

Preventing Workplace Harassment in the Aloha State

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About Makana Risser Chai

Makana graduated from the U.C. Berkeley law school and headed a law firm in Silicon Valley for 10 years, representing employees and employers in harassment, discrimination, wrongful termination, wage and hour, and other employment disputes. She then founded Fair Measures, a company that provides legal training for managers nationwide.

Makana has presented more than a thousand legal compliance trainings in 38 states including Hawai'i. She trains line managers, business owners, Human Resource professionals, lawyers and executives in management practices that prevent employee lawsuits. She conducts Respectful Workplace Harassment Prevention programs for all employees. She also provides one-on-one coaching of men and women who want to stop harassment, train-the-trainer, custom course development, policy and procedure drafting and review, and Human Resources consultation.

Prentice Hall published her book, *Stay Out of Court! The Manager's Guide to Preventing Employee Lawsuits*. Her articles on HR law appear regularly in Honolulu and national publications. Her book on sexual harassment will be published in 2019.

Makana's work is founded on the knowledge that organizations prevent lawsuits not by scaring people into compliance, but by empowering them to create respectful workplaces.

Helpful Ideas for Today's Workshop



Turn off your cell phone.



Learn so you can teach others, especially your family.



Listen respectfully to others' opinions.



If you feel uncomfortable, say something in class or tell the instructor.



Remember our purpose, to create a respectful workplace. **Respect starts here.**

VALUES

Employer Policy
Collective Bargaining Agreements

New laws

- Wrongful Action (1995)
 - Family and Medical Leave Act (1993)
 - Americans with Disabilities Act (1990)
 - Wrongful Termination (1980's)
 - Sexual Harassment regulations (1978)
 - Pregnancy Discrimination Act (1972)
 - Occupational Safety and Health Act (1970)
 - Age Discrimination in Employment Act (1967)
 - Affirmative Action (1965)
 - Civil Rights Act, Title VII (1964)
 - Equal Pay Act (1963)
 - Fair Labor Standards Act (1938)
 - National Labor Relations Act (1935)
 - Clayton Act (1914)
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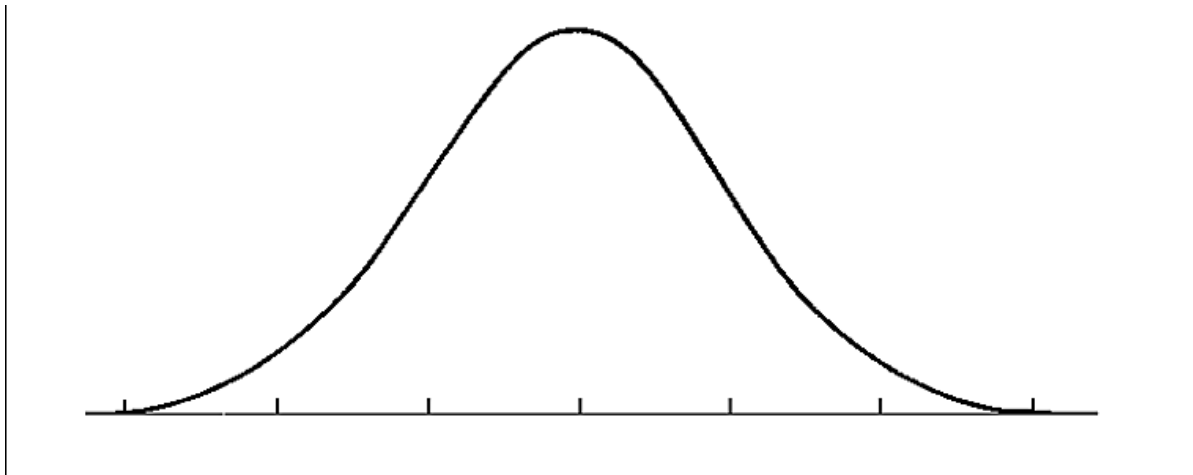
Old law

- master/servant at-will relationship

What Are Your Values?

How should we treat others so we have a good working environment?

