



WSSFC 2022

Practice Management Track – Session 3

What's Your EQ

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About the Presenters...

Sarah Byer is a licensed psychotherapist practicing in Madison, Wisconsin. She holds a BA in Sociology from UW Madison and a MA in Counseling from Lakeland University. After a career in the non-profit sector, Sarah is now devoted to providing therapy to individuals and couples. She works with clients dealing with anxiety, depression, grief and loss, major life transitions, relationship issues, illness as well as pregnancy and new parenthood. She collaborates with clients to help identify goals, gain insight and learn tangible tools to use in their lives. She incorporates her training in mindfulness and self-compassion into her practice. Sarah respects and values working with people from varying cultural, ethnic, racial and socioeconomic backgrounds, sexual orientations and gender identities.

David Hardin has been a founder, business owner, general manager, director, and executive. He has built businesses from the ground up and turned failing companies into profitable operations. Equally important, David has been remarkably successful at helping clients balance work and life. As a Cultivate Advisor, David uses his expertise to help business owners set SMART goals. He helps clients create systems, improve processes, and develop teams. Partnering with owners, David helps improve all business components, from recruiting to operations to sales. He helps prioritize tasks and tackle time management so owners can have a life beyond their business. With years of pouring blood, sweat, and tears into companies, he knows the challenges of entrepreneurship, and he is passionate helping his clients maintain a healthy work/life balance.

Jessica M. Kramer is the managing partner of Kramer, Elkins & Watt, LLC in Madison. Jessica focuses her practice on commercial real estate with an emphasis on representing landlords, including manufactured home communities, throughout Wisconsin. She provides landlords with comprehensive representation, including drafting customized lease packages, prosecuting evictions, defending administrative actions such as fair housing complaints, and providing day to day advice. Jessica regularly litigates landlord-tenant matters, employment matters, and business disputes and has a growing appellate practice. Jessica prides herself on being well prepared and organized while providing clients with the balance of appropriately aggressive advocacy they desire and the practical advice they need. When not at the office, Jessica enjoys cooking and attending live sporting events, especially football and basketball cheering on her beloved Wisconsin teams.

Erin Ogden is a trademark and copyright nerd who loves helping businesses grow. Whether helping clients directly or working with other attorneys to help their clients, she helps identify, protect, and monetize intellectual property while looking at the business holistically. She enjoys helping companies identify and protect their intellectual property with trademarks, copyrights, and trade secrets for her clients. If necessary, Erin also helps figure out options available when it comes to disputes starting with cease-and-desist letters all the way up to preparing for litigation. She is also a bit of a nerd when it comes to contract drafting to fit the firm's goal to "keep things as simple as possible, but no simpler" (Thanks, Einstein!). She has helped start-up companies create their first licenses, re-vamped existing licensing protocols, and helped established companies take their first steps into licensing. Erin also works with companies to buy and sell businesses through asset purchases, stock purchases, membership purchases and mergers. Drop her a line or connect on social media. We'll nerd out together!

WHAT'S YOUR EQ

Perhaps you've heard or seen "EQ" in your news feed and wondered what the heck it is. Or, like many, you have been looking for ways to implement it. Emotional Intelligence starts from at the individual level, and it starts from within, not with others. It is the ability to identify and manage emotions, and that has to begin with the individual – looking inwards first and foremost. Once a person can identify and manage their own emotions, then one can begin to identify emotions in those with whom they interact, and then help them manage. That does not mean manipulate in either case. According to Daniel Goleman, an American psychologist who helped to popularize emotional intelligence in his book *Emotional Intelligence: Why It Can Matter More Than IQ*, 2005, there are five key elements to it:

- Self-awareness.
- Self-regulation.
- Motivation.
- Empathy.
- Social skills.

Goleman and subsequent studies suggest that self-regulation and motivation could and should be combined into "emotional self-management." Within each of these now four domains live competencies that make a person highly effective. Thus, a deficit in a domain means the competencies based in that domain will suffer. Each domain and each competency in the domains matter, but they are interdependent. Much focus has been given to competencies in the self-management domain (grit, adaptability, resilience, etc.), but they fall apart without the rest. Ambition or grit without empathy makes for a good example of what people don't want as a boss.

