

Harassment, Discrimination, and Unprofessional Conduct

May 2019

The IACP Law Enforcement Policy Center creates four types of documents: Model Policies, Considerations Documents, Concepts & Issues Papers, and Need to Know one-page summaries. Typically, for each topic, either a Model Policy or a Considerations Document is created, supplemented with a Concepts & Issues Paper. This file contains the following documents:

- **Model Policy**: Provides police agencies with concrete guidance and directives by describing in sequential format the manner in which actions, tasks, and operations are to be performed.
- **Concepts & Issues Paper**: Designed to provide context and background information to support a Model Policy for a deeper understanding of the topic.
- **Need to Know...**: Synthesizes the key points of the topic into a brief, one-page overview. This document is developed by Policy Center staff following the final approval of the policy and paper.

Model Policy

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Harassment, Discrimination, and Unprofessional Conduct

I. PURPOSE

The purpose of this policy is to foster a healthy work environment in which all individuals are treated with respect and dignity and to provide procedures for reporting, investigating, and resolving complaints of harassment and discrimination, and unprofessional conduct. All employees have the right to work in an environment free of harassment and discrimination.¹

II. POLICY

It is the policy of this law enforcement agency that all employees shall not engage in any acts that threaten, intimidate, harass, demean, or torment fellow employees. This agency considers unprofessional conduct, harassment, discrimination, bullying, and retaliation of others to be serious employee misconduct. Any prohibited conduct covered by this policy that comes to the attention of a supervisor shall result in an investigation.

III. DEFINITIONS

Bullying: Repeated inappropriate behavior, abuse, or mistreatment conducted by one or more persons against another or others in the course of employment and involves a real or perceived power imbalance. Bullying includes behavior, either direct or indirect, that demeans, embarrasses, humiliates, persistently annoys, alarms, or verbally abuses a person.

Discrimination: Unfair or unequal treatment of an individual or group based on protected class status.²

Harassment: Unwanted, unwelcome, or uninvited conduct that demeans, threatens, or offends another person. 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.³

¹ Individuals covered under this policy include agency members defined as employees and applicants for employment with the agency, whether sworn, regular, reserve, or civilian; all volunteers; interns; cadets; Police Explorers, or any individual engaged in agency-sponsored mentoring activities.

² Protected class status may include, but is not limited to, race, sex, national origin, color, religion, age, or disability. Additionally, some locations may consider sexual orientation, gender identity, pregnancy, and marital status as protected classes.

³ Equal Employment Opportunity Commission (EEOC), "Harassment," <https://www.eeoc.gov/laws/types/harassment.cfm>.

Office of Professional Standards (OPS): The designated employee(s) or unit, which may be external to the agency, with primary responsibility for monitoring adherence of employees to agency policy, procedures, and rules and for conducting investigations of allegations of employee misconduct.⁴

Retaliatory Conduct: Conduct or action designed to serve as retribution against an employee who, in good faith, has reported or otherwise provided information regarding misconduct against another employee. In the context of this policy, retaliatory conduct includes any deliberate, purposeful actions or failures to act directed against employees that cause or that could reasonably be expected to cause physical harm, property damage, significant emotional stress, or other serious negative effect on another employee; designed to ridicule or embarrass; or could seriously impair the efficiency, safety, or effectiveness of that employee, this agency, or both. Such conduct may take many forms, including, but not limited to, bullying; persistent offensive comments, threats, or intimidation; false accusations; isolation; ostracism; posting of secure or personal information on the Internet; or acts that malign or disparage an individual's reputation.⁵

Sexual Harassment: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical offensive conduct of a sexual nature that explicitly or implicitly affects employment; unreasonably interferes with work performance; or creates an intimidating, hostile, or offensive working environment.⁶

IV. PROHIBITED ACTIVITIES

A. Unprofessional Conduct

1. No employee shall treat another employee with disrespect or discourtesy. Employees shall be civil and professional in their dealings with one another at all times.
2. No employee shall either explicitly or implicitly ridicule, mock, deride, bully, or belittle any fellow employee.

B. Discriminatory Treatment

No employee shall treat any employee differently based on a protected class status.

C. Prohibited Harassment

No employee shall

1. Make offensive or derogatory comments to any person, either directly or indirectly, whether verbally, in writing, or through the use of electronic devices or Internet services.
2. Engage in activity such as slander, sabotage, ostracism, badgering, withholding resources, disruptive treatment and/or conduct that intimidates or is hostile. Nor shall any employee allow non-employees who conduct business with this law enforcement agency to engage in such activity. All prohibited acts of these types will be judged on the basis of conduct that is "objectively reasonable."
3. Perform an objectively unreasonable act upon any employee based upon that employee's perceived protected class status.

⁴ This may also be referred to as internal affairs or professional responsibility.

⁵ For more information, please see the IACP Policy Center documents on Retaliatory Conduct available at <https://www.theiacp.org/resources/policy-center-resource/retaliatory-conduct>.

⁶ Sexual harassment includes, but is not limited to, "offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcomed touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcomed questions about an individual's identity, and offensive objects or pictures." See Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace Report* (EEOC, June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

4. Use blogs, social networking sites, or other Internet communication devices to harass another employee. This prohibition includes the employee's use of Internet or social networking sites outside the workplace.

D. Sexual Harassment

No employee shall engage in sexual harassment in any manner, to include verbal, nonverbal, or physical behavior of a sexual nature.

V. PROCEDURES

A. Supervisors' Responsibilities

1. Supervisors shall be responsible for
 - a. advising employees on the types of behavior prohibited and the agency procedures for reporting and resolving complaints of unprofessional conduct, harassment, bullying, and discrimination;
 - b. monitoring the work environment on a daily basis for signs that unprofessional conduct, harassment, bullying, or discrimination may be occurring;
 - c. stopping any observed acts that may be considered unprofessional conduct, harassment, bullying, or discrimination, and taking appropriate steps to intervene, whether or not the involved employees are under their supervision;
 - d. utilizing all reasonable means to prevent a prohibited act from occurring when they know or should know that an employee will or may perform such an activity; and
 - e. taking immediate action to prevent retaliatory conduct toward the complaining party and to eliminate the hostile work environment where there has been a complaint of harassment and/or discrimination.
 - i. If a situation requires separation of the parties, care should be taken to avoid action that punishes or appears to punish the complainant.
 - ii. Transfer or reassignment of any of the parties involved should be voluntary if possible and, if non-voluntary, should not be taken against the wishes of the complaining party.
2. No supervisor shall make any employment decision that affects the terms, conditions, or privileges of an individual's employment based on the basis of that person's protected class status.
3. Supervisors shall take action to notify the appropriate authority, such as OPS, any supervisor, or the agency's human resources function, of any prohibited activities that are brought to their attention.
4. Once a supervisor receives information regarding conduct that may violate this policy, they are responsible for taking action, regardless of whether the reporting employee wants any action taken on their behalf. Circumstances in which the victim is underage require immediate, emergency notification.
5. Each supervisor has the responsibility to assist any employee in documenting and filing a complaint of unprofessional conduct, bullying, harassment, or discrimination with OPS.

B. Employee Responsibilities

1. Each employee of this agency is responsible for assisting in the prevention of unprofessional conduct, harassment, bullying, and discrimination by
 - a. not participating in or encouraging any action that could be perceived as unprofessional conduct, harassment, bullying, or discrimination;

- b. reporting observed acts of unprofessional conduct, harassment, bullying, or discrimination to a supervisor; and
 - c. encouraging any employee who confides that they are being treated unprofessionally, harassed, bullied, or discriminated against to report these acts to a supervisor.⁷
2. Failure of any employee to carry out their responsibilities as defined in this policy will be considered in any performance evaluation or promotional decision and may be grounds for discipline.

