



## PDC Machines, LLC

### Avoiding Discrimination, Harassment, and Retaliation

Michael J. Torchia, Esq.

September 26, 2023



# Discrimination

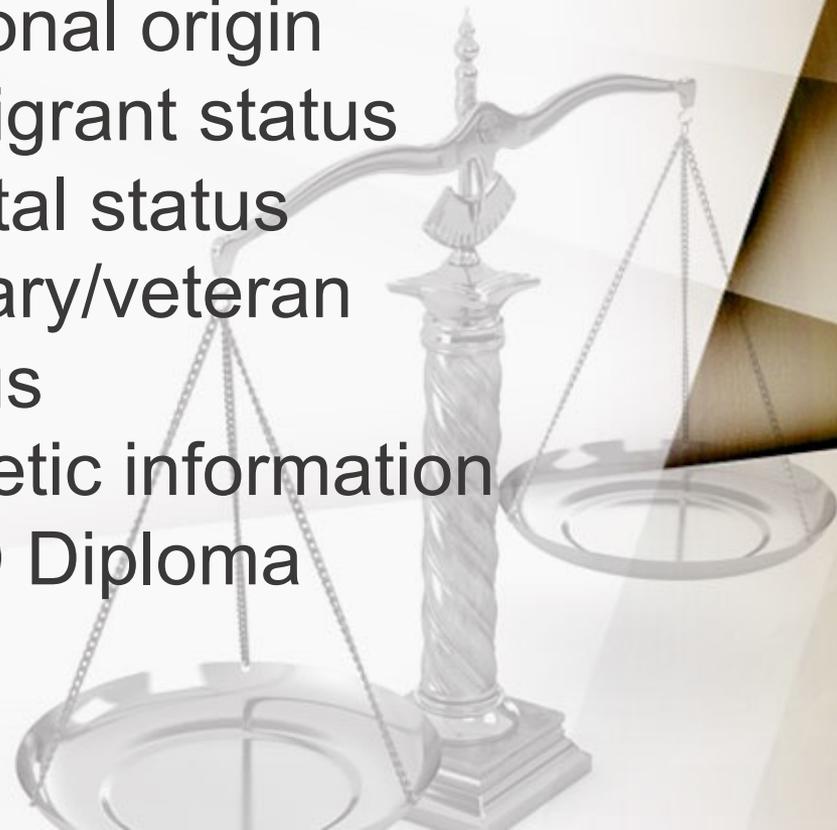
# Discrimination – WHAT IS IT?

**Very simply, it's treating someone differently (worse) because of their “protected characteristic.”**



# PROTECTED CHARACTERISTICS

- Sex
- Sexual orientation
- Gender Identity
- Pregnancy
- Disability
- Age
- Religion
- Race
- Color
- Ethnicity
- National origin
- Immigrant status
- Marital status
- Military/veteran status
- Genetic information
- GED Diploma



