

SAFE-D Conference 2023

**Personnel Problems and
Litigation:
Out of Your Control?**

Personnel Law

- **What makes personnel law so unique?**
- **Understanding the EPL**
“animal”
- **Court of law and public opinion**
- **The good, bad and the ugly**
- **What is on the horizon?**

Who I am

- **Understand your world?**
- **Background in:**
 - **Law**
 - **Emergency services**
 - **Public entities**
 - **Athletics organizations**
 - **Risk management and insurance**
 - **Human resources**
 - **Investigation training**

I am not

- **Your ESO's:**
 - **Employee**
 - **Volunteer**
 - **Legal counsel (internal or external)**
- **Resident of your community**
- **Governmental agencies**

Speaker

- **Questions?**
- **Contact after the session or later**

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Assessment



- **Policies and practices**
- **Model risk management agency?**

Meaning of Unlawful Misconduct

- **Crossing a legal line:**
 - **Criminal**
 - **Civil**
- **Elements of unlawful
conduct**

Exposures

- **Discrimination**
- **Hostile environment harassment**
 - Sexual and other legally protected grounds
- **Wrongful dismissal/discharge**
 - Constructive discharge
- **Retaliation**
- **Negligent hiring/retention/supervision**
- **Failure to hire/select/promote**
- **Wrongful demotion**



Unlawful vs. Lack of Civility

- **Not sterilize your unique environment**
 - Purpose of harassment and discrimination law is **not to create a general civility code**
 - **Two roads to “Crapville”**



Protection for All

- **Intentional misconduct**
 - People subjected to misconduct
 - Offender on notice – deterred
- **Correct unintentional risky behavior**
 - Many cases – not intending to offend; not directed at one individual
- **Bystanders**
- **False, exaggerated or misperceived allegations**
 - Personal and professional reputation

Need for Continued Training

- **Why every year?**
- **New issues come up**
- **Nature of these claims**
 - **Cumulative**
 - **Pervasive**
- **Too important to risk a one and done**

Objective Proof?

- **Was the organization negligent?
Were *you* negligent?**
- **What did the organization do in the last 12-months to prevent, identify and properly address wrongdoing?**

River of Denial

- **NIMBY**

- *“We haven’t had those problems here.”*

- *“Won’t happen to our organization.”*

- **No past personnel claims may lead to vulnerability.**



High Risk

- **Never been a broader range of human relations issues facing the emergency services profession.**
- **Understanding the risks**

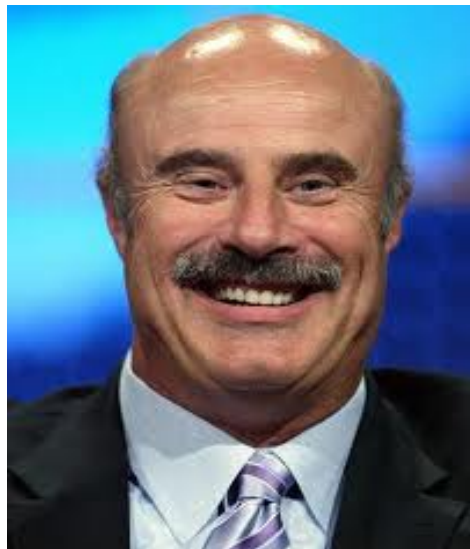
One True Nondiscriminatory Industry

- **Difficult to reconcile** – How emergency services professionals are expected to serve the public in a non-discriminatory way and expect the same for internal working relationships.



Part-time Dr. Phil

- **PEOPLE PROBLEM business!**
 - *“We are like family”*
 - **Dysfunctional families**
 - **Human relations**
 - **Interpersonal working relationships**



Lesson Learned From Your Industry

- *“We are hiring skills and not people.”*
- **5% of workforce causes 95% of problems**
 - **Easy to fix operational deficiencies, not as easy for people skills**

Trends

- **“Hard skills” vs. “soft skills”**
- **Discrimination and harassment or interpersonal working relationship problems?**
- **Investigations**
 - **Workplace wrongdoing (harassment / discrimination)**
 - **Other personnel relations problems & conflict**

We are all trying to...



