



WORKPLACE HARASSMENT 2023: IT'S A WHOLE NEW BALLGAME

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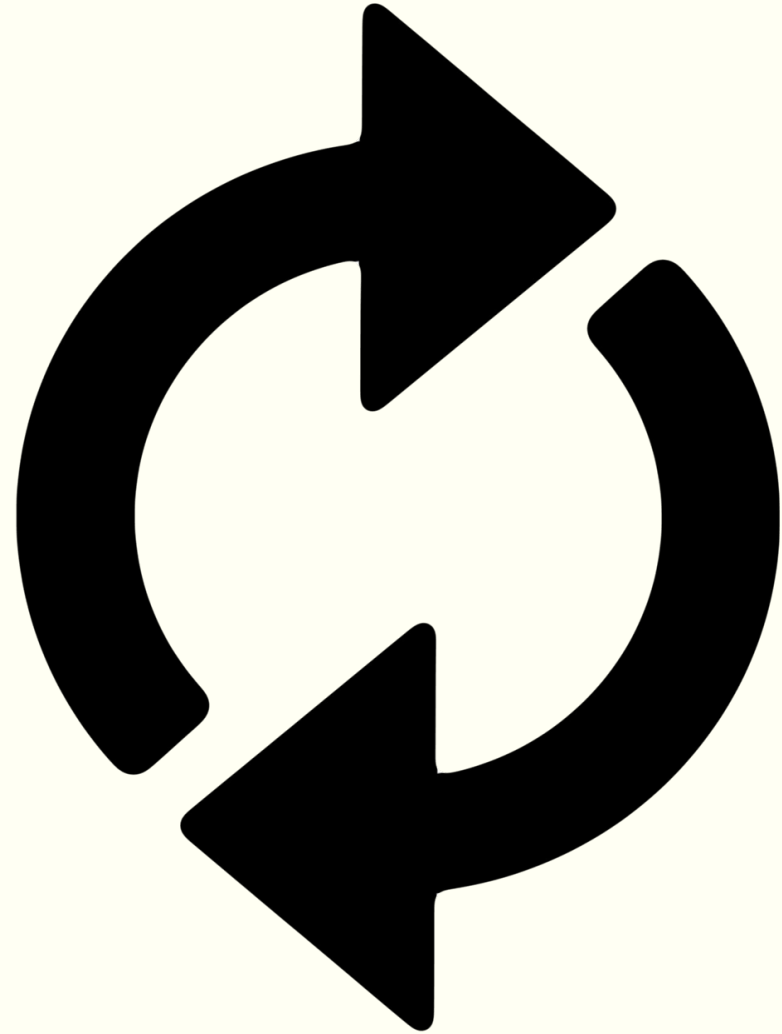




*“THE RULES ARE CHANGED, IT’S NOT THE SAME
IT’S ALL NEW PLAYERS IN A WHOLE NEW
BALLGAME”*

Lyrics from “The Goodbye Look”
Donald Fagan

Why is the
interpretation of
what is and what is
not workplace
harassment always
changing?



THE SUPREME
COURT IN *ONCALE*
V. SUNDOWNER



Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)

- Justice Scalia wrote: *"We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." Harris, supra, at 23. In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."*
- And then provided this example: *"A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."*

Justice Scalia continued . . .

- *"The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.*
- *Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."*
- **The Bottom Line:** As society changes so do the laws and the expectations for appropriate workplace behavior.

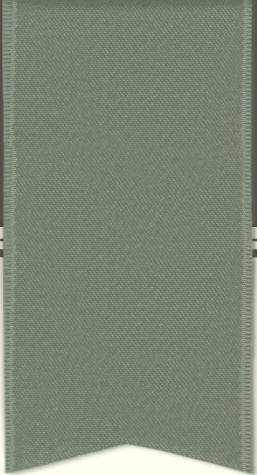
FEDERAL LAW PROHIBITS HARASSMENT ON THE BASIS OF THE PROTECTED CLASSES

- Race
- Color
- Sex
- Sexual Orientation
- Transgender
- Gender Identity/Expression
- Pregnancy
- Religion
- National Origin
- Age (40 and over)
- Disability
- Veteran Status
- Form of Citizenship
- Genetic Information

Tennessee State Law Does Not Prohibit
Discrimination/Harassment on the Basis
of Sexual Orientation, Transgender or
Gender Identity