C. Complaint Procedures

1. Any employee encountering unprofessional conduct, harassment, bullying, and/or discrimination is encouraged to
 - a. inform the person that their actions are unwelcome and offensive; and
 - b. immediately document all incidents in order to provide the details for investigation.
2. Any employee who believes that they are being treated unprofessionally, harassed, bullied, or discriminated against shall report the incident(s) as soon as possible to a supervisor or OPS so that steps may be taken to protect the employee from further actions in violation of this policy and so that appropriate investigative and disciplinary measures may be initiated. Where the immediate supervisor is involved in the prohibited action, the employee may waive filing a complaint with that supervisor and may proceed to a supervisor higher in the chain of command or an employee in OPS.
3. Employees who falsely accusing another as a means of harassing or bullying shall be disciplined.⁸
4. The supervisor or other person to whom a complaint is given shall meet with the employee and document
 - a. the incident(s) complained of;
 - b. the person(s) performing or participating in the prohibited action;
 - c. any witnesses to the incident(s); and
 - d. the date(s) on which it occurred.
5. The employee taking the complaint shall promptly submit a confidential memorandum documenting the complaint to OPS and/or the agency's human resources function.
6. Unless otherwise specified, OPS shall be responsible for investigating any complaint alleging a violation of this policy and shall
 - a. immediately notify the chief executive officer if the complaint contains evidence of criminal activity;
 - b. include a determination as to whether a violation of this policy occurred and whether other agency members participated in or encouraged the harassment or discrimination;
 - c. inform the parties involved and the chief executive or the chief's designee of the outcome of the investigation;
 - d. maintain a file of complaints in a secure location; and
 - e. provide the chief executive officer with an annual summary of these complaints.
7. The complaining party's confidentiality shall be maintained throughout the investigatory process to the extent practical and appropriate under the circumstances and controlling law.

⁷ In states with mandatory reporting laws and where the agency employs individuals under the age of 18, any employee who becomes aware of or is confided in regarding harassment and discrimination of these underage individuals must take action to report.

⁸ This does not refer to charges made in good faith that cannot be proven.

8. This policy does not preclude any employee from filing a complaint or grievance with an appropriate outside agency.⁹

D. Retaliatory Conduct

Retaliatory conduct against any employee for filing an unprofessional conduct, bullying, harassment, or discrimination complaint or for assisting, testifying, or participating in the investigation of such a complaint is prohibited by this agency.

E. Training

This agency shall provide regular and refresher training concerning the nature of unprofessional conduct, bullying, harassment, and discrimination in the workplace and prohibitions on such actions defined in the policy. Training should be tailored to specific sections within the agency, recognizing that middle and first-line supervisors are of particular importance in preventing, identifying, and responding effectively to unprofessional conduct, bullying, harassment, and discrimination.

⁹ In the United States, this may include a state agency or the federal Equal Employment Opportunity Commission (EEOC).

Every effort has been made by the IACP Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no model policy can meet all the needs of any given law enforcement agency. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives, and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors. Readers outside of the United States should note that, while this document promotes procedures reflective of a democratic society, its legal basis follows United States Supreme Court rulings and other federal laws and statutes. Law enforcement administrators should be cautioned that each law enforcement agency operates in a unique environment of court rulings, state laws, local ordinances, regulations, judicial and administrative decisions, and collective bargaining agreements that must be considered and should therefore consult their legal advisor before implementing any policy. This document is not intended to be a national standard.

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Concepts & Issues Paper

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Harassment, Discrimination, and Unprofessional Conduct

I. INTRODUCTION

A. Purpose of Document

This paper is designed to accompany the *Model Policy on Harassment, Discrimination, and Unprofessional Conduct* established by the IACP Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their community and their law enforcement agency.

Law enforcement executives must also review state, provincial, or territorial law regarding workplace harassment and discrimination, as these vary and may be more restrictive than federal law. As a region-by-region analysis cannot be provided herein, input from local legal counsel is critical in understanding applicable local laws, ordinances, court rulings, and other legally binding decisions. This area of law is constantly evolving and changing and agencies must perform periodic reviews of their policies and procedures to ensure they reflect changes in statutory and case law.¹

B. Background

In a time where the costs of liability insurance continue to rise driving many towns to self-insure or join insurance pools, law enforcement executives have a vested interest in prohibiting workplace harassment and discrimination, both from a moral and an economic viewpoint. The following statistics reveal the widespread nature of workplace harassment and discrimination.

- Approximately one third of the 90,000 charges received by the United States Equal Employment Opportunity Commission (EEOC) in fiscal year 2015 included workplace harassment based on sex (including sexual orientation, gender identity, and pregnancy); race; disability; age; ethnicity or national origin; color; and religion.²

¹ This discussion is more restrictive than applicable United States federal law and, in some cases, state law. Even if the activity is not actionable under law, it may be a basis for discipline if it violates this policy.

² For a more in-depth discussion regarding pregnancy, please refer to the IACP Policy Center documents on Pregnancy available at <https://www.theiacp.org/resources/policy-center-resource/pregnancy>.

- Twenty-seven percent of respondents in a separate study who reported gender discrimination within the last five years identified sexual harassment as the most recent type of discrimination they experienced.³ Additionally, in a survey of 23 countries, a reported 15-30 percent of women worldwide experience sexual harassment in the workplace.⁴
- In 2015, the EEOC recovered \$164.5 million for workers who filed harassment claims.⁵ In fiscal year 2017, the EEOC secured \$355.6 million for victims of employment discrimination in private sector and state and local government workplaces.⁶
- In Canada, the Court of Appeal for Ontario recently awarded almost \$250,000 in total damages to an employee who faced disability discrimination,⁷ and, in 2018, the Human Rights Tribunal of Ontario awarded \$200,000 to an employee who endured sexual harassment for injury to her dignity, feelings, and self-respect.⁸
- Three out of four individuals who experienced harassment never speak to a supervisor, manager, or union representative about the harassing conduct.⁹
- Retaliation is consistently cited as a reason for individuals not reporting harassment and/or discrimination.¹⁰ In
- 2017, 48.8 percent of all charges filed by the EEOC involved retaliation.¹¹
- A Workplace Bullying Institute survey found that 29 percent of targets remain quiet about abusive conduct— while only 17 percent of targets seek formal resolution. Furthermore, targets leave their jobs to escape more mistreatment 23 percent of the time; transfer to a different job or location with the same employer 11 percent of the time, or are forced to quit 12 percent of the time because of worse conditions.¹²

In addition, the EEOC has noted the following:

- Harassment is more likely to occur in workplaces that lack diversity.
- Employees who do not conform to workplace norms based on societal stereotypes are more likely to be harassed.

³ Department of Justice Office of the Inspector General, *Review of Gender Equity in the Department's Law Enforcement Components* (June 2018), <https://oig.justice.gov/reports/2018/e1803.pdf>.

⁴ Trishala Singh, "Prevention of Sexual Harassment of Women in the Workplace: Seeking Gender Equality at Work in India," *Journal of International Women's Studies* 18, no. 1 (2016): 104–113.

⁵ Singh, "Prevention of Sexual Harassment of Women in the Workplace."

⁶ U.S. Equal Employment Opportunity Commission (EEOC), *Fiscal Year 2017 Performance and Accountability Report*, <https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf>.

⁷ *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520.

⁸ *A.B. v. Joe Singer Shoes Ltd.*, 2018 HRTO 107.

⁹ Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace Report* (United States Equal Employment Opportunity Commission, June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

¹⁰ Employment and Social Development Canada (ESDC), *Harassment and Sexual Violence in the Workplace—Public Consultation: What We Heard* (Her Majesty the Queen in Right of Canada, 2017), <https://www.canada.ca/en/employment-social-development/services/health-safety/reports/work-place-harassment-sexual-violence.html>.

¹¹ EEOC, "EEOC Releases Fiscal Year 2017 Enforcement And Litigation Data," news release, January 25, 2018, <https://www.eeoc.gov/eeoc/news-room/release/1-25-18.cfm>.

¹² Workplace Bullying Institute (WBI), 2017 WBI U.S. Workplace Bullying Survey, <http://workplacebullying.org/multi/pdf/2017/2017-WBI-US-Survey.pdf>.

