Workplace Awareness
Weinstein and Beyond

T. Mickell Jimenez, Esq.
Clyde Snow & Sessions
Co-Chair Labor & Employment Group
tmj@clydesnow.com
September 25, 2018
Advisory

- Potentially offensive materials are for learning purposes only
- Humor does not mean issues are taken lightly
- Symposium materials are not a substitute for legal advice in a particular case
Agenda

- Workplace Sexual Harassment: Unpacking the “Sexual Harassment Spectrum”
- Navigating the Current Climate
- Preventing Workplace Sexual Harassment
  - Reporting and Investigation
  - Creating a “speak up” workplace
  - Best Practices
The Basics

Federal

- Title VII of the Civil Rights Act, 42 U.S.C. § 2000e

State

- The Utah Anti-Discrimination Act, 34A-5-101 et seq.
What is a Protected Category?

- Workplaces with 15 or more employees must provide equal employment opportunities to all individuals, and not discriminate against protected classes.
What is Unlawful Sexual Harassment?

Unwelcome sexual advances, requests for sexual favors, and 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, or

- Submission to or rejection of such conduct by an individual is used as a basis for employment decision affecting such individual, or

- Such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment
When Does Equal Employment Apply?

- Hiring
- Job assignments
- Promotions
- Demotions
- Leaves of absence
- Termination
- Layoffs
Where Can It Occur?

- In the workplace
- At work-related events, including social events outside the workplace (e.g. holiday party, outing to Maverick)
- At any other place if conduct or people are tied to work – need not be company sponsored
What’s all the Fuss?

- Have Sexual Harassment laws changed?
  - No
- Has Court guidance and interpretation changed?
  - No
- Has society changed?
  - Sort of…. #MeToo, #TimesUp
- Does every complaint end in termination?
  - No
The Basics

• The victim or harasser do not have to be of the opposite sex
• The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee
• The victim does not have to be the person harassed but could be anyone affected by the offensive conduct
• Unlawful sexual harassment may occur without economic injury to or discharge of the victim
• The harasser's conduct must be unwelcome
Objectives

• Learn to identify issues and circumstances where you should seek support from senior management
• Ensure that ALL employees are respected and feel safe
Objectives

Training: the right kind

• Traditional educational training
• Promoting women to leadership roles
• Bystander intervention (“speak up” workplace)
• Zero tolerance messaging: male and female leaders (think Wonder Woman 2!)
ASSAULT

- Utah law defines assault as:
  - An attempt, with unlawful force or violence, to do bodily injury to another; or
  - An act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

The “Harassment Spectrum”

ASSAULT

- The Department of Justice defines sexual assault as “any type of sexual contact or behavior that occurs without the explicit consent of the recipient. (forced intercourse, attempted rape, child molestation, incest, fondling and forcible sodomy.)

Source: https://www.justice.gov/ovw/sexual-assault
The “Harassment Spectrum”

HARASSMENT

Harassment occurs and is unlawful where:

1. The conduct is **severe** or **pervasive** enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (**hostile work environment**); or

2. Enduring the offensive conduct becomes a condition of continued employment (**quid pro quo**)

The “Harassment Spectrum”
Hostile Work Environment

3 Elements:

1. Person is subjected to verbal or physical conduct of a sexual nature;
2. The conduct was unwelcome; and
3. The conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment.

Source: Porter v. California Dept. of Corrections, 419 F.3d 885, 892 (9th Cir. 2004).
Hostile Work Environment

- Discussing sexual activities;
- Telling jokes of a sexual nature;
- Unnecessary touching;
- Commenting on physical attributes;
- Displaying sexually suggestive pictures;
- Using demeaning or inappropriate terms;
- Using indecent gestures;
- Using crude language;
- Sabotaging the victim's work;
- Engaging in hostile physical conduct.
Hostile Work Environment

HARASSMENT

Severe or pervasive is judged by both:

- objective standard (in other words, any reasonable person would find the conduct abusive); and
- subjective standard (in other words, the employee in question found the conduct abusive).

