

“Nice Outfit....  
or can I say that at work?”

*Sexual Harassment Training supervisors can use*

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# What is it?

**sex-u-al ha-rass-ment** \`sek-sh(e-)wel he-  
`ras-ment\ *n* (1975):

- According to Merriam-Webster's Collegiate Dictionary (3<sup>rd</sup> Ed.), it is: uninvited and unwelcome verbal or physical conduct directed at an employee because of his or her sex.

# A Legal Definition

Sexual harassment is any unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:

# Quid Pro Quo

- ◆ Submission to the conduct is made either explicitly or implicitly a term or condition of instruction, employment, or participation in other Business activity,
- ◆ Submission to or rejection of such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, or



You got  
the  
job!

# Hostile Environment

Such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile, or offensive environment.



# Necessary Showings

- The conduct must be unwelcome, and
- Either result in a tangible employment action, (Quid pro quo), or
- Be sufficiently severe or pervasive “to alter the conditions of employment and create an abusive working environment.” (Hostile environment)

# “Supreme” Definitions

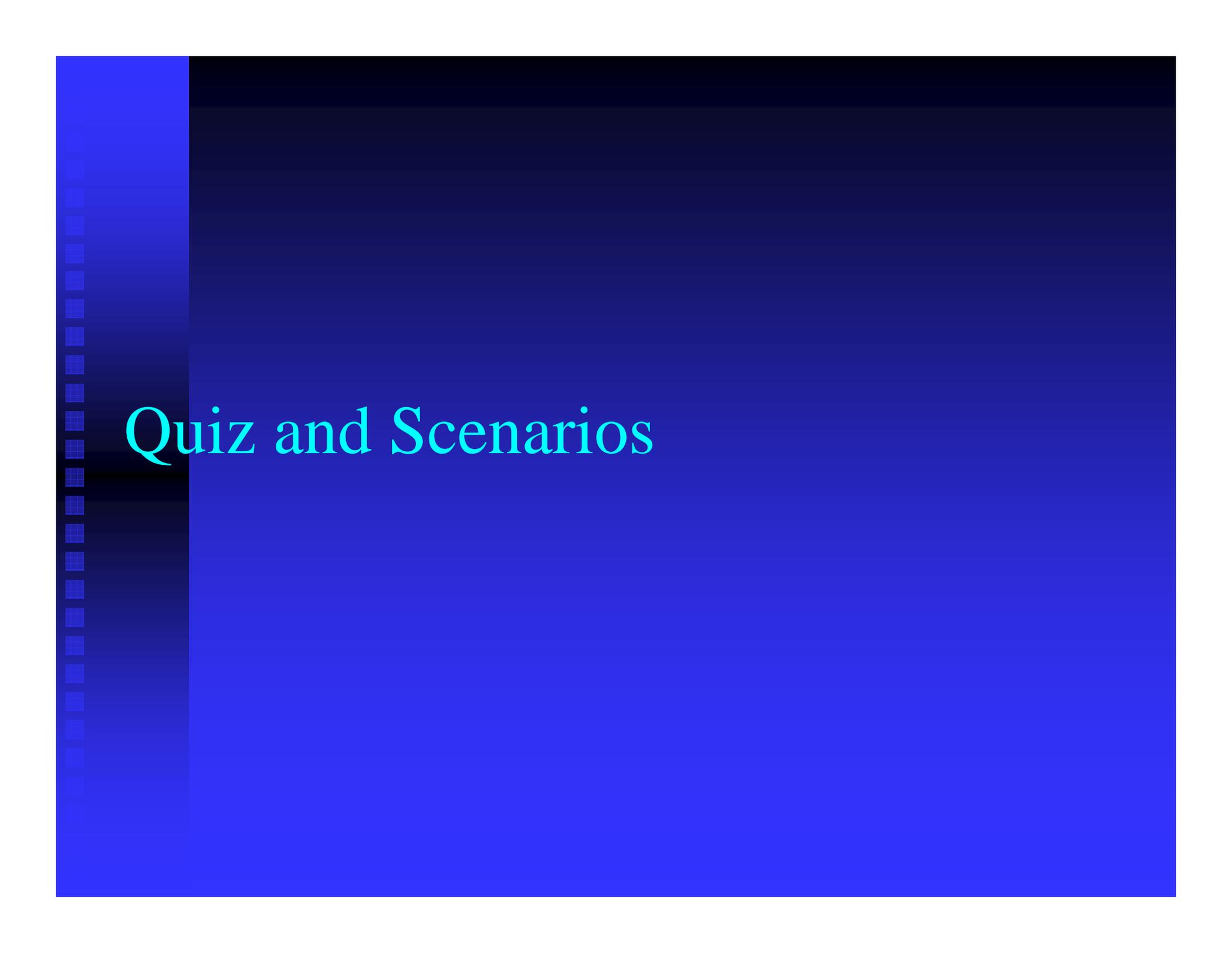
- Roth v. U.S (1957)
  - Attempted to define obscenity
- Miller v. California (1973)
  - ◆ Devised a test for judging obscenity statutes
- Cohen v. California (1971)
  - ◆ Gave First Amendment protection to a person’s right to use and display vulgar language
- FCC v. Pacifica Foundation (1978)
  - ◆ Provided FCC with authority to censor radio

