Massachusetts Commission Against Discrimination

Guidelines on Harassment in the Workplace

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I. Introduction

Harassment is a form of employment discrimination that deprives employees of their rights and basic well-being in the workplace, and it is prohibited by Massachusetts law under M.G.L. c. 151B, §§ 4(1), 4(1B), 4(1C), 4(1D), 4(4), 4(4A), 4(5), 4(16), and 4(16A). Discriminatory harassment can take many forms, but broadly speaking it is unwelcome conduct that may be verbal, non-verbal, or physical in nature and is based on an employee's membership in, or association with a person in, a "protected class," i.e., race,[1] color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, veteran status, age (over 40), disability, or military service. Sexual harassment is a type of sex discrimination in which an employee is subject to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. The Massachusetts Commission Against Discrimination ("MCAD" or "Commission") is the state agency responsible for enforcing M.G.L. c. 151B, and it investigates, prosecutes, and adjudicates claims of unlawful employment discrimination, including harassment. These Guidelines address harassment in the workplace only.[2]

Harassment of employees is unlawful when it is based on membership in a protected class and: (1) enduring or rejecting the offensive conduct becomes a condition of continued employment or is used as a basis for employment decisions (called "quid pro quo"[3] harassment); and/or (2) the offensive conduct creates a work environment that both the employee and a reasonable person would consider to be intimidating, hostile, or abusive (called "hostile work environment" harassment).[4]

Employers must adopt and provide employees with sexual harassment policies that include the provisions set forth in M.G.L. c. 151B, § 3A(b)(1). The Commission encourages employers to take additional steps to eliminate harassment in the workplace, such as adopting policies that prohibit harassment on the basis of any protected class, establishing grievance processes, providing anti-harassment training, providing human resources training on internal investigations of harassment complaints, promptly investigating, and taking effective remedial action when necessary. Additional steps an employer should take to reduce the likelihood of harassment in the workplace include: issuing a statement in the employee manual that the employer expects all employees to treat one another with dignity and respect, prohibiting retaliation against anyone who reports unlawful harassment or participates in an investigation, and allowing anonymous reporting of harassment.

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[1] See M.G.L. c. 4, § 7 defining "race" as applied to a prohibition on discrimination based on race, shall include traits historically associated with race, including, but not limited to, hair texture, hair type, hair length and protective hairstyles, inserted by St. 2022, c. 173, §§ 1-2.

[2] Discriminatory harassment is unlawful in other areas within MCAD jurisdiction, i.e., housing, education, and public accommodations, and concepts within these Guidelines will often apply in these areas as well.

[3] "Quid pro quo" means "something given or received for something else." *Quid pro quo*, Merriam-Webster's Collegiate Dictionary (11th ed. 2019).

[4] Workplace bullying that is not related to a person's membership in a protected class is not covered under M.G.L. c. 151B and therefore not addressed in these Guidelines.

These Guidelines are intended to provide guidance to Massachusetts employees, employers, attorneys, and the public in understanding what constitutes harassment in the workplace under M.G.L. c. 151B. The MCAD issues these Guidelines pursuant to M.G.L. c. 151B, § 2 and § 3(5) to interpret, apply, and enforce M.G.L. c. 151B, to carry out its provisions, and explain the policies of the Commission. For more information on the MCAD go to: Massachusetts Commission Against Discrimination | Mass.gov.

II. Sexual Harassment in the Workplace

Chapter 151B explicitly prohibits sexual harassment in the workplace by making it unlawful "for an employer, personally or through its agents, to sexually harass any employee." M.G.L. c. 151B, § 4(16A). Similarly, the MCAD enforces M.G.L. c. 149, § 191, which expressly prohibits sexual harassment in the workplace specifically with regard to domestic workers and personal care attendants.

Sexual harassment is defined under M.G.L. c. 151B as:

Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or
(b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment. Discrimination on the basis of sex shall include, but not be limited to, sexual harassment.

M.G.L. c. 151B, § 1(18).

The above definition identifies two forms of sexual harassment, i.e., "quid pro quo" harassment under subsection (a), and "hostile work environment" harassment under subsection (b).

Quid pro quo harassment occurs when an employee is asked to tolerate sexual conduct, up to and including engaging in sex acts, as a condition of employment, to avoid adverse employment actions, or to enjoy workplace benefits or opportunities.

Hostile work environment harassment occurs when sexual conduct is objectively and subjectively offensive and interferes with an employee's work performance by creating a workplace that is intimidating, hostile, humiliating, or sexually offensive.

An employee can suffer one type of harassment or both types of harassment simultaneously, depending on the circumstances. For example, an employee might understand that tolerating or acquiescing to a supervisor's unwanted sexual advances is required to get a promotion, and that conduct might also create a hostile working environment for the employee. Conversely, an

employee might have job security, get promotions, and otherwise enjoy benefits and opportunities in the workplace but nevertheless suffer from an intimidating, humiliating, and sexually offensive work environment created by supervisors, coworkers, or others in the workplace over whom the employer exercises some control.

A. Conduct Must be Sexual in Nature

Both types of sexual harassment require conduct of a sexual nature. Conduct of a sexual nature can encompass a broad range of behaviors including: inappropriate touching; sexual jokes; gossip; epithets or comments; requests for sex; displaying sexually suggestive pictures and objects; leering; whistling; sexual gestures; or sexually explicit text messages ("sexting"), online stalking ("cyberstalking"), or publishing private personal information ("doxing"). An employee can be a victim of sexual harassment regardless of their sex, gender identity, or sexual orientation, or a harasser's sex, gender identity, or sexual orientation, and harassing conduct need not be motivated by sexual desire to constitute sexual harassment.[5] Accordingly, in a claim for sexual harassment, the relevant consideration is whether the conduct at issue is sexual in nature, without consideration of the victim or harasser's sex, gender identity, or sexual orientation or the motivation of sexual desire. Sexual harassment includes much more than the stereotypical scenario where a heterosexual male employee motivated by sexual desire harasses a female employee.

B. Conduct Must be Unwelcome

Chapter 151B does not prohibit all conduct of a sexual nature or most consensual workplace relationships.[6] For this reason, if an employee initiates conduct of a sexual nature, including the initiation of sexual relationships, or is a willing participant in a sexually charged environment, they might not be a victim of sexual harassment. However, an employee's participation in or acquiescence to workplace conduct of a sexual nature does not determine whether the conduct was unwelcome. In other words, whether the conduct was "welcome" does not turn on whether the employee's behavior was "voluntary." When an employee submits to harassing behavior to avoid being targeted further, to cope in a hostile environment, or because participation is made an implicit or explicit condition of employment,[7] they have not welcomed the conduct.

An employee's rejection of, or failure to respond positively to, suggestive comments demonstrates unwelcomeness. An employee can show conduct was unwelcome through their testimony alone,

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[5] See Melnychenko v. 84 Lumber Co., 424 Mass. 285, 288–90 (1997) (sexual harassment prohibited by M.G.L. c. 151B, § 4(16A) is not limited to conduct aimed at the opposite sex nor limited to same-sex conduct only when the harasser's sexual orientation is to the same sex); Picco v. Town of Reading, 38 MDLR 42, 45 (2016) (actual and perceived sexual orientation of employee irrelevant as harassing conduct need not be motivated by sexual desire; lack of sexual desire does not negate the sexual nature of the conduct).

[6] However, a consensual workplace relationship could result in unlawful harassment of employees outside of the relationship if it creates a hostile work environment due to widespread "sexual favoritism." See, e.g., Ritchie v. Dep't of State Police, 60 Mass. App. Ct. 655, 662 (2004). Furthermore, an illegal quid pro quo can occur in the context of a consensual relationship.

[7] For further explanation on the latter point relating to quid pro quo harassment, see Section II.C.

or through other means, such as communications to others about the conduct, avoidance of the harasser, or other measures to avoid the conduct such as searching for another job, private writings such as journal entries, and counseling, among other actions. Furthermore, the fact that an employee may have sometimes voluntarily joked with a harasser, for example, does not mean that the harasser's entire course of conduct was welcome.[8] An employee does not have to communicate an objection to harassing conduct to demonstrate its unwelcomeness, or communicate objections every time a harassing incident occurs.

C. Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment occurs when an employer conditions an employee's continued employment, avoidance of adverse employment actions, or receipt of workplace benefits, promotions, assignments, or opportunities, etc. on the employee's willingness to tolerate conduct of a sexual nature.

Quid pro quo harassment is defined in M.G.L. c. 151B, § 1(18)(a) as:

> Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions.

Based on this statutory language, in a quid pro quo sexual harassment case, an employee must prove two elements:

- Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature were made; and
- Submission to or rejection of such advances, requests or conduct was either explicitly or implicitly made to be a term or condition of employment or as a basis for employment decisions.

An employee may have a claim of quid pro quo harassment when they either reject or submit to sexual conduct, or a mix of both. Unwelcomeness has historically been included as a stand-alone element in either type of quid pro quo sexual harassment case,[9] but logically, unwelcomeness is proven when an employee rejects sexual advances or other sexual conduct. Furthermore, it is the policy of the Commission that an offer of a workplace benefit or threat of workplace detriment conditioned on tolerating or engaging in sexual conduct is coercive per se, and an employee cannot 'welcome' an illegal quid pro quo. In other words, any illegal quid pro quo is per se unwelcome. It is fundamentally coercive when an employer or their agent offers workplace benefits as a condition of engaging in a sexual relationship or otherwise tolerating conduct of a sexual nature.

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[8] See, e.g., Mills v. A.E. Sales, Inc., 38 MDLR 87, 89 (2016) (employee did not welcome hostile work environment created by owner's unwanted touching, leering, and sexual comments despite routinely forwarding emails of a sexual nature to owner and others).

[9] See, e.g., Kirsten Pavoni v. Wheely Funn, Inc. and Kevin W. Baker, 38 MDLR 199 (2016) (proof of unwelcomeness required where employee alleged she rejected sexual conduct).

For these reasons, an employee who proves the two elements above, regardless of whether they rejected or submitted to sexual conduct, proves that the conduct in question was unwelcome.

Relatedly, unlawful quid pro quo sexual harassment occurs any time submission to or rejection of a sexual advance, requests for sexual favors, or other verbal or physical conduct of a sexual nature is made explicitly or implicitly a term or condition of employment or is used as a basis for employment decisions, irrespective of the level of harm incurred by an employee. Even where an employee voluntarily agrees to an illegal quid pro quo and might be shown to have enjoyed sought-after benefits as a result, with little evidence of emotional or other harm, there may be a violation of M.G.L. c. 151B. Because the Commission vindicates the public interest in enforcing the anti-discrimination laws under its jurisdiction and the conduct harms the public interest, such cases may be suitable for the imposition of affirmative relief or civil penalties by the Commission.[10]

Submission to or rejection of sexual conduct may be implicitly or explicitly a term or condition of employment or a basis for employment decisions when there is the threat or execution of an adverse employment action. If adverse action is threatened but not carried out after an employee rejects sexual advances or conduct, an employee may still have a claim of quid pro quo sexual harassment. Adverse employment actions include, but are not limited to: termination, demotion, denial of promotion, transfer, alteration of duties or assignments, change of hours or compensation, denial of overtime or benefits, or unjustified performance reviews. Submission to or rejection of sexual conduct may be implicitly or explicitly a term or condition of employment or a basis for employment decisions when there is a promise of workplace benefits or opportunities, such as promotions, salary increases, favorable assignments, etc. If promises of workplace benefits or opportunities are not fulfilled after an employee rejects sexual advances or conduct, an employee may have a claim of quid pro quo sexual harassment. By statutory definition, a quid pro quo described in M.G.L. c. 151B, § 1(18)(a) creates or alters a term or condition of employment upon its making.

Quid pro quo harassment occurs when an employee with authority or control over the terms and conditions of another employee's job abuses that authority. Abuses of such authority can take many forms, including offering or withholding workplace benefits depending on whether an employee will tolerate or engage in unwelcome conduct of a sexual nature. Typically, designated supervisors will have that level of control, but it is possible for a co-worker to have control over certain terms or conditions of another's employment such that they are able to issue an unlawful quid pro quo. A person with authority need not be a direct supervisor or an official supervisor. It could be anyone who acts as a supervisor by doing any of the following, including but not limited to: assigning tasks or shifts to an employee; overseeing or evaluating their work, managing their conduct and actions; directing an intermediate supervisor's management of the employee; overseeing or directing human resource decision with respect to the employee; or engaging in other similar conduct.

[10] See, e.g., 804 CMR 1.09 (5) (2020) (affirmative relief in the public interest available at conciliation).

Some examples of quid pro quo sexual harassment include:

- A restaurant manager tells a server that they will no longer be assigned to the Friday night lucrative dinner shift if they do not have sex with him. The server has sex with the manager and is assigned the shift;
- A restaurant manager tells a server that they will no longer be assigned to the Friday night lucrative dinner shift if they do not have sex with him. The server has sex with the manager and is not assigned the shift;
- A restaurant manager tells a server that they will no longer be assigned to the Friday night lucrative dinner shift if they do not have sex with him. The server does not have sex with the manager and is still assigned the shift;
- A restaurant manager tells a server that they will no longer be assigned to the Friday lucrative dinner shift if they do not have sex with him. The server does not have sex with the manager and is not assigned to the lucrative shift;
- A car dealership manager promises a car salesman that he will get a higher commission rate if he agrees to go out on a date with him. The car salesman goes on the date and is given the higher commission rate;
- A car dealership manager promises a car salesman that he will get a higher commission rate if he agrees to go out on a date with him. The car salesman goes on the date and is not given the higher commission rate;
- A car dealership manager promises a car salesman that he will get a higher commission rate if he agrees to go out on a date with him. The car salesman refuses to go on the date and is not given the higher commission rate; or
- A car dealership manager promises a car salesman that he will get a higher commission rate if he agrees to go out on a date with him. The car salesman refuses to go on the date and is still given the higher commission rate.

