



# **Workplace Discrimination, Harassment and Bullying: A New Legal Landscape**

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## The Plan

- Discuss workplace discrimination
- Ask you some questions
- Discuss workplace harassment
- Ask you some questions
- Discuss disability issues
- Ask you some questions
- Answer your questions about the questions I asked you

## Workplace Discrimination

- In Arizona, most employees are “at will”
- Government employees are entitled to “due process”
- No employee can be fired (or demoted, or disciplined, or be subject to some other adverse employment action) for a “bad” reason

## What are the BAD Reasons?

- **Race**
- **Sex**
- **Age**
- **Religion**
- **Disability**
- **Sexual Orientation**
- **Gender Identity**

## What Does That Mean?

- **Race**
  - ✓ Race means any race
- **Sex**
  - ✓ Sex means either sex
- **Age**
  - ✓ Means over 40
- **Religion**
  - ✓ Religion means “any” religion

## What Does That Mean?

- **Sexual Orientation**
  - ✓ Whether a person is romantically or sexually attracted to other adults of a different sex, the same sex, or both.
- **Gender Identity**
  - ✓ An individual's inner sense of belonging to a particular sex, male or female, regardless of whether this corresponds to his or her anatomical sex.

## ***Zarda v. Altitude Express, Inc.***

**883 F.3d 100 (2nd Circuit 2018)**

- **Male skydiving instructor was doing a “tandem jump” with a female client.**
- **To address potential discomfort, instructor told female client he was gay, and “had the ex-husband to prove it.”**
- **Client complained to boyfriend, who complained to instructor’s boss.**
- **Boss fired instructor.**

## ***Zarda v. Altitude Express, Inc.***

**883 F.3d 100 (2nd Circuit 2018)**

- Instructor sued under Title VII
- District Court held that Title VII does not cover sexual orientation discrimination
- Second Circuit reversed:

**“We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. ...This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an employer’s opposition to romantic association between particular sexes—is discrimination based on the employee’s own sex.”**



## ***Fabian v. Hospital of Central Connecticut,***

**172 F. Supp. 3d 509.**

- **Transgender female orthopedic surgeon applied to Hospital**
- **Was offered job, was given a contract, and was invited to interview**
- **At interview, she presented as male but informed the Hospital that she was transitioning to female**
- **Hospital then declined to hire**

## ***Fabian v. Hospital of Central Connecticut***

- Surgeon sued under Title VII
- Definition of “Sex” = “the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction ... and that is typically manifested as maleness and femaleness ....” (Webster’s Third New International Dictionary)
- The Court stated  
“Discrimination on the basis of the “peculiarities” that “typically” manifest as maleness and femaleness, or on the basis of “the property by which” people are classified as male or female, is much broader than discrimination against women because they are women and discrimination against men because they are men—it would surely include discrimination on the basis of gender stereotypes, and just as surely discrimination on the basis of gender identity.”

## ***Fabian v. Hospital of Central Connecticut***

- Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.”
- Similarly, discrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination “because of sex.”

# Burden-Shifting Test

## Three Parts

- 1. The employee must show:**
  - ✓ Was a member of the protected class,
  - ✓ Was qualified/performing satisfactorily,
  - ✓ Suffered an adverse employment action, and
  - ✓ Similarly situated employees treated differently.
- 2. Employer must articulate legitimate non-discriminatory reason for adverse employment action**
- 3. Employee must show that the employer's proffered reason is "pretext"**
  - ✓ Direct evidence of discrimination
  - ✓ Circumstantial evidence

## Strategies to Avoid Discrimination Allegations

- **Be objective**
- **Be consistent**
- **Be serious**
- **Document**
  - ✓ **Facts, not feelings**
  - ✓ **Document consistently**

## Pop Quiz Question #1

Supervisor Amy is considering candidates for a position in the City. The position requires the employee to be “on-call” and to respond quickly to off-site, after-hours emergencies. Which of the following questions would be appropriate to ask the applicants?

