

Workplace Harassment



Nebraska Equal Opportunity Commission

Presented by
Gretchen Eure

Nebraska Equal Opportunity
Commission

Illegal Discrimination



Showing prejudice in the treatment of
others based on their
“protected class”

Prejudice is shown when people respond to different races, ethnicities, cultures, religious beliefs, age, physical & mental abilities, and gender differences with negativity or stereotypes, based on assumptions.



“1 In 6”

Nebraska Equal Opportunity
Commission

Some **assumptions** we are familiar with...

1. People in wheelchairs should.....
2. Women really don't....
3. People over 65 can't...
4. People who don't speak English shouldn't...
5. Tall people are so...
6. African Americans usually...
7. Why can't Mexicans...
8. If poor people could just...
9. People with lots of kids...
10. Rich people are...
11. I heard Muslims...

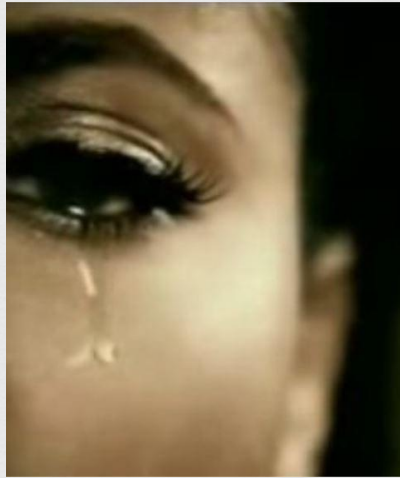
What is wrong with these statements? Have our concepts changed and **why?**

1. Mrs. Jones looks remarkably good **for someone her age**.
2. We need more **manpower** here.
3. I see Sally forgot to sign her timecard. **She** must be having a **blonde day**.
4. Even though he is confined to a wheelchair, Jim **manages** to live a productive life.
5. There is a daycare at the work location, **where women can leave their children** while they work.
6. We welcome all **managers, their wives**, and their children.
7. "All **men** are created equal."
8. "To boldly go where no **man** has gone before."

Did the person intend to be hurtful? Insensitive?

Discrimination can be intentional or unintentional but the

effects

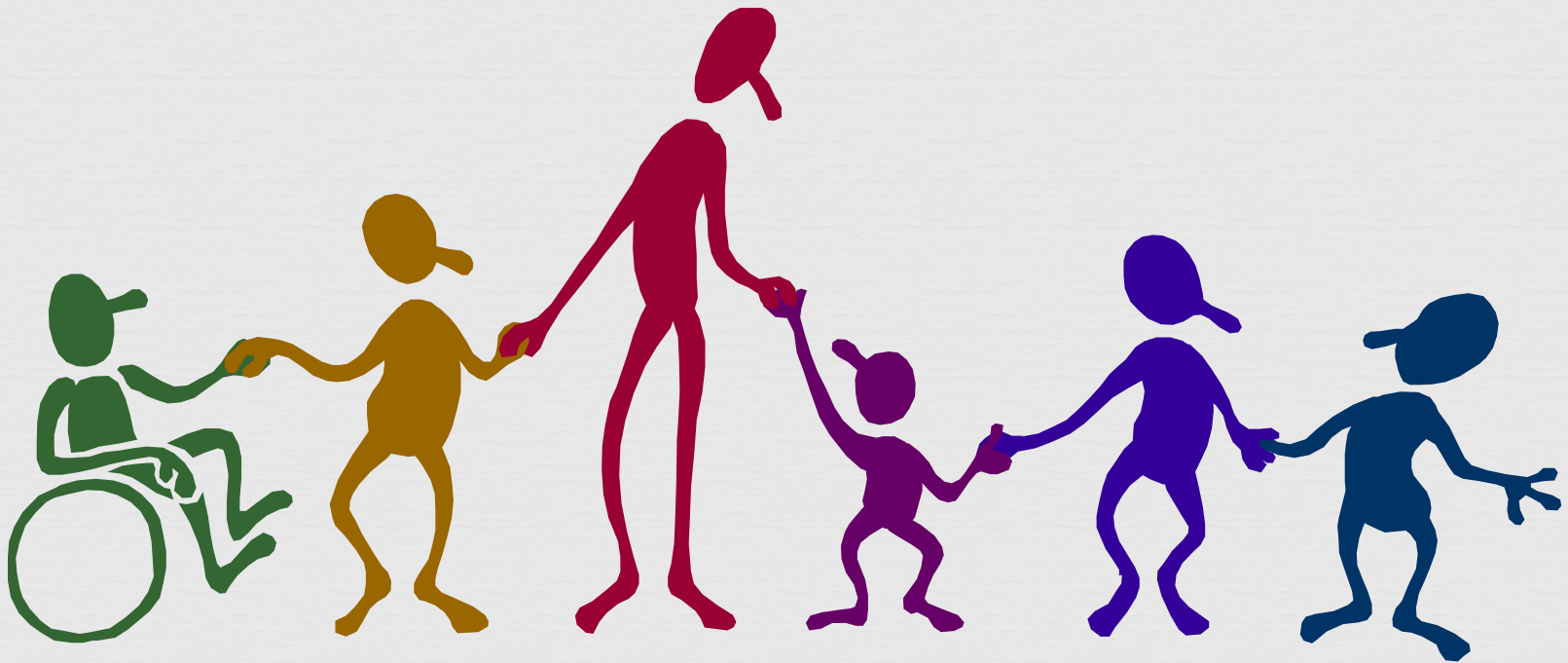


of discrimination are painful and can last forever.

