

The Macro Consequences of Microaggressions:

*How and When Microaggressions Can
Lead To Unlawful Discrimination*

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Today's Topics

- Refresher
 - Discrimination Laws
 - Unlawful Harassment
- Microaggressions
- Microaggressions And Unlawful Discrimination and Harassment
- Practical Tips



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Discrimination Laws

Federal Laws

- Title VII of the Civil Rights Act of 1964 (Title VII)
 - Prohibits employment discrimination based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), and national origin
- Title IX of the Civil Rights Act of 1964 (Title IX)
 - Prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.
- Americans with Disabilities Act (ADA)
 - Prohibits discrimination against individuals with disabilities in all areas of public life, including employment, schools, transportation, and all public and private places that are open to the general public.

Federal Laws (Cont.)

- Age Discrimination in Employment Act 1967 (ADEA)
 - Prohibits employment discrimination against workers age 40 and older.
- Pregnancy Discrimination Act (PDA)
 - Amended Title VII to clarify that discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination and requires employers to treat women affected by pregnancy, childbirth, or related medical conditions the same as any other employees with temporary disabilities with respect to terms and conditions of employment, including health benefits
- The Pregnant Workers Fairness Act (PWFA)
 - Requires covered employers to provide reasonable accommodations to a qualified applicant's or employee's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

State Laws

- Michigan's Elliot-Larsen Civil Rights Act (ELCRA)
 - Prohibits discrimination in Michigan on the basis of religion, race*, color, national origin, age, sex, height, weight, familial status, or marital status in employment, housing, education, and access to public accommodations

*CROWN Act (June 15, 2023): amended the definition of "race" in ELCRA to include "traits historically associated with race, including, but not limited to, hair texture and protective hairstyles"

Federal and State Civil Rights Laws Prohibit

- Discrimination based on a protected characteristic/category
- Harassment based on a protected characteristic/category
- Retaliation against employees who engage in protected activity

Legally Protected Categories

- Race
 - Color
 - Age
 - Sex (Sex Stereotyping)
 - Sexual Orientation
 - Gender Identity
 - Disability
 - Pregnancy
 - Religion
 - National Origin
 - Genetic Information
 - Veteran Status
- Michigan State Law :
 - Weight
 - Height
 - Marital Status



What Is Unlawful Discrimination?

- Making any employment decision or taking any action because of a person’s protected category, status or classification, including decisions about:
 - Hiring
 - Discipline
 - Demotions
 - Discharge
 - Wage Increases
 - Bonuses
 - Benefits
 - Transfers
 - Scheduling
 - Work Assignments
 - Evaluations

What Is Unlawful Harassment?

A form of *discrimination*
based on a “*protected category*”
that interferes
with equal employment opportunities

What Is Unlawful Harassment? (Cont.)

- Conduct that is:
 - Unwelcome
 - Based on a legally protected characteristic
 - And either:
 - Includes a tangible job detriment or
 - Creates a hostile work environment

Types of Unwelcome Conduct

- Physical
 - Sexual activity
 - Touching
 - Brushing the body
 - Shoulder massaging, hugging
 - Blocking exits
 - Threatening body language
- Verbal
 - Racial, ethnic, religious or other comments, jokes, stories, innuendoes
 - Sexual comments, comments about body parts or appearance, discussion of sexual exploits
 - Suggestive sounds
 - Asking for a date after rejection
 - Asking questions about dating, sex life
 - Mimicking speech
- Non-Verbal
 - Sexual or hate-related websites, e-mails, texts,
 - Suggestive or hate-related posters, cartoons, magazines
 - Winking, throwing kisses, “leering”
 - Other gestures or physical conduct mimicking stereotypes

Harassment: Unwelcome Conduct

- Must be “unwelcome” - both subjectively and objectively
 - Subjective- personally
 - That comment offended me
 - Objective- *reasonably*
 - A reasonable person would find that offensive