The Bell-Shaped Curve Of Compliance



**Perfect
People**

the rest of us

**Flawed
People**

Values >>> Assumptions

- Our hearts are in the right place.
- We have been doing the best we can.
- We have unconscious bias.
- We have made mistakes.
- We have been hurt.
- We have hurt others.
- We want to do the right thing.
- We can change ourselves when we're aware.
- We can change the world when we work together.

How much do you know?

True **False**

1. Illegal harassment is anything that makes a reasonable person uncomfortable.
2. If employees like telling each other offensive jokes, that can be harassment to someone who overhears.
3. Saying aloha and giving a hug may be considered harassment.
4. Harassment includes behavior from members of the public, students, and vendors.
5. Harassment includes someone making negative comments about their own group.
6. White men are protected by harassment law.
7. A person's tattoos can be harassment of others.
8. If a supervisor yells at an employee about job performance, that is not illegal harassment.
9. Before filing a lawsuit about co-worker harassment, the victim must file a complaint with the employer.
10. The impact on the victim of harassment is more important than the intent of the person accused.

Refuting Common Misconceptions



Illegal harassment is NOT...

...a manager telling a subordinate what to do, counseling on performance, "overseeing" or micro-managing

...everything that makes a person uncomfortable

...a personality conflict between people of different ethnicities, genders, ages, etc.



Illegal harassment INCLUDES...

...making negative comments about a group even if they are not in the room

...making negative comments about your own group

..."jokes" that are directed at a particular person



Claims of illegal harassment are not numerous...

...nationally, 11,000 federal claims are filed per year

...15% of sexual harassment claims are filed by men



Huge jury verdicts...

...are often reduced or thrown out by judges

...are usually divided with 33% going to lawyers, 40% to taxes, and about 27% to the "winners"



False claims...

...are rare. EEOC finds 3% of claims are false, but over half are dismissed because "unfounded"

...can be grounds for a lawsuit by person wrongly accused, and treated by employer as falsification of employer records.

Why Harassment, Bullying & Disrespect Happen

- Unconscious bias research

- Harassment and bullying are based on physical or supervisorial **POWER**

- Research shows sexual harassment by three types of men:
 - men who are **exploitative** of women
 - men who are **naïve** about heterosexual relationships
 - men who dislike or **despise** women at work

- Behavior perceived as **disrespectful** may occur because of
 - emotions
 - power
 - joking
 - cultural differences
 - ignorance
 - alcohol
 - tradition
 - personal history
 - environment
 - insecurity
 - other ?

- INTENT IS IRRELEVANT**

Types of Harassment, Bullying & Disrespect



Our **values**

- encourage respect for people



Employer **policy**

- may set higher standard than law
- employee may be terminated for behavior that violates policy, even if it doesn't violate the law
- supervisors held to a higher standard
- behavior that is not illegal harassment may be evidence of discrimination if done by a supervisor



Illegal quid pro quo ("this for that" or "play for pay")

- from a supervisor or person who takes adverse action
- job favors for sexual favors, express or implied threats
- can be implied by repeated propositions
- must show job impact: denied promotion or pay increase, laid off, terminated, forced to quit
- employer automatically liable



Illegal retaliation

- from supervisor, peer, subordinate, outsider
- for refusing sexual advances, complaining of harassment, or assisting in a claim
- demotion, poor appraisal, bad assignments, termination, threats, violence, other



Illegal sexual favoritism


- where manager and subordinate have consensual relationship AND
- the employee receives opportunities, benefits AND
- more qualified person denied opportunities, benefits



Illegal hostile environment


- next page

Hostile Environment Overview

 **Four factors** must be met to show hostile environment:

1. Discriminatory or sexual behavior according to a reasonable person
2. Unwelcome by the victim
3. So severe or pervasive it interferes with work
4. Employer knew, or should have known, and did not respond reasonably

 Conduct that meets factors 1 and 2 may violate employer **policy**

 Conduct is **illegal** only if all four factors are met

Factor 1: Discriminatory or Sexual Behavior

Reasonable person rule

Harassment is prohibited by law on the basis of:

age
ancestry and national origin
arrest and court record
breast feeding
citizenship
color
credit history
disability, including AIDS/HIV
domestic or sexual violence victim status
gender identity or expression
genetic information
health condition
health, medical or family leave
marital status
pregnancy
race
religion
sex
sexual orientation
veteran and military status

There is no such thing as illegal “general” harassment. If it’s not tied to one of these protected classifications, it is not illegal. However, certain harassment may violate criminal laws (e.g. stalking, assault, threats)

Employer may prohibit all harassment and bullying by policy.

