Oregon State Capitol Workplace Harassment Work Group Preliminary Recommendations – November 30, 2018

Request for Public Comment

Written comments may be submitted to olcinfo@uoregon.edu, or via the Oregon Law Commission website where informal comments may be submitted without attribution. Additionally, the Work Group welcomes public testimony on these preliminary recommendations on November 30, 2018, from 4 p.m. to 6 p.m. at the Oregon State Capitol.

I. Prohibited conduct

Consensus: The workplace harassment policy should affirmatively promote a respectful and inclusive work environment by prohibiting more conduct than the law requires it to prohibit. The policy should continue to apply to conduct that occurs in any setting, including electronic media, when the conduct creates a work environment that is intimidating, hostile or offensive. Conduct that occurs outside the Capitol building or after hours may create such an environment. The policy should include examples of prohibited conduct, as well as examples of conduct that may not be prohibited but that are inadvisable. A proposed definition of "harassment," with examples, is included as Attachment A.

II. The Equity Office

Consensus: The legislature should establish and fund an Equity Office. A substantial majority of Work Group participants believe that the Equity Office should be a neutral and independent office comprised of professionals employed full time by the legislature. The Work Group did, however, have a **dissenting view** about the structure of the office. One Work Group member would prefer a model whereby the entirety of the investigative function is outsourced to one or more outside entities.

The **dissenting view** held that the legislative environment is inherently and naturally partisan. Thus, employees of the legislature are likely to believe that any other employees (including Equity Office staff) are also politically motivated. Outsourcing the function would generate more confidence in the office.

The **majority view** held that directly employing the Equity Office staff would be more beneficial because dedicated employees located near the legislature are more likely to understand the legislature's culture and activities. Thus, they would be better positioned to educate, work with, and investigate the people who work for the legislature. Outsourcing the function could not truly remove partisanship from the office, because someone from the partisan environment would have to designate and pay the responsible contractors.

Both views agreed that there is no completely correct solution to any of these problems; the decision simply balances the risks and benefits of the various valid considerations described above.

Consensus: The Equity Office should be provided with as much independence as possible, including independent physical space.

Consensus: The staff of the Equity Office should be hired by, and report to, a joint legislative committee ("Conduct Committee"), with an equal number of members appointed by each of the four caucuses. The office should submit a report to the Conduct Committee and appear before the committee at least annually. The annual report to the Conduct Committee should include:

- A description of the activities of the office since the last report.
- Non-personally identifiable statistics that identify the number of confidential reports, formal reports and formal complaints made under the policy, as well as the number of investigations conducted.
- The results, or a summary of the results, of the most recent climate survey.

Consensus: The Equity Office should have at least two staff, with duties as follows:

- Staff #1: Conducting investigations, writing investigative reports and making recommendations regarding interim safety measures. This person should not have access to confidential information in the possession of the second staff member.
- Staff #2: Conducting outreach and training, administering regular climate surveys, and providing confidential process counseling to any individual that includes an explanation of the formal complaint and reporting processes.

Both employees should be expressly authorized to outsource work (including investigations), when workload or other practical factors require. As described above, one Work Group participant had a **dissenting view** whereby the entirety of the investigative function would be outsourced to one or more outside entities.

Consensus: The Equity Office should ultimately receive all reports of harassment, both confidential and nonconfidential. The Equity Office is empowered to investigate reports of harassment as appropriate.

III. Reporting harassment

Consensus: The workplace harassment policy should include:

- A confidential reporting process. The Work Group believes that more people will report harassment if there is a confidential reporting option. The confidential reporting process provides a mechanism for an individual who wishes to remain anonymous to report conduct that violates the policy. It also can include confidential "process counseling" for individuals who believe they may have been subjected to conduct that violates the workplace harassment policy and to individuals who are, or believe they may be, the subject of a complaint.
- A nonconfidential reporting process. Individuals who believe they may have been subjected to conduct that violates the workplace harassment policy may make a

nonconfidential report to a supervisor or other legally responsible person, to Human Resources, or to the Equity Office described below. A nonconfidential, formal complaint process. The formal complaint process is designed to trigger an investigation that may lead to discipline of respondents who have engaged in harassment.

