



HARASSMENT ISSUES For Elected Officials

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Harassment Claims are Alive and Well

- We're hearing a lot about the "reckoning" happening now in workplaces around the country as a result of the highly public harassment accusations that have hit the news in recent months
- There's talk that the "me too movement" (which encourages people who have experienced harassment to share their stories on social media using the hashtag "#metoo") is changing workplace culture
- These types of accusations are nothing new; in municipal government, we've worked diligently for decades to do the right thing when such accusations surface in our workplaces
- But these high profile incidents are reinforcing the importance of workplace culture – which begins at the level of the governing body
- Harassment claims can arise at any level of the organization, from the governing body through to co-workers, but how the governing body sets the tone for the organization is of pivotal importance




Harassment Claims are Alive and Well

- Another reason that you – as an elected official – must be actively engaged in dealing with harassment issues: the higher in the organization the issue arises, the more difficult it is to deal with; issues arising at your level will be the most challenging:
 - Governing bodies must do most of their work in public, while employee personnel matters are accorded greater confidentiality
 - "Consequences" are relatively straightforward with employees, not so much with elected officials
 - A sense that "This is happening above my pay grade. What can I do?"
 - Most organizations have personnel policies in place to address harassment issues on the administrative side of the organization; relatively few have policies at the level of the governing body
 - Governmental structures may make accountability difficult or impossible




Let's define some terms

- A typical definition of "**workplace harassment**" (this one comes from the Colorado General Assembly's policy; there may be variations in yours): harassment based on disability, race, creed, color, sex, sexual orientation, religion, age forty and older, national origin, military status, genetic information, or ancestry, including verbal or physical behavior or conduct:
 - that denigrates or shows hostility or aversion toward an individual because of that individual's disability, race, creed, color, sex, sexual orientation, religion, age forty and older, national origin, military status, genetic information, or ancestry; or
 - that has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.



Let's define some terms

- "**Sexual harassment**": Because sexual harassment is divided into two types ("quid pro quo" and "hostile work environment"), it is typically given some additional explanation (this also comes from the Colorado General Assembly's policy):
 - Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 - Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
 - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.



Let's define some terms

- Take note of this fact about harassment policies: the legal definition of "harassment" sets a high bar for liability – terms such as "substantially" or "unreasonably" interfering with work performance, and made "a term or condition" of employment are used
- This means that conduct often takes place that falls short of the high bar for liability, but does this mean, then, that the conduct is *acceptable*?
- Anyone who engages in conduct that is not workplace-appropriate should not take much solace in the fact that the conduct may not have met the high bar for liability – look at these contrasting statements:
 - "The City ... does not in the opinion of the City Attorney's office have any civil or criminal liability as a result of the allegations made against the city mayor, because based on the law, he did not engage in sexual harassment," [the] City Attorney... said.
 - "No matter what the City Attorney reports or what the City Council decides, nothing exonerates [the mayor] from the truth of those who have experienced inappropriate behavior, sexual and physical harassment, threats, voyeurism, rental housing violations, and all the other terrible things that have been reported and those that have not been reported because of fear of retribution...."



Risk factors in the environment

The EEOC recently identified "risk factors" for harassment; are any pertinent to municipal government?

- Homogeneity – lack of diversity, "currently only one minority among us"**
- Workplaces where some employees don't conform to workplace norms – "rough and tumble" or single-sex dominated workplace culture**
- Cultural and language differences – arrival of new personnel with different cultures, nationalities; segregation of personnel with different cultures or nationalities**
- Coarsened social discourse outside workplace – heated discussion of current events occurring outside workplace
- Young workforces
- Workplaces with "high value" personnel**
- Workplaces with significant power disparities – power disparities, possibly gendered
- Workplaces that rely on customer service or client satisfaction**
- Workplaces where work is monotonous or tasks are low-intensity – time on hands, repetitive work
- Isolated workplaces – people work alone, few interaction opportunities, "no witnesses"
- Workplaces that tolerate or encourage alcohol consumption
- Decentralized workplaces – isolation from "headquarters" may lead to out of bounds behavior



Scenario

"The Board is always bugging the Town Clerk about the timeliness of the agenda packet. They insist on getting the complete packet by the Thursday before the Monday meeting. Sometimes they get pretty annoyed about getting last minute materials on meeting day. She says it's a hostile work environment."



What do you think?

