

Implementing Harassment, Workplace Violence, & Discrimination Policies



Presenter



Shelby A. Hicks-Merinar

Of Counsel | Morgantown, WV
Shelby.Hicks-Merinar@Step toe-Johnson.com
304-598-8176

West Virginia Human Rights Act

- West Virginia law prohibits discrimination and harassment on the basis of **protected classes**.
- WV Code 5-11-1, et seq.

What Are the Protected Classes?

State and federal law prohibit discrimination based on:

- Race
- Religion
- Color
- National origin
- Ancestry
- Sex (including sexual orientation and transgender status)
- Age (40 and over)
- Disability



Discrimination

- Discrimination means **treating a member of a protected class differently than others**
- Can be overt, subtle, or concealed
- Examples include:
 - A Black employee is repeatedly passed up for a promotion even though they are clearly the most qualified
 - A manager does not hire a female applicant because he is concerned, she will get pregnant and take a leave of absence
 - A manager assumes that an older worker wants to retire and therefore selects him for a position elimination

Workplace Harassment: The Basics

- According to the [Equal Employment Opportunity Commission \(EEOC\)](#), harassment can include:
 - “offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.”

Workplace Harassment: The Basics

Can take many forms:

- Verbal harassment
- Psychological harassment
- Digital harassment (cyberbullying)
- Physical harassment
- Sexual harassment

Harassment – Examples

- **Sexual Orientation/Gender Identity**
 - Using derogatory terms
 - Mocking a person's relationship or mannerisms
 - Inappropriate questions about relationship status
- **Race/Ethnicity**
 - Displaying a confederate flag
 - Using racial slurs
 - “You people”
- **Sex/Gender**
 - Making assumptions about career aspirations
 - Excluding women from opportunities

Examples of Sexual Harassment

- Sexual harassment comes in many forms and is not limited to physical actions. Harassment also includes verbal or non-verbal conduct that rises to the level of being “severe or pervasive”
- Examples of sexual harassment include:
 - Touching or brushing against an individual’s clothing, body, or hair
 - Initiating unwanted sexual activity, such as kissing, touching, or hugging
 - Rubbing or touching anyone sexually
 - Repeating requests for a date with someone who has not returned an interest
 - Telling unwelcome jokes or stories, often with sexual innuendo
 - Initiating unwelcome flirtations
 - Making or using derogatory comments, epithets, slurs, and jokes

Sexual Harassment (cont'd)

- Intent is irrelevant
 - Sexual harassment may be unlawful even if not motivated by sexual desire
- Gender is also irrelevant
 - Men can harass women; women can harass men; men can harass men; and women can harass women
- Sexual harassment can occur outside the workplace, for example during:
 - Holiday parties
 - After-hours events
 - Social media
- Quid pro quo harassment – “this for that”

Retaliation

- Includes any adverse action taken against an employee for engaging in a protected activity (e.g., reporting discrimination or harassment or cooperating in a related investigation)
- Retaliation is prohibited by law. Supervisors should refrain from retaliating against any employee who reports discrimination/harassment
- “Adverse employment actions” include:
 - Termination from employment
 - Demotion
 - Reassignment to a less desirable position or duties
 - Reduction of work hours
 - Failure to promote
 - Failure to award pay increases or raises

Impact on Employees

Harassment in the workplace can create physical and psychological health problems for employees, including:

- Stress
- Anxiety
- Panic attacks
- Trouble sleeping
- High blood pressure
- Ulcers



Bullying v. Harassment

- Bullying that is **in reference to one or more of the protected classes** under the WVHRA/Title VII can provide the basis for a discrimination or hostile work claim.
- While ordinary “run of the mill” bullying is not yet actionable, it is still likely to have adverse effects on the workplace
- Striving to maintain a bullying-free workplace will help ensure a lawsuit-free workplace



