

CUNY SCHOOL OF LAW

NONDISCRIMINATION, SEXUAL MISCONDUCT, and REASONABLE ACCOMMODATION POLICIES

Michael J. Valente, Esq.

Chief Diversity Officer

(718) 340-4285

Room 4-321

Michael.Valente@law.cuny.edu

Nondiscrimination and Sexual Misconduct

- **The LAW** prohibits discrimination and sexual misconduct
- **CUNY POLICIES** prohibit discrimination & sexual misconduct
- **Respectful, Professional** workplace is good for all!
- **Diversity** is good for BUSINESS!
- **Affirmative Action** obligations



CUNY Policies

Policy on Equal Opportunity and Nondiscrimination

“Diversity, inclusion, and an environment free from discrimination are central to the mission of the University.”

“It is also the University’s policy to provide reasonable accommodations when appropriate to individuals with disabilities, individuals observing religious practices, employees who have pregnancy or childbirth-related medical conditions, or employees who are victims of domestic violence/stalking/sex offenses.”

Policy on Sexual Misconduct

“Every member of [CUNY’s] community, including students, employees and visitors, deserves the opportunity to live, learn and work free from Sexual Misconduct (sexual harassment, gender-based harassment and sexual violence.)”

Protected Civil Rights Categories

- Age
- Race
- Color
- Disability
- Sex (including Pregnancy)
- Religion/Creed
- Gender/Gender Identity
- Sexual Orientation
- National Origin/Ethnicity
- Military/Veteran Status
- Partnership Status
- Marital Status
- Credit History
- Criminal Record History
- Victims of Domestic Violence, Sex Offense or Stalking
- Alienage, Immigration or Citizenship Status
- Predisposing Genetic Information
- Unemployment Status
- Familial/Caregiver Status
- Sexual & Reproductive Health
- Height & Weight

Scenario

Ted claims that he is being “targeted” by **his new supervisor, Sam, who is of a different race than Ted**. Ted alleges that Sam did not grant Ted’s requested remote work schedule, denied Ted training and professional development opportunities, and did not promote Ted to Deputy Director. Ted believes that Sam does not know how to “manage” staff, is “too inflexible,” and that Sam has poor “people-skills.” However, Ted, at times, has not followed Sam’s instructions, is often late, and, on occasion, has not submitted work on time. Ted files a complaint with the Chief Diversity Officer.

Imagine you are the CDO (poor you!). Please discuss the pertinent EO issues with your colleagues and report out.

What is Employment Discrimination?

Conduct or action taken against a person **because of** the **person's protected status** which adversely affects the **terms and conditions** of that person's employment.

- Consistency, Uniformity and Fairness
- Importance of documentation
- Legitimate Business Reasons
- Totality of the Circumstances – Context Matters



Discrimination Examples:

- ❖ Hiring a younger employee (**age**) because you want “new college graduates” and “energized, digital natives,” even though an older worker has better education and experience.
- ❖ Not hiring a veteran (**military**) because you assume that he or she has post-traumatic stress disorder (**disability**).
- ❖ Promoting a female (**gender**) because you feel she is “more nurturing” even though a male had better evaluations in patient interaction. E.g. a nurse.
- ❖ Denying overtime opportunities to a gay employee (**sexual orientation**) because you believe homosexuality is “wrong.”
- ❖ Demoting and relegating a Muslim employee (**religion**) to the back room because you feel that the employee’s hijab (**religious head scarf**) is inappropriate. The Muslim employee used to work at the front desk.

Scenario: Rudy The Monster!



Rudy is a manager who is “very tough” on his staff. Some staff members complain that Rudy is abusive, always yelling, and making demeaning and condescending comments. However, Rudy, a huge Yankee fan, has a small “**clique**” of fellow Yankee fans in the office that he treats well by approving their vacation requests, excusing their lateness, and never yelling at them. Is there a hostile work environment? How to address it?

What is Unlawful Harassment?