An employee who files a claim of quid pro quo harassment has the burden of proving harassment occurred, and the proof can be direct or circumstantial. For example, in each of the above scenarios, an employee might be able to produce direct evidence in the form of an email or other communication detailing that an assignment, job, or schedule was conditioned on the employee's willingness to submit to sexual conduct. More commonly, however, proof is circumstantial, and an unlawful quid pro quo is proved in part by the timing of an adverse action in relation to the rejection of sexual conduct, or, in the case of an employee who submits to conduct, circumstances showing the expectation that submission was required to maintain employment, avoid adverse action, or receive workplace benefits.

D. Hostile Work Environment Sexual Harassment

Hostile work environment harassment is defined in M.G.L. c. 151B, § 1(18)(b) as:

sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when… such advances, requests or conduct have the purpose or effect[11] of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment.

In a hostile work environment sexual harassment case, an employee must prove:

- They were subjected to conduct of a sexual nature;
- The conduct was subjectively offensive (i.e., unwelcome) and objectively offensive;
- Considering the totality of the circumstances, the conduct altered conditions of employment by creating an intimidating, hostile, humiliating, or sexually offensive work environment; and
- The conduct was carried out by a supervisor or the employee's employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

1. Subjectively Offensive Conduct (Unwelcome)

The statutory language—unreasonably interfering with an individual's work performance—requires that sexual conduct[12] must be unwelcome to an employee for them to experience a hostile work environment. When an employee subjectively experiences conduct to be offensive, as a practical matter, that also demonstrates that conduct is unwelcome. Conduct can be subjectively offensive (unwelcome) even if an employee voluntarily participates.[13] In evaluating whether an employee views conduct as unwelcome, the Commission will consider, among other things, the imbalance in power between the alleged harasser and the alleged victim. The more unbalanced the power is between the harasser and employee, the more unlikely it is that conduct was welcome. Power imbalances also may make employees less likely to communicate unwelcomeness. For example, an administrative assistant might be less likely to verbally complain about offensive conduct from a higher-level employee, such as an owner, than a co-owner.

The subjective standard is a personal one. Thus, what an employee views as unwelcome can change over time. The employee could find the same conduct offensive when it comes from one

[11] Generally, cases addressing sexual harassment hostile work environment claims examine whether the sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature had the *effect* of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating, or sexually offensive work environment. However, the Legislature has also made actionable sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when such advances, requests or conduct have such a *purpose* regardless of their effect. M.G.L. c. 151B, § 1(18)(b). As discussed in Section II.C, the Commission serves the public interest in the enforcement of the anti-discrimination laws under its jurisdiction, and it may do so without regard to the extent of harm incurred by an individual employee. Employers and individuals who engage in objectively offensive sexual conduct for the purpose of creating a hostile work environment may be liable for harm to the public interest and subject to orders for affirmative relief or a civil penalty.

[12] See Section II.A above.

[13] See Section II.A above.

person (a lewd joke from a supervisor) but not from another person (the same joke from a close friend and coworker). The employee could also subjectively find one form of sexual conduct offensive (touch of an intimate body part) but not another (a crass joke). Conduct might be subjectively offensive to one employee but not to another. Therefore, an employee who does not subjectively perceive the conduct at issue as intimidating, hostile, or offensive is not a victim of sexual harassment within the meaning of the law, even if other individuals would consider such conduct to be so. Denial of sexual advances, requests to stop sexual behavior, remarks, or epithets, or complaints to other individuals about conduct are some ways of demonstrating that conduct was subjectively offensive and unwelcome.[14] However, an employee is not required to complain to the employer about the harassment or quit their job to prove that they found it subjectively offensive.[15]

2. Objectively Offensive Conduct

Unwelcome sexual conduct is objectively offensive when a reasonable person in the employee's position would consider the conduct to be offensive.[16] Therefore, an employee who subjectively finds behavior to be hostile, intimidating, humiliating or offensive when it is not objectively so, is not a victim of a hostile work environment harassment. This standard examines the totality of circumstances through the lens of a reasonable person. Circumstances might include, but are not limited to, the nature and type of an employee's work, the frequency of the conduct, the public nature of the conduct, how other employees, customers, or members of the public responded to the conduct, whether the conduct was previously objectionable to the employee, and whether it was physically threatening or humiliating, or whether any physical harm resulted. For example, in terms of the nature of the employee's work, comments about bodies or physical appearance may often be inappropriate in many workplaces, but not necessarily in medical or fitness fields.[17]

3. Conduct that Has the Purpose or Effect of Unreasonably Interfering with an Individual's Work Performance

Subjectively and objectively offensive conduct unreasonably interferes with an individual's work performance and creates a hostile work environment when it impedes an employee's full participation in the workplace.[18] Whether conduct impedes an employee's full participation in the

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[14] For other evidence of unwelcomeness see Section II.B.

[15] See, e.g., Hernandez v. Beautiful Rose Corp., 42 MDLR 139, 140 (2020).

[16] That which is objectively offensive is affected by changing attitudes, mores, and perspectives on sexual harassment that evolve throughout time. What may constitute objectively offensive sexual conduct at one point in time may not be the case at a different point in time.

[17] But see Barnes v. Sleek, Inc., et. al, 33 MDLR 30 (2011) (grossly inappropriate comments about clients' private parts made by aestheticians at a medical spa which provided services including laser hair removal were objectively offensive to a male manager).

[18] See Cuddyer v. Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001), quoting College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) ("[a] hostile work environment is one that… 'poses a formidable barrier to the full participation of an individual in the workplace'").

workplace is a question of fact based on the totality of the circumstances.[19] In evaluating whether conduct unreasonably interferes with an employee's work performance, the Commission will consider the totality of the circumstances, including but not limited to: the nature of the conduct; whether the conduct makes it more difficult for a reasonable person to perform their work; whether the conduct would undermine a reasonable employee's sense of well-being in the workplace. It is important to note that an employee's working conditions may be altered without a showing of a tangible job detriment, a tangible decline in productivity, or an inability to perform work. There are many scenarios in which an employee is unable to fully participate in the workplace without experiencing an adverse action such as a termination, suspension, or demotion. Thus, an employee may seek recovery for hostile work environment sexual harassment even if they have not suffered an adverse employment action.

Not all unwelcome, offensive conduct alters an employee's conditions of employment by creating a hostile work environment. The MCAD and the courts look at whether conduct was "severe or pervasive" as a measure of whether it created an intimidating, hostile, humiliating, or sexually offensive work environment,[20] but the ultimate focus is on whether, given the totality of all relevant circumstances, the conduct meets the definition of sexual harassment under the law.

Take, for example, an employee who is subjected to joking of a sexual nature on two occasions. Multiple circumstances might combine to show that the joking created a humiliating, hostile, or sexually offensive environment, such as:

- The identity of the harasser and relationship to the employee;
- The harasser's tone, volume, and demeanor during the joking incidents;
- The harasser's nonverbal conduct towards the employee before, during or after the incidents, including any touching;
- Whether the joking was personal to the employee;[21]
- Coworkers' treatment of the employee related to the incidents;
- The time and place where the incidents occurred;
- The amount of time between the incidents;
- The people present during the incidents and their relationship to the employee;
- The employee's behavior in response to the incidents; or
- Any diminished opportunities or exclusion of the employee related to the incidents, among other circumstances.

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[19] LaGrange St. Corp. v. Massachusetts Comm'n Against Discrimination, 99 Mass. App. Ct. 563, 572, review denied, 488 Mass. 1106 (2021), quoting Billings v. Grafton, 515 F.3d 39, 48 (1st Cir. 2008), quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (determining whether a hostile work environment is hostile or abusive "does not depend on any 'mathematically precise test'").

[20] See, e.g., Osorio v. Standhard Physical Therapy, 45 MDLR 1 (2023), citing Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016).

[21] However, joking, and other commentary need not be personal to the employee to constitute harassment. See Barnes v. Sleek, Inc., 37 MDLR 161, 162 (2015) (offensive comments not directed at employee adversely impacted his work environment and created hostile work environment).

When properly viewed in context, the joking incidents may create a hostile work environment even if, when viewed without context and in isolation, each incident may not appear severe, and the incidents alone are not pervasive.[22] The focus is ultimately on what the law prohibits, which is conduct that unreasonably interferes with an employee's work performance by creating a hostile work environment. While it is often true that a few isolated remarks over a period of time are generally insufficient to show an abusive or offensive work environment,[23] hostile work environments are determined exclusively on a case-by-case basis and uniform descriptions of what constitutes abuse risk overstatement.[24]

Abusive treatment can manifest through physical conduct, verbal conduct, nonverbal conduct, written communication, electronic communications, pictures, or any combination of conduct or speech. There is no requirement that conduct must be both severe and pervasive to create a hostile work environment, and, in certain circumstances, a single incident can be serious enough to create a hostile work environment, such as an incident of unwelcome touching on intimate areas of an employee's body.[25] Abusive treatment can be anonymous, such as anonymous hostile messages, graffiti or pictorial displays. Conduct experienced by others in the workplace may also be relevant in assessing whether conduct created a hostile work environment, but an employee may experience a hostile work environment regardless of whether their coworkers find the work environment to be hostile.

Even if the identity of the harasser is unknown and the harassment was anonymous, the conduct may be relevant to evaluating whether there is a hostile work environment—for example, where an employee is exposed to involving harassing graffiti or anonymous comments on a company database. The conduct may also be relevant where the harassing conduct occurs outside of the presence of the employee, provided the employee is aware of the conduct.

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[22] See, e.g., Gorski v. New Hampshire Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) (all of the circumstances surrounding a string of comments alleged to create a hostile work environment needed to be assessed by the factfinder to determine the severity of the comments themselves and the creation of a hostile work environment).

[23] See, e.g., Swenson v. Moini, 40 MDLR 27, 32 (2018) (a few isolated instances of inappropriate conduct over six years were insufficient to support a sexual harassment claim).

[24] See Billings v. Town of Grafton, 515 F.3d 39, 49 (1st Cir. 2008) ("[t]he highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior") and contrast Kelley v. Plymouth County Sheriff's Dep't, 22 MDLR 208, 214 (2000), quoting Carlton v. Worcester School Dep't, 14 MDLR 1143, 1147 (1992), aff'd by Full Commission, 24 MDLR 342 (2002) (employee must establish "a steady barrage of opprobrious [sexual] comment or abusive treatment" in order to prove that conduct was pervasive). While a "steady barrage" of offensive conduct would establish a hostile work environment, something less than a "steady barrage" of comments may create a hostile work environment given the severity of any one comment, and the totality of circumstances in any given case.

[25] See, e.g., Picco v. Town of Reading, 38 MDLR 42, 46 (2016) (single instance of physical touch was sufficient to support a sexual harassment claim).

E. Sexual Harassment Policy Mandated by Law

Chapter 151B, § 3A(b) mandates that employers adopt a workplace policy against sexual harassment and provides minimum requirements of what the policy must include. To that end, the Commission has a model sexual harassment policy available for employers to adopt. Notwithstanding, the Commission recommends employers go beyond what is mandated by law and implement a broader anti-harassment policy which includes a sexual harassment policy. See Section XIII below.

III. Protected Class Harassment in the Workplace

Sexual harassment is only one kind of unlawful harassment. Chapter 151B also protects employees against harassment based on their protected class,[26] their perceived membership in a protected class, or their association[27] with an individual in a protected class ("protected class harassment"). Chapter 151B antidiscrimination provisions protect the fundamental right to work in an atmosphere free from conduct that is demeaning and hostile to an employee because of protected class. Unlawful harassment actively impedes and substantially diminishes the ability to participate equally in the terms, conditions, and privileges of employment. By its nature, protected class harassment results in the unequal and inferior treatment of employees because of their protected class. Moreover, a workplace environment that is hostile toward an individual or group of people because of their membership in a protected class has an additional, deleterious effect on all employees in the workplace.

Protected classes in the workplace are: race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, veteran status, age (over 40), disability, and military service. Chapter 151B, § 4 prohibits discrimination against each of these protected classes across several provisions with differing language, all of which equally protect employees from workplace harassment. Harassment of employees is discrimination in the "terms, conditions or privileges of employment" when it is based on race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, or veteran status (all under M.G.L. c. 151B, § 4(1)), and age (under M.G.L. c. 151B, §§ 4(1B) and 4(1C)). Harassment of an employee because of handicap (i.e., disability) violates the prohibition in M.G.L. c. 151B, § 4(16) to "otherwise discriminate" because of handicap,[28] and harassment of employees on the basis of

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[26] See, Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996); see also Clifton v. MBTA, 445 Mass. 611, 616 n.5 (2005) ("There is no basis to review hostile work environment claims based on sexual harassment under a different standard from hostile work environment claims based on racial harassment").

[27] Grzych v. American Reclamation Corp. & Iuliano, 37 MDLR 19, 20 (2015) (Full Commission confirming protections of M.G.L. c. 151B § 4(1) prohibits associational race discrimination).

[28] The Commission has consistently held that harassing an employee based on their disability is a form of handicap discrimination in violation of M.G.L. c.151B, § 4(16). See Abrams v. Paddington's Place et. al, 27 MDLR 28 (2005), citing Sleeper v. New England Mutual Life

military service is an unlawful denial of "any benefit of employment" under M.G.L. c. 151B, § 4(1D).[29] Additionally, the MCAD enforces M.G.L. c. 149, § 191, which expressly prohibits protected class harassment in the workplace specifically with regard to domestic workers.

