



LEADINGAGE ANNUAL MEETING + EXPO

October 28-31, 2018

Pennsylvania Convention Center | Philadelphia, PA

www.LeadinAge.org/AnnualMeeting



**THE LEGAL IMPLICATIONS
OF
WORKPLACE HARASSMENT**

**LeadingAge Annual Meeting And Expo
October 30, 2018**

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Direct Polling Link:

<http://etc.ch/5yaT>



Harassment As Discrimination is Nothing New

- 1976 – Williams v. Saxbe U.S. Dist. Ct. for the District of Columbia – first case to recognize *quid pro quo* sexual harassment as a form of sex discrimination
- 1986 – Meritor Savings Bank v. Vinson – U.S. Supreme Court first recognizes sexual harassment as a form of sex discrimination
- 1991 – Amendment to Title VII provides right to jury trial and compensatory and punitive damages to sex harassment victims

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Fast Forward to 2018 ...

- Sexual harassment is still in the news – Now as “#MeToo”
- States enacting more restrictive laws – particularly regarding confidential settlements
- New York enacts comprehensive sexual harassment law with mandated policy and investigation protocol



Polling Question

Claims Filed with the EEOC in FY 2018 Regarding Sexual Harassment Increased by what Percentage over FY 2017

- A. 25%
- B. 12%
- C. 50%

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What is Sexual Harassment

Sexual Harassment is a form of sex discrimination. It includes unwelcome conduct, whether of a sexual nature or because of that person's sex, when:

- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment
- Such conduct is made (implicitly or explicitly) a term or condition of employment, or
- Submission to, or rejection of, such conduct is used as a basis for making employment decisions



Why Harassment is a Problem

- Victims may lose their sense of security, dignity, and confidence.
- All employees may be demoralized.
- People may start to feel unsafe on the job.
- Confidence in the organization and its reputation may be threatened.
- Accused employees may suffer loss of reputation and credibility – not to mention their jobs.

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Identifying the Problem

Sexual harassment can take many forms:

- Sexual comments
- Explicit derogatory statements
- Sexually discriminatory remarks
- Physical assault – unwanted touching
- Unwanted sexual advances
- Sexually overloaded gestures
- Hostile actions because of gender

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The Scope of the Problem

- Anyone can be a target
- Sexual harassment concerns everyone, its not just an employee problem
 - Vendors
 - Residents
 - Invited third parties

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When Is It Harassment?

- A single, extremely serious, incident
- A pattern of intimidating, hostile, and/or offensive conduct
- Unreasonable interference with work performance
- Negative effect on an individual's employment opportunities



What Harassment is **NOT**


- Occasional teasing
- Offhand comments
- Isolated incidents that are not extremely serious



Polling Question:

Harassment does not include activity outside of work settings and during work hours.

- A. Yes
- B. No



**Crowley v. L.L. Bean, Inc., 303 F.3d 387
(1st Cir. 2002)**

Courts permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace.



Pew Research Study 2017

62% of American Public consider online harassment to be a major problem.*

*<http://www.pewinternet.org/2017/07/11/online-harassment-2017/>



Pew Research Study 2017

41% of Americans have personally experienced online harassment and 66% have witnessed online harassment.*

*<http://www.pewinternet.org/2017/07/11/online-harassment-2017/>

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What is Online Harassment?

In general, most people would consider online harassment to be the use of email, instant messaging, SMS texting, and websites to bully or otherwise harass an individual or group through personal attacks.



Code of Virginia Section 18.2-152.7:1

Harassment by Computer

Any person, with the intent to coerce, intimidate, or harass any person [uses] a computer or computer network to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language, or make any suggestion or proposal of an obscene nature, or threaten any illegal or immoral act [is] guilty...

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Some Examples of Online Harassment

- Unsolicited emails
- Email viruses
- Online Impersonation
- Swatting
- Spreading rumors online
- Doxing
- Trolling



Technology Has Evolved Harassment

The advancement of technology has not only increased the ease with which someone may conduct harassing behavior against a fellow employee, it has also evolved into new methods of harassment such as revenge porn and catfishing.



Urban Dictionary Definition of Catfishing:

The fabrication of online personas and entire social circles to trick people into emotional/romantic relationships (over a long period of time).



Polling Question:

Can an employer discipline an employee for catfishing a fellow employee.

- A. Yes
- B. No



Hypothetical:

Sam and Victoria are colleagues. They are generally friendly with each other and work well together. Sam likes Victoria, but is very shy and does not express his feelings in any way. Sam learns that Victoria likes to post on a particular online forum so he creates a fake account in order to interact with her and learn more about her. Victoria learns about this fake account and is upset by it. Should Sam be disciplined?

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Facts and Circumstances Still Important

While changes in technology have opened up new opportunities for harassing behavior, the general premise and approach to addressing harassment in the workplace has not really changed.

