

#nowwhat - How #metoo, Social Media, & #timesup Impacts You as a Supervisor

Presented by Melissa H. Cranford

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NBC fires Matt Lauer after allegations of sexual misconduct



TIME'S UP

TIME'S UP on silence.
TIME'S UP on waiting.
TIME'S UP on tolerating discrimination, harassment and abuse.

#TIMESUP



The New York Times

Movie Mogul Weinstein Paid Off Harassment Cases for Years

By JONEN KAGANOFF and MORGAN THOMPSON

An investigation by The New York Times found previously undisclosed allegations against the Hollywood producer Harvey Weinstein.

Over nearly three decades, Mr. Weinstein has reached at least eight settlements with women, The Times found.



Harvey Weinstein, whose films have helped define American culture, apologized for behavior that he said "has caused a lot of pain."

Harassment Accusations: Reaction and Roundup

Sexual Harassment In the News!

- A recent USA Today article noted that more than 100 high profile men have been accused of sexual harassment or inappropriate workplace conduct in the last year.
- In 2017, the EEOC accepted 6,696 charges of sex based discrimination where sexual harassment was alleged in the charge. Forty-Four percent resulted in findings of cause.
- Approximately 10 percent of sex discrimination charges originated in Texas.
- 16.5 percent of 2017 EEOC charges alleging sexual harassment were brought by men.
- The charges resulted in \$46.3 Million dollars of monetary benefits being paid to complainants – NOT INCLUDING LITIGATION RECOVERY.



Overview of Title VII



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Discrimination and Harassment

- Statutes seek to prohibit three types of workplace conduct:
 - Discrimination
 - Harassment
 - Retaliation

Who's covered by Title VII?

- **Title VII** of the Civil Rights Act of 1964 is a federal law which:
 - Prohibits employers from discriminating against employees on the basis of
 - Sex, race, color, national origin, and religion.
 - It generally applies to employers with 15 or more employees, including federal, state, and local governments.
 - DOJ may be initiating a change to substitute "sex" for "gender" discrimination in its materials.



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Recent Changes in Who is covered

- In 2017, the Justice Department under the Trump administration reversed its position and now asserts that gender identity is not covered by Title VII.
- The 1st, 2nd, 6th, 7th, 9th and 11th Circuits have disagreed with the Trump Administration and held that ***gender identity, including transgender identity, is covered by Title VII.***
- ***Same-sex harassment is also covered***, per the U.S. Supreme Court in *Oncale v. Sundowner Offshore Servs.* (1998).



*Oncale v. Sundowner
Offshore Servs. (1998).*

Discrimination

generally unlawful to refuse to hire, to fire, or to treat differently in compensation or work conditions based upon a protected classification

- Race, color, national origin, gender, disability, age, religion, etc.

- Disparate treatment vs. disparate impact

- Defense: legitimate non-discriminatory business reasons.

Harassment

Harassment is prohibited conduct distinct from hiring and firing decisions.

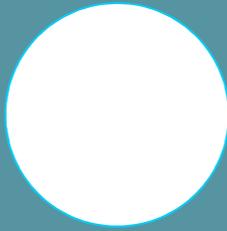
Two Types of Harassment:

- Quid quo pro sexual harassment:

An advantage promised or given in return for providing or agreeing to a sexual demand.

- Hostile Work Environment:

Must be based on a protected characteristic and conduct must be **severe and pervasive** to a reasonable person. (Stand alone incidents cannot create a hostile work environment.)



Sexual Harassment



"I know you don't date guys from work. So I could fire you Friday afternoon and hire you back Monday morning."

Quid Pro Quo Harassment

Occurs where an employee's advancement, conditions of employment or continued employment **are conditioned** upon the exchange of sexual conduct.

To establish Quid Pro Quo Harassment, an employee must show a '**tangible employment action**' resulted from the acceptance or rejections of the alleged harassment. *LaDay v. Catalyst Tech, Inc.*, 302 F.3d 474 (5th Cir. 2002).

Tangible employment actions include termination, failing to promote, reassignment, or a decision causing a change in benefits. *Burlington Indus, Inc. v. Ellerth*, 524 U.S. 742 (1998).

- An employee must prove:
 - The employee belonged to a protected class;
 - The employee was subject to unwelcome sexual harassment;
 - The harassment was based on sex;
 - The harassment affected a term, condition or privilege;
 - The employer knew or should have known of the harassment and failed to take adequate remedial action.

