Workplace Harassment

Nebraska Equal Opportunity Commission

Presented by
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Nebraska Equal Opportunity Commission
Illegal

Discrimination

Showing prejudice in the treatment of others based on their “protected class”
Prejudice is shown when people respond to different races, ethnicities, cultures, religious beliefs, age, physical & mental abilities, and gender differences with negativity or stereotypes, based on assumptions.

“1 in 6”

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Some **assumptions** we are familiar with…

1. People in wheelchairs should…..
2. Women really don’t…. 
3. People over 65 can’t…
4. People who don’t speak English shouldn’t…
5. Tall people are so…
6. African Americans usually…
7. Why can’t Mexicans…
8. If poor people could just…
9. People with lots of kids…
10. Rich people are…
11. I heard Muslims…

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What is wrong with these statements? Have our concepts changed and why?

1. Mrs. Jones looks remarkably good for someone her age.
2. We need more manpower here.
3. I see Sally forgot to sign her timecard. She must be having a blonde day.
4. Even though he is confined to a wheelchair, Jim manages to live a productive life.
5. There is a daycare at the work location, where women can leave their children while they work.
6. We welcome all managers, their wives, and their children.
7. “All men are created equal.”
8. “To boldly go where no man has gone before.”

Did the person intend to be hurtful? Insensitive?
Discrimination can be intentional or unintentional but the effects of discrimination are painful and can last forever.

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People are subjected to harassment because of a group they are identified with, or their protected class membership:

- Birthplace, ancestry, cultural, or linguistic characteristics related to a protected class
- Association/affiliation/friendship with someone in a particular protected class
- Attendance or participation in schools, churches, temples, or mosques associated with a protected class
- Surname identified with a protected class.
What are the “protected classes” under discrimination law?
National Origin includes, but not limited to:

**Hispanics** - All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture without regard to race.

**Asian or Pacific Islander** - All persons of the Far East, Southeast Asia, the Indian Sub-Continent, or the Pacific Islands. Included: China, Japan, Korea, the Philippine Islands, and Samoa.

**American Indian or Alaskan Native** - All persons having origins in any of the original people of North America.
Race includes, but not limited to...

All White people having origins in Europe, Northern Africa, or the Middle East, who are not Hispanic. All Black people having origins in any of the Black racial groups of Africa, but who are not of Hispanic origin.

Color

There are different colors even within racial groups, and a person may believe they have been treated unfairly because of the color of their skin.

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Religion

Showing a preference for or against a religious group, or showing intolerance for that group’s observation of their religious practices, dietary habits, or work schedules.

Sex

Sex discrimination is gender discrimination, and both women and men may experience discrimination, including sexual harassment.
Age - Anyone age 40 and over

Marital Status - Under employment law only: married or single.

Familial Status - Under housing law only: any family with minor children
Disability –

A person with a disability (under the ADAAA) has a physical or mental impairment that substantially limits one or more of their major life activities; a person who has a record of such an impairment; a person who is regarded as having such an impairment.

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Harassment is **conduct** that is:

- Disregard and Disrespect for Human Dignity
- **Illegal Discrimination** when based on a person’s protected class membership

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A perpetrator of harassment

Has a bias based on a stereotype or an individual belief or opinion

• Shows prejudice against a particular person or class of persons

• Treats others with disrespect based on an immutable trait
Is it harassment? CONSIDER...

- The totality of circumstances
- Whether a *reasonable person* would find the behavior objectionable
- The perception of the victim
The conduct must be sufficiently **severe** or **pervasive** to be actionable under discrimination law.

**Severe** means egregious just one time.

**Pervasive** means occurring frequently.
Unwelcome conduct is not consensual. It may set off an alarm.
It is **inappropriate conduct** when it is **verbal**, or **physical**, or **visual**, or any combination of these.
<table>
<thead>
<tr>
<th><strong>Verbal</strong></th>
<th><strong>PHYSICAL</strong></th>
<th><strong>Visual</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Swear Words or Profanity</td>
<td>Pushing, impeding, or blocking someone’s movements</td>
<td>Derogatory posters, pictures, cartoons, drawings, graphic materials, objects</td>
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<tr>
<td>Name-calling that refers to someone’s protected class status</td>
<td>Unwanted touching, assaults</td>
<td>Suggestive gestures</td>
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<tr>
<td>Any derogatory slurs, comments, or insults</td>
<td>Throwing objects</td>
<td>Glaring</td>
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<tr>
<td></td>
<td>Giving backrubs</td>
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Examples

- Discussing sexual activities
- Telling off-color jokes
- Unnecessary touching
Commenting on physical attributes
Displaying suggestive pictures
Using demeaning terms
Discussing someone’s race or religion or national origin in a negative way

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Using indecent gestures
Sabotaging the victim’s comfort or performance
Engaging in hostile provocation
Granting favors to participants in consensual but prohibited conduct

Using crude and offensive language in the presence of others or allowing the language to be used

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What should a victim of harassment do?