In addition to sexual harassment, the law prohibits non-sexual harassment which is based on sex. Sexual harassment, as defined by M.G.L. c. 151B, § 1(18), is a form of sex discrimination that stems from conduct of a sexual nature, and it can occur regardless of the sex, gender identity or sexual orientation of the victim or the harasser.[30] By contrast, harassment based on sex is a form of sex discrimination because the employee would not have been treated the same had they been a different sex. Sex and gender identity discrimination are broad categories that do not require conduct of a sexual nature, and harassment based on sex or gender identity includes non-sexual conduct that can include sexist comments and bullying based on sex or gender.[31] Sex

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Insurance Co., 24 MDLR 55 (2002); Joseph v. Massachusetts Department of Children and Families, 45 MDLR 5 (2023). Compare Chadwick v. Duxbury Pub. Sch., 97 Mass. App. Ct. 1106, n. 13 (2020) (summary decision and order issued pursuant to Rule 1:28) (assuming, without deciding, that employees with disabilities are protected from unlawful harassment under M.G.L. c. 151B, § 4(16)). Additionally, where an employer harasses a disabled employee because of the employee's receipt of accommodations, such harassment is actionable. See also Sleeper, 24 MDLR 55 (2002) (disability harassment where disabled employee sought accommodations, was subsequently hounded by her supervisor about the time spent away from her desk due to her accommodations, persistently monitored and repeatedly issued documentation of performance expectations).

[29] The Commission interprets the language in M.G.L. c. 151B, § 4(1D) prohibiting the denial of "any benefit of employment" to an employee because of membership, application, or obligation with respect to military service as prohibiting harassment based on military service, where "benefit" is defined as "something that produces good or helpful results or effects or that promotes well-being." Merriam-Webster's Collegiate Dictionary (11th ed. 2019). Unlawful harassment in the workplace actively impedes, diminishes, or even destroys the most basic well-being an employee protected by M.G.L. c. 151B has in the workplace. Moreover, exclusion of harassment as a form of discrimination under M.G.L. c. 151B, § 4(1D) would be inconsistent with the protection from harassment afforded veterans under M.G.L. c. 151B, § 4(1), and, as a matter of public policy, employees who are currently joining or serving in the military should be no less protected from harassment in the workplace than those who have already served.

[30] See Section II.A.

[31] See Nassab v. MGH, 25 MDLR 429, 441 (2003) (harassment based on sex where supervisor subjected employee to litany of abusive comments including telling her she should be home getting pregnant rather than working); Magill v. Massachusetts State Police, 24 MDLR 355, 363(2002) (harassment based on sex where supervisor subjected employee to profane and demeaning language in reference to women, refused to use her professional title, raised his voice to intimidate her, and singled her out for harsh treatment); Brown v. Phoenix and Foxwood, 22 MDLR 160 (2000) (repeated derogatory comments regarding employee's gender constituted actionable conduct).

discrimination and sexual harassment can occur simultaneously where conduct is variously sexual in nature or else targeting the employee because of their sex or gender.[32]

Most protected class harassment cases are based on a hostile work environment, but in some situations, protected class harassment might take the form of an illegal quid pro quo. The Commission analyzes protected class harassment claims, including concepts of continuing violation discussed herein at Section IX, in a manner similar to sexual harassment claims.[33]

Hostile work environment protected class harassment occurs when the harassing conduct is subjectively offensive and unreasonably interferes with a reasonable person's work performance. In evaluating whether conduct unreasonably interferes with an employee's work performance, the commission will consider the totality of the circumstances, including but not limited to, the nature of the conduct; whether the conduct makes it more difficult for a reasonable person to perform their work; and whether the conduct would undermine a reasonable employee's sense of well-being in the workplace. Quid pro quo protected class harassment occurs when an employee is asked to tolerate discriminatory conduct as a condition of employment, to avoid adverse employment actions, or to enjoy workplace benefits or opportunities.

An employee can suffer one type of protected class harassment or both types of protected class harassment simultaneously, depending on the circumstances. For example, an employee might understand that tolerating or acquiescing to a supervisor's unwanted conduct is required to get a promotion, and that conduct might also create a hostile working environment for the employee. Conversely, an employee might have job security, get promotions, and otherwise enjoy benefits and opportunities in the workplace but nevertheless suffer from an intimidating, humiliating, and offensive work environment created by coworkers or supervisors, and others in the workplace over whom the employer exercises some control.

A. Conduct Must be Related to Protected Class

Harassing conduct related to a person's protected class can encompass a broad range of behaviors including: inappropriate touching,[34] jokes, gossip, epithets, knowingly misgendering, offensive comments, displaying offensive pictures or objects, leering, or stereotyping. Harassing conduct might target an employee because they are a member of a protected class, perceived to be a member

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[32] See, e.g., Amanda Harper v. Z2a Enterprises, Inc. d/b/a Half Time Sports Bar & Grill and Adham Al Abdullah, 38 MDLR 164, 166-167 (2016) (employee proved harassment based on sex and sexual harassment where supervisor's abusive conduct was variously sexual in nature and gender based).

[33] See, e.g., Augis Corp. v. Massachusetts Commission Against Discrimination, 75 Mass. App. Ct. 398, 408 n. 11 (2009); Beldo v. Univ. of Mass. Boston, 20 MDLR 105 (1998); Richards v. Bull H.N. Information Systems, Inc. 16 MDLR 1639 (1994). As a technical matter, such claims arise under sections 4(1) (multiple protected classes), 4(16) (disability), and 4(1D) (military). See *supra* notes 27–28 and accompanying text.

[34] Examples include touching without invitation a Black employee's hair, a pregnant employee's stomach, a Muslim employee's hijab, or an employee's service animal, etc.

of a protected class, or are associated with a member of a protected class.[35] Harassing conduct can be specifically directed at an employee, or it can be directed at members of an employee's protected class as a whole.

Harassing conduct related to an employee's protected class can also manifest in hostility towards the employee without a direct reference to the employee's protected class. Take for example, a supervisor who harasses an employee by abusively yelling at them for simple work mistakes but does not yell at any other employees outside of the employee's protected class. While the content of the supervisor's abuse may be neutral, the employee could show that the supervisor's harassing conduct is related to their protected class in a number of ways, including by showing that the supervisor's yelling only started after the employee disclosed their disability.[36] An employee might also understand that their working conditions are less desirable because of their protected class when, for example, they learn about or overhear race-based comments directed at others.[37]

B. Conduct Must be Unwelcome

Chapter 151B does not proscribe all conduct of an offensive nature. For this reason, if an employee initiates conduct of an offensive nature or is a willing participant in an offensive environment, they might not be a victim of unlawful protected class harassment. However, an employee's participation in or acquiescence to workplace conduct of a harassing nature does not determine whether the conduct was unwelcome. In other words, whether the conduct was "welcome" does not turn on whether the employee's behavior was "voluntary." When an employee submits to protected class harassing behavior to avoid being targeted further, to cope in a hostile environment, or because participation is made an implicit or explicit condition of employment,[38] they are not considered to have welcomed the conduct.

An employee's rejection of, or failure to respond positively to, offensive comments or gestures demonstrates unwelcomeness. An employee can show conduct was unwelcome through their testimony alone, or through other means, such as communications to others about the conduct, avoidance of the harasser or other measures to avoid the conduct, searching for another job, private writings such as journal entries, and counseling, among other actions. Furthermore, the fact that

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[35] Romano & Hussey v. Lowell Paper Box Co., 4 MDLR 1087 (1982) (complainant had standing where her complaint alleged discrimination on the basis of her husband's religion); Papa v. Pelosi and Paulo, 18 MDLR 174 (1996) (Full Comm'n upheld hearing officer's finding of liability for racial discrimination where Respondent landlords denied housing to Complainant who was white, because of her son's race (Black)); Flagg v. Alimed, Inc., 466 Mass. 23 (2013) (SJC recognizing associational discrimination).

[36] See, e.g., O'Leary v. Brockton Fire Dep't, 43 MDLR 15, 17 (2021) (inferring disability harassment based on the temporal proximity between harassment and employee's disability disclosure).

[37] See, e.g., Sims v. 15 Lagrange Street Corp., 44 MDLR 1, 5 (2022) (finding employee was racially harassed when assigned to less advantageous working conditions based on employer's racially hostile statements directed at other employees), rev'd on other grounds, 99 Mass. App. Ct. 563 (2021).

[38] For further explanation on the latter point relating to quid pro quo harassment, see Section III.C.

an employee may have sometimes joked with a harasser, for example, does not mean that the harasser's entire course of conduct was welcome. An employee does not have to communicate an objection to harassing conduct to demonstrate its unwelcomeness or communicate objections every time a harassing incident occurs.

C. Quid Pro Quo Protected Class Harassment

Quid pro quo protected class harassment is less common than quid pro quo sexual harassment, but can occur, particularly where an employee is required as a term or condition of employment to mute or change behaviors or characteristics tied to protected class.[39] For example, quid pro quo harassment based on gender identity could arise where an employer refuses to accept the gender identity that an employee has communicated to the employer and coerces, threatens or cajoles the employee to behave or dress consistent with the employer's view of the employee's gender identity.

Quid pro quo protected class harassment can occur when an employer conditions an employee's continued employment or receipt of workplace benefits, promotions, assignments, or opportunities, etc. on the employee's willingness to tolerate conduct of a harassing nature.

In a quid pro quo protected class harassment case, an employee must prove:

- Conduct requiring an employee to alter, conceal, or eliminate a characteristic signifying their membership in a protected class or other conduct of a harassing nature based on protected class; and
- Submission to or rejection of the conduct was made either explicitly or implicitly a term or condition of employment or a basis for employment decisions.[40]

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[39] Some courts interpreting federal anti-harassment law under Title VII have rejected the viability of quid pro quo harassment claims outside of sexual harassment, particularly with regard to race. See, e.g., Lattimore v. Polaroid Corp., 99 F.3d 456, 463 (1st Cir. 1996). However, the theory has also been held to apply to claims brought under Title VII. See, e.g., Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997); Panchoosingh v. Gen. Lab. Staffing Servs., Inc., 2009 WL 961148, at *6 (S.D. Fla. Apr. 8, 2009). The MCAD is not bound by interpretations of Title VII in construing state law under its jurisdiction, and it is the Commission's interpretation that a quid pro quo protected class harassment theory is viable under Chapter 151B, particularly where an employee submits to demands to alter their appearance or expression of protected class identity as a condition of employment and does not suffer adverse action or necessarily suffer from a hostile work environment. Employees who submit to demands to alter, conceal, or eliminate a characteristic signifying their membership in a protected class as a condition of their continued employment, and consequently do not experience adverse employment actions, might consider whether the discrimination they faced may be characterized as quid pro quo protected class harassment.

[40] Consequences flow from policy compliance but those are not the same as quid pro quo threats. Requests to alter, conceal or eliminate signifying membership in a protected class amount to quid pro quo protected class harassment when submission to or rejection of the requests is made a term or condition of employment. For example, in the context of religion, when an employer connects

An employee may have a claim of quid pro quo harassment when they either reject or submit to the conduct in question, or a mix of both. In either type of case, proof of the above elements necessarily proves that conduct was unwelcome. First, unwelcomeness is logically proven when an employee rejects conduct of a harassing nature. Moreover, it is the policy of the Commission that an offer of a workplace benefit or threat of workplace detriment conditioned on alterations to protected class identity or tolerating harassing conduct is coercive per se, and an employee cannot 'welcome' an illegal quid pro quo. When an employee submits to harassing conduct, an employee's voluntary participation in the conduct does not mean it was welcome.

Relatedly, unlawful quid pro quo protected class harassment might occur irrespective of the level of harm incurred by an employee. Even where an employee voluntarily agrees to an illegal quid pro quo and might be shown to have enjoyed sought-after benefits as a result, with little evidence of emotional or other harm, there may be a violation of Chapter 151B. Because the Commission vindicates the public interest in enforcing the anti-discrimination laws under its jurisdiction and the conduct harms the public interest, such cases may be suitable for the imposition of affirmative relief or civil penalties by the Commission.[41]

Quid pro quo harassment occurs when an employee with authority or control over the terms and conditions of another employee's job abuses that authority. Abuses of such authority can take many forms, including offering or withholding workplace benefits depending on whether an employee will tolerate or engage in unwelcome conduct of a harassing nature. Typically, designated supervisors will have that level of control, but it is possible for a coworker to have control over certain terms or conditions of another coworker's employment such that they have the ability to issue an unlawful quid pro quo. A person with authority need not be a direct supervisor or an official supervisor, it could be anyone who acts as a supervisor by doing any of the following, including but not limited to: assigning tasks to an employee; overseeing their work, managing their conduct and actions; directing an intermediate supervisor's management of the employee; overseeing or directing human resource decisions with respect to the employee; or engaging in other similar conduct.

Submission to or rejection of unwelcome conduct may be implicitly or explicitly a term or condition of employment or a basis for employment decisions when there is the threat or execution of an adverse employment action. Adverse employment actions include, but are not limited to: termination, demotion, denial of promotion, transfer, alteration of duties or assignments, change of hours or compensation, denial of overtime or benefits, or unjustified performance reviews.

Some examples of quid pro quo protected class harassment include:

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a request to take off a hijab for a workplace event in the context of an implicit or explicit threat of demotion, they have issued an illegal quid pro quo. If the employer requests that the employee remove their hijab as a matter of workplace dress policy, there is not a quid pro quo but the employer may need to consider a reasonable accommodation for that employee.

[41] See M.G.L. c. 151B, § 5; 804 CMR 1.09(5) (2020) (affirmative relief in the public interest available at conciliation).

- An employee whose continued employment is conditioned on their willingness to conform and participate in their employer's religious practices;[42] or
- An employee assigned male at birth, who identifies as female, is required to dress in traditionally masculine clothing in order to keep her job and is terminated after refusing to do so.[43]

An employee who files a claim of quid pro quo harassment has the burden of proving that harassment occurred, and the proof can be direct or circumstantial. For example, an employee might be able to produce direct evidence in the form of a text detailing that an assignment, job, or schedule was conditioned on the employee's willingness to submit to harassing conduct in the workplace. More commonly, however, proof is circumstantial, and an unlawful quid pro quo is proved in part by the timing of the adverse action in relation to the rejection of harassing conduct, or, in the case of an employee who submits to conduct, circumstances showing the expectation that submission was required to maintain employment, avoid adverse action, or receive workplace benefits.