Severe and Pervasive

Isolated Incidents Do Not Count

- simple teasing
- offhand comments
- isolated incidents

BUT WAIT!!!

unless extremely serious

Test for Hostile Work Environment

Protected category (Sexual conduct or dealing with a protected category)

Unwelcome

Reasonably offensive

Extreme – severe or pervasive

Is the conduct PURE?
It Doesn’t Matter That:

• The person intended to be funny
• Others thought it was funny
• The person complaining seemed to go along at the time
• The people complaining were “only” bystanders
• The person didn’t know the law
Intimidation

Does your employee avoid his/her supervisor in the elevator, break room, at work functions?

- discounted the person’s thoughts or feelings (“oh, that’s silly”) in meetings
- used the “silent treatment” to “ice out” & separate from others
- yelled, screamed, threw tantrums in front of others to humiliate a person
- stole credit for work done by others
Intimidation

- retaliated against the person after complaint filed
- made verbal put-downs/insults based on gender, race, accent or language, disability
- assigned undesirable work as punishment
- encouraged the person to quit or transfer rather than to face more mistreatment
- ensured failure of person’s project by not performing required tasks: signoffs, taking calls, working with collaborators
Abusive

- Verbal: bullying, name calling, belittling, based on a protected class

- Physical: touching (whether or not causing pain or injury)
Quid Pro Quo

• Taking any tangible employment action based on an agreement or refusal to engage in sex, dating, etc.

• Typically involves a threat or promise of a benefit linked to sex.
Quid Pro Quo

Always involves a supervisor

WHY?

“It’s an abuse of power”
Quid Pro Quo Examples

- supervisor who fires or denies promotion to a subordinate for refusing to be sexually cooperative
- supervisor who cuts hours for refusal to engage in activity or reporting misconduct
- supervisor requires a subordinate to participate in religious activities as a condition of employment
- supervisor offers preferential treatment/promotion if subordinate sexually cooperates or joins supervisor's religion
The “Harassment Spectrum”

BIAS

Explicit

• Use of words like “lady,” “girl,” “Nancy,” “gimp,” or “geriatric” coupled with employment decisions, evaluations, etc.

Implicit

• If you are not aware of bias you are not aware of the need to change
• The “No-Lunch Rule”
Why Do We Need Training?

- It’s good business practice, and an important part of company culture
  - Harassment/discrimination free workplace = positive/productive workplace
- Prudent/preventative measure in today’s climate
  - Claims can impact the company’s bottom line – and your wallet
  - Good Faith defense – prompt and reasonable response to harassment
American Apparel Officially Terminates CEO Charney’s Employment

Apparel Company’s Founder Had Been Suspended Since June for Alleged Misconduct
Recent Firings

- 10/10/17 The New Yorker publishes the Harvey Weinstein expose and starts a revolution. Over 30 women spoke out about his harassment (71 men have been terminated or resigned since then – allegations range from inappropriate comments to rape)
- 10/10/17 – The New Yorker publishes the Harvey Weinstein expose and starts a revolution. In the wake over 30 women spoke out about his harassment
- 10/12/17 – Amazon Executive Roy Price suspended then resigned days after sexual harassment allegation by an Amazon Original series executive producer Isa Hackett
- 10/19/17 – Editorial Director Lockhart Steele immediately fired after accusations of unwanted kissing
- 10/21/17 – CEO of Besh Restaurant Group John Besh steps down after 25 women accuse him of sexual harassment
Recent Firings

- 10/31/17 – Michael Oreskes NPR Chief Editor resigns after allegations of inappropriate behavior and sexual harassment by 4 women while at the NYTimes years ago
- 11/1/17 – Kentucky House Speaker Jeff Hoover accused of sexual harassment by GOP caucus staffer steps down as speaker, remains in legislature, and pays undisclosed amount to settle claims
- 11/9/17 Former Alabama judge and politician Roy Moore continues to fight multiple claims of sexual assault of teenagers and young women when he was in his 30s
- 11/16/17 Former actor and U.S. Senator from Minnesota Al Franken steps down amid allegations of unwanted fondling, kissing, and groping
Recent Firings

