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# LEGAL DEFENSE FUND SEMINAR

Wednesday, December 5, 2018



PERSONAL INJURY / GOVERNMENT SERVICES / EMPLOYMENT AND LABOR / BUSINESS LAW / COMMERCIAL LITIGATION / ENVIRONMENTAL LAW / WORKERS' COMPENSATION / LAND USE AND ZONING / TRUSTS, ESTATES AND WILLS

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# HARASSMENT

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**In The Workplace  
Is Illegal.**

# State and Federal Law Prohibit Harassment Based on Protected Characteristics

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- Federal Title VII of the Civil Rights Act of 1964 (“Title VII”)
- The Americans with Disabilities Act (“ADA”)
- The Age Discrimination in Employment Act (“ADEA”)
- NJ Law Against Discrimination
  - More expansive
- New Jersey employers must comply with both

# To Whom Does it Apply?

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- Title VII applies to employers with 15 or more employees (including local, state and federal government), employment agencies, and labor organizations.
- NJLAD applies to employers in NJ with one or more employees.

# Protected Categories

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- Race
- creed
- color
- national origin
- nationality
- ancestry
- age
- sex
- pregnancy
- familial status
- marital status
- domestic partnership or civil union status
- affectional or sexual orientation
- gender identity or expression
- atypical hereditary cellular or blood trait
- genetic information,
- liability for military service,
- and mental or physical disability,
- perceived disability, and AIDS and HIV status
- breastfeeding

# Employment Discrimination

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- Prohibits discrimination based on protected traits
- In compensation, terms, conditions, or privileges of employment.

# Discriminatory Conduct

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- Must affect a term or condition of employment;
- Must create an unreasonable interference with individual's work performance;
- Must create an intimidating, hostile, or offensive work environment.



# Terms or Conditions of Employment

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- Hiring/firing
- Discipline
- Hours
- Workspace
- Quality/desirability of assignments
- Benefits
- Prestige

# Hostile Work Environment

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- Conduct is harassing or unwelcome;
- Conduct is based on a protected trait;  
and
- Conduct is severe OR pervasive.

# Unlawful Harassment

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- Slurs
- Threats
- Derogatory Comments
- Unwelcome Jokes
- Teasing
- Touching
- Abusing
- Other kinds of unwelcome verbal or physical comments based on protected class

# ALPHABET SOUP

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## NJLAD

Division of Civil Rights (DCR) enforces

## FEDERAL CLAIMS

ADA

ADEA

Equal Employment Opportunity Commission (EEOC)  
enforces

# Anatomy of Harassment Claims:

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- It is illegal to subject an employee to harassment based on a protected characteristic

# Two types of harassment claims

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1. “Quid pro quo”:
  - Employee required to submit to sexual conduct as a term/condition of his/her job, or submission to sexual conduct is used in making employment decisions.
  - The sexual conduct must be unwelcome.

# Two types of harassment claims

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## 2. Hostile Work Environment:

- Can involve any protected characteristic

# Hostile Work Environment Claim

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1. Harassing conduct occurred because of the employee's protected characteristic;
2. The harassing conduct was severe **or** pervasive;
3. The harassing conduct was to such a degree that a reasonable person having the protected characteristic;



# Hostile Work Environment Claim (cont.)

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4. Would think that the terms and conditions of employment have been altered.

- Interferes with work performance;
- Creates hostile, intimidating, or offensive workplace.

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# **Sexual harassment is a sub-set of illegal harassment**

# What is Sexual Harassment?

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*Unwelcome verbal, visual, or physical conduct of a sexual nature that is severe or pervasive and affects working conditions or creates a hostile work environment.*



# Sexual Harassment Is Against the Law

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- It is a form of sex discrimination
  - Title VII of the Civil Rights Act of 1964
  - New Jersey Law Against Discrimination
- Retaliation is also against the law
  - Making complaints
  - Participating in investigation

# Factors of Hostile Work Environment

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- Nature of conduct (verbal, physical)
- Frequency
- Hostility or offensiveness
- Perpetuated by coworker or supervisor
- Other people joined-in
- Conduct directed at individual or group

# Who Can be a Victim?

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- Anyone affected by the offensive conduct
- Does not have to be of the opposite sex
- Economic injury to or discharge of the victim is not necessary to cause liability

# Who Can Commit Harassment?

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- Victim's **supervisor**
- Supervisor in another area
- Co-worker
- Non-employee (customer, vendor)
- Man or Woman
- Same sex as employee



# Employer Responsibilities

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Prevent and stop harassment of employees:

1. Reasonable care to prevent harassment
2. Reasonable care to promptly correct harassment

***However first, employer must be aware harassment has occurred.***



# Legal Liability

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- Both the harasser and the Company may be liable for illegal harassment of any kind.
- Civil Liability
- Criminal Liability (assault)

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- There should be a **Zero Tolerance Policy** that bans all sexually oriented jokes, comments and behavior.

