

Recognizing and Preventing Sexual Harassment and Abusive Conduct

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Welcome!

- Please make sure your attendance is recorded
- Today's training is not legal advice
- Some content we will be going over may be perceived as offensive
- Despite any *attempts* at humor, harassment and discrimination are serious issues
- This is a judgment-free training, please feel free to ASK QUESTIONS

Agenda

- Overview of Harassment and Sexual Harassment
- Supervisor Obligations and Liability
- Strategies for Preventing and Responding to Sexual Harassment
- Prohibition against Harassment Based on Gender Identity, Gender Expression and Sexual Orientation
- Prevention of Abusive Conduct in the Workplace

Why are we here again?

Proactive obligation to prevent harassment:

- Federal and state law not only *prohibit* harassment...but also:
- Require employers to take all “reasonable steps” to prevent harassment from occurring....



For example...

Why are we here again?

Prevalence of harassment:

- 60% of **women** experience unwanted sexual attention or coercion or sexually crude conduct or sexist comments in the workplace.
- 19% of **men** report unwanted sexual attention or coercion.
- 47% of **gay** workers report some form of discrimination or harassment in the workplace, as do 82% of **transgender** workers.

Why are we here again?

- Harassment impacts productivity and employee retention
- Costs of harassment can be high –
 - To victim AND
 - To employer
 - Economic, emotional, career, morale, public relations



What about elected officials?

- California Legislature was concerned about high-profile cases involving elected local government officials who were accused of and/or found guilty of sexually harassing their staff.
- AB 1661 (2016): Legislature requires all local agency officials to receive:
 - At least two-hours of sexual harassment prevention training
 - Within the first six months of taking office or commencing employment
 - Every two years thereafter (Gov. Code section 53237.1)

Sexual Harassment Costs

- **2010:** Gender discrimination case; no harassment claims but was first time “microaggressions” alleged in a case, e.g., being punished for using the restroom and told not to apply for management jobs.
 - Jury awarded \$250 million.
- **2012:** Physician’s assistant claimed doctors asked her for sex, had explicit sexual discussions around her, one doctor intentionally stuck her with a needle; when she reported to her supervisor, her supervisor laughed at her and then fired her.
 - Jury awarded \$168 million (\$125 million of which was punitives)
- **2023:** CRD’s largest settlement. Against Riot Games.
- **2024:** Sexual harassment and sexual assault case by “brand ambassador” for one of his companies brought against billionaire Alkiviades David
 - Jury awarded \$900 million awarded(\$800 million of which was punitives)



**The average verdict for
harassment victims is
\$1,000,000.**

The average cost to investigate and defend
an employment claim is over \$300,000.

Importance of Early Intervention

*If you have a **big** problem **now**,
at some point in the past you had a **small** problem.*

*The earlier you intervene,
the easier it is to prevent and correct problem behavior.*

What Research Shows:

Cultivating a culture of sexual harassment intolerance will help all employees feel compelled to empathize with targets and respond appropriately, creating a safer environment.

- **In workplaces highly intolerant of sexual harassment, both men and women reported they had:**
 - Greater empathy towards victims;
 - Intervened more;
 - Exhibited less silence.
 - This in turn helped eliminate the gender gap in how people responded.
- **An employer is “intolerant” towards sexual harassment where they:**
 - Implement sexual harassment policies
 - Investigate harassment complaints
 - Enforce policies against harassers
 - Have supervisors and leadership engage in sincere efforts to stop sexual harassment

Is This Sexual Harassment?

- Male supervisor gives his assistant a pat on the butt.
- Male NFL coach pats the quarterback on the butt.
- A female construction worker with a short hair cut is called “butch” by her co-workers, male and female.
- An employee tells a “blonde” joke.
- Supervisor asks to discuss promotion with employee over dinner.
- Single employee seeks love advice from married co-worker.
- An employee has a loud personal phone conversation about their date last night, where everyone can hear.
- An employee compliments a coworker on their outfit.
- An employee hangs pictures of her competing in bodybuilding competitions in her cubicle.

LEGAL BACKGROUND

Anti-Discrimination/Harassment Laws

Federal

- Title VII of the Civil Rights Act
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Equal Pay Act

State

- Fair Employment and Housing Act (FEHA)
- Pregnancy Disability Leave Act
- Local ordinances

What is “Discrimination”?

To refuse to hire or employ a person, or to bar or to discharge a person from employment, or to discriminate against a person in compensation or in terms, conditions or privileges of employment based upon a protected category.