- 11/20/17 60 Minutes Host Charlie Rose suspended then terminated for sexual misconduct violations
- 11/29/17 – Garrison Keillor- longtime public radio host - has been dropped by Minnesota Public Radio this week for inappropriate behavior, and NBC has fired Today Show host Matt Lauer due to allegations of sexual misconduct
Recent Firings

- 1/27/18 – Steve Wynn, 76, resigns as RNC Finance Chair amid sexual harassment allegations;
- Around 1/30/18 – U Penn revoked Wynn’s honorary degree and removed his name from a campus plaza and scholarship;
- Around 1/30/18 – Massachusetts Gaming Commission promises an investigation into Wynn Resorts who is building a multibillion-dollar casino outside Boston;
- 2/06/18 – Wynn steps down as Chairman of Wynn Macau (Wynn Resorts that focuses on the Chinese gambling enclave);
- 2/06/18 – Steve Wynn resigns as Chairman and CEO of Wynn Resorts (the allegations span decades);
- And the list continues to grow……
Recent Settlements

- 21st Century Fox (Fox News) settles multiple sexual harassment allegations lodged against its top-rated host at the time, Bill O’Reilly
  - At least 6 settlements, the largest of which was a $32m settlement with a long-time network analyst
  - Despite this and until the #MeToo Movement, Fox then extended O’Reilly’s contract for 4 years for $25m/year
  - 21st Century Fox’s terminated O’Reilly in April 2017 only after the confidential settlements were leaked
Recent Settlements

• 11/30/17 – Trans Ocean Seafoods to pay $75,000 to Settle EEOC Sexual Harassment Suit (Explicit Sexual Harassment) – based only on sexually explicit comments to a 17-year-old worker and her mother (new policies, extensive training for employees and management, notice posting, 2-year mandatory compliance reporting to the EEOC)

Source: https://www.eeoc.gov/eeoc/newsroom/release/11-29-17a.cfm
Recent Settlements

• 21st Century Fox pays $20 million in 2016 to settle allegations against CEO Roger Ailes made by former broadcaster Gretchen Carlson. (Ailes departed in July 2016 with his own $40 million settlement and passed away in May 2017)

• 2005 - Wynn settles an internal HR Complaint for $7.5m; the employee, a manicurist, claims Wynn pressured her to have sex with him in his office

• Anucha Browne Sanders a former executive for NBA’s New York Knicks received $11.5 million related to allegations that Isiah Thomas (the team’s then president of basketball operations) sexually harassed her
What Could It Cost You?

• Between January 25\textsuperscript{th} and January 30\textsuperscript{th} 2018, Wynn Resorts stock price tumbled from $200.60 to $163.22 ($167.91 on 2/21; $136.73 on 9/24)

• Former U Michigan and USA Gymnastics doctor Larry Nassar sentenced to 60-year federal prison sentence, and 40-175 year Michigan state prison sentence
What Could It Cost You?

Workplace morale

Attrition levels

Reputation
Pop Quiz

• How much might it cost your company if a superior greeted a subordinate each morning with “I’m horny” and slapping the co-worker’s bottom?
• Somewhere between $1 and $168 million

Source: Ani Chopourian v. Catholic Healthcare West (2012) - jury verdict of $168 million reduced by judge to $82,230,484, and later undisclosed confidential settlement reached ended the matter finally.
Pop Quiz

• How much might it cost your company if a male executive called a female executive the “B” word, “ho,” and made thinly veiled solicitations for sex?
  • It cost the Knicks $11.5 million

Source: Isiah Thomas case
Pop Quiz

Is it Harassment?

• Your Founder makes lewd phone calls to some employees
• Your CEO parades around naked while on a business trip with other employees
• Your Human Resources director has been seen groping breasts, buttocks, or genital areas during employee performance reviews

Source: Charlie Rose case
Preventing Workplace Sexual Harassment
Start With a Robust Sexual Harassment Policy

COMPANY’S SEXUAL HARASSMENT POLICY

Company does not tolerate sexual harassment and strives to maintain a workplace free of such harassment from any source, including management, co-workers, or others. Any Company employee, supervisor or manager who has knowledge of any incident of sexual harassment is required to report such to the Human Resource Manager. This policy applies in every location in which the Company has facilities, and it applies to conduct in the workplace, at Company functions, and in all employment relationships. This policy is for the protection of employees at all levels and positions within the Company.