Quid Pro Quo Harassment

Hostile Work Environment



What we wish construction workers
would really say:



- a. You look really intelligent!
- b. You chose some great color combinations!
- c. You look like an important person!
- d. They're going to promote you today!
- e. You don't look old!
- f. We're idiots and apologize for man's insensitivity to woman.

DONNELLY

What is a Hostile Work Environment?

- Environment must be both **subjectively** and **objectively** offensive;
- A **reasonable person** would find the environment hostile or abusive and at least one that the victim perceived to be hostile;
- The level of hostility or abuse must be **severe** and **pervasive**
 - Physically threatening
 - Humiliating
 - Mere offensive utterance
- The Conduct **unreasonably interferes** with an employee's work performance.

C. 2000e-2(a)(1)



What's an Adverse Employment Action?

An Adverse employment action is defined as "ultimate employment decisions" and includes limited actionable retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting, and compensating." *Jones v. Pate Rehabilitation Endeavors, Inc.* WL 3364995 (N.D. Tex. 2016) (quoting *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)).

In evaluating whether actions are materially adverse, the Court went on to hold that "petty slights, minor annoyances, and simple lack of good manners will not" deter or dissuade a reasonable employee from making or supporting a charge of discrimination, and, therefore, they do not constitute conduct that is "materially adverse." *Id.* at 68.

Hostile Work Environment

Severe or Pervasive

- *Tolliver v. YRC, Inc.*, LEXIS 17806 (5th Cir. 2018) (unpublished)
 - One incident in which unknown persons left a noose at the workplace, and another incident involving racist graffiti on a company truck were not sufficiently severe or pervasive to create a hostile work environment for purposes of a racial harassment claim.
 - Employer was NOT liable for these incidents because it took “**prompt remedial action**”, including an offer of \$25,000 for information leading to the identification of the perpetrators, interviewing hundreds of employees, reporting the incidents to law enforcement, hiring more security guards and providing weekly reminders on the company’s antidiscrimination policies. No employees were disciplined, however.



Hostile Work Environment

- A plaintiff can prove sex-based discrimination in ***same-sex harassment*** cases under the Texas Commission on Human Rights Act (TCHRA) by offering direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace; this method allows a same-sex harassment plaintiff to demonstrate ***gender motivation based on either sex-neutral conduct or conduct with sexual connotations***. Tex. Labor Code Ann. § 21.051.

Alamo Heights Indep. Sch. Dist. v. Clark, 544 S.W.3d 755 (Tex. 2018)



Examples of Harassing Conduct

Conduct interferes with career advancement.

Conduct which interferes with workplace attendance.

Conduct with results in the employee seeking healthcare from associated stress or mental distress.

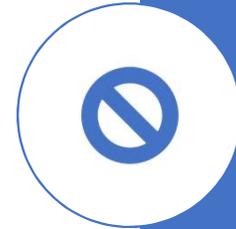
Examples of harassing conduct

These behaviors have been determined by various courts to have constituted illegal harassing conduct:

- Comments about clothing, personal behavior or a person's body;
- Sexual or sex-based jokes and use of sexual innuendos;
- Requesting sexual favors;
- Repeatedly asking a person out despite multiple rejections;
- Spreading rumors about a person's personal life or sexual conduct;
- Threatening a person;
- Sending emails or text messages of a sexual nature.

Physical Conduct as harassment

- Sexual assault;
- Impeding or blocking movement with the intent to harass;
- Inappropriate touching of a person or person's clothing;
- Kissing, hugging, patting or stroking.



Non-verbal conduct as harassment

- Looking up and down a person's body;
- Derogatory or obscene gestures;
- Facial expressions of a sexual nature;
- Following a person