People are subjected to harassment because of a group they are identified with, or their protected class membership:

- ✦ Birthplace, ancestry, cultural, or linguistic characteristics related to a protected class
- ✦ Association/affiliation/friendship with someone in a particular protected class
- ✦ Attendance or participation in schools, churches, temples, or mosques associated with a protected class
- ✦ Surname identified with a protected class.

What are the “**protected classes**”
under discrimination law?



Nebraska Equal Opportunity
Commission

National Origin includes, but not limited to:

Hispanics-All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture without regard to race.

Asian or Pacific Islander-all persons of the Far East, Southeast Asia, the Indian Sub-Continent, or the Pacific Islands. Included: China, Japan, Korea, the Philippine Islands, and Samoa.

American Indian or Alaskan Native-all persons having origins in any of the original people of North America.

Race includes, but not limited to...

All White people having origins in Europe, Northern Africa, or the Middle East, who are not Hispanic. All Black people having origins in any of the Black racial groups of Africa, but who are not of Hispanic origin.

Color

There are different colors even within racial groups, and a person may believe they have been treated unfairly because of the color of their skin.

Religion

Showing a preference for or against a religious group, or showing intolerance for that group's observation of their religious practices, dietary habits, or work schedules.

Sex

Sex discrimination is gender discrimination, and both women and men may experience discrimination , including **sexual harassment**.

Age - Anyone age 40 and over

Marital Status - Under employment law only: married or single.

Familial Status - Under housing law only: any family with minor children

Disability -



A person with a disability (under the ADAAA) has a physical or mental impairment that substantially limits one or more of their major life activities; a person who has a record of such an impairment; a person who is regarded as having such an impairment.

HOW TO IDENTIFY HARASSMENT...



Nebraska Equal Opportunity
Commission



Harassment is conduct that is:

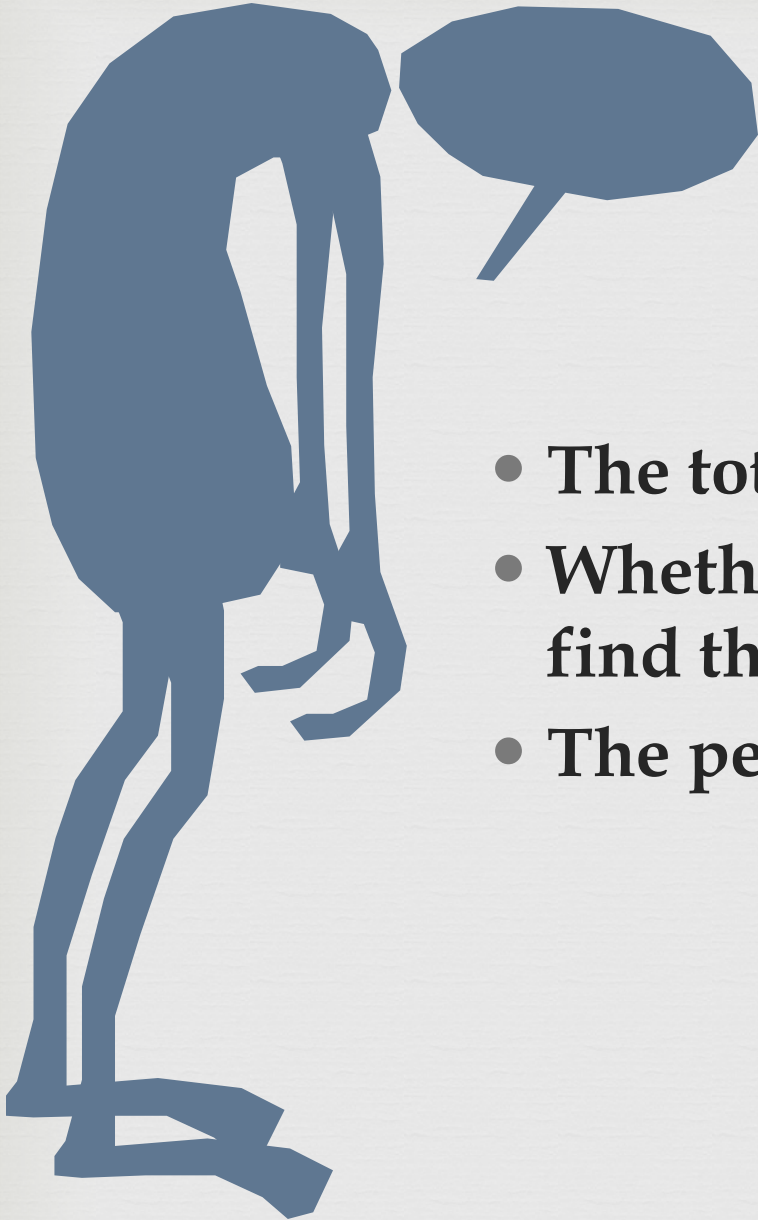
Disregard and Disrespect for
Human Dignity

Illegal Discrimination when
based on a person's
protected class membership

A perpetrator of harassment

Has a bias based on a stereotype or an individual belief or opinion

- Shows prejudice against a particular person or class of persons
- Treats others with disrespect based on an immutable trait



Is it harassment? CONSIDER...

