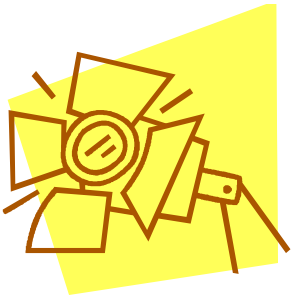
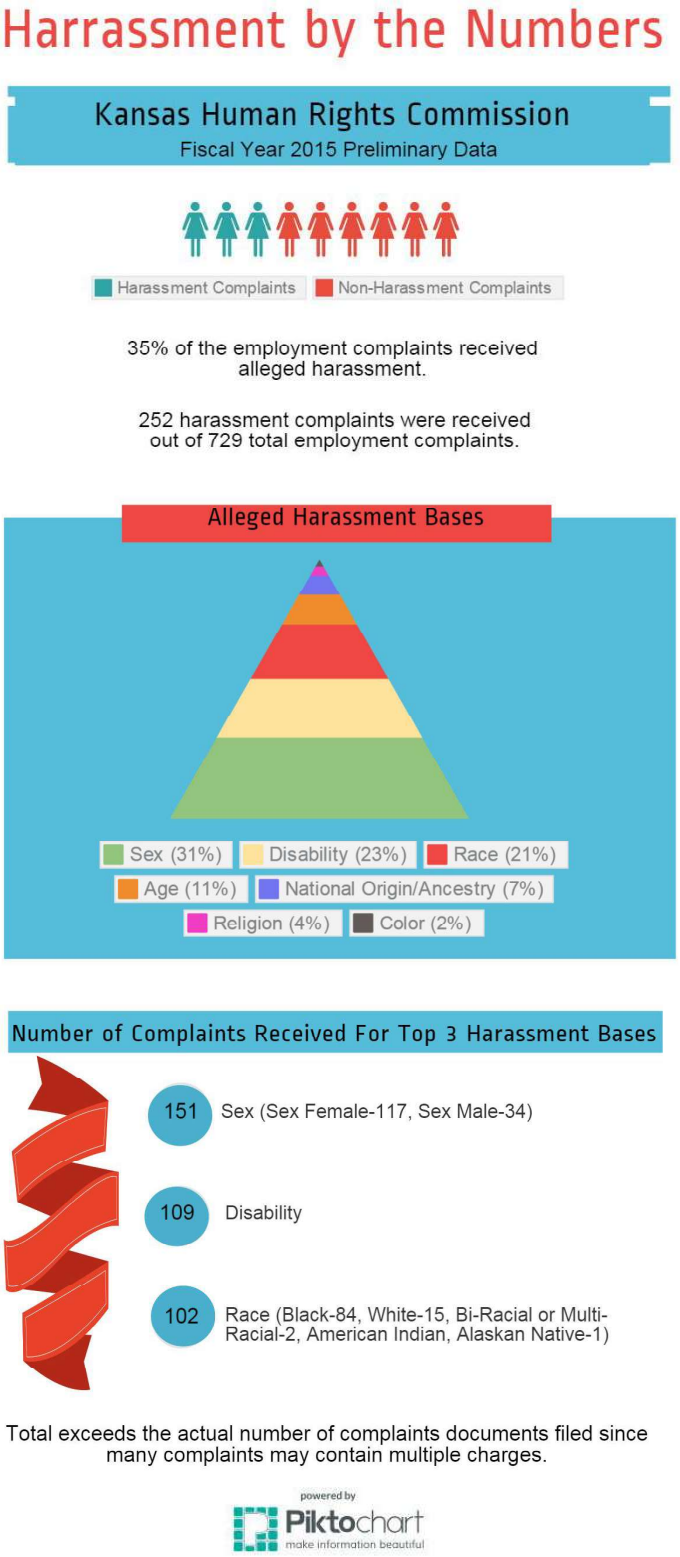


Spotlight on…….Harassment

An Age-Old Problem Continues in Today's Workplaces



Rumor has it that harassment in offices, on manufacturing floors, and even in social settings away from work is a major problem. Unfortunately, it isn't just a rumor. Facts bear out that illegal harassment in employment situations and employment related social settings is a continuing, sizeable problem.

