becomes term or condition of employment;
 - Used as the basis for employment decisions; or
 - Such conduct creates an intimidating, hostile or offensive work environment or substantially interferes with the employee's job performance
- Higher Ed: **Title IX**

Potential Harassment

- Making jokes or comments about someone's physical appearances or sexual history
- Giving preferential treatment, promotions, or assignments to someone in a personal/romantic relationship (or with hopes of one)
- Comments or advances prevent staff from focusing on tasks; begin practicing avoidance

“Hostile Environment”

- Factors that determine whether an environment is sufficiently hostile or abusive:
 - Frequency
 - Severity
 - Physically threatening or humiliating or offensive utterance
 - Unreasonably interferes with work
- *Less likely:*
 - Sporadic, accidental, or single offensive utterance

Source: U.S. Supreme Court – *Faragher vs. City of Boca Raton*; Iowa Supreme Court – *White v. State of Iowa*

Reasonable Person Standard

- If the challenged conduct would not *substantially affect the work/education environment of a reasonable person*, or *is not what a reasonable person would find sexual in nature*, it is not actionable, unlawful harassment
 - Still might violate policy
- **Context is important.**
 - Physical gestures
 - Verbal Comments
 - *Not* deferring to intent of alleged perpetrator

Reasonable Person Example

Employee alleges 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.

- Given this context, is the coworker’s invitation creating a hostile environment?
- Per EEOC: The coworker’s invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment



NOT Harassment

- Insisting employees be at work on time and perform duties.
- Insisting people meet performance expectations.
- Generally, not harassment when applied equally to ALL employees (though still a potential policy violation)



Harassment: Direct or By Association

In addition to harassment based on an *employee's* race, the law recognizes harassment for “race by association.” Example: *Madison v. IBP, Inc.*, 149 F. Supp. 2d 730 (S.D. Iowa 1999) *aff'd in part*, 257 F.3d 780 (8th Cir. 2001) *cert. granted, judgment vacated on other grounds*, 536 U.S. 919 (2002).

- Race by Association: Caucasian woman married to African-American man; had biracial children
- Unwelcome harassment: Derogatory statements about family (epithets, commenting on family's appearance); physical intimidation (writing slurs and epithets on walls/lockers, touching and grabbing employee)
- Severe and pervasive: Duration, frequency, emotional distress, lack of prompt and reasonable response to complaints

Liability

- An employing entity 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.
 - Obtain own attorney and pay for damages?



Juries and Credibility

- Expectations on “role” and relationship to other parties
 - Does this person meet my expectations?
- Behavioral patterns:
 - Does the person appear comfortable, confident, and in control?
- Posture and Gestures;
- Voice and Vocal Expressions:
 - Vocal characteristics, including low (agreeable in women, not in men) and high voices (reversed);
 - Phrasing, pausing, interrupting the questioner, “speech hesitancy,” raspy or tight voices suggest nervousness
- LIKEABILITY
- Jurors are generally not good at detecting good lies

- Source : 2013 ABA Conference, Demeanor, Deception, and Credibility in Witnesses

Identifying Discrimination and Harassment



Perpetrators and Targets

- **Who can commit harassment?**
 - Employees at all levels
 - Members of the opposite sex or members of the same sex
- **Who can be a target of harassment?**
 - Individuals or a group of people targeted by statements and actions
 - Bystanders not directly targeted

“Power” Dynamics

- Potential for:
 - Higher Discomfort
 - Not as likely to express or show discomfort
 - More concerned about direct or indirect consequences of addressing or reporting behavior
- Meaning: Supervisors, Administrators, Decision-Makers etc. should be *more* aware of behaviors towards others

Third-Party Conduct

- Employer can be held responsible for harassing conduct of third-parties if know about it and fail to take reasonable action.
- Report any harassing conduct by third-parties, whether experienced or observed.
- Examples: Vendors, Public, Volunteers



Outside/Off-Duty Conduct

- Texts on personal devices, even outside of work or activity hours, may require investigation
 - Review of offending messages
- Social Media
 - Is there a nexus with the workplace or school activity?

Complaints and Resolution Procedures



Complaint Process

- Identify offensive behavior to the harasser and request that it stop.
 - NOT required to confront harasser.
- Report conduct to:
 - Human Resources
 - Title IX Coordinator
- A manager, supervisor, or director who receives a complaint must immediately contact Human Resources or Title IX Coordinator
- Investigation
- Also: Title IX Process, if Applicable

**Report
it!**

Consequences to Harasser



No Retaliation

- Retaliation is unlawful.
- Witnesses also protected
- Protected activity and adverse action are linked
- Protection for good-faith complaints
- No direct or in-direct negative treatment based on complaint or participation



Avoiding Discriminatory Practice



Responsibilities

- Familiarize yourself with the College's Policies
- Immediately report any incidents
- Trust in investigation and non-retaliation policy

Questions?

