

PIERCE ATWOOD



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Unlawful Harassment and Discrimination in the Workplace: What You Need to Know

Hypothetical # 1

A Mentor or More?

Greg has been a very successful and well-regarded VP of Business Development for a long time. About 5 years ago, he hired Lynn for a junior level business development role. Lynn has proven to be a superstar and she has gained significant experience and exposure at the company. Greg and Lynn have always worked closely together, but with Lynn's increased portfolio, the two of them have begun working even more closely together and frequently travel together on extended customer visits.

Greg and Lynn talk almost every day. They consider each other to be good friends. They are both married. Lynn does not have any children, and Greg's children are older and out of the house.

Greg regularly checks in with Lynn at 8:00 in the morning to go over their priorities for the day. Greg talks to Lynn for an hour or two via Zoom and insists that she put her camera on. He routinely comments on her appearance, saying "You look very beautiful today," or "I really love that outfit on you." Lynn has occasionally told Greg that such personal comments make her uncomfortable, but Greg has responded to her by saying, "You should not feel uncomfortable, can't I give my friend a compliment?" One colleague overheard Greg telling Lynn she looked beautiful and said to Lynn, "Gosh, do you have to put up with that, it sounds really creepy!"

A Mentor or More?

During the pandemic, Lynn worked at home exclusively. She was caring for her elderly parents and did not want to expose them to anything. After a year of not seeing each other in person, Greg and Lynn got together for dinner to discuss an important project. Although Lynn went to the dinner prepared to discuss the project in detail, Greg told her that he wanted to get to know her better personally and did not want to discuss work. Greg then proceeded to hold Lynn's hand every time she reached for a glass of water. He told her how special she was to him, and how much he looked forward to talk with her every morning. At the end of the dinner, he said, "Don't I get a goodnight kiss?"

Lynn was horrified by Greg's conduct at dinner and reported it to HR. She also mentioned his prior comments on her appearance.

When Greg was interviewed as part of the resulting investigation, he insisted that he had the highest regard for Lynn and believed that they had a close friendship. He explained that they were discussing their elderly parents and he touched her hand as a sign of compassion and understanding. He was adamant that his conduct toward Lynn was professional and friendly at all times.

A Mentor or More?

Is this unlawful harassment?

What is the appropriate outcome here?



Harassment Basics

Sexual Harassment

Conduct of a
sexual nature



That is
unwelcome



Adverse
Action

- Submission to conduct is necessary to obtain/keep your job;
- Submission or rejection adversely affects your job; or
- Conduct unreasonably interferes with your ability to do your job

Important Details

Does intention matter?

- “I didn’t mean to offend you”
- “I was only kidding”

How can you tell if the conduct is unwelcome?

- Often, you can’t tell
- Consider body language/participation
- Don’t forget about bystanders

How bad does the conduct have to be?

- Severe or pervasive
- Objectively and subjectively offensive

Examples of Actions That May Create a Hostile Work Environment

Verbal or Written

- Requests for sexual favors
- Sexual comments or innuendos
- JOKES
- Sending/forwarding sexually explicit emails, text messages, or photos

Non-Verbal

- Leering, staring
- Sexual gestures
- Displaying sexually suggestive images

Physical

- Sexual advances
- Massaging a person's neck
- Hugging or kissing

Retaliation

What is it?

- Action that would dissuade a reasonable person from claiming or reporting discrimination or harassment
- “Any form of adverse action against” a covered employee

Who is protected?

- Employee who reports
- Anyone who participates in investigation

Not Just About Sex Anymore

Harassment based on any other protected characteristic is also prohibited!



Characteristics Legally Protected from Discrimination

race, color ,
national origin

sex, pregnancy,
sexual
orientation,
gender identity,

age

religion,
creed

physical or
mental disability,
genetic
information

military service,
application for
military service

Bullying: The Equal Opportunity Jerk

- Bullying is offensive conduct that is not related to protected characteristic
- No federal or state law prohibits bullying in the workplace, BUT **offensive conduct is disruptive should not be tolerated!**



ENOUGH ALREADY!