- An indication that, regardless of how the information is received, notice to HR or the Equity Office of a potential violation should result in an evaluation to determine whether an investigation is necessary. Policy violations may lead to discipline.

IV. Confidential reports

Consensus: The non-investigatory half of the Equity Office should be empowered to receive confidential reports about workplace harassment. The identity of confidential reporters may not be disclosed. Because of due process concerns, unsubstantiated confidential reports may not be used as the basis for any disciplinary action.

There should be two exceptions to the office's duty to provide confidentiality: (1) for cases when it is necessary to disclose a confidential report in order to prevent imminent physical harm to any individual and (2) when disclosure is required by law.

The Equity Office may access and use aggregate, non-personally identifiable data based on confidential reports. This data will allow the institution to observe patterns of behavior, take non-investigatory steps to remedy training, culture or climate, encourage reporters to come forward in a non-confidential way, and take other necessary actions.

Consensus: The Equity Office may informally reach out to respondents of confidential reports, if it is possible to do so without disclosing the identity of the reporter directly or indirectly. In such conversations, the Equity Office may provide formal or informal training or advice regarding expected standards of behavior, including a reminder regarding the policy against retaliation.

Consensus: The Equity Office may reach out to complainants who make confidential reports, to encourage them to come forward in a nonconfidential way.

Consensus: The Legislative Assembly should adopt a statute, modeled on ORS 40.264, that creates a privilege for communications made to the non-investigatory half of the Equity Office. The privilege would protect communications from intrusion by state legal processes.

Consensus: Because federal courts are not required to follow state privilege laws, the recommended privilege statute would not necessarily protect communications from disclosure in response to federal legal processes. Members of the Capitol Community should be fully informed of any limitations on the privilege, however theoretical.

V. Non-confidential reports

Consensus: If a legislative supervisor or other legally responsible person knows or reasonably should know about workplace harassment, the institution as a whole is also "on notice" and has a

Commented [Gail S.1]: While true, the above language implies that only certain types of reports will result in an investigation. It is the substance of "notice" to the employer that should be the determining factor, not the manner in which notice was received.

Also, as written, the policy appears to indicate that an offender may only be subjected to discipline if the subject of harassment actively files a complaint. The duty to take prompt, appropriate action exists regardless of whether a complaint has been filed, formal or informal. Notice, in whatever form, of a potential violation triggers a duty to investigate. From there, if evidence of a violation is substantiated, the employer has a duty to take prompt, appropriate action.

Commented [Gail S.2]: Your policy should meet minimum legal standards. "Notice" may come in many forms, even observation of open and notorious harassing conduct.

Reports are sometimes anonymous, and most reporting parties wish to remain confidential, especially when sexual harassment is alleged. While an anonymous or confidential report *alone* should not trigger discipline automatically, the purpose of an investigation is often to substantiate, confirm or refute such reports.

Thus, this sentence should be modified to state that "*unsubstantiated* confidential reports may not be used as the basis for any disciplinary action." Otherwise, the immunity it provides is overly broad and begs for legal challenge.

duty to take reasonable measures to stop the harassment. For this reason, legislative supervisors or other legally responsible persons should continue to be required to report conduct that may

violate the policy to Human Resources. Non-supervisors should be encouraged to make such reports. This form of reporting is not confidential.

Human Resources should determine whether the report is potentially a report of workplace harassment based on protected class, or whether it involves interpersonal difficulties or other matters. If the report is potentially a report of workplace harassment, Human Resources will forward the report to the Equity Office. If it is not, Human Resources should address the report.

Consensus: A supervisor or other legally responsible person must make a nonconfidential report to Human Resources if they have reason to believe that harassment may have occurred. This duty is triggered whenever an employee makes a complaint to a supervisor or other legally responsible person. It is also triggered when the supervisor or other legally responsible person receives information through direct observation, rumor, or otherwise, that the policy has been violated. Supervisors should not attempt to determine whether the information relates to harassment or not. If they have reason to believe the information could possibly be related to harassment, they should report it.

Consensus: Human Resources (unlike supervisors) may exercise its discretion to determine whether reports it receives involve prohibited workplace harassment and discrimination or whether they involve other interpersonal concerns. If Human Resources believes workplace harassment or discrimination may be involved, or if a reasonable possibility exists that workplace harassment or discrimination may have occurred, Human Resources must forward the information to the Equity Office.

