

Out-of-Bounds: The Legal Ramifications of Toxic Cultures in Sports, Education & Business

Presented by:
Julia M. Hilliker
 jhilliker@hodgsonruss.com
 p 716.848.1547

Jeffrey F. Swiatek
 jswiatek@hodgsonruss.com
 p 716.848.1449

UB Center for the Advancement of Sport
 February 9, 2019

Hodgson Russ
 ATTORNEYS

Copyright © 2018, Hodgson Russ LLP, all rights reserved

Topics

Learning how to better:


- Prevent harassment and unlawful discrimination;
- Create cultures that encourage reporting and open communication;
- Understand investigations, including: who reports, what happens during the investigation, and what happens after the investigation.

Hodgson Russ
 ATTORNEYS

2

Introduction

- Workplaces and educational institutions should be free of unlawful harassment, discrimination, and retaliation.
- Building Blocks of a respectful culture:
 - Appreciating Diversity
 - Accepting Differences
 - Equality
- Bottom Line: Every employee and student at the institution has a right to be free from unlawful harassment or discrimination.



Hodgson Russ
 ATTORNEYS

3

Introduction

- Key laws:
 - Title VII of the Civil Rights Act of 1964 – It is unlawful for an employer to discriminate against any person because of race, color, sex, religion, or national origin in employment practices, such as terms or conditions of employment (hiring, firing, employment opportunities, compensation, etc.).
 - New York State Human Rights Law – It is unlawful for an employer to discriminate against any person because of race, creed, color, national origin, sex, disability, marital status or sexual orientation.
 - Title IX of the 1972 Educational Amendments – Prohibits discrimination in educational programs and activities that receive federal funds.



4

Introduction

- Key laws:
 - New York Labor Law § 201-g – Establishes requirements for sexual harassment policy and annual sexual harassment training.
 - New York Executive Law § 296-d – Expands liability and negligence standard regarding harassment of non-employee (such as contractor).
 - New York CPLR § 7515 – Prohibits pre-dispute mandatory arbitration (unless inconsistent with federal law).
 - New York CPLR § 5003-b – Limits use of confidentiality and non-disclosure provisions in sexual harassment settlements.
 - New York Public Officers Law § 18-a – Requires public entity reimbursement by employee adjudicated to have committed harassment.



5

Employment Discrimination/Harassment

What is employment discrimination and harassment?

- For employees, it must be based upon a protected classification as defined by federal law, such as:
 - Unfair treatment because of race, color, religion, sex, sexual orientation, national origin, age, disability or genetic information.
 - Harassment by managers, coworkers, or others in your workplace, based upon the protected characteristics listed above.
 - Retaliation because an employee complained about job discrimination/harassment, or assisted with an investigation or lawsuit.



6

Employment Discrimination / Harassment (cont.)

What does **not** constitute employment discrimination or harassment?

- It is not discriminatory to treat employees differently based upon unprotected characteristics (e.g., work performance).
- The non-discrimination laws are not a civility code.



7

Sexual Harassment

Sexual harassment is a form of **gender** discrimination. Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, or other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.



8

Types of Sexual Harassment

- **Quid Pro Quo Sexual Harassment** ("this for that")
 - Threatening action usually between manager/subordinate where sexual favors demanded or retaliation such as demotion, termination implied.
 - This type of harassment occurs when a supervisor grants or withholds tangible job benefits based on receipt or refusal of sexual favors.
- **Hostile Environment**
 - Supervisor, co-worker or another who has contact "on the job" creates an intimidating, hostile work environment; interferes with work performance through word/deeds related to victim's gender.
 - This form of harassment occurs where the working environment is so sexually polluted that it interferes with the psychological well-being of the employee. A tangible job benefit may not be threatened.



9

Sexual Harassment (Cont.)

Questions

- How can I tell if it is really sexual harassment and not just a person being overly friendly? Who decides if an act constitutes sexual harassment?
 - Reasonable Person standard.
- Is it sexual harassment if my boss or coworker is mean to me?
 - No; there's no law against having a mean boss or co-worker. But, sexual statements or abuse of women or men only can be a different story.