- Does the scenario indicate "harassment"? A "hostile work environment"?
- "Hostile work environment" is starting to fall into common parlance as a synonym for "people are being mean to me." Keep in mind the definition calls for the hostile work environment to be connected to protected classes, such as gender, age, etc. The definition isn't intended to prevent expectations from being established, or to set some kind of "niceness" code
- Allowing the term "hostile work environment" to be divorced from its definitional context creates confusion – it might be "mean" but it's not a "hostile work environment" in the legal sense



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Scenario

"One of our new councilmembers is very blunt. He doesn't hesitate to criticize department heads at our meetings. He talks to us in public like he thinks we're idiots or criminals. Our Clerk recently observed that she feels like he comes down especially hard on her and other women."



What do you think?

- How about this scenario? Is it different from the previous one?
- "Disrespect" is a key concept here
- A disrespectful workplace is an inhumane workplace
- Elected officials are the center of the municipal universe; your treatment of employees, especially in public settings, speaks volumes about you, will be taken very personally, and can HURT
- Employees who aren't treated like adult human beings, are viewed with suspicion, or are not accorded basic courtesy and respect, are going to search for reasons why
- "Is it because I'm _____?" is a natural question that will come to people's minds



Scenario

"Sure, I hug all the ladies in the office whenever I come into City Hall. I'll lay a kiss on 'em, too, if they'll let me! I'm just a huggy type of Mayor."



What do you think?

- Are hugging and kissing OK in your work environment?
- Can you assume that, since no one's complaining, it must be OK?
- You may think you're a "huggy type of guy" but that may not be the perception at the receiving end
- Keep in mind that complaints about such conduct, if it's taking place at the very top levels of the organization, may tend to be suppressed – people may be very hesitant to raise concerns
- Clearly this is a situation that is very individual...the "norm" in a particular workplace, or between any two particular individuals, may not be the same everywhere



Scenario

"We finally got ourselves a strong, decisive City Manager. She's a young, take-charge type, just what we need in this City. Recently, some complaints have surfaced that she makes nasty, mean, or intimidating comments to the people she thinks are underperformers or who seem to be challenging her. Some of the comments seem to focus on our older employees, like calling someone an "old fogey who can't deal with modern technology," wondering if someone's "retired on the job," or asking if someone has "old timer's disease." I'm concerned, but at the same time, I sure don't want to rock the boat. She's the best thing that's ever happened to our City."



What do you think?

- Your direct reports (Manager, Attorney, etc.) are key personnel, and if you've found a "great fit," it's understandable that you don't want to do anything to jeopardize the relationship
- But can you afford to overlook indications of a clear problem?
- If you don't do anything, what recourse do employees have?
- Doing nothing is not a good option here!



Scenario

- **"The incident was a pretty minor one, and it's only happened once or twice. I'm not going to follow up."**



What do you think?

- Remember the difference between the high legal bar for harassment, and what's OK or not OK in the workplace
- If one or two incidents are overlooked, how many have to happen before the situation turns serious?
- Not every incident warrants the same response, but ignoring an incident may send the wrong message and reward/reinforce the wrong behavior
- EEOC's recent teachings on "bystander" empowerment may be helpful here...



Empowering the bystander

- You may think you're just a "bystander" to inappropriate conduct, but you can have a major positive impact
- Don't feel like you can't say or do something because it didn't happen to you
- You don't necessarily have to confront right then and there
 - Perhaps speak to the offender privately later... "that joke wasn't funny."
- Or disrupt the behavior while it's happening – walk over and put yourself in proximity, drop something on the floor...some action that you think will stop something bad that you see happening
- As a bystander, you can also be supportive to the person who was targeted for the bad behavior
 - People who are targeted for bad behavior can feel isolated; a colleague's support can be helpful.
 - "I noticed this happened; are you OK with that?"
 - Encourage or help the person to report the behavior.



Scenario

"As Mayor, I had an employee tell me that she feels like she's being harassed about her religion by a councilmember. I've heard some things he's said, and they are pretty inappropriate. But she refuses to put a complaint in writing. In fact, she swore me to secrecy about the fact that she approached me, and asked me to do nothing about it. So I didn't follow up on it. And anyway, he's an elected official. What can we do?"



What do you think?

- Is it OK to be "bound to secrecy" when you know inappropriate conduct is happening?
- Is it OK to take the position that no followup can be done without a written complaint?
- Is it OK to take the position that "It's an elected official engaging in this conduct, so there's nothing we can do anyway? What are we gonna do, dock his pay? Suspend him? Put him on probation? Fire him? We'll just let the voters decide."



What do you think?