Consensus: Third parties who contract with the Legislative Assembly should be incentivized to report conduct that may constitute harassment to the Equity Office.

VI. Complaints

Who may file a complaint?

Consensus: Any individuals who believe they have been subjected to workplace harassment, or believe they have witnessed workplace harassment, may file a complaint. To reduce the potential that complaints will be "weaponized" in a partisan environment, complaints should be submitted in good faith, with intentionally or knowingly false complaints being subject to discipline or termination, under penalty of perjury.

Consensus: Because investigations may lead to discipline of a respondent, principles of due process require investigations to be based on evidence which is provided to a respondent. For this reason, complaints may only be filed by individuals based on their own personal knowledge; that knowledge (and the complainant's sworn statement) is evidence. Neither the institution itself, nor the Equity Office, is an individual with personal knowledge; therefore, they do not have "standing" to initiate a complaint. That stated, regardless of whether a complaint has been

Commented [Gail S.3]: This level of discretion may not provide the anticipated legal protection.

Consider requiring HR to report any and all complaints of harassment to the Equity Office with a caveat or expectation that HR will make a timely determination as to whether further action may be necessary. By doing this, the Equity Office is at least aware of complaints immediately and, therefore, would have the opportunity to disagree with an HR assessment that the matter is or is not covered by the harassment policy.

Such a step would protect from delays such as those apparent in the report regarding the Senator Kruse matter.

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Commented [Gail S.4]: The reality of sexual harassment cases is that alleged offenders often deny the conduct at issue, even in the wake of a finding. As stated, this warning is broader than any I have seen in a personnel policy, and it would have a chilling effect on good faith reports.

filed, evidence of a policy violation will be provided to an alleged offender and may result in discipline.

Who may be the respondent?

Consensus: Any individual over whom the Legislative Assembly has the power to impose a remedy may be the subject of a complaint. This includes but is not limited to legislators, legislative employees (partisan and nonpartisan), government contractors, public and private sector lobbyists, and members of the public who visit the building.

Should there be time limitations?

Consensus: The one-year time limitation in Rule 27 is too limiting and should be changed.

No Consensus: Work Group participants debated a replacement period, but were unable to reach consensus. Some participants favored the elimination of any time limitations, while other participants expressed support for a four-year limitation.

VII. Protecting reporters, complainants and respondents

Interim Safety Measures

Consensus: Once the legislature is on notice that harassment may be occurring, it has an obligation to stop any harassment. This may require interim safety measures to be in place while an investigation is pending. To accomplish this goal, the policy should support interim safety measures (if any) that are appropriate to the situation, including but not limited to temporary reassignment, alternative work environments, paid and unpaid leave, no contact orders, and the temporary removal of potentially offending individuals. The policy should recognize the need to involve law enforcement in severe situations.

Consensus: If the investigator determines that interim safety measures are necessary to protect an individual or the integrity of the investigation, the investigator should immediately communicate that determination to the person or entity authorized to impose remedial measures under the policy (e.g. an employee's supervisor). The investigator should identify appropriate interim safety measures and may recommend that the person or entity impose those measures or may enter into a voluntary agreement with the respondent to follow the measures. All legislators and legislative supervisors should be required to cooperate with the investigator in imposing interim safety measures and should be required to provide a written explanation for declining to follow the recommendation of the investigator.

Transparency to Complainant and Respondent

Consensus: The policy should require the Equity Office investigator to check in with complainants and respondents on a regular basis or upon request.

Privacy During an Investigation

Consensus: The policy should require the Equity Office to provide as much privacy as possible, given the need to investigate and provide interim safety measures.

Commented [Gail S.5]: The law does not require an employee to complain before an employer is expected to remedy unlawful harassment. More often than not, victims of harassment do not wish to formally complain. Regardless, it is the employer's duty to investigate notice of a potential violation. Upon a finding of a violation, it is the employer's duty to take prompt, appropriate action against anyone over whom the employer may exercise control. Public accommodation law follows the same standards.