Emotional Intelligence ("EI") has a role in communication with colleagues, employees, and clients. Let's start with employees.

EI in the Work Place

Discrimination Claims

If an employee believes that they have been discriminated against at work because of their race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information, the employee can file a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"). A charge of discrimination is a signed statement asserting that an employer, union or labor organization engaged in employment discrimination and requests EEOC to take remedial action.

The U.S. Equal Employment Opportunity Commission enforces [federal laws prohibiting employment discrimination](#). These laws protect employees against employment discrimination when it involves:

- Unfair treatment because of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.
- Harassment by managers, co-workers, or others in the workplace, because of your race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.
- Denial of a reasonable workplace accommodation that an employee needs because of religious beliefs or disability.
- Retaliation because the employee complained about job discrimination, or assisted with a job discrimination investigation or lawsuit.

The federal laws enforced by the EEOC include:

- Title VII of the Civil Rights Act of 1964 (Title VII)
 - This law makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.
- The Pregnancy Discrimination Act
 - This law amended Title VII to make it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- The Equal Pay Act of 1963 (EPA)
 - This law makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- The Age Discrimination in Employment Act of 1967 (ADEA)
 - This law protects people who are 40 or older from discrimination because of age. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.
- Title I of the Americans with Disabilities Act of 1990 (ADA)
 - This law makes it illegal to discriminate against a qualified person with a disability in the private sector and in state and local governments. The law also makes it illegal to retaliate against a person because the person complained about

discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.

- Sections 102 and 103 of the Civil Rights Act of 1991
 - Among other things, this law amends Title VII and the ADA to permit jury trials and compensatory and punitive damage awards in intentional discrimination cases.
- Sections 501 and 505 of the Rehabilitation Act of 1973
 - This law makes it illegal to discriminate against a qualified person with a disability in the federal government. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless doing so would impose an undue hardship on the operation of the employer's business.
- The Genetic Information Nondiscrimination Act of 2008 (GINA)
 - This law makes it illegal to discriminate against employees or applicants because of genetic information. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members (i.e. an individual's family medical history). The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

The Wisconsin Fair Employment Law (Section 111.31-111.395 Wisconsin Statutes and DWD 218 Wisconsin Administrative Code) prohibits employers, employment agencies, labor unions, and licensing agencies from discriminating against employees and job applicants because of any of the following:

- Age
- Arrest and/or Conviction Record
- Ancestry, Color, National Origin or Race
- Creed
- Disability
- Genetic Testing
- Honesty Testing
- Marital Status
- Military Service

- Pregnancy or Childbirth
- Sex
- Sexual Orientation
- Use or nonuse of lawful products off the employer's premises during nonworking hours

The law prohibits discrimination in the recruitment and hiring, job assignments, pay, leave or benefits, promotion, licensing, union membership, training, layoff and firing, and other employment related actions. Employees may not be harassed in the workplace based on a protected status nor may they be retaliated against for filing a complaint, for assisting with a complaint, or for opposing discrimination in the workplace.

Why are we talking about the EEOC and discrimination claims in a section about emotional intelligence? Because a lot of these are addressing how people and employers relate and treat a diverse population. A population that has individuals may think, talk, act, and believe differently. If an employee does a “one size fits all” approach to communication, then the risk of an employee feeling (or even being) discriminated against increases.

While solo and small firms may not have enough employees to be subject to the laws, your clients may. And as we all know, just because a company isn’t subject to a law due to size, it doesn’t mean they should continue to act poorly.