What is “Harassment”?

Conduct or employment decisions based on a worker’s protected category that

- unreasonably interfere with an employee’s equal employment opportunities **OR**
- create an intimidating, hostile, or offensive working environment

Protected Categories: Federal Law

It is unlawful for an employer to discriminate against or harass an employee because of:

- Race
- Color
- National origin or ancestry
- Alienage/citizenship
- Sex (including pregnancy)
- Age (40 and over)
- Physical or mental disability
- Religion
- Military service
- Exercising leave rights under FMLA
- Genetic information

Protected Categories: Federal Law

“Religion” is a belief system that is recognized and not an isolated teaching and that occupies a place of importance in someone’s life equal to that of traditionally recognized religions.

- Atheism is included
- Veganism is not

Protected Categories: California Law

- Race
- Color
- National origin or ancestry
- Sex (gender)
- Pregnancy
- Age (40 and over)
- Physical/mental disability
- Religion
- Military service
- Request for statutory leaves (CFRA/PDL)
- Sexual orientation
- Gender identity
- Gender expression
- Medical condition
- Marital status
- Local laws

Protected Categories: Perception/Association

- Federal and California law also protect perceived membership in one or more protected category
- Federal and California law also protect employees associated with a person who is a member of (or is perceived to be a member of) a protected category

SEXUAL HARASSMENT

What is “Sexual Harassment”?

Sexual harassment in the workplace is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and California’s Fair Employment and Housing Act.

Briefly, sexual harassment refers to both:

- unwelcome sexual advances or other visual, verbal, or physical conduct of a sexual nature, and
- actions that create an intimidating, hostile, or offensive work environment based on an employee’s sex.

What Constitutes Sexual Harassment

- **Physical Conduct** – inappropriate touching, massaging, hugging, blocking exits, “overly familiar” gestures, standing or sitting too close
- **Verbal Conduct** – off-color jokes, slurs, sexual degrading words, graphic comments about anatomy or clothing, asking invasive personal questions, gossip about own personal life, belittling expressions, repeated requests for a date
- **Visual or Non-verbal Conduct** – unwelcome gifts, leering, posters, emails, texts, social media, sexual gestures, winking, sexually suggestive objects or pictures

What Constitutes Sexual Harassment

Auditory Harassment?

San Francisco Chronicle

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By **Bob Egelko**, Courts Reporter

Updated June 7, 2023 4:10 p.m.

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What Constitutes Sexual Harassment

Sexual harassment can also be nonsexual hostile conduct directed at an employee because of his/her/their gender:

- Unequal treatment of an employee because of the employee's gender, including unequal discipline
- Unequal targeting of an employee of one gender for pranks, jokes, yelling, or other offensive conduct

Who Can Be A Harasser?

- Someone of the opposite sex
- Someone of the same sex
- Temporary employee
- Contractor
- Customer, vendor, visitor, client, member of the public, some other non-employee

Who Can be a Harasser: Does Intent Matter?

Sexual Desire Irrelevant

- Since 2014, sexual desire need not be shown to establish a claim of sexual harassment.

Who Can Be Liable for Harassment?

- If employer knows or should have known about harassment, it will be liable if it failed to take immediate and appropriate corrective action.
- Harassers can be held personally liable for harassment or for aiding and abetting harassment.

TYPES OF SEXUAL HARASSMENT

1. *Quid pro quo*
2. **Hostile work environment**

Quid Pro Quo Harassment

- *Quid pro quo* is Latin for "this for that."
- *Quid pro quo* harassment applies where a superior seeks sexual favors either:
 - In return for a job benefit (for example, a promotion or raise).
 - To avoid a job detriment (for example, a demotion or pay cut).

Quid Pro Quo Harassment

- The superior's threat may be *express* or *implied*
- Also considered "economic harassment" because it involves an employment decision by a supervisor that affects compensation
- Strict liability for employers

Quid Pro Quo Harassment

Question:

- Can you think of some examples of *quid pro quo* sexual harassment?

Hostile Work Environment Harassment

- Hostile work environment sexual harassment occurs when **unwelcome comments or conduct** based on sex unreasonably interfere with an employee's work performance or create an intimidating, hostile, or offensive work environment.
- Must be **severe or pervasive** such that it alters the conditions of the victim's employment and creates an abusive working environment.
- **Need not be** (1) targeted at the offended individual to give rise to a hostile work environment claim or (2) motivated by sexual desire to be unlawful.
- The harassment can be physical, verbal, or visual conduct

Hostile Work Environment: “Severe or Pervasive” Standard

- Fact-intensive analysis
- Courts have considered:
 - Frequency of conduct
 - Severity of conduct
 - Whether the conduct was physically threatening or humiliating (as opposed to a merely offensive statement)
 - Whether the conduct unreasonably interfered with the employee’s work performance.

