



ZASHIN & RICH



# Workplace Standards & Supervisor Responsibilities County Engineers 'Association of Ohio

Jonathan J. Downes

17 South High Street, Suite 900

Columbus, Ohio 43215

614-565-2075    [www.zrlaw.com](http://www.zrlaw.com)

# Jonathan J. Downes

- More than thirty years of experience and expertise in representing public and private employers in labor and employment law and human resource management.
- Negotiated over 500 labor contracts.
- Represents employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
- Ohio State Bar Ass'n. Certified Specialist in Labor and Employment Law
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio "Super Lawyer".



# Agenda

- Discrimination and Harassment
- Protected Categories - Employment Discrimination Laws
- What Constitutes Unlawful Sexual Harassment
- Complaint Procedure
- Supervisor Conduct and Liability
- Avoiding Discrimination in Interviewing and Selection
- Lawfully Investigating and Documenting Discipline



# Discrimination v. Harassment

## **Unlawful Discrimination**

**Occurs when compensation, terms, conditions, or privileges of employment are negatively impacted due to membership in a protected class.**

**V.**

## **Unlawful Harassment**

**Occurs when abusive and harassing behavior is directed at individual due to membership in a protected class and which adversely affects terms, conditions or privileges of employment.**



# Categories of Discrimination & Harassment

- **Age**
- **Sex/Gender**
  - Gender Identity?
  - Sexual Preference?
  - Pregnancy?
- **Race/Color**
- **National-  
origin/Citizenship**



- **Religious**
- **Disability**
- **Genetic Information**
- **Military Status**



# Discrimination in Employment

## Required Elements of Claim:

- They belong to a protected class.
- They performed their job satisfactorily (“qualified”).
- They suffered an adverse employment action.
- They were treated less favorably than similarly-situated employees outside of that protected class.



# National Origin

## National Origin

- Discrimination or harassment due to a person's place of birth, ancestry, culture or linguistic characteristics common to a specific ethnic group.
- Harassing conduct might include slurs or jokes about a particular ethnic group, comments or questions about a person's cultural habits, or physical acts of particular significance to a certain ethnic group.



# Age Discrimination

**It is unlawful to harass a person because of his or her age - employees who are at least 40 years old and older.**

Harassment can include, for example,

- Biased comments – offensive remarks about a person's age
- Comparisons
- Disparate discipline
- Promotions
- Favoritism
- Hiring younger employees
- Suddenly stupid
- Harassment





# The Harassment Policy

- The policy prohibits discrimination and harassment against employees based on race, color, religion, sex, national origin, disability, age, military status, veteran status, or any other category protected by law.
- The policy provides equal employment opportunity and non-discrimination in hiring, promotion, demotion, transfer, recruitment, discipline, layoff, termination, rate of compensation, and training.



# What Constitutes Unlawful Sexual Harassment?



# Sexual Harassment Myths

- Harasser must be opposite sex of victim
- Same-sex harasser must be homosexual
- Claim involves sexual attraction
- It is not sexual harassment if both sexes are treated the same.



# Sexual Harassment Elements

## *Sexual Harassment elements are:*

- Behavior or comment(s) of a sexual nature which is unwelcome, personally offensive, or interferes with work performance.
- Verbal or physical conduct.
- Sexual advances or harassment which adversely affects an employee's terms or conditions of employment, either directly or indirectly.
- Conduct that has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.



# Sexual Harassment Laws

Sexual harassment occurs when an individual is subjected to harassment “because of sex,” (e.g., the individual was subjected to adverse terms and conditions of employment that members of opposite sex were not subjected to).

It is not sexual harassment if both sexes are treated the same but the conduct may violate standards of conduct.

In determining whether harassment occurred “because of sex,” courts will examine the “totality of the circumstances,” including non-sexual conduct.”



# Sexual Harassment Laws

## Examples of Adverse Terms and Conditions

- Teasing or roughhousing between members of same sex is typically insufficient to state a claim for same sex sexual harassment. Conduct must be “because of sex.”
- “Boorish” behavior by itself generally not harassment.



# What is and is not Sexual Harassment

## What is Sexual Harassment?

In determining whether harassment occurred "because of sex," courts will examine the "totality of the circumstances," including non-sexual conduct. Harassment is behavior that is not welcome, that is personally offensive, that debilitates morale, and that, therefore, interferes with work effectiveness.

## What is not sexual harassment?

Sexual harassment does not refer to occasional compliments of a socially acceptable nature.