Past programs have discussed cultural competence and the importance of diversity. One common thread is the need to communicate, empathize, and understand the background. In a recent *On Wisconsin* article by Jessica Steinhoff titled “The Science behind a Smile,” she provides quite a few examples of different cultures finding smiles to be a bit off-putting. But here in Wisconsin, smiles are on display often (Summer 2022 Issue). In fact, one might question why someone who never smiles and judge the non-smiler poorly for it. Dr. Paula Niedenthal of the UW – Madison Neidenthal Emotions Lab posits that our smiling ways are symptoms of something known as emotion culture or the societal rules about expressing emotion. A shared emotion culture helps people from different ethnic, religious, or linguistic backgrounds find common ground, but if it isn’t shared fully, then others may misinterpret another group’s emotion culture. That misinterpretation can lead to stereotypes, confusion, and cross-cultural conflict. In other words, before thinking the new employee doesn’t like you because she never smiles at you in the hallway, maybe you can remember that she may be wondering why you are always showing your pearly whites.

Workplace Efficiency

EI makes financial sense. When employees do not feel like they belong or are heard, they will disengage or leave.

TINYpulse by Limeade, a company that runs employee surveys for business clients, found in a 2019 report, they found 43% of workers would be willing to leave their companies for a 10% salary increase. *The 2019 Employee Engagement Report – The End of Employee Loyalty. 2019.* Only a third of workers received recognition the last time they went the extra mile at work and just a quarter feel highly valued at work. *Id.* It isn’t surprising that money and recognition are big

components of employee retention, but according to that same report, one major indicator of overall happiness is how comfortable employees feel about providing upward feedback to their supervisors. *Id.*

The top quantitative benefits include enhanced productivity, high employee satisfaction, increased market share, and reduced attrition. According to a CapGemini Research Institute, on average, 60% of organizations witnessed improvements in areas of productivity, employee satisfaction, market share and lower attrition to the extent of 20% or more over their previously existing levels. *Emotional intelligence– the essential skillset for the age of AI*, 2019. Employee benefits include greater wellbeing, reduced fear of job loss, more openness to change, and the safeguarding of human jobs from machines. *Id.* Organizations can achieve returns up to four times higher by investing in EI skills. *Id.*

Ideas for creating and supporting more emotionally intelligent workforce:

- 1) Create or revise existing learning programs to integrate EI and make them accessible to all
 - a. Create
- 2) Modify recruitment processes to include the evaluation of EI
 - a. Resumes don't show everything, but as small firms, we already knew that
- 3) Apply an EI lens when promoting and rewarding talent
 - a. Reward those that provide constructive feedback (including criticism)
 - b. Build and support those with high EI into leadership positions (even if there are just 3 of you)
- 4) Consider and use metrics to help measure your building of a high EI culture
 - a. 360 review: Self-review + 10 or so trustworthy people who know you well

EI with Clients

“Anybody can become angry, that is easy; but to be angry with the right person, and to the right degree, and at the right time, and for the right purpose, and in the right way, that is not within everybody's power, that is not easy.” Aristotle, *The Art of Rhetoric*.

Clients often come to an attorney with a lot of emotion and stress. The client is almost always in the moment of change when talking with an attorney. Otherwise, why pay the hourly rate? According to Wisconsin Lawyers Mutual Insurance Company (“WILMIC”), the top three error types in grievances reported to WILMIC are fee disputes, failure to obtain consent or keep the client informed, and failure to follow client instructions. “Top OLR Complaints: Grievances on the Rise”, WILMIC, May 10, 2022. The following are examples of types of grievances reported to WILMIC in 2012:

- a bankruptcy attorney who failed to timely return his client's phone calls;
- a criminal defense attorney who failed to keep the client informed of the status of the client's appeal;

- a divorce attorney who improperly withdrew from representation and charged excessive fees for the legal services rendered before withdrawal;
- a real estate attorney who failed to communicate with the client and attempted to collect his fee owed by the client; and
- a guardian ad litem in a family law matter who failed to conduct an adequate investigation before making a placement recommendation.

Id. As you can see, communication is key. While WILMIC's advice is to follow up in writing, that writing won't be very effective if the client doesn't understand what is being said.

Of course, this isn't new. In 2010, the Wisconsin State Bar provided advice regarding how to effectively communicate with elder clients. The article starts with these questions: "Can your client hear your advice? Can your client see you? Can your client see and read the document you present to them? Can your client find your office? Do you know the answers to these questions, or are you just assuming all the answers are 'yes?'"

