
**A Supervisor's Practical Guide to Understanding, Preventing, and Correcting
Unlawful Harassment, Discrimination, and Retaliation**

**A Workshop For
Managers & Supervisors**

THE LEGAL LEARNING GROUP

LLG 2009 Harassment Training

The Legal Learning Group
A Division of Littler Mendelson
650 California Street
San Francisco, CA 94108
Phone 415.433.1940 • Fax 415.399.8490

INTERACTIVE EXERCISES

Exercise One:

How would you define harassment?

The warning signs of workplace harassment may not always be obvious, but the need to understand what they are and to be preventive are just as important at the early stages as after a harassment claim has been made. By completing this training, you are playing a key role in creating a workplace that is free of harassment.

Exercise Two:

Pretest: Write your answers here:

1.

2.

3.

4.

5.

6.

7.

8.

Hot Zone of Risk:

Use this Code to Identify Potential Harassment Levels

5	Unlawful Severe Risk of Legal Liability
4	Unacceptable Violates Company Policy v. Harassment, Discrimination & Retaliation
3	Inadvisable Significant Risk of Employee Misconduct
2	Normal Interaction Minimal Risk of Employee Misconduct
1	All Clear No Risk of Employee Misconduct

Decoder:

A selection of “Unlawful” denotes that the described conduct or incident violates a statute or regulation prohibiting unlawful harassment.

A selection of “Unacceptable” denotes that the described conduct or incident may not violate a statute or regulation prohibiting unlawful harassment but is nonetheless prohibited under your organization’s anti-harassment policy.

A selection of “Inadvisable” denotes that the described conduct or incident may potentially violate workplace policies other than anti-harassment, such as standards of professionalism, or a Code of Business Conduct. This incident could also result in discipline as a result of the misconduct.

A selection of “Normal Interaction” denotes that the described conduct or incident is unlikely to violate workplace policies but may need to be kept in check.

A selection of “All Clear” denotes that the described conduct or incident is absolutely appropriate for your workplace.

SUPPORTING MATERIALS

*Please note: This handout was designed as an informational supplement to the training program and should not be used to follow the PowerPoint program.

Guide To Preventing Unlawful Harassment in the Workplace

I. Eliminating Harassment: It's Good Business

Creating and maintaining a working environment free of harassment is one of your workplace's most important responsibilities. You have been asked to attend this training because you are crucial to the well being of your organization and its workforce. All employees share the responsibility to create an inclusive and respectful environment for all. If you are a supervisory employee, you bear a heightened obligation to prevent and eliminate workplace harassment and sexual harassment.

While knowledge of the legal risks associated with workplace harassment is important, your organization's anti-harassment is as important a part of your overall commitment to promoting fairness in the workplace. But its effectiveness depends on the consistent application and well-informed level of knowledge of the people who carry it out. Workplace harassment hurts everyone: It has an obvious negative impact on the victim, it can result in disciplinary action (including termination) of the accused, and it can also create legal liability for the organization and its individual managers. Managers must understand the importance of eliminating harassment and their role in monitoring employee conduct, detecting inappropriate behavior and effectively responding to complaints and incidents.

Moreover, employees are entitled to a working environment free from unwelcome, inappropriate or offensive conduct. Whether based on sex, sexual orientation, transgender status, marital status, gender, race, national origin, age (over 40) or any other protected category, harassment demeans employees, reflects a lack of respect and interferes with an employee's right to equal employment opportunity. Harassment can also lead to decreased productivity, reduced morale and serious disruptions in the working environment. Stated simply, the organization believes that preventing harassment makes good business sense.

WHAT THIS RESOURCE GUIDE CONTAINS

Information, practical examples and guidance about:

- Federal and state statutory laws about unlawful harassment.
- The correction of unlawful harassment and the remedies available to victims of harassment.
- Practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation.

II. Definition Of Harassment – The Basics

Harassment is a form of discrimination that violates both Title VII of the Civil Rights Act of 1964, as amended, and the anti-discrimination laws of many states. Harassment is unwelcome conduct – physical, verbal or nonverbal – that unreasonably interferes with an employee’s job performance or creates an intimidating, hostile, or offensive work environment.

Generally, there are two types of harassment:

A. Economic Harassment

Economic harassment occurs when a manager’s harassment of or retaliatory conduct toward an employee in a protected category results in a “tangible employment action.” This is sometimes called “quid pro quo” harassment. A tangible employment action may be “positive,” such as granting a promotion in exchange for acquiescing to impermissible requests, or “negative,” such as demoting an employee for refusing to comply with such requests.

Economic harassment typically involves a threat or a promise of a benefit linked to race, sex, national origin, or any other protected category. For example, a manager says to a subordinate, “Switch shifts with James. He’s getting old and slow and I don’t want him working on my shift anymore. I’ll make sure you get that promotion.” If the employee says no and does not receive the promotion, the employee may believe it was because of the refusal to follow an age-motivated directive.

