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## Massachusetts Commission Against Discrimination

### Meeting Minutes

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**Date/Time:** January 23, 2024 at 1:00PM  
**Place:** Massachusetts Commission Against Discrimination  
**Thursday | January 23, 2024 | 1:00PM**  
**HYBRID MEETING - USING YouTube**  
[https://www.youtube.com/channel/UCh\\_wjAthLJTQf-KMgMGv1Yw](https://www.youtube.com/channel/UCh_wjAthLJTQf-KMgMGv1Yw)

The Commission conducted this public meeting in person and remotely utilizing collaboration technology. Use of this technology is intended to ensure an adequate, alternative means of public access to the Commission's deliberations for any interested member of the public. All documents and presentations related to this agenda will be available for review on the MCAD website.

#### **Commissioners Present:**

Chairwoman Sunila Thomas George  
Commissioner Monserrate Rodríguez Colón

#### **1. Call to Order**

Chairwoman Thomas George called to order today's public meeting of the Massachusetts Commission Against Discrimination at 1:01 p.m. Roll call attendance was conducted; Commissioner Rodríguez Colón was present.

#### *Roll Call Vote:*

|                                     |             |
|-------------------------------------|-------------|
| <i>Chairwoman Thomas George</i>     | <i>Aye.</i> |
| <i>Commissioner Rodríguez Colón</i> | <i>Aye.</i> |

#### **2. Approval of Minutes from August 24, 2023**

Commissioner Rodríguez Colón and Chairwoman Thomas George unanimously voted to approve the minutes of August 24, 2023.

#### *Roll Call Vote:*

|                                     |             |
|-------------------------------------|-------------|
| <i>Chairwoman Thomas George</i>     | <i>Aye.</i> |
| <i>Commissioner Rodríguez Colón</i> | <i>Aye.</i> |

#### **3. Commissioners' Update**

Commissioner Rodríguez Colón expressed her excitement for the upcoming press release announcing the opening of the Massachusetts Commission Against Discrimination's ("MCAD" or "Commission") new Worcester office location and thanked the community for the support that was received. Commissioner Rodríguez Colón stated she is looking forward to MCAD's imprint in the City of Worcester, by continuing to offer services to our constituents in Central Massachusetts. Next, Chairwoman Thomas George stated she continues to serve on the Equal

Employment Opportunity Commission (“EEOC”) Joint Standing Committee and attends the monthly meetings, which have been truly beneficial to both MCAD and EEOC, to have a New England Fair Employment Practices Agency (“FEPA”) on the standing committee of only 10 different FEPAs. Chairwoman Thomas George stated much was learned from EEOC about their process, procedures, and initiatives. Chairwoman Thomas George announced she has been asked to serve on the CMS Procurement Committee and is grateful to be a member of this committee as they embark on identifying appropriate vendors and help shape MCAD’s next CMS system. Chairwoman Thomas George then stated that on November 20, 2023, MCAD had the privilege to host a delegation of transgender rights leaders from India, who are currently participating in the U.S. Department of State’s International Visitor Leadership Program (“IVLP”). The MCAD has hosted several international groups from different countries, but this is the first time Chairwoman Thomas George had the privilege of being in front of a group from India, which was very touching, and she was honored to be a part of that and thanked everyone who participated in that event. Lastly, Chairwoman Thomas George thanked Interim Executive Director Michael Memmolo for selecting a qualified candidate for the position of Press Secretary, Director of Communications, & Legislative Liaison, who through press releases and social media, has helped showcase the agency’s commitment to expand its services and efforts to eradicate discrimination across the Commonwealth, in addition to sharing momentous occasions and events.

#### **4. Interim Executive Director’s Update**

Interim Executive Director Michael Memmolo thanked both Commissioners and staff for attending the grand opening of the MCAD Worcester office. Interim Executive Director Memmolo thanked State Senator Robyn Kennedy, State Representative Mary Keefe, Worcester City Manager Eric D. Batista, and Worcester Mayor Joseph Petty for attending, as well as Governor Healey’s Policy and Cabinet Affairs Liaison Rubby Wuabu. With the opening of the Worcester office, Interim Executive Director Memmolo hopes that individuals in Central Massachusetts, Worcester County and Worcester will visit and utilize the agency’s vital services. The Worcester office opened officially to the public on January 22, 2024, with a full complement of MCAD staff that are permanently assigned to the Worcester office and beginning January 24, 2024, MCAD will open the Worcester office to all other MCD staff who wish to voluntarily work periodically in that office, with manager approval and communication with the Director of Human Resources.