Unwelcome conduct with the purpose or effect of unreasonably interfering with an individual's work performance or creates an intimidating, hostile or offensive work environment **because of the individual's protected status.**

Examples of Unlawful Harassment, Hostile Environment:

- Using racial or ethnic slurs or epithets in the workplace - even one time can be problematic.
- Targeting a gay coworker by sending numerous anti-LGBTQIA+ news articles and cartoons to him over the campus email system.
- Drawing a swastika on a bathroom wall or engaging in antisemitic comments or stereotypes.
- Making negative comments or jokes about someone's age, immigration status, disability, sexual orientation, sex, religion, gender identity.

Reporting EO and Retaliation Complaints

Chief Diversity Officer

- Neutral, impartial investigator of facts and evidence
- Fairness to parties in accordance with due process, contractual rights

Managers and Supervisors are Mandated Reporters

- Must contact the CDO
- Must Report discrimination and retaliation via CUNY REPORTING PORTAL
- Model Behavior expected of Employees, maintain confidentiality
- No Retaliation! Same standards as other similarly situated employees
- Clearly Communicate work expectations, Document! Document!

Employees

- Can contact the CDO directly (need not inform supervisor)
- Must Report discrimination and retaliation via CUNY REPORTING PORTAL

What Is **Sexual Harassment**?

Sexual harassment is **unwelcome** conduct of a sexual nature, including sexual advances, and requests for sexual favors, that creates an intimidating, hostile, or offensive environment because of sex.

- Sexual harassment is considered a form of **employee misconduct** and an employee who engages in such conduct, or managerial and supervisory personnel who knowingly allow such behavior to continue, shall be subject to discipline.
- All employees, supervisors and managers must take ESPARC online training annually!

Examples of **Sexual Harassment**:

- Sexual comments, teasing, or jokes
- Inappropriate or unwelcome physical contact, such as touching, groping, patting, pinching, hugging, kissing, or brushing up against an individual's body
- Sexual slurs, demeaning words, or other verbal abuse
- Graphic or sexually suggestive comments
- Inappropriate inquiries about sexual activities
- Pressure to accept social and/or electronic invitations, to meet privately, to date, or to have sexual relations
- Sexually suggestive letters or other written or visual communication, including email, text, or other social media communications

Gender-based Harassment

- Unwelcome conduct of a **nonsexual** nature based on an individual's actual or perceived gender, including conduct based on **gender identity, transgender status, gender expression or non-conformity with gender stereotypes**
- Examples:
 - Intentionally using the wrong pronoun to identify a transgender individual
 - Mocking a person's appearance
 - Malicious "gossip" about a transgender individual
 - Refusing to Allow Individuals to Use Single-Sex Facilities Consistent With Their Gender Identity

What is Sexual Violence?

Consists of:

- Sexual assault, such as rape/attempted rape, forcible touching, fondling, groping, grabbing and rubbing
- Dating, intimate partner, domestic violence
- Stalking /Cyberstalking
- Voyeurism (unlawful surveillance, violation of right to privacy in connection with person's body and/or sexual activity)

What Is Affirmative Consent?

Consent is a **knowing, voluntary and mutual decision** among all participants to engage in agreed upon sexual activity. Consent can be given by words or actions, as long as they create **clear permission** to engage in the sexual activity. Each person must **clearly communicate** his/her **willingness and permission** to engage in sexual activity.

- A person who is drunk or high **may not** be able to consent.
- Having sex with a person who is passed out, or slides in and out of consciousness, is **rape**.
- **Failure to resist or say “no”** does **not** equal consent.
- **Silence** does not constitute consent.

