

IAJ/UIM

Fourth Study Commission Report—2019

Response of the United States

Harassment, in a broad sense—*moral and sexual*—and its consequences on labor relations

1. U.S. Laws that Cover Workplace Misconduct

In the United States, some, but not all, workplace misconduct is covered under equal employment laws. This misconduct is generally classified as discrimination and harassment (considered a form of discrimination). Less severe workplace misconduct, such as bullying, is not directly covered, though private companies, organizations, or internal policies may prohibit such behavior.

The cornerstone U.S. law that protects employees from discrimination, including harassment, is Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (“Title VII”). Title VII protects against discrimination and harassment that is based on an employee’s protected characteristic. These characteristics include race, color, national origin, religion, sex, age, and disability. Sexual harassment is considered form of sex discrimination and is covered under Title VII.

Title VII does not separately define harassment. Instead, harassment is considered a form of employment discrimination. The U.S. Equal Employment Opportunity Commission—the federal enforcement and investigative body established under Title VII—explains that employment harassment becomes unlawful when “1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”

Workplace misconduct is also covered under various other laws, such as the Pregnancy Discrimination Act, Equal Pay Act of 1963, Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990 (“ADA”), and Sections 501 and 505 of the Rehabilitation Act of 1973 (which relates to persons with disabilities in the federal government). All of these laws prohibit employers from retaliating against an employee for

complaining about discrimination or harassment or participating in such an investigation or lawsuit.

2. Remedies for Individuals and Penalties for Offenders; Examples of Cases Involving Harassment

Remedies for victims vary so the person can be returned to their same—or nearly same—position before they experienced the harassment or discrimination. These remedies may include a missed promotion, a job not offered, or lost pay and benefits. Sections 102 and 103 of the Civil Rights Act of 1991 also amended Title VII and the ADA to allow jury trials and permit awards for compensatory and punitive damages in certain intentional discrimination cases. These awards can also cover emotional harm. The total amount of recovery is capped under Title VII and the caps depend on the size of the employer (the more employees an employer has, the higher the cap is).

An employer will be required to stop any discriminatory practices and may be required to enact procedures to prevent future discrimination or harassment. As stated above, employers and other bad actors can be subject to punitive damages if their actions are particularly severe or reckless. Generally, an employer is not liable for its employees' harassment, unless the harassment results from a tangible employment action or the employer created such an environment where employees felt they could not complain.

Several high-profile harassment lawsuits have been in the news following the increased coverage of the #MeToo movement, which focused on sexual harassment in the workplace. The legal community has not been immune, and many major U.S. law firms now face suits alleging harassment and gender discrimination. Some examples are as follows:

- The world's largest law firm, Dentons, settled a New York State sexual harassment suit between one of its business development specialists and a non-attorney managing director. The allegations included the employee enduring verbal and physical sexual harassment and being told by human resources to keep silent about the allegations.
- International law firm Jones Day is facing two major workplace misconduct lawsuits. A former female partner filed the first case under California State law, alleging that the firm's compensation scheme systematically pays women less than men. The complaint also alleges the firm acts like a boys club, or "fraternity", and treats women like "second-

class citizens.” Female associates brought the second case as a class action and alleged claims under Title VII. The complaint characterizes the firm’s culture as “at best inhospitable to women and at worst openly misogynistic” and a “frat-house.” The suit similarly alleges pay discrimination. The plaintiffs seek \$200 million in damages.

- Another large international law firm, Morrison Foerster, faces a gender and pregnancy discrimination lawsuit. The allegations include that the firm is a “good old boys club” and that women who took maternity leave had their careers stalled, both in pay and advancement opportunities. The class action plaintiffs seek \$100 million in damages.

3. Examples of Judicial Misconduct

Though far from the norm, there are examples of judicial misconduct. A few examples of extreme, but actual, scenarios of workplace misconduct by judges in the United States include the following:

- A major U.S. newspaper reported multiple allegations of sexual harassment, sexual misconduct, and bullying against a prominent federal appellate court judge. The allegations originated from several former law clerks and externs. The allegations included asking female clerks to look at pornography on a chamber’s computer and making sexually charged comments. The judge retired within days of the allegations.
- A federal appellate court called out a federal trial court judge who attributed a female federal prosecutor’s mistake to her gender. Specifically, the trial court judge said, “It was a lot simpler when you guys wore dark suits, white shirts and navy ties. . . . We didn’t let girls do it in the old days.” The appellate court called the comments “demeaning, inappropriate, and beneath the dignity of a federal judge.”
- A state appellate judge allegedly asked a fellow justice to have an affair with him, regularly said lewd comments about her body, made bullying statements like “You would never report me, would you?,” and repeatedly invited her to coffee and told her how he was unhappy in his marriage. He also groped and pawed her and harassed many other lower level court employees. This case will proceed to a hearing in late summer 2019.
- A state trial court judge allegedly made various comments about female attorneys’ appearance in court, as well as making generally demeaning

comments (such as telling a female public defender that her parents didn't "spank" her enough as a child). This case is also pending before the state judicial misconduct board.

4. Judiciary Rules and Ethic Codes on Harassment

In the wake of the #MeToo movement, in late 2017-early 2018, the federal judiciary moved quickly to address workplace bullying and harassment. The Chief Justice appointed a national working group, the Federal Judiciary Workplace Conduct Working Group ("Working Group") (which includes Judge Margaret McKeown, who is First Vice President of the Fourth Study Commission).

Following the Working Group's recommendations, the federal judiciary established the first-ever national Judicial Integrity Officer to provide advice and assistance with workplace matters like harassment and to receive and address informal and formal complaints from within the judiciary. Both the EEOC and the working group identified the power imbalance between judges and their staffs as a key structural issue in workplace conduct. Links to the EEOC Report and the report of the Working Group are in the resources section at the end of this report.

