

# Learning From The #MeToo Movement: Building An Anti-Harassment Practice in Your Foundation Winter 2018

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# OBJECTIVES

- ▶ To gain a deeper understanding into fostering a respectful work environment
- ▶ To understand the legal definition, importance and implications of workplace harassment
- ▶ To understand the elements of a solid policy prohibiting harassment
- ▶ To know what to do with complaints of workplace harassment

# RESPECT IN THE WORKPLACE



- ▶ ***WHAT IS IT?***
- ▶ ***HOW DO WE ACCOMPLISH IT?***

# re · spect [ri-spekt]

–*noun*

1. a particular detail or point (usually prec. by *in*): *to differ in some respect.*
2. relation or reference: *inquiries with respect to a route.*
3. esteem for or a sense of the worth or excellence of a person, a personal quality or ability, or something considered as a manifestation of a personal quality or ability: *I have great respect for her judgment.*
4. deference to a right, privilege, privileged position, or someone or something considered to have certain rights or privileges; proper acceptance or courtesy; acknowledgment: *to show respect for the flag; respect for the elderly.*
5. the condition of being esteemed or honored: *to be held in respect.*
6. **respects**, a formal expression or gesture of greeting, esteem, or friendship: *Give my respects to your parents.*
7. favor or partiality.
8. *Archaic.* a consideration.

# re · spect [ri–spekt]

*–verb (used with object)*

9.to hold in esteem or honor: *I cannot respect a cheat.*

10.to show regard or consideration for: *to respect someone's rights.*

11.to refrain from intruding upon or interfering with: *to respect a person's privacy.*

12.to relate or have reference to.

# RESPECT

“Respect...is an appreciation of the separateness of the other person, of the ways in which he or she is unique.”

- Annie Leibovitz

“Sensitivity to others’ boundaries, perception, perspectives, opinions and outlook.”

- me



# HARASSMENT IN THE WORKPLACE

## ► How Do We Avoid It?



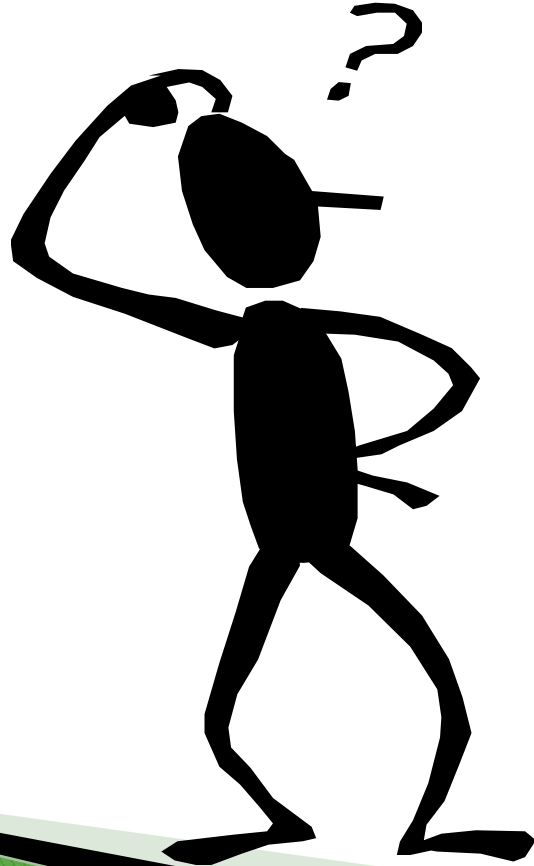
# U.S. LAWS PROHIBITING WORKPLACE DISCRIMINATION/HARASSMENT

- ▶ Title VII
  - race, religion, sex/gender and pregnancy, national origin, color
- ▶ The ADA
  - disability and accommodation
- ▶ The ADEA
  - age
- ▶ GINA
  - genetic information
- ▶ State Laws
  - *e.g.*, sexual orientation, political affiliation, marital status
- ▶ Local Laws
  - *e.g.*, unemployment discrimination





# DISCRIMINATION OR HARASSMENT



**WHAT'S THE  
DIFFERENCE?**

# THREE TYPES OF ILLEGAL DISCRIMINATION

1. Disparate Treatment
2. Disparate Impact
3. Harassment



# HARASSMENT IN THE WORKPLACE



- ▶ ***WHAT IS IT?***
- ▶ ***HOW DO WE AVOID IT?***

# HARASSMENT

## *1. QUID PRO QUO*

## *2. HOSTILE WORK ENVIRONMENT*

- unwelcome conduct
- by a supervisor, co-worker or third party business invitee
- based on a protected characteristic
- that rises to the level of being severe or pervasive

# AFFIRMATIVE DEFENSES TO U.S. DISCRIMINATION LAWS

- ▶ The Foreign Laws Defense
  - What is a foreign law?
    - Not a cultural or religious custom or preference
- ▶ The Bona Fide Occupational Qualification
  - BFOQ Definition
  - Establishing a BFOQ Defense
  - Customer Preference
- ▶ Faragher/Ellerth Defense