Unwelcome Conduct – It’s Not Always Easy To Tell What’s Unwelcome

- What if the victim seemed to participate willingly in the conduct they are now complaining about?
- The absence of an objection does not always equal consent

Unwelcome Conduct – Signs To Look For

- Employee Complains
- Verbal response (or lack of one)
- Expression changes
- Body language
- Avoidance



Harassment: Based on a Protected Characteristic

- Race
 - Color
 - Age
 - Sex (Sex Stereotyping)
 - Sexual Orientation
 - Gender Identity
 - Disability
 - Pregnancy
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Harassment: Tangible Job Detriment or Hostile Work Environment

- Conduct that is:
 - Unwelcome
 - Based on a legally protected characteristic
 - **And either:**
 - **Includes a tangible job detriment (quid pro quo) or**
 - **Creates a hostile work environment**
- While cases initially focused on quid pro quo, hostile work environment claims have become far more common

Quid Pro Quo Harassment

- Taking any tangible employment action based on an agreement or refusal to engage in sex, dating, etc.
 - Termination
 - Discipline
 - Failure to promote
 - Reduced compensation
 - Undesirable job assignment
- The harasser must be able to carry out the threat or promise (i.e. supervisor)

Hostile Work Environment Harassment

- Unwelcome harassment that is sufficiently severe or pervasive and has the purpose or effect of creating an intimidating hostile or offensive work environment
- Does not require a threat of tangible harm to employment
- Is not limited to supervisors or others who are in a position of power

Hostile Work Environment: Severe or Pervasive

- Severe
 - Sexual assault of any kind, including grabbing, fondling, forcibly kissing
 - Use of racial or ethnic slurs
- Remember- it's severe or pervasive
 - So a single instance of severe conduct can cause liability

Hostile Work Environment: Severe or Pervasive (Cont.)

- Pervasive
 - A pattern of repeated behavior
 - Example: suggestive or demeaning comments directed at an employee on a daily basis
- Remember- it's severe or pervasive
 - So non-severe conduct that is repeated can cause liability

Unlawful Harassment: Intent Does Not Matter

- Common excuses:
 - “Nobody else minded.”
 - “But I was only joking.”
 - “That’s just how I am.”
- It does not matter that:
 - You intended to be funny
 - Others thought it was funny
 - The person complaining seemed to go along with it at the time

Hostile Work Environment : Example 1

- During the first 6 months of working together, Gary’s co-worker Susan, made several dirty jokes in his presence, talked repeatedly about going to a strip club, called him “hot lips,” and told him that his shirt was “sexy.”
 - Unwelcome conduct?
 - Subjectively offensive?
 - Objectively offensive?
 - Based on a legally protected characteristic?
 - Severe or pervasive?

Hostile Work Environment : Example 2

- Every day for the last year, Juan’s co-workers have taunted him with derogatory comments about his sexual orientation. They regularly tease him about having a boyfriend and call him “Juanita.” This behavior makes Juan very uncomfortable at work but he’s too embarrassed to ask his co-workers to stop.
 - Unwelcome conduct?
 - Subjectively offensive?
 - Objectively offensive?
 - Based on a legally protected characteristic?
 - Severe or pervasive?

Retaliation

- Retaliation is taking an adverse action on an employee because they engaged in legally protected activity.
- Examples of materially adverse action:
 - Denial of a promotion or job benefits
 - Demotion
 - Suspension
 - Discharge
 - Any other action that may well *dissuade a reasonable person from engaging in protected activity.*

Microaggressions

What Is A Microaggression?

A comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group



Types of Microaggressions

Microassaults

Microinsults

Microinvalidations

Microassaults

- Intentional discrimination, bullying, or insensitivity
- Commonly form the basis of discrimination and harassment claims
- Examples:
 - Racial slurs
 - Offensive symbols
 - Mocking cultural norms

Microinsults

- Either intentional or unintentional speech that demeans another person based on an individual's protected class
- Examples:
 - Asking a person of color how he/she got into such a good school
 - Assuming a woman is in a secretarial role
 - Complimenting someone's ability to speak English
 - Telling someone that they "don't look or sound gay"

Microinvalidations

- Either intentionally or unintentionally excluding, ignoring, or discrediting a person based on their membership in a culture or protected class
- Examples:
 - “I don’t see color”
 - Telling someone that you cannot be racist because you have friends of the same race
 - Invalidating someone’s feelings by saying that the one causing the offensive conduct “didn’t mean it like that”

Microaggressions and Unlawful Discrimination or Harassment

Can Microaggressions Lead To Legal Liability?

- Historically, microaggressions have not been enough to lead to liability.
- But microaggressions are popping up in more and more hostile work environment claims and courts are starting to express the need to reevaluate the legal standard as society evolves

Case Examples: *Pringle v. Wheeler*

- Plaintiff alleged that he was discriminated against because of his race and subjected to a hostile work environment
- Alleged conduct at issue:
 - Plaintiff was issued a two-day suspension notice for “failing to properly pack up” his office during an office-wide move, while five other non-Black employees also failed to properly pack up but were not disciplined
 - Plaintiff was denied a promotion and the position was given to a non-Black employee with significantly less experience
 - Plaintiff was given unwarranted negative performance reviews

Case Examples: *Pringle v. Wheeler*(Cont.)

- Court found that Plaintiff alleged “a pattern of discriminatory and retaliatory harassment spanning over at least five years,” which created an intolerable working environment since other non-Black employees were not subject to the same treatment.
- “While macroaggressions undoubtedly constitute a hostile work environment, pervasive microaggressions have the ability to diminish the workplace significantly as well. Put differently, a severe episode that occurs rarely as once violates Title VII, and so does a relentless pattern of lesser harassment that extends over a long period of time.”

Pringle v. Wheeler, 478 F. Supp. 3d 899 (N.D. Cal. 2020)

Case Examples: *Chen v. Yellen*

- Plaintiff alleged that she was subjected to a hostile work environment based on her race and national origin
- Alleged conduct at issue:
 - Plaintiff was overlooked for a temporary manger position
 - Plaintiff’s requests for evaluations and promotions were ignored
 - Supervisors laughed at Plaintiff’s accent
 - Plaintiff was unjustifiably yelled at
 - Supervisors kept “secret notes” about Plaintiff

Chen v. Yellen, No. 3:14-cv-50164, 2021 WL 4226202 (N.D. Ill. Sept. 16, 2021)

Case Examples: *Chen v. Yellen* (Cont.)

- Court found that the conduct complained of was neither severe nor pervasive and it was not objectively offensive
- But the Court acknowledged that microaggressions can be considered as evidence of a hostile work environment:
 - “Plaintiff also urges this court to accept microaggression as evidence of a hostile work environment.... **Regardless of whether an aggression is micro or macro, the Court considers the evidence of hostility in totality. If the combination of conduct sums up to be severe or pervasive, then it is enough. If it doesn’t, then it is not. Whether the sum come from a *large number of small incidents*, or a small number of larger incidents, the result is the same.”**

Chen v. Yellen, No. 3:14-cv-50164, 2021 WL 4226202 (N.D. Ill. Sept. 16, 2021)

Case Examples: *Daywalker v. Univ. of Texas Med. Branch at Galveston*

- Plaintiff alleged a hostile work environment due to “microaggressions and indirect racial slights”
- Alleged conduct at issue:
 - Plaintiff’s supervisor insinuated that she was “an angry black woman” and said that she looked like she wanted to assault him
 - Plaintiff’s supervisor asked her why Black people use the emergency room for the majority of their health care
 - Plaintiff’s supervisor made comments about the lack of Black students enrolled in the residency program, which resulted in other medical students thinking that Plaintiff was given preferential treatment

Daywalker v. Univ. of Texas Med. Branch at Galveston, No. 3:20-cv-99, 2022 WL 17818069 (S.D. Tex. Nov. 14, 2022)

Case Examples: *Daywalker v. Univ. of Texas Med. Branch at Galveston (Cont.)*

- Court found that the comments were insensitive but did not create a hostile work environment because it was neither severe nor pervasive.
 - “Racial insults [must] be extremely severe,” and “[e]ven if some of [the supervisor’s] remarks were insensitive none were direct racial insults.”