Interim Executive Director Memmolo went on to discuss MCAD’s budget. Interim Executive Director Memmolo stated that the agency is financially stable, and the agency is anticipating a small surplus of funds that were budgeted for positions that have not yet been filled. The plan is to use those funds to perform necessary security, IT and safety upgrades in the Springfield office. Currently, the Springfield office has carpet, which has not been replaced in over two decades, as well as each cubicle that has exposed frayed wiring, that are potential fire and personal safety issues. Further, the IT infrastructure in the Springfield office is not properly ventilated, which has led to the overheating of that equipment, which could be detrimental to the agency’s data. Additionally, the Springfield Office is the only office not currently under the agency’s direct security control, so the plan would be to integrate the Springfield office into the agency’s existing security process. Interim Executive Director Memmolo stated he is currently working with Division of Capital Asset Management and Maintenance (“DCAMM”) and has received

approval to move forward with the Springfield office renovations. A DCAMM representative has been assigned to MCAD to assist in requesting quotes and proposals for the anticipated labor. Projects will be prioritized based on the amount of funds MCAD has available and the quotes received. The work must be done before June 30, 2024, and Interim Executive Director Memmolo is confident that working with DCAMM, the work will be completed or most of it by June 30th. Interim Executive Director Memmolo acknowledged the fiscal year 2024 statutory change to M.G.L. c.6, §56, which will now require the MCAD to have a field office in Fall River as opposed to New Bedford. A few months ago, Chief Callahan and Interim Executive Director Memmolo, scouted potential sites and agencies that are currently established in the Fall River area. Interim Executive Director Memmolo announced that there have been discussions with DCAMM to assist in facilitating shared space agreements with some of the established agencies and DCAMM has begun to reach out to some of those agencies. Interim Executive Director Memmolo anticipates within the next week or two to have more information from DCAMM and reminds the Commissioners that a full procurement would not be necessary, and this would be an Internal Service Agreement (“ISA”) with another agency, which means the process could be expedited quickly and could facilitate the opening of another MCAD office before the conclusion of the fiscal year.

Interim Executive Director Memmolo stated that fiscal year 2024 has seen a steady decline of revenue that necessitated the Governor to take certain cuts to some agencies, not MCAD. Interim Executive Director Memmolo continues to monitor the financial picture of the Commonwealth and currently does not anticipate any cuts for fiscal year 2024. However, the agency is bracing for more conservative funding in the next fiscal year. The Governor's budget is due to be released soon and will provide more insight on how agencies will be funded going forward in fiscal year 2025. He discussed how the management team, in collaboration with staff, have consistently come up with new and innovative ways to accomplish the work that the agency is doing. Interim Executive Director Memmolo stated funding will be a roadblock going forward, but the MCAD will continue its mission. Interim Executive Director Memmolo has given directives out to the managers to begin to convene working groups within their units to identify the process changes that we can either implement or bring to the Commissioners, to be more effective and efficient.

Interim Executive Director Memmolo stated that since the beginning of the fiscal year 2024, the agency has onboarded 13 new employees, but the agency is still struggling with attrition. The agency has lost 7 employees during the same time, this has brought the agency to 85% of the total budget for the staffing goal for this fiscal year. The total staffing goal is 97 employees at the agency and currently, the agency has approximately 15 positions that still need to be filled before June 30th. Twelve of those positions are posted at this present time.

Interim Executive Director Memmolo announced the approval of an agency unit restructuring Alternative Dispute Resolution unit, commonly known as the ADR unit. The ADR unit will transition to the Office of the General Counsel, effective February 12<sup>th</sup>. Lastly, Interim Executive Director Memmolo thanked the Commissioners, managers, and staff for their work on the Fiscal Year 2023 Annual Report, which will be publicly published next week. Interim Executive Director Memmolo echoed the Chairwoman Thomas George's remarks about MCAD's Press Secretary, Director of Communications and Legislative Liaison, Justine LaVoye.

Chairwoman Thomas George and Commissioner Rodríguez Colón thanked Interim Executive Director Memmolo and were pleased with the Interim Executive Director’s updates. Commissioner Rodríguez Colón also suggested a Community Open House for Springfield Office once renovations are complete.

**5. Discussion of draft document containing proposed 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]**

Chairwoman Thomas George and Commissioner Rodríguez Colón thanked General Counsel Deirdre Ann Hosler and staff for drafting a statement for the Commission. General Counsel Hosler stated MCAD is aware that since the issuance of the U.S. Supreme Court’s consolidated decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina* (“SFA decision”), on June 29, 2023, employers across the Commonwealth have increasingly expressed concerns and anxieties about the viability of workplace initiatives commonly known as diversity, equity and inclusion (“DEI”) and equal access programs or positions. These fears and anxieties have been stoked by, among other things, public declarations in the wake of the SFA decision that employer DEI programs by necessity convey workplace benefits and /or deny opportunities based on race and are accordingly illegal. To the contrary, many types of DEI work are designed to address barriers and eliminate discrimination in the workplace, not introduce it and the MCAD Commissioners, reject the notion that employer DEI efforts are categorically unlawful under Chapter 151B.

*Vote to approve the draft document containing proposed MCAD Commissioners Meeting Policy Question-03:*

Unanimous vote to approve the draft document containing proposed 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].

*Roll Call Vote:*

|                                     |             |
|-------------------------------------|-------------|
| <i>Chairwoman Thomas George</i>     | <i>Aye.</i> |
| <i>Commissioner Rodríguez Colón</i> | <i>Aye.</i> |

**6. Request from the General Counsel to post January 18, 2024 draft of MCAD “Guidelines on Harassment in the Workplace” on the MCAD website for 60-day public comment period**

General Counsel Hosler gave a summary about the Guidelines on Harassment in the Workplace. The current guidelines have remained unchanged since 2002, when they were implemented, and it has been a group effort from the members of the legal division and legal staff across the agency who have contributed greatly. Updating these sets of guidelines is meant to bring the guidelines fully into a modern era. General Counsel Hosler stated the three key components to modernizing the guidelines are that it covers all harassment in the workplace, not just sexual

harassment, the removal of all gender pronouns, clarifying that unlawful harassment can happen to any employee regardless of their gender, sex, or any other protected category, and it will be applied to the modern workplace, for example, online harassment. The draft guidelines will be posted on the MCAD website for a period of 60 days.