Hostile Work Environment: "Severe or Pervasive" Standard

Example: Employee Sonali mentions to you that a coworker, Marco, asked her out on a date, but that she turned him down and said she had a boyfriend.

Would a single date request be considered severe or pervasive?

Hostile Work Environment: "Severe or Pervasive" Standard

Example (continued): What if Sonali tells you that Marco keeps asking her out? Now she feels uncomfortable and tries to avoid him, but he comes by her cubicle all the time and asks if she's broken up with her boyfriend yet.

Would *this* be severe and pervasive?

What would you do in this situation as a supervisor?

“Unwelcome” Conduct

- This is not the same as intentional. Remember, harasser’s intent does not matter. “Unwelcome” is determined not by what the harasser intends, but by what the victim perceives*.
- Conduct of a sexual nature is *presumed* to be unwelcome and unwanted.
- Consider the effect of the power dynamic on whether something is truly “consensual”.

*Plus whether it is objectively reasonable to perceive the conduct that way.

When Is Conduct “Unwelcome”?

“Unwelcome” Conduct

How do you tell when something is welcome or unwelcome?

- Verbal response (or lack thereof)
- Facial expression and body language
- Remember third party witnesses too

Hypothetical 1

A manager walks into the lunchroom and overhears an employee telling an off-color joke to 5 or 6 other employees. The joke does not contain any extreme language, but there is some mild profanity and sexual connotation. All of the employees laugh at the punch line.

What should the manager do?

- A. Nothing**
- B. Immediately stop the activity**
- C. Talk to joke teller later**

“Severe OR Pervasive”

- A single incident might be **severe** enough to constitute harassment, though such cases usually involve physical conduct or touching.
- Even if not “severe” on their own, many seemingly trivial incidents can be **pervasive** enough to constitute harassment.



Severe OR Pervasive (continued)

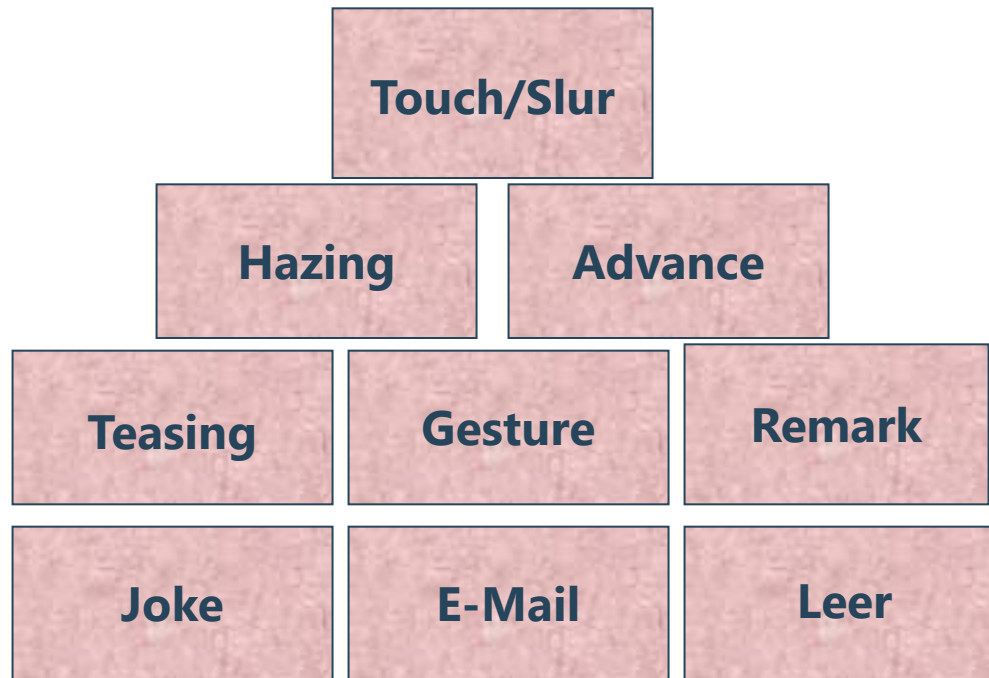
- Factors considered
 - Whether the conduct was verbal, physical, or both
 - Whether the conduct was physically threatening or humiliating vs. a mere offensive utterance
 - Whether the conduct interferes with the ability to work
 - Frequency of conduct
 - Whether others joined in the harassment
 - Whether the harassment was directed at more than one person
 - Whether the harasser is a supervisor or occupies a position of authority over the victim
 - Whether the harasser was involved in other incidents