# Foundation

- Point of view
  - ◆ Community standards
  - ◆ Community values
- Who defines?
  - ◆ Indecent words
  - ◆ Harmful speech

# Societal Norms - Acceptability

- TV and other media
- History and generational differences
- Does common use = acceptance?
- Role of organizational culture



# Quiz and Scenarios

# 1. Swearing Is Sexual Harassment

■ FALSE

2. *Playboy* And Other Types Of Photographs Of Women In Various Stages Of Undress Displayed In The Workplace May Contribute To A Hostile Environment For Women.

◆ TRUE

### 3. Telling One “Dirty” Joke Is Sexual Harassment.

■ FALSE

4. An Employer Is Liable For All Sexual Harassment That Takes Place In Its Workplace.

■ FALSE

5. Not All Physical Touching Between Co-employees At Work Is Sexual Harassment.

■ TRUE

6. You Should Always Try To Stop Sexual Harassment Yourself Before You Bring It To Your Employer's Attention.

■ FALSE

7. If You Report Sexual Harassment, And An Investigation Later Indicates Your Report Cannot Be Substantiated, You Can Be Fired.

■ FALSE

8. It Is Okay If There Is Sexual Graffiti In The Bathrooms Because They Are Not On General Display To The Public.

■ FALSE

## 9. Both Men And Women May Be Sexually Harassed.

■ TRUE

10. You Must Always Tell The Harasser That You Want No Part Of The Harassment, Otherwise It Is Presumed That You Have Consented To His Conduct.

■ FALSE

# Appropriate Preventative and Corrective Actions

- ◆ If harassment occurred, take prompt, corrective action to stop the harassment and prevent its recurrence in the future:
  - ◆ The behavior determines the action, for example if there was graffiti or posters that were offensive, the corrective action would include removal of those items.
  - ◆ Appropriate discipline for the harasser.
  - ◆ Protect against retaliation
  - ◆ Provide appropriate relief

# Examples of Corrective Actions

- Oral or written warning or reprimand
- Transfer or reassignment
- Demotion
- Suspension or discharge
- Training or counseling harasser
- Monitoring harasser

# Examples of Measures to Correct the Effects of Harassment

- Expungement of negative evaluations
- Apology from harasser
- Restoration of leave
- Reinstatement
- Compensation for losses

“Unwelcome” Is Not the Same As  
“Involuntary.”



# The Banker and the Teller

## Is this conduct welcome?

Taylor, the branch manager, invites Vinson, a recently hired teller-trainee, out to dinner and during the meal suggests that they go to a hotel to have sexual relations. After at first refusing, Vinson subsequently agrees. Over the next several years Vinson and Taylor have sex some 40 or 50 times. During this period, Vinson is promoted to teller, head teller, and assistant branch manager. These activities cease when Vinson starts going with a steady boyfriend.

# Do the following facts change your mind?

- Vinson says that she eventually agreed to have sex with Taylor because she was afraid to lose her job.
- Taylor makes repeated demands for sexual favors, usually at the branch, both during and after business hours.
- Taylor fondles Vinson in front of other employees.

# What about these facts?

- Taylor follows Vinson into the women's restroom when she goes there alone.
- Taylor exposes himself to Vinson.
- Taylor forcibly rapes Vinson.

# And how about these facts? Do they change your mind?

- Vinson never reports Taylor and never attempts to use the Bank's complaint procedure.
- Taylor denies everything and claims that Vinson is lying because of a business-related dispute.
- Vinson dresses provocatively and publicly expresses sexual fantasies.