- A. Do you have any children?
- B. Are you married?
- C. Have you ever been in a position where you had to respond to after-hours emergencies?
- D. Is there anything that would interfere with your ability to respond to after-hours emergencies?
- E. Both A & C.
- F. Both C & D.

## Pop Quiz Question #2

On Tuesday, John's supervisor finds him playing Scrabble (on his phone, of course) at his desk. John's supervisor shakes his head and tells him that he needs to get back to work. On Wednesday, Jane's supervisor (who is also John's supervisor) finds her playing Solitaire at her desk. Jane's supervisor issues Jane a written reprimand for playing games at her desk. This is okay if:

- A. John is Hispanic.
- B. Jane is Hispanic.
- C. Both John and Jane are Hispanic.
- D. The supervisor believes Scrabble is more stimulating than Solitaire, and therefore does not warrant discipline.
- E. The supervisor has documentation that Jane has previously been warned about playing games at her desk, and Jane violated a clear directive that had been provided to her.

## Harassment

- **Sexual Harassment**
- **Racial Harassment**
- **Disability Harassment**
- **Religious Harassment**



## Sexual Harassment

**Definition: Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, where:**

- ✓ 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 the basis for employment decisions affecting the 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.

## **Hostile Environment Sexual Harassment**

- **Unwelcomed conduct**
- **Conduct based on employee's sex**
- **Conduct sufficiently severe or pervasive to affect the terms and conditions of employment**

## **What is “Severe and Pervasive” Harassment?**

**Severe = Physical, threatening, humiliating?**

**Pervasive = Happens often or regularly**

**Severe + Pervasive = Hostile**

**Offensive to a reasonable person in that position?**

**Sliding Scale**

**Very severe = once is enough**

**Very pervasive = offense can be slight**

## **What is Acceptable?**

- **Depends on frequency and intensity**
- **Teasing, offhand comments and isolated incidents generally do not create a hostile environment (under the law)**
- **Set the bar low**
- **Do not try to be the judge of severity or good taste in your workplace**

## **Sexually Hostile Conduct**

- **Physical contact, interference or blocking movement**
- **Sexual advances or propositions**
- **Sexual cartoons, posters, pornography**
- **Derogatory sexual comments and slurs**
- **Gestures denoting sexual activity**
- **Leering and ogling**

## Same Sex Sexual Harassment

**Definition: Unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, where:**

- ✓ 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 the basis for employment decisions affecting the 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.

**Discrimination "because of sex."**

## **Showing Discrimination “Because of Sex”**

- **Conduct motivated by sexual desire**
- **Conduct shows general hostility towards the presence of the same gender in the workplace**
- **Perpetrator treats genders differently**

**Under New Legal Landscape = Racial Harassment**

## **Racial Harassment**

**Definition: Unwelcome conduct of a racial nature where such conduct has the purpose or affect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment.**



## **Racially Hostile Conduct**

- **Hate speech**
- **Jokes**
- **Pictures/Cartoons**
- **The magic word(s)**
- **Nicknames**

## **Disability Harassment**

**Definition: Unwelcome conduct relating to a person's disability where 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.**

## Pop Quiz Question #3

Which of the following could create a hostile work environment based on disability?

- A. Calling a co-worker with a prosthetic leg “Peg.”
- B. Decorating the office of a co-worker with a prosthetic leg with a pirate theme.
- C. Hopping around the office yelling “Hey, I’m Peg!!”
- D. All of the above.

## Religious Harassment

- Unwelcomed pressure to abandon, alter or adopt a religious practice as a condition of employment (quid pro quo);

OR

- Unwelcomed harassing conduct based on religion that is so severe and pervasive that the individual being harassed reasonably finds the work environment hostile or abusive

## What is “Religion?”

- **A sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by God.**
  - ✓ **Traditional organized religion**
  - ✓ **Moral or ethical beliefs held with conviction of traditional religion**
  - ✓ **Typically refers to ultimate ideas about life, purpose, death, right and wrong**

## Examples of Religious Harassment

- **Coercion**
  - ✓ Mandatory prayer meetings
  - ✓ Require answering phones with a religious greeting
  - ✓ Require church attendance, or non-attendance
- **Hostile Environment**
  - ✓ Comments, jokes, slurs, name calling
  - ✓ Disparaging a person's beliefs or lack thereof
  - ✓ Proselytizing to a person who asked not to have such discussions directed at them

