

Creating an Effective Anti-Harassment Policy

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What is Harassment?

- Discrimination?
- Bullying?
- Intimidation?
- Violence?

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Equal Opportunity Laws

(Title VI, VII and IX; ADEA;
ADA/Rehabilitation Act; 42 U.S. Code
§1981, 1983, 1985)

- *Age
- *Religion
- *Disability
- *Race
- *National Origin
- *Sex (Pregnancy, LGBTQ)
- *STATE LAWS

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Discriminatory Harassment

Unwelcome attention based on group status:

1. Basis of Decision
2. Hostile Intimidating Offensive Environment

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EEO Discrimination Laws

42 U.S. Code §1983 (Public Sector—
Constitutional Rights & Equal Protection)

Safe Place Acts

Abusive Workplace Acts

Civil Suits

Assault Defamation
Privacy Negligent Supervision

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Duty of Care

- *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998)
- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

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Duty of Care

- Duty to health, welfare and safety of those in the environment (employees, students, clients, patients, citizens)
- Duty to have policies
- Duty to monitor
- Duty to listen
- Duty of equality
- Duty to act (and follow up)

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Duty to Have Policies

- One is not enough
- Interrelated but differing issues
- Different people with differing rights and responsibilities (faculty, staff, students, etc.)
- Must Coordinate Policies

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Elements of an Effective Policy

All policies cover the territory of addressing unwelcome harassing/abusive behaviors. All have similar elements.

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Cover all Participants in
the Environment

- Employee, student, patient, citizen, vendor, customer, etc.
- “Two-way street” prohibits unwelcome attention “toward” and protects “from” others.
- Give it out.

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Go Beyond a Policy
Buried in a Handbook

- Postings
- ID cards
- Call-in line

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This NO QUIT policy is my commitment to you that I will talk to every person that is seriously considering leaving [redacted]. You are our greatest asset. I value you as an employee and a member of the [redacted] family. Your success and happiness is important to me. If given the opportunity, I would like to fix any issue that may arise. If you are considering leaving [redacted] for any reason, please call me.

Name _____
District Manager _____
Cell # _____

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Introductory Statement

- Organization commitment (not “illegal” harassment or abusiveness)
- Cover all EEO areas (state and federal) OR bullying/abusive behaviors
- General scope of coverage (do not have to list every possible sort of behavior)
- Easy to understand

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Reporting Mechanisms

- Report to specific management (do not name direct supervisor in policy, but do train supervisors)
- More than one way and place to report (local and central)
- Ease of reporting (written, verbal, electronic, 800 number)

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Who **Can** Report?

- Person who is the subject
- Anyone who observes
- Parents, etc. (special duty of care for minors)
- Anonymous? (How specific and credible is the information?)

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Who Has a Duty to Report . . .
And What?

Can the policy require reporting?

- Every “picky” thing?
- Can we require people to report each other?
(labor laws and Constitution)
- Who has a special duty of care; to whom?
- Is there a threat or developing safety issue?

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Did You Know?
OR
Should You Have Known?

Davis as Next Friend of LaShonda D. v. Monroe County Bd. of Ed. (St. Ct. 1999)
(Special duty of care)

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Duty to Act

Knowledgeable managers and prompt responses win cases. *Speigner v. Shoal Creek Drummond Mine*

(Policies and training are the keys to solving problems and preventing liability.)

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Action Statement

- Prompt action
- Include “informal” action (strong threats of discharge for all infractions backfire)
- Do not promise confidentiality (but try to maintain it)
 - “Policy” vs. “Practice”
 - What is confidentiality?
- Do not include procedure

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Anti-Retaliation Statement

- Covers anyone involved (except the harasser)
- No threats regarding frivolous or false claims (these will destroy the policy and be seen as suspect by EEOC, OCR and other agencies)

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Elements

- Intro (reason)
- Scope of coverage
- Reporting
- Promise of prompt action
- No retaliation

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Cautions in Policy
and Procedures

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Do not Include Procedure
in the Policy

- Practically *guarantees* problems, ineffective process and legal liability for the organization
- Creates inflexibility
- Hampers investigation
- Can be legally enforced against you by all parties (creates a “contract” or a Procedural Due Process guarantee)

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Coordination with other
Policies and Contracts

- “No policy is an island”
- Seamless web of interconnection and must design to weave into the fabric
- Coordinate with other policies (HR, labor, student/client rights, electronic usage, etc.)
- No-win policies; enforcement of one violates others; everyone sues you!

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Do not have a Committee for either Reporting or Investigating

- Practically *guarantees* problems (“too many cooks”), ineffective process, and legal liability for the organization.
- Possible personal liability for committee members.

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Equality of Focus

You probably did it because you are male!
Sassaman v. Gamache (2nd Cir., 2009)

Equal Protection. Policies which stereotypically imply that some sort of person is the typical “victim,” and another type of person is the typical “perpetrator” foster illegal discrimination.

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Over-Reaching Policies

- What is “zero tolerance”?
- Proportionally is important.

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Overly Rigid Policy and Overreaction

University overreacted by firing chin-chucking professor for harassment.

Haegert v. U. of Evansville (Ind. Ct. App. 2011)

- Action did not fit harassment definition.
- "Stony silence" was not fair warning.

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Overzealous Policies Backfire

- Create liability
- Actually can harm victims of harassment
- Destroy effectiveness and use of the policy

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- The rules are for the people in the organization
- They should be able to fit the human situation

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BUT

- Be careful of always finding an exception, especially for those you like
 - Favoritism
 - Discrimination

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Constitutional Balances

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Freedom of Expression

First Amendment

- Rights to express unpopular beliefs
- “Chilling effect”

Rodriguez v. Maricopa County Community College (9th Cir., 2010)

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- The policy should focus on actions and behaviors NOT against ideas or beliefs.

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Protected Expressions Include:

- Political beliefs
- Matters of public concern
- Private behaviors (off the job content on social media) but relationship to the organization may allow employers to act on inappropriate off-work social media behavior. *Richerson v. Beckon* (9th Cir., 2009)

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Balance of legally or constitutionally protected speech of "public concern"

vs.

Harassment, bullying, personal vendettas, undermining the public trust

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Freedom of Religion

- First Amendment and Title VII accommodation requirements

Baptist professor subjected to harassment for unpopular beliefs. *Gadling-Cole v. West Chester Univ.* (E.D. Pa., 2012)

Employee discharged for questing policy. *Buonanno v. AT&T Broadband, LLC (D. Co., 2004)*

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ADA and Rehabilitation Act

- Accommodation of mental disabilities which cause offensive behaviors
- What is “reasonable”?

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National and State Labor Relations Acts

- Protection of concerted activity (whether you like it or not)
- “Heat, profanity and invective” are protected

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