- Doing nothing may be a bad option!
- But first of all, do you have a policy in place that governs the conduct of elected officials, and sets out complaint/followup processes? If not, perhaps you should!
 - Council or Board rules of procedure/rules of conduct
 - Seen in one policy: "No member [of the Board] shall fail to comply with any provision of the Town's employee handbook with respect to the treatment of employees, including but not limited to provisions concerning prohibited harassment, discrimination, and bullying."
- But even if you're currently lacking a policy, doing nothing is still a bad option – get the advice of your attorney and deal with the issue
- If you're a CIRSA member, we can help, too



Scenario

"One of our local citizens hates our City Clerk. He constantly hassles her using vulgar, profane, and demeaning language. Basically, he thinks women shouldn't be in positions of authority. She has complained to us, but it's beyond our control."



What do you think?

- This is a tough one...but doing nothing may still be a bad option!
- But first of all, do you have a policy in place that reaches the conduct of citizens, vendors, contractors, etc.?
- One policy states: "Harassment and related conduct toward an on-duty employee by a non-employee such as, but not limited to, City customers, Council members, Board members, volunteers or vendors is covered by and subject to enforcement under this policy. A non-employee's conduct that is observed by, and offensive to, an employee may also constitute harassment. The City will take appropriate action to protect its on-duty employees from such conduct from non-employees."
- But even if you're currently lacking a policy, doing nothing is still a bad option
- Get the advice of your attorney, and work with affected personnel to determine a course of action that's workable under the circumstances



Scenario

"Our Council has been made up of all males in the past, and now a couple of women have been elected. Our Mayor has a habit of rolling his eyes, crossing his arms, or interrupting every time a female councilmember speaks. Once, he said this out loud after one of the women spoke: "Our meetings seem to last twice as long now." Another time, he said, "I'm sorry, but I feel like I'm being henpecked by my wife right now." One of the women observed that he ignores everything she says, but seems to pay attention and agree when one of the male councilmembers says the same thing." The other woman noted that she was afraid to speak up at all because she feels the Mayor has no respect for her."



What do you think?

- Take a look at the prevailing culture on your own governing body!
- If things have changed, make sure that the prevailing culture isn't inhibiting full participation, or making any member feel like less than an equal participant on the governing body
- Often, these kinds of dynamics happen at a subconscious or unintentional level
- Everyone on the governing body has the right to an equal voice; make sure that these dynamics aren't interfering



What do you think?

- Make sure you're not unconsciously engaging in behaviors that can become barriers to finding common ground
 - Male v. female meeting dynamics
 - NY Times, "The Universal Phenomenon of Men Interrupting Women" <https://www.nytimes.com/2017/06/14/business/women-sexism-work-huffington-kamala-harris.html>
 - "Academic studies and countless anecdotes make it clear that being interrupted, talked over, shut down or penalized for speaking out is nearly a universal experience for women when they are outnumbered by men."
 - Similar dynamics can exist between other groups
 - Examine the dynamics – these barriers are often difficult to detect and/or happening on an unconscious level



Scenario

"OK, we have some wannabe comedians on our Council, and we do get some joking comments, either during meetings, or maybe during executive sessions. A few examples:

- **"What's the difference between a wife and a girlfriend?" "45 pounds."**
- **"Blondes should not get coffee breaks because of the time it takes to retrain them when they get back to the job."**
- **"What do you expect . . . it's a woman."**
- **"I see that all our department heads, Alan and the girls, are here tonight."**
- **"The City Clerk is a little devil . . . looking at her gives me devilish thoughts."**

I say people need to get a sense of humor around here."



What do you think?

- See previous scenario!
- You may think these comments are just humor or levity, but how do others perceive them?
- And remember the "one or two incidents" scenario...how many of these comments (and other bad behaviors) does it take to add up to a real problem?



Your Take-Home Work

- Check your City or Town's policies
 - Are conduct expectations set out for the governing body, board and commission members, and your direct reports?
 - What about contractors, vendors, and the general public?
 - Does the policy set out a workable, flexible process for surfacing up concerns and complaints and dealing with them?
 - Does the policy protect people who come forward from retaliation?
 - Retaliation claims can be as troublesome as the underlying complaint of harassment, and can be even more corrosive in their impact on the workplace
- Assess how things are at the very top level of the organization... your level!
 - Make sure you're a great example for mutual respect, trust, collegiality, and humane treatment of one another and those who come before you
 - Mentor new colleagues, especially if their conduct is making you cringe