## ***EEOC v Abercrombie & Fitch*, 135 S.Ct. 2028 (2015)**

- Muslim prospective employee applies at A & F
- Muslim prospective employee wore headscarf
- A & F has a “Look Policy”
  - ✓ no “caps”
- Religion of Accommodation not mentioned in interview
- Interviewer believed that prospective employee wore headscarf for religious reasons
- A & F did not hire prospective employee

## ***EEOC v Abercrombie & Fitch*, 135 S.Ct. 2028 (2015)**

- **Employee goes to EEOC**
- **EEOC sues**
  - ✓ **District courts grants employee summary judgment on liability, holds trial on damages, and awards \$20,000**
  - ✓ **10<sup>th</sup> circuit reverses**
  - ✓ **“Employer cannot be liable for failing to accommodate religious practice until employee provide employer with actual knowledge of need for religious accommodation”**



## ***EEOC v Abercrombie & Fitch*, 135 S.Ct. 2028 (2015)**

- **C. U.S. Supreme Court reverses 10<sup>th</sup> circuit**
  - ✓ **Title VII prohibits making a protected characteristic a “motivating factor” in an employment decision**
  - ✓ **Title VII does not impose a knowledge requirement**
  - ✓ **If an employer was motivated by a desire to avoid accommodating a religious practice or belief, the employer can be liable under Title VII regardless of whether it has actual knowledge of the religious practice or belief.**

## Potential Perpetrators and Employer Liability

- **Supervisors**
  - ✓ **Tangible employment action = Employer liability**
  - ✓ **Hostile work environment = Employer has a defense if Employer has a harassment policy that was not followed.**
- **Co-Workers**
  - ✓ **Victims must prove that Employer knew or should have known about the harassment**

## Harassment by Non-Employees

- **The City can be liable for harassing behavior by non-employees, IF**
  - ✓ **It is harassing conduct as defined by law.**
  - ✓ **If the City (i.e. you) knew or should have known about it and failed to take corrective action.**

## Retaliation

- **Cannot retaliate against anyone who reports harassment or discrimination in good faith or who participates in an investigation in good faith**
- **Make sure your staff understands the “no retaliation” policy – encourage reporting**
- **Protect people who report**
- **Do not require victim to confront the alleged perpetrator**

## Bullying

- Title VII is not a “civility code.”
- It is not illegal to be rude to other employees.
- BUT!!!

## Professionalism Matters!!!

- Employees think all harassment is actionable.
- “Bullying” reduces morale and productivity.
- “Bullying” + one slip = potential discrimination claim.
- Bullying is against City policy
  - ✓ Policy requires employees to be respectful and courteous.

## Strategies To Avoid Harassment Claims

- **Keep eyes and ears open.**
  - ✓ Even if it looks like the conduct is welcomed, if it sounds or looks bad, end it or at least inquire if welcomed.
  - ✓ Important thing is how the recipient feels about the conduct, not what you or co-employees think.
- **Respect all complaints.**
- **“He’s just having fun,” “She doesn’t mean anything by it,” or “you just need to accept it” are never the right response.**
- **Report *all* complaints to HR immediately.**
- **Maintain your own level of professionalism.**

## Pop Quiz Question #4

Female employee tells male employee “That suit looks really good on you.” Male employee responds by saying “Thanks. You look smoking hot yourself.” Female employee then sends male employee raunchy text message with a proposition. Male employee complains of sexual harassment.

The male employee’s complaint is:

- A. Not valid, because he welcomed the conduct.
- B. Not valid, because he harassed the female first.
- C. Not valid, because he was not subject to severe or pervasive conduct.
- D. Valid, and should be addressed.



## Pop Quiz Question #5

Supervisor (1) sees Employee having personal problems and offers to share her faith. (2) Supervisor and Employee develop a friendship that includes sharing the Bible at work and going to church together on weekends. (3) Employee requests a transfer, but Supervisor denies it because she thinks Employee is better off if they work through her problems together.