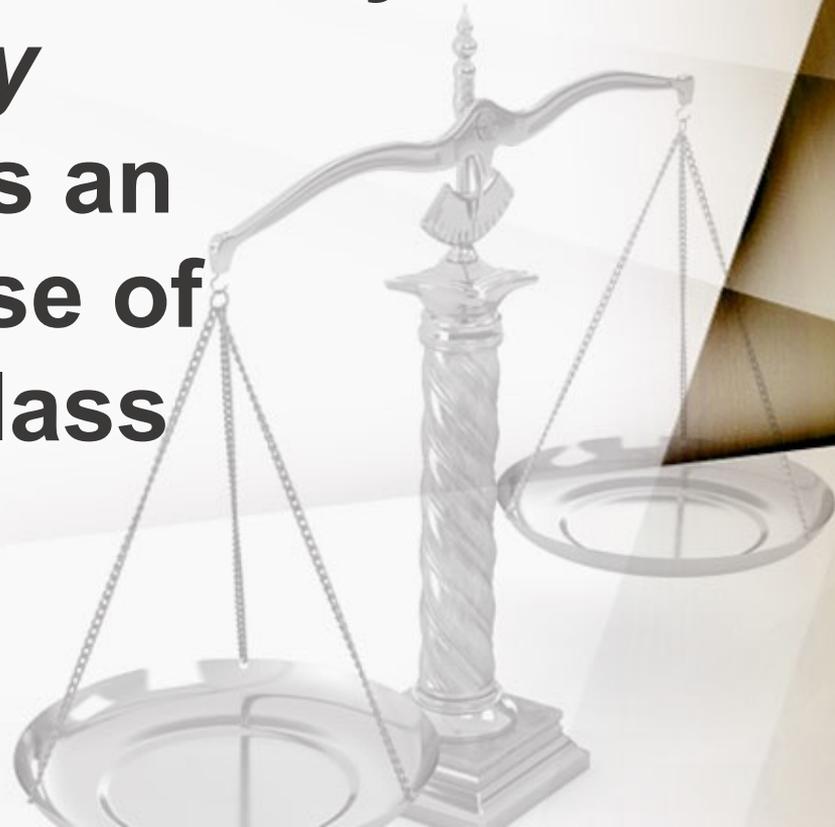
# ADVERSE JOB ACTION

- Not Hired
- No Promotion/Raise
- Dismissed



# DISPARATE TREATMENT & DISPARATE IMPACT

**Policy, procedure, or decision that intentionally or *unintentionally* negatively affects an employee because of their protected class**



# DISPARATE TREATMENT

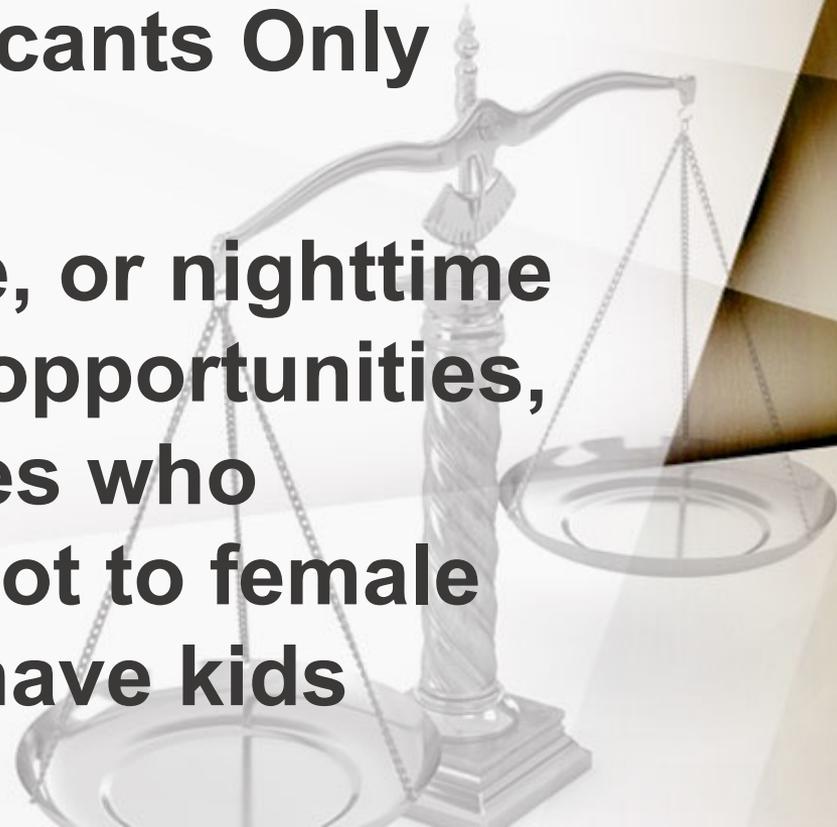
**DISPARATE TREATMENT**

**= Unequal Treatment**



# DISPARATE TREATMENT EXAMPLES

- **Criminal Background Checks on Minority Applicants Only**
- **Offering overtime, or nighttime client marketing opportunities, to male employees who have kids -- but not to female employees who have kids**



# DISPARATE IMPACT

## DISPARATE IMPACT

= Equal Treatment,  
But Unequal Results



# DISPARATE IMPACT

- **Neutral policy.**
- **Not trying to treat them differently.**
- **But, impact is different.**