Environmental Harassment

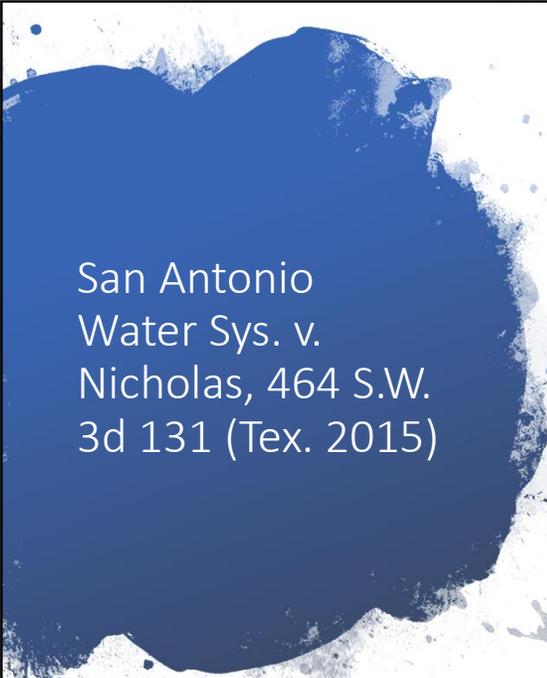
- These examples of have held to be harassing conduct sufficient to create a “hostile work environment.”
 - Posters
 - Drawings
 - Pictures
 - Screensavers
 - Emails and texts of a sexual nature



What's not a Hostile Work Environment?

- A Hostile Work Environment is not always created by an unpleasant workplace.
 - Requires more than a supervisor or co-worker “*being a jerk*”
 - Teasing
 - Offhand Comments
 - Isolated incidents

Severity is more important than pervasiveness in a sexual harassment claim.



San Antonio
Water Sys. v.
Nicholas, 464 S.W.
3d 131 (Tex. 2015)

- Debra Nicholas was employed by the San Antonio water system.
- Employee claims she was terminated because she confronted a male vice-president about his invitations to lunch for two different subordinates of the male employee.
- The Court held that a reasonable employee would not have believed the male employee's actions of issuing two single invitations was illegal harassment.
- Employee's claim was dismissed because her activity was not deemed protected.



Retaliation

Retaliation

Retaliation – when an employer takes an **adverse action** against a **covered individual** because he or she **engaged in a protected activity**.

- **Covered Individual** - 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.
- **Protected activity includes:** complaining about alleged discrimination; threatening to file a charge of discrimination; expressing opposition to an employment practice believed to be unlawful by the employee; refusing to undertake an act believed to be illegal by the employee

Guadalajara v. Honeywell International, Inc. (W.D. Texas; El Paso Division 2016)

Warehouse worker (male) brought claim of harassment by co-worker of the same gender, alleging he was the victim of daily sexually oriented remarks, questions about his sexual orientation and eventually that his co-worker offensively touched him

A complaint was made to HR and the co-worker (who was also an employee of a staffing agency), claimed the contact was accidental.

Subsequent to providing his statement to HR, Plaintiff told the co-worker that he'd defend himself if the co-worker touched him again.

Plaintiff was placed on administrative leave for making a threat of violence and terminated.

Guadalajara v.
Honeywell
International,
Inc. (W.D.
Texas; El Paso
Division 2016)

- Court determined there was evidence that the Co-Worker's actions were sexual advances toward Plaintiff.
- Court also noted that **"harassing conduct need not be motivated by sexual desire"** to support a claim of discrimination.
- Court determined that allegation of offensive touching or penetration between Plaintiff's buttocks was sufficient to show **a fact issue** regarding whether the conduct was **"severe and pervasive."**
- **Defendant raised defense that it took prompt remedial action by conducting an investigation and asked the court to dismiss on this basis.**

Guadalajara v.
Honeywell
International,
Inc. (W.D.
Texas; El Paso
Division 2016)

- Defendant relied upon its **investigation** to show it took "prompt, remedial action" to address Plaintiff's complaint.
 - Co-worker/witnesses were interviewed
 - Obtained statements from Plaintiff and the Co-worker alleged to be the harasser.
 - Viewed security tape footage of the incident.
- But Employer allowed **Plaintiff and Co-worker to continue working together for another week** before placing Plaintiff on leave.
- Court **denied** Employer's defense of "prompt remedial action."