This is just the beginning, however. After all, as I said before, they are working with an attorney because change is afoot. Any client is coming with their own views, stressors, and motivations. And, of course, the attorney has each of those themselves. An attorney able to recognize and address each of those both from the client's side and their own side is miles ahead and a better advocate.

Attorneys are used to "thinking like their client" in this way, but we often file it under our ethics obligations. For example, Wisconsin Memorandum Ethics Opinion 1/71 C of March 29, 2021, discusses potential conflicts in representing criminal defendants when the attorney also represents the local police association. In part, the Opinion states:

If adverse police witnesses were members of the police association the lawyer would face a possible personal conflict which could materially limit his representation of the client in the criminal matter. SCR 20:1.7(a)(2). Aggressive confrontation of adverse witnesses against the client may be required as part of competent and diligent representation. 20:1.1, 20:1.3. However, to do so would risk harming the lawyer's relationship with the association and its members. If the lawyer chose to not risk offending the police association members it would deprive the client of competent and diligent representation.

This is all EI. The ethics rules involved recognize the emotions, motivations, and impact of the actions of each of the parties.



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Knock it Off! Harassment & Bullying in the Workplace

Whether or not mistreatment of an employee is unlawful, such conduct can have negative effects in the workplace. Taking action to prevent and remediate bullying and harassment promotes a positive work environment. This is good for employers, staff, customers, and clients.

LISA M. BERGERSEN & CLAIRE ELIZABETH HARTLEY

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The #MeToo movement serves as a reminder of how common unlawful workplace harassment continues to be despite the many laws against it. Workplace bullying is also extremely prevalent and warrants attention and action by employers and their legal counsel. Approximately 30 million Americans are victims of bullying behavior in the workplace; another 30 million have witnessed such conduct.¹

Legal professionals also are affected by unlawful harassment and bullying. In its 2019 report, *Us Too? Bullying and Sexual Harassment in the Legal Profession*, the International Bar Association (IBA) found that “[b]ullying is rife in legal workplaces, affecting: 1 in 2 female respondents and 1 in 3 male respondents.” The report found that sexual harassment also is common, with one in three female respondents and one in 14 male respondents reporting having been sexually harassed in a work context.²

Both harassment and bullying can be toxic to the work environment and have the potential to result in legal liability for employers; therefore, neither type of behavior should be ignored. Lawyers advising employers should understand the legal differences between bullying and unlawful harassment, the effects these behaviors have in the workplace, and methodologies for investigating, taking remedial action, and assisting clients in preventing this conduct.

Legal Differences: Unlawful Harassment and Bullying

Many different federal and state laws prohibit harassment and bullying that is based on a person’s protected class status, such as sex, race, national origin, religion, age, or disability, to name only a few.³ Harassment is unlawful when the conduct is based on the victim’s protected class status and is unwelcome, offensive, and severe or pervasive enough to alter the conditions of employment or create a hostile or abusive work environment.⁴ These laws often provide for the award of damages that include back pay, front pay, compensatory and punitive damages, and attorney fees.⁵

Bullying is defined by the Workplace Bullying Institute as repeated mistreatment of an employee by one or more employees, and includes abusive conduct that is threatening, humiliating, or intimidating.⁶ Bullying conduct might or might not be based on a person’s protected class status.

Bullying that is not based on protected class status is rarely unlawful in the United States.⁷ It is not illegal in Wisconsin. However, Wisconsin courts have recognized that bullying behavior causing physical or mental injury can be covered by the Worker’s Compensation Act (WCA).⁸ The WCA is the exclusive remedy against an employer by an employee who suffers injuries due to bullying in the workplace, and private civil actions for claims, such as negligence or intentional infliction of emotional distress, are therefore not available.⁹



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For example, in *Jenson v. Employers Mutual Casualty Co.*,¹⁰ Jenson was the clerk-treasurer in the village of Solon Springs and brought a claim of intentional infliction of emotional distress against the village based on a pattern of what Jenson deemed to be abusive, bullying behavior by the village’s president. She alleged that the president’s conduct caused her physical and mental disabilities that necessitated a six-week leave of absence. After analysis of the WCA exclusivity provision, [Wis. Stat. section 102.03\(2\)](#), the Wisconsin Supreme Court found that the exclusivity requirement applies even in situations in which the employee’s injury is intentionally inflicted by a fellow employee. Thus, the remedies under Wisconsin law for injuries caused by bullying behavior are limited to the financial and medical benefits under the WCA.