It is common for a harassment victim to keep quiet for fear of retaliation or because the person does not want to be the subject of public scrutiny. That person may, however, tell other people about the behavior or situations, including supervisors and other responsible parties. This language seems to suggest that if HR or the Equity Office learns of potentially problematic behaviors through a person without first-hand knowledge of the event, it is not considered a "complaint," and therefore, it is not worthy of any action.

The applicable legal standard is whether the employer "knows or has reason to know" and may not be forgiving in this context — a credible report of harassment could come from a secondary source. Again, the legal standard looks to *notice*, not complaints.

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Commented [Gail S.6]: Under the law, a person does not have to be a "complainant" to warrant protection.

Consensus: Except for the contents of a formal complaint, records relating to an ongoing investigation should be exempt from disclosure under public records laws. At the conclusion of the process, the results of the investigation and the investigative file should be subject to disclosure. Other existing exemptions (e.g. medical records or internal advisory communications) should continue to apply. Workplace harassment reports (confidential or nonconfidential) that do not result in an investigation should be exempt from disclosure.

Consensus: The investigator should keep information obtained during the investigation as confidential as possible given the need for a sufficient investigation. The policy should not prohibit individuals from discussing the investigation, but the investigator may request that individuals not discuss the investigation in order to protect its integrity. The investigator may disclose the fact of the investigation and any relevant details to Human Resources, the supervisor of the complainant or respondent, the Equity Committee or any other person or entity authorized to take action under the policy, if the investigator determines that there is a legitimate need to disclose the information.

Protection Against Retaliation

Consensus: The policy should include and explain protections against retaliation and the application of those protections to complainants, respondents, witnesses who provide information during the course of an investigation, and any other party to the investigation or investigation process. It should provide a safe place to report or make a complaint about retaliation, in the same way as reporting or complaining about harassment.

Access to Other Resources

Consensus: The policy should provide the contact information for outside entities such as the Equal Employment Opportunity Commission and the Bureau of Labor and Industries, with a reminder that time limitations apply.

Due Process

Consensus: The respondent should be provided with notice of the specific allegations of a report or complaint and an opportunity to respond to the allegations and provide witnesses, testimony and other evidence. This may have the effect of allowing the respondent to determine the identity of the complainant or reporting parties. Nonetheless, this is necessary to provide due process over what could lead to reputational damage, loss of professional status, or loss of other privileges for the respondent.

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Conflicts of Interest

A person who has allegedly engaged in harassing behavior must be recused from the decision making process, including the decision whether to investigate or take interim safety measures.

VIII. Investigations

Consensus: The Equity Office should evaluate notice of potential harassment to determine whether an investigation is necessary to determine if harassment occurred. If the office determines that an investigation is necessary, it should initiate an investigation promptly.

Commented [Gail S.7]: To be compliant, the Equity Office should evaluate *notice* of potential harassment — regardless of how the information was received and regardless of whether an employee chooses to file a complaint, formal or informal.

The duty to investigate and the duty to take prompt appropriate action are important duties to exercise for compliance with Title VII and ORS 659A.030. Those duties are reflected in LBPR 27.

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Consensus: All investigations under the policy should be completed as soon as practicable. The investigation into a formal complaint and the submission of a final investigative report should generally be completed within 84 days. The Equity Office may extend the timeline for good cause by providing notice to the complainant and respondent and explaining the justification for the extension. Both the complainant and respondent should be made aware of the investigative timelines and status of the investigation on a regular basis and upon request.

Consensus: Before the investigator completes the investigative report, the investigator should give every respondent and every complainant notice of the proposed factual findings and proposed conclusions as to whether a policy violation has occurred. The respondent and complainant should be afforded no more than seven days to respond. This period is included within the 84-day investigation window.

Consensus: For any **legislator** alleged to have engaged in conduct that violates the workplace harassment policy, the investigator should make findings of fact. At the conclusion of the

investigatory period, the investigator should provide a final investigative report to the complainant, the respondent and the Conduct Committee. The complainant and the respondent may submit to the Conduct Committee a written challenge to the investigator's factual findings, within seven days after receiving the final investigatory report. The challenge must specifically identify the factual findings that are the subject of the challenge and articulate the reason those findings are in error. The Conduct Committee should make a final determination of the facts, determine whether the facts constitute a violation of the policy, and impose or recommend any remedial measures no later than 28 days after receiving the final investigative report. The seven-day response period is included in that 28 days. The Conduct Committee should be expressly provided with the authority to issue subpoenas.

