

Sex, Drugs andthe Scary Cell Phone – Best Practices for Managing the Workplace

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Defending Public Entities and Public
Entity Employees

- Don't Like Surprises
- Must Have Evidence Preserved
- Employees Know and Understand
Policy at Every Level !

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MUNICIPAL STRUCTURE

* Example: Cleveland

* Code Charter

- * Executive = Mayor
- * Legislative = Board of Aldermen

* Home Rule

- * authority derived from the legislature that can be taken away
or narrowed in scope by other legislation per Article 4,
Section 88 of the Mississippi Constitution of 1890

* Jural Authority

- * City (can sue or be sued)
- * Employees get defense (Miss. Code Ann. §11-46-7)

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Separation of Powers

- * Article 1, Section 1, Mississippi Constitution
 - * Executive
 - * Legislative
 - * Judicial
- * Article 1, Section 2
- * No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.

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Employees of City

- * You are part of the executive branch of government.
- * Via the Chain of Command, you ultimately answer to the Executive (mayor in our form of government) who executes policies adopted by the Legislative Branch (board of aldermen in our form of government).

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Chain of Command



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WHO ARE THE DEFENDANTS

FEDERAL LAW CLAIMS AGAINST THE CITY PAIRED WITH
INDIVIDUALS BEING SUED UNDER STATE LAW

- * Why ?
- * Increases litigation costs by creating conflicts
- * Personal Asset Exposure
- * Job Exposure

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Course and Scope

Beyond exposure to federal tort law, acts of employers
or co-worker that are deemed outside the course and
scope can result in individual exposure without the
benefit of the immunities we have under the MTCA.

EXAMPLE: INTENTIONAL INFLICTION OF
EMOTIONAL DISTRESS

*Conduct so outrageous in character,
So extreme in degree,
As to go beyond all possible bounds of decency, and
To be regarded as atrocious and utterly intolerable.*

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Title VII

Title VII of the Civil Rights Act

- ❖ It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.
- ❖ Simply put, Federal Law prohibits discrimination based on race color, religion, sex, pregnancy or national origin.

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WHAT IS SEXUAL HARASSMENT?

- * It is unlawful to harass a person (an applicant or employee) **because of that person's sex**. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- * Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

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Can Co-Workers Date?

- * Yes. Conduct directed towards another based upon their sex must be un-welcome.
- * Just Remember the Righteous Brothers

*You never close your eyes anymore when I kiss your lips
And there's no tenderness like before in your fingertips
You're trying hard not to show it
But baby, baby I know it*

*You lost that lovin' feelin'
Whoa, that lovin' feelin'
You lost that lovin' feelin'
Now it's gone, gone, gone, whoa-oh*

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Reporting Requirement For Employees in Same Department

- * Consensual relationship romantic or sexual in nature
- * One directly or indirectly reports to the other
- * MUST notify Human Resources Director
- * HR will evaluate effect

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Who Can Be a Harasser?

- * The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

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WHO CAN BE A VICTIM ?

- * The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- * It is helpful for the victim to directly inform the harasser that the conduct is unwelcome and must stop.
- * The victim should use any employer complaint mechanism or grievance system available.

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TWO ROUTES TO LIABILITY

The first question a court will look at is whether there has been a tangible employment decision.

Courts require a significant change in employment status, such as hiring, firing, failure to promote, reassignment with significantly different responsibility, or a decision causing a significant change in benefits.

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Examples

- * Loss of benefits specifically negotiated for, such as a private office because he or she said "no".
- * Threats of discharge by a supervisor to coerce compliance to a sexual demand.
- * Withholding a promotion or benefits for promotion for refusing to accept sexual advances from a supervisor.
- * The employer took some action, even recommending a raise in exchange for sex because the law protects you where the boss used that power to obtain sex.

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Quid Pro Quo



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STRICT LIABILITY

QUID PRO QUO SEXUAL HARRASSMENT BY A SUPERVISOR

- A person is a "supervisor" for purposes of sexual-harassment law when he or she can take tangible employment action.
- Employers are strictly liable (no defense available) when workplace harassment involves a tangible employment action by the harasser. This means that the employer need only prove that the unlawful harassment and the tangible employment action occurred.

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What Happens ?