# THE ANSWERS

What the Courts Decided

# The Banker and the Teller

Meritor Savings Bank v. Vinson

**Hostile environment claims are recognized as unlawful sex discrimination:**

“Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”

# The Banker and the Teller

Meritor Savings Bank v. Vinson

## **The conduct must be unwelcome:**

“[T]he fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”

# The Banker and the Teller

Meritor Savings Bank v. Vinson

**The conduct must be severe or pervasive:**

“For sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment. . . [Vinson’s] allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for ‘hostile environment’ sexual harassment.”

# The Banker and the Teller

Meritor Savings Bank v. Vinson

“[W]e reject [the Bank’s] view that the mere existence of a grievance procedure and a policy against discrimination coupled with [Vinson’s] failure to invoke that procedure, must insulate [the Bank] from liability.”

# The Reasonable Person

- Pervasiveness and severity are judged by a reasonable person standard.
- The reasonable victim's perspective must be considered in determining whether or not a reasonable person would find the conduct offensive.
- Employers are not required to accommodate the individualized concerns of hyper-sensitive employees.

# The Lovelorn Revenue Agent



# Is this a hostile work environment?

Ellison and Gray are revenue agents in the same office. According to Ellison, Gray pesters her and hangs around her desk. Ellison declines an invitation to go out for drinks and suggests lunch the next week but then tries to stay away from the office during lunch time to avoid having to go. Sometime during the next week, Gray uncharacteristically wears a three piece suit and asks Ellison to lunch. She declines.

## Is it now?

- Gray gives Ellison the following note: “I cried over you last night and I’m totally drained today. I have never been in such constant term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day.”
- Ellison leaves the room after reading the note and Gray follows her. Ellison leaves the building.

# What should the supervisor do?

- Ellison shows the note to Miller who supervises both Ellison and Gray but asks Miller not to do anything because she wants to handle it herself.
- Ellison asks a male co-worker to tell Gray that she is not interested.

# The story continues:

- Ellison gets Gray's note on Wednesday. He calls in sick on Thursday and Ellison is off Friday. The next Monday she starts four weeks of training out of town.
- Gray sends Ellison a three-page, typed, single spaced letter which states in part: "I know you are worth knowing with or without sex.... Leaving aside the hassles and disasters of recent weeks, I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and élan.... Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks. . . I will [write] another letter in the near future."

# What should the supervisor do now?

- Ellison immediately telephones Miller. She tells Miller that she is frightened and upset.
- Ellison asks Miller to transfer either her or Gray because she would not be comfortable working in the same office with Gray.
- Miller discusses the problem with her supervisor, Benton, and meets with Gray. Miller tells Gray to leave Ellison alone.
- Over the next week, Miller advises labor relations of the situation and reminds Gray “many times” not to contact Ellison.

# And now what should the supervisor do?

- Gray transfers to another office before Ellison's return but files a grievance requesting to be transferred back.
- The grievance is settled permitting Gray to return provided he spends four more months away and promises to leave Ellison alone.
- When Ellison learns that Gray will be returning she files a sex harassment complaint and transfers to another office.

# Does Gray's intent matter?

- Suppose Gray sees himself as a modern day Cyrano de Begerac wishing no more than to woo Ellison with his words? There is no evidence that Gray harbors any ill will toward Ellison.
- In his three page love letter, Gray offers to leave Ellison alone if she wishes.

# THE ANSWERS

What the Courts Decided

# Ellison v. Brady

AKA: The Lovelorn Revenue Agent

“We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”

# The Lovelorn Revenue Agent

Ellison v. Brady

**The “reasonable woman” standard is adopted:**

“[I]n evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim....If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy. We therefore prefer to analyze harassment from the victim’s perspective.”

# The Lovelorn Revenue Agent

Ellison v. Brady

**The employer's remedial action was inadequate:**

“We strongly believe that the victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment.”

“Ellison's employer did not express strong disapproval, . . . did not reprimand Gray, did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination. Apparently, Gray's employer only told him to stop harassing Ellison. Title VII requires more than a mere request to refrain from discriminatory conduct. Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment.”

# When is an environment “hostile” or “abusive”?

- Look at all circumstances.
- How frequent is the conduct?
- How severe is the conduct?
- Is the conduct physically threatening or humiliating?
- Is it “a mere offensive utterance”?
- Does it unreasonably interfere with work or school performance?

# Social Context

Determining whether a reasonable person would consider behavior to be severe requires “careful consideration of the social context in which the particular behavior occurs and is experienced by its target.”

“The real social impact of workplace behavior often depends on a constellation of surrounding circumstance, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”

*Oncale v. Sundowner Offshore Services*

# Example

- Is a football player's environment severely or pervasively abusive if the coach smacks him on the buttocks as he heads onto the field?
- Would the same behavior reasonably be experienced as abusive by the coach's secretary back at the office?



