

Preventing and Confronting Workplace Sexual Harassment



ALASKA MENTAL HEALTH TRUST AUTHORITY

BOARD OF TRUSTEES

MAY 9, 2019

**Preventing and Confronting
Workplace Sexual
Harassment**



Alaska Mental Health Trust Authority
Board of Trustees
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1

Tim Parker
Training & Development Manager
Division of Personnel & Labor Relations
Alaska Department of Administration

907.375.7702
timothy.parker@alaska.gov

2

What is illegal sexual harassment?

- ▶ The federal U.S. EEOC defines **sexual harassment** as unwelcome verbal or physical conduct of a sexual nature:
 - ▶ When submission to such conduct is made a term or condition of employment;
 - ▶ When submission to or rejection of such conduct is used as a basis for employment decisions;
 - ▶ When such conduct unreasonably interferes with job performance or creates an intimidating, hostile, or offense work environment.

3




Quid Pro Quo - This for That

4

Hostile Workplace

Applies to **all** protected classes



5

Co-worker harassment:

- The State is liable if we knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Non-employees:


- The liability standard for non-employees is the same as for employees; Except consideration is given to the extent of the State's control over the non-employee.

Harassment by co-workers or non-employees

6

Sexual Harassment Test

- ✓ Sexual Nature
- ✓ Unwelcome or Offensive
- ✓ Severe or Pervasive
- ✓ Reasonable Person



7

Harassment is SIGNIFICANTLY under-reported

UPWARDS OF 85% OF PEOPLE NEVER FILE A FORMAL LEGAL COMPLAINT




APPROXIMATELY 70% OF EMPLOYEES NEVER FILE AN INTERNAL COMPLAINT



8

Why is it under-reported?

- Fear
- Humiliation
- Ostracism
- Damage to reputation or career
- Self-blame
- Don't want to be the cause of someone being disciplined
- Retaliation
- Shame
- Low or no organizational or manager trust
- Inaction
- Labeled a trouble-maker
- Labeled "crazy"



9

The business case

- **Direct costs:** legal representation, litigation, settlements, judgments, etc.
- **Indirect costs:** loss of public trust; decreased productivity; failure to meet mission; disengaged workforce and effects on clients/the public; increased turnover; low morale; absenteeism; increased health care and workers' compensation cost; lose great employees quit and great employees don't seek work with that employer, etc.

10

AO 81 – Statement of Policy

- Persons who knowingly engage in or instigate such harassment **will** be subject to disciplinary actions which may lead to suspension and discharge. Managers and supervisors who knowingly permit harassment activity to occur without further action **will** be subject to disciplinary action. Where such prohibited activity is perpetrated by a non-employee, the State will take available and appropriate disciplinary action which may include, by way of example, loss of contract.

11

What managers should NOT say:

- JUST IGNORE HIM.
- Just avoid Her.
- Do you want to file a formal complaint?
- Put it in writing.
- You misinterpreted him.
- He's going through a rough time.

Do NOT evaluate, mitigate, or speculate.

12


What should an employee do?

- Clearly communicate to the harasser - verbally, in writing, through a third party, or in some other way - that the conduct is unwelcome.
- The person affected by the conduct should promptly report it or file a complaint if the conduct continues after the perpetrator becomes aware it is unwelcome.

13

State Employee Complaint Options

- Department's internal process
- SOA Equal Employment Opportunity Program
- Alaska State Commission for Human Rights
- U.S. Equal Employment Opportunity Commission
- Office of the Ombudsman
- Court



14

Thank you

907.375.7702
timothy.parker@alaska.gov

15

Facts About Retaliation

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**. These three terms are described below.

Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and

- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

For more information about adverse actions, see [EEOC's Compliance Manual Section 8, Chapter II, Part D.](#)

Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

Protected Activity

Protected activity includes:

Opposition to a practice believed to be unlawful discrimination

Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding.

Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

For more information about Protected Activities, see EEOC's Compliance Manual, Section 8, Chapter II, Part B - Opposition and Part C - Participation.

Facts About Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

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

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual

advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Check the EEOC Website for Sexual Harassment statistics.

http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm

Facts About Sex-Based Discrimination

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex.

Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.

Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes.

Sex Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Sex Discrimination Harassment

It is unlawful to harass a person because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not 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).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Sex Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of sex, can be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business.

Check the EEOC Website for Sexual Harassment statistics.

<http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm>

Appendix

State of Alaska

Anti-Discrimination/Harassment Statement and Overview

The State of Alaska prohibits any form of discrimination, harassment, or retaliation in the workplace. Any employee of state government who violates the protections of federal and state laws and the Alaska Administrative Orders communicated in this statement will be subject to disciplinary action, up to and including dismissal.

Federal Employment Laws

- The Equal Pay Act of 1963 (EPA) protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination.
- Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination based on race, color, religion, sex, or national origin.
- The Age Discrimination in Employment Act of 1967, as amended, (ADEA) protects individuals who are 40 years of age or older.
- Section 794 of the Rehabilitation Act of 1973 makes it unlawful for recipients of federal financial assistance to discriminate in employment or provision of services based on handicap.
- Title I and V of the Americans with Disabilities Act of 1990 (ADA) and the ADA Amendments Act of 2008 prohibits employment discrimination against qualified individuals with disabilities in the private sector and in state and local governments.
- The Civil Rights Act of 1991 (CRA) amends the Civil Rights Act of 1964 to, among other things, strengthen and improve federal civil rights laws, provide for damages in some cases of intentional employment discrimination, and clarifies provisions regarding disparate impact actions.
- The Lilly Ledbetter Fair Pay Act of 2009 permits an individual to timely file under Title VII, ADEA, or ADA any discriminatory decision or practice affecting that individual's compensation.

State Employment Laws

- AS 18.80.220 – Unlawful Employment Practices

“(a) Except as provided in (c) of this section, it is unlawful for

(1) an employer to refuse employment to a person, or to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's race, religion, color, or national origin, or because of the person's age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood when the reasonable demands of the position do not require distinction on the basis of age, physical or mental disability, sex, marital status, changes in marital status, pregnancy, or parenthood;”

“(3) an employer ... to print or circulate or cause to be printed or circulated a statement, advertisement, or publication, or to use a form of application for employment or to make an inquiry in connection with prospective employment, that expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, age, race, creed, color, or national origin, or an intent to make the limitation, unless based upon a bona fide occupational qualification;”

“(4) an employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against a person because the person has opposed any practices forbidden under AS 18.80.200 - 18.80.280 or because the person has filed a complaint, testified, or assisted in a proceeding under this chapter;”

- AS 39.25.010 – State Personnel Act

“(a) It is the purpose of this chapter to establish a system of personnel administration based upon the merit principle and adapted to the requirements of the state to the end that persons best qualified to perform the functions of the state will be employed, and that an effective career service will be encouraged, developed and maintained.

(b) The merit principle of employment includes the following:

- (1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;
- (2) regular integrated salary programs based on the nature of the work performed;

(3) retention of employees with permanent status on the basis of the adequacy of their performance, reasonable efforts of temporary duration for correction in inadequate performance, and separation for cause;
(4) equal treatment of applicants and employees with regard only to consideration within the merit principles of employment; and
(5) selection and retention of an employee's position secure from political influences."

- AS 39.28 – Equal Employment Opportunity Program
 - AS 39.28.040 requires the state to establish an equal employment opportunity program, adopt an affirmative action plan for the executive branch of state government, and for the director of personnel to work with each agency for the purposes of enhancing equal employment opportunity.
 - AS 39.28.050 requires "each agency" within the executive branch to comply with the state's affirmative action plan and adopt and implement an affirmative action program. The director of personnel, upon determining that an agency has violated the affirmative action plan or its affirmative action program, may "(1) suspend the hiring authority of the agency; and (2) impose mandatory affirmative action measures on the agency to bring the agency into compliance."
 - AS 39.28.060 requires the division of personnel to accept complaints of employment discrimination in the executive branch of state government, an agency notify the division of personnel of complaints of discrimination, and for the division of personnel to maintain confidentiality of a complaint or investigation.
 - AS 39.28.070. "Retaliation prohibited. (a) An agency, officer, or state employee may not directly or indirectly refuse to hire, transfer, or promote, or dismiss, demote, suspend, lay off, or otherwise discipline a person for filing a complaint with the division of personnel for a failure to comply with affirmative action or equal employment opportunity or for assisting the division of personnel in an investigation of a complaint. (b) A person who knowingly violates this section is liable for a civil penalty of not more than \$1,000."