Regarding Consent:

- **CUNY Policy prohibits** faculty and staff from engaging in consensual intimate relationships with **students** for whom they have a **professional responsibility**
- **CUNY Policy strongly discourages** consensual intimate relationships between a **supervisor and supervisee**. Such relationships must be disclosed to the supervisor's supervisor

Reporting a Sexual Misconduct Complaint

Employees who have experienced or witnessed sexual misconduct are strongly encouraged to report the incident to campus authorities. Can receive supportive assistance and resources from the law school. Can report to Police. Bystanders are encouraged to intervene if safe to do so or report incidents.

Employees can report incidents to campus officials:

- Title IX Coordinator – a neutral, impartial investigator
- Director of HR - reports incident to Title IX Coordinator
- Public Safety - reports incident to Title IX Coordinator

Managers and Supervisors are mandated reporters: **MUST REPORT** Sexual Misconduct incidents to the Title IX Coordinator

Filing an External Complaint

- The following federal, state, and local agencies enforce laws against sexual misconduct or discrimination. If you are a victim of sexual misconduct or discrimination, you may file an external complaint with these agencies, or you may file litigation in a court of competent jurisdiction. **Depending on the forum, the time to file and the available remedies may vary based on the applicable statutes of limitations.**
- New York City Commission on Human Rights
<http://www1.nyc.gov/site/cchr/index.page>
- New York State Division on Human Rights
<http://www.dhr.ny.gov>
- US Equal Employment Opportunity Commission
<http://www.eeoc.gov>
- US Department of Justice
<http://www.justice.gov/>
- US Department of Education, Office for Civil Rights
<http://www2.ed.gov/ocr>

Reasonable Accommodations

An **individualized** action taken to adapt to a person's:

1. Disability
2. Religious need or practice
3. Status as a victim of domestic violence, sex offense or stalking, or
4. Pregnancy, child-birth or related medical conditions

Accommodation Request Process: A Cooperative Dialogue or Interactive Communicative process with Human Resources in accordance with CUNY Procedures for Reasonable Accommodations and Academic Adjustments

Examples of reasonable accommodations:

- ❖ Modifying work schedules
- ❖ Granting breaks or providing leave
- ❖ Reconfiguring work spaces/equipment, universal design
- ❖ Providing assistive technology/equipment

What is **NOT** a reasonable accommodation?

- ❖ Removal of an essential job function
- ❖ Hiring someone to do your job
- ❖ Undue hardship on employer: significant or substantial financial or administrative hardship
- ❖ Lowering performance or conduct standards

What Is Retaliation?

- **Retaliation is adverse treatment** of an individual because the individual made a discrimination or sexual misconduct complaint, opposed discrimination or sexual misconduct, cooperated with an investigation, or requested accommodations
- **Retaliation is illegal**
- CUNY will seek to **discipline** anyone found to have engaged in retaliation

If Violation Finding, Possible Disciplinary Penalties

Employees

(based on collective bargaining agreements)

- Reprimand, suspension or termination of employment
- Demotion
- Fine or restitution
- Campus ban
- No contact order
- CUNY may also take other measures not governed by CBAs, such as removal from discretionary positions

Students

- Probation, suspension, expulsion
- Removal from dorm and/or extracurricular activities including athletics
- Campus ban

IMPORTANT “TAKEAWAYS”:

1. Employees have R_____, but also R_____, under the EO/Nondiscrimination/Sexual Misconduct Policies.
2. S_____ FIRST, Get Assistance!!
3. *If you _____ something, _____ something*, especially if you are a M_____ Reporter!!
4. If you have a Discrimination or Sexual Misconduct concern or complaint, *Who you gonna call?* G_____ B_____ or the CDO/Title IX Coordinator _____

IMPORTANT “TAKEAWAYS”:

1. Employees have rights, but also responsibilities, under the EO/Nondiscrimination/Sexual Misconduct Policies.
2. Safety FIRST, Get Assistance!!
3. *If you see something, say something*, especially if you are a Mandated Reporter!!
4. If you have a Discrimination or Sexual Misconduct concern or complaint, *Who you gonna call?* Ghostbusters or the CDO/Title IX Coordinator, Michael J. Valente, Esq.