D. Hostile Work Environment Protected Class Harassment

Chapter 151B affords employees the right to full participation in the workplace free from harassment on the basis of their actual or perceived membership in a protected class, or association with others who are members of a protected class.

In order to prevail in a hostile work environment case based on protected class, an employee must prove:

- They are an actual or perceived member of a protected class, or associated with a member of a protected class;
- They were subjected to conduct directed at said protected class;
- The harassing conduct was subjectively offensive (i.e., unwelcome) and objectively offensive;
- Considering the totality of the circumstances, the conduct altered conditions of employment by creating an intimidating, hostile, or humiliating work environment; and
- The harassment was carried out by a supervisor, or the employer knew or should have known of the harassment and failed to take remedial action.

Conduct of a harassing nature does not need to explicitly reference the protected class in order to be based on a membership in a protected class. For example, comments that are critical of an

[42] See, e.g., Landry v. Northboro George Assocs., Inc., 15 MDLR 1261 (1993) (quid pro quo harassment found where employer sent evangelist literature to the employee's home and discussed his religious beliefs with employee, told the employee that her job depended on her willingness to participate as a born again Christian, asked the employee to attend religious meetings, and ultimately terminated the employee, replacing her with a practicing born again Christian).
[43] See, e.g., Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007).

employee's race are obviously directly about their membership in a protected class.[44] However, abusive behavior might be based on an employee's membership in a protected class given the totality of circumstances. For example, if a supervisor starts harshly and unfairly criticizing an employee's work, yelling at, or otherwise exhibiting hostile behavior towards the employee as soon as the employee discloses a disability, the employee may be able to establish a hostile work environment based on disability.

A manager who harasses an employee because of unconscious bias against their protected class is as culpable as a manager who harasses an employee because of conscious bias. Harassing conduct is no less injurious to an employee when it is the result of unconscious bias as opposed to consciously held biases against a protected class.[45]

1. Subjectively Offensive Conduct (Unwelcome)

Harassing conduct[46] is subjectively offensive when an employee experiences the conduct to be offensive, which, as a practical matter, also demonstrates unwelcomeness. Conduct can be subjectively offensive even if an employee voluntarily participates.[47] In evaluating whether an employee views conduct as unwelcome, the Commission will consider, among other things, the imbalance in power between the alleged harasser and the alleged victim. The more unbalanced the power is between the harasser and employee, the more unlikely it is that conduct was welcome. Power imbalances also may make employees less likely to communicate unwelcomeness. For example, an employee who is the only Black employee in an office of all white employees might be less likely to verbally complain about offensive conduct from a white employee, given power imbalances caused by systemic discrimination in our society.

This standard is a personal one—conduct might be subjectively offensive to one employee but not to another. Therefore, an employee who does not subjectively perceive the conduct at issue as intimidating, hostile, or offensive is not a victim of harassment within the meaning of the law, even if other individuals would consider such conduct to be so. Objections to or requests to stop harassing behavior, remarks, or epithets, or complaints to other individuals about conduct are some ways of demonstrating that conduct was subjectively offensive. However, an employee is not required to complain to the employer about the harassment or quit their job in order to prove that they found is subjectively offensive.[48]

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[44] See, e.g., Windross v. Village Automotive Group, Inc., 71 Mass. App. Ct. 861 (2008) (evidence of racial harassment included persistent ridiculing and taunting of an employee regarding his skin color, including other offensive comments and conduct).

[45] See, e.g., Adelabu v. Teradyne, Inc., 28 MDLR 215, 229 (2016) (finding supervisor individually liable when his likely unconscious bias created a hostile work environment against Black employee because "unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination"), citing Thomas v. Eastman Kodak Co., 183 F.3d 38 (1st Cir. 1999).

[46] See Section III.A above.

[47] See Section III.B above.

[48] See, e.g., Hernandez v. Beautiful Rose Corp., 42 MDLR 139, 140 (2020).

2. Objectively Offensive Conduct

An employee who subjectively finds behavior to be hostile, intimidating, humiliating, or offensive when it is not objectively so, is not a victim of hostile work environment harassment. Harassing conduct relating to protected class is objectively offensive if it is offensive to a reasonable person in the employee's position, considering all the circumstances.[49] The circumstances considered might include, but are not limited to, the nature and type of employee's work, frequency of conduct, the public nature of the conduct, how other employees responded to the conduct, whether the conduct was previously objectionable to the employee, whether it was physically threatening or humiliating, or whether any physical harm resulted. For example, in terms of the nature of the employee's work, in a medical setting, comments from patients who might not have control over their words and actions might not be objectively offensive to the employees hired to care for those patients. Those circumstances should include an employee's protected class(es) (e.g., a lesbian woman), if considering protected class may help a factfinder determine what would be offensive to a reasonable person in the employee's position.[50] Ultimately, an examination into the totality of circumstances is necessary.

3. Conduct that Alters the Terms, Conditions, or Privileges of Employment

Subjectively and objectively offensive conduct alters the conditions of employment and creates a hostile work environment when it impedes an employee's full participation in the workplace.[51] Whether conduct impedes an employee's full participation in the workplace is a question of fact based on the totality of the circumstances.[52] This includes, but is not limited to, the nature, severity, frequency, and pervasiveness of the conduct and the psychological harm to an employee, if any. It is important to note that an employee's working conditions may be altered without a showing of a

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[49] Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 412 (2001).

[50] However, considering a person's protected class(es) as one of the circumstances must not introduce negative stereotypes. See id. at 413-414 (warning against perpetuating negative stereotypes by including consideration of plaintiff's protected class in the reasonable person standard).

[51] In the sexual harassment context, conduct that unreasonably interferes with an employee's work performance violates M.G.L. c. 151B, and the same is true in the context of protected class harassment. While § 4(1) prohibits discrimination in the "terms, conditions, or privileges of employment," conduct that unreasonably interferes with an employee's work performance amounts to the same, as recognized by the SJC. College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987) (before M.G.L. c. 151B was amended to include an explicit prohibition on sexual harassment, holding hostile work environment sexual harassment was prohibited under § 4(1) because "[c]learly, within the broad sweep of [the terms, conditions, and privileges] language [in § 4(1)] falls conduct which creates a sexually harassing work environment").

[52] LaGrange St. Corp. v. Massachusetts Comm'n Against Discrimination, 99 Mass. App. Ct. 563, 572, review denied, 488 Mass. 1106 (2021), quoting Billings v. Grafton, 515 F.3d 39, 48 (1st Cir. 2008), quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (determining whether a hostile work environment is hostile or abusive "does not depend on any 'mathematically precise test'").

tangible job detriment. There are many scenarios in which an employee is unable to fully participate in the workplace without experiencing an adverse action such as a termination, suspension, or demotion. Thus, an employee may seek recovery for hostile work environment protected class harassment even if they have not suffered an adverse job action.

Not all unwelcome, offensive conduct alters an employee's conditions of employment by creating a hostile work environment. The MCAD and the courts look at whether conduct was "severe or pervasive" as a measure of whether it created an intimidating, hostile, humiliating, or offensive work environment,[53] but the ultimate focus is on the totality of all relevant circumstances. Relevant circumstances may include comparisons between how the employee and coworkers outside of the employee's protected class are treated, particularly when the hostile treatment does not explicitly implicate or reference protected class.[54] However, so-called "comparator evidence" is not required to prove a claim of protected class harassment. Furthermore, an employee may prove harassment based on protected class regardless of whether other employees in the same protected class were treated the same, better, or even worse. For example, a harasser may target a female supervisee for abuse based on her sex but choose not to target other female supervisees. Alternatively, a harasser may choose to harass multiple female supervisees to varying degrees.

Take, for example, an employee who is subjected to jokes of a harassing nature on two occasions. Multiple circumstances might combine to show that the joking created a humiliating, hostile, abusive, or offensive environment, such as:

- The identity of the harasser and relationship to the employee;
- The harasser's tone, volume, and demeanor during the joking incidents;
- The harasser's nonverbal conduct towards the employee before, during or after the incidents;[55]
- Whether the joking was personal to the employee;[56]
- Coworkers' treatment of the employee related to the incidents;
- The time and place where the incidents occurred;
- The people present during the incidents and their relationship to the employee;
- The employee's behavior in response to the incidents; or

[53] See, e.g., Melissa Verne v. Pelican Products, Inc., 38 MDLR 155, 157 (2016).

[54] See, e.g., Adelabu v. Teradyne, Inc. et. al, 38 MDLR 215 (2016) (African American engineering manager proved racial harassment with evidence that a department manager treated him dismissively, disrespected his opinions, resolved disputes in favor of a white manager, and engaged in unwarranted criticism and scrutiny, but did not treat similarly situated colleagues outside of his protected class in the same way).

[55] See, e.g., Said v. Northeast Security, 18 MDLR 255 (1996) (hostile work environment where coworker engaged in pervasive, hostile, and intimidating verbal and physical conduct derogatory to employee's religion, race, and national origin, including but not limited to, throwing, and wiping his feet on employee's prayer rug).

[56] However, joking, and other commentary need not be personal to the employee to constitute harassment. See Barnes v. Sleek, Inc., 37 MDLR 161, 162 (2015) (offensive comments not directed at employee adversely impacted his work environment and created hostile work environment).

- Any diminished opportunities or exclusion of the employee related to the incidents, among other circumstances.

When properly viewed in context, the joking incidents may suffice to create a hostile work environment even if, when viewed without context and in isolation, each incident may not appear severe, and the incidents alone are not pervasive.[57] While it is often true that a few isolated remarks over a period of time are generally insufficient to show an abusive or offensive work environment,[58] hostile work environments are determined exclusively on a case-by-case basis and uniform descriptions of what constitutes abuse risk overstatement.[59]

Abusive treatment can manifest through physical conduct, verbal conduct, nonverbal conduct, written communication, electronic communications, pictures, or any combination of conduct or speech. There is no requirement that conduct must be both severe and pervasive to create a hostile work environment, and, in certain circumstances, a single incident can be serious enough to create a hostile work environment, such as a single use of a racial epithet.[60] Abusive treatment can be anonymous, such as anonymous hostile messages, graffiti or pictorial displays. Conduct experienced by others in the workplace may also be relevant in assessing whether conduct created a hostile work environment, but an employee may experience a hostile work environment regardless of whether their coworkers find the work environment to be hostile.

E. Harassment Based on More Than One Protected Class

Protected class harassment commonly revolves around membership in a single protected class, but harassment may also be attributed to membership in two or more protected classes. This means that an employee may face harassment not necessarily because of their membership in one

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[57] See, e.g., Gorski v. New Hampshire Dep't of Corr., 290 F.3d 466, 474 (1st Cir. 2002) (all of the circumstances surrounding a string of comments alleged to create a hostile work environment needed to be assessed by the factfinder to determine the severity of the comments themselves and the creation of a hostile work environment).

[58] See, e.g., Swenson v. Moini, 40 MDLR 27, 32 (2018) (a few isolated instances of inappropriate conduct over six years were insufficient to support a sexual harassment claim).

[59] See Billings v. Town of Grafton, 515 F.3d 39, 49 (1st Cir. 2008) ("[t]he highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior") and contrast Kelley v. Plymouth County Sheriff's Dep't, 22 MDLR 208, 214 (2000), quoting Carlton v. Worcester School Dep't, 14 MDLR 1143, 1147 (1992), aff'd by Full Commission, 24 MDLR 342 (2002) (employee must establish "a steady barrage of opprobrious [sexual] comment or abusive treatment" in order to prove that conduct was pervasive). While a "steady barrage" of offensive conduct would establish a hostile work environment, something less than a "steady barrage" of comments may create a hostile work environment given the severity of any one comment, and the totality of circumstances in any given case.

[60] See, e.g., Augis Corp. v. Massachusetts Comm'n Against Discrimination, 75 Mass. App. Ct. 398, 408–09 (2009).

protected class, but because of their concurrent membership in two or more protected classes.[61] An employee might have a claim under M.G.L. c. 151B that alleges harassment based on concurrent membership in multiple protected classes, i.e., a claim based on the intersection between one or more protected classes.[62]

This concurrent membership may subject an employee to distinct harassment that others solely within one of the employee's protected classes do not face. For instance, a Black female employee might experience harassment that her Black male colleagues and white female colleagues have not experienced in the same workplace.[63] When an employee claims harassment based on their concurrent membership in multiple protected classes, it must be determined whether the employee faced discrimination because of that combination of factors, often based on stereotypes. For example, an employee may be able to demonstrate that they have been subjected to a stereotype that applies to a particular combination of protected classes but not necessarily to any single protected class, such as a female employee in her 70s who is harassed based on stereotypes about grandmothers that do not necessarily apply to sex and age individually. Alternatively, an employee may be able to demonstrate that a stereotype with respect to one protected class is a basis for harassment when they are additionally a member of another protected class, such as a male employee with a disability who is discriminated against using stereotyping about masculinity and male strength that do not apply to disability per se. When an employee who belongs to multiple protected classes is harassed based on either kind of stereotype, they may have an intersectional claim.

Accordingly, when faced with a claim of intersectional harassment, employers should be prepared to defend their claim by showing they did not subject the employee to harassment based on the individual protected classes implicated or the combination of the protected classes. However, the employer cannot show that the harassing conduct was not based on protected class because employees in only one of the protected classes at issue were not discriminated against.

