State of Wisconsin
Department of Workforce Development
Equal Rights Division
Civil Rights Bureau

Wisconsin Fair Employment Law
#2 in a Series
Harassment IN THE WORKPLACE

Harassment in the Work Place

1. <u>What is the Legal Definition of Harassment</u>?

Under the Fair Employment Law harassment in the workplace may be illegal under two circumstances. The first is when an employer, supervisor or co-worker **singles a person out** for harassment **because of** that person's race, color, creed, ancestry, national origin, age (40 and up), disability, sex, arrest or conviction record, marital status, sexual orientation or military services. The second situation is when the **content of the harassment** itself relates directly to any of these protected characteristics (i.e. sexual harassment, use of derogatory ethnic or religious terms, age or disability related comments, etc.)

It is important to note that the Fair Employment Law only prohibits harassment in the circumstances described above. **There is no general prohibition against harassment.** An employer who harasses an employee because of a personal dislike, for example, or who harasses employees in general is **not** violating the Fair Employment Law, no matter how abusive or hostile the environment might be.

Harassment may include verbal abuse, epithets, sexually explicit or derogatory language, display of offensive cartoons or materials, mimicry, lewd or offensive gestures and telling of jokes offensive to the above protected class members. The behavior must be more than a few isolated incidents or casual comments. It involves a pattern of abusive and degrading conduct directed against a person **because of** his or her protected class that is sufficient to interfere with work or creates an offensive and hostile work environment.

"Sexual" harassment includes **unwelcome sexual advances, requests for sexual favors and verbal or physical conduct of a sexual nature** when:

- Engaging in such conduct is made an implicit or explicit term or condition of employment. **Example: A newly hired machine operator is told sexual jokes, touching and display of nude posters are just part of factory life and she should try to ignore it.**

- Acceptance or rejection of such conduct is used as the basis for an employment decision affecting an employee. **Example: A manager tells a worker applying for a promotion that the job would be his if he just "treated her right."**

- The conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment. **Example: One worker experiences repeated advances from another asking her for dates or "just to go out for drinks after work." The worker says she isn't interested, but the co-worker won't take 'no' for an answer.**

2. When is Conduct Unwelcome?

Conduct is unwelcome when an employee does not solicit or invite it and when the employee regards the conduct as undesirable or offensive. Since sexual attraction is a normal factor in employee interactions, the distinction between advances that are *invited, uninvited-but-welcome, offensive-but-tolerated and flatly rejected* may be difficult to discern. This distinction is important because conduct is unlawful when it is unwelcome.

It is important to note that harassment is in the "eye of the beholder". What might be acceptable to one worker might be offensive and unwelcome to another. The U.S. Supreme Court has adopted the "reasonable person" standard in determining if conduct is harassing.

3. What Forms Does Sexual Harassment Take?

In practical terms, there are two forms of sexual harassment.

Quid Pro Quo ('this for that'): When employment decisions or expectations (e.g. hiring, promotions, salary increases, shift or work assignments, and performance standards) are based on an employee's willingness to grant or deny sexual favors. Examples of quid pro quo harassment include:

- Demanding sexual favors for a promotion or raise.
- Disciplining or firing a subordinate who ends a romance.
- Changing work standards after a subordinate refuses repeated requests for a date.

Hostile Environment: A work environment is "hostile" when unwelcome verbal, non-verbal or physical behavior focusing on sexuality is severe and pervasive enough to interfere with the victim's work performance or be intimidating or offensive to a reasonable person.

Examples of behaviors that can create a hostile environment:

Verbal

- Sexual jokes or insults
- Comments about a person's body or sex life
- Sexually demeaning comments

Non-Verbal

- Making gestures or staring
- Display of sexually suggestive or degrading materials
- Giving sexually suggestive "gifts".