Employees are responsible for seeing that their own conduct does not violate this policy.

(continued). . . .
Robust Sexual Harassment Policy

COMPANY’S SEXUAL HARASSMENT POLICY

Company expressly prohibits unwelcome sexual advances, requests for sexual favors (whether explicit or implied), and all other verbal or physical conduct of a sexual or offensive nature, where:

- submission to such conduct is made either explicitly or implicitly a term or condition of employment;
- submission to or rejection of such conduct is used as the basis for decisions affecting an individual’s employment;
- such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment.

(continued) . . .
COMPANY’S SEXUAL HARASSMENT POLICY

• examples of conduct prohibited as sexual harassment include but are not limited to:
  • conversations with sexual innuendo such as sexually suggestive comments or jokes or comments of a sexual nature, and derogatory comments about gender, which can be heard by those in the vicinity where the conversation takes place;
  • invasive questions about an employee’s private life;
  • graphic, degrading, or condescending comments about an employee’s appearance, dress, or anatomy unrelated to compliance with any other Company policy;
  • repeated social invitations when the invitee has previously indicated that he or she is not interested in accepting such an invitation;

(continued)...
COMPANY’S SEXUAL HARASSMENT POLICY

- circulation or possession on the work site or at Company functions of material which ridicules gender or which is sexually suggestive (including but not limited to calendars, books, magazines, objects, video or audio material, cartoons, graffiti, computer applications, etc.), regardless of whether the ridicule is directed at specific individuals;

- unwelcome, intentional physical contact (e.g., embracing, touching, pinching), or any suggestions or threats of such contact;

- continued use of familiarities or inappropriate behavior such as whistling or catcalls, offensive gestures, or leering.
Company is committed to correcting any situation affecting an employee’s employment relationship. Company provides several ways for an employee to report a complaint or discuss a concern without prejudice or fear of retaliation. **The following procedure constitutes the exclusive and mandatory procedure for reporting all complaints, including allegations of sexual harassment and/or illegal discrimination.**

- If an employee has a complaint or concern, unless that complaint or concern involves the employee’s supervisor, the employee should discuss it with his or her supervisor as soon as possible.
- If the complaint is not satisfactorily resolved, or if the issue is with the supervisor, the employee should call Human Resources at 888-123-4567.
- If the complaint is not satisfactorily resolved, or if the issue is with the supervisor, the employee should contact the HR Hotline at 888-123-4567. This hotline is managed by a third party vendor, the employee may remain anonymous if desired.
Robust Sexual Harassment Investigation Policy

Allegations may be presented to an employee’s supervisor or HR representative in person, telephonically, and/or in writing.

Notice to anyone other than an employee’s supervisor, the HR Hotline, or Human Resources Manager shall not constitute the required notice of a complaint or an allegation of sexual harassment and/or illegal discrimination.

If you receive information regarding sexual harassment in your capacity as a supervisor, you are obligated to report it to your supervisor and/or HR representative immediately upon becoming aware of it.

Confidentiality: Company will make every effort to handle complaints and investigations with sensitivity to the rights of the person who complains and to the rights of the accused, and will endeavor to maintain confidentiality throughout the investigatory process, to the extent practicable and appropriate under the circumstances. However, in order to conduct an effective investigation, Company may need to discuss the allegations with the accused or other potential witnesses. Records related to harassment and discrimination complaints and investigations will be maintained in separate, confidential files, and all individuals receiving information about the allegations will be made aware of the consequences of retaliation.
Protection against retaliation: Retaliation against an individual for reporting questionable behavior in good faith or providing information relevant to an allegation is a serious violation of this policy and will not be tolerated regardless of the outcome of any investigation conducted as a result of such complaint. Acts of retaliation should be reported immediately and will be promptly investigated. However, the Company will not condone bad faith complaints (i.e., complaints known to be false and fictitious at the time that they were made). Any employee knowingly participating in a bad faith complaint will be subject to disciplinary action including but not limited to termination of employment.