PROTECTED CLASSES (FEDERAL LAW)

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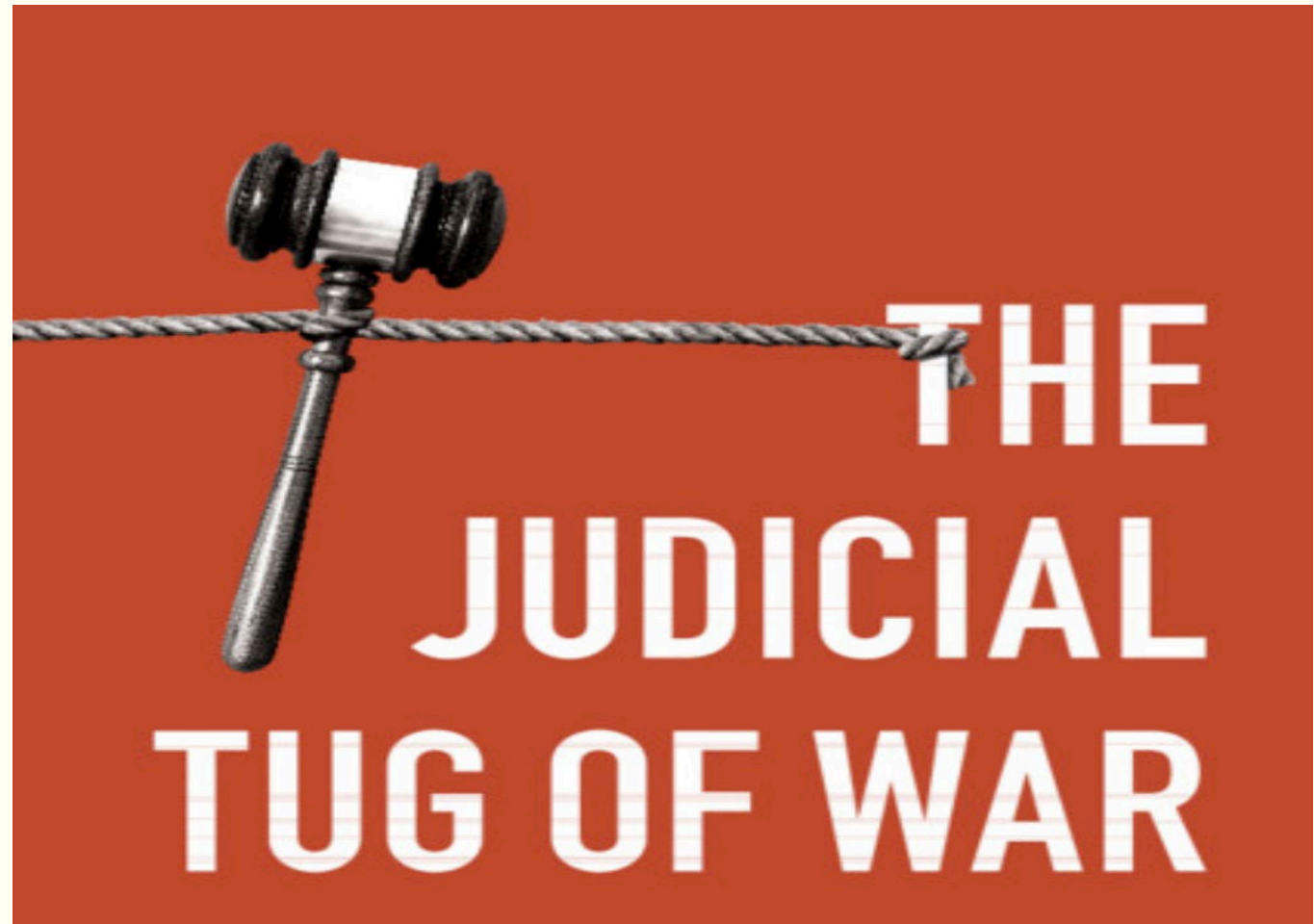
UNDERSTANDING THE SCOPE OF THE SUPREME COURT'S *BOSTOCK* DECISION

In today's workplace



The EEOC v. The Courts

The interpretation and the breadth of the ruling in *Bostock* is currently the subject of a tug of war between the Equal Employment Opportunity Commission and the Federal Courts in conservative States



A year after the Bostock decision, the EEOC issued technical guidance on LGBTQ discrimination and harassment in the workplace.