Daywalker v. Univ. of Texas Med. Branch at Galveston, No. 3:20-cv-99, 2022 WL 17818069 (S.D. Tex. Nov. 14, 2022)

Case Examples: *Paschall v. Tube Processing Corp.*

- Plaintiff alleged a hostile work environment and race discrimination
- Alleged conduct at issue:
 - Co-workers used the n-word when referring to Plaintiff but never said it directly to her
 - A supervisor refused to shake Plaintiff’s hand
 - Co-workers wore clothing to offend her, such as confederate flag and MAGA/Trump t-shirts
 - Plaintiff was treated more harshly than her White co-workers

Paschall v. Tube Processing Corp., No. 1:19-cv-04488-JMS-MG, 2021 WL 1390350 (S.D. Ind. April 13, 2021)

Case Examples: *Paschall v. Tube Processing Corp. (Cont.)*

- Court found that Plaintiff was not subjected to a hostile work environment because the conduct was merely offensive but not severe or pervasive
 - “General complaints that people of a certain race are treated less favorably than others do not support a hostile work environment claim”
 - “One or two uses of that deplorable word (the n-word)—when used by coworkers rather than a supervisor—is not so severe as to create an objectively hostile work environment.”
 - BUT, the Court added a footnote where it explained that it’s decision was based on binding precedent and it might be time to reevaluate the legal standards regarding racial hostilities and microaggressions....

Paschall v. Tube Processing Corp., No. 1:19-cv-04488-JMS-MG, 2021 WL 1390350 (S.D. Ind. April 13, 2021)

Case Examples: *Paschall v. Tube Processing Corp. (Cont.)*

“The Court arrives at this conclusion by following, as it must, binding precedent establishing and applying the standard for what constitutes an objectively hostile work environment based on race. *In light of recent events and the continuing movement to reevaluate and redefine societal standards of acceptable behavior, recognize the harms caused by racial hostilities and microaggressions, and encourage tolerance and acceptance, it may well be time to revisit the legal requirements for what an individual must endure before his or her work environment can be deemed objectively hostile as a matter of law.*”

Paschall v. Tube Processing Corp., No. 1:19-cv-04488-JMS-MG, 2021 WL 1390350 (S.D. Ind. April 13, 2021)

Example

- A long-term employee transitioned from female to male, started using “he/him” pronouns, and has changed his name to Jacob. Jacob notified his supervisors and co-workers of his preferred name and pronouns when he transitioned 6 months ago. Jacob and his co-worker, Max, have worked together for almost 3 years and always had a good co-worker relationship. However, Max continues to call Jacob by his former name (Anita) and refers to him as “she/her.” Jacob is offended and hurt.
- Does this conduct rise to the level of hostile work environment harassment?

EEOC’s Position

- The EEOC has stated that although accidental misuse of an employee’s preferred name and pronouns does not violate Title VII, **intentionally and repeatedly using the wrong name and pronouns could contribute to an unlawful hostile work environment.**

Takeaways From Case Examples

- A microaggression will likely never be “severe”, but it can be “pervasive”
- The discussion of microaggressions in case law will continue to increase in the coming years
- It’s very possible that in the near future, the legal standard for what constitutes a hostile work environment may be reevaluated and amended to a standard in which microaggressions will be enough to support a hostile work environment claim

Takeaways From Case Examples (Cont.)