- The totality of circumstances
- Whether a *reasonable person would find the behavior objectionable
- The perception of the victim

The conduct must be sufficiently

severe or pervasive

to be actionable under discrimination law

Severe means egregious just one time



Pervasive means occurring frequently

Unwelcome conduct is not consensual



It may set off an alarm



It is **inappropriate conduct**
when it is
verbal, or physical, or visual,
or any combination of these

Verbal

- Swear Words or Profanity
- Name-calling that refers to someone's protected class status
- Any derogatory slurs, comments, or insults

PHYSICAL

- Pushing, impeding, or blocking someone's movements
- Unwanted touching, assaults
- Throwing objects
- Giving backrubs

Visual

- Derogatory posters, pictures, cartoons, drawings, graphic materials, objects
- Suggestive gestures
- Glaring

Examples

- ∞ Discussing sexual activities
- ∞ Telling off-color jokes
- ∞ Unnecessary touching



Commenting on physical attributes

Displaying suggestive pictures

Using demeaning terms

**Discussing someone's race
or religion or national origin
in a negative way**



Using indecent gestures

Sabotaging the victim's comfort or performance

Engaging in hostile provocation



Nebraska Equal Opportunity
Commission

**Granting favors to
participants in
consensual but
prohibited
conduct**

**Using crude and
offensive language
in the presence of
others or allowing
the language to be
used**



What should a victim of harassment do?

**Clearly
communicate that
the behavior is
offensive or
unwelcome.**

NO

In AGE – based harassment, there are themes of remarks, behaviors, and opinions that are reflective of stereotypical and discriminatory views, such as:

1. “We need some new blood in this company.”
2. “You can’t teach an old dog new tricks.”
3. “We have laid-off most of our employees reaching retirement age. That should save us some money on our medical insurance.”



Many studies have shown that older workers have lower absentee rates and more job stability and tenure.

The perpetrator may be a
coworker, manager, vendor,
... *any* workplace contact



**The victim does not
have to be the
person who is the
victim of the
unwelcome conduct,
but could be
someone who is
offended by the
conduct**



The victim and the harasser *do not* have to be of a different protected class membership



Oncale v. Sundowner Offshore Services 523

U.S. 75, 118 S.Ct. 998,

[72 EPD (CCH) ¶45,175]

Same-sex harassment is
recognized under Title VII

**It is illegal harassment when
the unwelcome conduct is
based on the person's
protected class membership**

**It is harassment
when others join
in, or are aware
and do not
prevent/stop it**

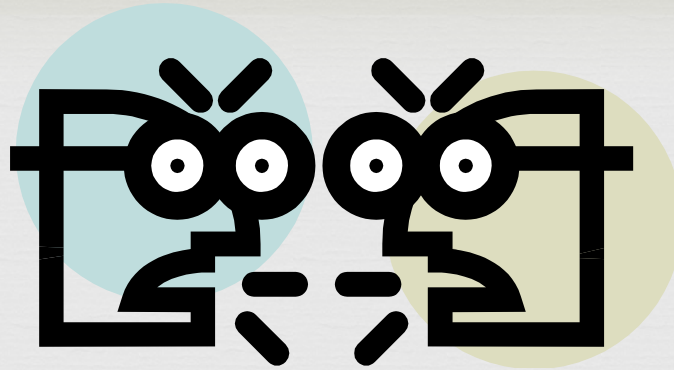


***Note: The responsibility for prevention and action is different between supervisors and non-supervisory employees.**

Negative Behavior:

- ☞ Talking at a person
- ☞ Belittling
- ☞ Ignoring
- ☞ Cutting someone short
- ☞ Condescending
- ☞ Discounting a person's intelligence or knowledge





definition:

“Hostile Environment”

A work environment created by a
workplace contact

(including a supervisor)

who does not impact tangible terms and
conditions of employment



definition

“Quid Pro Quo”

Unwelcome
behavior by
**someone who
has authority or
power to control
or make
decisions**

Who impacts tangible terms and conditions of employment:

**hiring, promotion, demotion, discipline/termination, compensation,
work assignments**

Nebraska Equal Opportunity
Commission

Meritor Savings Bank v. Vinson

477 U.S. 57, 106 S.Ct. 2399

[40 EPD (CCH) ¶36,159} (1986)

The U.S. Supreme Court held that Vinson had been subjected to sexual harassment by the supervisor, and this harassment also constituted a “hostile environment”.

If not opposed, it may affect:



- ❧ VALUED EMPLOYEES
- ❧ PRODUCTIVITY
- ❧ MORALE
- ❧ SALES AND PROFITS
- ❧ CLIENTS, CUSTOMERS
- ❧ LEGAL FEES
- ❧ GOODWILL AND REPUTATION

The courts have established that an employer is liable if negligent in failing to prevent harassment from taking place.

When.....