Complaints filed with the Kansas Human Rights Commission (KHRC) in Fiscal Year 2015 (July 1, 2014 - June 30, 2015) reflect the harassment problem. Of the 729 employment complaints filed, 35 percent cited some type of harassment. Sexual harassment with 151 complaints was the primary reason for filing a harassment charge, and included both female and male Complainants. 109 complaints alleged harassment based on disability, closely followed by race harassment with 102 charges. Other charges included harassment based on age, national origin/ancestry, religion and color.

The KHRC's experience mirrors that of the U.S. Equal Employment Opportunity Commission's (EEOC). In January 2015, the EEOC held a meeting focusing on workplace harassment. EEOC Chair Jenny R. Yang reported to the EEOC Commission that workplace harassment is alleged in approximately 30 percent of all charges filed with the EEOC. In addition, Fatima Goss Graves, Vice President of the National Women's Law Center, told the Commission that one in four women will face harassment in employment situations. Jane Know, Principal of HR Law Consultants, reported that individuals with disabilities are especially vulnerable to harassers. Know also highlighted the adverse role that social media has played in harassment claims. Know said, "The ease and speed of posting or responding to the proliferation of messages and images on social media has spawned employee complaints of harassment defamation, violation of a right to privacy and a host of other claims." Know continued, "None of this was even imaginable in 1964 when Title VII was enacted."

Because of the importance of addressing workplace harassment, EEOC Chair Jenny Yang announced the formation of an EEOC Select Task Force on the Study of Harassment in the Workplace. EEOC Chair Yang said, "A lot of progress has been made around the issue of workplace harassment, but we know it remains a persistent problem. Complaints of harassment span all industries, include many of our most vulnerable workers…"

It is important that employers learn what harassment is to ensure that individuals are treated properly if they become victims or report harassment, and to prevent the incurrence of liability. Appropriately addressing illegal harassment and other bad behaviors will positively impact the workplace by helping to maintain morale and creating confidence in management that

(Continued on page 7)

You Decide Case Study

Sally works at Warehouse A, one of three warehouses at a manufacturing plant. Sally transports the finished product from the manufacturing plant to the warehouse for temporary storage. She also prepares product for shipping by semi-truck and loads the product on semi-trucks. Sally held this job and worked for the employer from January 2014 to January 2015.

Sally's supervisor is Burke. One of her co-workers is Sam, who is also supervised by Burke. Burke and Sam are good friends and are considered a "team" by other employees. Sally works with Gina, who is also supervised by Burke and works alongside Sam.

Sally filed a complaint of sexual harassment with the KHRC. Sally charges that she was subjected to sexual harassment by Burke and Sam, including inappropriate sexual advances, gestures, comments, and conversations. Sally alleges that she complained to her Human Resources, but that the employer continued to subject her to harassment.

According to Sally, Burke and Sam make sexual jokes and comments. They talk about their sexual experiences, and make inappropriate remarks about the bodies of female workers. Sally told Burke and Sam to stop making these types of statements when she first started working with them. However, Burke and Sam escalated their behavior in response to Sally's objections.

Sally decided it was better to tolerate Burke's and Sam's bad behavior than to display her disapproval. Sally says that if she acted like she was uncomfortable with Burke's and Sam's actions, then Burke and Sam would talk louder to make sure she heard their chatter or ask her what she thought of female co-workers' bodies. They would laugh if she walked away from this behavior.

The company held their annual holiday party at a local restaurant in December 2014. Sally charges that, when she and Burke were in the hallway leading to the banquet room, that Burke grabbed her derriere and tried to kiss her. Sally says that she pushed Burke away, and he laughed at her. Sally says she told Burke that she wasn't interested in him "that way". They then entered the banquet room. Sally went to sit with her co-worker friends, and Burke went to sit with his friends. Sally says she was very uncomfortable and decided to leave right away. Sally's friends, including Gina, asked Sally what was wrong.

Sally decided the incident at the holiday party was "the last straw" and asked to meet with Human Resources. The Human Resources Director met with Sally that same day. According to the Human Resources Director, Sally talked about how she was "uncomfortable" working with Burke and Sam. The Human Resources Director confirms that Sally told him about Burke's and Sam's sexual comments and the Burke's inappropriate touching at the company party. The Human Resources Director says that Sally was nervous, and kept mixing her remarks about Burke's and Sam's sexually targeted comments with complaints about their poor work habits.

