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ATTORNEYS & COUNSELORS AT LAW

Don't Even Go There!

Sexual Harassment in the Modern Workplace

Presented by
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Today's Presenters



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Elliott-Larsen Civil Rights Act

- Prohibits discriminatory practices, policies, and customs in the exercise of those rights **based upon** religion, race, color, national origin, age, **sex**, sexual orientation, gender identity or expression, height, weight, familial status, marital status or source of income.

*Protected classes were expanded in March of 2023 to include sexual orientation and gender identity or expression.



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Michigan Civil Rights Commission

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What is Sexual Harassment?

- Physical
- Non-physical



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How to Define IT (ELCRA)

- MCL 37.2103(k): Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct or communication of a sexual nature under the following conditions:



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The Conditions

- (i) Submission to the conduct or communication is made a term or condition (explicitly or implicitly)

Continued



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The Conditions

- (ii) Submission to or rejection of the conduct or communication is used as a factor in decisions affecting the individual's employment

Continued



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The Conditions

- (iii) Conduct or communication has purpose or effect of substantially interfering with individual's employment, ... or creating intimidating, hostile or offensive employment ... environment.



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Sexual Harassment

- Unwelcome sexual conduct
- Conduct not solicited
- Conduct not incited
- Conduct regarded as undesirable
- Conduct regarded as offensive



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Examples of Offensive Language or Conduct

- Comments about looks
- A state of arousal
- "I'm dreaming about you."
- "Lift up your shirt."
- Put \$ in shirt pocket = stripper
- Things you wouldn't do to a member of the same sex



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Quid pro quo Sexual Harassment

- Literally means "that for this" and involves supervisor's or manager's subtle (or not so subtle) requests for sexual favors in exchange for tangible employment action.
- Tangible employment action can be favorable treatment if employee plays along or adverse action (i.e., punishment) if they do not.



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Hostile Work Environment

- Unreasonably interferes with work performance - actions must be sufficiently severe or pervasive
- Creates intimidating, hostile or offensive work environment
- Created usually after repetition of offensive behavior
- Intent



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'Mere Offensive Utterances' are not Actionable.



There's no such thing as an appropriate joke.
That's why it's called a joke.



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Prima Facie Case for Hostile Work Environment

- Employee belongs to a protected class.
- Employee subjected to unwelcome communications or conduct based on protected status.
- Unwelcome conduct or communication is intended to, or does, interfere substantially with employee's employment or created an intimidating, hostile or offensive work environment.
- But for the fact of his/her sex, he/she would not have been the object of harassment.



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What's the Difference?

- Frequency of discriminatory conduct
- Its severity
- Whether it is physically threatening or humiliating or mere offensive utterance
- Whether it unreasonably interferes with employee's work performance



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Hostile Work Environment

- Supervisors/managers must understand that there is significant difference between employee flirting with co-worker or asking them out and supervisor/manager doing this with a subordinate.
- Supervisors/managers must avoid even appearance of impropriety.



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STANDARD – Reasonable Person

- Hostile work environment:
 - “whether a reasonable person, in the totality of the circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.”



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Real Life Examples

- **Facts:** Over the course of six months, a female firefighter, Officer Chen, is subjected to the following in the firehouse: male coworkers post sexually explicit photographs in the common area; they routinely comment on her appearance and make remarks about women not belonging in the fire service; and one coworker once blocked the bathroom doorway until she pushed past him. Officer Chen has not formally complained because she fears being labeled a "troublemaker."
- **Question:** Has a hostile work environment been created? Consider the frequency and severity of the conduct, whether it is physically threatening or humiliating, and whether it unreasonably interferes with Officer Chen's work performance.



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"Mere Utterance" – Where is the Line?

- **Fact Pattern A:** During a one-time staff luncheon, a coworker makes a single off-color joke with a sexual undertone. Several employees are visibly uncomfortable, but the comment is not directed at any individual and is never repeated.
- **Fact Pattern B:** A department manager routinely greets the sole female engineer on his team each morning by commenting on what she is wearing, says things like "you're too pretty to be an engineer," and makes frequent sexual innuendos at team meetings over the course of a year.
- **Question:** Which scenario is more likely to rise above "mere offensive utterances" to actionable hostile work environment harassment, and why? What factors — frequency, severity, targeting — are most significant?



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Example- Reasonable Person Standard

- **Facts:** David, a male city employee, alleges that a female supervisor's repeated comments about his physique and her practice of touching his shoulder each time she passed his desk created a hostile work environment. The supervisor argues that her behavior was harmless and that she "didn't mean anything by it." David found the conduct offensive and uncomfortable.
- **Question:** Should the analysis focus on the supervisor's intent or on how a reasonable person in David's position would perceive the conduct? How does the "reasonable person in the totality of the circumstances" standard apply here?



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Employer Liability

- Employer vicariously liable for hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile work environment."
- Employee needs to report up the chain of command to give notice.



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Supervisor Liability

- Moreover, just like any civil rights claim, supervisor can be held personally liable under state law for causing or permitting violations.



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Duty to Report

- If manager/supervisor witnesses or becomes aware of inappropriate comments or conduct that is of a sexual nature (or based on any other protected status), he or she **MUST** immediately stop improper comments/conduct and report it to the Human Resources Department.
- Failure by manager or supervisor to do both may result in disciplinary action!

Continued



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Duty to Report

- This is true *even if manager or supervisor is told in confidence by someone who he/she considers to be a friend.*
- Reason is that once complaint is made (even in confidence) or once supervisor/manager becomes aware of harassment, the city has "notice" and needs to investigate and take appropriate action to avoid liability.