Consensus: For any **non-legislator** alleged to have engaged in conduct that violates the workplace harassment policy, the investigator should determine the facts and determine whether the facts constitute a violation of the policy. The investigator should provide a report to the person or entity who will determine remedial measures for the violation, as described in the section on remedies, below.

Consensus: Any **non-legislator** respondent may appeal the investigator's findings and conclusions in writing to the Equity Committee no later than seven days after the imposition of remedial measures. The appeal is limited to presenting newly discovered evidence, process error, or bias. The appeal should not delay the imposition of any remedies.

IX. Remedies

Consensus: For any **legislator** who violates the policy, the Conduct Committee should impose or recommend remedial measures. The Conduct Committee should be empowered, via chamber rule, to impose any remedial measures that are appropriate under the circumstances, subject to two exceptions. First, the Committee should not have the power to expel or censure a legislator; these remedial measures (or their equivalents) should be recommended to the full body of which the respondent is a member. Except where the Constitution requires a two-thirds vote (e.g. expulsion vote on the chamber floor), action under the policy should require a majority vote of

the Committee or of the full body. The second exception should be for committee assignments – if the Conduct Committee concludes that a change in committee assignments is an appropriate remedial measure, the Committee should recommend that the Presiding Officer take action.

Consensus: For **non-partisan legislative employees** who violate the policy, the respondent's supervisor, in consultation with Human Resources, should impose any remedial measures. The supervisor should notify the employee of the proposed remedy and give the employee an opportunity to respond before making a final determination. A final decision regarding remedial measures should be made within 14 days after the respondent receives the final investigatory report.

Consensus: For **partisan legislative employees** who violate the policy, the Equity Committee should recommend remedial measures to the supervising legislator. The legislator should consider the recommendation, notify the employee of the proposed remedy, and give the employee an opportunity to respond before making a final determination. A final decision

regarding remedial measures should be made within 14 days after the respondent receives the final investigatory report.

Consensus: For **any other third party** (public and private sector lobbyists, members of the public, contractors, etc.) who violates the policy, the Legislative Administrator should be empowered, via chamber rule, to impose an appropriate remedy that, depending on the circumstances, may include a monetary fine or a limitation on the respondent's access to the Capitol building. The Legislative Administrator should provide the third party notice of the proposed remedy and give the third party an opportunity to respond before making a final determination. A final decision regarding remedial measures should be made within 28 days after the respondent receives the final investigatory report.

If the third party's conduct occurred within the scope of employment, the Legislative Administrator should provide notice of the determination and any remedial measures that are imposed to the third party's employer. If the third party is a member of the Capitol Club, the Legislative Administrator should provide notice to the Capitol Club. If the third party is a member of any other association or regulatory body that is related to the third party's Capitol activities, the Legislative Administrator should provide notice to the association or body.

X. Interns, volunteers and pages

Consensus: The name and contact information of every intern, page and volunteer in the State Capitol should be provided to Human Resources via a standard form. Human Resources may develop a form that includes other required information.

Consensus: The Equity Office should ensure that appropriate information and in-person training on the workplace harassment policy is provided to each intern, page and volunteer as soon as practicable.

Consensus: The Equity Office should proactively attempt to conduct exit interviews with interns, pages and volunteers. The Equity Office should consider expanding these interviews to all staff, perhaps beginning with legislative assistants.

Consensus: The Equity Office should build constructive relationships with universities and other institutions that regularly recommend legislative interns, volunteers or pages, for the purpose of reaching those interns, volunteers, or pages.

XI. Training and Culture

Consensus: The Equity Office should be responsible for ensuring that all members of the Capitol community are familiar with the workplace harassment policy by providing training on the policy and making policy-related information available on the Internet.