The Reasonable Person Standard

- This standard is both *objective* and *subjective*.
- “Subjective” because it is from the point of view of the target or victim, not from the point of view of the harasser.
- “Objective” because the person must be reasonable considering the circumstances.
 - For example, if the plaintiff is a woman, this standard asks whether a “reasonable woman” would be offended by the allegedly harassing behavior.

ZERO TOLERANCE = PREVENTION

Every brick violates zero tolerance



Together the bricks form
a pattern of conduct...
**that creates a Hostile
Work Environment**

Hypothetical 2

Laura is attracted to her boss, Will. Since they're both single, she asks him out for after-work drinks. After proceeding to dinner and having a few drinks, they go back to Laura's apartment and Will ends up spending the night.

Could this be considered sexual harassment?

Answer to Hypothetical 2

- The situation does raise some legal exposure for the company, and for Will. Because Will is Laura's boss, Laura could later allege that she felt pressured to sleep with Will to keep her job, or for other job-related reasons.
- Employers and supervisors **must** be aware of how their sexual relations with a subordinate could have detrimental effects on themselves, as well as their company.

Romantic Relationships in the Workplace

- “Welcome” now, unwelcome later?
- Can consensual relationships give rise to sexual harassment complaints?
- Consider the power dynamic
- Consider “third-party” observers and the impression of sexual favoritism
- Consider the supervisor’s obligation

Sexual Harassment Based on Sexual Orientation, Gender Identity, or Gender Expression

Definitions

- **Gender Expression:**

- a person's gender-related appearance or behavior; or
- the *perception* of such appearance or behavior, whether or not stereotypically associated with the person's sex assigned at birth.

- **Gender Identity:**

- a person's internal understanding of their gender;
- the *perception* of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female;
- a gender different from the person's sex assigned at birth; or
- transgender.

Definitions (continued)

- **Transgender:**

- A general term that refers to a person whose gender identity differs from the person's sex assigned at birth. A transgender person may or may not have a gender expression that is different from the social expectations of the sex assigned at birth.
- a transgender person may or may not identify as transsexual (an older term that usually refers to a person who has taken medical steps to change the body to conform to one's gender identity).

- **Transitioning:**

- a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth; may include changes in name and pronoun usage, facility usage, undergoing hormone therapy, surgeries, or medical procedures.

- **Sexual orientation:**

- a person's physical, romantic, or emotional attachment to another person.
- a person can be heterosexual (straight), homosexual (gay or lesbian), bisexual, or asexual.

Definitions (continued)

- **Gender-Nonconforming:**
 - a person whose gender expression is different from conventional expectations of masculinity or femininity. Not all gender nonconforming people identify as transgender and not all transgender people are gender nonconforming.
- **Genderqueer:**
 - a term used by some people who define their gender as falling somewhere in between or outside the categories of male and female.
- **Cisgender:**
 - refers to a person whose gender identity is consistent with the sex the person was assigned at birth.

Harassing Conduct

- ***Intentionally*** continuing to call a male to female transgender employee by her male name or using the pronouns “he” or “his”.
- An employer ***refusing*** to allow a transgender individual to wear the clothing associated with the gender the individual identifies with.
- ***Expressing hostility*** to transgender gender-nonconforming individuals because they do not look or act how the person thinks a man or woman should act.
- ***Using slurs or other derogatory terms*** to refer to an employee who is homosexual or perceived to be homosexual.

****If you make an honest mistake, apologize.***

DEFINING THE WORKPLACE

Defining the Workplace

Pop Quiz:

The things that an employee does on his or her “personal time” (e.g., breaks, lunch, after work, etc.) cannot be considered harassment because they are not done “at work”?

TRUE OR FALSE?

Defining the Workplace (continued)

Is this activity “away” from the workplace such that employment laws do not apply?