Factor 2: Unwelcome by the Victim

- Severe behavior is **presumed unwelcome**
 - physical threats
 - severe physical contact
 - negative slurs

- Sexual banter
 - flirting, innuendoes, requests for dates, jokes, banter
 - may be **presumed welcome** by law
 - may be presumed unwelcome by policy
 - especially from a supervisor
 - if comments are unwelcome, clearly say so

- Victims may include people who **overhear or observe** the harassment

- To prove unwelcome, victims should
 - clearly inform harasser **and/or**
 - follow employer procedure and file internal complaint

Why victims don't complain or confront

1. Fear of retaliation
2. Fear for personal safety
3. Fear of being laughed at or teased
4. Don't want harasser to get into trouble
5. Embarrassed
6. Afraid people won't believe them
7. Wonder if they did something to invite it
8. Don't want to be seen as a complainer
9. Fear of spouse/partner/family finding out
10. Don't want to deal with procedure
11. Unaware it violates policy
12. Fear of negative effect on career
13. Fear of being shunned
14. Cultural differences
15. Don't want harasser to know they are vulnerable
16. Other?

Factor 3: So severe or pervasive it interferes with work

 **Once** may be severe

- touching intimate sexual parts
- assault and battery
- physical threats

 Generally these must be **frequent** to be severe:

- defamatory
untrue statements made to others about a person implying a lack of chastity (including rumors and gossip)
- degrading
statements made to or in front of others about a person that are sexual, highly personal or negative
- discriminatory
 - unwelcome sexual propositions
 - slurs and names directed at a person
 - intrusive questions or comments about the person's sex or other protected characteristics
- other

Factor 4: Employer knew or should have known and did not respond reasonably

- If **supervisor or HR** does not handle complaint correctly may be personally liable for “aiding and abetting”
- Individual harasser** may be sued personally if behavior violates any other law (e.g. assault and battery)
- If employer takes appropriate action against co-worker harassment, the victim has no right to sue the employer
 - “appropriate action” is **reasonably calculated to end the harassment**
- If **supervisor** harasses, employer may be automatically liable
- Employer knew or should have known if:
 - victim filed complaint
 - a **supervisor** heard, saw, or heard about the harassment
 - it is so open that “everyone” knows
- Employer responsible for behavior of or towards temps, consultants, customers, suppliers, etc.
- Off-site behavior
 - work-related function, treated same as at work
 - **private behavior** that affects work may lead to valid claim

Aloha Spirit and Harassment



Cheek to cheek air kisses, cheek kisses, hugs
- not everyone welcomes!
- cultural differences



How have some people taken advantage of these?



When is it really aloha?



To be safe:

- if someone holds out their hand to shake, shake it
- if you welcome a hug, hold out your arms and let them come to you
- don't escalate
- use the side to side hug or bro hug
- other?

Values, Policy, Law

	Physical	Visual	Verbal
VALUES	Touching in "Neutral Zone"		Non-directed swearing
	Invading space		Compliments Endearments
POLICY	Unwelcome hugging	Suggestive pictures	Repeated requests for dates by peer
	Unwelcome shoulder rubs	Offensive cartoons Obscene gestures Sexy clothing	One request for date by supervisor to direct report Directed swearing Offensive jokes
	Touching intimate parts*	Lewd cards	Rumors and gossip
LAW	Defacing property*	Obscene email	Slurs
	Assault*	Nude pin-ups	Implying lack of chastity
	Stalking*	Porno internet sites	Personal sexual questions
		Porno screen savers	Propositions
			Public comments about another's body Threats*

* May violate criminal laws

Another point of view

Dr. ArLyne Diamond tells men (and women) to be safe:



No compliments on physical appearance

In today's workplace, you shouldn't tell a person they look handsome, pretty, professional, polished, etc.



