



A Troublesome Topic Faced in Many Workplaces

Multiple accounts of sexual harassment allegations are coming forth in workplaces impacting Hollywood, the military, government, the sports world and many other workplaces. While such issues are not new to work environments, recently relayed tales of such occurrences (past and present) afford an opportunity for employers to highlight a wider awareness of the issues associated with workplace harassment; review and reacquaint employers and employees with workplace policies; and possibly update workplace harassment policies to ensure protections for not just employers but more importantly also employees in the workplace in general.

Harassment in general is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA). Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Discrimination in employment on the basis of race, color, national origin, religion, sex (including pregnancy), disability, or marital status is prohibited in Nebraska. In general, covered entities include most private and non-profit employers with 15 or more employees, state and local government subdivisions of any size, employment agencies and labor organizations. See the Nebraska Fair Employment Practice Act (FEPA – NEB. REV. STAT. §§ 48-1101 to 48-1125).

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

- The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.
- The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
- Unlawful harassment may occur without economic injury to, or discharge of, the victim.

The best tool to eliminate harassment in the workplace is through prevention. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. It should be clearly communicated to employees that unwelcome harassing conduct will not be tolerated. Employers can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Additionally, the U.S. Equal Employment Opportunity Commission (EEOC) states, “Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.”

More specifically, sexual discrimination is gender discrimination, and both males and females may experience discrimination, including sexual harassment. Sexual harassment is a form of sex discrimination prohibited by Title VII. There are two theories of sexual harassment that have been recognized by the courts: “quid pro quo” and “hostile work environment” harassment. “Quid pro quo” cases are generally those in which the plaintiff claims that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands. Such cases are distinguished from cases based on “bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment.”

In *Gavin v. Rogers Tech Servs., Inc.*, 276 Neb. 437, 755 N.W. 2d 47 (2008), the Nebraska Supreme Court identified what constitutes a hostile work environment. The harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Further, the court explained, “Courts examine the totality of the circumstances to determine whether there is a hostile work environment, considering the frequency of the behavior, its severity, whether physical threats are involved, and whether the behavior unreasonably interfered with the employee's work performance.” To make a prima facie case for a hostile work environment based on sexual harassment, the plaintiff must show:

1. she belongs to a protected group;
2. she was subject to unwelcome harassment;
 - Inappropriate conduct may be verbal, physical, visual or any combination of these;
 - Verbal – swear words or profanity; name-calling that refers to someone’s protected class status; or any derogatory slurs, comments or insults;
 - Physical – pushing, impeding, or blocking someone’s movements; unwanted touching, assaults; throwing objects; or giving back rubs;
 - Visual – derogatory posters, pictures, cartoons, drawings, graphic materials, objects; suggestive gestures or glaring
3. the sexual harassment was based on sex;
4. the harassment affected a term, condition, or privilege of her employment; and
5. the employer knew or should have known of the harassment and failed to take proper remedial action.

When considering the totality of the circumstances, the work environment must be both objectively and subjectively offensive—one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. Whether workplace harassment is severe, pervasive, and objectively offensive is a question of fact.

“A perpetrator may be a manager, coworker, vendor, or any workplace contact.” Nebraska Equal Opportunity Commission.

If a workplace with a hostile environment is not opposed, it may affect:

- Valued employees,
- Productivity,
- Morale,
- Sales and profits or customer relations,
- Clients, customers,
- Legal fees, and
- Goodwill and reputation.

As stated by the Nebraska Equal Opportunity Commission, “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.”

The EEOC established minimum standards and guidelines for agencies' use in developing anti-harassment policies. Pursuant to Part V(C)(1) of the *Enforcement Guidance*, an anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues for complainants;
- Assurance that employer will protect the confidentiality of the individuals bringing harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

To handle complaints and resolve problems, as recommended by the Nebraska Equal Opportunity Commission:

- 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

For an internal investigation, take the following steps:

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 crystal clear to the extent possible to all staff
5. Remember the “Yes, but ...” test
6. Take immediate and appropriate remedial action if warranted.

Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

The EEOC outlines when an employer has liability for harassment.

- The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
- The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.
- When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

Additional Information can be found at:

- The EEOC - <https://www.eeoc.gov/laws/index.cfm>, and
- Nebraska Fair Employment Practice Act (FEPA) - <http://www.neoc.ne.gov/laws/laws.html>

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