The Human Resources Director quickly investigated Sally's complaints about Burke's and Sam's sexual comments and jokes by asking them if they had made such comments and jokes. Burke and Sam denied that they acted in that manner. The Human Resource Director did not ask Burke about the incident at the holiday party. The HR Director felt that an incident away from the worksite in a social setting, even though it involved a supervisor and supervisee at a company sponsored event, could not be sexual harassment. The HR Director did not interview any of Sally's co-workers or ask if there were any witnesses.

The HR Director met with Sally to report his findings: that Burke and Sam denied sexually harassing Sally and sexual behavior by supervisors/co-workers outside work was not against their company policy. Sally told the HR Director that she "had had enough" and did not want to work with Burke or Sam anymore due to their harassing behavior. Sally asked if she could transfer to another warehouse on the same shift to get away from Burke and Sam. The HR Director said that Sally would be allowed to transfer to another warehouse on the same shift with the same pay. The HR Director did not offer any alternative arrangements so that Sally would not have to work with Burke and Sam.

Sally began working at the new warehouse, Warehouse B, at the end of December 2014. Approximately three weeks later, Burke applied for and was given a promotion to Warehouse B Manager. He began his new job immediately.

Although Burke is not continuously on the floor as he was in his previous job, he does cover whenever a supervisor is absent and is a resource whenever there are questions. Therefore, he does come into contact with Sally. Sally alleges that Burke's sexually harassing behavior begins again. Sally does not believe that Human Resources is a viable resource because the employer did not take steps to protect her from the harassment when Burke was transferred to her worksite, even though she complained about him.

Sally quit her job to get away from the harassment and filed a complaint with the KHRC.

As part of the KHRC investigation, Sally supplied the names of co-workers who might have observed the alleged sexually harassing behavior. All co-workers acknowledged Burke's and Sam's behavior. Some viewed it as "boys being boys", while others reported the behavior as unwanted, bothersome, and interfering with work. Several workers expressed surprise that Burke was promoted to Warehouse Manager due to his inappropriate actions and recognized that Sally was upset by Burke's and Sam's actions.

(Continued on page 9)

Spotlight on.....Harassment
(continued)

(Continued from page 3)

they will not tolerate harassment, internal complaints will be treated respectfully, individuals will not be retaliated against, and harassers will be dealt with appropriately. Demonstrating reasonable care to prevent harassment, encourage the reporting of complaints, appropriately and timely investigating complaints and appropriately dealing with harassers assures that employers treat employees respectfully, thereby minimizing the chances that an employer will be held responsible for bad behavior.

The Kansas Act Against Discrimination (KAAD) and the Kansas Age Discrimination in Employment Act (KADEA) prohibit harassment on the basis of race, color, sex (including pregnancy), age 40 years and older, religion, national origin, ancestry, and genetic screening and testing. The KAAD and the KADEA also prohibit retaliation for having openly opposed discrimination, i.e. having previously filed a complaint of harassment or discrimination with the KHRC or the EEOC, or internally, or having participated in an investigation or lawsuit involving a complaint. Likewise, Title VII of the Civil Rights Act prohibits harassment of an employee based on race, color, sex, religion, or national origin. The Age Discrimination in Employment Act prohibits harassment of employees who are 40 or older on the basis of age. The Americans with Disabilities Act Amendments Act (ADAAA) bans harassment based on disability. The Genetic Information Nondiscrimination Act of 2008 prohibits harassment based on genetic information. The Pregnancy Discrimination Act bans harassment of those who have been pregnant, are pregnant, or might become pregnant.

When is Harassment Illegal and an Employer Held Liable?

Harassment is illegal if it is based on any of the prohibited bases (race, color, sex (including pregnancy) religion, national origin, age disability genetic screening/testing/information, or retaliation). The conduct must be unwelcome, sufficiently frequent or severe to create a hostile work environment or result in a tangible employment action.

An employer is responsible for harassment by non-supervisory, co-workers or non-employees over whom it has control, such as independent contractors or customers, if the employer knew, or should have known about the harassment and failed to make a prompt and appropriative corrective action.

An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible employment action, the employer is liable unless it proves that it: 1) it exercised reasonable care to prevent and promptly correct any harassment, and 2) the employee unreasonably failed to complain to management or to avoid harm otherwise.

