



# ***EQUAL EMPLOYMENT OPPORTUNITY***



# **Supervisors Advanced Series Installment #4: Harassment**



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## **Part 1: Instruction**



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## **OVERVIEW**

- Laws and Policies Prohibiting Harassment
- Prevention of Harassment
- Employer Liability and Related Issues
- Non-EEO Harassment
  - Toxic Work Environment
  - Favoritism



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## **HARASSMENT**

Laws and policies that prohibit workplace harassment:

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Rehabilitation Act of 1973 (as amended)
- Genetic Information Nondiscrimination Act of 2008 (GINA)
- Department of Navy EEO Statement 4 April 2018
- Department of Navy Workplace Anti-Harassment Policy Statement 1 May 2018
- Marine Corps Order 12713.6A
- CMC EEO Policy Statement 31 Oct 2018



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## **HARASSMENT**

Harassment is a form of unlawful discrimination.

- EEO laws prohibit unlawful discrimination in the “terms, conditions or privileges of employment.”
- When a work environment becomes “so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of ... workers,” it becomes a violation of EEO law.



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## HARASSMENT

Unlawful harassment involves behavior with three characteristics:

1. The conduct is **unwelcome**
2. The conduct is based on a protected class: **race, color, national origin, religion, sex (including sexual conduct), age (40 or older), disability or genetic information.**
3. Enduring the offensive conduct becomes a condition of continued employment, or the conduct is **severe or pervasive** enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive



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## **HARASSMENT**

Anti-discrimination laws also prohibit harassment against individuals in retaliation for participating in the EEO process. This includes:

- Filing an EEO complaint
- Meeting with EEO professionals regarding rights under anti-discrimination laws
- Testifying, or participating in any way in an investigation, proceeding, or lawsuit under EEO laws;
- Opposing employment practices that are reasonably believed to violate EEO laws



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## **HARASSMENT**

- Courts have held that the discrimination laws are not intended to establish a “civility code” for the workplace.
- Petty slights, annoyances, and isolated incidents (unless extremely serious) will generally not rise to the level of illegality.
- To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.
- What is “severe or pervasive” is determined by a reasonable person standard on a dual sliding scale, i.e. if conduct is more severe, it does not need to be pervasive to be unlawful.





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## **HARASSMENT**

Offensive conduct may include, but is not limited to:

- Offensive jokes, slurs, epithets or name calling, ridicule or mockery, insults or put-downs
- Physical assaults or threats, intimidation,
- Offensive objects or pictures, and interference with work performance.



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## **HARASSMENT**



Just because conduct does not rise to the level of illegality **DOES NOT** mean that the conduct is appropriate, that it is professional, or that it comports with organizational policy. Employees should be held accountable for all conduct that is inappropriate, unprofessional or that violates policy standards.



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## **HARASSMENT**

**Harassment can occur in a variety of circumstances, including, but not limited to:**

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



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## HARASSMENT



Supervisors should take appropriate steps to prevent and correct workplace harassment.

Action must be:

- *Prompt*
- *Effective*
- *Remedial*



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## PREVENTION OF HARASSMENT

*Prevention is the best tool to eliminate harassment in the workplace:*

- Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.
  - No retaliation, ever
  - Knowledge regarding avenues of redress
  - Consistent reminders regarding harassment policy



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## **PREVENTION OF HARASSMENT**

- Employers should clearly communicate to employees what unwelcome harassing conduct will not be tolerated
- Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop.
- Employees should also report harassment to management at any early stage to prevent its escalation.
- There should be **NO QUESTION** as to how to report harassment.



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## The Organization is Automatically Liable for Harassment by Supervisors

The Supreme Court made clear that employers are subject to automatic vicarious liability for unlawful harassment by supervisors.