*Vote to post January 18, 2024 draft of MCAD “Guidelines on Harassment in the Workplace” on the MCAD website for 60-day public comment period:*

Unanimous vote to post January 18, 2024 draft of MCAD “Guidelines on Harassment in the Workplace” on the MCAD website for 60-day public comment period.

*Roll Call Vote:*

*Chairwoman Thomas George*

*Aye.*

*Commissioner Rodríguez Colón*

*Aye.*

**7. Recommendation from the General Counsel to proceed with the posting of the Executive Director Job Description**

General Counsel Hosler requested permission from the Commissioners to proceed with the posting of the Executive Director Job Description approved at the open meeting on July 18, 2023, and to begin candidate screening and initial interviews via the MCAD’s internal customary process for manager hiring. General Counsel Hosler proposed that the initial screening and interviewing of candidates is done internally and consistent with the MCAD’s customary hiring process for managers. The key components to the hiring process are the posting and dissemination of the job description, the review of resumes for minimum qualifications, a diverse candidate pool, a hiring panel that drafts a set of questions and a scoring rubric for all interviews and conduct first round interviews that are scored. With the help of the Press Secretary, General Counsel Hosler will curate a list job posting sites, prominent affinity organizations, cities and towns, Human Rights Commissions, alumni, and networks, among other places far and wide to broadcast the posting. The posting will remain open for 30 days, at a minimum before selecting the first round of candidates and then finally it would culminate in delivering at least three final candidates for the Commissioners to choose amongst, at an open meeting with final interviews and selecting a final candidate. Commissioner Rodríguez Colón stated she would like to ensure an open and competitive process and encourage internal employees to apply, as well as the agency’s outreach to various diverse communities, out-of-state organizations to be included.

*Vote to proceed with the posting of the Executive Director Job Description approved at the open meeting on July 18, 2023, and to begin candidate screening and initial interviews via the MCAD’s internal customary process for manager hiring:*

Unanimous vote to proceed with the posting of the Executive Director Job Description approved at the open meeting on July 18, 2023, and to begin candidate screening and initial interviews via the MCAD’s internal customary process for manager hiring

*Roll Call Vote:*

*Chairwoman Thomas George*

*Aye.*

*Commissioner Rodríguez Colón*

*Aye.*

6. **Business - Reserved for matters the Chair did not reasonably anticipate at the time of posting.** None.

7. **Next Meeting Date:** TBD

8. **Adjournment** – The meeting concluded at 1:49 p.m.

Unanimous vote to adjourn.

*Roll Call Vote:*

*Chairwoman Thomas George*

*Aye.*

*Commissioner Rodríguez Colón*

*Aye.*

### **List of Documents and Other Items Used**

1. Notice of Meeting and Agenda dated January 23, 2024
2. Final draft Meeting Minutes from August 24, 2023
3. January 18, 2024 draft MCAD Guidelines on Harassment in the Workplace
4. 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]
5. Executive Director Job Description approved at the open meeting on July 18, 2023



# Massachusetts Commission Against Discrimination

## Guidelines on Harassment in the Workplace

Issued: [INSERT DATE]

January 18, 2024

DRAFT

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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(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, 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.<sup>1</sup>

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"<sup>2</sup> 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).

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, informing employees that their conduct does not need to meet the definition of "unlawful harassment" in order for the employer to determine that the conduct violates the anti-harassment policy, prohibiting retaliation against anyone who reports harassment, or participates in an investigation, and allowing anonymous reporting of harassment.

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)

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<sup>1</sup> 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.

<sup>2</sup> "Quid pro quo" means "something given or received for something else." *Quid pro quo*, Merriam-Webster's Collegiate Dictionary (11th ed. 2019).

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](https://www.mass.gov/info-details/massachusetts-commission-against-discrimination)

## **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).

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, sexually explicit text messages (“sexting”; 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.<sup>3</sup> 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.<sup>4</sup> 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,<sup>5</sup> 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, 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.<sup>6</sup> An employee does not have to communicate

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<sup>3</sup> See Melnichenko 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).

<sup>4</sup> 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. Dept. of State Police, 60 Mass. App. Ct. 655, 662 (2004).

<sup>5</sup> For further explanation on the latter point relating to quid pro quo harassment, see Section [II.C.](#)

<sup>6</sup> 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).

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<sup>7</sup> but unwelcomeness is logically 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. 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. A scenario where an employee incidentally receives favorable treatment as a result of a consensual workplace relationship is distinct from one in which 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, because the latter scenario is fundamentally coercive. For these reasons, an employee who proves the two elements above, whether they rejected or submitted to sexual conduct, proves that the conduct in question was unwelcome.

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<sup>7</sup> 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).

Relatedly, unlawful quid pro quo sexual harassment occurs any time submission to or rejection of a sexual advance, requests for sexual favor, or other verbal or physical conduct of a sexual nature is made explicitly or implicitly a term or condition of employment or 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 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 <sup>8</sup>

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.