Relatedly, harassing conduct might at times target an employee's membership in one protected class, and at other times, target an employee's membership in a different protected class. If an employee experiences harassing acts variously based on different protected characteristics, all of

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[61] See, e.g., Massasoit Indus. Corp. v. Massachusetts Comm'n Against Discrimination, 91 Mass. App. Ct. 208, 209-11 (2017) (affirming Commission's finding of discrimination based on a combination of age and disability against employee in his mid-seventies who was confronting sequential health issues).

[62] See, e.g., Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 110 (2d Cir.2010) (citing Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir.1994)) (acknowledging that "the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences" including a specific set of stereotypes and assumptions not shared by all persons of that race or gender).

[63] See, e.g., Sun v. University of Massachusetts, Dartmouth, 33 MDLR 74, 84 (2011) (considering complainant's gender and race/ancestry claims "as a single, combined category" as the discrimination she "endured might not have occurred had she been a member of one protected group rather than two at once, i.e., a Caucasian female faculty member or a male member of the faculty of Asian race/ancestry").

the harassing acts may be considered together in a combination claim to determine if a hostile work environment was created if all the acts were sufficiently related.[64] For example, if an employee complains that their supervisor has harassed them with comments about their disability and separate comments about their race, the combined effect of all the comments can be considered under one combination claim when evaluating whether there has been hostile work environment protected class harassment, even if the employee cannot establish disability-based harassment or race-based harassment claims separately.

F. Protected Class Anti-Harassment Policy

While the law does not require employers to adopt a workplace policy specifically against protected class harassment, it is strongly encouraged. The Commission recommends that employers implement a general anti-harassment policy aimed at eliminating all protected class harassment in the workplace. See Section XIII below.

IV. Harassment Outside the Workplace

Harassment that occurs outside of the workplace may be actionable if there is a sufficient link with the workplace or employment relationship or both.[65] To determine whether conduct outside of the workplace constitutes unlawful harassment, the Commission may consider the following non-exhaustive list of factors:[66]

- Whether the conduct adversely affected the terms and conditions of the complainant's employment or impacted the complainant's work environment;
- Whether the conduct occurred during a workplace event, such as an employer-sponsored function or outing;
- Whether the conduct occurred during work hours;
- The work relationship between the employee and alleged harasser, such as harassment between a supervisor and supervisee; or
- The nature and severity of the alleged outside-of-work conduct.

The employer-employee relationship cannot be solely restricted to what happens inside the four walls of an employee's workplace or their regular schedule. This is particularly true in remote and hybrid work environments. Depending on many considerations including the factors above,

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[64] See, e.g., Moore v. Boston Fire Dep't, 22 MDLR 294, 300 (2000) (holding female firefighter's gender-based harassment was "compounded by the fact that [she was also] Black and self-avowed lesbian").

[65] See, e.g., Cahill v. Silva, 79 Mass. App. Ct. 1122 (2011) (summary decision and order issued pursuant to Rule 1:28) (finding harassing action that does not occur on work time or work property can still be work-related if it affects work terms and conditions or is otherwise sufficiently linked to the workplace).

[66] See, e.g., Picco v. Town of Reading, 38 MDLR 42, 46 (2016).

harassment claims can involve conduct entirely inside the workplace, outside the workplace, or a combination of both.[67]

V. Online Harassment

Unlawful harassment may also occur via social media and other virtual platforms. Offensive conduct occurring online may be considered in determining both quid pro quo harassment claims and hostile work environment harassment claims, such as the harasser making sexual requests through private online messages or employees posting derogatory information about a coworker online. Social media can be utilized during the workday, outside the workday, in the workplace, or outside the workplace. Harassment occurring through the use of social media can provide a basis for harassment in the workplace or out of the workplace. To determine whether conduct occurring online constitutes unlawful harassment, the Commission may consider a range of non-exhaustive list of factors:

- The nature or severity of the conduct;
- The virtual platform within which such conduct took place, and whether it is connected to the workplace;
- The device or account used to access social media or the platform, such as use of a company account or device;
- Whether the conduct occurred during work hours;
- How the harasser obtained access to the employee's social media accounts;
- Whether the harassment was on publicly available social media or private;
- The relationship between the complainant and alleged harasser, such as harassment between a supervisor and employee; or
- Whether the conduct adversely affected the terms and conditions of the complainant's employment or has an effect on the complainant's work environment.

Depending on the factors above, harassment claims can involve conduct entirely online, offline, or a combination of both. The online environment is an ever-present and pervasive aspect of virtually every employee's workplace and personal life, even for those with jobs that do not interface daily with computers. Accordingly, unlawful harassment can occur when coworkers or supervisors use social media or other virtual platforms at work or outside of work.

VI. Harassment of Minors, Non-Full-Time Employees, and Volunteers

Employees under the age of 18 are entitled to the same protections from workplace harassment as adults. This is true regardless of whether underage employees are part-time or temporary workers. Therefore, if an underage employee believes they are a victim of sexual harassment or protected class harassment, they are encouraged to report it. Age discrimination under the law starts at age

[67]See, e.g., Chase v. Crescent Yacht Club, 38 MDLR 97, 101-02 (2016) (finding sexual harassment based on conduct that happened on premises off hours between two club members who also had an employee and supervisor relationship), aff'd by Full Commission, 42 MDLR 8, 9 (2020).

40, and therefore minors cannot bring age discrimination claims. However, if a minor is subjected to race harassment, sexual orientation harassment, gender identity harassment or any other protected class harassment, they are encouraged to report it.

To initiate a claim at the MCAD or in court, a minor must have an adult file on their behalf, but minors who are hesitant to involve their parents or guardian can and should bring their complaint to the MCAD, as the MCAD has the authority to initiate complaints in the name of the agency. Under 804 CMR 1.21 (2020), the MCAD has confidentiality provisions for minors.

Temporary workers, part-time workers, and contract workers (but not independent contractors) are entitled to the same protections as full-time employees and are able to hold employers liable for sexual or protected class harassment that they encounter in the workplace. While interns (whether paid or unpaid) and volunteers do not have protections from workplace harassment under M.G.L. c. 151B, employers are nevertheless encouraged to apply anti-harassment policies to interns and volunteers because they may seek recourse pursuant to a source other than M.G.L. c. 151B.[68] Moreover, if an intern or a volunteer engages in harassing conduct toward employees, an employer may still be liable for such conduct.

VII. Liability for Harassment

Chapter 151B, § 4 provides the statutory basis for liability in cases of workplace harassment. Employers may be liable for unlawful workplace harassment under M.G.L. c. 151B, §§ 4(1), 4(1B), 4(1C), 4(1D), 4(4), 4(4A), 4(5), 4(16) and 4(16A), whether as corporate or partnership entities or as individuals. The standard applied for employer liability for harassment claims depends on the identity of the harasser. If a supervisor is the harasser, an employer will be vicariously liable for the conduct whether or not it knew about the conduct. Further, if the employer knew or should have known of harassing conduct of a non-supervisor and failed to take adequate remedial action, the employer will be liable.

Individuals or entities that are not the employer or the employer's agent may also be held liable for discriminatory harassment under M.G.L. c. 151B, §§ 4(4A) and 4(5). Employers and individuals are also liable under these sections if they retaliate against employees because they complained about unlawful workplace harassment, or aid and abet in retaliating against an employee. See Section VIII below.

A. Employer Liability

1. Supervisors & Managers

[68] Volunteers who experience sexual harassment may bring actions under other statutes, including the civil rights act, M.G.L. c. 12, § 11I, as well as common-law claims for sexual harassment or related injuries that would be barred for employees by the exclusivity provisions of M.G.L. c. 151B, § 9; M.G.L. c. 214C, § 1C; and the workers' compensation statute. Lowery v. Klemm, 446 Mass. 572 (2006).

In general, an employer is vicariously liable for the harassing conduct of its supervisory personnel, regardless of whether the employer knew about the conduct. An employer is strictly liable for the actions of its managers and supervisors because they are given authority by the employer over subordinates and are thus considered agents of the employer. Therefore, any discriminatory harassment committed by a supervisor is interpreted as if the employer themselves engaged in harassment.

A supervisor is not limited to individuals with the specific title or job description of "supervisor." Any individual who has a supervisory relationship with an employee can fall under this category.[69] Accordingly, an employer may be liable for the actions of a supervisor even if that supervisor does not have direct supervisory authority over an employee.

Supervisory personnel are those upon whom the employer confers sufficient authority. To determine whether an employee has supervisory authority, the Commission may consider a range of factors, including but not limited to whether the allegedly supervisory employee:

- Undertakes or recommends tangible employment decisions affecting an employee;
- Directs employee's daily work activities;
- Directs activities, assigns work, and controls workflow;
- Hires, fires, promotes, demotes, reassigns, or disciplines;
- Alters or affects an employee's compensation or benefits;
- Evaluates an employee's workload;
- Distributes necessary supplies and tools;
- Gives directions and verifies or fixes mistakes;
- Assists employees in assigning tasks; and
- Monitors and evaluates work performance.

Additionally, under the doctrine of "apparent authority," an employer may be vicariously liable for harassment even if the alleged harasser is not formally designated as a supervisor and if a supervisor lacks actual authority. The employee's belief that the harasser has authority over them, to the extent that is reasonable, is a significant factor in determining the existence of apparent authority.[70] Such a belief might form when the employer has given the employee the reasonable impression that the harasser has supervisory authority over the employee. For example, an employer might give such an impression by doing nothing to correct an employee who is acting as a supervisor without having any authority to do so.[71] An employer might also give such an

[69] See, e.g., Chase v. Crescent Yacht Club, 42 MDLR 8, 9 (2020) (finding executive board member of club as a supervisor of bar employees as he had overall authority over the club and the bar, including the authority to terminate bar employees, define their duties, and ensure duties were carried out).

[70] See Linkage Corp. v. Trs. of Bos. Univ., 425 Mass. 1 (1997) (in a contracts case, finding that a showing of apparent authority requires proof of conduct by the employer that caused the contractor to reasonably believe that the employer's agent had the requisite authority to enter into the contract).

[71] See, e.g., Williams v. Karl Storz Endovision, Inc., 24 MDLR 91, 108 (2002), aff'd by Full Commission, 26 MDLR 156 (2004).

impression by permitting an employee who is acting like a supervisor without actual authority to attend manager meetings, listing them as a manager on the company directory, or by giving the employee additional duties or compensation out of step with their actual role.[72]

2. Coworkers

An employer may be liable for harassing conduct of coworkers if the employer knew or should have known of the conduct and failed to take prompt and effective remedial and preventative action reasonably calculated to end the harassment. An employer can be put on notice in multiple ways. An employer is on notice of harassment when the victim makes a formal or informal complaint, when other employees express concern about harassment perpetrated by one coworker against another, and when the employer observes the harassment. An employer can also be put on notice constructively, such as when a supervisor overhears a complaint or observes behavior or receives information reasonably indicating that harassment has occurred. Employers who are on constructive notice of harassment and who fail to take prompt and effective remedial action reasonably calculated to stop the harassment, may be found liable for harassment.

Co-worker harassment can be between co-workers, by a supervisee to a supervisor, by non-managerial employees to managerial employees, or by non-human-resource employees to human-resource employees. The employer has a duty to investigate and address all harassment between all co-workers no matter the hierarchical or departmental relationship between co-workers.

3. Third Parties Over Whom the Employer Has Control

An employer may also be liable for harassment of employees by non-employees, such as customers, vendors, patients, students, clients, independent contractors, or other acquaintances. First, an employer may be held liable for conduct of third parties when the employer knew or should have known of the conduct, failed to take prompt and effective remedial action, and had some degree of control over the third party.[73] The greater the employer's ability to control the nonemployee's conduct, the more likely that the employer will be found liable for that person's unlawful harassment. For example, if the employer knew that a customer was harassing an employee and failed to take adequate, prompt, and effective action, such as removing the customer from its premises, the employer could be found liable.

An employer may also be held liable for the conduct of third parties if it has conferred sufficient authority on a nonemployee such that the nonemployee may be considered an agent of the employer, and the employer may be held vicariously liable for harassment. For example, if an employer allowed a friend to come to the place of business daily and give directives to employees, the employer could be found liable for the harassing actions of the friend.

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[72] See, e.g., Robinson v. Haffner's Service Stations, 23 MDLR 283, 287 (2001), aff'd by Full Commission, 24 MDLR 393 (2002).

[73] See Modern Continental/Obayashi v. Massachusetts Comm'n Against Discrimination, 445 Mass. 96, 106-107 (2005).

B. Liability of Any Individual Including Individual Employers

"Any person" may be liable for unlawful workplace harassment under M.G.L. c. 151B, §§ 4(4A) (harassment by coercion, intimidation, threats, or interference) and 4(5) (aiding and abetting and inciting and compelling harassment). "Any person" is a broad category. A "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof. M.G.L. c. 151B, § 1. For example, a supervisor, human resources professional, co-worker, company owner, or subordinate could be held individually liable for unlawful workplace harassment. Individual liability means that the individuals themselves will be held legally responsible for their actions, and their company or organization cannot shield them from responsibility.

Individuals who are employers may be individually liable for harassment under M.G.L. c. 151B, §§ 4(1), 4(1B), 4(1C), 4(1D), 4(4), 4(16) (discrimination) and 4(16A) (sexual harassment). A common example of an individual who is an employer is a business owner who also acts as the CEO, president, or manager of the business.

Employer liability is a separate and distinct concern from individual and non-employer liability. In other words, an employee's rights might be violated by any individual (or entity under definition of "person") under M.G.L. c. 151B, §§ 4(4A) and 4(5) regardless of whether the employer violated their rights.[74] Accordingly, an employee may file a complaint against one or more individuals for harassment with or without filing a complaint against the employer.

In summary, a victim of harassment may file a claim against:

- The company that they work for;
- The individual harasser, whether that individual is an employee, independent contractor, or member of the public;
- An individual principal, owner, president, or partner in the business;
- An individual who coerced, intimidated, threatened, or interfered with the victim's right to work in an environment free of harassment;
- An individual who aided, abetted, incited, compelled, or coerced the harassment; or
- An individual who had knowledge of the harasser's conduct and intended to assist the harasser in the unlawful actions.