Currently, a bill dealing with abusive work environments is pending in the Wisconsin Legislature before the Assembly Committee on Labor and Integrated Employment. The proposal would amend the exclusivity provisions of the WCA to grant to an individual who has been subjected to an abusive work environment the right to bring a civil action for the recovery of medical expenses, back pay, front pay, compensation for pain and suffering, emotional distress, punitive damages, and attorney fees.¹¹

Effects of Harassment and Bullying in the Workplace

Regardless of whether laws specifically prohibit the conduct or allow for certain types of financial recoveries, bullying and harassment at work can result in significant harm. Bullying or harassment can cause employee-victims to be physically ill and lower their productivity, focus, and ability to interact. In extreme cases, bullying or harassment can lead to post-traumatic stress disorder (PTSD), depression, substance misuse, and even suicide.¹²

Perpetrators’ behavior can result in good employees leaving jobs and remaining staff members feeling demoralized, leading in turn to quantifiable costs to organizations in terms of turnover, hiring, retraining, poor customer relations, and increased leaves of absence and insurance claims. In its recent report, *The High Cost of a Toxic Workplace Culture: How Culture Impacts the Workforce – and the Bottom Line* (2019), SHRM (the Society for Human Resource Management) found that almost 20 percent of workers in the last five years have resigned due to toxic work cultures, and the associated costs to U.S. employers exceeded \$200 billion.

“The WCA is the exclusive remedy against an employer by an employee who suffers injuries due to bullying in the workplace, and private civil actions for claims, such as negligence or intentional infliction of emotional distress, are therefore not available.”

Within the legal profession, many victims of bullying and harassment also decide to leave their places of employment as a result of the conduct. In its *Us Too?* report, the IBA found that 65 percent of respondents who were bullied and 37 percent of respondents who were sexually harassed had either left or were thinking about leaving the workplaces where the bullying or harassment occurred.¹³

Considering the negative effects on a work environment and the liability and related costs, it is important for employers and their legal counsel to recognize the risk behaviors and respond appropriately to allegations of harassment or bullying.

Investigating Bullying and Unlawful Harassment

Investigations are the primary tool used to detect and root out bullying and harassment. Prompt and thorough investigations have long been a legal requirement for employers presented with allegations of potential unlawful harassment in the workplace.¹⁴

Even though bullying of individuals in nonprotected classes is not illegal, it likely violates other employer policies. Thus, employers should, for the sake of their staff and the fact that bullying is bad for business, investigate any complaints or other reasons to believe that someone is creating a toxic work culture. Moreover, an investigation is often needed to ensure that the complained-of behavior is not, in fact, based on the target’s protected class and, consequently, illegal under both state and federal laws.

Investigations should be started as soon as possible. Ensuring a prompt investigation meets the law’s requirement to move in an expeditious fashion in cases of unlawful harassment,¹⁵ and it assists in the preservation of evidence. In addition, many employees are fearful about making a complaint or participating in an investigation, so moving quickly helps to obtain needed information from the complainant and witnesses before they change their minds about cooperating. Legal counsel should also discuss with employers whether interim measures are needed while an investigation is pending, such as placing the accused individual on leave during the investigation or otherwise separating the complainant and the accused individual, if the seriousness of the allegations warrant doing so.¹⁶

“Perpetrators’ behavior can result in good employees leaving jobs and remaining staff members feeling demoralized, leading in turn to

resources policies and initiatives.