Supervisors/Managers as Leaders: *Monitoring the Workplace*

- When trying to determine if particular conduct constitutes harassment, supervisors should use the “reasonable person” standard: if a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive, then it is likely harassment.
- When employing this “reasonable person” view, it is important to consider the conduct from the perspective of persons from the same race, color, religion, gender, national origin, age, or disability as the harassment victim.
- The conduct must also be viewed subjectively as harassment. If the employee does not actually perceive the conduct to be harassment, then it is not unlawful.
 - However, it still may be a good idea to caution employees that the conduct could be construed as harassment

How to Handle the “Equal Opportunity Harasser”

The “equal opportunity harasser” defense is sometimes used to defend against a claim of harassment or discrimination if the harasser directs his/her conduct **towards everyone**, regardless of a protected attribute such as sex, race, or ethnicity.

However, this defense can fail.



How to Handle the “Equal Opportunity Harasser”

If you think an employee may be an equal opportunity harasser, here are some points to consider:

- Is the harasser’s choice of language or conduct **different** toward a particular group (i.e, women or minorities)?
- Is the harasser’s conduct occur **more frequent** with regard to a particular group?
- Is the harasser’s behavior toward a particular group in any way **related to the identity** of that particular group?

If any of the above are true, a court may find that the conduct is prohibited harassment or discrimination under WVHRA/Title VII.

How to Handle the “Equal Opportunity Harasser”

- Enforce policies about respect and professionalism in the workplace
- Appropriate discipline for violating those rules
- Additional training and counseling, if necessary
- Consider risks v. value of keeping the “equal opportunity harasser”

Effective Training

- Regular training about harassment and bullying in the workplace is important
- Tell supervisors and employees what they can do, not just what they should not do.
- Create a culture where all employees—not just supervisors—are motivated to and comfortable speaking up. Incentivize good faith reports!
- Give employees the tools to have meaningful discussions with each other about concerning behavior
- Identify barriers to speaking up

***Employer Policies to Help Prevent
Harassment***

Essential Policies to Include in Your Handbook

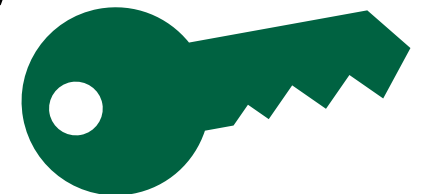
- Important policies that can limit an employer's liability:
 - **Equal employment opportunity / non-discrimination policy** – addresses an employer's obligation to create a workplace free from discrimination based on protected characteristics
 - **Anti-harassment policy** – prohibits unlawful harassment based on sex or other protected characteristics
 - **Complaint procedures** – establishes the procedures employees may use to file complaints of discrimination and harassment
 - **Workplace violence policy** – addresses an employer's commitment to maintaining a safe workplace for its employees

Equal Employment Opportunity Policies

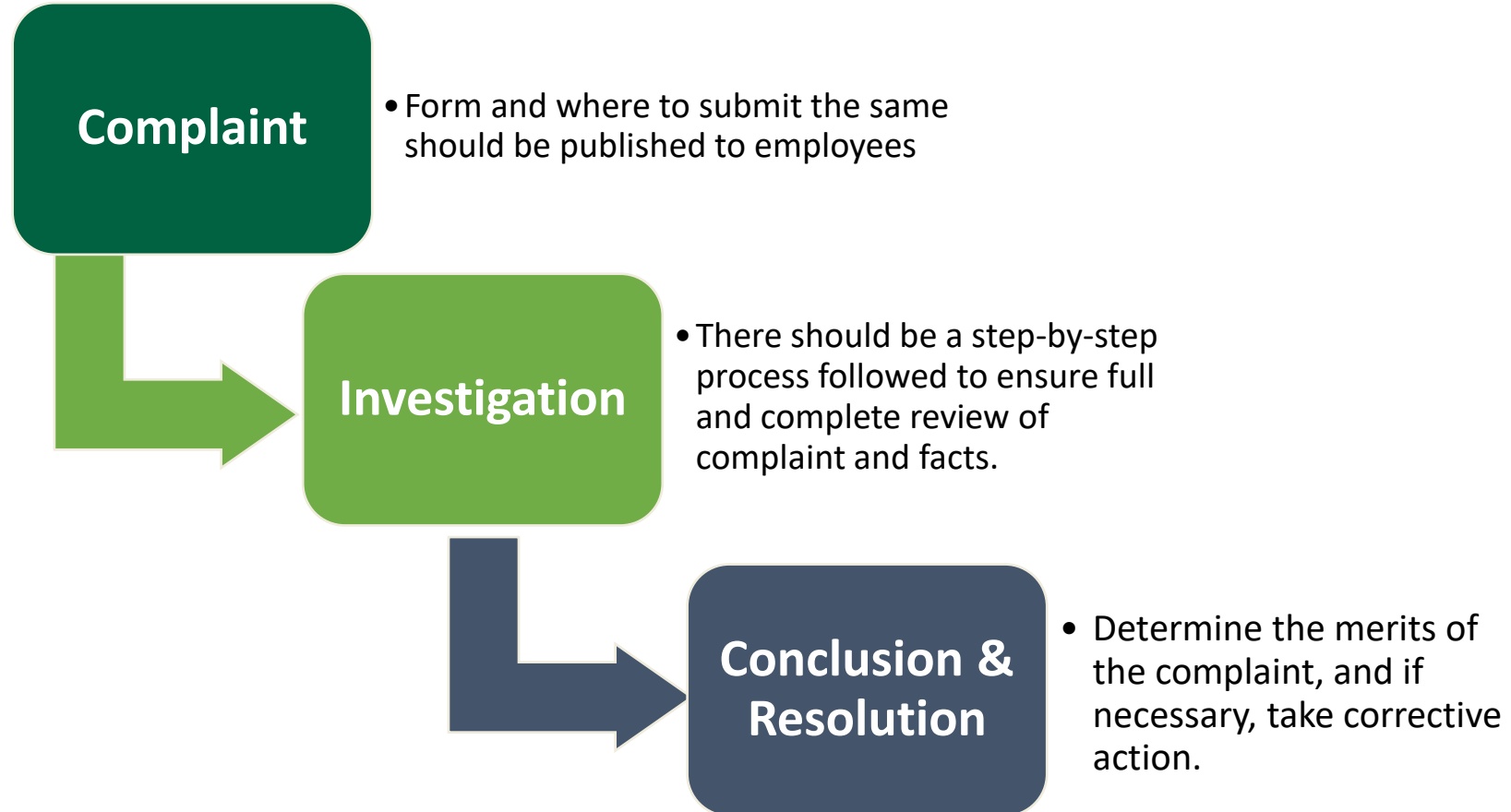
- Perhaps the most important handbook policy!
- Applies to all aspects of employment, including, but not limited to, hiring, job assignment, compensation, promotion, benefits, training, discipline, and termination
- **Goals:**
 - Demonstrate compliance with anti-discrimination laws, and
 - Support a legal defense against discrimination claims

Equal Employment Opportunity Policies

- Key Drafting Considerations:
 - Before drafting, determine which discrimination laws apply
 - Make sure the EEO policy outlines the protected classes
 - Including “catchall” language
 - Specify that discrimination is not tolerated with respect to any aspect of employment
 - Provide a complaint procedure for employees who believe they have been subjected to discrimination
 - Incorporate a retaliation provision if its not a standalone policy
 - Explain the consequences for violating the EEO policy



Complaint Procedures



Complaint Procedures

- Key Drafting Considerations:
 - Make your policy detailed!
 - Provide assurance that all complaints will be investigated “promptly” and “thoroughly”
 - Include alternative methods for filing complaints
 - Explain that prompt corrective action will result if conduct occurred
 - Maintain confidentiality to the extent possible
 - Remember no retaliation!



Anti-Harassment Policies

- Critical to employer protection
- **Purpose:** Defend against hostile work environment claims
- An employee who quits or resigns, alleging a harassment/hostile work environment claim, may bring suit against the employer
 - In this instance, the employer could avoid liability if it can show (1) it took reasonable steps to prevent and correct the harassing behavior, and (2) the employee unreasonably failed to take advantage of preventive opportunities

Anti-Harassment Policies

- Key Drafting Considerations:
 - Draft a policy that covers not only sexual harassment, but applies to harassment based on any protected characteristic
 - Define harassment and provide examples of such conduct
 - Reiterate that harassers and harassed persons can be male or female, that harassment can occur among individuals of the same sex, and that the policy covers third parties (e.g., clients or vendors)
 - Incorporate a retaliation provision if its not a standalone policy
 - Explain consequences for violating this policy



Workplace Violence Policies

- Not only informs employees of employer's commitment to keeping a safe work environment, but also assists employers in defending against claims for workplace injuries caused by violence
- Key Drafting Considerations:
 - Inform employees that violence will not be tolerated
 - Include a list of prohibited conduct
 - Underscore that such a list is only illustrative and not exhaustive
 - Provide for a confidential reporting procedure
 - Again, remember no retaliation!



Mental Health in the Workplace

Understanding Mental Health

- A mental disorder is a syndrome characterized by a clinically significant ***disturbance*** in an individual's
 - Cognition,
 - Emotion regulation, or
 - Behavior
- Mental illnesses are associated with ***significant distress or disability*** in social, occupational, or other daily activities

Work-Related Signs & Symptoms

- Frequent absenteeism
- Long lunch breaks
- On the job absenteeism
- Rigid perspective
- Inability to work with co-workers
- Inconsistent work patterns
- Trouble accepting responsibility
- Blames others for poor performance
- Strange or grandiose ideas
- Reacting out of context
- Feels resentful and unappreciated
- Leaving work early or arriving late
- Avoiding supervisors or co-workers
- Lack of respect for workplace boundaries
- Financial difficulties
- Changes in personality or behavior
- Poor appearance and hygiene
- Defensiveness

High Risk Warning Signs

- Suicidal statements
- Saying things like “it would be better if I wasn’t here” or “I want out”
- Making statements about being hopeless or worthless
- Losing interest in things that used to be valued
- Increased irritability and dramatic mood swings
- Impulsive behavior
- Always thinking about or talking about death
- Taking extreme risks or having a “death wish,” such as driving recklessly
- Giving away possessions, putting affairs in order, saying farewell to friends/colleagues
- Sudden, unexplained change in mood from extreme sadness to calm, happy appearance
- Any major changes in patterns of behavior

Providing Support

As a Manager, How Can You Help?

- Know company policies and protocols
- Involve others (e.g. HR or Work/Life Assistance Program)
- Reach out to the person based on work performance
- Be specific about what you have observed
- Avoid trying to diagnose/interpret the problem
- Be prepared to offer resources
- Avoid enabling and stigma



Example of Intervention

Scenario: A manager has a supervisory meeting with an employee due to recent absenteeism. The employee becomes tearful and distraught, and says they need help.

Intervention:

- Individual is evaluated immediately for risk
- If risk identified, emergency services engaged
- If no imminent risk, individual referred for in-person assessment
- Individual provided with short-term counseling (if appropriate) or referred on to specialized services
- Individual provided with case management oversight
- Ongoing consultation with Company regarding employee's progress and readiness for return to work

Health & Well-being in the Workplace

- Encourage:
 - Preventive care
 - Healthy eating
 - Exercise
 - Good sleep habits
 - Employees to contact the work/life program
 - Appropriate break & mealtimes



Accommodations

Americans with Disabilities Act

- Prohibits **disability discrimination** and **harassment**
- Requires employers to:
 - provide a **reasonable accommodation** **unless** undue hardship; and
 - engage in an **interactive process** with the employee when the need for an accommodation is known; and
 - **NOT retaliate** against an employee for requesting a reasonable accommodation



What is a Mental Disability under the ADA?