This form of harassment always involves a manager or supervisor abusing supervisory power. An employer is strictly liable for economic harassment committed by a manager, because the actions of the manager are considered actions of the employer itself.

B. Environmental Harassment

Environmental harassment involves behavior which an employee finds offensive even though no tangible employment action results from the behavior. In this situation, harassing conduct interferes with an employee’s work performance or creates an intimidating, hostile or offensive working environment. Examples of conduct that constitute environmental harassment include, but are not limited to, slurs, jokes, graffiti, suggestive remarks, and cartoons relating to a protected category, physical interference with

movement such as blocking or following, or racially derogatory comments that create a hostile work environment.

Managers and supervisors, in addition to co-workers or persons who are not even employed by the employer, can engage in environmental harassment. Not all conduct aimed at a protected category is harassment, however. The conduct must be unwelcome, offensive to the person complaining, offensive to the reasonable person, and severe or pervasive.

Harassing conduct does not have to be directed at the particular individual complaining; an observer or third-party witnesses can complain that harassment of others created a hostile environment. In addition, same-race harassment can be unlawful, if it is “because of” race.

REMEMBER!

Unlawful harassment does not have to be intentional.

- In fact, INTENT USUALLY DOES NOT MATTER.
- What is offensive conduct should be judged from the perspective of the reasonable recipient or observer of the offensive conduct.

III. Environmental Harassment In Detail

The term “harassment” is often used in a non-legal context to describe conduct at work. For example, an employee might say that a manager is harassing her for continually being late to work. This common usage is not *unlawful* harassment.

Unlawful harassment stems from discrimination law. Thus, unlawful workplace harassment focuses on conduct aimed at any legally protected category, i.e., race, gender, religion, color, national origin, age, veteran status, sex, sexual orientation, transgender status, marital status and disability.

To be unlawful environmental harassment, the conduct must be:

1. ***Unwelcome;***
2. ***Directed at gender, race or another protected category, OR, in sexual harassment cases, be sexual in nature;***
3. ***Offensive to both the recipient and to a “reasonable person”;*** and
4. ***Severe or pervasive.***



A. Unwelcome

Only conduct which is unwelcome or unwanted can be sexual harassment. The perception of the person who is subjected to the conduct determines the unwelcomeness. Signals that conduct is unwelcome include:

- The employee complains;
- Verbal response (or lack of one);
- Expression changes;
- Body language.

Remember, employees may have differing reactions to the same behavior in the workplace, and may express their displeasure differently. Be sensitive to the reactions of those around you at all times.

B. Conduct

To constitute harassment, the conduct must be because of a person's race or other protected category. Offensive conduct may be physical, verbal or visual as illustrated by the following examples.

Examples of physically harassing conduct in the case of sexual harassment include:

- Pranks, intimidating acts;
- Hugging, groping, inappropriate touching;
- Neck or shoulder massages;
- Touching, rubbing, hugging, pinching, patting, or kissing;
- Rape, sexual assault;
- Rewards/punishments contingent upon submission to or participation in these behaviors give rise to economic harassment.

Courts generally consider physical harassment to be more severe than non-physical conduct. Thus, fewer incidents of physical harassment are usually necessary to constitute harassment.

Examples of verbally harassing conduct include:

- Epithets, offensive jokes, stories;
- Offensive terms of address;
- Graphic or degrading comments about an individual's appearance or body;
- Racial or intrusive questions about an individual's personal life;
- Rewards/punishments contingent upon submission to or participation in these behaviors give rise to economic harassment.

Examples of visually harassing conduct include:

- Offensive cartoons, images;
- Offensive gestures;
- Display of racially offensive objects or pictures – display or transmission of racially-motivated electronic content;
- Rewards/punishments contingent upon submission to or participation in these behaviors give rise to economic harassment.

Note: One instance of behavior occurring within the context of economic harassment will generally constitute harassment. A severe and pervasive pattern of these behaviors can constitute environmental harassment. This is not an all-inclusive list.

C. *Offensive To The Recipient And A Reasonable Person*

Conduct constitutes unlawful harassment if the conduct is offensive to the recipient and would be found offensive by a reasonable person. Thus, the inquiry has both a subjective and an objective component.

The employee need only show that he or she reasonably perceived the work environment as hostile or abusive; the employee need not show that he or she was psychologically disabled.

D. *Severe Or Pervasive*

To qualify as unlawful harassment, conduct must be sufficiently severe or pervasive such that it interferes with the employee's working environment and alters the conditions of employment. Generally, the more severe the harassment, the fewer times it need be repeated to constitute harassment.

A single isolated incident may be considered harassment if it is severe enough to poison the work environment.