# The Risks of Romance

Can I date a fellow Employee?

# It's a bad idea

- There might be a rule or policy forbids dating a fellow employees.
- Consensual relationships between a supervisor and a subordinate are suspect given the power difference.
- Claims of harassment may also be made by other employees who believe they are treated unfairly because of the relationship.
- What if (*more like when*) the relationship sours?

# Power imbalances and changing circumstances

- Everyone interprets events based upon their own background, experiences, hopes and wishes.
- You cannot be sure that someone who depends on your good favor will view a pass as innocent or believe that rejection would be free of consequences.
- Current events will be interpreted in light of subsequent events.

# What do you see?



- A fashionable young woman from a bygone era?
- An ugly hag?
- Which one is the truth?

# Date at your own risk

- If you date and your former love object alleges that the whole thing was sexual harassment, you are on your own.
- Most times your employer will not defend you, so check your homeowner's policy.
- You might lose more than money, like your spouse and family.
- Oh yes, and your job could also be at stake because, while dating might not be against the rules, harassment is.

# Supervisor Responsibilities

What should you do if:

- An employee who you supervise tells you that she is being sexually harassed?
- You overhear two non-supervisory employees talking about their sexual conquests?
- Another supervisor tells you that he has been dating a coworker?
- You see an employee looking at a porno web site?
- You receive a sexual joke as an e-mail attachment?

# Supervisors Must Take “Reasonable Care”

The Supreme Court has given employers a defense in some hostile environment cases. To take advantage of the defense an employer must show that it “*exercised reasonable care to prevent and correct promptly any sexually harassing behavior.*”

*Faragher v. City of Boca Raton*

# What Is “Reasonable Care?”

- **YOU MUST DO SOMETHING WHEN YOU LEARN ABOUT HARASSMENT:** The Supreme Court denied the defense to the employer where the victim of harassment actually told a supervisor, Gordon, about the harassing conduct and he had done nothing.
- **YOU ARE RESPONSIBLE:** Gordon had similar informal talks with other women but felt it was not his place to report the conduct.
- **YOU HAVE TO PAY ATTENTION:** The Supreme Court also noted that the employer had “made no attempt to keep track of the conduct of supervisors.”

# Report all inappropriate conduct

- Your company can be held to know what you know.
- Your failure to report will be judged using 20-20 hindsight.
- When in doubt, shout.

# Why Not Handle It Yourself?

- Most managers and supervisors see harassment claims only rarely and so have little experience.
- If you talk to the alleged discriminator you can make matters worse, triggering retaliation, or giving him a chance to “get his story straight.”
- You might not learn of other facts that should influence your decision making.

# Express disapproval

- Take down offensive jokes and cartoons.
- If you overhear sexually explicit conversations or language, say that it is inappropriate in the workplace.
- If you hear discriminatory language, verbalize disapproval
- Do not laugh at racy jokes, no matter who tells them. You are a role model. You set the tone. Say it is not okay.
- Dare to be square.

# Why react to minor incidents?

- While a single utterance generally will not be held to create a pervasively hostile work environment, you will not see or hear about all incidents. You may be seeing only the proverbial tip of the iceberg.
- You set the tone. An employee who sees you laughing at sexual jokes is unlikely to feel that she can complain to you; thus, you would never learn about the rest of that iceberg.

# Take disciplinary action

- If you learn of conduct that may constitute sexual harassment, you must take disciplinary action.
- It is not enough that the conduct stops.
- At minimum, the harasser must be advised in strong terms that the conduct is wrong and that further discipline will be imposed if it is repeated.
- In many circumstances, much stronger action must be taken.

# Follow Up

- The victim may have useful suggestions.
- You may end up preventing further harassment.
- If it turns out that the remedy was inadequate, you might learn about it before the complaint turns into a lawsuit.
- You might prevent a constructive discharge.
- You might deter others from engaging in harassment.
- You communicate a seriousness of purpose.

## What not to do

- If you get a complaint, do not suggest that it is trivial or that the complaining person has simply misinterpreted the facts.
- Do not ignore it or conclude that it is not your place to do anything about it.
- Do not discount claims made by “trouble makers” or by employees who are having other difficulties at work.

# Role Play

What should you say?

- You overhear two non-supervisory employees talking about their sexual conquests?
- You see an employee looking at a porno web site?
- You receive a sexual joke as an e-mail attachment?

# Any questions, comments, concerns or complaints

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