- Physical or *mental* impairment
- Substantially limits one or more major life activities
 - How it affects the individual
 - ADAAA (broad construction)
 - Determine without mitigation
- Record of impairment
- “Regarded as” impaired



Impermissible/Permissible Inquiries

- Application process
- Post-offer / Pre-employment
 - Asked of all employees in job class
 - Confidentiality
- During employment
 - Employee self-identifies
 - Request for reasonable accommodation
 - Fitness-for-Duty Exam

Confidentiality

- Separate files
 - No more than necessary
- Supervisors and safety personnel
- Co-workers
 - Not entitled to know
 - “Approved pursuant to policy”
 - Handbook
 - General sensitivity training

Reasonable Accommodation (Affirmative Duty)

- The “Interactive Process”
 - **Employee must inform the employer** of the need for an accommodation
 - **Employer should initiate** the interactive process without being asked if the employer knows or has reason to know:
 - The employee has a **disability**;
 - The employee is experiencing **workplace problems** because of the disability; or
 - The **disability prevents** the employee from requesting a reasonable accommodation

Reasonable Accommodation (Affirmative Duty)

- “Essential Job Functions”
 - Can the employee perform the **essential functions** of the job with or without a reasonable accommodation?
- Modify
 - Workspace
 - Schedule
 - Method of doing work
- Employer’s expense and option

Examples of Accommodation

- Flexible work arrangements
- Soundproofing or visual barriers
- Noise canceling headset
- Job coach or mentor
- Check lists, electronic organizers
- Allowing T/C's to doctors and counselors
- Bending/modifying policies, rules and procedures



Job **A**ccommodation **N**etwork (**JAN**)

Leave as Reasonable Accommodation

- Occasional
- Part-time schedule
- Extended
- Transfer to vacant positions

Undue Hardship

- View from perspective of individual worksite
- Disruption to business
 - Production, deadlines, quality
 - Costly
 - Co-worker morale
 - Difficult area
- Burden on employer to establish hardship

“Direct Threat” Due to Impairment

- ***Significant*** risk of ***substantial*** harm
- Individualized assessment
- Objective; based on most current medical evidence
- Burden on employer
- “Direct Threat” factors
 - The duration of the risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur
 - The imminence of the potential harm

Conduct

- Discipline if misconduct results of mental impairment?
 - Do not have to excuse
 - Job-related
 - Consistent with business necessity
 - Examples: violence, threats of violence, stealing
- Reasonable accommodation
 - Duty is prospective
 - Do not have to excuse past behavior

FMLA Concerns

- Mental health conditions **are not always as obvious** as physical health conditions – should still be treated the same
- Employees are still entitled to rights under the FMLA
 - To care for **their** mental health condition **or**
 - The mental health condition **of someone they love**



Basic FMLA Principles Apply

- Qualified employees entitled to up to 12 weeks of FMLA leave
- Employees still entitled to group health benefits **and** either the same or virtually identical position upon return to work
- FMLA leave may be paid or unpaid depending on the employer's policy

Confidentiality

- Employee mental health conditions should be kept confidential
- Records must be separate
- Communication with supervisors and managers presents risk
 - Email chains; open verbal communication; gossip

Key Learning Points

Key Learning Points

- Dealing with employees with mental health issues requires individualized assessments, and not formulaic or cookie-cutter approaches.
- To minimize surprises later, review benefit plan provisions now, and make changes to coordinate coverage with employment policies and governing law.

Questions?



Disclaimer

These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the author and are not individualized legal advice. It is understood that each case and/or matter is fact-specific, and that the appropriate solution in any case and/or matter will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the presenter and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.

