

Workplace Respect Comes Home

2019 Idaho Bench Bar Conference – Moscow, Idaho



The Honorable Candy W. Dale
U.S. Magistrate Judge – District of Idaho

Background of #MeToo in the Federal Judiciary

- ▶ December 2017—Chief Ninth Circuit Judge Sidney Thomas initiates a Complaint against Judge Alex Kozinski, on behalf of law clerks, under the Judiciary Conduct & Disability Act (28 U.S.C. Sections 351-364).
- ▶ December 2017—Chief Judge Thomas appointed the Ad Hoc Workplace Environment Committee to address any deficiencies in the Circuit's policies, procedures, and culture.
- ▶ December 2017—Chief Justice John G. Roberts, Jr., appoints the Federal Judiciary Workplace Conduct Working Group. Circuit Judge Margaret McKeown is common member of the Ninth Circuit's Committee and the Working Group.
- ▶ December 2017—Idaho's Chief Judges ask Judge Dale to review Courts' policies and affirm commitment to safe and healthy workplace for all employees

Background *(continued)*

- ▶ January/February 2018—EEO/EDR workgroup formed for District of Idaho, including 10 employees from clerk's office, chambers and probation
- ▶ Outreach, research and other work of Ninth Circuit Committee results in Judicial Council's approval of revised and revamped Employment Dispute Resolution Policy, effective and applicable to all courts and court units as of January 1, 2019. (Full report issued June 18, 2019, is in materials.)
- ▶ Idaho adopts Policy with expansion of anti-bullying provisions in same and expansion of EDR Coordinator role to an EDR Team. (Policy is in materials)
- ▶ March 2019—Judicial Conference of the United States approves revisions to the Code of Conduct for judiciary employees and revised rules under the Judiciary Conduct & Disability Act.
- ▶ Training began in January 2018 and continues at all levels of the federal judiciary.



Scope of Coverage

Covered Conduct

Options for Resolution

Idaho's EDR Policy

"If we cannot now end our differences, at least we can help make the world safe for diversity..."
John F. Kennedy

respect / fairness / dignity / tolerance



INTRODUCTION

The District of Idaho is committed to a workplace that fosters fairness, dignity, and tolerance.



The goal is to eliminate misconduct, including discriminatory, harassing, demeaning, and bullying behavior, by encouraging reporting and by providing alternatives to an adversarial process.

COVERED CONDUCT

- A.** Equal Employment and Anti-Discrimination Rights
Employees are prohibited from engaging in discrimination, harassment, bullying, and retaliation – which are actions or behaviors that are unwelcome, illegal, unfair, demeaning, or offensive.
- B.** Family and Medical Leave Rights
Title II of the Family and Medical Leave Act of 1993 applies to employees in the manner prescribed in Vol. 12, Ch 9, § 920.45.20 of the Guide to Judiciary Policy.
- C.** Employment and Reemployment Rights of Members of the Uniformed Services.
Title II of the Family and Medical Leave Act of 1993 applies to employees in the manner prescribed in Vol. 12, Ch 9 § 920.45.20 of the Guide to Judiciary Policy.



D. HARASSMENT

Harassment can include physical, verbal, non-verbal, or psychological behavior that interferes with work performance or creates a hostile or offensive work environment. Examples of harassment include offensive jokes, remarks, gossip, stuns or name-calling; viewing or displaying inappropriate images, pictures, videos or cartoons, or disparaging comments.



Sexual Harassment

Sexual harassment can include physical, verbal, or non-verbal behavior.

- Examples of sexual harassment include:
- Offensive remarks about an individual's sex or gender;
 - Unwelcome sexual advances;
 - Requests for sexual favors;
 - Repeated sexual advances or jokes;
 - Inappropriate touching or physical contact;
 - Displaying sexually suggestive posters, cartoons, or drawings;
 - Leering; making sexual gestures;
 - Or another other conduct of a sexual nature.

WHAT IS BULLYING?