Guadalajara v.
Honeywell
International,
Inc. (W.D.
Texas; El Paso
Division 2016)

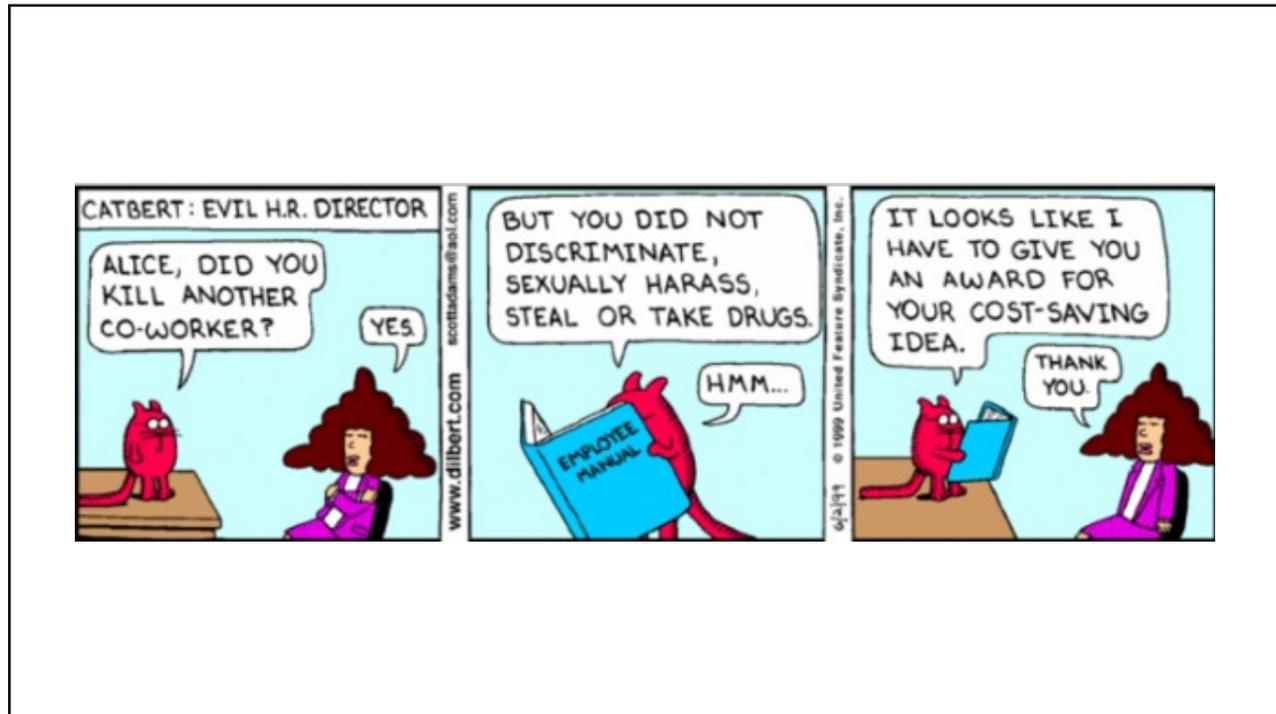
Court also allowed Plaintiff to continue with his **retaliation complaint** after Defendant could not articulate a solid reason for Plaintiff's termination, considering the workplace violence threat was in the context of a complaint of assault.

Court examined the **proximity** between the Plaintiff's complaint and his termination to allow the claim to survive.

Protected
Activity



- Opposing Sexual Harassment;
 - Requires employee have a good-faith, reasonable belief that the underlying conduct was illegal harassment.
 - Subjective belief that conduct was illegal is insufficient.
- Participating in or supporting an investigation into a complaint;
- A "causal link" exists between the activity and the adverse action.



Other Potential Claims

Third Party Harassment

- Employers must provide a safe and harassment free environment
- Third party harassment complaints may concern:
 - Vendors
 - Customers/citizens
 - Elected officials
 - Contractors
- Standard to investigate and act:
 - Employer **knew or should have known** about the offending behavior and failed to take action to stop the behavior or protect the employee.

Other potential claims

Third Party Harassment

- *Example: Summa v. Hofstra University*, 2013 WL 627710 (2nd Cir. Feb. 21, 2013).
- Part-time football manager brought hostile environment claim against university, alleging:
 - While traveling with the team, she was subjected to constant comments about having sex with her boyfriend and with other players.
 - Team members even made a Facebook page about Summa and her boyfriend suggesting, among other things, that her weight fluctuated due to “excessive sexual activities.”
 - On a bus trip on the last day of the football season, the assistant coach played a movie with numerous explicit sex scenes, causing the players to jeer at Summa and make sexual comments and propositions to her. After a particularly egregious sexual comment made Summa cry, she asked the assistant coach to turn the movie off, which he promptly did.