# Complaint Policy

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## In Handbook

- Reporting hierarchy
- Alternates to report to
- Form for complaints
- Employee sign off

# Employee's Failure to Complain May Be Reasonable If:

- Reasonable fear of retaliation
- Unnecessary obstacles to making a complaint
- Believed complaint procedure was ineffective

# Supervisors Must:

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- Take complaints seriously
- Encourage employees to put complaints in writing
- Document complaints received
- Act promptly to prevent and cease harassment



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***Harassment is not asking  
employees to do their jobs,  
according to their job  
descriptions and company  
standards.***

# Complaint Procedure

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- The name and contact information of individuals who will receive complaints;
- Prompt, good faith investigation, including interviews with:
  - complaining party
  - alleged harasser, and
  - independent witnesses;
- Confidentiality provision;
- Written report.

# Investigate When:

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- Potential for a complaint exists
- On receipt of complaint or report of discrimination or harassment
- Observe facts or hear statements that suggest discrimination or harassment is occurring.

\*Remember it's what an employer knows or *should* know\*



# Prohibition Against Retaliation

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- Any form of retaliation against individuals who in good faith report unwelcome conduct or who cooperate in an investigation **is illegal**

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# WORKPLACE BULLYING

## ON THE RISE

But it is NOT illegal

# Workplace Bullying

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- Workplace Bullying is behavior of individuals or groups that is persistent, aggressive or unreasonable; or mistreatment directed towards a co-worker or subordinate

# Bullies can be:

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- Bosses/Supervisors
- Co-Workers
- Subordinates
- Customer/Clients
- Third Parties
- Any Age
- Any Gender

# Workplace Bullying Trends

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- 65.6 million workers are affected by bullying at work

“Workplace bullying” defined as repeated mistreatment, abusive conduct that is threatening, humiliating, or intimidating, work sabotage, or verbal abuse.

(Based on 2014 Workplace Bullying Institute (WBI) Survey Results, [www.workplacebullying.org](http://www.workplacebullying.org))

# Workplace Bullying Trends

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- 20% have been bullied
- 7% are currently bullied
- 21% have witnessed bullying
- 23% aware of bullying
- 28% unaware of bullying

## Workplace Bullying Trends

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- 69% of bullies are men
- 31% female bullies
- Women bullied women 68% of the time
- Male on male targets 43%

# Workplace Bullying Trends

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- 56% of bullies are higher ranking
- 33% are coworkers
- 11% are subordinate

Bosses are still majority of bullies

(Based on 2014 Workplace Bullying Institute (WBI) Survey Results, [www.workplacebullying.org](http://www.workplacebullying.org))



# Workplace Bullying Tactics

## Might Include:

- Humiliation
- Sabotage
- Persistent singling out of one person
- Not allowing the person to speak or express him/herself (i.e., ignoring or interrupting)
- Threats or intimidation

# Examples

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- Public humiliation
- Constant criticism on matters unrelated or minimally related to the person's job performance or description
- Ignoring/interrupting an individual at meetings

# Examples

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- Repeatedly accusing someone of errors which cannot be documented
- Deliberately interfering with the person's work
- Spreading rumors and gossip regarding individuals

# Examples

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- Encouraging others to disregard a supervisor's instructions
- Refusing reasonable requests for leave
- Deliberately excluding an individual or isolating them from work-related activities

# Bullying in Cyberspace

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- Hostile, aggressive, demanding, threatening, or humiliating e-mails
- Social media posts or comments
- Text messaging

# Why is Workplace Bullying a Problem?

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- Hostile workplaces often lead to less productive employees
  - less successful companies
- Research suggests that incivility makes workers less engaged
  - less productive
  - less likely to stay at their jobs

# Estimating the costs of Bullying in the Workplace

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- Bullying in the workplace is often experienced by the best and brightest employees
- Factors to consider when calculating the cost of bullying:
  - Turnover
  - Lost Opportunity
  - Absenteeism & Presenteeism
  - Litigation & Settlements
  - Workers Compensation & Disability Claims

# 2017 WBI U.S. Workplace Bullying Survey

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- 19% of Americans are bullied, another 19% witness it
- 61% of Americans are aware of abusive conduct in the workplace
- 60 million Americans are affected by it
- 70% of perpetrators are men; 60% of targets are women
- Hispanics are the most frequently bullied race
- 61% of bullies are bosses, the majority (63%) operate alone
- 40% of bullied targets are believed to suffer adverse health effects
- 29% of targets remain silent about their experiences
- 71% of employer reactions are harmful to targets
- 60% of coworker reactions are harmful to targets
- To stop it, 65% of targets lose their original jobs
- 77% of Americans support enacting a new law
- 45% report worsening of work relationships, post-Trump election