# ELEMENTS TO ANTI-HARASSMENT PROGRAM

- ▶ Policy
  - No Discrimination/Harassment on the basis of protected characteristics
  - Reporting procedure with alternative avenues
- ▶ Training
  - New employees and managers
  - New Managers
  - Existing every few years
- ▶ Take it Seriously
  - Do not condone violations
  - Investigate
  - Hold managers responsible
- ▶ No Retaliation



# THE COMPLAINT PROCEDURE

## What to do if you feel you are the victim of harassment:

- ▶ D.I.S. the harasser
  - Directly, immediately and specifically tell the harasser that his/her conduct is unwelcome
  - This is a suggestion; you are NEVER REQUIRED to confront the harasser
- ▶ Notify your Supervisor or the VP of HR or ??? by telephone, in person or in writing
- ▶ Anonymous reporting

# THE COMPLAINT PROCEDURE

## What happens when a report of harassment is made?

- Someone must be designated ahead of time as being ultimately responsible for dealing with complaints of harassment
- A prompt, thorough and confidential investigation
- All individuals must cooperate fully in the investigation
- If appropriate, remedial action will be taken
- No retaliation will occur

# UNLAWFUL RETALIATION



- ▶ ***WHAT IS IT?***
- ▶ ***HOW DO WE AVOID IT?***

# RESPONSIBILITY OF ALL EMPLOYEES TO PREVENT CLAIMS OF HARASSMENT

- ▶ Understand and observe The Foundation's Policy against Harassment
- ▶ Report any and all conduct which you find offensive to the designated individual
- ▶ Do not allow negative feelings to linger
- ▶ Take criticism and give criticism constructively

# RESPONSIBILITY OF ALL EMPLOYEES TO PREVENT CLAIMS OF HARASSMENT, cont'd.

- ▶ Encourage employees to go to their supervisor or the designated individual with concerns
- ▶ Use legal language responsibly
- ▶ Avoid compromising situations
- ▶ Respect boundaries-- watch what you say and what you do

# RESPONSIBILITY OF MANAGERS TO PREVENT CLAIMS OF HARASSMENT

- ▶ Act promptly and seriously in situations in which you observe or are notified of inappropriate/offensive behavior
- ▶ Report concerns of harassment to the designated individual
- ▶ Administer fair discipline when needed
- ▶ Provide continuous open and honest feedback about performance to prevent misunderstanding



# RESPONSIBILITY OF MANAGERS TO PREVENT CLAIMS OF HARASSMENT, cont'd.

- ▶ Encourage employees to come to you with concerns
- ▶ Always take ALL complaints seriously
- ▶ Make employment decisions objectively and consistently

# MANAGERS MUST TAKE ACTION WHEN THEY:

- ▶ get a complaint regarding behavior that is prohibited by the policy
  - *i.e.*, offensive behavior pertaining to sex, gender, race, religion, color, national or ethnic origin, marital status, sexual orientation, age, disability, etc.
- ▶ know (or should reasonably know) about behavior that is prohibited by the policy
  - *i.e.*, offensive behavior pertaining to sex, gender, race, religion, color, national or ethnic origin, marital status, sexual orientation, age, disability, etc.

# WHAT HAPPENS WHEN MANAGERS FAIL TO ACT?

- ▶ Liability (corporate and personal)
- ▶ Continued Offensive Behavior
- ▶ Disciplinary Action



WHEN YOU GET A  
COMPLAINT OF  
DISCRIMINATION OR  
HARASSMENT OR KNOW  
OFFENSIVE CONDUCT HAS  
OCCURRED...

- ▶ Consult with the designated individual at the soonest possible opportunity so she can assist you and consult on next steps
- ▶ Meet with the complaining employee in private (as opposed to discussing over email or in public setting)
- ▶ Actively listen to the complaining employee and take notes
- ▶ **Do not judge and keep your opinion to yourself**
- ▶ Instruct the complaining employee about The Foundation's applicable policy

- ▶ Assure the complaining employee his/her complaint is, and will continue to be, taken seriously and investigated; inform the complaining employee you will get back to him/her with next steps
- ▶ If the complaining employee expresses a desire to complain externally or file a lawsuit, make sure the employee knows about his or her internal avenues, but do not overtly discourage complaints to courts or governmental bodies
- ▶ Assure the complaining employee that information will be treated discreetly and ask him/her to do the same
- ▶ Assure the complaining employee that he/she will not be retaliated against



- ▶ Inform the complaining employee that someone from the senior management team (probably the designated individual) may contact him/her
- ▶ ASAP after taking a complaint, contact the designated individual to discuss the complaint
- ▶ Prepare and send an email to the designated individual (and in some situations, your supervisor) regarding the complaint you received and your subsequent action (be specific!!)
- ▶ Do not retaliate or condone retaliation

# QUESTIONS?

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Founded in 1992, Ellenoff Grossman & Schole LLP is a New York City-based law firm comprised of almost 90 professionals, offering its clients legal services in a broad range of business related matters.

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