Consensus: The Equity Office should have a general mandate to maximize attendance at annual trainings. At least initially, the policy should:

- Make records of legislator attendance at annual trainings publicly available and require legislators to sign an anti-harassment statement, similar to those signed by employees. If attendance problems develop, the imposition of sanctions via chamber rule should be considered at that time.
- For legislative staff, including interns, attendance at training should be mandatory.
- Registered lobbyists should be required to take in-person workplace harassment training provided by the Equity Office. The training should be completed within the first quarter of registering and annually thereafter. Out-of-state lobbyists can be exempted from the obligation to take in-person training and the Equity Office should consider approving equivalent training provided in other states.
- Contractors should be required to attend an appropriately designed training and should be compensated for their attendance.
- Executive and Judicial branch employees who regularly work in the Capitol should be invited to attend annual training. The Equity Office should work with their counterparts in state government to promote consistency in trainings and policies.

Consensus: The Equity Office should make at least two hours of respectful workplace training available on multiple occasions throughout the year (e.g. quarterly or four times in two months). The participation or presence of high-level management at the training should be encouraged. In-person training should be required in the vast majority of circumstances. Online training should, however, be available as a last resort.

Consensus: The Oregon Government Ethics Commission should be required to track which registered lobbyists have and have not attended the required training and should be required to notify the Equity Committee of any registered lobbyists who fail to timely complete the required training. Working in conjunction with the Equity Committee, the Legislative Administrator should be empowered to impose fines or other remedial measures on registered lobbyists who fail to timely complete the training.

Consensus: Training curriculum should be reviewed to identify improvements in substance and delivery. While the Equity Office should be generally empowered to identify best practices, potential substantive training improvements include:

- More clearly describing conduct that constitutes workplace harassment under the policy.
- Include training on available methods of reporting under the policy, supervisor obligations to report violations of the policy and the statutory obligation of legislators and other legislative employees to report suspected child abuse.
- Addressing the ability of an individual to withdraw consent to certain conduct and the challenges associated with consensual relationships in the workplace.
- Modeling positive behaviors and constructive working relationships.
- Encouraging active bystanders.
- Discouraging behaviors – regardless of whether they violate the policy – that do not promote a productive, inclusive work environment.
- Articulating the human impact and harm to the work environment caused by harassment.
- Tailoring training to individual groups in the Capitol community, while using consistent terms, concepts and frameworks across trainings.

• Highlighting potential pitfalls with consensual relationships in the workplace, emphasizing that consent to specific conduct may be withdrawn.

Consensus: Best practices include the regular use of culture (and climate) surveys to identify broader cultural issues and specific training needs. Survey results, or a summary, should be disclosed to create a continuous cycle of improvement. Highly qualified individuals should be selected to provide training and conduct surveys.

Consensus: Recognize an Equity Leadership Team. The Team should be recruited by the Equity Office and should:

- Be comprised of leaders from across the Capitol community who have an interest in promoting a productive and inclusive environment.
- Be provided with advanced, respectful workplace training and training related to implementing cultural change, that could lead to a credential or certification.
- Serve as a mentor or informal resource for colleagues who are interested in promoting a more respectful workplace.
- Identify additional services and training needs and communicate those needs to the Equity Office.

Consensus: Utilize technology to create a respectful workplace. Subgroup suggestions include:

- Using cell phone applications that allow persons subject to the policy, including participants in training, to anonymously submit questions to or otherwise interact with the Equity Office or trainer.
- Utilizing online conferencing software that allows for interactive training, when in-person training is impractical.
- Creating a mechanism for persons to anonymously utilize the confidential reporting process and to anonymously submit electronic evidence.

Attachment A
Suggested Definition of Workplace Harassment

What is a Protected Class?

A protected class is one that is protected by applicable law. Protected classes include:

- Sex
- Race
- National Origin
- Disability
- Age
- Religion
- Injured worker status
- Marital status
- Sexual orientation
- Gender identity or expression
- Engaging in whistleblowing activity
- Opposing an employer's actions when the employee reasonably believes them to be unlawful
- Taking leaves protected by law (such as OFLA, FMLA, disability-related leave)
- Any other classes protected by applicable law (provide link to list of applicable statutes)

What Is Harassment? Harassment is verbal or physical conduct or visual displays that denigrate or show hostility or aversion toward a person or group because of a protected class. This may include behavior such as:

- name-calling,
- slurs,
- stereotyping,
- threatening, intimidating, or hostile acts that relate to a protected class,
- demeaning or humiliating a person because of a protected class, and
- written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of a protected class.