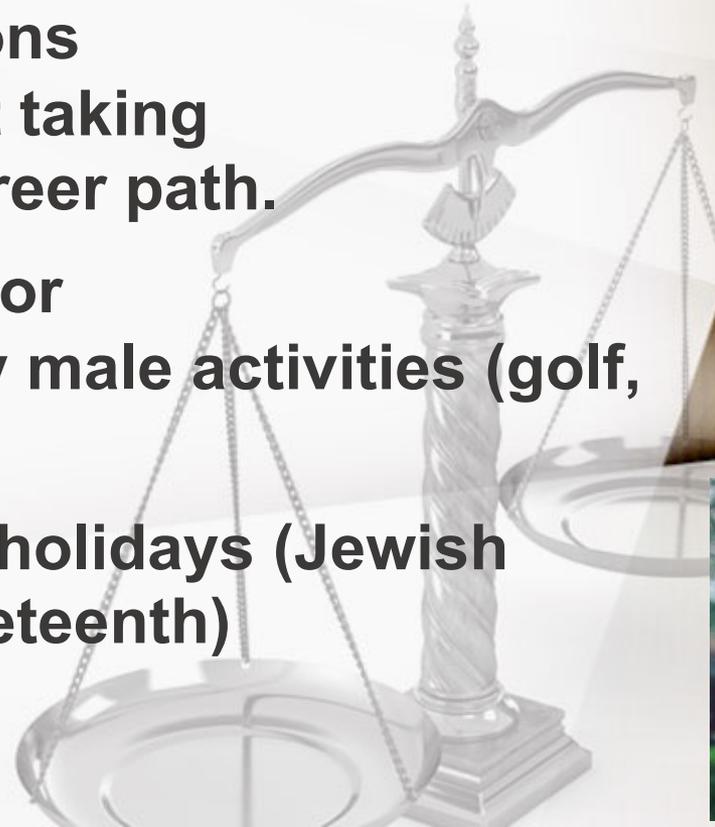
# DISPARATE IMPACT EXAMPLES

- **Company offers free beer after 5pm in the breakroom to team build/socialize. . .**

**May negatively impact employees whose religions discourage drinking. Not taking part may impact their career path.**

- **Company entertainment or marketing in traditionally male activities (golf, strip clubs)**

- **Activities during others' holidays (Jewish holidays, Ramadan, Juneteenth)**





# Harassment

# Harassment

**Harassment is not the same  
as discrimination**



# Preventing Sexual Harassment and Discrimination

- **Quid Pro Quo**
- **Hostile Work Environment**



# Quid Pro Quo

- **“This for that”**

**Example. . .**

- **“If you have sex with me, I’ll give you a raise.”**
- **“If you don’t have sex with me, you won’t get the raise.”**



# Quid Pro Quo

**Makes submission to sexual conduct, or rejection of sexual conduct (either directly or indirectly) a condition of employment or the basis of an employment decision.**



# Quid Pro Quo

**Occurs with actions directly or indirectly from managers, supervisors, executives, etc. since there is control over employment conditions.**



# Quid Pro Quo

**This is the claim that is often alleged when a personal, sexual or dating relationship ends.**



# Hostile Work Environment

**Severe  
or  
Pervasive**



# Hostile Work Environment

**Occurs with actions directly or indirectly from anyone related to the workplace on-site or off-site:**

- **managers**
- **peers**
- **independent contractors**
- **customers**
- **vendors, repair personnel**



# Hostile Work Environment - Scope

- **Unwelcomed touching**
- **Propositions and flirtation**
- **Jokes and humor**
- **Leering**
- **Comments about attire**
- **Posters, e-mail and websites**
- **Sexual questions, comments**



# Hostile Work Environment - Unintended

**What happens if someone is “accidentally” exposed to your comments? Examples:**

- **finds copy on the machine**
- **has email or text forwarded to them**
- **overhears conversation**



# Hostile Work Environment - Location

## You can get in trouble...

- **at work**
- **at company functions and social events (and before and after)**
- **non-work events with co-workers**
- **high risk locations (e.g. Hooters)**



# Hostile Work Environment- Social Media

- **Email**
- **Text**
- **Facebook**
- **Twitter**
- **Instagram**
- **Blogs**
- **Review sites**