If there appears to be any imminent threat to the safety of any employee, inform the supervisor, or an HR representative immediately so that immediate steps may be taken to eliminate the danger.

Responsive action: Upon the conclusion of any investigation, Company will take prompt remedial or disciplinary action against any employee who is found to have participated in prohibited behavior or retaliation. Responsive action may include, for example, mandatory training or referral to counseling, and disciplinary action such as warnings, reprimands, withholding of a promotion or pay increase, reassignment of the offender, temporary suspension without pay, termination of employment, or other measures as Company believes will be effective in ending the misconduct and correcting the effects of the behavior.

We fully expect that each employee will bear this policy in mind in his or her daily contact with other employees and customers and will treat each of them with dignity and respect.
Discipline and Termination of Employment

Company may take disciplinary action, **up to and including termination**, against any employee for failing, in Company’s sole discretion, to adhere to certain standards of behavior. Such failure is frequently reflected in certain actions by the employee, like some of those mentioned elsewhere in this handbook, and including, but not limited to, the following examples:

- Physically sexually harassing any individual
- Verbally sexually harassing any individual
- Threatening, intimidating, or coercing fellow employee’s at any time and for any reason

Each situation is dealt with on a case-by-case basis at the sole discretion of the Company. Discipline may include any or all of the following and may occur in any particular order:

- Verbal Warning
- Written Warning
- Final Warning and Suspension, with or without pay
- Termination of Employment
How Does the Company Rebut Discrimination?

Ensure ALL Managers/Supervisors/Executives Follow

The Golden Rule

Every employment decision should be motivated by legitimate, business-related reasons

• Needs to be some identifiable relationship to the position in question
Preventing Workplace Sexual Harassment
Managers/supervisors commit harassment/discrimination

“Strict liability”

“Why”

Managers/Supervisors/Executives are the Company
Employers have an affirmative defense to liability, if they can show that:

1. They used reasonable care to **prevent** and **correct** any harassment (e.g. by having an anti-harassment policy in place); and

2. The employee unreasonably failed to make a complaint under the policy or to avoid harm otherwise.

The *Faragher-Ellerth Defense is Discussed in Detail by Mr. Snow*
Michelle and Tom frequently visit by the copier. Their offices are in close proximity to one another and they frequently chatter back and forth. Lately, Tom has perceived Michelle to be “coming on” to him, engaging in flirtatious behavior. She asks if he has any plans for the weekend, extending an invitation to go running together and grab a bite to eat (they both train for and run marathons separately). In the office, she periodically stops by his cubicle a couple times a day and talks about her plans for the evening, always inviting him to join her. On each occasion, Tom has politely declined her requests. In one specific instance, Tom told her, “I appreciate our professional working relationship and prefer to keep it that way. At this time I am not interested in going out.”  

(continued) . . .
Harassment or Discrimination?

Michelle interprets Tom’s response as one of not yet but maybe in the future he’ll be interested in going out with me. Two weeks later, Michelle engages in the same behavior, pressing Tom for a date. He again tells her he’s not interested.

Michelle supervises Tom.

Approaching the line? On the line? Crossed over the line?
Harassment or Discrimination?

Samantha (the guys call her Sam) is a part-time intern, working 10-15 hours per week. Her job involves computer data entry and some field work. Part of her internship involves working in the field collecting data. Often she works with one or two male employees at a time. On separate occasions, a male employee tells her how nice she looks, is a bit more friendly than he ought to be helping her down a ladder into a vault (touching her inappropriately), and repeatedly stares at her. Another male employee tells off-color jokes in her presence. As a new intern, this is her first “real” exposure to the working world and she doesn’t know what to do or how to handle the situation even though during her orientation on her first day, just a few weeks ago, the HR Manager reviewed the District’s sexual harassment policy, had her sign an acknowledgment form, had her review a booklet regarding sexual harassment and take a quiz. She really needs this internship and doesn’t want to rock the boat or get anyone in trouble.