An employer is responsible for unlawful harassment, even if it did not result in a tangible employment action, when the harasser is of a sufficiently high rank to act as the organization's proxy or "alter ego". Examples might include a president, owner, partner, or corporate partner.

Petty slights, annoyances, and isolated incidents (unless extremely serious) are not illegal. The conduct must create a work environment that is intimidating, hostile, or offensive to reasonable people.

Evidence of Harassment

Bad behavior may include, but not limited to offensive jokes, "nick names", slurs, epithets or name calling, blocking of movement, touching, physical assaults or threats, intimidation, ridicule or mockery, insults or put downs, offensive insults or interference with work performance. Harassment often occurs in person, but it has increasingly occurred through electronic methods such as screensavers, e-mail, voice mail, texting/sexting, and social medial websites or apps.

Who Can Be a Harasser?

Co-workers and direct supervisors are most frequently alleged to be harassers. However, harassers can be supervisors in other areas, "higher ups", or non-employees who come into contact with employees. Examples in this last category include contractors or consultants, customers, or vendors. For example, a customer who "hits on" a waitress or a vendor delivery driver making inappropriate comments to a receivables clerk. Employees who make service calls to outside customers may also fall victim to harassment.

Any employee who witnesses the bad behavior may file a complaint. For example, an African American kitchen staff overhearing waiters using racial slurs and making fun of African American customers may file a complaint.

Unwelcome?

The first element to review is whether the Complainant considered the offensive behavior as unwelcome. It does not matter what the harasser intended, i.e. that he or she was just having "fun" or "kidding ". Emphasis is placed on how the Complainant viewed the behavior. The most obvious way to demonstrate that conduct was unwelcome is for the Complainant to tell the harasser to stop the bad be-

(Continued on page 8)

Spotlight on.....Harassment (continued)

(Continued from page 7)

havior. Many employees are reluctant to take this action because they are afraid the offensive actions will worsen or they will be retaliated against. The EEOC advises that when confronted with conflicting evidence as to welcomeness, the EEOC looks "at the record as a whole and at the totality of circumstances...."

Generally, "unwelcome" means the Complainant did not solicit or invite the offensive behavior, and that the Complainant viewed the conduct as undesirable or offensive.

In some instances, a Complainant will tolerate certain behavior, but consider more extreme behavior as offensive. For example, a Complainant may consider certain off-color jokes or wisecracks as funny, but draw the line at being presented offensive images or touching. If an employer argues that a Complainant welcomed such behavior, they must show that the "welcomeness" was specifically related to the alleged harasser.

According to the EEOC, "A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome. If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work."

Evaluating Harassment Claims

To be illegal, harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment by unreasonably interfering with the individual's work performance or creates an intimidating, hostile or offensive work environment. Thus, one offhand comment or one instance of teasing based on a protected category will not reach the threshold of illegality.

The conduct must be viewed as abusive by the victim. In addition, the "reasonable person" standard is used to evaluate harassment claims. Specifically, would a reasonable person in the victim's circumstances find the alleged conduct to be hostile or offensive? Please note the alleged harasser's "innocent" intent of joking, banter, or the like is not a factor in this determination.

K.A.R. 21-41-10 (v) provides a reasonableness standard in determining if a violation, i.e. "Probable Cause", has occurred.

Isolated Incidents of Harassment

In a "quid pro quo" complaint, a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits. A "hostile work environment" implies there is a continuing pattern of bad behavior. However, a single, unusually severe act of harassment may be enough to constitute a violation. The more severe the act(s), the less need to show a pattern of infractions, especially when the harassment is physical. For example, unwelcome, intentional touching of intimate body parts would be listed as a violation. The EEOC provides, "When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment." In addition, incidents of harassment directed at more than one Complainant can help establish that the work environment was hostile.

When the bad behavior is verbal, the nature, frequency, context, and target of the remarks will be evaluated.

Case-By-Case Basis

At this point, it would be convenient if we could write that this type of behavior or that type of behavior would always result in a violation. However, evaluating harassment claims is not that simple. There is no magic checklist. Rather, each complaint must be evaluated on a case-by-case basis and the totality of the circumstances must be considered.