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. 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. If adverse action is threatened but not carried out after an employee rejects sexual advances or conduct, an employee does not have a claim of quid pro quo sexual harassment.<sup>9</sup>

Some examples of quid pro quo sexual harassment include:

- A restaurant manager tells a server that they will not be assigned to the lucrative dinner shift if they do not have sex with him;

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<sup>8</sup> See, e.g., 804 CMR 1.09 (5) (2020) (affirmative relief in the public interest available at conciliation).

<sup>9</sup> However, the employee may have a hostile work environment claim. Any threat to deny job benefits or otherwise alter an employee's terms and conditions of employment as a consequence for rejecting sexual conduct is inherently abusive, and even one threat could be enough to support a hostile work environment claim depending on the totality of the circumstances. See Section [II.D](#) below. The employee may also have a constructive discharge claim if the unexecuted threat makes working conditions so intolerable that a reasonable employee would feel they have no alternative but to quit. See Section [X](#).

- An employee who controls the assignment to a prestigious project assigns an employee to work on that project in exchange for sexual favors or gratification, or withholds assignment if the employee rejects sexual advances;
- A supervisor terminates an employee who refuses to go on a date with the supervisor; or
- A supervisor demotes an employee after they object to the supervisor's inappropriate touching.

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<sup>10</sup> 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;

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<sup>10</sup> 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.



- 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<sup>11</sup> 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.<sup>12</sup> 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—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.<sup>13</sup> 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.<sup>14</sup>

## 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.<sup>15</sup> 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

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<sup>11</sup> See Section [II.A](#) above.

<sup>12</sup> See Section [II.A](#) above.

<sup>13</sup> For other evidence of unwelcomeness see Section [II.B](#).

<sup>14</sup> See, e.g., *Hernandez v. Beautiful Rose Corp.*, 42 MDLR 139, 140 (2020).

<sup>15</sup> 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.

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.<sup>16</sup>

### **3. Conduct that Alters the Conditions 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.<sup>17</sup> Whether conduct impedes an employee's full participation in the workplace is a question of fact based on the totality of the circumstances.<sup>18</sup> 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 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 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,<sup>19</sup> 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;

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<sup>16</sup> 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).

<sup>17</sup> 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'")

<sup>18</sup> 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'").

<sup>19</sup> See, e.g., Osorio v. Standhard Physical Therapy, 45 MDLR 1 (2023), citing Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290, 296 (2016).



- Whether the joking was personal to the employee;<sup>20</sup>
- 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.

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.<sup>21</sup> 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,<sup>22</sup> hostile work environments are determined exclusively on a case-by-case basis and uniform descriptions of what constitutes abuse risk overstatement.<sup>23</sup>

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

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<sup>20</sup> 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).

<sup>21</sup> 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).

<sup>22</sup> 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).

<sup>23</sup> 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 Dept., 22 MDLR 208, 214 (2000), quoting Carlton v. Worcester School Dept., 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.

employee's body by a supervisor.<sup>24</sup> 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. 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,<sup>25</sup> their perceived membership in a protected class, or their association<sup>26</sup> 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

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<sup>24</sup> 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).

<sup>25</sup> 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.")

<sup>26</sup> 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).

employee because of handicap (i.e., disability) violates the prohibition in M.G.L. c. 151B, § 4(16) to “otherwise discriminate” because of handicap,<sup>27</sup> and harassment of employees on the basis of military service is an unlawful denial of “any benefit of employment” under M.G.L. c. 151B, § 4(1D).<sup>28</sup>

There is overlap and distinction between sexual harassment and harassment 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.<sup>29</sup> By contrast, harassment based on sex occurs when an employee is harassed precisely because of their sex. Sex discrimination is a broad category that does not require conduct of a sexual nature, and harassment based on sex includes non-sexual conduct based on sex, including sexist comments and bullying based on sex.<sup>30</sup> Sex

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<sup>27</sup> 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 Insurance Co., 24 MDLR 55 (2002); Joseph v. Massachusetts Department of Children and Families, 45 MDLR 5 (2023). Cf. 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 Sleeper v. New England Mutual Life Insurance Co., Inc., 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).

<sup>28</sup> 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.

<sup>29</sup> See Section [II.A.](#)

<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup>

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

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,<sup>33</sup> jokes, gossip, epithets, or 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 of a protected class, or are associated with a member of a protected class.<sup>34</sup> 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.

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<sup>31</sup> 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).

<sup>32</sup> 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).

<sup>33</sup> 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.

<sup>34</sup> 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

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<sup>35</sup> or that the supervisor subjected the employee to less desirable working conditions and directed race-based comments at others.<sup>36</sup>

## **B. Conduct Must be Unwelcome**

Chapter 151B does not prescribe 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,<sup>37</sup> 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 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.

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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).

<sup>35</sup> See, e.g., O'Leary v. Brockton Fire Dept., 43 MDLR 15, 17 (2021) (inferring disability harassment based on the temporal proximity between harassment and employee's disability disclosure).

<sup>36</sup> 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).