# Why is Workplace Bullying a Problem

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- Targets experience stress related health problems
  - Anxiety
  - Panic attacks
  - Clinical depression
  - Post-traumatic stress disorder

# Who Do Bully's Target at Work

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- THREATS:
  - Those with superior technical skills
  - Popular employees
  - Those perceived as weak
  - Those of are not political
  - Those who are not “game players”

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## Watch out for:

- Complaints of screaming, tantrums, public humiliation, sabotage, and verbal abuse.
- A person who always takes credit for things others obviously contributed to
- A person who dominates meetings with sarcasm, interruptions, or insults.
- People who are afraid to speak up.

## Be on the look-out for potential bullies and targets

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### Watch out for:

- Signs of obvious tension between certain individuals or in certain groups.
- Example: Lynn consistently doodles, rolls her eyes, or squeaks chair when John talks... and only when John talks.

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# Workplace Bullying Is Not Illegal

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- Company policies and procedures may cover bullying.
  - Complaint should not be ignored.
  - Consistent follow up.

# If Choosing to Institute Workplace Bullying

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1. Establish purpose of **Policy**
  2. Define behavior to be covered by the policy (with possible examples)
  3. Intentional vs. “unintentional” bullying
  4. Consequences of breaking company policy
  5. Implement consistently

# Proposed Legislation in NJ

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- January 10, 2012 Senator Linda R. Greenstein introduced the “Healthy Workplace Act” in the New Jersey Senate
- Bill was referred to the Senate and Assembly Labor Committee
- Re-introduced 12/16/2013, died in Senate Labor Committee
- S280 re-introduced in 2014-15 legislative session; stalled again; after 6<sup>th</sup> introduction



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*The NJ Legislature finds that studies and surveys have shown that between 16 to 21 percent of employees nationwide have directly experienced health-endangering workplace bullying, abuse and harassment.*

# NJ Healthy Workplace Bill

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Would make it unlawful:

- for employers to subject employees to abusive conduct;
- to permit an abusive work environment; or
- to retaliate

# Abusive Work Environment

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Proposed Definition:

“A workplace in which an employee is subjected to abusive conduct... which is severe enough to cause physical or psychological harm to the employee.”

## Abusive conduct may include but is not limited to:

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- Repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliation

## Abusive conduct may include but is not limited to:

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- The sabotage or undermining of a person's work performance
- A single act shall not constitute abusive conduct, unless it is especially severe

# Proposed Penalties Under the Healthy Workplace Act

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Allows action in court:

- Injunction
- Reinstatement
- Removal
- Compensation
- Punitive Damages

# Proposed Affirmative Defense

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- Employer had effective policy AND employee failed to take advantage

\* Does not apply if adverse employment action

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*The Healthy Workplace Act is just proposed legislation at this time, but can serve as a guide moving forward in preventing workplace violence and bullying.*



## Bullying may be illegal if a bully engages in:

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- **Retaliation** – Targeting an employee because he/she has made a particular claim related to a hostile work environment
- **Stalking** – New Jersey has a criminal anti-stalking statute
- **Assault** – Making someone fearful that they are about to be hit

## Bullying may be illegal if a bully engages in:

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- **Battery** – Engaging in offensive or harmful touching or hitting
- **Illegal Discrimination** – Targeting protected categories of people
  - E.g. targeting people based on race, sex, religion, national origin, age, etc.

# Often workplace bullying moves into something illegal:

- 1. Targeting the weak** - often leads to protected categories
  - Disabled, Pregnant, Older
  - Illegal Discrimination
- 2. Targeting the different** - others in same group are targeted
  - Race, Sex, Religion, National Origin, Color
  - Illegal Discrimination

## Often workplace bullying moves into something illegal;

3. **A Sudden Change** - turn 50, take medical leave, return from military service, make a worker's compensation claim
  - Discrimination
4. **Stalking** - Bullying that leads to harassing can also be considered stalking (including cyber stalking)
  - Criminal Conduct
5. **Assault and Battery** - offensive behavior turns into offensive or harmful touching or hitting
  - Criminal Conduct

# Solution to Workplace Bullying

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- 3 step plan:
  - Name it, recognize it
  - Take time off to heal & launch a counterattack
    - Check your physical & mental health
    - Research your legal options
    - Create a bottom-line business case for stopping the bully
    - Start the search for your next position
  - Expose the Bully
    - Present your business case to your employer

# Questions?

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