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The employer should select an appropriate investigator. The investigator should be trained and experienced and possess core soft skills, such as the ability to demonstrate empathy and establish rapport to encourage cooperation from the complainant and witnesses.¹⁷ The investigator must be fair and impartial, keep an open mind, and use active listening skills as well. Good investigators also will have training in minimizing their own biases and being intentional about avoiding them during the investigative process.¹⁸

In many instances, the organization should hire an outside investigator. It can be difficult for in-house staff to be impartial and objective, especially if the investigator knows the parties involved and has already formulated beliefs about them.

Another consideration is attorney-client privilege. When the investigation is done by or under the direction of a lawyer, the investigation might be cloaked by the privilege.¹⁹ However, it is important that the employer understand that the privilege might not be absolute. If litigation later ensues, the employer might have to waive the privilege, for example, to demonstrate that the investigation was prompt and thorough or that no unlawful harassment occurred.²⁰ It is crucial that the investigator operate under the assumption that the privilege will be waived at some point and to keep this in mind when making decisions and documenting the investigation.

In both bullying and unlawful harassment investigations, the primary focus of fact-finding is on the nature, frequency, severity, and effects of the alleged conduct. This information is needed to determine whether the elements of unlawful harassment exist,²¹ and in the case of bullying, to determine whether there is a pattern of behavior that is more than rude or disrespectful and that crosses the line to bullying.

Also of Interest

Wisconsin Employment Law: Answers at Your Fingertips

Written and reviewed by some of the state’s foremost employment lawyers, [Wisconsin Employment Law](#) offers a comprehensive treatment of Wisconsin law governing private-sector, nonunion employment. Readers will find thorough explanations of key subject areas from hiring through termination, including employee benefits, wages and hours, privacy, wrongful discharge, and more.

[Wisconsin Employment Law](#), State Bar of Wisconsin PINNACLE®, 2162+ pp.; 7th ed., 2018-2019 (3 vols.), member price, \$235 (nonmember price, \$295). Order, <https://marketplace.wisbar.org>.

Remedial and Preventive Measures

Once an investigation is completed, the investigator typically will determine whether the alleged conduct occurred, whether the conduct rose to the level of bullying or harassment, and whether any laws or employer policies were violated. If the investigator finds that bullying or harassment took place, the employer should take remedial measures to end the inappropriate behaviors. An employer who takes prompt and effective action to address and prevent further unlawful behavior may have a defense to a claim of harassment under state and federal antidiscrimination laws.²²

When deciding which remedial measures to take, the most important consideration is whether the measures taken will stop the behavior from recurring. Termination of employment is not always necessary when other remedial measures may be appropriate and sufficient to address the inappropriate behavior.

If the perpetrator is retained, behavioral expectations should be agreed to in writing. The perpetrator also should be asked to agree in writing to cooperate with any support that will be provided, such as coaching, counseling, referral to an employee assistance program, or a performance improvement plan. A refusal to agree, or any other indication that the perpetrator has no intention or is incapable of changing, will most likely necessitate termination of employment.

The #MeToo movement and studies that show the ongoing existence of unlawful harassment and toxic work environments should serve as a call for all employers, including those in the legal profession, to take preventive action.²³ Anita Hill,²⁴ who made allegations of sexual harassment against then U.S. Supreme Court Justice-nominee Clarence Thomas, has aptly stated that workplace leaders must “examine their cultures and procedures and then begin the difficult work of eliminating the [toxic] behavior.”²⁵

Prevention requires a commitment from top leaders to implement and insist on adherence to organizational values that include zero tolerance for bullying and harassment. The zero-tolerance policy must be enforced, be regularly and consistently communicated, and include an effective complaint and investigation process that results in prompt remedial action when inappropriate conduct is found. (Please see the sidebar, “[Key Measures to Prevent Unlawful Harassment and Toxic Work Environments](#).”)

Accountability is key to elimination and prevention. If managers make clear that certain types of conduct are not tolerated, the behaviors will be greatly reduced or eliminated because employees know the response will be swift and severe.