1. Employer does not monitor the workplace
2. Employer failed to respond to complaints
3. Employer failed to provide a system for registering complaints
4. Employer discouraged complaints from being filed.



**Develop, promulgate
and maintain policies
that are periodically
reviewed and owned by
employer and employee.**

**Periodically read the
policies that address
filing an internal
complaint.**

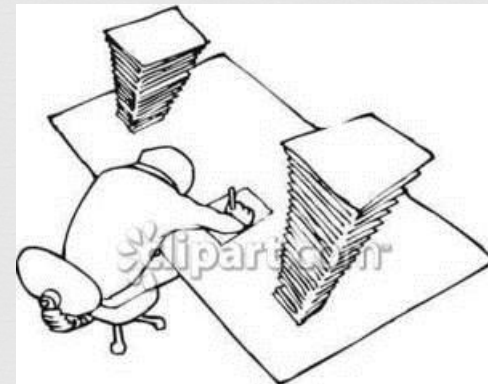
How to Handle Complaints and Resolve Problems

- ❧ Listen to the complaint/concern/objection
- ❧ Reduce your feelings of fear
- ❧ Empathize
- ❧ Apologize when a mistake has been made
- ❧ Affirm the dignity and worth of the person



1. **Document** : keep records, notes, emails, etc. of concerns or complaints
2. The internal investigation should be conducted by a person who does not have stake in the outcome
3. Be honest with the employee/employer
4. Reasons for decisions should be made crystal clear to the extent possible to all staff
5. Remember the “Yes, but...” test

internal



**Take immediate
and appropriate
remedial action if
warranted.**

RETALIATION



Discrimination against a person who has opposed an illegal practice or participated in an investigation

Why People Complain



- ❧ Employee treated unfairly
- ❧ Employee believes no one would listen
- ❧ Employee has financial needs/losses
- ❧ Employee reads employment laws
- ❧ Employee wants to know their rights
- ❧ Employee has misunderstandings about their rights

Overview of Retaliation

The law prohibits retaliation against someone who is a:

- ∞ Current workplace contact
- ∞ A perspective workplace contact
- ∞ A former workplace contact



Types of Retaliation by Employers

1. Threat to file a counterclaim in court
2. Suspension with pay
3. Changing the qualifications for an open position sought
4. Selective strict enforcement of a policy
5. Harassment
6. Manipulation of union contract rights
7. Reprimands
8. Extending Probation
9. Transfer to a lower grade or salary
10. Intimidation of witnesses during an internal investigation of a complaint

The Opposition Clause

Opposition is protected if the employee had a reasonable and good faith belief that the practice opposed was a violation of the Act, or a federal, state, or local law.



Opposition includes:



- ∞ Peaceful picketing
- ∞ Public protest of an employee by an employee who is also a consumer
- ∞ Devoting small amounts of office time to complaint-related work
- ∞ Refusing to perform a directive that is a violation of the state or federal law*

*Whistle-blower retaliation

Opposition may not include:



- ⌘ Disruption of the workplace
- ⌘ Neglecting work duties to perform complaint activities
- ⌘ Willful violation of legitimate company rules
- ⌘ Complaining outside the chain of command



“Participation” activities include:



- œ Filed a charge
- œ Refused to be a cooperative witness for the employer
- œ Testified for a coworker
- œ Become a probable witness
- œ Gathered evidence to support a charge of discrimination
- œ Expressed an intent to file a charge

The Participation Clause



Protection is not
lost if the
employee is
wrong on the
merits of the
charge.



Nebraska

Fair Employment Practice Act



Section 48-1114. Opposition to unlawful practice; participation in investigation; discrimination prohibited.

It shall be unlawful employment practice for an employer to discriminate against any of his or her employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership because he or she...

Section 48-1114 (FEPA)

(1) has opposed any practice made an unlawful employment practice by the Nebraska Fair Employment Practice Act

(2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act

(3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or this state.

(Whistle-blower)

Nebraska Age Discrimination in Employment Act



Section 48-1004(3): It shall be an unlawful employment practice for any employer or labor organization to discharge, expel or otherwise discriminate against any person, because he opposed any unlawful employment practice...or has filed a charge or suit, testified, participated, or assisted in any proceeding under the provisions of (the) sections...

Equal Pay Act of Nebraska



Section 48-1221(4): No employer may discharge or discriminate against any employee by reason of any action taken by such employee to invoke or assist in any manner the enforcement of the provisions...

Prima Facie Elements of a charge of *Retaliation



1. Person has: (1) opposed any practice made an unlawful practice (2) has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Acts, (3) has opposed any practice or refused to carry out any action unlawful under the laws of the United States or Nebraska
2. C suffered an adverse action by the business
3. There exists a temporal and causal connection between the protected activity and the business's action

Mattson v. Caterpillar, Inc., 359 F.3d 885 (7th Circuit 2004)

A discrimination complaint that is unreasonable, meritless, and motivated by bad faith does not qualify for protection under the participation clause of Title VII's retaliation provision.

Deravin v. Kerik, 335 F.3d 195 (2d Circuit 2003)

Defending oneself against a charge of discrimination by participating in a Title VII proceeding or investigation constitutes protected activity.