- Language differences and differing cultural backgrounds may play a role in cases of harassment and discrimination.
- Events that occur outside the workplace may impact how harassment and discrimination is viewed within the workplace.
- Certain workplaces tend to have a higher risk for harassment. These include those workplaces with young workers; where workers are physically isolated from one another; with decentralized locations, such as retail stores; and/or where significant power disparities between different groups of employees exist.¹³

Harassment can have a seriously debilitating psychological effect on the victim. Productivity is disrupted while the victim deals with the stress, pain, anger, depression, and resentment caused by harassing language. Victims may elect to take sick time or extended leave in order to avoid confrontations with their harasser. Forced to work in an atmosphere where they are subject at any time to being treated in a humiliating manner, some employees may resort to drugs and/or alcohol, resulting in more sick leave, work loss, and medical costs for the employer.

Employees who are not direct targets are also negatively impacted, with knowledge of harassment in the work environment causing damaging health-related, occupational, and psychological consequences. In the United Kingdom, it is estimated that 10 percent of the workforce has experienced some degree of emotional and physical health-related problems due to occupational stress.¹⁴

If agency administrators take the approach of dealing only with the minimal and most apparent requirements of applicable laws, they are setting themselves up for failure at every level within the agency from recruitment, training, promotion, and retention. The prudent approach is to establish the line for unacceptable conduct at a point below the level of what would likely constitute legally actionable behavior. In addition, law enforcement executives can combat many of the negative consequences of harassment by implementing measures suggested by the courts and discussed in this paper.¹⁵

C. Harassment in the Age of Technology

Agency executives must also be aware of and understand one of the newest forms of harassment—the use of technology and electronic media, to include social media sites, to harass individuals. These technologies provide individuals with an opportunity to harass others without the need for face-to-face interactions. This form of anonymity may embolden some to act in ways they would not in the physical arena. In addition, the exact definition of what constitutes the workplace is now expanded. This means liability may attach if a sufficient connection between the harassing conduct and the employment relationship can be made. In fact, discriminatory or harassing blog or web entries made regarding co-workers may be considered in the same vein as if those comments were made verbally in the workplace.¹⁶ Even with personal webpages, blogs, and social media sites, although employers might not face liability, the employee may face personal liability. However, if it is shown that the employer was aware of the harassment and did nothing to stop it, a court may find the employer should have done more to stop the harassment.

This duty to shield employees from harassment can include not only the conduct of coworkers and managers, but also the conduct of the public. In Ontario, Canada, an arbitrator held that an employer, a municipal transit

¹³ For a more in-depth discussion of each of these items, please see Feldblum and Lipnic, *Select Task Force on the Study of Harassment in the Workplace Report*.

¹⁴ Kamaldeep Bhui et al., “Perceptions of Work Stress Causes and Effective Interventions in Employees Working in Public, Private and Non-governmental Organisations: A Qualitative Study,” *BJPsych Bulletin* 40, no.6 (2016): 318–325.

¹⁵ For a list of recommendations from the EEOC regarding workplace harassment, please visit https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm.

¹⁶ Alison Cain and Katherine O’Brien, “Facebook Status Update: Employer Is...Sued: How Internet Harassment Could Lead to a Change in Status,” <http://www.lmblaw.com/media/in-the-news/articles/internet-harassment>.

commission, was liable for failing to protect its employees from online harassment from the public via its Twitter account. Customers occasionally used harassing, derogatory, and abusive language when complaining about employees via tweet. The transit commission ignored the offensive language in tweets and redirected users to its complaint service. The transit commission was found to be condoning online harassment and contributing to a hostile work environment.¹⁷

Therefore, agencies must establish clear technology use policies to prevent, detect, and mitigate harassment. The technology use policy should describe the employee's rights and obligations when related to both the professional and personal use of technology and include a clear statement regarding harassment. In addition, harassment claims resulting from the use of technology should be responded to promptly and in the same manner as other claims. Monitoring the use of internal technology systems can also assist agencies in identifying potential harassment and other types of unprofessional conduct, such as bullying.¹⁸

D. Importance of Training

The boundaries of what constitutes prohibited harassment or discrimination can often be confusing. Even if employee misconduct is not actionable under applicable statutes, it can be a violation of the agency's policy on the topic or another agency policy dealing with employee conduct and thereby subject to disciplinary action.¹⁹ While a written policy provides a framework for delineating prohibited acts, the law enforcement executive should also consider implementing training programs to combat harassment and discrimination.

Training on this topic must be part of a holistic culture that begins at the highest level of management. Chief executives should tailor training to specific employee groups within their agencies, recognizing that their middle and first-line supervisors can be a valuable resource in preventing and stopping harassment and discrimination if trained correctly.

A successful training program will help instill and reinforce the agency's philosophy against harassment and discrimination. Special training programs that are carefully developed can be a valuable tool in fleshing out the policy description of what acts are prohibited. The training program should explain the agency's policy and philosophy and the applicable laws pertaining to workplace harassment and discrimination. Such training should be used at the recruit level and on a regular basis with the entire agency.

A top-down approach to training should be used. In order for a policy of this type to be effectively administered, the agency's top executives must be the first trained. This method also reinforces the significance placed on the subject by the agency's top management. Supervisors and managers should receive additional training in how harassment and discrimination affect the mission of the agency and the impact on budget, morale, and retention.

As part of this training, bullying and retaliation should be addressed. While these types of behavior might not rise to the level of legal action, they should be prohibited by policy. Employees should receive specific guidance on identifying the types of behavior that constitute bullying and retaliation, avenues for reporting such behavior, and potential consequences for participating. Bullying is defined herein as repeated inappropriate behavior, abuse, or mistreatment, either direct or indirect, that demeans, embarrasses, humiliates, persistently annoys, alarms, or verbally abuses a person and that involves a real or perceived power imbalance. Bullying can be verbal, such as persistent name calling or abusive and offensive remarks; physical, to include poking, kicking, threat of physical assault, or

¹⁷ *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*, [2016] O.L.A.A. No. 267.

¹⁸ See the IACP Policy Center documents on Social Media available at <https://www.theiacp.org/resources/policy-center-resource/social-media>.

¹⁹ See the IACP Policy Center documents on Standards of Conduct available at <https://www.theiacp.org/resources/policy-center-resource/standards-of-conduct>.

damage to the individual's work area; and exclusionary, to include ignoring or disregarding the individual. Examples of bullying may include the following:

- Persistent singling out of one person for no valid reason
- Shouting or using a raised voice at an individual in public or in private
- Using verbal or obscene gestures
- Not allowing the person to speak or express themselves during a public conversation
- Personal insults and use of offensive nicknames
- Public humiliation in any form
- Constant criticism on matters unrelated or minimally related to the person's job performance
- Public reprimands that result in the individual being humiliated
- Repeatedly accusing someone of errors that cannot be documented
- Spreading rumors and gossip regarding individuals
- Manipulating the ability of someone to do their work (e.g., overloading, under loading, withholding information, assigning meaningless tasks, setting deadlines that cannot be met, giving deliberately ambiguous instructions)
- Deliberately excluding an individual or isolating them from work-related activities, such as meetings
- Unwanted physical contact
- Physical abuse or threats of abuse to an individual or an individual's property²⁰

A particularly important issue to address is that of caring for the complaining party. Preventing additional harm to the complaining party and showing employees that the organization is concerned about their welfare can go a long way toward solving the problem, preventing lawsuits, and limiting potential liability.

Some larger agencies have in place a full or part-time ombudsman who is available to assist the complaining party in resolving the matter informally, if appropriate, or initiating the formal complaint. The ombudsman also serves as a troubleshooter who maintains contact with the complaining party throughout any resultant investigation. Because of the ombudsman's familiarity with discrimination laws and case decisions, they are also a valuable resource to supervisors.

II. LEGAL REMEDIES FOR WORKPLACE HARASSMENT AND DISCRIMINATION

Employment discrimination law is a complex web of overlapping legal statutes. This section will provide a brief overview of the main types of legislation prohibiting workplace harassment, discrimination, and other unprofessional conduct that law enforcement agencies must comply with and some of the causes of action and remedies available to employees under these laws.