The standard of liability set forth in these decisions is premised on two principles:

- An organization is responsible for the acts of its supervisors, and
- Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

*Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).*



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## **Affirmative Defense for Co-Worker Harassment**

The organization may be able to avoid liability or limit damages for a hostile work environment among co-workers by establishing an affirmative defense that includes two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior (**PROMPT EFFECTIVE REMEDIAL ACTION**), and;
- The employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.
  - Does the organization have a policy?
  - Does the employee know about the policy?
    - Policy Prominently Posted
    - Training Records
  - Does the policy include information about multiple avenues to inform management of harassing behavior?





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## Affirmative Defense for Co-Worker Harassment

It is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, “Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.” Ellerth, 118 S. Ct. at 2270. Failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment.

An employer should ensure effective dissemination of the policy and complaint procedure including posting them in central locations, and provide training to all employees to ensure they understand their rights and responsibilities.



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## **Affirmative Defense for Co-Worker Harassment**

- When an employee complains to management about alleged harassment, the employer is obligated to investigate the allegation regardless of whether a formal complaint is filed.
- The organization should provide several accessible points of contact for the initial complaint.
- It also is important for an employer's anti-harassment policy and complaint procedure to contain information about the time frames for filing charges of unlawful harassment



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## **LIABILITY FOR HARASSMENT**

- In addition to co-workers, the organization will be liable for harassment by non-employees over whom it has control (e.g., independent contractors, vendors, or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.
- When investigating allegations of harassment, the EEOC looks at the entire record; including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.



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## **Non-EEO Harassment**

The current DON Workplace Anti Harassment Policy, while prohibiting EEO-based harassment, goes further, and prohibits “any form of harassment in the workplace.”

- The policy requires any Marine or civilian employee who encounters harassment to report the incident through appropriate channels.
- Supervisors are required to ensure that every reported incident is investigated immediately and thoroughly with corrective action taken as appropriate.
- The policy prohibits any action taken in retaliation for reporting harassing conduct.
- The policy “is separate and apart from ... the Equal Employment Opportunity complaint process.”



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## **Toxic Work Environment**

### **Definition:**

- Unwelcome behavior, severe or pervasive, not necessarily based on a protected class, which negatively impacts the work environment.
- Includes behaviors that could be defined as “bullying” or “hazing”
- Lack of concern for the well-being of others
- Perception of self-motivating interests



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## **Toxic Work Environment**

Impact – negative trends:

- More stress
- Less organizational citizenship behavior
- Less job satisfaction
- More cynicism
- Lower retention rates



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## **Toxic Work Environment**

Impact – real numbers:

- 47% decreased work effort
- 47% decreased time at work
- 38% decreased work quality
- 66% performance decline
- 80% lost time worrying about TWE
- 63% lost time avoiding the offender

Porath, C. & Pearson C. (2009). How Toxic Colleagues Corrode Performance. Harvard Business Review



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## **Toxic Work Environment**

Toxic behaviors may constitute harassment under the DON Policy, and could result in investigation and discipline – even if they are not related to an EEO protected category.





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## **Toxic Work Environment**



**You don't lead people  
by hitting them over the  
head – that's assault,  
not leadership.**

*---Dwight D. Eisenhower*

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## **Favoritism**

Definition: Favoritism occurs when a supervisor or selecting official grants an advantage to one employee or applicant but not another similarly situated employee or applicant based on friendship or other affinity rather than a legitimate merit-based reason

Favoritism is considered a violation of merit principles, and is a prohibited personnel practice.



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## **Favoritism**

In a 2013 Report regarding favoritism, the Merit Systems Protections Board (MSPB) found:

- 28% of federal employees believe their supervisors engage in favoritism
- 53% of federal employees believe that other supervisors within the organization engage in favoritism
- 30% of federal human resources professionals believe that supervisors they serve engage in favoritism
- 25% of federal employees perceive that favoritism has helped another employee obtain benefits beyond what they deserve
- 15% of federal employees believe that favoritism has harmed their career



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## **Favoritism**

Supervisors should:

- Honor merit system principles
- Seek the advice of subject matter experts
- Make decisions that are based on objective criteria
- Document decisions carefully
- Rotate responsibilities
- Treat employees with respect
- Facilitate two-way communication
- Provide honest and ongoing feedback



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## **Part 2: Scenarios**