There is a complaint of sexual harassment, but there is no tangible employment decision. Not fired, not demoted, not placed in a stigmatizing position

Example – another employee repeatedly seeks sexual favors to the point stalking, un-wanted touching and suggestive texts well beyond what anyone would tolerate, and it begins to impact the victim's health.

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HOSTILE WORK ENVIRONMENT

- * Unwelcome conduct based on sex.
- * Harassment is continued and long lasting.
- * Conduct is severe enough that the environment becomes intimidating, offensive or abusive.
- * The words and actions of the harasser make it impossible to do your job effectively.
- * Effective handling has not occurred.

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EXAMPLE FROM AN ACTUAL CASE

Employee claimed she was a victim of sexual harassment because her boss was, allegedly, watching pornography and masturbating behind his closed office door.

There was no allegation that the employee and her boss interacted in any way that was remotely sexual, that it took place because she was present or that the boss engaged in the activity because the employee was a woman.

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Points

Boss was an elected official who could hire and fire, so there would be strict liability if this were sexual harassment.

Nothing here altered the terms and conditions of the complaining employee's employment.

This was not sexual harassment because there are no allegations that even imply that the Boss's actions were motivated by the employee's gender.

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Hostile Work Environment

Jane Doe testified that over a three-month period her boss, an elected official, called and texted her numerous times after hours to ask her out; made suggestive and sexual comments two to three times a day; and once rubbed his genitalia against her.

Jane Doe had phone records, but actual text messages or recorded calls. Her Boss regularly communicated with staff for legitimate business reasons and never allowed employees in his office without the door remaining open.

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Result

* The court found a jury question existed as to whether the conduct was sufficiently severe or pervasive.

* The live and learn lessons from this included delegating after hours communications, no texting employees, making sure the cameras in the work area were always on and a confidential settlement.

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Workplace Harassment Examples



Unwanted sexual text messages/emails

Comments about anatomy/body parts

Propositions to engage in sexual activity

Being asked repeatedly for a date

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NON-VERBAL

- * Looking a person up and down
- * Staring at someone
- * Blocking a person's path
- * Giving personal gifts
- * Displaying sexually suggestive visuals
- * Facial expressions – winking or blowing kisses
- * Making sexual gestures with hands or body movements



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MORE



DON'T Stroke, grab, pinch, hug, or put your arm around someone.



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VERBAL HARASSMENT

Again, Sexual harassment in a work environment refers to repeated and continuous behaviors of a sexual nature, including comments, touching, sending or posting photos and literature (e.g. emails) or requests (e.g. a supervisor asking an employee for sex or a date).

Verbal sexual harassment refers to any of the above behaviors that are said out loud either to a person directly, near them or about them. This can look like inappropriate sexual comments said about your appearance to colleagues, sexually suggestive emails sent to your work account and lewd requests for dates or sexual favors.



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How Offensive Must it Be?




- ❖ Courts look at the totality of the circumstances.
- ❖ Frequency of the harassing conduct
- ❖ Its severity
- ❖ Whether it is physically threatening or humiliating
- ❖ Can be verbal, written, graphics, jokes, slurs...

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Subjective & Objective

- * Harassment must be severe or pervasive enough to alter the conditions of employment and create an abusive environment.
- * AND both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.



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Co-Worker Standard

❖ Hostile Environment By a Co-Worker

- ❖ Employee belongs to a protected class;
- ❖ Employee was subject to unwelcome sexual harassment;
- ❖ The harassment was based on sex;
- ❖ The harassment affected a 'term, condition, or privilege' of employment, and
- ❖ The employer "knew or should have known of the harassment and failed to take remedial action."

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DON'T

- * Refer to an individual as HOT, BABE or DOLL
- * Comment about a person's body
- * Comment about a person's clothing
- * Talk about your love life
- * Get in someone else's personal space



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What do we look for?

- * Jokes
- * Innuendos
- * Racial, Sexist or Homophobic Slurs
- * Name-Calling
- * Condescending Talk
- * Insults
- * Yelling
- * Aggressive Gestures



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
Fear Forensics


- * Does anyone really believe their social media accounts are private?
- * What about text messages?
- * Emails?





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Look at your cell phones. Go through your texts and pick an emoji you have sent or received.