- Texting with a coworker after work hours
- Commenting on or “liking” social media postings by coworkers
- “Matching” with a coworker on Tinder, Bumble, or similar dating app
- Office party, in the office, during work hours
- Office party, off-site, not during work hours
- Informal happy hour after work
- Business trip, but during non-working parts of the trip (e.g., dinner, drinks, on the plane, etc.)
- Weekend barbeque at co-worker’s house with both work and non-work friends

Defining the Workplace – Technology

Technology has made these issues in harassment cases much more difficult:

- Where is the workplace?
- When is harassment occurring?
- How to investigate harassment?
- How to prevent harassment?
- More mediums for harassment?

Technology and Harassment

Think About Emails Before You Hit Send!

- Can they be misinterpreted?
- Do you want to have to explain this email?
- And remember what the “E” in “E-mail” stands for...

“Evidence.”



**DANCE LIKE NO
ONE IS WATCHING**



**EMAIL LIKE IT MAY
ONE DAY BE READ
ALoud IN A DEPO**

MONITORING THE WORKPLACE AND RESPONDING TO COMPLAINTS

Pop Quiz:

If an employee does not follow agency procedure by making a complaint to their supervisor or human resources about inappropriate behavior first, there is no basis later for a lawsuit alleging harassment.

TRUE OR FALSE?

Pop Quiz:

What is the *earliest* point at which an employer has a duty to take action in response to potential harassment?

- A. When a lawsuit has been filed
- B. When an internal complaint has been made, before a lawsuit
- C. When an employee talks informally to a supervisor about bad behavior by a coworker, before an internal complaint is made
- D. When the supervisor observes a problematic interaction, but no employee has yet complained

Constructive Knowledge Standard

Employers are liable for harassment when:

- They *actually* knew about the offending behavior; or
- They *should have known* about the offending behavior
...and failed to take action.

What Does “Taking Action” Mean?

It depends! Helpful questions:

- How serious was the conduct
- Is this repeat conduct
- Has there been an actual complaint, whether formal or informal

Examples of potential actions:

- Reporting to HR
- Reporting to next level supervisor
- Informal check-in with affected employee
- Check-in with witnesses
- Public reprimand

What Does “Taking Action” Mean?

Two guiding principles for supervisors:

- Here’s what I did
- Here’s why it was reasonable under the circumstances

Hypothetical 3

What should you do if:

- (1) You overhear employees joking with each other about which co-workers are the hottest and who they would like to sleep with?
- (2) An employee says that she wants to tell you about some sexually inappropriate comments being said at work, but that she does not want you to get management involved?

Answer to Hypothetical 3

Supervisors have the responsibility to address situations in the workplace of which they become aware that could be viewed as sexually harassing and creating a hostile work environment.

Supervisors should **NEVER** agree **NOT** to get management involved. Management should be notified immediately of any potentially harassing situation so that appropriate steps can be taken to investigate any incidents and take immediate, corrective action.

Monitoring the Workplace

- **Be alert to potential trouble areas:**
 - Joking and off-color language
 - Pictures, posters and publications
 - Disputes between employees
- **Act quickly if you *suspect* a problem.**
 - Don't wait for someone to complain
- **Your goals:**
 - Stop problems before they arise
 - Impress upon employees the commitment to providing a good work environment



Harassment Complaints

- **“Formal” complaint not required**
 - Casual statements
 - Second or third hand statements
 - Observations
 - Doesn’t need to be to any specific person
- **Confidentiality**
 - Can’t be promised
 - Obligation to correct may override privacy concerns
 - No such thing as “off the record”
- **For supervisors, especially**
 - You are a resource for employees
 - Informal resolution if possible
 - Not reporting is not an option

Harassment Complaints

Responding to Harassment

What if the complaint is about you?

RETALIATION

Preventing Retaliation

Federal and state law prohibit an employer from taking “adverse employment action” towards an employee who has engaged in “protected activity”

“Protected Activity” includes:

- Filing an administrative or civil complaint in good faith
- Reporting harassment/discrimination internally at work
- Participating in a harassment or discrimination investigation or proceeding

Retaliation – “Adverse Employment Action”

Standard: any action that “could well dissuade” an employee from engaging in protected activity in the future

- Obvious – disciplinary action, demotion/failing to promote, withholding a benefit, termination
- Not so obvious – ostracism/silent treatment, changing work assignments, disclosure of complaint, gossip, hazing, bullying

Retaliation

Relationship between the “protected activity” and “adverse employment action”

- Same actor
- Concurrent statements/actions
- Timing

Hypothetical 4

On more than one occasion, Rebecca has told her administrative assistant Nathan, who has been working for her for 6 months, that he is attractive. Nathan never says anything in response. Rebecca assumes he is flattered and continues complimenting him on his appearance.