<https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>

- i In July 2022, a federal district court preliminarily enjoined the EEOC from implementing this document as to plaintiffs in [*Tennessee. et al. v. U.S. Dep't of Educ. et al.*](#), Case No. 3:21-cv-308 (E.D. Tenn.).
- i In October 2022, a federal district court vacated this document in [*Texas v. EEOC et al.*](#), 2:21-CV-194-Z (N.D. Tex.).

The Current EEOC Website for Its LGBTQ Technical Guidance

Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

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On June 15, 2020, the Supreme Court of the United States issued its landmark decision in the case *Bostock v. Clayton County*,^[1] which held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) includes employment discrimination against an individual on the basis of sexual orientation or transgender status.

This fact sheet briefly explains what the *Bostock* decision means for LGBTQ+ workers (and all covered workers) and for employers across the country. It also explains the Equal Employment Opportunity Commission's (EEOC or Commission) established legal positions on LGBTQ+-related matters, as voted by the Commission. Before *Bostock*, the Commission decided an array of matters involving employment discrimination based on sexual orientation and gender identity. For example, the EEOC has authority under Title VII to decide employment discrimination appeals by employees of the federal

This technical assistance document was issued upon approval of the Chair of the U.S. Equal Employment Opportunity Commission.

OLC Control Number: NVT-2021-1

Concise Display Name: Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity

Issue Date: 06-15-2021

General Topics: Sex Discrimination, Sexual Orientation, Gender Identity

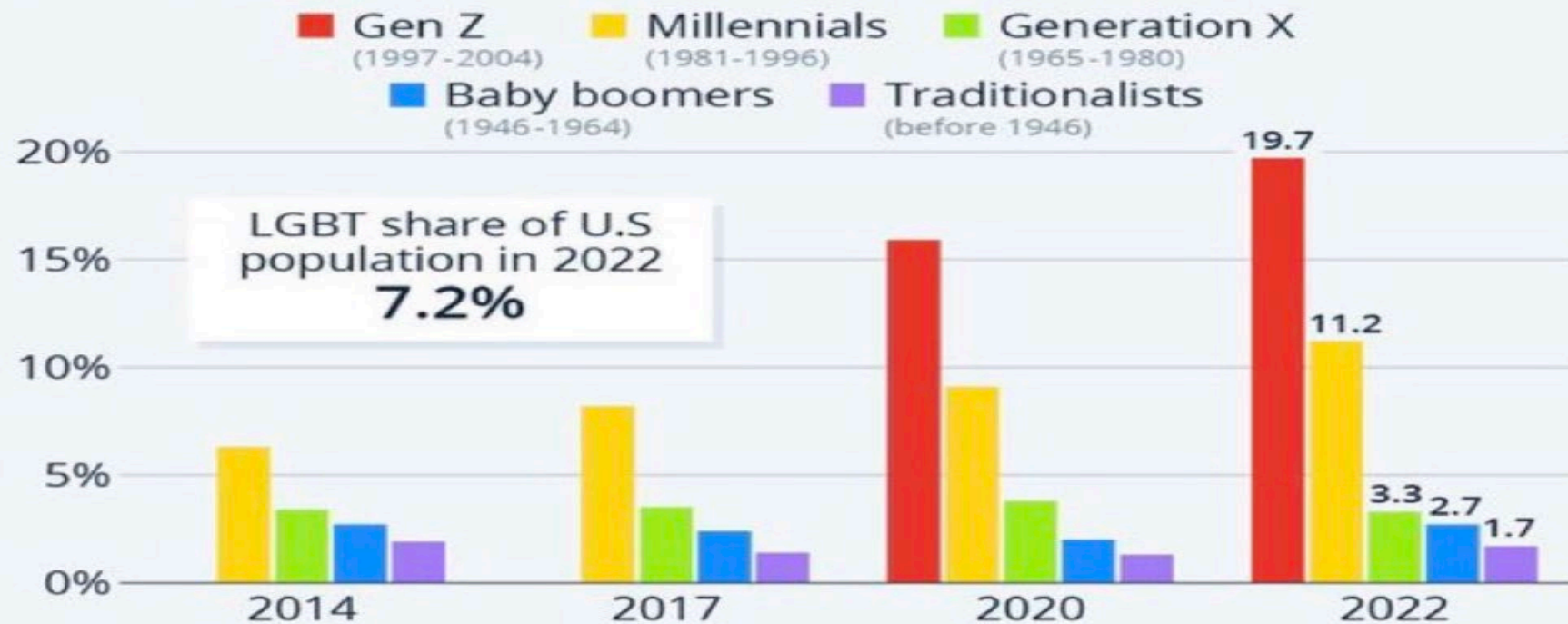
What to do?