Employment discrimination law is premised on the belief that each worker should be treated with the same degree of respect and have the same access to job opportunities. Not all acts of discrimination are legally actionable, nor do courts analyze them in the same manner. Legislative efforts have focused on remedying discrimination against certain protected classes of persons who have traditionally been the subject of discrimination. The main emphasis is on remedying discriminatory acts that occur in the workplace against a person because of their protected class status. Protected class status may include, but is not limited to, race, religion, national origin, color, sex, age, or disability.

²⁰ Society for Human Resources Management, "Workplace Bullying Policy," https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_018350.aspx (Note this document is only available to SHRM members.).

Additional laws applicable to workplace discrimination usually protect one or more of the above-cited groups and may include additional protection. For example, many state equal employment laws now include a prohibition against workplace discrimination on the basis of sexual orientation, gender identity, and marital status. Local legal counsel should be consulted for a more precise explanation of specific rulings and actions for the appropriate jurisdiction.

A. United States Federal Law

The main body of federal law prohibiting discrimination in the workplace is Title VII of the Civil Rights Act of 1964, commonly referred to as Title VII.²¹ Additional federal laws prohibiting discrimination in the workplace include, but are not limited to, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act, as amended.²² These laws prohibit a wide variety of discriminatory acts by employers against applicants and employees and create a substantive federal right to work in an environment free of discrimination. In order to implement this right, it is the duty of each employer to provide and maintain a discrimination-free workplace.

More specifically, these laws provide that “employment decisions” that affect the “terms, conditions or privileges of an individual’s employment” shall not be made on the basis of that individual’s protected class status.²³ Employer behavior that is based on one or more of these categories may also be considered discrimination affecting the terms and conditions of the individual’s employment.²⁴ If the employer is responsible for certain harassment or discriminatory treatment, it is considered an employment decision, and federal law provides a remedy against the employer. Where an employer makes an employment decision based on considerations that are partly discriminatory and partly nondiscriminatory, the employer must be able to show by a preponderance of the evidence that it would have made the same decision even without the discriminatory motive; otherwise the employer will be liable for discrimination under federal law.²⁵

There are two basic types of discrimination: disparate treatment and disparate impact. Disparate treatment occurs when an employment practice, without appropriate justification, treats persons differently based on their protected class status. Disparate impact occurs when seemingly neutral employment practices, without appropriate justification, adversely affect an employee based on the employee’s protected status.

Behavior can constitute unlawful discrimination or disparate treatment when the conduct is unwelcome; is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment; is perceived by the victim as hostile or abusive; and creates an environment that a reasonable person would find hostile or abusive.

Hostile Work Environments. The employer’s duty to maintain a workplace free of unlawful harassment is not limited to protecting tangible and economic job benefits from a decision-making process tainted by discrimination. The Supreme Court held in *Meritor Savings Bank, F.S.B. v. Vinson* that Title VII protection extends to certain non-economic losses by an employee subjected to prohibited workplace harassment.²⁶

The “terms, conditions and privileges of an individual’s employment” that are protected from harassment include the psychological atmosphere of the work environment.²⁷ The *Meritor* case held that where harassing conduct has the purpose or effect of unreasonably interfering with an employee’s work performance, or creating an intimidating,

²¹ The Equal Employment Opportunity Act of 1972, Pub. L. No. 88-352, 78 Stat. 253, as amended, 42 U.S.C. 9 2000e et seq.

²² The Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (1967), <https://www.eeoc.gov/laws/statutes/adea.cfm>;

ADA.gov, “Information and Technical Assistance on the Americans with Disabilities Act,” https://www.ada.gov/2010_regs.htm.

²³ Title VII of the Civil Rights Act of 1964.

²⁴ *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

²⁵ *Price Waterhouse v. Hopkins*, 57 U.S. Law. Wk. 4469 (1989).

²⁶ *Meritor*, 477 U.S. 57.

²⁷ *Meritor*, 477 U.S. at 65.

hostile or offensive work environment, the harassed employee has a cause of action against the employer for maintaining a hostile work environment.²⁸ This cause of action protects each employee's right to go to work each day and do their job in peace. The court noted in *Meritor* that an employee should not be required to run the gamut of repeated insults, belittling conduct, sexist jokes, sexual advances or other such behavior just for the privilege of being able to work. These types of behavior create an oppressive psychological atmosphere in the workplace and may be remedied under Title VII.²⁹

Not all workplace harassment will be sufficient to hold the employer liable for maintaining a hostile work environment. The harassment must be repetitive, and sufficiently severe or perverse to alter the conditions of the victim's employment so that it creates an abusive working environment.³⁰ To determine whether the alleged instances of harassment created a hostile work environment, the totality of the circumstances, to include the workplace, behavior, and results, must be analyzed.³¹

Isolated instances of workplace harassment may lead to some other type of personal liability for the harasser, but generally not to the employer's liability. In assessing the severity of the harassment for this type of action, courts may ask whether the reasonable person would have found the alleged incidents of harassment offensive.

Federal law remedies only those acts of harassment that somehow reflect employer responsibility. Employers act through their supervisory agents, and an employer can be held liable under certain circumstances when one of its supervisors is responsible for, actively participates in, or otherwise encourages the creation of a hostile work environment. Liability may also arise when the supervisor disregards open harassment, fails to assist the victim who seeks a remedy, or otherwise attempts to subvert a remedy.

EEOC Guidelines state that, under the doctrine of respondeat superior, the employer is responsible for the supervisor's harassing acts regardless of whether the employer had notice of them.³² In *Meritor*, the U.S. Supreme Court adopted many of the principles set out in these guidelines but rejected employer liability based on respondeat superior. The *Meritor* case held that employers will not automatically be held liable for a supervisor's harassment.³³ While this would seem to suggest that employer liability could be premised only on the employer's having notice of the harassment and failing to take decisive remedial action, the court stated that a lack of notice of harassment will not always shield the employer from liability.

The court suggested resorting to the principles of agency law as a foundation for employer liability.³⁴ Agency law permits employer liability where the employer has either actual or constructive notice of the misconduct. Employer liability based on constructive notice occurs when

- the employer was negligent or reckless about detecting and remedying harassment; and
- the harasser purported to act on behalf of the employer and the victim relied on this holding out of authority, or the harasser was somehow aided in carrying out the harassment by their supervisory position.

Even where the employer has a policy and grievance procedure designed to remedy harassment, and the victim does not use the procedure to report supervisory harassment, the circumstances of the case may dictate that this is not enough to deflect employer liability.³⁵ The court did recognize that victims are sometimes not in a position to

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Meritor*, 477 U.S. at 67.

³¹ *Id.*

³² See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Part 1604 (1986) 1604.11 Sexual Harassment

³³ *Meritor*, 477 U.S. at 68.

³⁴ *Id.*

³⁵ *Id.*

complain about harassment, and that grievance procedures can be ineffective, and sometimes a deterrent, to complaints.

Normally, harassment occurring between co-employees will not trigger employer liability under federal law because it is not considered to be actions of the employer. However, under the hostile work environment cause of action, harassment between co-employees may result in employer liability under certain circumstances if the employer is found to have somehow fostered or been aware of and not made an effort to curb the acts. For example, the employer might be held liable for co-employee harassment when the employer or its supervisory agents contribute to the co-employee's creation of a hostile work environment by ignoring the harassment, either subtly or by actively encouraging the harassment, or by failing to take effective remedial steps.

An employer will not usually be held liable when immediate and effective steps have been taken to remedy harassment. This includes establishment of a policy prohibiting harassment and discrimination and an effective complaint procedure and discipline for misconduct. Taking these steps will not ensure insulation of the employer; however, when the employer has acted in good faith to remedy misconduct, liability will shift to the harasser.

Sexual Harassment. There are two categories of unlawful sexual harassment—quid pro quo and hostile work environment. Situations that fall under the category of quid pro quo occur when submission to, or rejection of, unwelcome sexual conduct is used as the basis for employment decisions affecting the individual or when some term of employment is either expressly or implicitly conditioned on participation in unwelcome sexual conduct. This action generally arises when employers use their position of authority to force an employee to submit to sexual harassment in return for tangible job benefits. It is also applicable when an employment decision is made based on whether the employee agreed or refused to submit to such actions. Examples of employment decisions are promotions, demotions, pay raises, performance evaluations, and disciplinary measures.