<sup>37</sup> For further explanation on the latter point relating to quid pro quo harassment, see Section [III.C.](#)



### C. Quid Pro Quo Protected Class Harassment

Quid pro quo protected class harassment is atypical 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.<sup>38</sup> 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 as 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 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.

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<sup>38</sup> 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.

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. .<sup>39</sup>

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. If adverse action is threatened but not carried out after an employee rejects harassing conduct, an employee does not have a claim of quid pro quo protected class harassment, but they may have a hostile work environment claim.<sup>40</sup>

Some examples of quid pro quo protected class harassment include:

- An employee whose continued employment is conditioned on their willingness to conform and participate in their employer's religious practices;<sup>41</sup> or

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<sup>39</sup> See M.G.L. c. 151B, § 5; 804 CMR 1.09(5) (2020) (affirmative relief in the public interest available at conciliation).

<sup>40</sup> Any threat to deny job benefits or otherwise alter an employee's terms and conditions of employment as a consequence for rejecting harassing conduct is inherently abusive, and even one threat could be enough to support a hostile work environment claim depending on the totality of the circumstances. See Section [II.D](#). The employee may also have a constructive discharge claim if the unexecuted threat makes working conditions so intolerable that a reasonable employee would feel they have no alternative but to quit. See Section [X](#).

<sup>41</sup> 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

- 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.<sup>42</sup>

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 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 employee's race are obviously directly about their membership in a protected class.<sup>43</sup> However, abusive behavior might be based on an employee's membership in a protected class given the

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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.)

<sup>42</sup> See, e.g., Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007).

<sup>43</sup> 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).



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. Harassing conduct caused by an employer's unconscious bias causes just as much injury as blatant discrimination.<sup>44</sup>

## **1. Subjectively Offensive Conduct (Unwelcome)**

Harassing conduct<sup>45</sup> 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.<sup>46</sup> 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 it subjectively offensive.<sup>47</sup>

## **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.<sup>48</sup> 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

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<sup>44</sup> 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), citing Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 686 (2016).

<sup>45</sup> See Section [III.A](#) above.

<sup>46</sup> See Section [III.B](#) above.

<sup>47</sup> See, e.g., Hernandez v. Beautiful Rose Corp., 42 MDLR 139, 140 (2020).

<sup>48</sup> Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 412 (2001).

to a reasonable person in the employee's position.<sup>49</sup> Ultimately, an examination into the totality of circumstances is necessary.

### 3. Conduct that Alters the Conditions 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.<sup>50</sup> Whether conduct impedes an employee's full participation in the workplace is a question of fact based on the totality of the circumstances.<sup>51</sup> 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 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,<sup>52</sup> 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.<sup>53</sup> 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

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<sup>49</sup> 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).

<sup>50</sup> See *Cuddy v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 532 (2001) ("[a] hostile work environment is one that... 'poses a formidable barrier to the full participation of an individual in the workplace'"), quoting *College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination*, 400 Mass. 156, 162 (1987).

<sup>51</sup> *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'").

<sup>52</sup> See, e.g., *MCAD and Melissa Verne v. Pelican Products, Inc.*, 38 MDLR 155, 157 (2016).

<sup>53</sup> See, e.g., *MCAD and 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).

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;<sup>54</sup>
- Whether the joking was personal to the employee;<sup>55</sup>
- 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
- 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.<sup>56</sup> 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,<sup>57</sup> hostile work environments are determined exclusively on a case-by-case basis and uniform descriptions of what constitutes abuse risk overstatement.<sup>58</sup>

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<sup>54</sup> 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).

<sup>55</sup> 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).

<sup>56</sup> 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).

<sup>57</sup> 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).

<sup>58</sup> 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

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.<sup>59</sup> 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. Intersectional Harassment**

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 protected class, but because of their concurrent membership in two or more protected classes.<sup>60</sup> An employee might have a claim under M.G.L. c. 151B that alleges harassment based on concurrent membership in multiple protected classes.<sup>61</sup>

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. 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

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insufficiently abusive behavior”) and contrast Kelley v. Plymouth County Sheriff’s Dept., 22 MDLR 208, 214 (2000), quoting Carlton v. Worcester School Dept., 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.

<sup>59</sup> See, e.g., Augis Corp. v. Massachusetts Comm’n Against Discrimination, 75 Mass. App. Ct. 398, 408–09 (2009).

<sup>60</sup> 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).

<sup>61</sup> 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).

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 male employee with a disability who is discriminated on 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.

#### **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.<sup>62</sup> To determine whether conduct outside of the workplace constitutes unlawful harassment, the Commission may consider the following non-exhaustive list of factors:<sup>63</sup>

- 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

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<sup>62</sup> 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).

<sup>63</sup> See, e.g., *Picco v. Town of Reading*, 38 MDLR 42, 46 (2016).



hybrid work environments. Depending on many considerations including the factors above, harassment claims can involve conduct entirely inside the workplace, outside the workplace, or a combination of both.<sup>64</sup>

## **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 40, and therefore minors cannot bring age discrimination claims. However, if a minor is subjected

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<sup>64</sup>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).

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.<sup>65</sup> 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(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**

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<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup> An employer might also give such an

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<sup>66</sup> 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).

<sup>67</sup> 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).