Other Potential Claims

Third party harassment

- Court applied 29 C.F.R. § 1604.11(e):

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

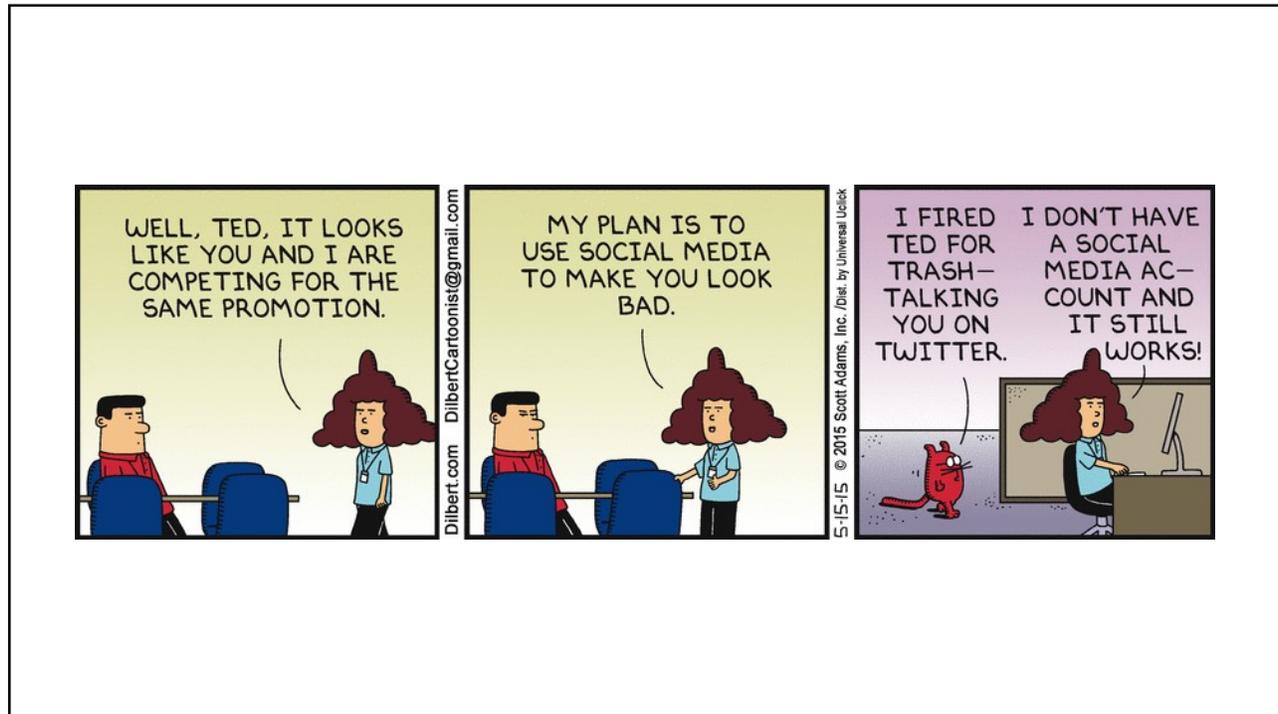


What's NOT Harassment:

- Dating Co-workers
 - Have clear policies about dating in the workplace, especially in a supervisory position.
 - Train managers to help identify harassment complaints.
 - React if an employee complains the relationship is not consensual or has become harassing.
- Friendly remarks and collegial jokes to build team unity:
 - Co-workers should refrain from remarks which could diminish an employee's standing in the workplace.
 - Be mindful of comments which address an employee's physical characteristics or appearance.



Social Media in the Workplace



The SHRM Survey

- The Society for Human Resource Management (SHRM) recently released the findings of a social media survey they conducted.
- When asked if any groups or individuals in an organization currently engage in social media activities to reach external audiences, 68% of people surveyed replied with “yes”.
- Some other interesting findings from the survey include:
 - 31% of companies track employee use of social media services.
 - 43% block access to social media platforms on company computers and handheld devices.
 - The three most likely groups in an organization to use social media are marketing (67%), HR (44%) and public relations (38%).
 - Only 27% of companies provide social media training to employees who engage in social media activities on behalf of the company.

Similarly, online harassment has proven to be a significant problem, with 40% of Internet users being victims of varying degrees of online harassment as of a 2014 Pew Research study.