- Make sure your own behavior is compliant.
- Be mindful it is part of your role as leadership to prevent/stop harassment between your employees on the basis of the protected classes
- If you are faced with issues related to applicants or employees based on sexual orientation, transgender or gender identity you should:
 - Not take any action or make any decisions until you seek assistance from skilled resources
 - Remember the law is in a constant state of development
 - State law in Tennessee differs from Federal law on these issues as well as from the EEOC guidance
 - Do not assume you will not have to face these types of issues in the coming years as the younger generations show increased numbers of people identifying as part of the LGBTQ community

7.2 Percent of U.S. Adults Identify as LGBT

Share of American adults who identify as LGBT, by birth year



Source: Gallup



In addition to expanded protected classes we also have expanded definitions of “harassment” in the workplace.





RAESS V. DOESCHER

883 N.E.2d 790 (Ind. 2008)

The Jury Trial

- The jury heard the story of a cardiovascular surgeon who was angry with his employee, a perfusionist,
- What is a “perfusionist?” The person who operates the heart/lung machine during open heart surgeries.
- Why was the surgeon angry? Because the employee reported the surgeon to hospital administration for how the surgeon treated other perfusionists.



So what did the surgeon do?

- Following a verbal exchange between the surgeon and the employee about the employee's report to administration, the surgeon
- “Aggressively and rapidly advanced on the employee”
- “With clenched fists, piercing eyes, beet-red face, popping veins, and screaming and swearing” at the employee.”
- The employee backed up against a wall and put his hands up believing the surgeon was going to hit him, “that [the surgeon] was going to smack the s**t out of me or do something.”
- Then the surgeon suddenly stopped, turned, and stormed past the employee and left the room, momentarily stopping to declare to the employee, “you’re finished, you’re history.”



The employee left work and did not return choosing instead to sue the surgeon.

What causes of action did the employee assert?

The fight over an expert witness

- Surgeon's counsel filed a motion *in limine* to prevent the employee's expert from testifying the surgeon was a workplace bully.
- The Judge ruled the expert could say the surgeon *"was a bully, workplace bully to [the employee], okay, he can't paint him as a workplace bully against the world, but as it relates to what he did to [the employee], I think that's permitted . . ."*
- The expert who had never spoken to the surgeon took the stand and was asked whether he was able to render an opinion as to the surgeon's behavior during the incident in question.
- Over objection, the expert was allowed to answer stating, *"In my opinion it's an episode of workplace bullying."*
- The expert was allowed over objection to testify that *"I concluded that based on what I heard and what I read that [the surgeon] is a workplace abuser, a person who subjected [the employee] to an abusive work environment. It was a horrific day, it was [a] particularly egregious, outrageous episode."*

The Jury Instruction

- Surgeon's counsel proffered the following jury instruction:
 - "Workplace bullying" is not at issue in this matter, nor is there any basis in the law for a claim of "workplace bullying." In other words you are not to determine whether or not the [surgeon] was a "workplace bully." The issues are as I have instructed you: whether the [surgeon] assaulted the [employee] and whether that assault constituted intentional infliction of emotional distress.
- Judge's Ruling: *"well, you can argue that [this case] isn't [about workplace bullying], and they're not going to get an instruction that says it is about workplace bullying, that's not in the elements of this anywhere . . ."*



\$325,000

Jury Verdict in Favor of the Employee



INDIANA COURT OF APPEALS REVERSES AND REMANDS FOR A NEW TRIAL



INDIANA SUPREME COURT SAYS NOT SO FAST

And reinstates the jury verdict of \$325,000 against the surgeon

The Indiana Supreme Court

- The trial court did not abuse its discretion in refusing the tendered workplace bullying jury instruction.
- “Workplace bullying” is an issue in the case because it is the conduct of the surgeon that is at issue.
- “The phrase ‘Workplace bullying,’ like other general terms used to characterize a person’s behavior is an entirely appropriate consideration in determining the issues before the jury.”
- The Indiana Supreme Court also found ample evidence of emotional distress in the testimony of the employee.