Which of these actions is permissible?

- A. Only #1
- B. Only #2
- C. Both #1 and #2
- D. #1, #2, and #3
- E. None

## Pop Quiz Question #6

City hires a female Administrative Specialist. The Specialist's boss routinely and daily criticizes her work in an extremely harsh manner. The Specialist reports that she does not like the boss's comments.

True or False:

Steps need to be taken to address the conduct of the boss.

## Disability Discrimination

- If an employee is:
  - ✓ A qualified individual
  - ✓ With a disability
- Then the employer (a) cannot discriminate against employee; and (b) has an obligation to provide the employee with a reasonable accommodation to allow the employee to work

## **What Constitutes a Disability?**

- **A physical or mental impairment that substantially limits a major life activity, OR**
- **A record of such impairment, OR**
- **Being regarded as having such impairment.**
- **Alcohol or Drug Use = disability**
- **Drug Addition or Alcoholism = disability**

## Who is a “Qualified Person with a Disability?”

- An individual with a disability who:
  - ✓ with or without reasonable accommodation
  - ✓ can perform the essential functions
  - ✓ of the employment position the person holds or desires
- If an employee is not “Qualified,” the employee is not covered by the ADA (no matter the nature of their disability).

## What is a Substantial Limitation on a Major Life Activity?

- **Substantial Limitation:** A significant restriction regarding the duration, manner or condition of performance compared to the average person (*construed broadly*).
- **Major Life Activity:**
  - ✓ Daily activities like performing manual tasks, hearing, eating, interacting with others, caring for oneself, walking, standing, lifting, hearing, learning, concentrating, working.

## What is a “Reasonable Accommodation?”

- **Examples**
  - ✓ **Job restructuring/Modified work schedule**
  - ✓ **Re-assignment**
  - ✓ **Change in equipment**
  - ✓ **Leave**
- **No need to provide an accommodation if it poses an undue hardship on the City**
- **It is hard for City to show “undue hardship”**

## The City's Interactive Process

- HR receives an accommodation request.
- HR gives the employee their job description and asks for medical confirmation of limitations.
- HR meets with supervisor.
- HR (and potentially supervisor) meets with employee.
- HR provides written confirmation of outcome.



## Interactive Process

- **Employers must engage in an interactive process with the employee in order to determine what accommodation would be reasonable.**
- **Both the employer and employee are obligated to engage in an interactive process**
  - ✓ **requires communication and good faith exploration of possible accommodations.**
  - ✓ **neither side can delay or obstruct the process.**

## **Strategies to Avoid Disability Discrimination**

- **Call HR.**
- **Do not make medical judgments about your employees.**
- **Make sure your job descriptions are up-to-date.**
- **Do not make your own decisions about accommodations.**
- **Call HR.**

## Pop Quiz Question #7

Becky is an attorney for the City. Becky comes in and says that she has developed carpal tunnel and that her doctor has advised her that she cannot type and that she does not know when she will be able to do so again. Becky's supervisor should:

- A. Terminate Becky immediately.
- B. Tell Becky to type through the pain.
- C. Tell Becky to take the week off.
- D. Provide Becky with dictation software.
- E. Call HR.

## Pop Quiz Question #8

Jonah is an employee in the City's accounting department. Jonah comes to his supervisor and states that he has been diagnosed with "heptaphobia" (fear of the number seven) and that he will no longer be able to use the number seven in the course of his employment. He asks that he be transferred out of accounting into a less number-centric department. The supervisor should:

- A. Deny the transfer because there is no such thing as "heptaphobia."
- B. Deny the transfer because "heptaphobia" is not a disability.
- C. Deny the transfer because dealing with the number seven is an essential function of Jonah's position.
- D. Call HR.

## Things To Remember From This Talk

- Supervisors are responsible for seeing and addressing discrimination and harassment in the workplace.
- Supervisors can counsel employees to change their behavior even without someone complaining about the behavior.
- Supervisors need objective reasons to support discipline decisions.
- Call HR when you have questions.

## Questions?



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