Any individual could be found liable by themselves or jointly and severally liability with another individual, employer, or non-employer.[75]

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[74] See McGrath v. Local Union No. 12004, 26 MDLR 178 (2004) (union employee individually liable for harassment even "when the person charged with employment discrimination is not the complainant's employer or an agent of the employer").

[75] See, e.g., Canton v. Biga Wholesale, Inc., 42 MDLR 75, 76 (2020) (finding joint and several liability for complainant's direct supervisor, company's owner, and the company).

1. Individual Employer Liability

When employers are individuals, they may be personally liable for harassing conduct under M.G.L. c. 151B, §§ 4(1), 4(1B), 4(1C), 4(1D), 4(4), 4(16) (discrimination) and 4(16A) (sexual harassment). This can be in addition to liability for the business. Personal liability requires that the individual be closely identified with the business and will depend on the size, nature, and form of the business. Individual liability may apply to principals, owners, presidents, or partners in a business. These employer-individuals may also be personally liable for harassment under M.G.L. c. 151B, §§ 4(4A) (harassment by coercion, intimidation, threats, or interference) and 4(5) (aiding and abetting harassment).[76]

2. Harassment by Coercion, Intimidation, Threats, or Interference

Under M.G.L. c. 151B, § 4(4A), any employer, individual, or entity meeting the definition of "person" may be liable for coercing, intimidating, threatening, or interfering with another person in the exercise or enjoyment of any right protected by M.G.L. c. 151B, including the right to be free from unlawful harassment in the workplace.

To establish a claim of harassment under M.G.L. c. 151B, § 4(4A) an employee must establish that an individual intentionally coerced, intimidated, threatened or interfered with their rights protected by M.G.L. c. 151B, which may be shown by a deliberate disregard of those rights.[77] A claim under M.G.L. c. 151B, § 4(4A) does not require proof of an adverse action, such as termination, demotion, etc.

There is not only one form of harassment by coercion, intimidation, threats, or interference. Such harassment can be done by any person in a variety of ways. By way of limited example, harassment by coercion, intimidation, threats, or interference can look like:

- Manager coerces an employee into an unwanted sexual act by promising a promotion;
- Company owner intimidates a human resources employee by yelling at them each time they hire a Black employee;
- Supervisor threatens to fire employee if they ask for parental leave, even if the supervisor does not act on the threat;
- Coworker blocks the only wheelchair accessible entrance so a wheelchair-using employee cannot access the office;

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[76] See, e.g., Casoni v. Edgewater Kitchen & Bath, Inc., 34 MDLR 167 (2012) (finding individual liability for owner of the corporation for aiding and abetting supervisor's offensive behavior where her inaction permitted and condoned a sexually hostile work environment)

[77] See, e.g., Harper v. Z2A Enterprises, Inc., 28 MDLR, 164, 167 (2016); Canton v. Biga Wholesale, Inc., 42 MDLR 75, 76 (2020), but note that because 4(4A) applies to "any person," not every case requires a showing that a respondent had the authority to act on behalf of the employer. Also, disparate impact claims under M.G.L. c. 151B, § 4(4A) require intentional conduct, but not necessarily an intent to discriminate evidenced by a deliberate disregard for the employee's rights or otherwise. See Lopez v. Com., 463 Mass. 696 (2012).

- Sister of harassing employee files a false police report about the harassed employee in order to intimidate the harassed employee into dropping the harassment complaint;[78]
- Human resources employee deliberately obstructs a discrimination investigation;[79]
- Company has a policy that employees can only receive severance if they have never filed a discrimination complaint; or
- A termination agreement or waiver that says an employee cannot file a harassment claim with any employment discrimination enforcement agency.

3. Aiding, Abetting, Inciting or Compelling Harassment or Attempting to Do So

Under M.G.L. c. 151B, § 4(5), any employer, individual, or entity meeting the definition of "person" may be liable for aiding, abetting, inciting, compelling, or coercing any acts forbidden by M.G.L. c. 151B, which includes unlawful workplace harassment, or attempting to do any of those things. To establish liability, an employee must satisfy a three-part test:

(1) The wrongful act must be separate and distinct from the underlying claim or an act in furtherance of the underlying claim;
(2) The aider, abettor, inciter, or compeller shared an intent to discriminate not unlike that of the alleged principal offender; and
(3) The aider, abettor, inciter, or compeller knew of their supporting role in an enterprise that deprived an individual of a right guaranteed under M.G.L. c. 151B.[80]

Individuals and entities may also be liable for aiding, abetting, inciting, or compelling under M.G.L. c. 151B, § 4(5) for the failure to take adequate remedial action to stop or prevent the harassment. To establish such liability, an employee must prove that the individual or entity:

- Knew of the ongoing harassment;
- Had an obligation and the authority to investigate or take remedial action;
- Intentionally failed to take such action; and
- Contributed to the employee's injury by failing to act.[81]

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[78] See, e.g., Leahy v. City of Boston Fire Dep't, 42 MDLR 155, 158 (2020) (highlighting likely unlawful conduct of unnamed respondent).
[79] See, e.g., Canton v. Biga Wholesale, Inc., 42 MDLR 75, 76 (2020).
[80] See Lopez v. Com., 463 Mass. 696, 713 (2012) (an aiding and abetting claim is derivative of a discrimination claim and requires an allegation of an underlying act of discrimination, although the failure to name the person or entity who committed the underlying act as a defendant is not necessarily fatal to the claim).
[81] See, e.g., Roughneen v. Bennington Floors, Inc., 38 MDLR 48, 50 (2016) (finding individual liability for owner who aided and abetted a hostile work environment by personally participating or implicitly condoning sexual harassment); Casoni v. Edgewater Kitchen & Bath, Inc., 34 MDLR 167, 172 (2012); Chapin v. University of Massachusetts at Lowell, 977 F. Supp. 72, 80 (D. Mass. 1997).

To establish such liability, the inaction must be a purposeful or conscious choice not to act.[82]

VIII. Retaliation

It is unlawful for an employer or individual to retaliate against an employee who alleges discriminatory harassment.[83] Employees may bring a separate complaint of workplace retaliation. Retaliation can take many forms, from an employer deciding to terminate an employee's job after they file a complaint, to a supervisor or any other individual harassing an employee in response to the employee raising concerns about workplace harassment, to any individual threatening, intimidating, or coercing retaliatory conduct, or aiding, abetting, inciting, or compelling, or attempting to aid, abet, incite, or compel retaliatory conduct.

A. Retaliation by Adverse Action

Under M.G.L. c. 151B, § 4(4), it is unlawful for "any person," employer, labor organization, or employment agency to discriminate against an employee because they have opposed any practices forbidden under M.G.L. c. 151B or filed a complaint, testified, or assisted in any proceeding under M.G.L. c. 151B. Under M.G.L. c. 151B, § 4(4A), it is unlawful for "any person" to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right protected by M.G.L. c. 151B, including the right to be free from unlawful retaliation, or to engage in such conduct against persons who aided or encouraged other persons in exercising any right protected by M.G.L. c. 151B.

"Any person" as referenced in M.G.L. c. 151B, §§ 4(4) and 4(4A) includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof. M.G.L. c. 151B, § 1. Any individual, employer, or other entity can be liable for retaliation under M.G.L. c. 151B, §§ 4(4) and 4(4A). A retaliation claim may be successful even where the underlying claim of discrimination fails.[84]

To prove a claim of retaliation under M.G.L. c. 151B, §§ 4(4) or 4(4A), an employee must show that (a) they engaged in conduct protected under M.G.L. c. 151B which the employer or other

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[82] Lazaris v. Human Resources Division, 41 MDLR 117 (2019) (a respondent's inaction must be more than merely negligent to rise to the level of aiding and abetting under M.G.L. c. 151B, § 4(5); an intent to discriminate is required).

[83] Retaliation against persons who engage in protected activity under M.G.L. c. 151B is broadly prohibited and includes protected activity with respect to all other forms of unlawful discrimination under M.G.L. c. 151B, not just workplace harassment. These guidelines address retaliation in the context of workplace harassment but M.G.L. c. 151B, §§ 4(4), 4(4A), and 4(5) may be sources of liability for "any person" who retaliates against someone who engages in protected activity or aids and abets others in retaliation.

[84] See e.g., Santiago v. Caregivers of Massachusetts, 44 MDLR 61, 70-71 (2022) (finding employer retaliated after internal complaint of sexual harassment though underlying sexual harassment claim failed).

person knew about or believed to have occurred;[85] (b) they suffered an adverse action; and (c) a causal connection existed between the protected conduct and the adverse action. The employee must also prove that they reasonably and in good faith believed that their employer engaged in wrongful discrimination, that they acted reasonably in response to this belief,[86] and that the decision to retaliate against them was a determinative factor in the adverse action.[87]

A relevant factor in the causation analysis is the proximity in time between the adverse action and the protected activity.[88] The mere fact, however, that adverse action occurred after protected activity does not necessarily show causation.

Protected activity may include, but is not limited to, such actions as:

- Speaking to the MCAD, Equal Employment Opportunity Commission (EEOC,) other civil rights or law enforcement agency, or third-party human resources or complaint resolution centers;
- Speaking to an attorney about filing a claim of discrimination against their employer;
- Sending a demand letter to the employer through an attorney about discrimination claims;
- Filing a complaint at MCAD or EEOC against an employer;
- Filing a complaint in court;
- Talking to the MCAD or EEOC about another employee's discrimination complaint against an employer;
- Testifying as a witness concerning a claim of harassment against an employer;
- Complaining to management about harassing conduct directed at the employee or others or filing an internal complaint;
- Asking a supervisor or coworker to stop engaging in harassing conduct;

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[85] These guidelines have historically recognized that an employer can be held liable for retaliation for when they "should have known" about the employee's protected conduct, but such knowledge was only ever imputed on the employer if there was proof that the employer had actually known. This update clarifies that standard. See Bass v. Dep't of Mental Retardation, 20 MDLR 1, 4 (1998) (retaliation claim dismissed where employer fired complainant prior to being served with a copy of her MCAD charge and employer had no other reason to know about charge). Knowledge of protected activity or belief that it occurred is required to prove retaliation.

[86] See, e.g., Babu v. Aspen Dental Management, Inc., 42 MDLR 99, 100 (2020) (finding employee's complaint about supervisor's flirtations to be protected activity as employee reasonably believed supervisor's behavior to be unlawful, even though it was likely not unlawful)

[87] See Loewy v. Ariad Pharmaceuticals, Inc., 42 MDLR 28, 32 (2020), citing Tate v. Dep't of Mental Health, 419 Mass. 356, 362 (1995).

[88] See id. at 30 (proximity permits trier of fact to infer causal connection). These guidelines have historically recognized that proximity is "highly" relevant to causation and its omission here does not diminish the significance of timing and sequence of events in retaliation claims. Rather this change recognizes that sometimes "revenge is a dish best served cold," and that retaliation can be found even when there is attenuated temporal proximity. See Bonds v. School Committee of Boston, 80 Mass. App. Ct. 1113 (2011) (summary decision and order issued pursuant to Rule 1:28). There is no standard amount of time between protected activity and adverse action that proves retaliatory intent, and retaliatory action can be heated or cool.

- Cooperating with an internal investigation of a harassment complaint; and/or
- Meeting with coworkers to discuss how to stop harassment in the workplace.

In order to prove retaliation, an employee must show that the employer or other person knew or believed that an employee engaged in protected activity when it took adverse action.[89] This is true even if the employer or other person was mistaken in its belief that the employee engaged in protected activity. In order to establish protected activity, employees must also demonstrate a reasonable, good faith belief that the employer engaged in wrongful discrimination and that they acted reasonably in response. The Commission may consider the egregiousness of the alleged harassment in making a determination as to the reasonableness of an employee's oppositional conduct. Certain protected activity, such as filing of an MCAD claim, will put the employer on notice because of its very nature when received by the employer.

A broad range of conduct qualifies as adverse action under M.G.L. c. 151B, §§ 4(4) and 4(4A). Under M.G.L. c. 151B, § 4(4), an adverse action is an action to "discharge, expel or otherwise discriminate against" an employee, and under M.G.L. c. 151B, § 4(4A), an adverse action is any action "to coerce, intimidate, threaten, or interfere with" the employee.[90] As a result, adverse actions under these sections may include, but are not limited to:

- Termination;
- Denial of promotion;
- Demotion in title or duties;
- Transfer to a different position or location;
- Involuntary placement on leave;
- Hostile or abusive treatment;
- Unwarranted negative job evaluations;
- Toleration of harassment by other employees;
- Decreasing compensation or benefits;
- Exclusion from training opportunities;
- Threaten to give an employee a warning;[91]
- Exclusion from employer-sponsored social activities or events; or
- Retaliatory harassment.[92]

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[89] See, e.g., Martin v. Mickey M. Assoc., 41 MDLR 146, 156 (2019) (finding no retaliation where employer was unaware that employee was seeking advice on how to file a discrimination claim or had been complaining about racial harassment).

[90] Leahy v. City of Boston Fire Dep't, 42 MDLR 155, 158 (2020), citing Mole v. Univ. of Massachusetts, 442 Mass. 582, 592 n. 19 (2004) (explaining acts of threats, intimidation, coercion, or interference are adverse actions in and of themselves).

[91] See, e.g., Phillips v. Electro-Term, Inc., 43 MDLR 27 (2021) (finding employer's threats of discipline to be retaliation in response to employee's complaints of a sexually hostile work environment even when employer did not act on threats).

[92] Retaliatory harassment is harassment targeting an employee because they engage in protected activity, not because of their membership in a protected class, although harassing conduct can involve both motivations.