Hodgson Russ

Sexual Harassment (Cont.)

Questions


- Can sexual harassment occur by a person of the same sex?
 - Yes. **Both** quid pro quo and hostile environment are possible.
- Does the harassment have to come from a coworker in order for it to be actionable?
 - No. The status of the harasser is irrelevant. For example, an employee of an outside contractor can be a sexual harasser.

Hodgson Russ

Sexual Harassment (Cont.)

Questions

- Is it possible to have "unintended" harassment?
 - Yes. Overheard remarks can qualify.




Hodgson Russ

Sexual Harassment (Cont.)

Questions


- Can actionable discrimination or harassment occur outside of the workplace?
 - Yes; always be mindful of social media and text messages, as well as conduct at work related social gatherings.

 13

Avoiding Accusations of Discrimination or Harassment

Create a Culture to Foster Reporting


- Train all staff and students on appropriate versus inappropriate conduct as well as reporting procedures.
- Be cognizant of the imbalance of power.
 - Whether supervisor/employee or professor/student, always be certain that a position of power is never used to influence the situation.
- Have well defined boundaries that are reiterated often at all levels.
- Always take appropriate action and provide a final reasoned decision to the reporter. Failure to act sends an implicit message that these behaviors are acceptable.

 14

The School's Investigation

What should I do if I feel as though I experienced discrimination or harassment?

- REPORT!
- To whom?
 - Supervisor
 - Administrator
 - Designated Individual

 15

The School's Investigation

Can only the person being harassed/discriminated against complaint?

- No.
- Even a witness can report.
- Recall: unintended harassment (aka third-party harassment).



16

The Institution's Investigation

Is it better to file a report in writing or make a verbal report?

- Written reports are best.
- Be as detailed as possible.
- Written reports are typically easier to investigate.



17

The Investigation

What are the general guidelines to follow when conducting an investigation?

- Contact Counsel before beginning the investigation.
- Begin the investigation immediately.
- Initial Preparation
 - The investigator will review and follow the procedures outlined in the School's policies regarding:
 - Sexual harassment and discrimination.
 - Employee discipline.
 - Student Code of Conduct (where appropriate)
 - Select a person to conduct the interviews of witnesses.



18

The Investigation

What are the general guidelines institutions follow when conducting an investigation?

- Interview the complaining party, the alleged offender, and other witnesses.
- Establish expectations with complainant and alleged offender regarding conduct and interaction, if any, during investigation.
- Gather all documentary and physical evidence.



19

The Investigation

What will the institution do once the investigation is complete?

- Determine what, if any, disciplinary or administrative action should be imposed against the harasser.
 - Discipline will only be imposed on an offender if the complaint is substantiated
- Determine whether there are any appropriate remedial steps with regard to the complainant.
- Prepare the final investigation report, and inform complainant of disposition.



20

The Investigation

Privilege Considerations



- Engage counsel at the outset.
- Consider whether counsel may be more effective at completing the interviews.
- Counsel provide an outside and unbiased assessment of the information gathered.
- How the investigation is completed may be critical to any future litigation.
- Consider whether, and to what extent, you wish to preserve privilege.



21


Conclusions and Recommendations

- Everything I needed to know, I learned in kindergarten:
 - Be nice to others;
 - Keep your hands to yourself; and
 - Respect differences.
- Report any instance of harassment/discrimination so that the institution can investigate and remedy it.

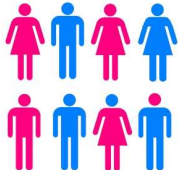




Conclusions and Recommendations

“The world is a dangerous place to live, not because of the people who are evil, but because of the people who don’t do anything about it.”
-Albert Einstein



Questions?

THANK YOU!

Julia M. Hilliker, Esq.
jhillike@hodgsonruss.com
(716) 848-1547

Jeffrey F. Swiatek, Esq.
jswiatek@hodgsonruss.com
(716) 848-1449

Hodgson Russ, LLP
The Guaranty Building
140 Pearl Street
Buffalo, New York 14202
www.hodgsonruss.com



25