Employer liability results when the quid pro quo exchange is suggested by the main employer or any agents or supervisors who have the authority to make employment decisions that affect the employee. The quid pro quo suggestion may be either explicit or implicit to be actionable. Employer liability that is based on a supervisor's acts includes those supervisors with the actual authority to make such decisions. Employer liability may be based on single or multiple acts of pressured submission.

Law enforcement executives should be aware that agency liability for a quid pro quo action is not limited to the victim. Other employees who are negatively affected may also have an action. For example, when a woman having an affair with the employer is promoted over a male employee who is not, the male employee is a victim of sex discrimination.

Agencies should also be aware that they are legal and moral duty to investigate claims of sexual harassment. For instance, in *Malik v. Carrier Corp.*, the plaintiff alleged his employer was negligent in its decision to investigate retracted allegations of sexual harassment that had been brought against him by a female colleague. The court held that the employer's decision to pursue the investigation was warranted, given that an employer's investigation of a sexual harassment complaint was not a "gratuitous or optional undertaking." The Court stated that under federal law, an employer's failure to investigate "may allow a jury to impose liability on the employer."³⁶

In a sexual harassment claim, inquiries often lead to the issue of the credibility of the parties and whether the complainant consented to sexual advances. The harasser may assert that the alleged acts were misunderstood, submission was voluntary, or that a romantic relationship existed between the parties. Because victims of sexual harassment may submit to sexual advances out of fear of losing their jobs or other job benefits, the mere fact that an employee permitted the behavior is not by itself considered voluntary consent. The focus is whether the complainant indicated to the harasser that their advances were unwelcome.³⁷ Even if the parties had a romantic relationship at one

³⁶ *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2nd Cir., 2000).

³⁷ *Meritor*, 477 U.S. at 68.

time, a viable claim of sexual harassment can be made if one party no longer welcomes the interaction and/or advances.

Constructive Discharge or Dismissal. Employees may quit their jobs to avoid further harassment, especially when the employer has not acted to remedy the harassment. When this occurs, the courts may consider the termination to be a byproduct of the initial harassment in that it is an involuntary termination of employment that could have been remedied through a finding of constructive discharge or dismissal.

To assert constructive discharge, the employee must show illegal treatment by the employer, for example, being forced to work in a hostile work environment. The employee must prove that the overriding reason for the decision to quit was the illegal treatment. Although the employee may have had personal reasons in addition to the harassment for quitting, the employee must be able to show that workplace harassment was the primary reason for leaving the job. Where the harassment was done with the intent of forcing the employee to quit, the reasonableness of the employee's decision will not be questioned. If the harassment was not calculated to force termination, the victim must show that the working conditions were so difficult or abusive that a reasonable person would have felt compelled to resign. Isolated instances of harassment, such as a discriminatory rate of pay or assignment to a less prestigious position, usually are not enough to uphold constructive discharge. Like the hostile work environment claim, the discriminatory acts must be repeated and decidedly hostile so much so that quitting is a reasonable response.

B. United States Constitutional Remedies

The 14th Amendment Equal Protection Clause prohibits workplace harassment by government officials. Title 42 U.S.C. §1983 provides a separate and additional basis for a law enforcement agency's liability for harassment and permits damages not available under other federal law.³⁸ Whereas other federal law premises employer liability upon a failure to remedy harassment that the employer knew or should have known about, employer liability for harassment under the equal protection clause rests on a showing of intentional discrimination by the employer.³⁹ In addition, the harassment must amount to a municipal policy of harassment, through either explicit or implicit sanctioning of such behavior. While the Title VII action for a hostile work environment generally requires multiple acts of harassment that alter the work environment, a single act of harassment can often suffice under the equal protection clause to produce employer liability. With respect to the action ordered, a single act will establish employer liability when it can be deemed an official municipal policy made by a decision maker with the final authority to establish such policy.

Employees can use several types of evidence to prove intentional discrimination. They may show overt acts of harassment done with discriminatory intent. They may also seek to prove that there was a conscious failure by the employer to protect employees from an abusive work atmosphere that constituted intentional discrimination.⁴⁰

C. State, Provincial, Territorial, and Local Laws

Each state, province, or territory may have independent equal employment laws that must be addressed in individual agency policy. These laws will either mirror federal laws or add additional protection to employees. Cities, towns, and other municipalities may also establish protective legislation.

D. EEOC, State, and Federal Actions

It is beyond the scope of this paper to discuss procedural matters relating to the filing of a workplace harassment claim with the EEOC, or the precise interplay of an action combining harassment claims brought under both state and federal laws. The law enforcement executive is cautioned, however, that such procedural matters can be very complex

³⁸ *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986)

³⁹ *Id.* at 1187.

⁴⁰ *Bohen*, 799 F.2d at 1187.

and crucial to the outcome of a case. Local legal counsel should be consulted for an explanation of the workings of the EEOC, individually initiated state or federal actions, and the interplay of the EEOC filing requirements with state and federal actions.

E. Canadian Law Regarding Workplace Harassment

In Canada, when determining if an employer is responsible for a supervisor's harassing conduct, the courts consider the

- opportunity that the enterprise afforded the supervising employee to abuse supervisory power;
- extent to which the wrongful act may have furthered the employer's aims;
- extent to which the wrongful act was related to intimacy inherent in the employer's enterprise;
- extent of power conferred on the employee in relation to the victim; and
- vulnerability of potential victims to wrongful exercise of the employee's power.⁴¹

In addition, victim employees can be awarded compensation for noneconomic losses, including general damages, aggravated damages, and punitive damages. In 2017, in what is considered a groundbreaking decision, a sergeant who brought a civil suit against a police force for being harassed by his superiors was awarded over \$40,000 for his economic loss resulting from delayed promotions and another \$100,000 in general damages for his noneconomic losses.⁴² The court explained the test for the tort of harassment as follows:

- Was the conduct of the defendants toward the plaintiff outrageous?
- Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
- Did the plaintiff suffer from severe or extreme emotional distress?
- Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

III. PROHIBITED ACTS – UNLAWFUL HARASSMENT

Law enforcement executives should recognize that the specific acts considered to be unlawful harassment are more important than the laws under which they may potentially be sued. Unfortunately, statutes very seldom provide an exhaustive list of prohibited acts. Instead, they represent an analytical framework by which to measure whether specific acts will be considered unlawful harassment. While case law provides examples of specific acts and situations that have been measured, not every type of harassing act has been litigated. Thus, law enforcement executives must be familiar with both litigated examples of harassment and the analytical framework courts use so that they can evaluate any incident of harassment that may arise in their agencies.

The specific acts that are considered unlawful workplace harassment are difficult to define. The examples provided herein are by no means an exhaustive list but are intended to familiarize law enforcement executives with some of the more common types of incidents. In addition, an act that would be considered harassment in one court might not be in another. Finally, workplace harassment cases are very fact sensitive in that they turn on the type of workplace, nature of the alleged harassment, and overall behavior of both the victim and the alleged harasser.

Workplace harassment is characterized by a spectrum of behavior of varying degrees of offensiveness, directness, and subtlety. On the one end, there are very overt and hostile acts. This can be exemplified by verbal abuse directed

⁴¹ See *Bazley v. Curry*, [1999] 2 S.C.R. 534.

⁴² *Merrifield v. The Attorney General*, 2017 ONSC 1333.

specifically at one or more persons that leaves no question as to the hostile feelings the speaker has toward a certain group. Racial, ethnic, or religious epithets or slurs are prohibited harassment of this type.

Subtle harassment may only be measurable in the tone of voice or look on the speaker's face. Prohibited acts should include abusive, belittling, and demeaning comments. Bullying, which may appear on the surface to be innocent behavior, may also rise to the level of harassment and should be prohibited. Assignment of an employee to complete demeaning types of tasks that are otherwise not in their job description is a form of harassment. Similarly, assignment to stereotypical duties, such as a female required to get coffee at a staff meeting, can also be harassment.