Proactive Measures

In order for an employer to assure that employees are protected from harassment and that any complaints are dealt with effectively, it is important for the organization to have an anti-harassment policy, including sexual harassment, that is clear, regularly communicated to employees, and effectively implemented. The EEOC advises, "The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual [and other] harassment complaints. The procedures should be designed to 'encourage victims of harassment to come forward' and should not require a victim to complain first to the offending supervisor….It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation."

It is important to train employees, supervisors, human resource personnel, whoever might receive harassment complaints, to recognize such complaints. Many Complainants will not actually use the word "harassment". Rather, they will describe being bullied, say that the harasser is "toxic", or they have been mistreated. They will talk about the bad behavior and how it makes them uncomfortable. They may discuss how they have taken steps to avoid, especially being alone with, the harasser.

If a complaint of harassment is received, it may be necessary for the employer to take temporary action so that additional alleged harassment cannot occur. Preventative measures might include making scheduling or reporting changes so the alleged victim and perpetrator do not come into contact with each other; temporary, non-disciplinary leave or a

(Continued on page 9)

Spotlight on.....Harassment (continued)

(Continued from page 8)

temporary transfer for the alleged harasser while the investigation is in process. The Complainant should not be involuntarily transferred, shifts changed, etc. as the employer should be careful about the appearance of retaliating against the Complainant.

The EEOC further advises, "When an employer receives a complaint or otherwise learns of alleged sexual [or other] harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employees, may ranging from reprimand to discharge. Generally, the corrective action should reflect the severity of the conduct….The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation." Also, report back to the Complainant that the investigation has concluded, although it may not be appropriate to discuss all parts of the final report, such as disciplinary action.

If an employer's harassment investigation is inconclusive, it is recommended that, at a minimum, the employer re-issue its anti-harassment policy, complaint procedure, and engage in training to limit bad behavior in the workplace and increase supervisors' and co-workers' recognition of harassment.

Conclusion

Taking steps to prevent harassment, investigating allegations, and addressing a confirmed harasser may seem difficult. There are, however, resources available to you, and it is important that steps be taken to protect employees and your organization. Resources include:

- ◊ www.khrc.net.: Click on the "Public Information Program" tab to find articles and/or Power Point presentations addressing *Internal Investigations Intelligence, Inappropriate Behavior and the Inclusive Workplace,* and *Sexual Harassment is Discrimination.*
- ◊ www.eeoc.gov: Click on "About the EEOC", click on "Laws, Regulations, Guidance & MOUs", click on "Harassment".

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You Decide Case Study (continued)

In addition, Sally's co-worker, Gina, reported that she filed an internal sexual harassment complaint with the HR Director in November 2014 regarding Burke's and Sam's behavior. Gina confirmed her allegations mirrored those of Sally's, except for the altercation at the company party. Gina said that she decided to put up with the behavior because she needed the job.

The HR Director confirmed that he received Gina's complaint. The HR Director investigated Gina's complaint in the same manner that he investigated Sally's: He questioned Burke and Sam, who denied the charges. None of the co-workers were questioned about their observations. The company did not take any proactive measures, such as reissuing their anti-harassment policy, or providing counseling or training.

The HR Director also confirmed that Sally's and Gina's complaints were not considered when Burke was promoted to Warehouse B Manager.

You decide: Did the employer demonstrate "reasonable care" to prevent and promptly correct harassment with:

1. An effective anti-harassment policy and complaint procedure?

   ( ) Yes ( ) No

2. An effective investigation process?

   ( ) Yes ( ) No

3. Immediate and appropriate corrective action and follow up with the Complainant?

   ( ) Yes ( ) No

Why or why not?_____

The KHRC investigation concluded the employer did not demonstrate reasonable care to prevent and address allegations of sexual harassment:

The anti-harassment policy was inadequate because it did not recognize that harassment by supervisors or co-workers outside the workplace is prohibited.

The investigations of two separate complaints, which re-enforced each other's allegations, were inadequate. The investigation consisted solely of inquiries to the alleged harassers. No co-workers who might have knowledge of the alleged incidents were questioned.

There was no recognition that two separate, but substantially similar complaints, might reflect a hostile work environment.

No proactive measures, such as counseling or training, were taken to increase awareness of harassment and to prevent future incidents.

The employer did not protect Complainants from future harassment. They transferred Burke to the same warehouse as Sally, even after she complained and requested a transfer to a different location specifically to get away from him.