Discriminatory Practices Prohibited

Under federal and state anti-discrimination laws it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Administrative Orders

- Administrative Order 75 – policy providing equal employment opportunity for executive branch employees and applicants for employment in all aspects of personnel management. AO 75 states, “To insure equal opportunity there shall be no unlawful discriminatory treatment concerning any individual or group because of race, religion, color, or national origin, age, physical handicap, sex, marital status, changes in marital status, pregnancy or parenthood.”
- Administrative Order 81 – policy and guidelines for the executive branch of state government on discriminatory harassment, i.e., sexual harassment. AO 81 provides the definition of harassment and sexual harassment and guidelines on how to implement the policy, e.g., the complaint process.

- Statement of Policy –

“1.1 The Executive Branch of the State of Alaska, as an employer, will not tolerate, condone or permit any kind of harassment of employees or applicants for employment on the basis of their sex, color, race, religion, national origin, age, handicap, marital status, changes in marital status, pregnancy or parenthood. Such harassment is in direct violation of Federal and State law and is

inconsistent with the State's policy on equal employment opportunity."

"1.2 Persons who knowingly engage in or instigate such harassment will be subject to disciplinary actions which may lead to suspension and discharge. Additionally, managers and supervisors who knowingly permit harassment activity to occur without further action will be [sic] subject to disciplinary action. Where such prohibited activity is perpetrated by a non-employee, the State will take available and appropriate disciplinary action which may include, by way of example, loss of contract."

- Guidelines for the Implementation of Policy –

"4.2 (d) Any form of retaliation, reprisal or adverse action taken against an employee for complaining about, reporting, or cooperating in the investigation of such harassment is prohibited and will be dealt with severely. Such disciplinary action may include suspension and dismissal."

- Administrative Order 129 – "...policy of the executive branch of state government for the provision of services to and employment of people with disabilities and establish the Americans with Disabilities Act compliance program for the executive branch of Alaska state government." The policy establishes the position of State ADA Coordinator and includes references and resources regarding technical guidance and assistance, training, complaint procedures, policy dissemination, and recordkeeping.

- Policy –

"A. No qualified individual with a disability shall be excluded, by reason of such disability, from participation in or be denied the benefits of the services, programs, or activities of a state agency, or be subjected to discrimination by any such agency."

B. No agency shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and any other term, condition, and privilege of employment.

C. Each agency shall operate each of its services, programs, and activities so that a service, program, or activity, when viewed in its

entirety, is readily accessible to and usable by individuals with disabilities.”

- Administrative Order 195 – diversity policy based on the findings of the Governor’s Commission on Tolerance to “... renew the state’s commitment to diversity in the state workplace free from discrimination and harassment.” It requires, for example, the implementation of an early intervention process for discrimination and harassment complaints, standard orientation for new hires, diversity training for all state employees, recruitment outreach, training for hiring managers, customer service training, and the implementation of a public complaint process for perceived discrimination in state service delivery.

- Declaration –

“... that it is the continued goal of the executive branch to eliminate discrimination and harassment in the contexts of the state as an employer and service provider; to assure timely response to discrimination and harassment complaints concerning state personnel or services; to prohibit and prevent discriminatory behavior in the state workplace based on race, sex, color, religion, physical or mental disability, sexual orientation, or economic status, to assure that all Alaskans have the opportunity to compete fairly for state jobs; and to assure that state personnel serve all Alaskans with respect.”

You are invited to contact the Equal Employment Opportunity (EEO) Program with any comments, questions, or complaints you may have concerning anti-discrimination or any other EEO matter.

Equal Employment Opportunity Program
Division of Personnel & Labor Relations
Department of Administration
State of Alaska
550 W. 7th Ave., Suite 1970
Anchorage, Alaska 99501
907.375.7700