Key Measures to Prevent Unlawful Harassment and Toxic Work Environments

Key preventive measures include the following:

1. Train managers how to:
 - Listen to employees and have difficult conversations;
 - Develop their emotional intelligence to ensure that they are aware of their effect on others and are treating others appropriately; and
 - Monitor the work environment, recognize prohibited conduct, and know how to handle prohibited situations.
2. Train all staff about preventing bullying, harassment, and discrimination, promoting diversity and inclusion, managing biases, avoiding risk behaviors, and developing bystander awareness.
3. Develop policies that clearly:
 - Delineate values regarding workplace civility and professionalism, anti-bullying, harassment, and discrimination;
 - Outline expectations of acceptable behavior and prohibited conduct; and
 - Include a commitment to prevent and eradicate unacceptable behavior and retaliation, along with clear processes that incorporate effective complaint mechanisms, investigations, coaching, counseling, discipline, detection, and risk management.²⁶
4. Conduct regular risk assessments to watch for and prevent the development of any bullying or harassment.

Conclusion

Bullying and unlawful harassment create toxic work cultures. Employers who ignore or tolerate these behaviors do so at their peril and expense in terms of loss of key employees; hiring, retraining, and insurance costs; and potential costs if litigation ensues. The use of trained investigators skilled at workplace investigations is necessary to identify and eradicate bullying and unlawful harassment.

However, prevention of these behaviors starts at the top, and managers can take many measures to assess potential risks and head off inappropriate behavior before legal liability is created. Legal counsel representing employers should be prepared to assist their clients in taking steps to prevent bullying and harassment and to address complaints or reports of such conduct.

Meet Our Contributors

What is the most memorable moment of your career?



My most memorable career moment was arguing before the Seventh Circuit Court of Appeals at the University of Illinois Law School. Apparently, the court likes to take the show on the road and schedules arguments periodically at different venues. Judge Easterbrook was fun, brilliant, and on my client’s side, so I enjoyed every moment and forgot there were 100 or so law students behind us.

[Lisa M. Bergersen](#), [Buelow Vetter Buikema Olson & Vliet](#), Waukesha.

What are you reading now? What is your favorite genre?



I am currently reading *The Giver of Stars* by Jojo Moyes. My favorite genre of literature is historical fiction. I selected this book to read because it provides historical information about the operation of the Kentucky Pack Horse Library in the 1930s, while also including fictional stories about the group of female librarians who delivered the library books to rural areas of Kentucky by horseback. I’ve enjoyed the book so far, for the historical information it’s providing and the inspirational stories about a group of strong women, all dealing with different life circumstances and personal struggles, in addition to the daily struggles of the job they were doing.

[Claire E. Hartley](#), [Buelow Vetter Buikema Olson & Vliet](#), Waukesha.

Become a contributor! Are you working on an interesting case? Have a practice tip to share? There are several ways to contribute to *Wisconsin Lawyer*. To discuss a topic idea, contact Managing Editor Karlé Lester at (800) 444-9404, ext. 6127, or email klester@wisbar.org. Check out our [writing and submission guidelines](#).

Endnotes

¹ Workplace Bullying Inst., *U.S. Workplace Bullying Survey* (2017).

² Kieran Pender, Int’l Bar Ass’n Legal Pol’y & Research Unit, *Us Too? Bullying and Sexual Harassment in the Legal Profession* 8 (May 2019) [hereinafter *Us Too?*].

³ Some applicable laws include the Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§ 444.01–.005; Title VII of the Civil Rights Act

³ Some applicable laws include the Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§ 111.31-.395; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17; Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. This list is not exhaustive.

⁴ *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018); U.S. EEOC, [Harassment](#) (last visited April 12, 2020).

⁵ Civil Rights Act of 1991, [42 U.S.C. §1981](#). The WFEA limits remedies to back pay and benefits and does not allow compensatory- or punitive-damages awards. [Wis. Stat. § 111.39\(4\)\(c\)](#).

⁶ Workplace Bullying Inst., [The WBI Definition of Workplace Bullying](#), (last visited April 12, 2020).