Adverse actions may be retaliatory conduct following termination of the employment relationship or extend beyond the workplace. If the conduct in question is materially adverse to the employee such that it would have discouraged a reasonable person in the employee's circumstances from pursuing a charge of discrimination, it constitutes unlawful retaliation.[93]

B. Aiding, Abetting, Inciting, or Compelling Retaliation or Attempting to Do So

Any person who aids, abets, incites, compels, or coerces the doing of any act unlawful under M.G.L. c. 151B, including retaliation, or attempts to aid, abet, incite, compel, or coerce retaliation, commits a violation of M.G.L. c. 151B. "Any person" as referenced in M.G.L. c. 151B, § 4(5) includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and the commonwealth and all political subdivisions, boards, and commissions thereof. M.G.L. c. 151B, § 1. Any individual, employer, or other entity can be liable under M.G.L. c. 151B, § 4(5) for aiding, abetting, inciting and compelling retaliatory conduct that violates M.G.L. c. 151B, §§ 4(4) or 4(4A). A retaliation claim under M.G.L. c. 151B, § 4(5) requires underlying allegations of retaliatory conduct that violates M.G.L. c. 151B, §§ 4(4) or 4(4A). For details on aiding and abetting claims, see Section VII.B.3 above.

IX. Continuing Violation

If an employee wishes to file a complaint of discriminatory harassment with the MCAD, M.G.L. c. 151B, § 5 requires that a charge of discrimination be filed with the Commission within 300 days of the alleged harassment. However, in certain circumstances, if an employee is complaining about continuing harassment, unlawful conduct occurring before the 300-day filing deadline may be considered in assessing both liability and damages. The continuing violation theory applies to all protected class harassment, including but not limited to sexual harassment.

If the employee establishes a continuing violation, harassing events, policy, or practice occurring outside the 300 days will be considered timely, so long as the last act of discrimination or discriminatory practice and effect occurred within 300 days of the filing date. Under these circumstances, the employee may be able to recover damages for otherwise untimely acts in addition to damages for timely conduct. In contrast, where a continuing violation is not

[93] See Burlington Northern & Santa Fe Railway v. White, 548 U.S. 53, 59-70 (scope of Title VII anti-retaliation provisions broadly prohibiting any discrimination in response to protected activity is not limited to employer actions that affect terms or conditions of employment or even those actions that occur in the workplace; instead, actionable retaliatory conduct must be materially adverse such that the conduct might have dissuaded a reasonable employee in the plaintiff's circumstances from making or supporting a charge of discrimination). See also DiIorio v. Willowbend Country Club, Inc., 33 MDLR 166 (2011) (affirming finding of retaliation where manager of country club discouraged employee's presence on country club grounds following her termination); Murphy v. S&H Construction, Inc., 36 MDLR 160, 166 (2014) (finding employer retaliated against employee for filing MCAD complaint when employer filed a lawsuit to recover monies owed and caused employee's ex-wife's mini-van to be repossessed), aff'd by Full Commission, 40 MDLR 108 (2018).

established, the employee is limited in using the untimely events as evidence to establish a hostile work environment, and they may not recover damages for the time-barred events.[94]

There are two types of continuing violations—serial and systemic.

A. Serial Continuing Violation

A serial continuing violation exists when there is a series of related acts that form a pattern of discrimination when viewed together.

Under 804 CMR 1.04(4)(b) (2020), when facts are alleged which indicate unlawful conduct is of a continuing nature and part of an ongoing pattern of discrimination, the complaint may include discriminatory acts outside of the statutory filing period so long as a discriminatory act in the pattern occurred within the statutory filing period that serves as the "anchoring event." This situation may occur if the case involves a pattern of conduct, the cumulative effect of which results in a hostile work environment over time, as opposed to a distinct discriminatory act on a specific date.

Continuing violations are recognized because some claims of discrimination involve a series of related events that must be viewed in their totality to assess their discriminatory nature and impact. Continuing violations are especially prevalent in hostile work environment cases since incidents of harassment typically build over time to create a work environment permeated by abuse. While any one incident, standing alone, may not be enough to constitute harassment, many incidents viewed cumulatively may show a pattern of discrimination and mistreatment of the employee.[95]

The MCAD will find a serial continuing violation when the following factors are met:

1. At Least One Instance of Conduct Within the Applicable Limitations Period, i.e., the anchoring event: To establish an anchoring event, the timely conduct must be in furtherance of or exacerbate previous and related harassing conduct.[96] The conduct within the limitations period need not, standing alone, have created a hostile work environment. However, ongoing distress caused by the conduct occurring outside the 300 days alone will not suffice to establish a continuing violation.

2. Timely Conduct Must Be Substantially Related to Conduct Outside the Applicable Limitations Period: The employee must show that the timely conduct is substantially related to the prior, untimely harassing conduct. The timely incident must anchor all the untimely acts by being substantially related so that both the timely and untimely conduct comprise a pattern of harassment. Factors the Commission considers in evaluating whether the untimely acts are related to the timely act(s) include but are not limited to: the nature

[94] Evidence of untimely conduct may be admissible to give context or meaning to the timely acts of alleged harassment.
[95] See Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 539-40 (2001).
[96] Harassing conduct can be related even if it is variously aimed at different protected classes when there is a combination claim. See Section III.E above.

of the timely and untimely conduct, the similarity of the acts, who is engaging in the acts, the amount of time between incidents and the time period over which the conduct is alleged to have occurred.[97]

3. Employee's Delay in Filing the Charge Must Not Be Unreasonable: If the employee knew or should have known that their work situation was pervasively hostile and unlikely to improve, and a reasonable person in the employee's shoes would have filed a complaint with the MCAD before the 300-days, the employee will not be able to seek damages for the untimely conduct. In that instance, only the conduct occurring within the 300 days before filing will be actionable.

B. Systemic Continuing Violation

A systemic continuing violation occurs when an employer has an ongoing discriminatory policy or practice. To be timely, the employee must establish that the discriminatory policy or practice and its injurious effects on the complainant continued into the limitations period, not that the discriminatory act has occurred within the 300-day period.[98] For example, if an employer had a practice of only promoting men to be managers, and a woman applied for a promotion to the position and was rejected because of this practice, she could file a complaint more than 300 days after her rejection as long as the practice was still in place and she was still adversely affected by the practice.

X. Constructive Discharge

Constructive discharge occurs when an employee resigns or leaves a job due to working conditions so intolerable that the law treats the resignation as a firing. Constructive discharge is a basis for damages that is available in all discrimination cases, including retaliation cases, but often occurs in harassment cases. An employee alleging harassment may prove constructive discharge by showing that they left their job under circumstances where a reasonable person in their position would have felt compelled to resign because the conditions arising from discriminatory conduct were so intolerable. An employee's subjective belief that conditions were so intolerable that they had no other choice but to resign is not sufficient to prove constructive discharge. The employee

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[97] See, e.g., Coburn v. Cuca, Inc., 41 MDLR 29, 30-31 (2019) (finding harasser's rehiring was an anchoring event and substantially related to prior sexual harassment because the rehiring was employer's failure to remediate the prior sexual harassment). Accordingly, while a sexual harassment claim requires that an employee was subjected to conduct of a sexual nature, conduct that is not necessarily sexual in nature might serve as anchoring events if it is substantially related to untimely acts of sexual conduct and in furtherance of a hostile work environment.

[98] See Tassinari v. Salvation Army Nat'l Corp., 610 F. Supp. 3d 343, 359 (D. Mass. 2022) (holding the plaintiffs must show that "the discriminatory policy was in effect, and injured [them], during the limitations period"). See also, Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 183 (1st Cir. 1989) ("if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends").

must show that a reasonable person in the employee's position would have felt that the conditions were so intolerable that they were compelled to resign.

A constructive discharge analysis is a fact-specific one. For example, if the separation from employment occurs long after exposure to the harassment and the harassment has ceased, a constructive discharge is less likely to be found. Where the harassment continues after the employer is on notice of the harassing conduct and after no effective or remedial steps have been taken by the employer, the employee is more likely to be found to have been constructively discharged.[99]

Constructive discharge can occur even if the harasser does not act with the specific intent of forcing the employee to resign from their job. A claim of constructive discharge under M.G.L. c. 151B does not arise, however, when the employee resigns due to general dissatisfaction with the workplace or because of other conduct that does not violate M.G.L. c. 151B.

Generally, an employee who is subjected to harassment must first pursue reasonable alternatives to quitting, such as filing an internal complaint, calling an employee complaint hotline to complain about the working conditions, or speaking with their supervisor about the working conditions, in order to establish constructive discharge. Determining whether there are reasonable alternatives to quitting is a fact-specific inquiry. Just because an employee has more than one alternative to quitting, does not mean that the employee has to pursue all of those alternatives.[100] For example, it may not be reasonable for an employee who is sexually harassed by the president of the company to complain to a human resources representative subordinate to the president in order to establish constructive discharge. Moreover, if there is no human resources department or policy regarding how to address a complaint of discrimination, it may not be reasonable to expect an employee who is being harassed by their supervisor to file a complaint. There is also no requirement that the employee confront the harasser directly. However, if an employee feels comfortable confronting the harasser directly, they can attempt to stop the harassment as an alternative to quitting by making it clear to the offending party that the harassing behavior is unwelcome and by requesting that it stop.

Where avenues for filing an internal complaint exist, if an employee resigns before the employer has had a reasonable opportunity to investigate and address the allegation of harassment, the resignation is less likely to be determined to be a constructive discharge. Where the employee makes an internal complaint and the employer fails to respond adequately, constructive discharge

[99] See, e.g., Michaela Martins v. Isabel's Pizza, Inc. 40 MDLR 33, 35 (2018) (finding constructive discharge where employer failed to act in a meaningful way to minimize threats of continued harassment to employee from harasser's associates after harasser was terminated); Coburn v. Cuca, Inc., 41 MDLR 29, 31 (2019) (finding constructive discharge when employee resigned when employer rehired harasser six months after promising employee that harasser was fired).

[100] See, e.g., Harper v. Z2A Enterprises, Inc., 28 MDLR, 164, 167 (2016) (finding constructive discharge for employee sexually harassed by general manager even though employee did not complain to restaurant's owner).

is likely to be found. As such, responding to allegations of harassment in a prompt, effective, non-retaliatory manner may prevent a finding of constructive discharge.[101]

XI. Investigation

Upon learning of harassment allegations, employers should investigate and take reasonable and appropriate action to remedy the situation. A complaint can be made by the victim of harassment, an observer of the harassment or a third party, such as a coworker, friend, parent or relative. Anonymous harassment such as graffiti, messages, or pictorial displays, etc., may also trigger an employer's obligation to investigate and take reasonable and appropriate action to remedy the situation. If an employee complains to officials identified in the employer's sexual harassment policy, the employer is on sufficient notice to trigger an obligation to investigate and take remedial action if the complaint proves well founded. However, an employer may be put on notice of an employee engaging in sexually harassing conduct by means other than a complaint made in accordance with the employer's sexual harassment policy and to employees other than those identified in a sexual harassment policy.[102] An employer is on notice of harassment allegations if it is reported formally or informally, verbally or in writing to any supervisory personnel, management employee, owner, high-ranking officer, human resources, EEO director, or any other individual responsible for taking action on such a complaint. If an employer knew or should have known that an employee has been subjected to harassment, the employer is on notice and should take prompt, effective and remedial action.

To put the employer on notice and to assist with an effective investigation, the reporting individual should identify the potentially unlawful conduct with as much specificity as possible. However, a reasonable investigation should encourage the employee to provide as much detail as possible and specifically describe all harassing conduct, including the events, dates, participants, places, and witnesses. Where an employer fails to investigate a complaint of coworker harassment in a prompt and effective manner, or to take reasonable steps to stop the harassment, the employer faces liability. Although an investigation and remedial action does not shield the employer when the harasser has supervisory authority, nevertheless, it may reduce the damages that the employer may ultimately be liable for as a result of the harassment. Investigations must also be conducted without unlawful bias. While investigative plans depend on the scope and nature of the allegations in a given complaint, employees alleging harassment must not be treated differently because of protected class.

Finally, the employer should conduct an investigation irrespective of the employment status of the persons involved. For example, if a victim complains for the first time at an exit interview or if the victim or harasser are no longer employed by the employer, the employer should still conduct an investigation and take appropriate action, including addressing a hostile workplace culture or harassing behavior that may continue in the victim's or harasser's absence.

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[101] For more information about investigating claims of workplace harassment and taking effective remedial action to eliminate harassment, see Section XI and XII of these Guidelines.
[102] See, e.g., Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016).

A. Who Conducts the Investigation

The employer must decide who will conduct the investigation. The investigator must be able to maintain neutrality and have the appropriate authority to collect the evidence necessary to do a full investigation. The employer should determine whether an internal investigator or external investigator would be most appropriate depending on the circumstances and ensure neutrality. None of the affected parties, whether the complainant, witnesses, or the accused perpetrator of discrimination should conduct the investigation.[103] The alleged harasser should not have supervisory authority over the person conducting the investigation and should not have direct or indirect control over the investigation. The individual selected to conduct the investigation should be trained in how to interview witnesses and evaluate credibility.

B. Confidentiality

Employers should investigate allegations of harassment in a fair and expeditious manner that also maintains confidentiality to the extent practicable. Information gleaned from the investigation should be shared with others only on a need-to-know basis. Employers should inform alleged victims of harassment that the employer has a legal duty to investigate allegations of harassment and that, while the matter will be kept as confidential as possible, it may not be possible to withhold the victim's identity from the alleged harasser. An employer should not promise absolute confidentiality to the victim, the alleged harasser, or other witnesses because such a promise may obstruct the employer's ability to conduct a fair and thorough investigation. Generally, the victim and the alleged harasser should be kept informed of the status of the investigation during the process, and the results once the investigation is concluded.