Practicing "Reasonable Care" Against Harassment

Employers should take reasonable care to prevent and promptly correct harassment. According to the U.S. Equal Employment Opportunity Commission (EEOC), "Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment."

Effective Anti-Harassment and Complaint Procedure

- A clear explanation of prohibited conduct;
- Assurances that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible and multiple avenues of complaint. The policy should not mandate the employee report the harassment to the immediate supervisor (in case the supervisor is the alleged harasser) or one sole contact. Make sure employees in outlying offices or 2nd or 3rd shifts have access to file complaints.
- Assurance the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.
- The policy should prohibit harassment by everyone in the workplace and non-employees who come into contact with employees (customers, delivery personnel).
- The policy should prohibit harassment by employees in work-related situations outside the normal workplace (training, conventions, travel status).
- The policy should prohibit harassment by employees in social settings away from work (i.e. holiday parties or other celebrations).

Effective Investigation Process

- As soon as management learns about alleged harassment, it should determine whether a detailed fact finding investigation is necessary. Be open to where the investigation may lead you.
- The investigation, if necessary, should be launched immediately.
- The Complainant may ask you to keep the complaint to yourself or not proceed with an investigation. The Employer has been put on notice about the alleged harassment and has a responsibility to investigate.
- Select an investigator who will be unbiased and will base recommendations on the investigative facts. It is recommended that the investigator be independent of the chain of command for the alleged incidents.
- If possible, select someone with experience in this area. Did the proposed investigator previously know about the alleged harassment (and did nothing about it)? If so, select someone else.
- Conclude the investigation in a timely manner. Investigations lasting more than a week will be scrutinized.

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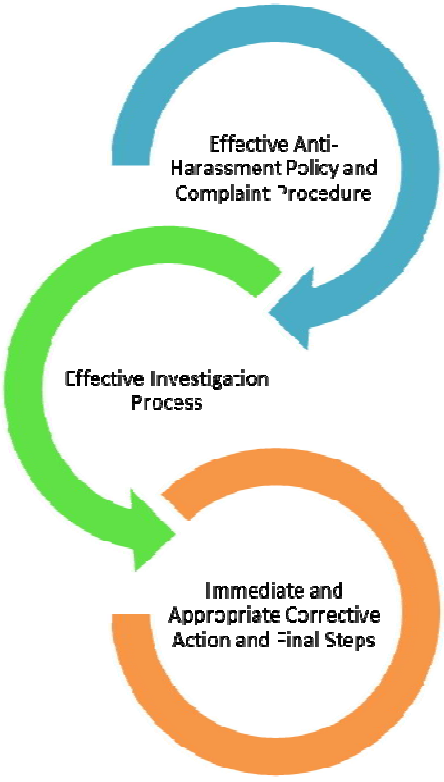

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The Investigation

- Explain the complaint. Remind participants of confidentiality expectations and non-retaliation provision. Thank for participating. Explain that you are a neutral investigator.
- Remember the who, what, when, where, why, and how.
- Who did it?
- What happened?
- When did it happen?
- Where did it happen?
- Why did it happen?
- How did it happen? How often?
- Is there evidence? (text messages, social media posts, copies of "jokes")
- Was there touching involved?
- Witnesses?
- Do you know of others who were harassed by the same person?

Remember to ask witnesses, and the alleged harasser the same information.

Be sure to use open-ended questions and follow-up questions when interviewing the complainant, the alleged harasser, and witnesses. The purpose is to facilitate the gathering of information.

Practicing "Reasonable Care" Against Harassment

(continued)

Immediate and Appropriate Corrective Action and Final Steps

Assurance of Immediate and Appropriate Corrective Action

- When a violation has occurred the alleged harasser should receive appropriate corrective action in accordance with any disciplinary policies or harassment policies.
- Measures should then be put into place which are designed to stop the harassment. Be sure that any actions taken are not considered retaliation against the Complainant.
- Management should keep in mind that the employer is liable if the harassment does not stop.

Final Steps

- Report back to the Complainant that the investigation has concluded. (It may not be appropriate to discuss all parts of the final report, such as disciplinary action.)
- Follow up with the Complainant in the future to make sure any harassing behavior has not continued.
- Document! Document! Document! Document your receipt, investigation, and resolution of any complaints received! (It is easier to document at each point in the process, instead of waiting until the end.)