(continued)
Harassment or Discrimination?

After her first 5 weeks on the job, she decides to quit. One of her friends asks why and she indicates it was because of a culture of inappropriate, harassing behavior. He tells her she should file a complaint with the EEOC, which she does.

Approaching the line? On the line? Crossed over the line?

Is there liability here for the District? Why or why not? Did the District know about it or should they have known about it (supervisor, upper management)?
Tina is a field maintenance technician with the district. Her daily routine is to punch in for work, organize her gear needed for the day, walk to her cubicle to check emails or voice messages, make a few calls, coordinate with other staff, then head out to perform various maintenance tasks. Everyday she walks past Steve’s office to get to her cubicle. The other day she noticed a calendar hanging inside Steve’s cubicle. Instead of the District calendar with all of the beautiful pictures taken by District employees, she notices one of those girly calendars, depicting scantily clad females. She wonders if one of the other guys has played a prank on Steve as he was on vacation for a week.

However, even after Steve’s return the calendar stays on the wall. The pictures make her feel uncomfortable but she doesn’t say anything to Steve for fear of embarrassing him or having him get mad at her. Besides, she doesn’t want to come off as being overly sensitive. After all, she wants to fit in with all of her male workers.

Approaching the line? On the line? Crossing the line?
Be the Change  
You Want to See at Work

Catharine MacKinnon recently explained in a New York Times interview that company leadership is key. She’s seen company leaders speak to employees in no-nonsense terms:

‘Listen, we’re here to work, not to cater to your social and sexual needs. If I hear you’re doing that, you’re out of here.’

‘Work is for work, not sex; women are professionals, not objects; and if your desire to sexualize your co-workers overwhelms your professional focus, then you, my friend, are the problem. And thankfully, your time is up.’

It’s pretty strong, but harassment doesn’t happen in those places.

Responding to a Complaint – Liability and Prevention
Respond
How to React to the Complaint

• Listen
• Take notes and get details
• Don’t offer an opinion
• Don’t promise *absolute* confidentiality (rather, assure that it will be kept as confidential as possible)
• The matter must be investigated
• Refer them to Human Resources/Senior Management: Contact Human Resources/Senior Management!
What Do You Do?

One of the company’s best workers is being hit on by his supervisor and he comes to you, the department head and lets you know. However, he says it’s ok and doesn’t want you to do anything. He just wants it to be on record that he told someone. He says he’s handling the situation and he asks you to promise not to discuss the issue with anyone.
You Must Report It
And Must Do So Promptly!

You must act, and report it, even if:

• An employee asks you not to do anything or tell management
• An employee requests that you keep it confidential
• You do not directly supervise the employee
• Referring employees back to their immediate supervisor is not enough
What Happens Next

• Prompt investigation
• Appropriate disciplinary action
• Follow up with complainant
• No retaliation!
Retaliation
Retaliation Cases Have Three Elements

- Protected Activity
- A materially adverse action
- A connection between the two
Adverse Action

• Need not be a specific employment action such as termination, demotion, reduction of salary

• Just needs to be “materially adverse”
“Materially Adverse?”

Any action that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern v. White*, 126 S. Ct. 2405 (2006)
Examples of Adverse Action

- Being ostracized
- Removed from committees
- Transferred to a different area
- Placed on administrative leave
- Termination
When Is The Best Time To Deal With An Issue?

Now!

• Deal with little problems before they “explode” into landmines
• Report to the Human Resources Manager or Senior Management to start prompt investigation
• Respond promptly to complaints of discrimination, harassment, or other potentially unlawful conduct
• Take complaint seriously
Tips and Best Practices

• Promote “say something if you see something” in the workplace
• Robust policies
• Prohibit retaliation
• Take appropriate corrective action
• Training
Tips and Best Practices

- Create a “speak up” work place
- What’s Your **One Best Idea** for Ending Sexual Misconduct?
- Start the conversation
- Listen
- What if it was your daughter/son/partner/friend?
THANK YOU

T. Mickell Jimenez, Esq.
tmj@clydesnow.com
801.433.2458