EDR Policy:

Repeated mistreatment involving abusive conduct that is threatening, oppressive, or intimidating, and interferes with an individual's ability to do one's job. It can be physical, verbal, non-verbal, or psychological and can involve work assignments and social ostracism as well as demeaning treatment and comments.





District of Idaho's Policy:

It is behavior that harms, demeans, intimidates, offends, or humiliates employees. It is behavior that a reasonable person would find threatening, intimidating, or humiliating.

- It may happen in private, in front of others, or in public.
- It may be conducted by a single individual or a group.
- It can be repeated or a persistent pattern of behavior but can also be a single incident.

Who is covered?



BULLYING IS NOT TOLERATED BY ANY EMPLOYEE IN THE DISTRICT OF IDAHO

RETALIATION

- Right to be free from retaliation for participation in EDR in any way: Complainant, witness, representative, EDR Coordinator.
- Retaliation can be the basis for a separate claim, even if the initial EDR claim is unsuccessful.



CONFIDENTIALITY IS ESSENTIAL TO THE SUCCESS OF THE DISTRICT'S EDR PROGRAM

OPTIONS FOR RESOLUTION



- INFORMAL ADVICE**
An employee may contact a member of the EDR Team to request advice about a workplace concern. An employee may request anonymity, confidentiality, or that no action be taken following the inquiry.
- ASSISTED RESOLUTION**
In addition, or in lieu of, seeking Informal Advice, an employee can seek an Assisted Resolution. Information about the complaint will be shared only on a "need to know" basis.
- FORMAL COMPLAINT AND HEARING**
An employee may also initiate a formal dispute resolution process. This option involves filing a formal complaint, which leads to an investigation and possibly a hearing. Any remedies imposed by the hearing officer will be tailored to the specific violation.

District of Idaho

EDR TEAM

Three EDR Team Members
(Chambers, Clerk's Office, and Probation)

One EDR Coordinator

One EDR Judicial Advisor

Other Resources for Judiciary Employees

- ▶ Ninth Circuit Director of Workplace Relations—new position created upon recommendation of the Ninth Circuit's Committee
- ▶ Office of Judicial Integrity—new office created within the Administrative Office of the Courts.
- ▶ Judicial Conduct & Disability Act

Practices and Policies for Employers (including Law Firms) and a #MeToo Update

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- Social uprising aided by technology
- #MeToo and #TimesUp movements have focused attention on the continued concerns of harassment in the workplace
- 70% of Americans describe sexual harassment as a "very serious problem" in 2018, compared to 36% in 1998
- Reputational risks (Guess, Wynn, Uber)

TITLE VII of the Civil Rights Act

- Harassment (based on sex, race, etc.) in the form of a hostile work environment: 1) unwelcome conduct, 2) because of or based on a protected status, 3) that is so **severe** or **pervasive** that it alters the terms or conditions of employment and constitutes a hostile work environment. **Harris v. Forklift Systems, 510 U.S. 17 (1993)**: consider "all the circumstances" including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance"
- **Faragher/Ellerth** affirmative defense – companion cases out of the U.S. Supreme Court in **1998**; employers can fully defend cases of harassment by a supervisor (avoid liability) if the harassment does not result in an adverse action (\$ action) and the employer can demonstrate: 1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, and 2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures

The Impact of the #MeToo Movement

Employee's Perspective

- Complaining employees
 - Any infraction is cause of termination
 - No time limit on complaints
- Accused employees
 - Feel "doomed"
 - Presumption of guilt because of interim changes to job during investigation
 - "I've been doing that for years" #WhyNow

Employer/Defendant's Perspective

- Significant increase in # of internal company reports of sexual harassment requiring complex investigation regarding a good performer who was left for years to do bad things
- Age of report is a significant legal barrier #ItsTooLate
- Confidentiality challenges

#MeToo Backlash

The "Mike Pence" Workplace Rules:

- Avoid being alone with a woman
- Never attend social events where alcohol is served without your spouse
- Study results (Atwater, Tringale, et. al forthcoming in *Organizational Dynamics*):
 - > 19% of men and 11% of women were reluctant to hire attractive women; and
 - > 21% of men and 15% of women were reluctant to hire women for jobs involving close interpersonal interactions such as travel



IHRC/EEOC Statistics on Sexual Harassment - FY 2018

- IHRC 500 charges filed in in FY 2018, 50% are disability-based charges
- IHRC does not track sexual harassment, but discrimination claims based on sex are down from 36% to 33% between FY 2017 and FY 2018
- EEOC sexual harassment charges were up **13.6%** from FY 2017 to FY 2018
- The EEOC filed 66 sexual harassment lawsuits in FY 2018, up **50%** from FY 2017
- The EEOC collected **\$70 million in settlement** for sexual harassment victims in FY 2018, up from \$47.5 million in FY 2017



A Change in the Severe or Pervasive Standard?

Parker v. Reema Consulting Serv., Inc., 915 F.3d 297 (4th Cir. 2019)

Held: Employee adequately alleged the severe or pervasive element of a claim for sexual harassment in the form of a hostile work environment under Title VII, where co-workers spread a false, humiliating rumor that the female employee slept with her boss to obtain a promotion

Consideration by Court: Because traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist, leading to women being treated differently from men, it is plausible Parker suffered harassment because she was a woman



Cynthia Fuller v. Idaho Department of Corrections

- Case was based on a Title VII hostile work environment claim brought by a plaintiff who was raped off-duty by an IDOC co-worker. The case was dismissed on summary judgment by the district court
- The Ninth Circuit vacated and remanded the hostile work environment claim for trial, finding that the plaintiff raised sufficient admissible evidence as to whether the IDOC's actions following the report of the rape were sufficiently severe or pervasive to create a hostile work environment (865 F.3d 1154 (9th Cir. 2017) cert. denied 138 S. Ct. 1345 (2018))
- February 2019 a jury in Boise awarded Fuller \$1.8 million on the hostile work environment claim

Best Practices for all Employers (including law firms)

- Idaho's Human Rights Act applies to employers with 5 or more employees, while Title VII applies to employers with 15 or more employees
- Written policy on anti-harassment/anti-discrimination including definitions, examples, and multiple reporting options
 - Melissa's Sexual Harassment Classification & Consequences Code
- Annual training for all employees on anti-harassment and respectful workplaces (Idaho Human Rights Commission will do this training for free), with separate and specialized training for supervisors (quality of training as litigation point)

Best Practices for all Employers (setting expectations with complainants)

- Include an initial review at the beginning of the complaint process
- The investigator should interview the complainant to obtain important details often absent from a written complaint
 - Evaluate the complaint details against sexual harassment definitions and standards → If true, would this meet the definition of sexual harassment?
 - If the complaint of conduct would not constitute sexual harassment, educate the complainant about the definitions and standards. Explain how matter will move forward

Best Practices for all Employers
(setting expectations with the accused employee)

- If interim actions are taken (i.e., administrative leave, moving office location, etc.) explain how the decision was made and assure the accused there's no presumption of guilt
- Explain that the investigator will pursue the information where it takes them so there is no surprise if the scope of the investigation expands
- Define the circumstances under which a complaint would be considered "false"

2018 Legal Profession Guide to "Interrupting" Bias



This report was prepared and written for the American Bar Association's Commission on Women in the Profession and the Minority Corporate Counsel Association by Joan C. Williams, Marina Mulhaupt, Su Li, and Rachel Korn of the Center for Worklife Law at the University of California, Hastings College of the Law.

"The second part... offers two cutting-edge toolkits, one for law firms and one for in-house departments, containing information for how to interrupt bias in hiring, assignments, performance evaluations, compensation, and sponsorship."

"Based upon the evidence... these bias interrupters are small, simple, and incremental steps that tweak basic business systems and yet produce measurable change."

Document free to ABA members & available for purchase online

THANK YOU!

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