Conversely, a pattern of repeated conduct can make it pervasive. Less obvious acts such as hanging posters may lead to liability if they occur repeatedly or are extremely common.

IV. Liability For Harassment By Managers

Employers are strictly liable for economic harassment and environmental harassment committed by managers, regardless of whether the employer actually knew of the harassment in advance. Strict liability means that once an employee proves that unlawful harassment occurred, there is generally no defense available to the employer.

- *Exception For Environmental Harassment*

However, for environmental harassment, the law does provide one defense to employers who have actively attempted to prevent harassment in their workplaces. Under this affirmative defense, an employer is not liable for environmental harassment committed by managers if it can meet the two-pronged test:

1. Did the employer take reasonable steps to prevent harassment?
2. Did the employee unreasonably fail to complain?

Manager's Checklist: The Affirmative Defense

- Read and learn your employer's harassment policy and complaint procedures – every policy is unique.
- Comply with and consistently apply your employer's harassment policy.
- Use the policy actively during meetings, training sessions, complaints and disciplinary actions.
- Distribute the policy to all employees at the beginning of and throughout their employment.
- Ensure your employees receive anti-harassment training.
- Respond promptly to any complaint and take appropriate remedial and disciplinary action.

V. Employer Liability For Co-Worker And Non-Employee Harassment

Employers are liable for harassment by co-workers and non-employees only if the employer (e.g., a manager) *knew or should have known* about the harassing conduct. Thus, an employer would be liable for co-worker or non-employee harassment if the victim complained to management, or if a manager witnessed the harassment and nothing was done to remedy the situation. An employer may avoid or limit its liability by demonstrating that it took immediate and appropriate corrective action after learning of the harassment.

An employee complaining of harassment may show that the employer “should have known” about the situation by showing:

- The employer did not provide an appropriate avenue for the victim to complain to the management;
- The employer did not take the victim’s complaint seriously;
- The employer failed to adequately investigate the situation; or
- The employer failed to continue monitoring the alleged harasser’s conduct.

The best way to avoid claims that the employer “should have known” is to encourage all employees to bring their issues to management’s attention.

- Ensure that there are no barriers to reporting harassment;
- Be an open and responsive manager;
- Address the behavior of co-workers and employees that may discourage reporting;
- Recognize that out-of-channel reporting triggers a responsibility on your part to act;
- Respond promptly to a complaint of harassment from *anyone* who seeks your help – not just employees that you immediately supervise;
- Simply referring an employee back to their immediate supervisor is not enough. His or her manager may be the underlying cause of the harassment complaint.
- Your job is not to override the decision of another manager, but to contact Human Resources or senior management to inform them of the situation.

VI. Individual Liability For Harassment

- Supervisors should be careful of their behavior, not only in preventing harassment, but also in addressing harassment complaints. A supervisor can be held individually liable for:



- Defamation, if he or she falsely publicizes information about employees involved in a harassment claim
- Inflicting emotional distress
- Negligent supervision and retention
- Falsely imprisoning an employee, alleged harasser or witness during an investigation
- Committing assault/battery against a complainant or alleged harasser
- Engaging in harassment

To avoid individual liability and create a more productive workforce, practice the steps in the following checklist.

MANAGER'S CHECKLIST: AVOIDING HIGH-RISK BEHAVIOR

- Recognize the devastating impact a claim of personal liability would have on your career, professional reputation, family and health.
- Avoid any kind of harassing behavior, whether physical, verbal or nonverbal.
- Monitor your workplace for potential harassment.
- Make time to address harassment claims, no matter how busy you are, and take all complaints of potential workplace harassment seriously.
- Respond promptly to all complaints, and cooperate fully with your employer's investigative and remedial procedures.
- Maximize training opportunities by using some simple learned rules – this can be one of the best investments for you and your employer's protection.
- Apply workplace rules consistently.
- Use respectful language and terminology at work and work-related functions.
- Avoid negative jokes or comments about protected categories.
- Never threaten an employee based on a protected category.
- Do not engage in any kind of physical conduct that could lead to a harassment claim – inappropriate touching, physical intimidation, assault, or destruction of property.
- Be aware of how physical touching could be misinterpreted or later misrepresented.
- Remember that non-verbal conduct could also lead to a harassment claim – offensive graffiti, the circulation or posting of offensive materials such as magazines, posters and Internet sites inappropriately related to protected categories.
- Do not rely on or endorse stereotypes.
- Scrutinize your own actions. Ask yourself if you would feel comfortable with your behavior knowing that it was being observed by an immediate supervisor.
- Address the inappropriate behavior of co-workers and non-employees. You and your employer's obligation to ensure a harassment-free workplace extends to all those who interact with employees in the workplace.
- Do not excuse workplace harassment, even if it comes from a valuable client. Your obligations and liabilities are the same and will require appropriate solutions.
- Watch your use of alcohol at meetings and off-site. Remember that just because your inhibitions may be lower, your liability is not.