Cross v. Cleaver, 142 F.3d 1059 (8th Circuit 1998)

The court rejected a “knew or should have known” standard for employer liability in favor of a vicarious liability standard that depends on the status of the retaliator and the nature of the retaliation.

Best Practices



Handling Issues

To Avoid Complaints

Human Resource department/decision-maker should

1. **Document : keep records, notes, emails, etc.**
2. **Be honest with the employee/employer**
3. **Reasons for decisions should be crystal clear to the extent possible**
4. **Remember the “Yes, but...” test**

Complaint Handling



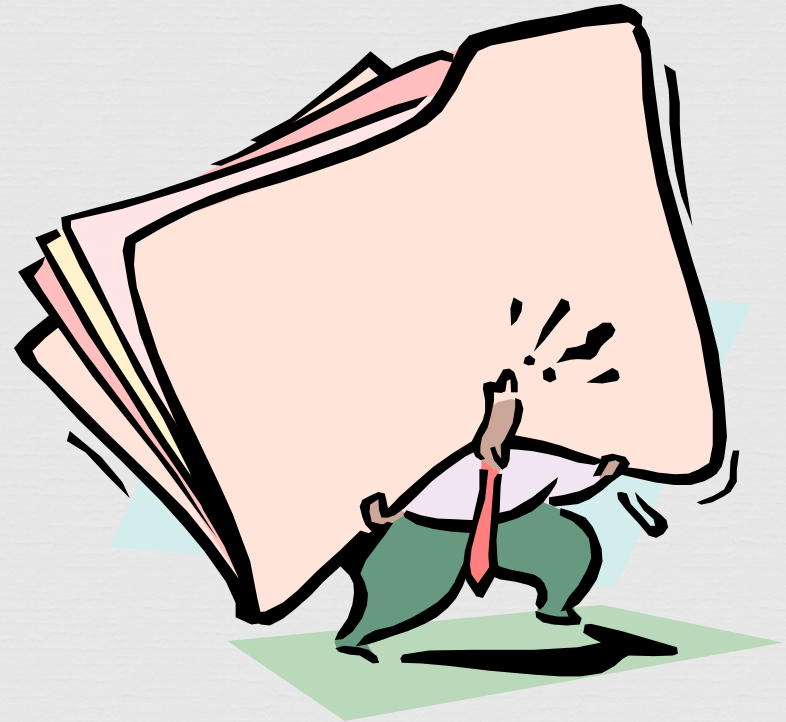
- Prompt
- Neutral
- Thorough
- “No retaliation” clause
- Investigator has no interest in the outcome
- Documented

Follow-up



It is the company's responsibility to provide closure for the person who complained...and to address inappropriate behavior or activity in the workplace.

The laws require the business to make, keep, preserve *records* relevant to the determination of whether unlawful practices have been or are being committed.



Section 48-1117(5)(a)(b): Nebraska Fair Employment Practices Act



Everyone by
birthright is
entitled to

Human Rights

**People residing in
this country are
covered by its laws.**

Working in a Diverse Community

Practice kindness

Help to resolve conflicts



Nebraska Equal Opportunity
Commission

- **Recognize similarities and differences in individuals within groups.**
- **Acknowledge your own biases and prejudices. We all have them.**
- **Let go of stereotypes.**
- **Learn from others.**
- **Yield to respect, acceptance, and inclusiveness instead of insulting and contentious behavior.**



Value and respect diversity



Nebraska Equal Opportunity
Commission

Tell your family and
others that you value and
respect diversity



Nebraska Equal Opportunity
Commission

Be the example



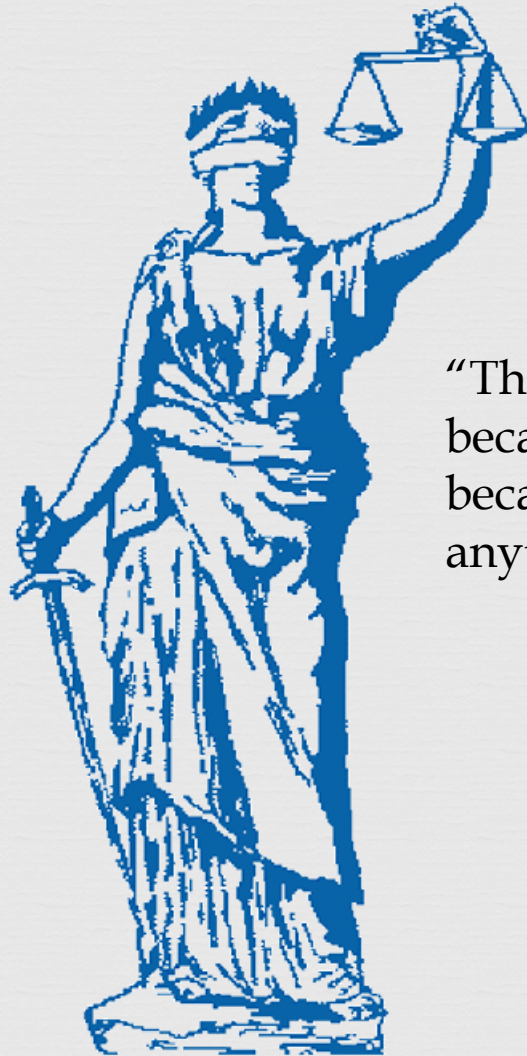
Nebraska Equal Opportunity
Commission

Walk the talk and
implement/enforce/follow
policies, rules and practices that
hold all persons accountable for
inappropriate behavior.