External Reporting

In addition to reporting harassment internally, employees can report harassment or discrimination to state and federal human rights agencies:

- Equal Employment Opportunity Commission:
(800) 669-4000
- Maine Human Rights Commission:
(207) 624-6290
- Massachusetts Commission Against Discrimination:
(617) 994-6000
- New Hampshire Commission for Human Rights:
(603) 271-2767

Legal Remedies

- Injunctive relief or specific action
 - › Training
 - › Development or changes in policies/procedures
 - › Job reinstatement
- Economic damages
 - › Lost wages
- Compensatory damages
 - › Out-of-pocket expenses caused by the discrimination/harassment (e.g., costs associated with a job search or medical expenses)
 - › Compensation for emotional harm suffered (e.g., mental anguish, inconvenience, or loss of enjoyment of life)
- Punitive damages
- Reasonable attorneys' fees, expert witness fees, and court costs

Definition

Microaggressions:

Everyday, subtle, intentional or unintentional interactions or behaviors that communicate some sort of bias toward historically marginalized groups.

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Examples - Verbal

"Your English is strong."

"I have Black /
gay / etc.
friends"

"As a woman, I know what you go through as a person of color."

"Can I touch your hair?"

"Ok, but where are you really from?"

"When I look at people, I don't see color."

Examples - Behavioral

Mistaking female lawyer for court reporter

Giving someone a nickname without permission because uncomfortable saying full name

Scheduling meetings or events that conflict with religious observances

Eye rolling when someone mentions feeling invalidated

Excluding someone from an afterwork event based on assumptions about childcare responsibilities

Assuming an older person isn't able to use or learn technology

Examples – Phrases to Excise

Black sheep

Sold down the
river

Peanut gallery

Slave driver

Too many
chiefs, not
enough Indians

We got gypped

They're on the
warpath

You guys

Beyond the
pale

Hypothetical # 2

Alice, a manager, is bright, hard-working, and receives consistently strong performance evaluations. Over time, she is charged with an increasing level of direct client contact and, in fact, one of the company's more important clients frequently calls her directly when they need something. Alice reports to a Vice President, John. Over time, John notices some changes in Alice's appearance and presentation. Specifically, Alice cuts her hair quite short and increasingly wears clothing that John would describe as traditionally "men's clothing." One day, Alice comes to work wearing a three-piece suit and with a new a flat top haircut. Alice has always chosen to include pronouns in the signature line of her email and overnight they have gone from "she / her / hers" to "they / them / theirs." Alice has also changed the name in their signature from "Alice" to "Ali."

John has the following questions and concerns:

- Is it okay to acknowledge this change directly with Ali and to ask them what's happening?
- The important client who calls Ali directly is conservative, and John is afraid they will not react well if surprised with this identity change. Is it okay for John to speak with the client and give them a heads up?
- What if the client is thereafter unwilling to work with Ali?
- Which bathroom will Ali use? If it's the men's room, how will the male employees react to that? What if someone complains that it's an invasion of their privacy for Ali to use the men's restroom?
- Adjusting to "they / them / theirs" pronouns can be challenging, both because John's brain has been trained to refer to them as "she" and because John is a grammar purist. What if he messes up and calls Ali "Alice" or "she"?

“Microaggressions are more similar to ‘mere offensive utterances’ than ‘physically threatening or humiliating statements,’ and are insufficient to support a hostile work environment claim.”
Chambers v. City of Lakeland, 2022 WL 2356818 (M.D. Fla. 2022) *citing* 2015 case.

“Regardless of whether an aggression is micro or macro, the Court considers the evidence of hostility in totality. Whether the sum comes from a large number of small incidents, or a small number of large incidents, the result is the same.” *Chen v. Yellen*, 2021 WL 4226202, n. 4 (Sept. 16, 2021)

A Cautionary Tale

- Black manager sued for race discrimination.
- Employer defended, arguing poor performance.
- Plaintiff had conflicts with his supervisor and expressed concern that he was being treated unfairly compared to white employees.
- Supervisor allegedly responded: “I have a black foster child, so please don’t talk to me about discrimination.”
- Facts revealed supervisor cared for a bi-racial child many years ago but was not a foster mother.
- **\$3 million Plaintiff’s verdict.**

Presenters

Katy Rand

krand@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

Suzanne W King

Skings@pierceatwood.com

One New Hampshire Ave.
Suite 350
Portsmouth, NH 03801