Emotional Distress Proof

The employee's testimony

- The assault detrimentally affected his life, his career, his ability to interact with his wife, his family, and people in general.
- After the confrontation he had a “lack of focus, lack of confidence, and inability to make split-second decisions.”
- The employee's psychiatrist testified the confrontation with the surgeon was the cause of the employee's “major depressive disorder with anxiety and panic disorder.”

The surgeon's rebuttal

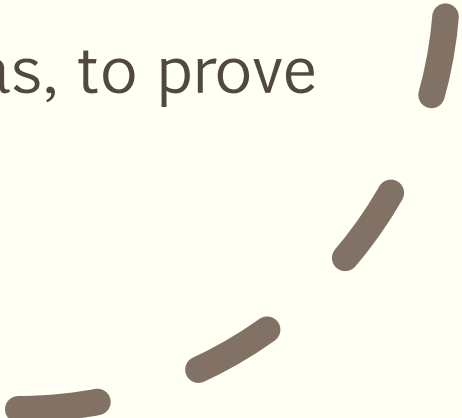
- The employee was already suffering from psychological problems at the time
- The employee could have returned to work on the following Monday.
- Failure to return was due to the employee's
 - Own stubborn pride
 - Not because he was afraid of the surgeon



THE AFTERMATH



Another Example

- A nurse alleged that on three occasions her supervisor screamed at her “Just shut up. Just shut up. I’m sick of you,” with his hands raised and his fists clenched.
 - The nurse reported the conduct to Human Resources and claimed her supervisor was “screaming at her.”
 - The supervisor then called her into an office after business hours and gave her a demonstration of what screaming was, to prove that he had not screamed.
- 

What happened?

- The nurse sued for intentional infliction of emotional distress. The case went to jury trial but settled for \$440,000 just before the verdict was announced.
- What was the actual verdict?
- \$1.08 million for the employee which included \$348,889 against the supervisor individually for bullying the nurse.



Interesting Outcome

- Supervisor asked employees overly personal questions, gave them unsolicited personal advice, and often discussed sex and sexual orientation.
- When a female employee told the supervisor she wanted to add her domestic partner as a beneficiary to her Company health insurance plan, the supervisor replied, “So you really do like boobs better?”
- The Supervisor discussed how to manage this same female employee with a nonsupervisory coworker of the employee and disclosed information from the employee’s personnel file about the employee not passing the probationary employment period in a prior job.
- *Hurley v. California Department of Parks and Recreation*, Calif. Ct. App., No. D070098 (Feb. 21, 2018).

Interesting Outcome (cont'd)

- Employee sued her employer and the supervisor, individually
- A jury found the employer was not liable for harassment, discrimination or retaliation
- The jury found, however, that the supervisor was individually liable for intentional infliction of emotional distress.
- Damages assessed against the supervisor: \$67,000

TODAY'S

GROUND RULES



Do not “Go It Alone”

- Ask for assistance
- Get an objective viewpoint from skilled resources
- Remember how society has changed its expectations about the everyday workplace
- It is not just harassment based on the protected classes that can be unlawful



Judges as Employers

- Enforce Tennessee Judiciary employment policies including those prohibiting discrimination, harassment, bullying, and retaliation
- Comply Federal and Tennessee State laws governing the workplace
- Adhere to the Judicial Code of Professional Behavior
- Remember you will be held to a higher standard for workplace behavior by the public and juries

Count to 10 . . .

- Anyone in a leadership role today must have a high degree of emotional intelligence (EQ)
- Being able to control our emotions including legitimate frustrations about poor performance or unacceptable employee behavior is critical
- **You can and should hold employees accountable**
 - Stop. Think. Act.
 - Get help from skilled resources
 - Use talking points to keep you on track/avoid letting emotions take over
 - Consider whether you should have someone join the discussion with an employee either in person, by phone, or video conference
- Holding employees accountable is not “bullying” behavior as long as all employees in the role are held to the same standard and the way you hold them accountable is not abusive or otherwise unlawful.



Question

Time

Thank You