It takes only one person



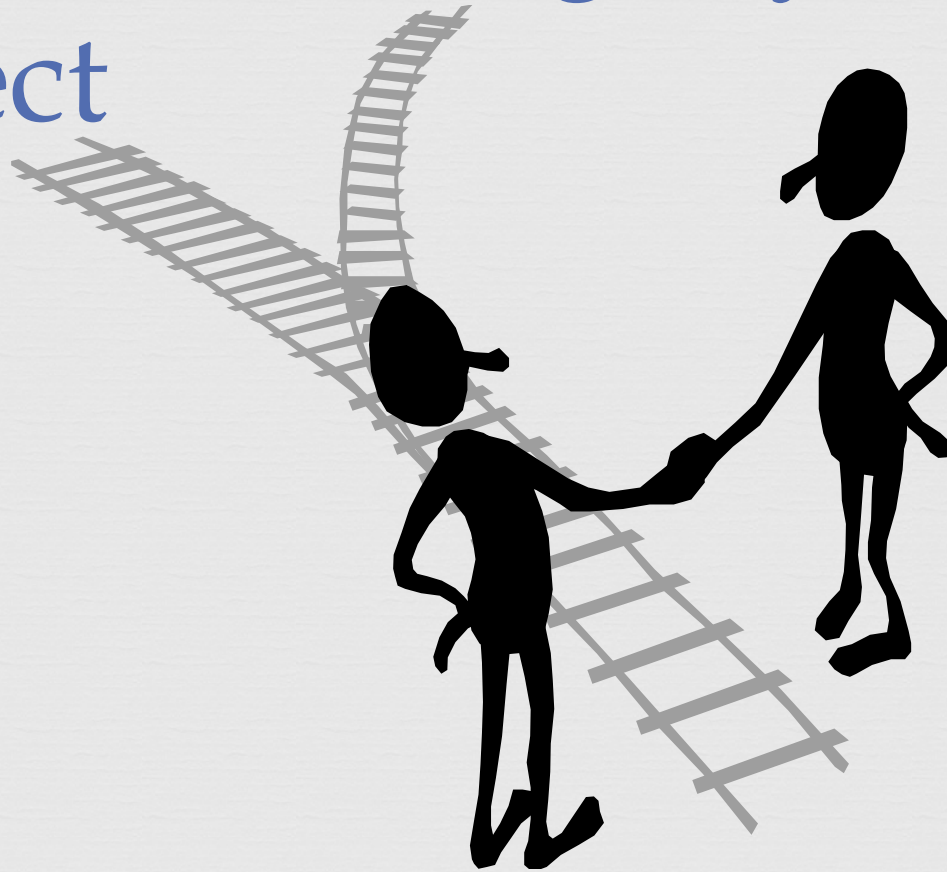
Treat all people fairly



“The world is a dangerous place to live; not because of the people who are evil, but because of the people who don’t do anything about it.”