Immediately after reports of allegations against one of its appellate judges, in late 2017, the Chief Judge of the Ninth Circuit, the nation's largest appellate court, appointed Judge McKeown to chair the Workplace Environment Committee, a task force to develop policies and procedures for the courts within the circuit.

After surveying 6,000 current and former employees, the Ninth Circuit adopted various policies to address its employees' concerns. Some of these changes include:

- Rewriting the Ninth Circuit Employee Dispute Resolution ("EDR") policy in plain language and expanding the time for employees to report misconduct;
- Defining "harassment" and including "bullying" as misconduct within the EDR policy;
- Increasing the options for informal, confidential reporting and creating an independent Director of Workplace Relations, the first position of its kind in the country. The Director works with both judges and employees to resolve

workplace disputes and provides counseling and information on formal and informal reporting options;

- Retooling training for both judges and employees and implementing a range of programs for law clerks who serve as research attorneys for the judges;

A copy of a recent press release describing these initiatives is attached and the report from the Ninth Circuit is included in the links in the resource section.

The Code of Conduct for United States Judges (the judicial ethics code) and federal Judicial Conduct and Disability Rules apply to all federal judges across the U.S. Following recommendations of the national Working Group, these nationwide codes and rules were recently updated to address issues of harassment and workplace misconduct. These rules and codes now prohibit “abusive or harassing behavior,” among other misconduct; include an affirmative obligation for judges to report misconduct, including harassment, when they become aware of conduct that is reasonably likely to be misconduct; impose discipline for judges who do not change their inappropriate behavior; and clarify the confidentiality policy to define expectations and limitations of confidentiality.

Not every code or rule violation leads to disciplinary action for a judge. But, if disciplinary action is appropriate, the judge in question will face discipline. The degree of discipline will depend on various factors, including the seriousness of the misconduct, the judge’s intent, whether the misconduct is a part of a pattern of improper activity, and the effect of the improper activity on others or on the judicial system

Federal judges, along with federal court employees, must also follow procedures within their individual appellate and trial courts. In the wake of #MeToo, many of these entities have revamped and expanded their rules and reporting procedures to ensure the judiciary is a safe and welcoming environment for all employees.

Lastly, state court judges and judicial employees are subject to the judicial ethical codes and rules imposed by each state. Many of these state codes and rules prohibit harassment. For example, California’s Judicial Ethics Codes prohibits judges, while performing their judicial duties, from engaging in harassment. And this prohibition explicitly includes sexual harassment.

Resources

- **Equal Employment Opportunity Commission’s Select Task Force on the Study of Harassment in the Workplace Report:**
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf
- **Federal Judiciary Workplace Conduct Committee Report:**
https://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf
- **Ninth Circuit Ad Hoc Committee on Workplace Environment Report:**
<https://www.ca9.uscourts.gov/workplace/committee-report/Ninth-Circuit-Workplace-Environment-Committee-Report.pdf> and related Press Release (also attached):
http://cdn.ca9.uscourts.gov/datastore/ce9/2019/06/18/Workplace%20Environment%20Committee%20Report%20Release_6.18.19.pdf



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NEWS RELEASE

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Ninth Circuit Committee Issues Workplace Environment Report

SAN FRANCISCO – The Ninth Circuit Ad Hoc Committee on Workplace Environment issued a report of its work and accomplishments over the past 18 months. The committee, which Chief Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit created on December 17, 2017, identified challenges and presented initiatives that foster a healthy workplace environment for all employees.

The report provides an overview of the committee’s work to date, including its outreach to approximately 6,000 current and former employees and law clerks to inform its efforts on preventing and resolving workplace issues such as harassment and bullying.

“The Ninth Circuit takes seriously its commitment to a respectful workplace. Over the past eighteen months, we have worked hard to put in place revised policies and procedures to make that commitment a reality and we will continue our innovations to foster a culture of respect,” Chief Judge Thomas said.

The committee’s recommendations and the Ninth Circuit’s implemented changes highlighted in the report include:

- Revising the Ninth Circuit Employment Dispute Resolution (EDR) Policy;
- Establishing the Director of Workplace Relations, who will assist in guiding employees through the EDR process; serve as a resource to all employees on EDR-related matters; and oversee general workplace environment issues;
- Revising and simplifying the circuit’s confidentiality policy, which clarifies that misconduct issues are not protected by the confidentiality policy;

- Providing an expanded law clerk orientation and other resources for law clerks, including the formation of a Law Clerk Resources Group;
- Conducting an employee climate survey and law clerk exit questionnaire as ongoing mechanisms to monitor the workplace environment; and
- Expanding training and education on policies and practices for all employees, including judges.

The committee is chaired by Ninth Circuit Judge M. Margaret McKeown, who formerly chaired the Judicial Conference of the U.S. Committee on Code of Conduct and served on various committees and panels related to workplace and gender discrimination. Committee members include Chief District Judge Virginia A. Phillips of the Central District of California; Senior District Judge Charles R. Breyer of the Northern District of California; Magistrate Judge Candy W. Dale of the District of Idaho; and San Diego attorney Abby Silverman, one of the nation's top employment and alternative dispute resolution practitioners.

The Ninth Circuit is committed to maintaining a respectful workplace for all employees, and the committee will continue its work to ensure a healthy and productive workplace.

The full report can be found here: <https://www.ca9.uscourts.gov/workplace/committee-report>.

For more information on the Ninth Circuit's workplace relations initiatives, please visit the Office of Workplace Relations website at: <https://www.ca9.uscourts.gov/workplace>.

The U.S. Courts for the Ninth Circuit consists of the Ninth Circuit Court of Appeals, and the federal trial and bankruptcy courts and related court units in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands.

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