- Even though the case examples showed that currently microaggressions are typically not enough to create legal liability, it does not mean that someone cannot file a charge of discrimination or a lawsuit due to experiencing microaggressions in the workplace
 - You might ultimately prevail in the lawsuit but not without:
 - Legal fees
 - Time spent defending the lawsuit
 - Potential damage to the company’s reputation

Practical Tips & Takeaways

Consequences on the Workplace

- If microaggressions or other forms of harassment / discrimination are left unchecked, it can lead to:
 - A toxic environment that lowers employee morale
 - Lack of motivation
 - Decreased productivity
 - Increased employee turnover
 - Increased complaints & charges of harassment
 - Difficulty recruiting due to tarnished reputation
 - Union activity

Create a Respectful Workplace

- Acknowledge the unique perspective and knowledge each person brings



- Encourage open and respectful communication

Create a Respectful Workplace

- Ensure diversity and inclusion
 - Diversity is going to a party; Inclusion is being a member of the party-planning committee.



- Lead by example
 - Act with integrity and be accountable for your conduct

Educate

- Employers, human resources personnel, and leaders should be educated on how to identify comments and actions that:
 - May lead to legal liability, or
 - Are inappropriate and need to be addressed (even if they are not severe or pervasive enough to constitute a viable claim of discrimination or harassment)

Review/Update Employment Policies

- Equal Employment Opportunity
 - [Company] provides equal employment opportunities to all employees and applicants for employment and prohibits discrimination and harassment of any type without regard to race, color, religion, age, sex, national origin, disability status, genetics, protected veteran status, sexual orientation, gender identity or expression, or any other characteristic protected by federal, state or local laws. This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training.

Review Employment Policies

- Anti-Harassment and Anti-Discrimination
 - Unlawful discrimination based on any protected characteristic is prohibited.
 - Harassment, joking remarks, nicknames, or other abusive conduct based on an individual's protected characteristic is prohibited.
 - Sexual harassment is prohibited.
 - Individuals found to be in violation of the anti-harassment or anti-discrimination policy will be subject to disciplinary action, up to and including termination.

Review Employment Policies

- Complaint Process and Procedures
 - Who do employees complain to?
 - Supervisor, HR, etc.
 - How do employees submit a complaint?
 - Online form, handwritten statement, verbal, etc.
 - Reports will be investigated promptly and appropriate corrective action will be taken
 - Retaliation is prohibited

Promptly Investigate Complaints

- Each complaint should be taken seriously
- Investigator(s) should be objective with no stake in the outcome
- Confidentiality – *Remind supervisors to report!*
 - Absolute confidentiality not possible
 - Right to as much confidentiality as possible

Promptly Investigate Complaints

- Conduct Interviews:
 - The parties involved and any witnesses
 - Gather as much information as possible:
 - ✓ Who committed the alleged harassment?
 - ✓ What exactly occurred or was said?
 - ✓ When did it occur and is it still ongoing?
 - ✓ Where did it occur?
 - ✓ How often did it occur?
 - ✓ How did the harassment affect you?
 - ✓ Is there anyone who may have relevant information?
 - ✓ Was anyone present when the alleged harassment occurred?
 - ✓ Are there any notes, physical evidence, or other documentation regarding the incident(s)?
 - ✓ How would you like to see the situation resolved?
 - ✓ Do you know of any other relevant information?

Promptly Investigate Complaints

- At the conclusion of the investigation:
 - Determine appropriate remedial action
 - Verbal warning
 - Written warning
 - Suspension
 - Termination
 - Notify both parties of the results

Final Takeaways

- Treat employees respectfully and always be professional
- Encourage open communication and listen well
- Monitor the working environment (don't turn a blind eye just because no one complains)
- Tolerate no disrespect of others or harassment
 - Just because it isn't illegal, doesn't mean it should be tolerated
- Ensure your decisions are not influenced by bias
- Promote and value diversity and inclusion
- Do not retaliate

Thank You!
Any Questions?



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