Behavior creates a hostile work environment when (a) it is unwelcome and (b) it is so severe or pervasive that it either affects a person's ability to function effectively in the workplace or denies someone the benefits of the workplace. "Severe" means that one incident could be significant enough to create a hostile environment; "pervasive" means that a series of less significant incidents, taken together, could create also create a hostile environment.
The legislature prohibits all harassing behavior, even if it does not rise to the level of creating a hostile environment.

Examples of harassing behavior:

- Telling a non-white employee to "go back where you came from."
- Imitating a person's physical disability or referring to an employee with a mental health disorder as "unhinged," a "head case," or someone likely to "go postal."
- Assuming that a black employee is an expert on hip-hop music or basketball.

- Questioning a gay employee about the mechanics of sex between him and his partner or implying that he must have a sexually transmitted disease.
- Suggesting an older worker should retire, is unable to adapt to new technology, or is "behind the times"; complaining that the workplace needs fewer "gray hairs" or more "young blood."
- Intentionally referring to a transgender employee by the wrong pronoun or using the employee's former name associated with the wrong gender ("deadnaming").
- Use of ethnic slurs, such as calling someone from the Middle East a "Camel Jockey"; calling someone from Mexico a "Wet Back"; or calling an African-American the "N-word" or "boy".

What Is Sexual Harassment? Sexual harassment is harassment based on sex. Sexual harassment occurs when it meets the criteria for harassment described above.

In addition, it may also include unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when submission to the conduct is made an explicit or implicit term or condition of employment or submission to or rejection of the conduct is used as a basis for employment decisions.

The legislature prohibits all sexually harassing behavior, even if it does not rise to the level of creating a hostile environment.

Sexual harassment may include but is not limited to:

- unwanted sexual advances, flirtations, or propositions;
- demands for sexual favors in exchange for favorable treatment or continued employment;
- sexual jokes;
- verbal abuse of a sexual nature;
- verbal commentary about an individual's body, sexual prowess, or sexual deficiency;
- leering, whistling, touching, or physical assault;
- sexually suggestive, insulting, or obscene comments or gestures;
- display in the workplace of sexually suggestive objects or pictures;
- sending or forwarding e-mail of an offensive or graphic sexual nature; and
- discriminatory treatment based on sex.

Examples of sexually harassing behavior:

- A female employee is usually asked to make coffee while male employees of equal status are not.
- An employee eyes a coworker's rear end and comments that they must be "great in the sack."

- On Monday mornings, the supervisor emails everyone a "dirty joke of the week."
- A staffer keeps a calendar of semi-nude women posted in his office.
- An employee hugs coworkers even though they pull away, explaining "oh, come here,
  I'm just a hugger."

Commented [Gail S.8]: Do not over apply this standard, which is for ambiguous situations. It does not matter whether someone has communicated a concern when the violation is clear.

Deleted: , despite a coworker's ¶
statement that she finds the calendar demeaning

- A lobbyist pitches a bill regarding nonprofit boards. The legislator laughs and says, "well, sure, honey, if you got on my "board" I'd show you some results...." The lobbyist protests, but the legislator shrugs, "well, I'm just trying to lighten the conversation. If you don't like these meetings, you don't have to be here."
- A male supervisor excludes female employees from after-hours meetings because he "does not want to be accused of sexual harassment later."
- A supervisor tells an employee that he could get her a better assignment if she sleeps with him.

What Is Retaliation? Retaliation is the treatment of a person less favorably because the person exercised a legal right, made a good-faith complaint about unlawful conduct (such as prohibited discrimination, harassment, or retaliation), or participated in an investigation about unlawful conduct.

The legislature prohibits all retaliatory behavior, even if it does not rise to the level of behavior that the law recognizes as retaliation. The workplace harassment policy applies to allegations of retaliation.

Examples of retaliatory behavior:

- In a staff meeting, a supervisor complains about all of the disruption that an employee's complaint is causing.
- An employee is not selected for an assignment because he is "not a team player" since he supported another employee's complaint.
- An employee returns from parental leave and is criticized because his attendance is unreliable.