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Facts and Circumstances to Consider

- A single, extremely serious, incident
- A pattern of intimidating, hostile, and/or offensive conduct
- Unreasonable interference with work performance
- Negative effect on an individual's employment opportunities



Healthcare Settings Create Special Issues

- Interactions with:
 - Supervisors
 - Peers
 - Subordinates
 - Patients and their families
 - Physicians and other independently contracted providers
 - Other contracted staff

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Employer has duty to provide safe work environment for all its employees.

*Harassment can come from others who are not supervisors.



Question is whether employer knows or should have known about the hostile work environment yet allowed it to persist.

**Gardner v. CLC of Pascagoula, LLC
Fifth Cir., June 29, 2018**



Many cases of third-party harassment are from restaurants, bars, and casinos.

Gardner involved repetitive harassment of a nurse by a resident of an assisted living facility. The resident had diminished mental capacity from a variety of ailments, including dementia. The nurse complained several times to her supervisor, who brushed aside her complaints.

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Lessons from Gardner

The Gardner decision recognized that inappropriate comments and incidental contact are common amongst patients with reduced cognitive ability, and it is not objectively reasonable to expect that they will never happen. However, the Court found that the facility must take steps to protect its employee from significant physical contact or violence.

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Lessons from Gardner

The Court noted that the facility could have assigned a security escort or additional staff, reassigned the employee, moved the resident to an all-male facility, used medication to control the resident, or discharged the resident. It looked to prisons for guidance.



- The employer must look at the work environment and listen to staff.
- Staff must feel that it is safe to communicate their concerns.
- Once a complaint is filed, it should be promptly addressed and, if necessary, the problem should be promptly corrected.



- The employer should objectively document the information it learns and the steps to ameliorate it.
- Part of our goal is to prevent litigation, not just win lawsuits. Litigation is expensive and disruptive.



Hypothetical

Dr. Gross hangs around the hospital lab. For years, the staff has known that he pinches the backsides of the female staff, but no one told a supervisor. Finally, he pinched the wrong person, and she complained to the lab supervisor.

What should the hospital do? What could the hospital have done better?



Hypothetical

Would your answer vary if Dr. Gross were a big admitter? Or a contracted provider?

Physicians are not always employed by the same employer as the harassed staff. Consider whether to complain to medical staff or contracted providers.



Policy Considerations

Having a policy that just sits on the shelf is not enough.

Sometimes, it is worse to have a policy than to not have one, because having a policy shows that the employer knows what should happen.

If you have a policy (and you should), it should be a workable policy.



Policy Considerations

When considering whether to take action against a harasser, some employers worry that they will be sued by the harasser.

Remember that doing nothing can also lead to litigation.


The employer must balance how best to prevent litigation by either party.



Polling Question:

What is the Most Important Component of an Effective Sexual Harassment Policy?

- A. “Zero Tolerance”
- B. A clear description of prohibited behavior
- C. An effective complaint resolution process

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Key Components of an Effective Harassment Policy

- Firmly prohibits workplace harassment
- Encourages victims to come forward
- Promises and delivers prompt and effective response to employee complaints
- Ensures fair and professional treatment of all employees
- Promotes a respectful work environment



Increasing the Effectiveness of Your Reporting System

- Encourage reporting not only to direct supervisors but also to managers and HR
- Provide a clear description of how to file a complaint
- Stress that retaliation will not be permitted – and show it
- Test your reporting system
- Devote the necessary resources
- Conclude your investigations timely and with a consistent response



Non-Traditional Reporting Procedures

- Apps – AllVoices, STOPit, Talk to Spot - complaints generally made anonymously
- Hotlines, external consultants
- Apps may generate more specific information than hotlines
- Tracking software – similar to that used to monitor efficiency and productivity

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Conducting Your Investigation -- Has Harassment Occurred?

- Developing an investigation plan – Review documents/interview witnesses
- Make a determination
- When no determination is possible – what now?
- Preparing a report
- Inform those involved
- Dealing with cases involving behavior short of unlawful harassment



Conducting Your Investigation -- Corrective Action

- You must make sure:
 - The victim is not adversely affected
 - The harassment stops immediately and does not occur again – The key is prompt, effective measures which are reasonably designed in order to stop the inappropriate conduct



Corrective Action

- You must also be careful to:
 - Correct the effects of the harassment
 - Follow up to make sure the problem is solved

NOT MEETING THESE BASIC REQUIREMENTS WILL
LEAD TO CLAIMS AND POSSIBLE LIABILITY



QUESTIONS?



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Evaluate Sessions in the Annual Meeting App

- Go to the **sessions** icon
- Select the session
- Click on **evaluate session** link
- Respond to all 6 questions
- Tap **submit** button