VII. Management's Legal Obligation To Respond To Harassment, Discrimination, and Retaliation Complaints

Harassment is a form of discrimination. By law, employers must investigate complaints of harassment, discrimination, and retaliation when they arise.

If management concludes that inappropriate harassment has occurred, or has likely occurred, management must take *prompt remedial action* reasonably designed to stop the harassment.

- The victim does not have a right to decide the appropriate response.
- The victim should not be required to transfer or change jobs to resolve the situation.

Managers and supervisors have a responsibility to treat all complaints seriously, by initiating prompt action – including a thorough investigation – and following through to ensure that the complaining employee suffers no retaliation for having complained.

Prevent Retaliation

It is critical that managers ensure that no retaliation occurs. Retaliation for complaining of harassment, or for cooperating with a harassment investigation, can result in significant liability, which may be greater than the liability for the conduct complained of.

Past retaliation discussions have referred to the prohibition against taking "adverse employment action" against employees who engage in protected activity. However, in its June 2006 decision in the *Burlington Northern v. White* case, the U.S. Supreme Court rejected as too narrow the "adverse employment action" standard for defining unlawful retaliatory conduct under Title VII. Instead, the Court held that prohibited retaliatory conduct includes any action that is "materially adverse," which it defined as any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

"We conclude that the anti-retaliation provision [Section 704] does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."

- **Material adverse action.** In order to "separate significant from trivial harms," the Court requires the employee to show that the employer's action was "materially adverse." This will exclude "petty slights or minor annoyances."
- **Reaction of a reasonable employee.** The Court adopted an objective standard, so an individual employee's "unusual subjective feelings" will not be relevant. The focus is on the materiality of the employer's action and "the perspective of a **reasonable person in the plaintiff's position.**"

Examples:

- **Changed job duties.** In the *Burlington* case, the employer changed the employee's duties, however the duties were still within her job description. The job description did not matter. What mattered was that the new job was dirtier, harder, less prestigious, and perceived by other employees as being worse.
- **Temporary suspension.** In the *Burlington* case, the employee was suspended for 37 days, and then reinstated with back pay. The Court said a reasonable employee would find a month without a paycheck to be a "serious hardship."
- **Schedule change.** Might not matter to many employees, but "may matter enormously to a young mother with school age children."
- **Refusal to invite to lunch.** Usually trivial, but exclusion from a weekly training lunch might well deter a reasonable employee from complaining.

Confidentiality

An issue which often arises after an employee complains is the extent to which a manager can maintain the confidentiality of the complaint and the investigative process. Once an employee complains, an employer has a duty to investigate, even if the complaining employee requests that the issue not be pursued. This duty to investigate means that requests for absolute confidentiality cannot be granted without putting the organization at risk. Absolutely no assurance should be given that a complaint will simply be filed away and ignored. The law does not permit such a response. The law requires a prompt thorough investigation.

Manager's Initial Response To Harassment, Discrimination, And Retaliation Complaints (First Steps)

1. ***Contact HR to conduct investigation.***
2. ***Act immediately – do not procrastinate or avoid the matter.***
3. ***Meet with the employee privately to get initial information.***
4. ***Give the employee a chance to explain the situation.***
5. ***Review the organization's harassment policy with the employee.***
6. ***Discuss confidentiality (but do not promise it).***
7. ***Ensure no retaliation.***
8. ***Tell the employee he or she will be kept informed.***

Error! Objects cannot be created from editing field codes.

- Recognize** - **Be able to spot issues that require managerial action of some kind**
- Remove** - **Remove yourself from any semblance of participation, agreement or assent**
- Redirect** - **The conversation or conduct to make it clear it is not acceptable**
- Reeducate** - **The individual(s) as to the offense, the risk and the applicable policy**
- Respond** - **What might be needed in terms of a more formal response?**

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COURSE EVALUATION

Speaker: _____

Date: _____

	High	Low
Course Content		
The course is important for our organization	5	1
The course will help me on the job	5	1
My understanding of the subject matter <u>before</u> training was	5	1
My understanding of the subject matter <u>after</u> training is	5	1
The quality of the information	5	1
Course Presentation		
Speaker's knowledge of subject	5	1
Speaker's thoroughness of preparation	5	1
Speaker's clarity	5	1
Speaker's attention to questions	5	1
Speaker's ability to enliven material	5	1

Overall Course Rating (compared with similar courses): 5 4 3 2 1

Overall Comments: _____

Which part of the program was of most value to you? Why? _____

Which part of the program was of the least value to you? Why? _____

Would others in the organization benefit from this program? (circle) Yes / No

If yes, what departments or areas? _____

WHAT OTHER COURSE TOPICS WOULD YOU FIND VALUABLE?

Optional:

Name: _____ Organization: _____

Please complete and re turn to trainer.