The investigator should inform and remind each interviewee, including the parties as well as any other employee involved with the investigation, that the investigation is confidential and should not be discussed with anyone. The investigator should inform them that the employer will not tolerate any retaliation against the victim or anyone else who cooperates with the investigation. The investigator should also prohibit interference or obstruction to an investigation into the allegations by any local human rights organization, the MCAD or the EEOC.

C. Investigation Must be Adequate and Prompt

The employer should investigate a complaint of harassment in a reasonably prompt manner, even if the employee asks that it not investigate. In evaluating whether an employer has acted in a reasonably prompt manner, the Commission may consider facts including but not limited to the nature and severity of the alleged harassment, and the employer's reasons for the delay.

The nature and duration of the investigation will depend on the circumstances of the complaint, including the type, severity, and frequency of the alleged harassment. Employers are responsible for the promptness and adequacy of their investigation whether conducted by the employer itself or pursuant to a contract with a third party to conduct internal investigations or otherwise manage

[103] See, e.g., Osorio v. Standhard Physical Therapy, 45 MDLR 1, 2 (2023) (investigation found to be wholly inadequate when conducted by the accused harasser and not a neutral party).

employee personnel matters. When workplace conduct involves potential criminal conduct and unlawful conduct under M.G.L. c. 151B, the employer retains the responsibility to investigate the workplace conduct even where the police or other law enforcement may be investigating a related criminal charge.

The employer's investigation should generally include interviews of the victim, the alleged harasser, witnesses, individuals identified by any of the preceding parties as having knowledge of potential relevance to the allegations, and anyone else whom the employer believes may have such knowledge. Interviews should be conducted in a way that protects the privacy of the individuals involved to the extent practicable under the circumstances. They should also be conducted, where possible, in person. Recognizing that modern day workplaces might have fully or partially remote workforces, in person interviewing may be impractical, but should ideally be done via videoconference. Also, if the workplace has an open floor plan without private space, for example, it might be impossible to conduct in person interviews and maintain confidentiality. The employer's investigation should include a review of any documents, journals, recordings, photographs, videos, voicemails, emails, text messages, social media posts, web history, contemporaneous reports to family, friends, coworkers, or other items that may be relevant to the allegations of harassment.

The victim of harassment should be interviewed first with the understanding that they may be interviewed more than once depending on information developed throughout the investigation. The other witnesses should then be interviewed in the order most appropriate for developing facts. The investigator may seek pertinent documents from the parties and witnesses.

The investigator should take notes during the interview, or soon thereafter, for the purpose of maintaining accurate records. The investigator should obtain signed and dated statements from the victim and other interviewees as appropriate. At a minimum, the harassing incidents, dates, places, and identified witnesses should be memorialized in the investigator's notes, if not also within written witness statements. The investigator should create and maintain a confidential investigative file separate from the personnel files. The file should include any materials relevant to the investigation, including the initial written complaint (if applicable), interview notes, witness statements and evidence collected during the investigation. All evidence should be preserved by the employer until all potential legal liability has been resolved.

D. Interim Measures Pending the Outcome of the Investigation

During the investigation, it may be necessary for the employer to take measures to separate the alleged harasser from the complainant. These measures should be carefully crafted to minimize the chance that the alleged harasser will either continue to harass the complainant or will retaliate against them. The employer must also ensure the measures themselves do not amount to retaliation against the complainant. The employer should consider a number of factors in deciding what interim measures to take, including, but not limited to, the following:

- The expressed wishes of the complainant;
- The nature and extent of the allegations;
- The personal safety of the complainant;

- The number of complaints;
- Whether the alleged harassment is ongoing in nature;
- The behavior of the alleged harasser; and
- Whether the alleged harasser has an alleged or actual history of engaging in harassment.

Consideration of these factors may lead the employer to decide that certain interim measures are necessary. Such measures might include, but are not limited to:

- Placing the alleged harasser on administrative leave;
- Placing the complainant on administrative leave if the complainant so requests;
- Transferring the alleged harasser, or the complainant if they request, to a different area/department or shift so that there is no further contact between the complainant and the alleged harasser;
- Instructing the alleged harasser to stop the conduct;[104] and
- Eliminating the alleged harasser's supervisory authority over the complainant.

During the investigation, the employer has a duty to take the necessary steps to eliminate ongoing harassment at issue in the complaint, so long as evidence is catalogued and preserved. For example, if the employer discovers racist graffiti in the bathroom during its investigation, it should document the graffiti and then remove it immediately rather than waiting for the conclusion of the investigation. The fact that it may be burdensome for the employer to take such action does not diminish this duty. The employer should monitor any interim measures it takes throughout the investigation. Monitoring may include assessing whether the interim measures meet the goals of preventing ongoing harassment, protecting the safety of the parties, and preventing retaliatory conduct.

E. Outcome of the Investigation

After the employer's investigation is complete, the investigator should prepare a final written report documenting their findings. Generally, the investigator's report should detail the steps the investigator took in examining the complainant's allegations and explain any conclusions the investigator has made. The employer should promptly inform the complainant and the alleged harasser of its findings. If the employer concludes that harassment has occurred,[105] the employer must take prompt and effective remedial action designed to end the offending conduct and prevent future harassing conduct. Regardless of the investigator's findings, the employer should make follow-up inquiries to ensure that no one who cooperated with the investigation suffered any retaliation. The MCAD may request an employer's final written report as part of its investigation of the matter.

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[104] See, e.g., Phillips v. Electro-Term, Inc., 43 MDLR 27 (2021) (finding remedial measures inadequate where general manager promptly issued vague warnings about inappropriate language, but supervisor only joked with harassers to stop the harassment and no investigation was conducted until employee's departure).

[105] It is important to note that the employer's determination as to whether harassment did or did not occur does not in any way bind the Commission to make the same finding.

F. Remedial Actions

When an employer concludes that harassment has occurred, the employer must take prompt remedial action designed to end the harassment and prevent future harassment. What constitutes appropriate remedial action depends on the circumstances. Appropriate remedial action should reflect the nature and severity of the harassment, the existence of any prior incidents, and the effectiveness or lack thereof of any prior remedial steps.

Generally, remedial action consists of the following:

- Promptly investigating the harassment;
- Promptly halting any ongoing harassment;
- Changing the harasser's work assignment or office location to eliminate the interactions between the employee who has complained of harassment and the alleged harasser;
- Taking prompt, appropriate disciplinary action against the harasser;
- Redistributing the employer's anti-harassment policy;
- Conducting office-wide anti-harassment training;
- Taking effective actions to prevent the recurrence of harassment, including conducting anti-harassment training where appropriate; and
- Making the complainant whole by restoring any lost employment benefits or opportunities.

Whether the employer has taken prompt and appropriate remedial action in a given case depends upon many factors, including the timeliness of the action and whether, given the circumstances, the action was reasonably likely to stop the conduct and prevent it from reoccurring. If the initial remedial measures that the employer implemented did not stop the harassment, the employer should continue to take additional actions until the remedial measures succeed. The inquiry into whether the employer took appropriate action is not focused primarily on whether the remedial action ultimately succeeded, but should take into consideration whether, under the circumstances, the employer's total response was reasonable.[106] The efficacy of the action is not measured by whether the complainant feels that justice has been achieved, but whether the action was reasonably calculated to succeed.[107]

Failing to take steps to promptly remediate known harassment may itself be actionable as an adverse employment action sufficient to support a retaliation claim.[108]

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[106] See Modern Continental/Obayashi v. Massachusetts Comm'n Against Discrimination, 445 Mass. 96, 109 (2005).

[107] Compare, e.g., Philips v. Electro-Term, Inc., 39 MDLR 72 (2017), aff'd by Full Commission, 43 MDLR 27 (2021) (finding employer's investigation was not prompt and adequate based on the fact that the behavior continued despite employer's assurances that the behavior would cease) with Verne v. Pelican Products, Inc., 35 MDLR 155, 157 (2016) (finding no liability for employer who took adequate remedial steps by immediately investigating and terminating non-supervisory harasser on the same day for using a racial epithet).

[108] See Saxe v. Baystate Med. Ctr., Inc., 93 Mass. App. Ct. 1114 (2018) (summary decision and order issued pursuant to Rule 1:28).

XII. Training

The Commission strongly recommends that employers regularly conduct education and training programs on anti-harassment for all employees. Additionally, M.G.L. c. 151B, § 3A(e) specifically encourages employers to provide training against sexual harassment, within one year of commencement of employment. Any training specific to sexual harassment should make clear that harassment based on other protected classes is also unlawful. Employers are further advised to conduct additional anti-harassment training for supervisory and managerial employees in M.G.L. c. 151B, § 3A(e) within one year of employment or promotion, which should address their specific responsibilities as well as the steps that such employees should take to ensure immediate and appropriate corrective action in addressing harassment complaints. This is significant because employers are vicariously liable for the conduct of their supervisors. See Section VII above.

Employers should also train employees on how to recognize and report incidents of harassment. Employers should consider offering training addressing the realities of the modern, remote work environment that address harassment prevention in the remote workplace, including clear remote and other channels for reporting harassment. Employers are encouraged to conduct periodic assessments of their workplace culture and training (and policies) to identify and address potential areas of inclusion. The MCAD recommends and offers "bystander intervention training" which encourages all people to feel confident intervening when they witness an uncomfortable situation, for the well-being and safety of others. When all people in an organization are held to work together, the culture of the organization can shift in a way to prevent harassment.

XIII. Policy

The MCAD strongly encourages employers to have a broad anti-harassment policy which prohibits sexual harassment, M.G.L. c. 151B, § 3A(b), as well as harassment based on race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, veteran status, age (over 40), disability, or military service. Such anti-harassment policies should specify that employees are protected from harassment on the basis of their protected classes. Employer trainings and polices addressing diversity, equity and inclusion ("DEI") may complement anti-harassment policies and trainings.[109]

Anti-harassment policies should include language providing that:

- Harassment based on race, color, religious creed, national origin, sex, gender identity, sexual orientation, genetic information, pregnancy or pregnancy condition, ancestry, veteran status, age (over 40), disability, or military service in the workplace is unlawful;
- Sexual harassment in the workplace is unlawful;
- It is unlawful to retaliate against an employee for complaining about or otherwise opposing harassment, or for cooperating in an investigation of a complaint for harassment;

[109] See MCAD, COMMISSIONERS MEETING POLICY QUESTION-03, A STATEMENT FROM THE COMMISSIONERS OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION ON WORKPLACE DIVERSITY, EQUITY AND INCLUSION PROGRAMS AND POSITIONS (2024).

- A description and examples of harassment;
- A statement of the range of consequences for employees found to have committed harassment;
- A description of the process for filing internal complaints about harassment and the work address/telephone numbers/email of the person or persons to whom complaints should be made; and
- The identity of the appropriate state (MCAD) and federal (EEOC) employment discrimination enforcement agencies, and directions as to how to contact such agencies;
- Complaints of discrimination filed with the MCAD must be filed within 300 days from the last act of discrimination.

Employers should specifically prohibit the dissemination of harassing texts, voicemail, email, graphics, downloaded material, social media, or websites in the workplace and include these prohibitions in their workplace policies. This also includes a ban on sexually explicit material that is not otherwise relevant to an employee's job duties. Policies should be tailored to fit the employer's specific working conditions, such as frequent travel, sales calls, or employment-related social activity. For example, if an employer staffs its company with employees who travel frequently to customers' offices, employees should be advised that they are to always conduct themselves in a manner consistent with the anti-harassment policy, including when visiting customers' offices.

Employers must ensure that the policy is properly disseminated, that their employees have seen it and that their employees are aware of its existence. It is best practice to have employees acknowledge that they have received and read the policy upon hire, and on an annual basis, and to have that policy readily accessible to all employees whether it is placed in a shared drive or other electronic storage medium, or available in hard copy.

What constitutes sufficient dissemination of the policy may vary according to a number of factors, including the type of work the employee is engaged in (for example, a desk job versus on the sales floor), where the work is done (in-person versus remote), and what sort of access the employee has to the policy (a display in the lunch room does little for remote workers who are not in the office). Electronic distribution of the policy will suffice so long as employers ensure that their written policies are available to all employees, no matter their roles, schedules, access to employer intranet or other internal computer systems, or the location from which the employees work.

Once the policy has been implemented, employers should adhere to the policy and follow the processes when internal complaints of harassment are filed. An employer's failure to follow its policy is evidence of a failure to adequately remedy the purported discrimination.

The MCAD is required by M.G.L. c. 151B, § 3A(c) to provide a sexual harassment poster, which is available on its website here and or any of its offices. While there is no requirement for employers to post this poster, it is recommended that they do so.

The MCAD publishes the MCAD Model Sexual Harassment Policy for employers to adopt and use. If an employer opts to only have a sexual harassment policy and not an anti-harassment policy, M.G.L. c. 151B, § 3A requires that these policies include language providing that:

- Sexual harassment in the workplace is unlawful;
- It is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment;
- A description and examples of sexual harassment;
- A statement of the range of consequences for employees found to have committed sexual harassment;
- A description of the process for filing internal complaints about sexual harassment and the work address/telephone numbers of the person or persons to whom complaints should be made; and
- The identity of the appropriate state (MCAD) and federal (EEOC) employment discrimination enforcement agencies, and directions as to how to contact such agencies.

XIV. Enforcing the Right to be Free from Harassment at Work

The MCAD enforces M.G.L. c. 151B and it may impose broad remedies where it determines that unlawful workplace harassment has occurred. To initiate formal action, an employee must file a complaint with the Commission, whose addresses can be found on the MCAD website here. The complaint must be filed within 300 days of the last discriminatory act, subject to only very limited exceptions. An employee who has suffered unlawful workplace harassment is entitled to the remedies available in M.G.L. c. 151B, including but not limited to monetary damages for emotional distress or back wages due to job loss. The MCAD may also impose civil penalties, order training for employers and individuals, or impose other affirmative relief.