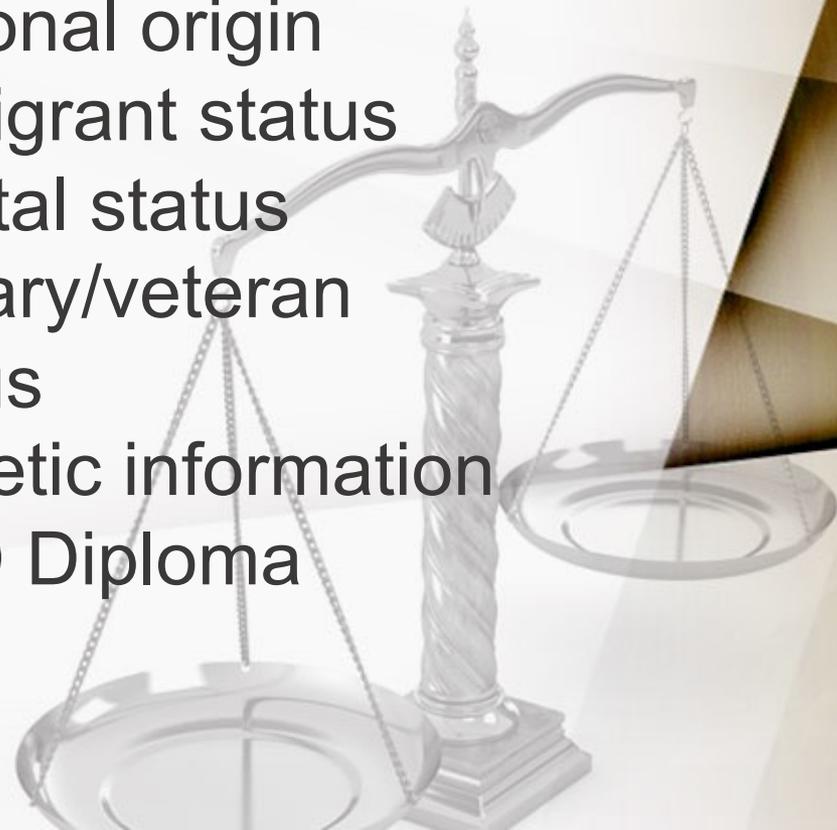




# Other Harassment and Discrimination

# PROTECTED CHARACTERISTICS

- Sex
- Sexual orientation
- Gender Identity
- Pregnancy
- Disability
- Age
- Religion
- Race
- Color
- Ethnicity
- National origin
- Immigrant status
- Marital status
- Military/veteran status
- Genetic information
- GED Diploma



# Other Harassment and Discrimination

## Sensitivity Generally

**Not protected by law, but still sensitive, for example:**

- **Political speech**
- **Socio-economic status**
- **Regional differences (city, state, country)**
- **Favorite sports team**
- **Almost any subject!**





# Implicit Bias

# Implicit Bias

“Implicit,” “hidden” or  
“unconscious” assumptions

- Biases are prejudices in favor of, or against, a person or group
- Bias is pre-judging in a positive or negative way.



# Implicit Bias

Individuals can harbor unconscious prejudice about a variety of characteristics (not just skin color or gender), such as:

- Height and weight
- Use of a wheelchair or cane
- Foreign accents
- Where someone attended college
- Someone who is hearing impaired



# Implicit Bias at Work

In the workplace, implicit bias can influence:

- Recruitment methods
- Hiring
- Promotions
- Assignments
- Compensation
- Terminations



# Implicit Bias Examples

- “Doctor riddle” from the 1970s

And the answer is. . .



# Implicit Bias Examples

“Doctor riddle” from the 1970s

The surgeon is the boy’s mother!

In 2023, the surgeon could of course also be the boy’s father – the boy has two fathers.



# Institutional Bias

Some reasons:

- “We’ve always done it that way”
- Similar type people making decisions
- Company history of treating certain groups



# Microaggressions

- Comments or actions that send a message of bias.
- Conscious or unconsciously used.
- Hurtful to recipient
- Perpetuates bias



# Microaggressions - Examples

“Complimenting” performance in a demeaning way:

- To a female mechanical engineer: *“You really know your subject”*
- To an Asian-American office worker: *“You are very articulate”*
- To a male kindergarten teacher: *“I think it’s great how you can be so nurturing to the kids.”*



# Microaggressions - Examples

- Using male pronouns and terms: “You guys” or “he” to describe everyone
- Insulting expressions: “Indian giver”  
“That’s so gay” “You throw like a girl”
- Demeaning LGBTQ+ individuals: “I have a neighbor who is a lesbian – maybe you know her?”
- “Where are you from?”
- “I wouldn’t even know you have a disability, you act normal”



# Can I make fun of myself?

- I can call that guy a “wop” because I’m Italian
- I can say “that’s retarded” because I have a special needs child
- I can make jokes about my black colleagues working on the plantation, because I’m black





# Handling an Incident

# Handling an Incident

## What Do You Do?

First, try to work it out.