Harassment does not have to be expressly directed at the intended target in order to be actionable. When the harassing statements or actions are done within the sight or hearing distance of the target, the target is still being harassed. A common example of this is where the harasser is talking to one person but makes offensive comments loud enough that the target knows it was meant for them.

Harassing conduct can occur between supervisors and subordinates, co-equal employees, or by a subordinate employee to an employee of higher rank. For this reason, it is important that all employees receive information pertaining to the prohibition of workplace harassment. While agency liability is generally based on supervisor-subordinate harassment, the other situations can also create liability.

The workplace is not always a bastion of civility. Friendly banter often arises between employees that may carry sexual, racial, or other discriminatory overtones. Where such banter is not found offensive by the involved parties, there may be no actionable harassment. The work environment should be monitored to ensure that it is not conducive to harassment. The following are some warning signs that may signal a potential for harassment:

- An atmosphere where swearing or sexually oriented language is common.
- Joking or teasing that appears to cause discomfort or tension among other employees.
- One employee avoiding another employee.

Just because the behavior might not rise to the level of harassment for the courts does not mean the behavior is acceptable in the workplace. Likewise, when the courts do find that the behavior rises to the level of harassment, or the agency settles with the complainant, that settlement is between the agency and the employee. The settlement does not negate the need to discipline the offending employee.

In addition, with agencies increasing their programs that encourage explorers, cadets, interns, and stay-in-school programs, harassment can be even more problematic as it may target underage individuals who do not possess the skills or maturity to protect themselves. Agencies with programs that work with underage individuals need to incorporate additional safeguards and training for employees to ensure that they are protected.

Finally, employers may be held liable for permitting non-agency members to repeatedly harass employees. Any employee who interacts regularly with the public should be advised that they do not have to endure racial slurs, sexual innuendos, or other abusive discriminatory comments by the public. While law enforcement duties do require extraordinary patience in the face of certain inflammatory acts by suspects, the law enforcement executive must make it clear that harassment of its employees is not acceptable.

Sexual Harassment.⁴³ Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical offensive conduct of a sexual nature that explicitly or implicitly affects employment; unreasonably interferes with work performance; or creates an intimidating, hostile, or offensive working environment. In a sexual harassment case, two types of gender-based actions may be involved—sexual advances and suggestive comments. Sexual harassment also includes behavior without sexual overtones that is gender-based, such as sexual stereotyping and abusive comments.

⁴³ The term “sexual violence/sexual harassment” may also be used.

Less overt, unless the perpetrator acknowledges responsibility, are the use of pictures, cartoons, posters, and other printed matter that are calculated to make fun of or offend the viewer. For instance, one item for debate is whether the posting of calendars or posters depicting naked women, or casually planted magazines depicting various sexual acts, will create a hostile work environment. Some courts have held that such materials do contribute to a work environment that is hostile to women, while others have not.⁴⁴ The determination may end up being a matter of the degree to which the posters or magazines are shown in the workplace.

Unwelcome touching that goes beyond socially acceptable boundaries can be considered sexual harassment. Again, the issue will be whether it was unwelcome or unsolicited. Touching includes not only actual placing of the hands on the body of another, but also brushing up against the individual, especially when done in a suggestive manner. Some people do not like to be touched at all or do not like what is considered their “personal space” being invaded or violated. The measure is whether a reasonable person would have found the touching offensive. For example, where a supervisor does not normally touch employees, but one day rests his hand on the employee’s shoulder to emphasize a point, it will probably be considered an act within the normal bounds of what a reasonable person would not consider offensive. Touching genitals or caressing a person is considered inappropriate workplace touching. However, other acts that are less overt can be considered sexual harassment. These include sexually suggestive jokes, gestures, and innuendoes. Display of sexual devices or other items that are sexually suggestive may also be considered harassment.

Many employers believe that sexual harassment is limited to acts of men against women. However, sexual harassment encompasses harassment of women by men, men by women, women by women, and men by men.

IV. PREVENTION OF WORKPLACE HARASSMENT AND DISCRIMINATION

Employers have a legal duty to provide their employees with a workplace free from harassment and discrimination. Law enforcement executives must commit to a workplace that is diverse, inclusive, and respectful of others and does not tolerate any forms of harassment or discrimination.

A. Policy Development

One important step toward eradicating workplace harassment and discrimination, and thus minimizing the chances of liability, is the development of an agency policy prohibiting harassment and discrimination in the workplace. A written policy begins the process of establishing the agency’s philosophy that workplace harassment and discrimination is prohibited conduct that will not be condoned. It provides employees considering such acts with notification of what acts are prohibited. In addition, it provides a shield for those employees who do not want to participate in harassing behavior, such as bullying, but do so because of group pressure. Finally, a written policy informs all employees of their right not to be subjected to harassment and discrimination, and how to remedy the situation should it occur.

Employer liability for maintaining a hostile work environment is determined by weighing all of the facts of the case, including whether or not the employer had a well-developed policy prohibiting workplace harassment. However, having a policy will not necessarily shield the employer from liability.⁴⁵ Further, policy implementation goes hand in hand with training. Ignorance is no excuse for offensive and discriminatory behavior. However, it must be recognized that some employees could not be aware of the offensiveness and illegality of their behavior. The employee who has been given explicit instruction in the nature of harassing and discriminatory behavior cannot claim ignorance of the law or the policy of the agency. Enforcement of established policy is the final step and one of the more critical links in safeguarding the rights of employees and protecting the agency and its administrators against liability.

⁴⁴ Compare *Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987) with *Rabidue v. Osceola Refining Corp.*, 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S. Ct. 1983 (1987).

⁴⁵ *Meritor*, 477 U.S. at 72.

Several points should be considered when developing a policy. First, the policy must be clearly written so that it is easily understood. There should be a statement within the policy that harassment and discrimination are illegal, prohibited by the agency, and will be dealt with through disciplinary action. However, a violation of the policy is not necessarily the equivalent to a violation of the law. The policy should state that the employer adopts a stricter standard than the law regarding harassment and discrimination.

Next, the policy must clearly delineate specific types of conduct that will be prohibited. The scope of workplace harassment is defined legally and is not assumed to be common knowledge. Many agencies choose to include a set of examples and/or definitions of harassment in their policies. This is an excellent practice because it provides notice to employees of the types of prohibited activity while continually reinforcing that knowledge. On the other hand, many agencies provide a brief legal definition of workplace harassment and discrimination and then rely on special training programs to provide more specific examples. The rationale behind this approach is that by stating a set of examples in the policy, it may be misconstrued as being an exclusive list of prohibited conduct. The benefit of this overarching approach is that it allows the employees to focus on specialized training and examine for themselves whether certain conduct could be construed as harassment or discrimination. However, where this approach is adopted, the agency must provide special training on harassment and discrimination for its employees.

Finally, the policy should state how an employee can register a complaint of harassment. Again, clarity in drafting is necessary so that employees do not bypass agency remedies because of frustration. A complex, multistep procedure, or one that is too vague, can lead to misunderstandings and thus frustrate both the employees' and agency's attempts to eliminate harassment.

Agencies should also develop policy specifically prohibiting retaliatory conduct, defined as conduct or action designed to serve as retribution against an employee who, in good faith, has reported or otherwise provided information regarding misconduct, including harassment and discrimination, against another employee. Retaliatory conduct includes any deliberate, purposeful actions—or failures to act—directed against employees that cause or that could reasonably be expected to cause physical harm, property damage, significant emotional stress, or other serious negative effect on another employee; is designed to ridicule or embarrass; or could seriously impair the efficiency, safety, or effectiveness of that employee, the agency, or both. Such conduct may take many forms, including, but not limited to, bullying; persistent offensive comments, threats, or intimidation; false accusations; isolation; ostracism; posting of secure or personal information on the Internet or social networking sites; or acts that malign or disparage an individual's reputation.⁴⁶

Prohibitions should be included in the policy regarding false or frivolous charges or complaints to include those intended to bully or harass an individual. This does not refer to charges made in good faith that cannot be proven. A false and frivolous charge should be considered a severe offense that may result in disciplinary action or termination.

