



Understanding the EEOC's
Updated Harassment
Guidance

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Why Are We Here?

- Due to the nature of the business, restaurants are particularly vulnerable to sexual harassment claims.
- Even in concepts owned and managed by upstanding operators, claims can arise without adequate procedures and processes.
- A single actionable incident that is published online can adversely affect the business's reputation
- Claims are costly, time-consuming, and stressful for all involved.
- The good news is that education and training can help independent operators ensure a respectful and inclusive culture and avoid liability.



Harassment – EEOC Task Force Findings

- A “jaw-dropping” moment – 30 years of corporate training has had little effect on preventing workplace harassment
- Of 90,000+ charges against employers – 1/3 related to harassment
- EEOC says 90% of harassment victims never file a legal complaint
- The number of harassment charges processed by the agency increased from 24,430 in fiscal 2022 to 31,354 in fiscal 2023.

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Harassment In Hospitality

- According to a Huffington Post article citing a survey by *Cosmopolitan* magazine:
 - Of 2,235 female employees – 1 in 3 had experienced sexual harassment at work
 - 16% of women who said they had not been harassed said they had experienced sexually explicit behavior or remarks
 - 71% stated they did not report the harassment.
 - 42% of women in the food service and hospitality industry reported sexual harassment
 - Highest of any field

Cosmopolitan Magazine 2015

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What is Harassment?

- Harassment is a form of discrimination, which is prohibited by federal law and most states
- It is offensive, intimidating, or hostile behavior related to any of the protected characteristics



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Unlawful Sexual Harassment

Two Broad Legal Definitions

#1 Quid Pro Quo	#2 Hostile Working Environment
<i>This for that</i>	<i>Severe or Pervasive Conduct</i>

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Quid Pro Quo

- “this for that”
- Submission is a “term” of employment
- Sexual
- Refusal = Adverse action



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HOSTILE ENVIRONMENT

unwelcome

sexual conduct

creates a hostile, intimidating
or offensive work environment

unreasonably interferes with
employee's ability to perform job



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Hostile Work Environment

This conduct may be:

- ❖ Male to Female
- ❖ Female to Male
- ❖ Female to Female
- ❖ Male to Male
- ❖ By managers, supervisors, or co-workers
- ❖ By guests, customers, vendors, contractors, consultants, or other third parties

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What is Hostile Work Environment Harassment?



- Conduct that unreasonably interferes with work performance
- Objectively offensive behavior (to a reasonable person) that subjectively offends the victim (offensive to that specific employee)

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It Can Include . . .

- Emails
- Sending Texts
- Sending Photographs
- Sending Videos
- Text Messages
- Phone Calls
- Voicemails



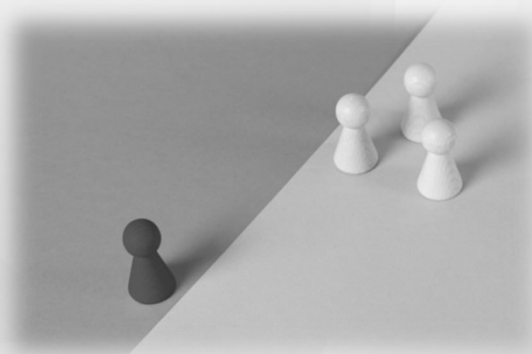
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Hostile Work Environment

Who can create a hostile work environment? Anyone!

- Supervisors
- Managers
- Coworkers
- Temporary Employees
- Contractors
- Guests and Customers



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What is the Work Environment?

- Work Premises
- Off-Premises Social Settings
- After-Hours Communication
- Training Sessions
- Off-Site Meetings

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Examples of Verbal Harassment

1. Intimate nicknames, “honey”, “darling”, “sweetie”, “girls”
2. Dirty, ethnic, or racist jokes
3. Ageist statements and jokes
4. Discussing sexual topics
5. Flirting/sexual advances
6. Boasting of sexual conquests
7. Intimate questions re: sex life
8. Excessive compliments
9. Sexual innuendo
10. Whistling, cat-calls, etc.
11. Sexual profanity/innuendo
12. Harassing voicemails/texts
13. Mocking disability, religion, gays, lesbians, bisexuals, and transgenders
14. Repeated advances by co-workers

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Examples of Physical Harassment

Unwarranted physical contact, such as:

- Touching
- Pinching
- Patting
- Grabbing
- Poking
- Brushing against
- Hugs
- Kisses
- Neck/shoulder rubs
- Blocking movement
- Standing too close
- Intimidating behavior

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Examples of Visual Harassment

Inappropriate images, such as:

- Photographs
- Posters, pin-ups
- Cartoons
- Drawings
- GIFs, emojis, other digital images
- Texts or emails
- Notes or writings
- Staring at or directing attention to certain parts of the body
- Gestures
- Adult toys or props

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Sexual Harassment

- Sex Stereotyping
 - Sexual or discriminatory displays or publications, displaying pictures, posters, calendars, graffiti, objects, promotional material, reading materials, or other materials that are sexually demeaning or pornographic
- This includes sexual displays on workplace computers or cell phones and sharing such displays while in the workplace

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Retaliation

- Based on Protected Activity
 - Exercising right protected by law
 - Internal or external complaint including harassment and discrimination
 - Participating in an investigation



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Retaliation

Any action to alter an employee's terms and conditions of employment because that individual engaged in protected activities

Examples:

- Demotion
- Sudden change in work schedule or work location
- Pay decrease
- Exclusion from meetings