Men & women should not touch each other at all

Nothing beyond a handshake.



Avoid all forms of joking

Everyone has a different reaction to humor and what is funny to one person can be incredibly offensive to others.



No cursing or crude language

If you wouldn't say it in front of your Mother, you shouldn't say it in the office.



No asking out for drinks

Flirting or asking a co-worker out for drinks should be avoided at all costs.



Do these recommendations relate to law, policy, or values?

How to recognize harassment and bullying



The Media Test



The Both Sexes Test

- Would you treat a man the way you're treating a woman?

- Should you treat women the way your treat men?

- Treat women equal to men on a professional level (pay, responsibility, praise for their work), but not necessarily on a personal level (joking, using sexual words, swearing).

- When you want to treat women "nicely"—giving compliments, hugs, or kisses—let them initiate. Follow their lead.



The Family Test

- your family

- their family

If you see or hear disrespect, bullying or harassment

- Whatever you do, you are making a choice
 - whose side are you on?
 - if you do nothing, you are supporting the bully

- Intervene so that it stops
 - buddy up to the victim
 - ask the bully questions
 - directly ask bully to stop
 - divert attention to yourself
 - get others involved
 - other?

- What questions could you ask?

- If you would rather not intervene, or you do and it continues
 - let victim know you will help them
 - encourage them to talk to supervisor or HR
 - if you are a supervisor, report to HR
 - if you are a co-worker, you can report to HR

- If victim does not go to supervisor or HR and it continues
 - you can go to supervisor or HR

- Be a good role model

Video case study “What Would You Do?”

	Rate 1-5	Would you do?	What was most effective? What was least effective?
Woman in pink top			
Woman with glasses			
3 businessmen			
Woman with white hair			
HR manager			
Man in red shirt			
Woman in pink sweater			
Man in blue shirt			

Video case study - “We know what’s going on”

- 1) Is the gossip about the supposed affair related to sex? (Factor 1)
- 2) Is the gossip presumed unwelcome? (Factor 2)
- 3) Is the gossip so severe that it could affect Maya’s work? Why or why not? (Factor 3)
- 4) Is the gossip so open that the company “should have known” about it? (Factor 4)
- 5) Does this gossip violate UH policy?
- 6) You are a co-worker standing there hearing the speculation about Maya. After the man says, “Maybe you're right. How else can you explain it? There's no way she can handle that area director position,” what could you say to both him and the gossiping woman?
- 7) What if Maya and the boss are having an affair? How could that be sexual harassment towards anyone else?
- 8) Assume Maya and the boss have an affair and then break up. Could Maya claim sexual harassment? Why or why not?
- 9) If they are having an affair, what should the company do?

Video case study “Those People”

- 1) Would a reasonable person say the man's comments were based on national origin? (Factor 1)
- 2) Are his comments presumed unwelcome? (Factor 2)
- 3) At what point, if any, would comments like this interfere with the work of the woman? (Factor 3)
- 4) At what point, if any, would comments like this interfere with the work of the person he is talking about? (Factor 3)
- 5) Assuming neither the man nor the woman are managers, at what point should the company know these comments were occurring? (Factor 4)
- 6) If you were the woman in the video, what could you have said or done during or after this conversation?
- 7) What sorts of negative comments have you heard co-workers make about people's national origin any place you've ever worked?
- 8) What sorts of negative comments have you heard co-workers make about co-workers any place you've ever worked?

If you are a victim of bullying or harassment

- Consider talking to a friend.
 - Get support
 - Talk through options
 - Can be evidence

- If you feel comfortable, you are encouraged to **inform harassers and bullies** you do not welcome it.

- Write out what you want to say.
 - “On [this day] at [this time] you [did this]. I consider this harassment. If this continues, I will inform HR. If it stops, I assume we can have a good working relationship.”

 - Date when you told them or gave them letter.