When Nathan learns that another administrative assistant hired after him earns more money, Nathan asks Rebecca for a raise. Rebecca says that she will consider it if Nathan goes out to dinner with her. Nathan makes it clear that he wants to keep their relationship professional and would prefer not to go out with her. Rebecca says she understands and that they can talk about it over dinner.

Hypothetical 4 (continued)

While having lunch with a friend in Human Resources, Nathan mentions that his boss will only consider a raise if he goes out with her, which he is dreading because she constantly makes comments that make him feel uncomfortable.

Human Resources begins an investigation, and Rebecca determines it is best for everyone if she transfers Nathan to work under a different supervisor.

Is this a good solution?

ABUSIVE CONDUCT AND WORKPLACE BULLYING

“Abusive Conduct”

- AB 2053, effective January 1, 2015, requires all anti-harassment training to include prevention of “abusive conduct” in the workplace
- Abusive Conduct = Conduct of an employer or employee in the workplace, **with malice**, that a **reasonable person** would find hostile, offensive, and **unrelated to an employer’s legitimate business interests**

Abusive Conduct – What Is “Malice”?

- Malice: acting with intent to cause injury; engaging in conduct that is despicable and done with willful and knowing disregard of the rights or safety of another
- Despicable: conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people

“Abusive Conduct”

Examples from AB2053:

- Repeated infliction of verbal abuse
- Use of derogatory remarks, insults, and epithets
- Gratuitous sabotage or undermining of a person’s work performance
- Verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating

Common Workplace Bullying Tactics

- Falsely accusing someone of “errors” not actually made
- Using the “silent treatment” to “ice out” and separate from others
- Purposely not greeting someone and greeting everyone else
- Rolling eyes when one particular person speaks in a meeting
- Taking credit for work done by others
- Creating unrealistic demands or assigning undesirable work to a person singled out
- Starting or failing to stop destructive rumors or gossip
- Launching a campaign to oust someone
- Unnecessarily copying superiors on emails in an attempt to make someone look bad
- “Micromanaging”

Conduct That Is NOT Bullying

- Legitimate performance reviews
- Disciplinary action
- Coaching and counseling
- Non-malicious conduct
- A single instance of conduct, unless severe and egregious

CLOSING THOUGHTS

How Do These Cases *Really* Play Out?

- Micro-aggression = an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group
 - Can be unconscious or unintentional
 - Can come out in seemingly innocuous comments by people who might be well-intentioned
- Most victims of micro-aggressions do not respond in the moment because the aggression is, by definition, “micro”
- The point is the accumulation over time of indignities that the majority group is not subjected to – “death by a thousand paper cuts”

How Do These Cases *Really* Play Out?

Common gender-based micro-aggressions:

- “When are you thinking of starting a family?”
- “Have you met Jennifer yet? She’s a lovely girl.”
- “Jennifer can be too assertive in meetings” vs. “I like how Joe always speaks up and stands his ground in meetings”
- “That’s not very lady-like.”
- Interrupting
- Taking credit
- Assuming a position/role – woman as the “notetaker”
- Mansplaining

Mansplaining...Mansplained

How Do These Cases *Really* Play Out?

Common orientation/identity-based micro-aggressions:

- "You're transgender? Wow, you don't look like it at all."
- "Is that a man or a woman?"
- "Oh, you're gay? You should meet my friend, they're gay too!"
- "He/She is gay? What a waste."
- "You don't sound gay" or "You don't look gay"
- "Which one of you is the man/woman in the relationship?"
- Repeatedly using non-preferred pronoun

How Do These Cases *Really* Play Out?

Common race-based microaggressions:

- “You speak so well” or “You’re so articulate” or “Your English is good”
- “What are you?” or “No, where are you *really* from?”
- “You don’t act like a ____ person”
- “I don’t see color” or “I don’t care if you’re black, white, green, or purple”
- “Your name is so hard to pronounce”
- “Where can I get the best [food item]?” or “You’re ____? I love [food item]!”
- “I’m not racist, my friend/significant other is ____”
- Policing presence
- Touching hair

How Do These Cases *Really* Play Out?

Combating micro-aggressions:

- Drop the defensiveness
- If someone says you offended them, listen
- Think before you speak – would you make this comment or ask this question to someone of a majority group?
- Do your own occasional gut check
- Seek out articles, podcasts, and other media to learn about why some things might be problematic – don't rely on the labor of others
- As a supervisor, address micro-aggressions when you see or hear them

QUESTIONS?