# What is Illegal Harassment?

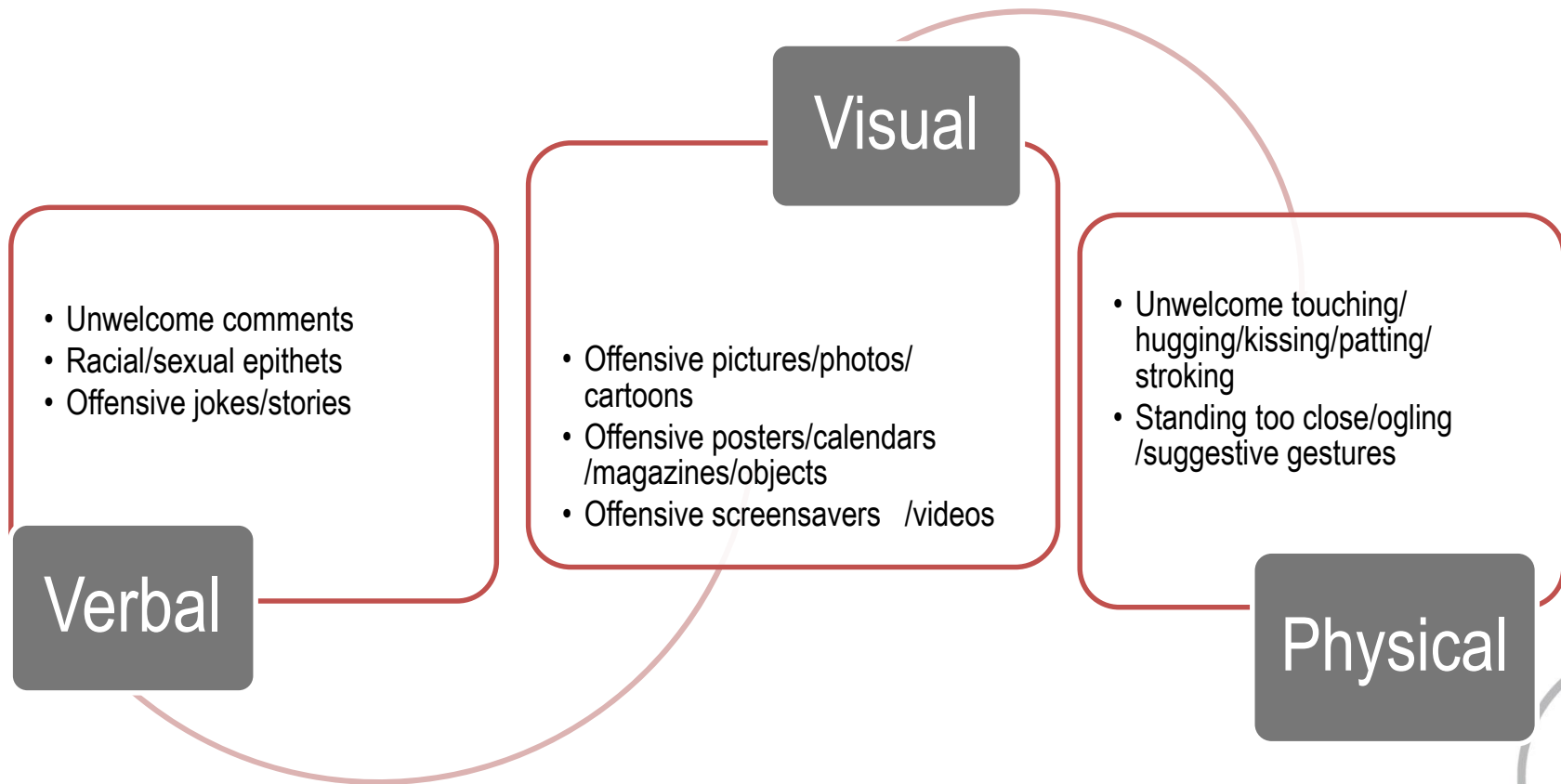
**All** of these factors must exist for **illegal** harassment to be proven:

- Unwelcome conduct “because of” the victim’s membership in a protected class
- Conduct is serious enough to create a legally “hostile working environment” (both from the victim’s perspective *and* the perspective of a reasonable person)
- A valid legal basis to hold the employer responsible for the conduct (usually depends on who the harasser is)
- No valid defenses (such as an unreasonable failure of the victim to complain about the conduct)





# What is “Unwelcome” Harassment?



# Sexual Harassment Hostile Environment

- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, **harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).**



# Hostile Environment

“Hostile Environment” harassment is offensive, sexually-related conduct that interferes with the employee’s work performance or creates an intimidating working environment.