Every employee, regardless of rank, should be issued a copy of the harassment and discrimination policy. Agencies should not only disseminate a copy of the policy to each employee, but also require that the employee sign an acknowledgment of receipt of that policy. Doing so serves two purposes: (1) It reinforces the importance that the agency places on the policy; and (2) It aids any subsequent investigation by proving that the offender was aware of the policy.

A popular way to continuously reinforce the policy is through the use of posters.⁴⁷ In addition any information regarding workplace harassment and discrimination should also be distributed and reinforced through emails, internal webpages, and employee newsletters. Additionally, changes in applicable laws may require dissemination of updated information.

⁴⁶ See the IACP Policy Center documents on Retaliatory Conduct by Employees available at <https://www.theiacp.org/resources/policy-center-re-source/retaliatory-conduct>.

⁴⁷ Note that some posters are required to be displayed. For more information, please visit the Department of Labor website at <https://www.dol.gov/general/topics/posters>.

B. Supervision

No law enforcement agency can fulfill its duty to maintain a workplace free of harassment and discrimination without the assistance and support of its supervisors, especially first-line supervisors. Apathetic or hostile supervisors can quickly undermine an otherwise effective and meaningful policy against harassment and discrimination through their actions or non-actions in implementing the policy. By contrast, through their daily supervision of employees, supervisors can assist the agency in identifying, stopping, and preventing harassment and discrimination.

Supervisors' responsibilities include watching for signs that unprofessional conduct, bullying, harassment, or discrimination may be occurring in their units. As agency liability may turn on the effectiveness or negligence of supervisors in monitoring the workplace, supervisors should receive thorough training in identifying prohibited behaviors. This training should be provided on a regular basis and include an in-depth review of agency policy on the topic, instruction on how to identify potential harassing or discriminatory behavior, and guidance on how to respond to potentially unlawful behavior.

All supervisors must, by their own actions and words, act as role models for employees and not participate in or initiate unprofessional conduct, bullying, harassment, or discrimination. Supervisors should also be required to stop any actions that may be perceived as prohibited conduct and take immediate steps to prevent further occurrences. This responsibility should be reinforced during performance evaluations. When a supervisor stands by silently or fails to take appropriate action, the supervisor is tacitly encouraging prohibited conduct, regardless of policy.

Supervisors should be required to report any observed or reported instances of unprofessional conduct, bullying, harassment, or discrimination to the employee(s) or unit responsible for investigating employee misconduct, herein referred to as the Office of Professional Standards (OPS).⁴⁸ The supervisor's failure to take actions to stop known prohibited conduct, such as failure to report an incident, should be grounds for discipline. This is an essential requirement to underscore the integrity of the policy at each level of the process.

Each supervisor is responsible for reinforcing the agency's training program by actively counseling employees on the topic of workplace unprofessional conduct, bullying, harassment, and discrimination. Supervisors must stress that they are always accessible for complaints and will handle them in a discreet and confidential manner.

Finally, agency supervisors need to be briefed immediately on any policy changes, especially as they alter the supervisor's duties.

C. Compliant Procedure

Development of an effective complaint procedure is an important action that the agency can take to stop workplace harassment and discrimination and minimize liability. Maintaining an accessible and effective complaint procedure may be a factor to be considered in determining employer liability for maintaining a hostile work environment.⁴⁹ Complaint procedures should allow victims to quickly and easily seek assistance from the agency in stopping the misconduct, in both a confidential and effective manner.

Alternative Reporting Channels. The law enforcement executive is cautioned that courts will focus on the quality of the complaint procedure in assessing agency liability. The key to developing a quality complaint procedure is providing employees with several viable and confidential channels through which prohibited conduct can be reported. Providing multiple channels gives an employee alternative means of reporting prohibited conduct, especially when the person doing the harassing or discriminating also happens to be the person authorized to accept complaints. The classic example is the complaint procedure that requires employees to report all cases of harassment or discrimination to their supervisor. However, in some cases, it is the supervisor who is responsible for the misconduct. Notification

⁴⁸ See the IACP Policy Center documents on Investigations of Allegations of Employee Misconduct available at <https://www.theiacp.org/resources/policy-center-resource/employee-misconduct>.

⁴⁹ *Meritor*, 477 U.S. 57.

procedures like this effectively block victim complaints and deter employees from seeking agency assistance. Thus, standard complaint or grievance procedures are generally considered insufficient because they do not provide the employee with viable opportunities to report complaints.

The employee should be able to notify any supervisor of the problem. If this is not a viable option, the employee should be encouraged to go directly to OPS. Finally, the employee should have the option of bypassing all of these employees and notifying either the chief executive officer of the agency, the city manager, or other members of the jurisdiction's leadership of incidents of harassment. In addition, agencies may choose to establish an independent telephone hotline or develop a similar electronic means that allows employees to report instances of harassment and discrimination. Any information provided through these channels should be directly forwarded to OPS for investigation. Agencies may also wish to establish a method to communicate information regarding complaints brought to the attention of a union.

While these measures may seem extraordinary, the law enforcement executive must remember that a hostile work environment may be one where harassment and discrimination is considered to permeate the agency. Thus, the law enforcement executive must develop an extremely flexible notification process that is based on the hypothesis that there will be both active and inactive harassers. Inactive harassers may secretly sympathize with the misconduct and block complaints by failing to investigate, disrupting the investigation, or lying to cover for the employee actively harassing the victim.

The focus is to encourage employees to report prohibited conduct; therefore, the complaint procedure must be developed to achieve this goal. A victim of harassment is not required under law to report harassment to the employer to be entitled to bring an action under Title VII. The employee's failure to use an existing complaint procedure will also not automatically shield the agency from liability.⁵⁰ The importance of notification or non-notification will be determined by the facts of the case, for example, whether notification would have jeopardized the employee or the existing procedure would have failed to remedy the situation.

As a matter of policy, employees should also be encouraged to document incidents of what they perceive to be harassing or discriminatory behavior. This will assist in the investigation of complaints and in building any case that might exist.

Employees must know about the complaint procedure. This is easily achieved by distributing a copy of the policy to each employee and having each supervisor discuss the provisions with their employees to ensure that it is understood.

Confidentiality. Confidentiality is another key factor in the development of an effective and accessible complaint procedure. The rights of both parties—the complainant and the alleged harasser—must be considered in this situation. From the complainant's viewpoint, confidentiality of the complaint procedure is crucial. Workplace harassment and discrimination can have a devastating emotional impact. With sexual harassment cases, the complainant must reveal very personal and painful facts that they could want to remain unknown within the whole agency. The thought of having to repeat painful and frustrating incidents to several persons in order to obtain assistance, or knowing that confidentiality is not protected, could deter victims from reporting harassment.

In addition, confidentiality of the complaint process protects the employee from potential ramifications. When a supervisor or other high-level manager is responsible for the prohibited conduct, the employee may be afraid to report the acts for fear of retribution. Although firing or otherwise penalizing an employee who reports harassment is illegal, this may provide little comfort for the affected employee who must wait for such retribution to be legally remedied. Thus, only through the confidentiality of the complaint process will employees be encouraged to report illegal acts of harassment. The person who is alleged to have harassed or discriminated against another employee is similarly entitled to agency protection of their good name and reputation as is the victim. The alleged harasser is entitled to the same privileges of confidentiality in the complaint process as the accuser. However, agency executives must be aware

⁵⁰ *Meritor*, 477 U.S. 57.

that some public records laws prevent confidentiality. In addition, in order to conduct an effective investigation, some information may need to be shared on a “need to know” basis. Therefore, employers should communicate that, while steps will be taken to ensure information is protected, absolute confidentiality cannot be promised.⁵¹ An investigating agency must balance the need for confidentiality with the need for conducting a thorough investigation.

Investigations. An integral aspect of the complaint procedure is the effectiveness of the ensuing investigation. In assessing agency liability in certain instances, courts will scrutinize the actions, or lack of actions, taken by the agency to investigate and remedy allegations of harassment or discrimination. Failure to take meaningful action in addressing harassment and discrimination complaints through a thorough and unbiased investigation and swift discipline where appropriate translates directly to agency sanctioning of this behavior and may result in liability.