 - Best to do it in a public place where you can have a private conversation (e.g. coffee shop)

- If behavior continues or you do not want to speak to them, **file a complaint** per policy, which says _____

- If you are not satisfied with how employer handles complaint, or harassment is from supervisor/manager, you can file directly with the U. S. Equal Employment Opportunity Commission or the Hawai’i Civil Rights Commission

If you are accused of disrespect or harassment

Typical responses when someone is accused of harassment:

If someone tells you they do not welcome your behavior:

- "Thank you. I appreciate your feedback."
- "I apologize. It will never happen again."
- "It was not my intent to harass."
- "How can I make it up to you?"
- "I hope someday you can forgive me."
- "Is there anything else you want to tell me about?"

If a complaint is filed against you with the company

- Participate in the investigation.
- You have the right to tell your side.
- Tell the truth.
- Bargaining unit, you have a right to a Union rep.
- You can seek outside legal counsel
(at your own expense)

Avoid claims of retaliation

- Be civil.
- Limit conversation with complainant to work.
- Do NOT talk to complainant about the complaint.
- Do not speak to anyone at work about the situation.

If you feel the investigation was unfair

- Bargaining unit – can file a grievance
- You may have right to sue if adverse action taken against you (demoted, terminated, denied promotion, etc.)
- You have the right to see your own attorney.

Complaint Process

- Supervisor** should listen to the complaint
 - do not give advice
 - do not make conclusions
- If **may** violate law or policy, supervisor must call HR
 - even if requested to keep confidential
 - when in doubt, call HR
- The complaint is evaluated by HR
 - does it violate law, policy, or values?
 - if violates values only, HR may not take action
- Investigation conducted if law or policy violation alleged
 - investigation must be prompt, impartial, thorough
 - what happens if there are no witnesses, no prior complaints, and the accused denies that it happened?
- HR/management makes a determination
 - based on preponderance of evidence and reasonable conclusion
- Management takes appropriate corrective action
 - any corrective action is appropriate if it is **reasonably calculated to end the harassment**
- Document
- Follow up with victim
 - ensure harassment not repeated
 - ensure no retaliation

Guidelines for a respectful workplace

- Most disrespect is unintentional.
- Platinum rule: **Treat people the way they want to be treated**
- With peers:
 - listen – observe – ask for permission
 - when in doubt, don't
 - the bigger the group, the higher the standard
 - ask for feedback
- What are ways to encourage respect?**
 - what does respectful behavior look like?

Repairing the Past, Preparing for the Future



Past

- reflect on your past
 - have you disrespected others?
 - ask for feedback
 - apologize
 - make amends
 - have you been disrespected?
 - consequences?
 - compassion and forgiveness



Future

- if you make a mistake
 - catch yourself
 - apologize
 - make amends
- if others make mistakes
 - if they catch themselves and apologize
 - praise them for catching themselves
 - consequences?
 - compassion and forgiveness
 - if they don't catch themselves
 - say something
 - consequences?
 - compassion and forgiveness
- Become a coach
 - men and women can coach men and women
 - ask for permission to coach
 - ask to be coached

Exercise

List one or two things you learned or were reminded of today.

List one or two things you will do(or not do) as a result of this class. This could include sharing with a family member, talking to HR, changing your own behavior, coaching someone about their behavior, etc.

PROGRAM EVALUATION FORM

Date

Your name (optional):

Please rate the workshop according to the following categories and dimensions: 1 is Low, 5 is High

I. Instructor

Ability to meet workshop objectives 1 2 3 4 5

Ability to keep workshop alive and interesting 1 2 3 4 5

Ability to make content relevant to your job 1 2 3 4 5

Please comment on the strengths and weaknesses of the instructor:

II. Material (Handouts and Books)

Readability/ Ease of understanding 1 2 3 4 5

Usefulness for later reference on the job 1 2 3 4 5

III. Job Applicability

How applicable is the class to your job 1 2 3 4 5

Comments about how the class can apply to your job?

IV. General

Would you recommend workshop to others? Yes No

Was the length of the workshop: too long? too short? just right?

Overall I would rate the workshop 1 2 3 4 5

Other comments?