<sup>68</sup> 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.<sup>69</sup>

## **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, 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.<sup>70</sup> 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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<sup>69</sup> See, e.g., Robinson v. Haffner's Service Stations, 23 MDLR 283, 287 (2001), aff'd by Full Commission, 24 MDLR 393 (2002).

<sup>70</sup> 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(16) (discrimination) and 4(16A) (sexual harassment). A common example of an individual who is an employer is a business owner of a business 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.<sup>71</sup> 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.<sup>72</sup>

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<sup>71</sup> 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”).

<sup>72</sup> 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(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).<sup>73</sup>

## **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, § 4(4A) which may be shown by a deliberate disregard of those rights.<sup>74</sup> 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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<sup>73</sup> 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)

<sup>74</sup> 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;<sup>75</sup>
- Human resources employee deliberately obstructs a discrimination investigation;<sup>76</sup>
- 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.<sup>77</sup>

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.<sup>78</sup>

<sup>75</sup> See, e.g., Leahy v. City of Boston Fire Dept., 42 MDLR 155, 158 (2020) (highlighting likely unlawful conduct of unnamed respondent).

<sup>76</sup> See, e.g., Canton v. Biga Wholesale, Inc., 42 MDLR 75, 76 (2020).

<sup>77</sup> 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).

<sup>78</sup> 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.<sup>79</sup>

## **VIII. Retaliation**

It is unlawful for an employer or individual to retaliate against an employee who alleges discriminatory harassment.<sup>80</sup> 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 is separate from a claim of unlawful workplace harassment, and, as such, a retaliation claim may be successful even where the underlying claim of discrimination fails.<sup>81</sup>

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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<sup>79</sup> 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).

<sup>80</sup> 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.

<sup>81</sup> 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 or should have known about; (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,<sup>82</sup> and that the decision to retaliate against them was a determinative factor in the adverse action.<sup>83</sup>

A highly relevant factor in the causation analysis is the proximity in time between the adverse action and the protected activity.<sup>84</sup> 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;
- 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 should have known of the protected activity when it took adverse action.<sup>85</sup> 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

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<sup>82</sup> 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)

<sup>83</sup> See Loewy v. Ariad Pharmaceuticals, Inc., 42 MDLR 28, 32 (2020), citing Tate v. Dept. of Mental Health, 419 Mass. 356, 362 (1995).

<sup>84</sup> See id. at 30 (proximity permits trier of fact to infer causal connection, but does not, by itself, establish causation).

<sup>85</sup> 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).



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.<sup>86</sup> As a result, adverse actions under these sections include, but are not limited to:

- Termination;
- Denial of promotion;
- Demotion in title or duties;
- Transfer to a less favorable 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;<sup>87</sup>
- Exclusion from employer-sponsored social activities or events; or
- Retaliatory harassment.

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.<sup>88</sup>

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<sup>86</sup> Leahy v. City of Boston Fire Dept., 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).

<sup>87</sup> 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).

<sup>88</sup> 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 Dilorio 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

**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 continuous 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.

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 adequately 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.<sup>89</sup>

If the employee establishes a continuing violation, harassing events occurring outside the 300 days will be considered timely, so long as the last act of discrimination occurred within 300 days of the

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monies owed and caused employee’s ex-wife’s mini-van to be repossessed), aff’d by Full Commission, 40 MDLR 108 (2018).

<sup>89</sup> See Cuddy v. The Stop & Shop Supermarket Co., 434 Mass. 521, 539-40 (2001).



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 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.

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. 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. 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) are the nature 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.<sup>90</sup>
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**

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<sup>90</sup> 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.

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 that harmed the employee continued into the 300-day period, not that the discriminatory act has occurred within the 300-day period.

## **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 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.<sup>91</sup>

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 her 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.<sup>92</sup> For example, it may not be reasonable for an employee who is sexually harassed by the president of the company

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<sup>91</sup> See, e.g., Michaela Martins v. Isabels 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).

<sup>92</sup> 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)

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 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.<sup>93</sup>

## **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. 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.<sup>94</sup> 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. 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

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<sup>93</sup> 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.

<sup>94</sup> See, e.g., *Gyulakian v. Lexus of Watertown, Inc.*, 475 Mass. 290, 296 (2016).

complaint, employees alleging harassment must not be treated differently because of protected class.

#### **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 to ensure neutrality. None of the affected parties, whether the complainant, witnesses, or the accused perpetrator of discrimination should conduct the investigation.<sup>95</sup> 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.

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<sup>95</sup> See, e.g., Osorio v. Standhard Physical Therapy, 45 MDLR 1, 2 (2023) (finding investigation started less than 24 hours after the accusation wholly inadequate when conducted by the accused harasser and not a neutral party).

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 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. 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 interviewees. 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;<sup>96</sup> 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,<sup>97</sup> 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.

#### **F. Remedial Actions**

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<sup>96</sup> 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).

<sup>97</sup> 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.



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.<sup>98</sup> 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.<sup>99</sup>

Failing to take steps to promptly remediate known harassment may itself be actionable as an adverse employment action sufficient to support a retaliation claim.<sup>100</sup>

## **XII. Training**

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<sup>98</sup> See Modern Continental/Obayashi v. Massachusetts Comm'n Against Discrimination, 445 Mass. 96, 109 (2005).