Your Take-Home Work

- Don't forget to use your power as a "bystander"
- Speak up if you are targeted for concerning behaviors; speak up if you see retaliatory behavior
- Take it seriously when complaints or concerns are surfaced up to your level – don't ignore or hope they'll go away on their own
 - You can see that most of the time, doing nothing is a bad option!
 - It's not going to be an easy thing to deal with, but ignoring problems will only multiply their magnitude
 - Obtain your municipal attorney's advice
 - If your City/Town is a CIRSA member, we can assist as well



Some concluding thoughts

- Everyone in the organization is a "leader," but elected officials are the ultimate leaders of the organization. Here are some ways in which the leadership can send the wrong message reverberating through the organization:
 - Has a dismissive attitude towards harassment issues as "political correctness"
 - Sets a bad example by his or her own conduct but thinks the behavior is OK because it's visible only to peers
 - Asserts "authority" by being disrespectful and inhumane in dealings with each other or with employees
 - Ignores problems when they surface
- If a leader's conduct sets a bad example, then that leader can no longer credibly deal with problem situations involving others
- A leader's bad conduct puts peers/subordinates in difficult position of figuring out an appropriate course of action to deal with an issue above their "pay grade"



Concluding thoughts

- Consequences of harassment can be severe
 - Personal liability
 - Liability for City/Town
 - Punitive damages
- And you should be aware of your coverage protections (and lack thereof) in the context of a harassment claim! Here's how CIRSA's coverage works:
 - Defense and indemnity for City/Town
 - Defense for accused ONLY at the City/Town's option
 - NO indemnity for a judgment against the accused
- And whether or not the conduct "rises to the level" of harassment, the following may occur:
 - Reputational damage to you
 - Organizational morale and productivity issues
 - Loss of credibility for organization



Concluding thoughts

- Harassment claims can't be dismissed as "political correctness" infecting the workplace
- They are often about an imbalance of power
 - First, the "power" is held by the person whose inappropriate conduct is creating problems or an intolerable environment for those who are subjected to the conduct
 - But after a complaint is made, the power may shift to the complainant, who now may hold the power to ruin the career of the person against whom the complaint is made!
 - There is often a nexus between bullying and harassment/discrimination



Concluding thoughts

- Think of inappropriate conduct in the workplace as a hand grenade you may be handing to someone
 - You don't know when or where, but the subject of the conduct may decide at some point to lob the grenades back at you, and ruin your career
 - Make sure you preserve control over your destiny by never handing out hand grenades!



Resources

- 2018 Report to the Colorado General Assembly on harassment issues:
https://leg.colorado.gov/sites/default/files/the_report_final_2.pdf
- Read an example of an investigative report here:
<https://localtvkdv.files.wordpress.com/2018/02/redacted-investigation-report-lebsock4.pdf>
- Colorado General Assembly Workplace Harassment Policy:
<https://leg.colorado.gov/sites/default/files/workplace-harassment-policy.pdf>
- EEOC Select Task Force report and resources:
https://www.eeoc.gov/eeoc/task_force/harassment/
- League of Minnesota Cities harassment resources: <https://www.lmc.org/page/1/sexualharassmentprevention.jsp>
- City of San Francisco harassment policy encompassing elected officials and employees:
<http://sfdhr.org/sexual-harassment-policy>
- Carson City unacceptable behavior policy:
<http://carson.org/home/showdocument?id=52559>



Speaker Bio

Tami A. Tanoue

- In-house General Counsel/Interim Executive Director for CIRSA
- Previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, serving CIRSA as its contract General Counsel for 12 years, and serving as City or Town Attorney for several Colorado municipalities.
- Previously Staff Attorney for the Colorado Municipal League, representing the collective interests of Colorado municipalities.
- Regular speaker on local government liability topics; author of several publications on liability issues.

Note: The information in this presentation is provided solely as a training resource, and is not a substitute for obtaining the advice of your City/Town Attorney on any legal question.



About CIRSA

- Colorado Intergovernmental Risk Sharing Agency
- Public entity self-insurance pool for property, liability, and workers' compensation coverages
 - Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations
 - Not an insurance company, but an entity created by intergovernmental agreement of our members
- Total membership today stands at over 267 member municipalities and affiliated legal entities
- Out of 271 incorporated municipalities in Colorado:
 - 83% are members of our PC pool
 - 45% are members of our WC pool



About CIRSA

- Member-owned, member-governed organization
 - No profit motive – sole motive is to serve our members effectively and responsibly
 - Have returned over \$35,000,000 in contributions to our membership
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities