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Recent Developments

- For the first time in 25 years, the EEOC issued new workplace harassment guidance for employers
- The new guidance:
 - Formally updated the EEOC's position on the legal standards and employer liability under federal antidiscrimination laws
 - Incorporates several new developments in the law and modern workforces
 - Is intended to bring together best practices for preventing and remedying harassment

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Race and Color Harassment

- New EEOC guidance acknowledges that color-based harassment due to an individual's pigmentation, complexion, or skin shade or tone is independently covered by Title VII
- Includes:
 - Supervisors harassing Black employees with darker complexions and not Black employees with lighter complexions

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Sexual Orientation/Gender Identity Harassment

- *Bostock v. Clayton County, Georgia* – 2020 U.S. Supreme Court Title VII case
- Held that Title VII gender discrimination claims include claims predicated on sexual orientation and gender identification
- Recognizes potentially unlawful workplace harassment against LGBTQ+ individuals

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Sexual Orientation/Gender Identity Harassment

- EEOC updated their guidance on sex-based harassment to align with the *Bostock* decision:

“Sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed.”

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Sexual Orientation/Gender Identity Harassment

- The new EEOC guidance clarifies that sexual harassment can include:
 - Epithets regarding sexual orientation or gender identity
 - Misgendering – refusing to refer to someone who identifies with a certain gender by that gender’s pronoun or their preferred name
 - Refusing access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity
 - Outing – disclosing an individual’s sexual orientation or gender identity without permission
 - Repeated and intentional misgendering based on an individual’s known gender identity

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EEOC Lawsuits

- FY 2024 – EEOC filed 7 lawsuits alleging discrimination/harassment based on LGBTQ+ status
- Conduct included slurs and homophobic and transphobic remarks, and claims of intentional misgendering
- In the first three full fiscal years since *Bostock* — 2021, 2022 and 2023 — the EEOC saw a steady increase in the number of LGBTQ-based sex discrimination charges
- FY 2021 - 1,968 charges alleging sexual orientation or gender identity discrimination
- FY 2022 - 2,229 charges
- FY 2023 - 3,037 charges

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Recent Developments *Okonowsky v. Garland (July 25, 2024)*

What Happened?

- Female psychologist in a federal prison discovered a corrections Lieutenant ran an Instagram page, which included graphic, sexually offensive and violent content
- The psychologist complained many times to no avail
- The employer eventually instructed the psychologist to stop looking at the Instagram page and directed the Lieutenant to stop posting offensive content on the account
- The Lieutenant continued posting offensive, derogatory content with no repercussions
- When the harassment did not stop, the psychologist resigned

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Recent Developments

Okonowsky v. Garland (July 25, 2024)

Prison's Arguments:

- The Lieutenant posted the content while “outside of the workplace”
- The posts were not sent to the psychologist or shown to her directly

Key Takeaways:

- Even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment
- Employers can be held liable for claims of hostile work environment if an employee posts content on a personal social media account that negatively impacts the workplace

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Social Media Harassment

- The *Okonowsky* case is consistent with the EEOC's updated harassment guidance:
“Conduct that can affect the terms and conditions of employment, even if it does not occur in a work-related context, includes electronic communications using private cell phones, computers, or social media accounts, if it impacts the workplace.”
- However, social media posts alone generally will not contribute to a hostile work environment if they do not target the employer or its employees

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Pregnancy Harassment

- The EEOC also updated their guidance related to pregnancy discrimination/harassment:

“Sex-based harassment under Title VII includes harassment based on pregnancy, childbirth, or related medical conditions.”

- Includes:
 - Lactation
 - Using or not using contraception
 - Deciding to have, or not to have, an abortion

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Pregnancy Harassment

- The updated EEOC guidance includes several examples of pregnancy harassment:
- Employees make negative comments about a pregnant employee who is allowed to telework up to three days per week and utilized flexible scheduling as an accommodation for pregnancy-related morning sickness
- Negative comments made about female worker who expresses milk in lactation room at work and other inappropriate behavior, including a male employee feigning intent to enter the lactation room

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What To Do - NOW

- Review, update, develop harassment and EEO policies
- Include definitions of key terms
- Include examples of unprofessional conduct
- Ensure that the reporting policy encourages complaints
- Include several avenues for complaints
- No retaliation
- Train your supervisors and managers about the policy and how to handle complaints

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Zero Tolerance Policy



- All discrimination and harassment based on any protected classification in the workplace is prohibited.
- Company will take all reasonable steps to prevent discrimination and harassment from occurring and will take prompt and appropriate corrective action when it knows or suspects that inappropriate actions have occurred.

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Supervisor's Responsibility

- Require them to report any harassment reported to them or which they observe
- Hold them responsible for any harassment or discrimination they should have known about
- Expect them to model appropriate behavior

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What About . . . ?

Off Site Conduct/Communication with Sexual Content

- *Do you have a duty to respond?*
- *Investigate?*
- *How do you respond to the behavior?*

Harassment by Non-Employees/Third Parties

- *Includes: customers, guests, visitors, vendors, independent contractors and other business associates*
- *What do you do if you can't discipline them?*
- *How do you protect your employee?*

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Employee Relations – Practical Guidance

- Be respectful. Be consistent. Promote respect and consistency through policy and personal examples.
- Make decisions based on legitimate business reasons. Have practices that support and encourage business-based decision-making.
- “Call out” and document inappropriate behaviors.
- Protect others’ privacy, their confidential information, their reputations. But don’t promise “confidentiality.”
- When you are over your head, avoid “winging it.” Get help.
- Doing nothing is not an option.