Physical

- Touching, hugging, kissing or patting
- Brushing against a person's body
- Blocking a person's movement

4. Important Facts about Harassment

- Sexual harassment often occurs when there is a disparity of power, not just when men and women work together.
- A person who consents to a supervisor's sexual advances might still be a victim of sexual harassment.
- A member of one sex can sexually harass a member of the same sex even if there is no romantic motive for the harassment.
- "Horseplay" can constitute sexual harassment if the actions are explicitly sexual in nature.
- Offenders can be supervisors, co-workers, or non-employees such as vendors, customers, or suppliers.
- The victim does not have to be directly involved. A third person can be offended by harassing behavior among willing participants.
- Harassment does not have to be reported or complained about by the victim to be defined as harassment.
- An employer can set stricter limits on harassment in the workplace (such as prohibiting all harassment) than may be specified under fair employment laws.
- Unless severe, a single incident or a few isolated incidents of offensive behavior will not likely rise to the level of harassment.
- A single incident of unwanted touching of a person's intimate body areas is sufficiently offensive to be defined as sexual harassment. It may also constitute a criminal offense under state "sexual assault" laws.
- Abusive, hostile, or rude treatment of one sex (as opposed to mistreatment of all employees) may still constitute harassment, despite the absence of overt sexual behavior.

5. How Can Management Respond To Harassment Concerns?

- Implement a strong policy explicitly prohibiting harassment, including a description of disciplinary consequences that will be applied.
- Provide training to educate employees on the issue of harassment and periodically remind them of your strong desire to maintain a harassment free workplace.
- Have multiple avenues in place for making an internal complaint and regularly inform employees about the complaint process. A "victim-friendly" complaint procedure encourages employees to come forward, is sensitive to their situation, stresses the need for confidentiality and ensures that retaliation will not occur, whatever the investigation outcome is.
- Ensure that every complaint is taken seriously. It is essential that the employer act in a timely manner. Commence an investigation immediately and take appropriate corrective action **as soon as possible**.
- Avoid making credibility judgments or reaching conclusions before you have gathered the facts, even if you think you "know" the parties involved and have an "idea" about what happened.
- Keep in mind that there is a wide range of sensitivity toward harassing behavior. Remember, the "eye of the beholder" is what is important, not what you or other co-workers might find personally offensive. And be aware that it is not just young, "attractive" females who are sexually harassed.

- Keep lines of communication open. Make sure the complaining employee is informed of your efforts to correct any harassing behavior (including information about the consequences to the harasser) and of your desire to be promptly notified if problems persist or if retaliation occurs.
- Realize that as a supervisor or owner you are “at risk” anytime you have an intimate relationship with a subordinate, even though you present relationship is not harassing and may not affect employment decisions. Policies that regulate social contact between supervisors and subordinates, including requirements that such contact be divulged by supervisors, are within an employer’s rights under the Fair Employment Law.

6. Who Is Liable For Harassment?

How an employer addresses harassment with its employees is likely to be the single most critical issue in determining liability in legal actions.

- An employer is responsible for **its own acts** and those of **its agents** regardless of whether the acts were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of those acts.
- An employer is responsible for harassment between **co-workers**, if the employer or its agents **knew or should have known** of the conduct and failed to take immediate and appropriate corrective action.
- An employer is responsible when non-employees such as customers or suppliers harass its employee(s) during the workday, where the employer or its agents knew or should have known of the conduct and failed to take immediate and appropriate action.

7. What Are The Consequences?

Lost Work Time:

- Harassment is very disruptive of production.
- It can seriously affect victim/employee morale.
- It may increase absenteeism and turnover.

Reputation:

- An owner’s or company’s community reputation may suffer.

Damages:

- A victim’s back pay; attorney fees and costs may be substantial.
- Compensatory and punitive damages under federal law may dramatically increase dollar damages.
- Other laws, such as state sexual assault statutes, may result in criminal charges.

8. When in Doubt about Sexual Harassment!!

Often, an employee or supervisor may not be sure if a particular behavior or interaction is appropriate. The following “not sure” tests might be helpful.

Ask yourself:

- Would you say or do it in front of your boss, grandparent or a stranger?
- How would you feel if your family or close friends were subjected to the same words or behavior?
- Would you say or do it to a colleague who is the same sex as you?

This is one of a series of pamphlets highlighting programs of the Wisconsin Department of Workforce Development. It is intended to provide only a general description, not a legal interpretation.

The Equal Rights Division also has additional informational material that explains various aspects of the fair employment law.

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