- It must be “**severe and pervasive.**”
- Isolated incidents are typically insufficient to sustain hostile environment claims.
- “**Totality of the circumstances**” will be examined to determine whether conduct is “severe and pervasive.”



# WELCOMENESS

## Factors to Consider:

- Whether the complaining employee solicited or incited the behavior.
- Whether the conduct was regarded as undesirable or offensive.
- Whether the complaining employee told the harasser to stop.
- Whether the complaining employee instigated the behavior.



# Dealing With an Hostile Environment

The first step an employee needs to take if he or she is experiencing a hostile work environment is to ask the offending employee to stop their behavior or communication.

If an employee finds this difficult to do alone, it is encouraged to solicit help from a supervisor or HR

An employee who experiences a hostile work environment, and has attempted to make the behavior stop without success, should seek help from his or her supervisor or HR.



# Complaint Procedure

**Employees who feel that they have been the subject of harassment, discrimination or bullying should:**

1. Talk directly to the person displaying the unwelcome behavior, if this is not an option, report the incident to their supervisor or to your supervisor.
2. Document the situation in writing; include specific information such as the date and time that the incident(s) occurred, location of the incident(s), content of the harassment or bullying, steps you have taken to address the problem and witnesses.



# Complaint Procedure

## Common reasons why people don't complain?

- fear of work-related retaliation
- distrust of the hierarchy
- not wanting to be seen as a troublemaker
- no trusted complaint-handling procedures
- low self-esteem
- guilt that they encouraged the behavior
- not trusting their own judgment
- social conditioning
- harassment is a part of the workplace culture



# Supervisor Conduct & Liability

**CO-WORKER:** Employer knew or should have known about the discrimination/harassment.

**SUPERVISOR:**

Higher Standard of Conduct Martinez v Cracker Barrel 2013 WL 115587

**DEFENSE:** Must establish, by a preponderance of the evidence:

- That employer exercised reasonable care to prevent and correct any sexually harassing behavior; and/or
- That the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.





# Supervisor Responsibilities

- **Know Discrimination & Harassment Policy**
- **Know Standard of Conduct Policy**
- **Distribute Policy**
- **Educate on Policy**
- **Enforce Policy**
- **Test Employee Understanding**
- **Investigate**
- **Document**
- **Observe Rights**



# Navigating Employment Law



**LAWFULLY  
INVESTIGATING  
AND DOCUMENTING  
DISCIPLINE**



# GOAL OF EMPLOYEE DISCIPLINE

Improve employee  
performance



Should be progressive in  
nature when possible

Make sure that the punishment fits  
the crime consistent with policy and  
past practices



The worst thing supervisors  
can do?



# STANDARDS FOR DISCIPLINE

**At Will  
or  
Just Cause**



# BASIS FOR DISCIPLINE

## Under O.R.C. 124.34

- Incompetency/Inefficiency
- Neglect of Duty
- Insubordination
- Dishonesty
- Misfeasance/Malfeasance/Nonfeasance
- Failure of Good Behavior



# BASIS FOR DISCIPLINE

## OFF-DUTY CONDUCT AS A BASIS FOR DISCIPLINE



# DOCUMENTING THE INVESTIGATION

## Recommendations for Record-Keeping:

- Keep a list of individuals interviewed
- Retain records of all dates and times of interviews
- Keep detailed notes of all interviews
- Maintain relevant photographs
- Retain all documentation obtained during investigation;
- Maintain a separate investigation file
- Keep copies of the work rules and policies
- Any other records required by law



# POSSIBLE POST-TERMINATION ISSUES TO KEEP IN MIND

***EEOC/OCRC***

***DOL***

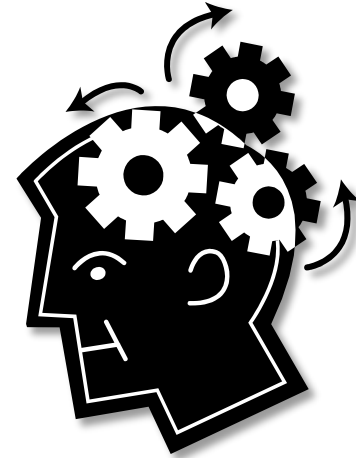
***Unemployment Compensation***

***Grievance/Arbitration***

***Civil Service Commission Appeal***

***Litigation***

***References***





# THANK YOU!

Questions concerning this presentation contact:

**Jonathan J. Downes**

Zashin & Rich

17 South High Street, Suite 900

Columbus, Ohio 43215

614-565-2075

[jjd@zrlaw.com](mailto:jjd@zrlaw.com)