Albert Einstein

All people want to be
treated with dignity and
respect

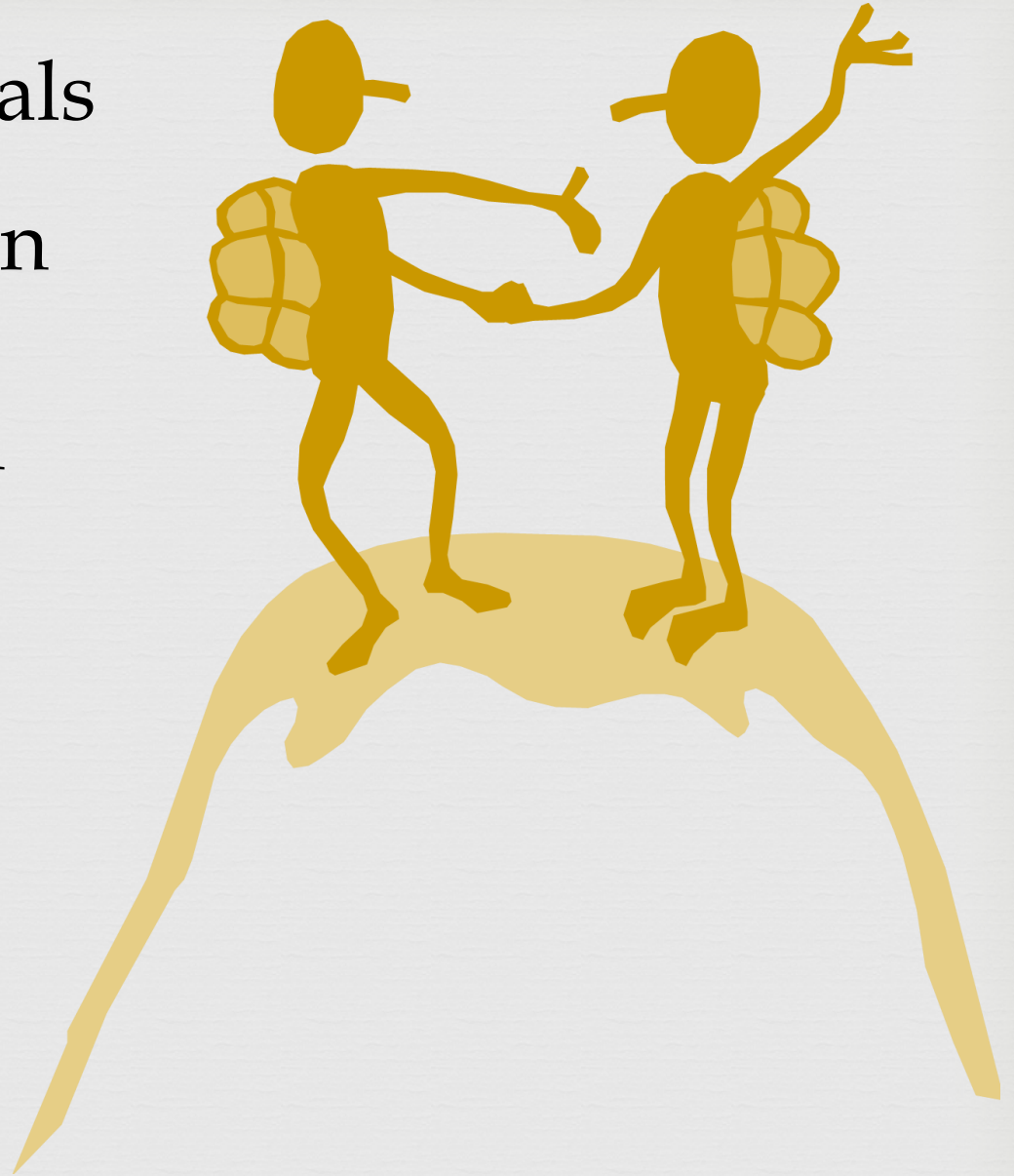


Nebraska Equal Opportunity
Commission

People are individuals
but more often than
not, share values,
beliefs, and social
culture

“The task that remains is to cope
with our interdependence – to
see ourselves reflected in every
other human being and to
respect and honor our
differences.”