 Smiling Face with Heart-Eyes


 Winking Face


 Dog Face

 Cow

 Peach


 Hot Pepper

 Eggplant

 Coconut

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Do You Think an Emoji is OK?
There are no secrets



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WORKPLACE BULLYING

* Recognize that a range of conduct can combine to make work life intolerable – we are looking to avoid instances of repeated stress – both active and passive actions which create feelings of helplessness

Discourtesy

Disrespect

Intimidation

Harassment

Retaliation

Verbal Abuse

Physical Aggression

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Why ?

Bullies work to wear down or socially isolate another person to:

Ensure their own job security

Advance their career

Gain a sense of power

Instill fear in the target or observers

Observers are either intimidated or join in

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Impact in a 2021 world




For the Victim

For the Employer

- | | |
|---|--|
| * Stress & job dissatisfaction | * Job turnover |
| * High absenteeism | * Loss of Quality Employees |
| * Hyper-vigilance | * Loss of Productivity |
| * Emotional distress | * Low Job Satisfaction |
| * Increased risk of self-destructive behavior | * High absenteeism |
| | * Toxic Work Environment for by-standers |
| | * Injury to Business Reputation |

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AVOID




- Spreading malicious rumors or gossiping
- Undermining another's work
- Shifting blame or unwarranted criticism
- Exclusion, social isolation
- Excessive monitoring or micromanaging
- Unwarranted punishment or papering a file
- Blocking training, leave or promotion

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Defense

- The City defends itself by having immunity from a hostile work environment based upon sex by having a policy that establishes:
- A) Reasonable care to prevent and promptly correct sexually harassing behavior; and,
- B) Proof that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm.



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HOW THIS WORKS IN REAL LIFE

Proactive Employer	Exposed Employer
1. City exercises reasonable care to prevent and correct promptly any sexually harassing behavior,	1. not trained on sexual harassment,
2. Gives notice of a policy and complaint procedure, and,	2. not informed of the existence of a policy,
3. The policy is reasonable.	3. not shown where to find it, and
	4. not told whom to contact regarding sexual harassment.

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Acknowledgement

EMPLOYEE AGGRESSION AND HARASSMENT POLICY

I have read, understood, and agree to comply with the City of Cleveland Anti-Harassment policy. I understand the City of Cleveland strives to create and maintain a work environment in which people are treated with dignity, decency and respect. Furthermore, I understand that this policy can be amended at any time.

Date: _____

Employee's Signature: _____

Employee's Printed Name: _____

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HOW TO COMPLAIN

- * A written complaint is most effective.
- * EMAIL = Official Complaint of Sexual Harassment
- * ADDRESS =
 - * heather.williams@cityofclevelandms.com

OMIT THE DEPARTMENT HEAD IF HE/SHE IS THE HARASSER

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HOW TO COMPLAIN

- * I am writing to notify you that _____ has been sexually harassing me. The following incidents have occurred:

[Write a legible description of every incident.]

No Fancy Wording Required.

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WHAT HAPPENS NEXT

- * HR will investigate.
- * Multiple witnesses will be interviewed.
- * Both parties will be interviewed.
- * Both your personnel file and the other party's will be reviewed.
- * The City will take action to address the problem.
- * You cannot be punished in any way for making a complaint.

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Your Rights

- * You have a right to an attorney of your choosing at your expense.
- * You have a right to file a formal charge with the Equal Employment Opportunity Commission (EEOC).

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Tangible Employment Decisions After a Complaint

Unwarranted reprimands	Denial of promotion	Termination
Threatening messages to the employee and others	Unjustified negative performance evaluations	Unjustified negative references

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Tangible Employment Decision After a Complaint?

Anti-retaliation protection exists under multiple avenues if there is a direct causal connection between protected activity and a tangible employment decision.

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THE EEOC DESCRIBES PROTECTED ACTIVITIES AS

- * Complaining to anyone about alleged discrimination against oneself or others
- * Threatening to file a discrimination charge
- * Demonstrating in opposition to discrimination
- * Refusing to obey an order reasonably believed to be discriminatory
- * Filing a charge of employment discrimination
- * Participating in an investigation of alleged discriminatory practices
- * Testifying as a witness in an EEOC investigation or litigation

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TIME LIMITS

City policy requires that you immediately report unwelcome harassment in the workplace of a sexual nature.

The EEOC requires you to file a charge within 180 days.

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MEDICAL MARIJUANA AND
THE WORKPLACE

*d-IM

* Create a policy

* Federal Law concerns

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