Trying to Figure It Out

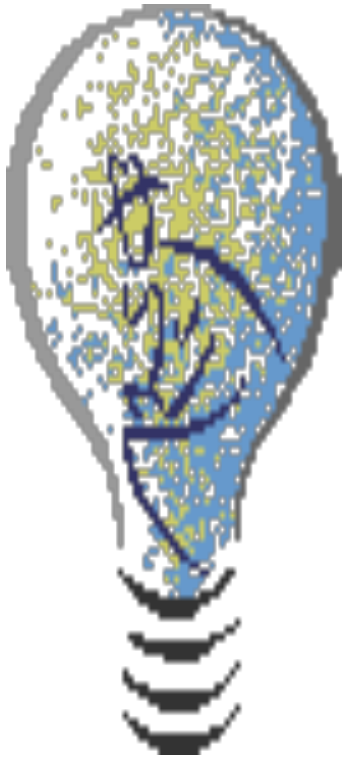
- **Anita Hill and the #MeToo movement**
- **U.S. Supreme Court; various jurisdictions**
- **Changing laws**
- **Presidential administration changes; EEOC Guidance**
- **Diversity, equity and inclusion (DEI) training and CRT (Critical Race Theory)**

Why so many claims today?

- *Let's hear your opinion!*



Why Claims Today?



- **Wrongdoing occurs**
- **Confusion about behavior that crosses the line**
- **Know their rights**
- **Increased legal standards**
- **Attorney advertising**
- **Perception of monetary awards**
- **Media coverage**

“30 is the new 20”

- **What does this mean?**
- **College and University
Student Counseling
Services**
 - **Why?**
 - **How impact human
relations risks?**

Anti-bullying Laws

- **TX state anti-bullying in the workplace law?**
- **Bullying law for schools?**
- **Youth education**
 - **Discrimination, harassment, retaliation, sexual misconduct, hazing, bullying, emotional abuse, physical misconduct**

Interpersonal Relationship Skills

- **Electronic communications**
 - “Selfie” generation
 - First Amendment and social media
- **Helicopter parenting**
 - If you got in trouble in junior high or high school, who is the last person you would want to tell?
 - Conflict resolution

EEOC – Select Task Force

- **On the Study of Harassment in the Workplace**
- **18 month study**
- **16 members and 30 witnesses**
- **Holistic approach to harassment prevention**

Training Must Change

- **Too focused on avoiding legal liability**
- **Effective – can reduce harassment**
- **Ineffective – can be counterproductive**
- **Tailored for unique workforce**
- **Supervisor training**

Starts at the Top

- **Leadership**
 - **Culture**
 - **Necessary time and resources – personnel liability risk management**
- **Accountability at all levels**
 - **Systems: coaching/counseling; discipline; performance evaluations; and exit interviews**

New Approaches to Training

- **Bystander intervention training (bystander effect)**
- **Civility training**
 - **Not just unlawful harassment based on legally protected class status**
 - **Promoting respect and civility**
 - **Contradicts Supreme Court?**

Harassment – Unreported

- **Task Force: 3 of 4 never talk to supervisor, manager, Officer or union representative**
- **Many claims – after leave the ESO**
 - **Termination or quit**
 - **ESO doesn't receive a formal complaint or conduct investigation**

Trend – Why fail to report?

- Majority of claims



Non-Reporting Challenges

- **Fears**
 - **Retaliation or intimidation**
 - **Risk to employment**
 - **Reputation**
- **Unclear reporting & investigation processes (behind the curtain?)**
- **Unknown resources**

25 Years – Emergency Services

- **Sexual deviants?**
- **Member of anti-race,
religion, or other group?**

Very Common

- **Bob – “jokester”**



“The Dumb@\$\$”

- **Dumb@\$\$ doctrine**
 - **What is the problem with this testimony?**



When on Notice?

- **Actual notice/knowledge**
 - **“Known” standard**
- **Constructive notice/knowledge**
 - **“Should have known” standard**

ESO's Responsibility

- **ESO must exercise reasonable care to prevent and correct promptly any misconduct.**
 - Policies and procedures
 - Safe avenues of reporting
 - Investigations (behind the curtain)
 - Training



Employee/Member

- **Employees/members: Did you take advantage of any reasonable preventative or corrective opportunities provided by the ESO?**

Objective Proof?

- **Was the organization negligent?**
- **Were *you* negligent?**

- **What did the organization do in the last 12-months to prevent, identify and properly address wrongdoing?**

Policies vs. Practices

- **Personnel policies**
- **Practices**
 - **Training**
 - **Performance management**
 - **Non-disciplinary coaching & counseling**
 - **Evaluations**
- **Discipline and terminations**
- **Investigations (internal or 3rd party)**
- **Exit interviews**

Conclusion

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