The employee(s) or unit responsible for performing investigations of employee misconduct, such as OPS, should be responsible for investigating allegations of prohibited conduct. These individuals must be proficient in undertaking sensitive and confidential investigations and specifically trained in investigating these types of cases. Some agencies refer these complaints to the criminal investigations division for investigation. As incidents of harassment often include actions that should be criminally charged, this can also be an effective practice. Another method is to allow persons from outside of the agency, such as the EEOC, a private law firm, or the jurisdiction’s human relations unit, to investigate the incident.

The integrity of the investigation should be of utmost importance in each case. If there is any suspicion that the normally authorized investigative unit will not do a thorough or unbiased job, the law enforcement executive should appoint another unit to perform the investigation.

Improperly conducted investigations can directly affect the outcome of harassment and discrimination cases. Therefore, the entity conducting the investigations should establish standard procedures to be followed in all cases. This should include the creation of an investigative action plan to include “an outline of the issue, the development of a witness list, sources for information and evidence, interview questions targeted to elicit crucial information and details, and a process for retention of documentation.”⁵²

The investigation should not be limited to the preliminary facts given by the complainant, as there are often additional pertinent avenues that should be explored. One person who comes forward to complain of harassment can potentially unearth several other employees encountering the same issue.

Interview questions should be developed beforehand and should be tailored to the individual situation. Investigators should avoid leading questions and instead utilize open-ended questions to encourage the individual to provide as much information as possible.⁵³

After the investigation is completed, investigators must evaluate the information and determine whether prohibited harassment or discrimination occurred. If the investigation is conducted by a different entity, this determination, along with all supporting documentation, should be forwarded to OPS where a determination of appropriate action can be made.

A collateral issue to the complaint process concerns the steps the agency takes during the investigation with regard to both the alleged victim and harasser. Pending the outcome of the investigation, the involved parties should be separated in the workplace if at all possible. Caution should be exercised if reassignment is used to separate the parties. Whenever possible, reassignment should not be imposed against the complaining party, although a voluntary reassignment should be considered. In no instance should a reassignment be made that results in a reduction of wages,

⁵¹ Society for Human Resource Management (SHRM), *How to Conduct an Investigation* (2018), <https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoconductaninvestigation.aspx> (Note this document is only available to SHRM members.).

⁵² SHRM, *How to Conduct an Investigation*.

⁵³ Examples of interview questions are provided by the EEOC at <https://www.eeoc.gov/policy/docs/harassment.html>.

benefits, promotional opportunities, or other job status for the complaining party. Such maneuvers may be interpreted by the courts as retaliation, penalizing the complainant and deterring future complaints of harassment, which can weigh heavily against the employer in a subsequent Title VII action.

Discipline. Discipline fulfills a number of related goals for law enforcement agencies. Where a proven case of harassment or discrimination is met with swift and meaningful discipline, the agency philosophy against this behavior becomes clear. By contrast, when employees perceive that a strong policy against harassment and discrimination exists, but that the agency metes out little or no discipline for such acts, they often lose the incentive to comply with the policy. Thus, effective discipline deters prohibited conduct and reinforces the agency philosophy.

The disciplinary process has an additional proactive aspect. Law enforcement executives should maintain a record of prohibited conduct complaints and their disposition. This will enable the executive to quickly determine whether any potential prohibited conduct is confined to isolated instances, is widespread, or is in the process of becoming widespread. Remedial acts can then be taken to alleviate the situation. Law enforcement agencies have a vested interest in adopting this barometric tool, as courts assessing employer liability for maintaining a hostile work environment will scrutinize the agency's remedial acts, or failure to take remedial acts, in an effort to effectively address harassment.

The most important goal of the disciplinary process is to stop identified prohibited behavior and prevent its recurrence. Employer liability for maintenance of a hostile work environment will turn on whether the agency used effective and meaningful discipline that fits the misconduct. An agency will not be held automatically liable for every act of harassment that occurs during working hours. Where the agency has initiated an effective program prohibiting workplace harassment and discrimination as outlined herein and has responded in a quick and meaningful fashion to investigate and punish acts of harassment and discrimination, it will probably be able to deflect liability. In essence, to avoid liability, the agency must show a good-faith effort to confront and discipline wrongdoers.

The specific level of discipline used for harassment and discrimination should, as with other types of misconduct, be calculated to fit the specific acts and deter further misconduct. While termination is not called for in every case of harassment or discrimination, the agency should not be lax. Weak disciplinary remedies can be considered agency ratification of the misconduct, and the victim can use this to prove employer liability.

APPENDIX A: UNITED STATES LOWER COURT REFERENCES

- *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985): Less overt acts can be considered sexual.
- *Barbetta v. Chemlawn Services Corp.*, 669 F. Supp. 569 (W.D.N.Y. 1987): If the harassment was not calculated to force termination, the victim must show that the working conditions were so difficult or abusive that a reasonable person would have felt compelled to resign.
- *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986): Basis for a law enforcement agency's liability for harassment and permits damages not available under other federal law.
- *Brown v. Town of Allentown*, 648 F. Supp. 831 (D.N.H. 1986): Firing or otherwise penalizing an employee who reports harassment is illegal.
- *Hicks v. Gates Rubber Co.*, 833 F.2d 106 (10th Cir. 1987): Employer liability based on constructive notice of misconduct.
- *Highlander v. KFC Nat'l Management Corp.*, 805 F.2d 644 (6th Cir. 1986): Employer liability may be based on single or multiple acts of pressured submission.
- *Jordan v. Wilson*, 42 Fair Emp. Prac. Cases 950 (D. Ala. 1986): Some maneuvers may be interpreted by the courts as retaliation, penalizing the complainant and deterring future complaints of harassment.
- *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988): "Quid pro quo" applicable when an employment decision is made based on whether the employee agreed or refused to submit to such actions.
- *Malik v. Carrier Corp.*, 202 F.3d 97 (2nd Cir., 2000): Agencies are legally required to investigate claims of sexual harassment.
- *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972): Duty of employers to provide and maintain a discrimination-free workplace.
- *Sapp v. City of Warner Robins*, 43 Fair Emp. Prac. Cases 486 (D.Ga. 1987): Workplace harassment may lead to personal liability for the harasser, but not the employer.

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Need to Know ...

Updated: May 2019

Harassment, Discrimination, and Unprofessional Conduct

All employees deserve a healthy work environment where all individuals are treated with respect and dignity. To further this goal, law enforcement agencies should provide procedures for reporting, investigating, and resolving complaints of harassment, discrimination, and unprofessional conduct.

- In addition to policies regarding unlawful harassment and discrimination, agencies should also develop procedures specific to preventing, identifying, and responding to reports of **sexual harassment** and **bullying**.
- It should be the responsibility of every employee to assist in the **prevention** of harassment, discrimination, and unprofessional conduct. This includes reporting prohibited acts as defined by policy.
- **Supervisors** are responsible for advising employees on the types of prohibited behavior and monitoring employee conduct for signs of these behaviors.
- No employment decisions that affect the terms, conditions, or privileges of an individual's employment should be made based on the person's **protected class status**. Protected class status may include, but is not limited to, race, sex (which may include sexual orientation, gender identity, and marital status), national origin, color, religion, age, or disability.
- Any employee who believes they are being treated unprofessionally, harassed, bullied, or discriminated against should **report** the incident(s) as soon as possible so that steps may be taken to protect the employee from further actions in violation of agency policy and appropriate investigative and disciplinary measures may be initiated.
- **Retaliatory conduct** against any employee for filing a complaint or for participating in an investigation should be prohibited.
- Agencies should establish the line for unacceptable conduct in relation to harassment and discrimination below the level of what would likely constitute **legally actionable behavior**.
- Agency executives and employees should be aware that discriminatory or harassing **blog or web entries** made regarding co-workers may be considered in the same vein as if those comments were made verbally in the workplace.
- **Complaint procedures** should be developed that allow victims to quickly and easily seek assistance from the agency in stopping the misconduct, both in a confidential and effective manner and through several viable channels.



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