Melba Patillo Beals



Nebraska Equal Opportunity
Commission

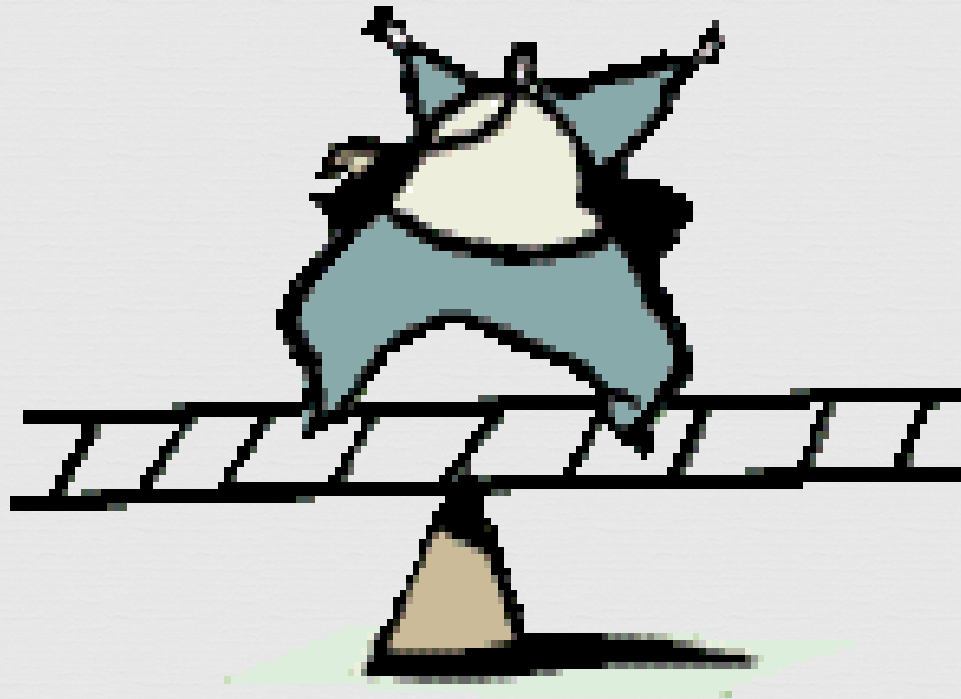


*Discrimination issues in
the community find their
way into the workforce*

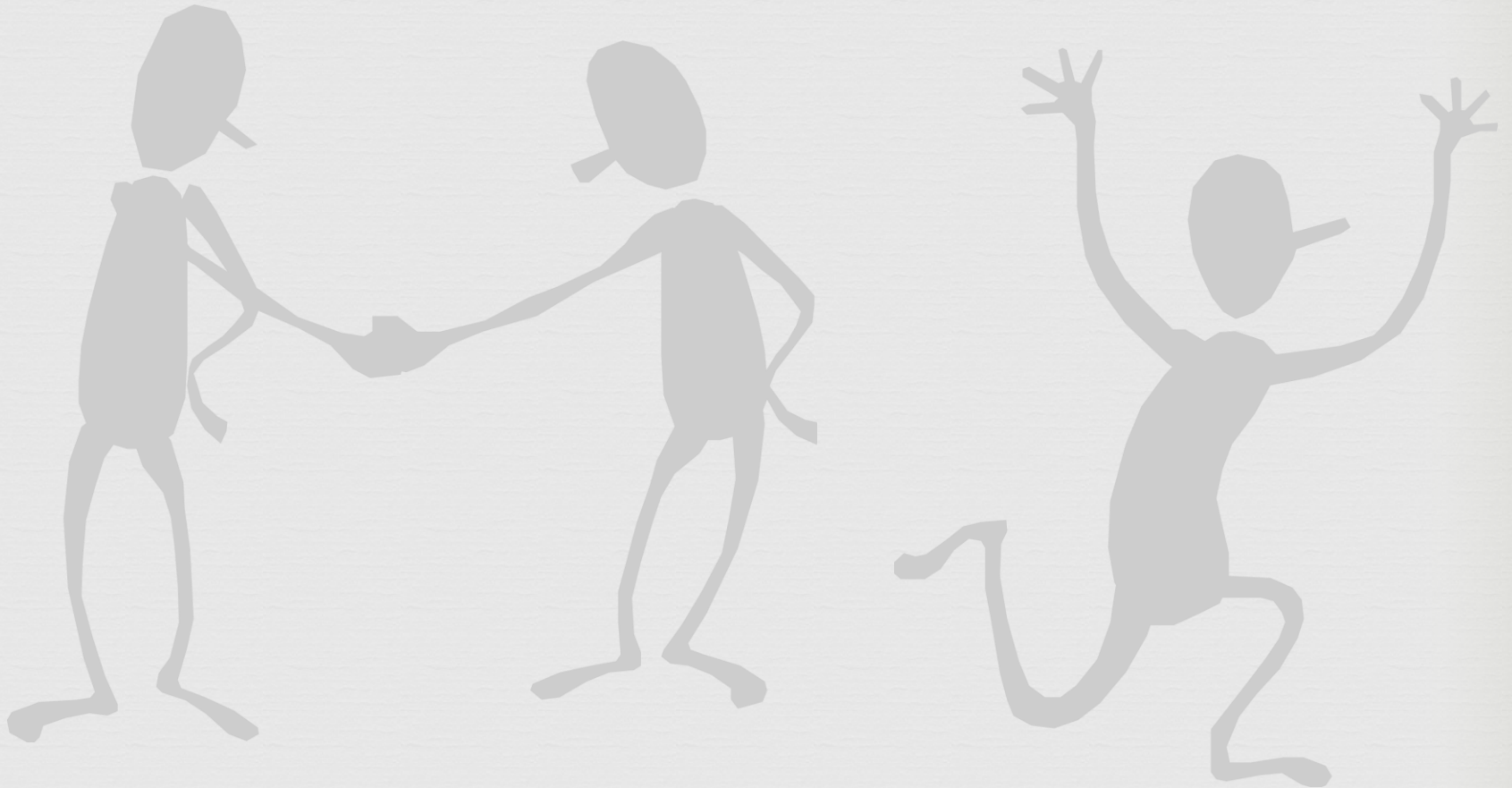
None of us alone can save the nation or world. But each of us can make a positive difference if we commit ourselves to do so.

Cornel West

Make an assessment of your own strengths and weaknesses in your interactions with your colleagues



Support positive behavior

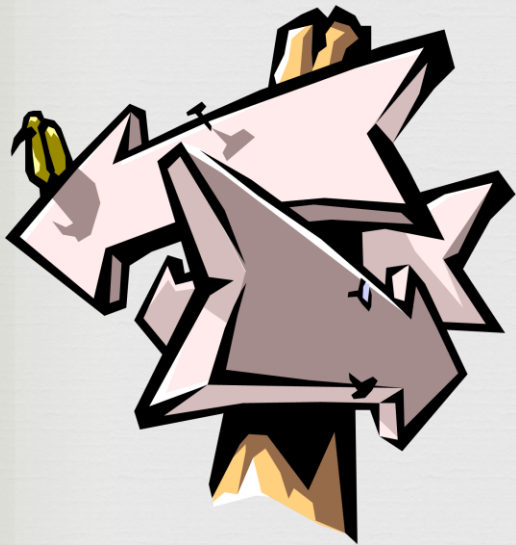


Nebraska Equal Opportunity
Commission

**Know the policies and procedures
for addressing harassment**

Have a clear understanding

Follow the
company policy on
resolving problems



Lift each other up



**Don't pass your
discriminatory biases
unto someone else**

**Examine your
responsibility for
problems**

**Build rapport with a
victim of harassment**

**Find the resources to
address harassment and
inappropriate
workplace banter and
behavior**



Be prepared to eliminate
harassment and conflicts.

**Remember: You are not expected to
tolerate harassment in the workplace**

**Your colleagues will stand with
you when there is harassment**



Nebraska Equal Opportunity
Commission



Take big problems to upper management's attention if appropriate, whomever the perpetrator



A workplace challenge you face alone...

Nebraska Equal Opportunity
Commission

Or a challenge you face as
a team...



Nebraska Equal Opportunity
Commission



**Will be resolved with
everyone working
together...**



Nebraska Equal Opportunity
Commission