Continued



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Reporting Sexual Harassment

- Managers/supervisors must make themselves accessible and receptive to employee complaints.
- If an employee complains to you about your own behavior, you should inform the human resources department.
- Doing so will allow an investigation that may later protect you and city from liability.



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Retaliation

- Elliott-Larsen Civil Rights Act (ELCRA) prohibits retaliation or discrimination against a person **because** the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

Continued



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Retaliation

- To establish a prima facie case of retaliation under ELCRA, a plaintiff must prove:
 - He/she engaged in protected activity.
 - That this was known to the defendant.
 - That the defendant took an employment action adverse to the plaintiff.
 - There was a causal connection between the protected activity and the adverse employment action.



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Cat's Paw Theory

- This includes a harassing supervisor influencing another supervisor to engage in any retaliatory conduct against a reporting individual.



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Examples of Retaliatory Conduct

- Demotion or loss of hours after a complaint is made.
- Sudden poor performance reviews from a supervisor who previously had no concerns.
- Transfer to undesirable shifts or locations, disrupting your life or career.
- Exclusion from meetings, training, or advancement opportunities.
- Termination shortly after filing a report or cooperating in an investigation.



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Business as Usual

- Supervisors/managers should not treat a reporting employee any differently at all after he or she asserts their rights.
- Any change in behavior may serve as evidence of retaliation, whether that be more closely monitoring the employee with performance problems, or failing to be as friendly or supportive as before they asserted their rights.
- Employee still needs to do their job.



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Example- Duty to Report

- Facts:** A junior employee, Priya, tells her supervisor, Lieutenant Dawson, in strict confidence that a coworker has been making sexually suggestive comments to her for weeks. She begs Lt. Dawson not to say anything because she "doesn't want to cause drama." Lt. Dawson agrees to keep it between them and takes no further action. Two months later, Priya formally complains to Human Resources and the city is sued.
- Question:** Did Lt. Dawson fulfill his legal obligations? Does the fact that Priya asked for confidentiality relieve Lt. Dawson of his duty to report? What exposure does the city now face?



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Example- Supervisor Personal Liability

- Facts:** Sergeant Rose, a supervisor in the city police department, witnesses a male detective repeatedly make sexually charged comments to a female civilian employee during shift briefings over a period of three weeks. Sgt. Rose finds it amusing and says nothing. The female employee later files a complaint under the ELCRA naming both the detective and Sgt. Rose personally.
- Question:** Can Sgt. Rose be held personally liable under state law? What does it mean to "cause or permit" a civil rights violation, and what should Sgt. Rose have done?



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Opposition Activity may Occur

- *Crawford v Metropolitan Government of Nashville and Davidson County*:
 - Employer received sexual harassment complaint, and while conducting internal investigation, asked another employee if they were aware of any workplace harassment.
- U.S. Supreme Court held that employee engaged in protected opposition activity simply by answering employer's question. Therefore, any retaliation against that employee would be unlawful.



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Coworker Off-Site Conduct Supports Retaliation Claim

- *Hawkins v Anheuser-Busch, Inc.*
 - Plaintiff's coworker set fire to plaintiff's car after she had complained of harassment by him.
 - Company was told by anonymous letter that coworker had admitted to doing so, but employer took no action because act occurred after hours and off company property.

Continued



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Coworker Off-Site Conduct Supports Retaliation Claim

- Sixth Circuit found that plaintiff had stated a retaliation claim based on coworker's off-site conduct because it was sufficiently severe and company failed to investigate or monitor actions of coworker.



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Maintaining Adequate Policies & Procedures



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Purpose

- To maintain a productive work environment and establish procedures for reporting, investigating and resolving any complaints of employee harassment, including sexual harassment.



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Define Harassment

- Defined as any physical or verbal contact, written, illustrated, symbolic and/or visual displays, messages or conduct, sexual or otherwise, that creates intimidating, offensive or hostile environment that interferes with work performance.



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Conduct That Constitutes Harassment

- Submission to conduct is made either as implicit or explicit condition of employment.
- Submission to or rejection of conduct is used as a basis for an employment decision.
- Harassment interferes with employee's work performance or creates intimidating, hostile or offensive work environment.



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Reporting Requirements

- Employees who feel they are victim of harassment, or observe harassment of another employee, shall immediately tell person displaying offensive behavior to stop (he or she may not be aware that his or her conduct is unwelcome or offensive); however, this is not required.
- Such verbal notice is not required but is almost always effective to eliminate or reduce offensive behavior.

Continued



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Reporting Requirements

- Promptly report any incident of harassment to any supervisor or commander **AND** department head, even if employee has discussed it directly with individual(s) involved.
- In cases involving department head, employees shall report any incident to city administrator or Chief Executive Officer / Chief Operating Officer.

Continued



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Reporting Requirements

- Provide following information:
 - Date(s), time(s) and location(s) when incident(s) took place
 - Detailed description of each incident (i.e., Was any physical contact made? What was said and/or done and who said it? etc.)
 - Name(s) of anyone present during each incident
 - Anyone with whom employee has discussed incident(s)
 - Any physical evidence



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Key Takeaways

- Know the law and stay up to date on recent decisions
- Create policy of expected behavior
- Ensure ALL employees are aware of rights and reporting requirements
- Employee complaint reporting process
- Investigation and remedial actions
- Protect against retaliation
- Training, actions, discipline
- **DOCUMENT, DOCUMENT, DOCUMENT!**



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Questions?



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Date: March 25, 2026
Time: 11 a.m. to Noon
Cost: Complimentary

Many employers continue to struggle with issues like sexual harassment in the workplace, despite their best efforts to curb such behavior.



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Have a Great Day!

Thank You!

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