⁷ Workplace Bullying Inst., [Frequently Asked Questions: 14. Is There a Law Against Workplace Bullying in the U.S.?](#), (last visited April 12, 2020); Healthy Workplace Bill, <https://healthyworkplacebill.org/> (last visited April 12, 2020).

⁸ Wis. Stat. ch. 102.

⁹ [Wis. Stat. § 102.03\(2\)](#).

¹⁰ *Jenson v. Employers Mut. Cas. Co.*, 161 Wis. 2d 253, 468 N.W. 2d 1 (1991) (concluding that complained-of conduct did not constitute an “assault intended to cause bodily harm,” which is an exception to exclusivity provisions).

¹¹ Wis. Assemb. B. 116 (2019-2020).

¹² Workplace Bullying Inst., *Impact on Employee Health Survey* (2012); WORKSAFE New Zealand, *Preventing and Responding to Bullying at Work* (2017).

¹³ *Us Too?*, *supra* note 2, at 9.

¹⁴ *Cerros v. Steel Tech. Inc.* 398 F.3d 944, 954 (7th Cir. 2005).

¹⁵ EEOC, [Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors](#) (June 18, 1999).

¹⁶ EEOC, [Questions and Answers: Small Employers on Employer Liability for Harassment by Supervisors](#) (June 21, 1999).

¹⁷ EEOC, *supra* note 15.

¹⁸ Amy Oppenheimer, [The Psychology of Bias: Understanding and Eliminating Bias in Investigations](#) (May 2012).

¹⁹ *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

²⁰ See, e.g., *Barbini v. First Niagara Bank N.A.*, 331 F.R.D. 454, 461-62 (S.D.N.Y. 2019) (noting that human resource director’s testimony about counsel’s involvement in sex-harassment investigation constituted waiver of attorney-client privilege when it went further than “generalized references to counsel’s advice”).

²¹ *Robinson*, 398 F.3d at 952.

²² *Swyyear v. Fare Foods Corp.*, 911 F.3d 874 (7th Cir. 2018).

²³ David J. Parnell & Patrick J. McKenna, *Bullying, Lack of Respect, Me First, Law Firms Suffer the Behaviour They Tolerate* (2016).

²⁴ Nina Totenberg, NPR, [A Timeline of Clarence Thomas-Anita Hill Controversy as Kavanaugh to Face Accuser](#) (Sept. 23, 2018).

²⁵ Anita Hill, *Preface*, in [Zero Tolerance: Best Practices for Combatting Sex-Based Harassment in the Legal Profession](#) 8 (ABA Comm’n on Women in the Profession, 2018).

²⁶ One study of AmLaw 100 firms found that more than 50 percent of responding firms had reduced a partner’s compensation based on the partner’s poor treatment of other employees. The authors suggest making good behavior an evaluative component to the firm compensation structure as one preventive measure. See Parnell & McKenna, *supra* note 23.

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Wisconsin Memorandum Ethics Opinion 1/71 C Potential conflicts in representing criminal defendants

Revised March 29, 2021

Question:

May a lawyer for a local police association represent criminal defendants at the same time?

Opinion:

The analysis of this question would depend upon whether members of the police association were adverse witnesses in the criminal case.

If adverse police witnesses were members of the police association the lawyer would face a possible personal conflict which could materially limit his representation of the client in the criminal matter. SCR 20:1.7(a)(2). Aggressive confrontation of adverse witnesses against the client may be required as part of competent and diligent representation. 20:1.1, 20:1.3. However, to do so would risk harming the lawyer's relationship with the association and its members. If the lawyer chose to not risk offending the police association members it would deprive the client of competent and diligent representation.

Representation of both clients would require the lawyer to reasonably conclude that adequate representation of both clients was possible and obtain written informed consent from each client. SCR 20:1.7(b)(4). Absent consent, the lawyer would have to decline representation of the criminal defendant, or, if already involved in the case, to withdraw.

On the other hand, representation of a police association alone is insufficient to create a conflict in any criminal case simply because the lawyer may be required, as part of representation of a defendant, to aggressively examine a police officer from an agency unconnected to the police association.