Social Media in the workplace

- Creates a record of interactions, timelines and other evidence which can form the basis of a complaint or contribute to an investigation.
- Examples of conduct which has been found to create a hostile work environment:
 - Setting up a social media page to shame or ridicule a colleague.
 - Posting inappropriate photos, memes or messages in reference to a co-worker.
 - Sending uninvited and repeated requests to connect via social media.

Social Media and Harassment

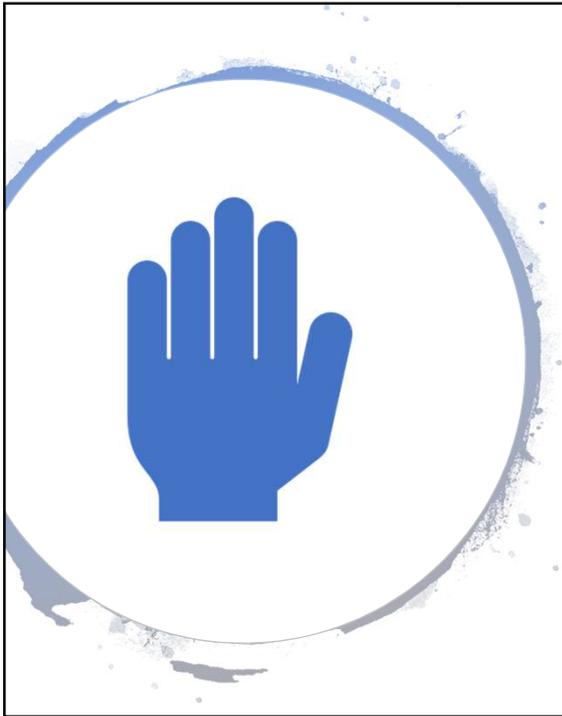
Blakey v. Continental 751 A.2d 538 (N.J. 2000):

Airline attendant was subjected to harassing remarks via a company bulletin board.

Company claimed the bulletin board was not “in the workplace”.

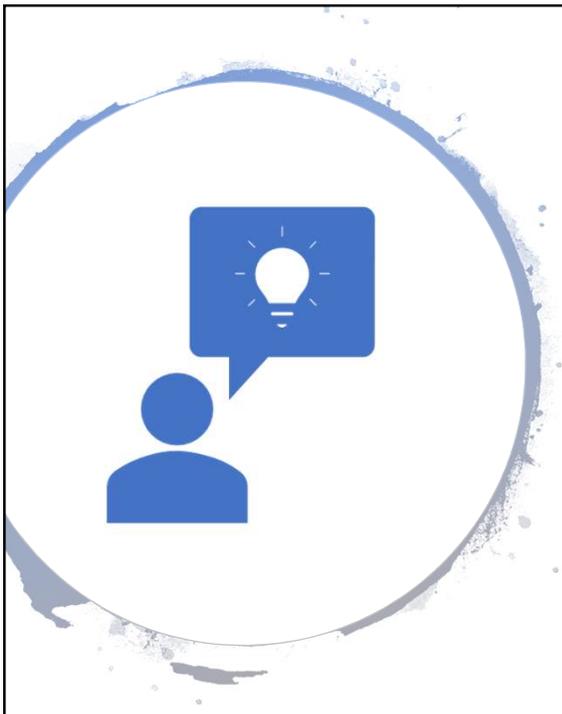
Court held the employer liable for the conduct saying it created “hostility within the four walls of the workplace.”

Internet sites compared to “employee lounge”



Social Media and Harassment

- How should an employer prevent or address the use of social media in the workplace as it relates to sexual harassment claims?
- Have a clear policy regarding employee on duty and off duty conduct.
- Other policy "to dos."
 - Determine who is authorized to post on the organization's social media page and who and how comments or other material may be preserved or deleted.
 - Address the use of intellectual property, i.e., trademarks, logos and the use and display of those items by employees on the employee's personal social media.
 - Treat social media platforms as the medium and not the message itself. Conduct which would violate an organization's policy should be treated uniformly.



Social Media and First Amendment

- Governmental employers must be mindful of FIRST AMENDMENT considerations when using social media as the basis for employee discipline.
 - Public Employees have the **right to comment upon matters of public concern.**
 - Workplace complaints regarding the ordinary business of the organization are not considered protected speech.
 - Harassing speech or speech which appears to violate an organization's policies should be **reviewed on a case-by-case basis** with legal counsel to determine if First Amendment concerns are present.
 - Private employers are subject to the standards expressed under Section 7 of the NLRA which allows employees to organize and express disagreement with terms and conditions of employment.