<sup>99</sup> Compare, e.g., Philips, 39 MDLR 72 (2017), aff'd by Full Commission, 43 MDLR 37 (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).

<sup>100</sup> See Saxe v. Baystate Med. Ctr., Inc., 93 Mass. App. Ct. 1114 (2018) (summary decision and order issued pursuant to Rule 1:28).

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. 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.

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 filing a complaint of harassment or for cooperating in an investigation of a complaint for harassment;
- 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.

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(d) 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.

DRAFT



***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]***

***Decided at open meeting held on January 23, 2024***

We, the Commissioners at the Massachusetts Commission Against Discrimination (“MCAD” or “Commission”), are aware that since the issuance of the U.S. Supreme Court’s consolidated decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* (“SFA decision”), on June 29, 2023, employers across the Commonwealth have increasingly expressed concerns and anxieties about the viability of workplace initiatives commonly known as diversity, equity and inclusion (“DEI”) and equal access programs or positions. These fears and anxieties have been stoked by, among other things, public declarations in the wake of the SFA decision that employer DEI programs by necessity convey workplace benefits and /or deny opportunities based on race and are accordingly illegal.

As an important preliminary matter, the SFA decision does not address unlawful discrimination in employment. Moreover, since 1946, discrimination based on race, national origin and other protected class membership in hiring, retention, promotion, and other employment practices has been illegal in the Commonwealth under Chapter 151B. Employment discrimination based on race, color, national origin, and other protected categories has been and continues to be unlawful in Massachusetts.

Broadly speaking, equity work in the DEI space acknowledges and engages with the effects of centuries of systemic discrimination in American society with respect to numerous historically marginalized groups, including people of color, and it does not, in and of itself, and without more, constitute race or other unlawful discrimination under Chapter 151B. It is not unlawful for employers to contemplate or address the ways in which racism or other forms of discrimination have affected its workforce or the composition of its teams, divisions, units, programs, culture, or other workplace conditions. To the contrary, employers have an affirmative duty to ensure that their workplaces are free from unlawful discrimination based on race and other protected class membership. Examining ways to guard against implicit bias in hiring or promotional processes, for example, is just one way in which DEI work might serve employers’ affirmative duties under

the law, not undermine them. Training that addresses both implicit and explicit biases, bystander intervention, and inclusive practices and strategies for greater understanding of differences within a workforce is another. Mentoring programs and ombudsman mediators that can facilitate acceptance, empathy, and equal opportunity for growth, are yet another. These and many other types of DEI work are designed to address barriers and eliminate discrimination in the workplace, not introduce it. The pursuit of diversity, equity, inclusion, and equal access is not inherently a zero-sum endeavor, necessitating that if some are included, others must be excluded based on their membership in a protected class.

For these reasons alone, we, the MCAD Commissioners, reject the notion that employer DEI efforts are categorically unlawful under Chapter 151B. The details regarding DEI programs, initiatives, or efforts in any one workplace are entirely fact-specific and must be examined on a case-by-case basis. In short, so long as employers do not discriminate against employees in the terms or conditions of their employment based on race, color, national origin, or other protected categories as proscribed by Chapter 151B, they are free to creatively engage in how to develop and maintain diverse, equitable and inclusive work environments that provide equal opportunities to their employees. Moreover, to the extent that DEI work facilitates workplaces free of unlawful discrimination, such work aligns with employers' affirmative duties under the law.



## ***MCAD Executive Director Job Description***

### **General Statement of Duties**

The Executive Director is the executive, operational and administrative head of the Massachusetts Commission Against Discrimination (“Commission” or “agency”) responsible for overseeing agency operations in service to the Commission’s mission to eradicate discrimination in the Commonwealth. The Executive Director is responsible for developing and executing the Commission’s strategic plan, and ensuring that the Commission fulfills its statutory mandates through respectful leadership of agency personnel, and open, collaborative communication with the Commissioners. The Executive Director manages the Commission’s senior management team and other agency personnel and serves as the liaison between the three MCAD Commissioners and agency staff. The Executive Director reports to and is annually evaluated by the three MCAD Commissioners.

### **Detailed Duties**

#### **I. Leadership**

1. In collaboration with agency Commissioners and senior leadership team works to develop strategic planning, and implements the Commission’s vision, goals and objectives using best business practices, available resources, and appropriate allocation of funds
2. Responsible for fostering a mission-forward agency culture, ensuring that strategy and allocation of resources serves the overarching mission to eradicate discrimination in the Commonwealth
3. Represents the agency to the public; serves as Commission spokesperson in dealings with the media and approves all agency press releases and publications
4. With respect to all assigned duties, communicates consistently, regularly, and effectively with the Commissioners in one-on-one and public meetings to ensure that the Commissioners are kept apprised of agency operational developments and fully briefed on Commissioners’ meeting agenda items requiring discussion and a vote
5. Acts as primary liaison between agency and Commissioners and the MCAD Advisory Board, manages the relationship and works with the MCAD Advisory Board
6. In collaboration with key staff, drafts legislative recommendations and develops the Commission’s legislative agenda; acts as the Commission’s liaison to the legislature and stakeholders, acts as primary communicator to those groups on the agency’s behalf including sending correspondence as the agency administrative head

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7. Acts as primary liaison to the agency's federal partners; the U.S. Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD)