# Handling an Incident

## What Do You Do?

Tell the offender:

- you don't appreciate the conduct, it makes you feel uneasy, uncomfortable, etc.
- to stop

**No obligation to do this,  
however**



# Handling an Incident

## Who Do You Tell?

In writing or in person,  
tell:

- **Immediate Supervisor**
- **Human Resources**



# Handling an Incident

**Complain or don't complain: do not make an "informal" complaint by asking someone not to take action. They will anyway.**



# Are You A Bystander?

- **Address the act at the time**
- **Address the act later**
- **Check on the victim later**
- **Make a complaint**
- **Cooperate with the investigation**



# Handling an Incident – For Managers

**Reminder for Managers:**  
**If you become aware of**  
**a problem from *any***  
**source, pass it along.**



# Handling an Incident - Investigation

## Investigation

- Extent of investigation depends on circumstances
- Do not expect absolute confidentiality



# Handling an Incident – Action / Discipline

## **Action and/or Discipline**

Extent of action and/or  
discipline depends on  
circumstances



# Handling an Incident – No Retaliation

- **No retaliation for making good faith, true and accurate complaint (even if wrong!)**
- **Alleged harasser must not retaliate at any time**



# Handling an Incident – No Retaliation

**Acts of retaliation have a broad scope; they include *anything* that might deter someone from complaining**





Questions?



**Specifically for Managers. . .**

# Manager Point #1

“You are they”

The company acts through its employees – meaning you. What you do, the company does. Often, there is no “they.”



# Manager Point #1

“You are they”

Pursuant to some statutes, managers, supervisors and decision makers have personal liability to employees.



# Manager Point #2

DOCUMENT

and

NOTIFY

HUMAN RESOURCES



# Documenting Performance Issues

Be fair, firm and consistent

Evaluations, reviews and disciplinary notices are frequently used in litigation



# When should you notify HR?

- Any communication from an employee that is an HR request or complaint.
  
- Any performance issues or violations of company policy.



# When should you notify HR?

- A third party or anonymous report.
- When you witness something.
- Don't wait or defer! Notify ASAP.



# What is a complaint or a request?

Complaint of harassment or discrimination

Complaint about pay, leave or medical

Complaint about different treatment

Request for investigation

Request for accommodation due to health or  
medical issues

\*\*Complaint does not have to be in writing



# Manager Point #3 - Confidentiality

When you resolve and/or notify, do so as confidentially as possible and maintain confidentiality thereafter.

\*This does not mean keep confidential from HR or management.



## Manager Point #4 - No Promises or Rejections

Be extremely careful about what you say, verbally or in writing, to employees.

Remember Manager Point #1  
“You Are They”



## Manager Point #4 - No Promises or Rejections

Often, “helpful” and “sympathetic” statements to the employee are just as harmful as negative statements.



# Manager Point #4 – No Promises

## Positive Statements

For example, do not say:

“Take as much time as you need”

“Whatever you need to do”

“You can always come back to your position”

“We’ll hold open your job”

“Don’t worry, you can’t be fired if you’re really sick”



# Manager Point #4 – No Rejections

## Negative Statements

For example, do *not* say:

“Sorry, we won’t be able to hold your job open”

“Do you know how inconvenient that is for me?”

“That’s not that serious, you’ll be back soon”

“Being out that long could affect your position”

“Taking time off isn’t smart in this environment”

“The company can fire you anytime they want”



# Manager Point #5

## Lead by example!

- Words (what you say)
- Actions (what you do)
- Inaction (what you don't do)
- Directives (what you tell others to do)





Questions?



## PDC Machines, LLC

### Avoiding Discrimination, Harassment, and Retaliation

Michael J. Torchia, Esq.

September 26, 2023