Social Media and First Amendment

Sims v. City of Madisonville, (5th Cir., July 2, 2018)
that a **nonfinal decisionmaker** can be liable for a retaliatory discharge against an employee in violation of the First Amendment.

As numerous courts of appeals have recognized, individual liability for a government official who violates constitutional rights, including First Amendment ones, turns on traditional tort principles of "but-for" causation. If an individual defendant's animus against a coworker's exercise of First Amendment rights is a link in the causal chain that leads to a plaintiff's firing, the individual may be liable even if she is not the final decisionmaker.

Electronic Communication Laws

- An employer is permitted to monitor work-related use of electronically generated communications when the monitoring serves a legitimate business interest. Employers should be aware of privacy concerns when they monitor employees' electronic communications. BUT REMEMBER:
- – The Wiretap Act: Permits an employer to intercept electronic communications where there is a legitimate business reason for the interception. An employee's failure to restrict privacy settings will likely lead to legitimate viewing of his or her social media profile.
- – Stored Communications Act: Congress passed the SCA to prevent communication providers from divulging private communications to certain entities and individuals. How does this affect employers?

Electronic Communication Laws

- *Pietrylo v. Hillstone Restaurant Group* (D.N.J. 2009):
- Employer found liable under the SCA for coercing an employee to give it the password to a private MySpace page used by employees to complain about work conditions and then firing the page's creator.
- Employers could violate either the **Wiretap Act** or the **Stored Communications Act** by accessing private information.
- Employment relationship doesn't negate **employee's First Amendment rights**. Use caution when monitoring employees' use of government-owned computers.

Social Media- Other considerations

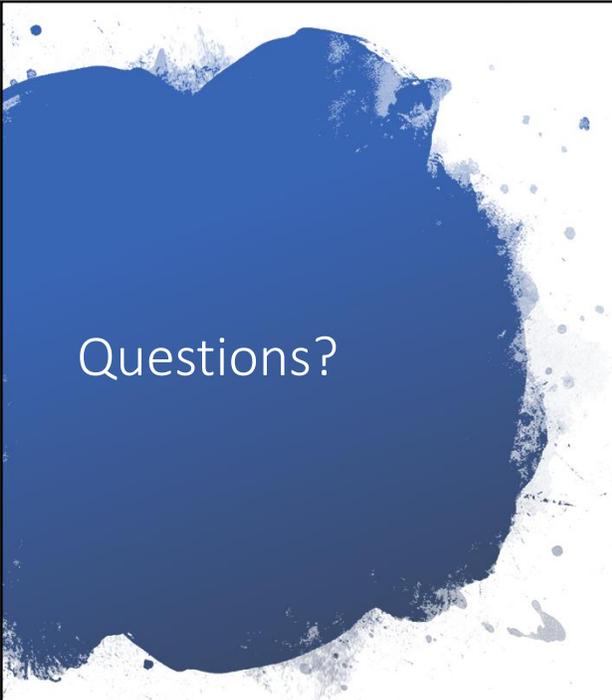
Sites may allow potential employers to **discover "protected" information** (e.g., age, marital status, familial status, sexual orientation, religious affiliation, political views, etc.)

- If you choose to examine external social networks, **have non-decision maker conduct search and filter out** information related to protected characteristics before passing along to hiring manager
- Have searches run by employer and not third party to avoid potential issues under the Fair Credit Reporting Act or state-specific statutes
- Carefully consider criteria in determining how and when to use online social networking sites in evaluating applicants

A blue icon depicting three stylized human figures (two in the back, one in the front) inside a white circle, which is set against a larger blue circular background with a watercolor-like texture.

Social Media in the Workplace

- [*Jones v. Gulf Coast Health Care of Del., LLC*](#), No. 16-11142, slip op. (11th Cir., Apr. 19, 2017). The defendant employer terminated the plaintiff employee after he took FMLA leave, citing vacation photographs posted to social media by the plaintiff during their leave period.

A large, dark blue watercolor splash graphic on the left side of the slide, with the word 'Questions?' written in white text over it.

Questions?

Thank you!

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