## **II. Operations and Administration**

1. Oversees all operations, administration, budget and finances of the agency, personnel, and information technologies
2. Works with key staff to develop and implement internal policies, protocols, and procedures to effectuate agency programs and ensure compliance with all applicable state and federal laws, regulations, collective bargaining agreements, and requirements
3. Serves as manager of the senior management team and from time to time, various other supervisors
4. Attends and participates in all Commissioners' meetings, works with staff to prepare for meeting presentations and policy discussions, implements all Commissioner-approved actions or follow up as directed in meetings
5. Delivers reports to the Commissioners on activities generally within Executive Director control, i.e., agency operations, finances, budget status and preparation, audits, and overall agency management; prepares the Commissioners for votes on all matters appropriate for Commissioners to vote upon as generally provided for in M.G.L. c. 151B, sec. 3
6. Prepares the Commission's annual report
7. Serves as the appointing authority for the agency for all positions reporting up to the Executive Director and is responsible for maintaining an organizational structure that will best serve the mission and organizational goals, as well all personnel matters, including hiring Commission staff and instituting any necessary disciplinary or other corrective action. Approval by the Commission to create or backfill senior management positions is required; senior management positions are those that report directly to the Executive Director
8. Responsible for agency risk assessment, final budget preparation for presentation to the Commissioners, and agency operations
9. Identifies any risks to the reputation, safety, security, and finances of the agency and develops risk management policies and protocols; implements processes and procedures to mitigate risk by implementing the agency's Internal Controls Plan
10. Assesses organizational opportunities for improving agency operations including all of the considerations with respect to risk assessment

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11. Responsible for final agency audit responses and corrective action
12. Oversees the planning and preparation of Commission publications including website, reports, email communications and letters, social media, informational and related materials to further the Commission's mandate and goals
13. Responsible for training of agency staff ensuring all are competent and knowledgeable of regulations, laws, policies, and procedures pertaining to their job responsibilities, including standardization in the use of agency application and systems
14. Responsible for overall buildings facilities management, security, safety issues, managing facilities relationships
15. Oversees and manages agency services and public information priorities and strategy including website and information technologies
16. Oversees all procedures regarding record management and retention / destruction, telecommunications, health and safety, security, quality assurance and mail
17. Oversees and manages procurement and purchasing, and inventory of supplies and goods and services
18. Responsible for the retention and security of agency data including the agency's case management (CMS) applications and systems Oversees all policies regarding replacement, security and maintenance on all computers, laptops, printers, copiers, faxes, telephones, and other electronic communication devices

### **III. Budget and Finance**

1. Responsible for the agency's budget process, supervising the accounting and related financial services, monitoring sources of agency funding
2. Presents yearly funding recommendations the Commissioners for approval
3. Oversees agency purchasing process, and ensuring that agency employees are informed about and follow OSD procurement policies and procedures, particularly regarding large vendor and consulting procurements, ensuring compliance with the Commonwealth's supplier diversity program
4. Develops and presents information to legislators, analysts and staff about Commission funding needs

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5. Coordinates budget development with the Commonwealth's Administration and Finance budget staff; coordinates budget development strategies with House/Senate Ways and Means staff
6. Recommends administrative budget requests and budget allocations. Ensure proper and timely allocation of funds and transfers
7. Communicates budget needs to external constituents including the Executive Office of Administration and Finance, legislators, and legislative staff, including testifying in front of the Legislature's Joint Committee on Ways and Means
8. Ultimately responsible for executing and performance of the agency's federal workshare agreements

#### **MINIMUM ENTRANCE REQUIREMENTS:**

Applicants must have at least (A) eight (8) years of full-time or, equivalent part-time, professional, administrative, supervisory, or managerial experience in business administration, business management, public administration, public management, clinical administration, or clinical management of which (B) at least five (5) years must have been in a managerial capacity.

#### **Preferred Requirements**

Master's Degree or other graduate degree in Business Administration, Finance, Economics, Business, Law, Public Policy, Public Administration, or related field

Fifteen years of managerial experience with significant responsibilities in both administrative and financial responsibilities in a senior level position

Experience with federal and state civil rights laws and mandates

Experience with public policy

Ability to tactfully navigate challenging political environments and to keep all stakeholders informed and engaged

An understanding of performance management, lines of accountability, performance reviews, and the use of metrics to track and predict progress

Demonstrated record of success in management of a large and diverse staff

Experience working within a public body, Commission and with the Commonwealth's Open Meeting Law

Experience developing and enforcing and ensuring adherence to best practices business models

Demonstrates exemplary ethical standards by leading by example

Familiar with working with all types of media

Superior writing, analytical and verbal presentation skills

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Ability to take initiative, use sound judgment, resolve problems and work effectively with all levels of staff and constituents

Experience working in state government

Knowledge and experience in the Commonwealth's budget process

Knowledge and experience in Human Resources

Fluent in more than one language

Ability to solve complex problems and engage Commissioners and key staff in the decision-making process

Ability to recruit, mentor, promote and retain a diverse group of talented colleagues

Reputation for good character, honesty, and integrity

Capable of managing multiple tasks that are time sensitive in pressure situations.

Experience with change management and / or transforming an organization

Classification:

Annual salary range: \$172,000 to \$215,000