Clearly communicate that the behavior is offensive or unwelcome.
In AGE – based harassment, there are themes of remarks, behaviors, and opinions that are reflective of stereotypical and discriminatory views, such as:

1. “We need some new blood in this company.”

2. “You can’t teach an old dog new tricks.”

3. “We have laid-off most of our employees reaching retirement age. That should save us some money on our medical insurance.”

Many studies have shown that older workers have lower absentee rates and more job stability and tenure.
The perpetrator may be a coworker, manager, vendor, ... *any* workplace contact
The victim does not have to be the person who is the victim of the unwelcome conduct, but could be someone who is offended by the conduct.

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The victim and the harasser do not have to be of a different protected class membership
Same-sex harassment is recognized under Title VII
It is illegal harassment when the unwelcome conduct is based on the person’s protected class membership.
It is harassment when others join in, or are aware and do not prevent/stop it

*Note: The responsibility for prevention and action is different between supervisors and non-supervisory employees.

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Negative Behavior:

- Talking at a person
- Belittling
- Ignoring
- Cutting someone short
- Condescending
- Discounting a person’s intelligence or knowledge
definition:

“Hostile Environment"

A work environment created by a workplace contact (including a supervisor) who does not impact tangible terms and conditions of employment
**Definition**

“Quid Pro Quo”

Unwelcome behavior by someone who has **authority or power to control or make decisions** who impacts tangible terms and conditions of employment:

- hiring, promotion, demotion, discipline/termination, compensation, work assignments

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The U.S. Supreme Court held that Vinson had been subjected to sexual harassment by the supervisor, and this harassment also constituted a “hostile environment”.

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If not opposed, it may affect:

- VALUED EMPLOYEES
- PRODUCTIVITY
- MORALE
- SALES AND PROFITS
- CLIENTS, CUSTOMERS
- LEGAL FEES
- GOODWILL AND REPUTATION

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The courts have established that an employer is liable if negligent in failing to prevent harassment from taking place.

When…..

1. Employer does not monitor the workplace
2. Employer failed to respond to complaints
3. Employer failed to provide a system for registering complaints
4. Employer discouraged complaints from being filed.
Develop, promulgate and maintain policies that are periodically reviewed and owned by employer and employee.
Periodically read the policies that address filing an internal complaint.
How to Handle Complaints and Resolve Problems

- Listen to the complaint/concern/objection
- Reduce your feelings of fear
- Empathize
- Apologize when a mistake has been made
- Affirm the dignity and worth of the person
1. Document: keep records, notes, emails, etc. of concerns or complaints

2. The internal investigation should be conducted by a person who does not have stake in the outcome

3. Be honest with the employee/employer

4. Reasons for decisions should be made crystal clear to the extent possible to all staff

5. Remember the “Yes, but...” test
Take immediate and appropriate remedial action if warranted.
Discrimination against a person who has opposed an illegal practice or participated in an investigation

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Why People Complain

- Employee treated unfairly
- Employee believes no one would listen
- Employee has financial needs/losses
- Employee reads employment laws
- Employee wants to know their rights
- Employee has misunderstandings about their rights
Overview of Retaliation

The law prohibits retaliation against someone who is a:

- Current workplace contact
- A perspective workplace contact
- A former workplace contact
Types of Retaliation by Employers

1. Threat to file a counterclaim in court
2. Suspension with pay
3. Changing the qualifications for an open position sought
4. Selective strict enforcement of a policy
5. Harassment
6. Manipulation of union contract rights
7. Reprimands
8. Extending Probation
9. Transfer to a lower grade or salary
10. Intimidation of witnesses during an internal investigation of a complaint
The Opposition Clause

Opposition is protected if the employee had a reasonable and good faith belief that the practice opposed was a violation of the Act, or a federal, state, or local law.
Opposition includes:

- Peaceful picketing
- Public protest of an employee by an employee who is also a consumer
- Devoting small amounts of office time to complaint-related work
- Refusing to perform a directive that is a violation of the state or federal law*

*Whistle-blower retaliation
Opposition may not include:

- Disruption of the workplace
- Neglecting work duties to perform complaint activities
- Willful violation of legitimate company rules
- Complaining outside the chain of command
“Participation” activities include:

- Filed a charge
- Refused to be a cooperative witness for the employer
- Testified for a coworker
- Become a probable witness
- Gathered evidence to support a charge of discrimination
- Expressed an intent to file a charge
The Participation Clause

Protection is not lost if the employee is wrong on the merits of the charge.
Section 48-1114. Opposition to unlawful practice; participation in investigation; discrimination prohibited.

It shall be unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because he or she...
Section 48-1114 (FEPA)

(1) has opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act

(2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act

(3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or this state. (Whistle-blower)
Section 48-1004(3): It shall be an unlawful employment practice for any employer or labor organization to discharge, expel or otherwise discriminate against any person, because he opposed any unlawful employment practice...or has filed a charge or suit, testified, participated, or assisted in any proceeding under the provisions of (the) sections...
Equal Pay Act of Nebraska

Section 48-1221(4): No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of the provisions...
Prima Facie Elements of a charge of *Retaliation

1. Person has: (1) opposed any practice made an unlawful practice  (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Acts, (3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or Nebraska

2. C suffered an adverse action by the business

3. There exists a temporal and causal connection between the protected activity and the business’s action
A discrimination complaint that is unreasonable, meritless, and motivated by bad faith does not quality for protection under the participation clause of Title VII’s retaliation provision.
Defending oneself against a charge of discrimination by participating in a Title VII proceeding or investigation constitutes protected activity.

The court rejected a “knew or should have known” standard for employer liability in favor of a vicarious liability standard that depends on the status of the retaliator and the nature of the retaliation.
Handling Issues

Best Practices
To Avoid Complaints

Human Resource department/decision-maker should

1. Document: keep records, notes, emails, etc.
2. Be honest with the employee/employer
3. Reasons for decisions should be crystal clear to the extent possible
4. Remember the “Yes, but…” test
Complaint Handling

- Prompt
- Neutral
- Thorough
- “No retaliation” clause
- Investigator has no interest in the outcome
- Documented
Follow-up

It is the company’s responsibility to provide closure for the person who complained...and to address inappropriate behavior or activity in the workplace.
The laws require the business to make, keep, preserve records relevant to the determination of whether unlawful practices have been or are being committed.

Section 48-1117(5)(a)(b): Nebraska Fair Employment Practices Act
Everyone by birthright is entitled to Human Rights. People residing in this country are covered by its laws.
Working in a Diverse Community

Practice kindness
Help to resolve conflicts

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• Recognize similarities and differences in individuals within groups.

• Acknowledge your own biases and prejudices. We all have them.

• Let go of stereotypes.

• Learn from others.

• Yield to respect, acceptance, and inclusiveness instead of insulting and contentious behavior.
Value and respect diversity
Tell your family and others that you value and respect diversity

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Be the example

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Walk the talk and implement/enforce/follow policies, rules and practices that hold all persons accountable for inappropriate behavior.

It takes only one person
Treat all people fairly

“The world is a dangerous place to live; not because of the people who are evil, but because of the people who don’t do anything about it.”

Albert Einstein

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All people want to be treated with dignity and respect

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People are individuals but more often than not, share values, beliefs, and social culture

“The task that remains is to cope with our interdependence – to see ourselves reflected in every other human being and to respect and honor our differences.”

Melba Patillo Beals

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Discrimination issues in the community find their way into the workforce

None of us alone can save the nation or world. But each of us can make a positive difference if we commit ourselves to do so.

Cornel West
Make an assessment of your own strengths and weaknesses in your interactions with your colleagues
Support positive behavior
Follow the company policy on resolving problems
Lift each other up

Don’t pass your discriminatory biases unto someone else

Examine your responsibility for problems

Build rapport with a victim of harassment

Find the resources to address harassment and inappropriate workplace banter and behavior

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Be prepared to eliminate harassment and conflicts.

Remember: You are not expected to tolerate harassment in the workplace.

Your colleagues will stand with you when there is harassment.
Take big problems to upper management’s attention if appropriate, whomever the perpetrator
A workplace challenge you face alone…
Or a challenge you face as a team…
Will be resolved with everyone working together...