

DATE: **2008 July 13**  
PODCAST: **The Undercover Lawyer**  
TITTLE: **The Hostile Work Place Episode 2: Sexual Harassment**

This is The Undercover Lawyer and this is the "Hostile Work Place" podcast episode 2. On today's show we are going to talk about the topic of all topics in the workplace, sexual harassment, which is frequently misunderstood and actually could be the basis to understand many of the other types of discrimination in the workplace. For today's quick tip, we are going to talk about making sure you know what is in both of your personnel files. That is right, both of them, and we will explain that when we get to that part of the show.

First, the announcements, we have our forums going at [undercoverLawyer.com/forum](http://undercoverLawyer.com/forum), and it has been great to see that really taking off over the last 10 days. We have the contest going for an Apple iPhone 3G which someone at the end of the month will win by being the top poster in the forums. Number two for the price will be an iPod Shuffle, and then third place will be an iTunes gift card. Then an Undercover Lawyer book, *Work Laws Exposed*, will go along with each of those three top place posters. The contest is going so good that I am considering offering another iPhone 3G for next month, August, top poster. Considering that, let me know your feedback, what you think on whether that is something we should offer. Finally, there is a new post up at the website regarding age discrimination and layoffs, with all the layoffs coming from Starbucks closing 600 stores, Northwest Airlines laying off 2,500 flight attendants. It seemed that a piece on layoffs was appropriate, and specifically age discrimination. Layoffs seems to hit the over 40 and often over 50 age set more so than other workers, they are more expensive, they are closer to retirement, companies think they can induce them to retire easier than they can layoff younger workers. So that is covered in the new piece at [UndercoverLaywer.com](http://UndercoverLaywer.com).

Finally as part of our announcements, I have happily had a number of people ask when is episode two coming out and what is episode two going to be on. So, you now know that episode two will be on sexual harassment. As far as the frequency of the podcast, we are going to have them every other week. So, every two weeks, and I will put them out on Sunday evening by midnight Pacific Time. So, Monday morning if you are on the East Coast they will be available. I may get the episodes up earlier, but I do not want to make any promises I cannot keep. What you can count on is every two

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weeks, on Sunday night, you will have a new podcast telling you all about your workplace rights and tips on how to apply those in a practical way.

For those of you that are listening to the show for the first time, you may be interested to know that I was an attorney in a large law firm for 10 years, still am - but I was before I started the Undercover Lawyer websites, podcast and articles. What led me to write Work Laws Exposed and then explain other facets of work life through the podcast and through articles on the website was seeing just how much of employment law regular people did not know, and it really was not accessible to them unless maybe they have a parent who is a lawyer or go to law school. It is too expensive to learn by hiring a lawyer to teach it to you, it is not covered in classes anywhere. A plaintiff lawyer does not want to educate you on how to keep your job, they want you to get fired and leave work so you rack up big damages that you suffer a lot of loss of money that they can sue to recover. So I am trying to fill that gap and teach everyone what their concrete legal workplace rights are, how to apply them and how to do it for far less than the \$250-500 an hour that a regular attorney would charge.

With that, we can return to the featured segment on sexual harassment. So just to see where everyone stands in their knowledge of sexual harassment, let us start with a little quiz. An employee can file a claim for sexual harassment for which of the following: the employees asked to submit to require requests or is subjected to sexual conduct that interferes with their job performance, employee does not like the job assignments they are getting, employee does not like his or her supervisor, employee does not like a co-worker, or any of the above? Now if you think the answer is any of the above, you are right. It is kind of a trick question. It is not who could file an employment lawsuit, sexual harassment lawsuit, and win. The question is who can file a claim for sexual harassment. The truth is people who suffer all of those things wind up filing complaints, lawsuits, for sexual harassment. They do that when everything is going wrong at work and they feel that they have no other avenue to push back except through filing a lawsuit.

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Next question, true or false, the law allows more joking of a sexual or racial nature in highly stressful work environment because humor diffuses stress and increases productivity. Now if you think that is true, you are wrong. It is false, but so many people act like it is true, do they not? It is just the major excuse that I come across in my day job as a defense attorney, advising companies. This is why people go ahead and joke this way anyway, they think, "Well, it is different here, we all know each other. We have to deal with the stress somehow, so we joke this way." You know what, the law does not care. If that is the excuse that people give in your workplace, you do not have to put up with it.

Next, true or false, sexual harassment laws prohibit only physical harassment. False. Of course not, the epitome of the hostile work environment are females scantily dressed as part of a tool calendar hung up on the wall in a workplace that does labor; a shop, an auto part store, there is no physical harassment there. As on the side, ever noticed how women that are scantily dressed seem to know more about cars than women who are fully clothed? I wonder why that is.

Next in our quiz, an employer is not liable for sexual harassment unless someone intended to harass an employee. Again, this is false, and I have got a story to illustrate it. There was an employee who worked in a two-person department and they were relatively autonomous. She, the female employee, reported to the one male in the department. They were equals, but he was a lead worker and wrote the schedule for both of them. They began a relationship at work despite the fact they both had spouses. Their relationship became very physical in and out of the workplace. Ironically, they were animal control officers and they basically carried on like animals. So when this came into an end, and it did, the male was heartbroken. He was just crushed. The female went quickly about getting together with a police officer. So, the male animal control officer, he had no intention of sexually harassing his beloved, but he tried so hard to win her back. He just thought if he could convince her to take him back, then the world would be a happy place again, the planets would be in alignment, everyone would buy each other a coke and it was their destiny to be together forever.

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But she did not want him back, and so his frustration grew into sending her e-mails all the time, calling her all the time, following her home and trying to explain his feelings to her as she went from her car to her house. He just would not give up, he was determined to win her back. Now did he have any intention of harassing her? No, I honestly do not think so. I interviewed the guy, I think he was just crazy in love and would not give up when a normal person would catch a clue and layoff. So, the employer in that case was potentially liable for sexual harassment because he had heard of this behavior was not putting a stop to it, and this was the case even though the employee had no intention of harassing. It was the behavior and whether or not the receiver of the behavior welcomed the potentially harassing actions, and that is the team we will hit on more in just a little bit.

True or false, the law prohibits sexual harassment only if the harasser was sexually attracted to the person he or she harassed. False. Sexual harassment can be used just as a way to control employees or put down employees or even one employee to another, it does not have to be due to sexual attraction at all.

Next true or false, sexual harassment always involves a male and female, homosexual activity is not covered by the law. False. It does not have to include a male and a female. Now, this can also be true federally under the Federal Law, sexual orientation is not a protected class. However, as you have probably heard in the news, multiple states have started allowing civil unions or gay marriage, and then other states have passed laws saying, "There are no civil unions between same sex couples. There is no gay marriage here." So there is a conflict on a state level, there is none at the Federal level. However, what many people do not realize is that straight male to straight male sexual harassment is possible as is straight female to straight female sexual harassment, and that is another topic that we are going to cover later.

Now finally, true or false, there is no problem with the consensual romantic relationship between employees. That is true and false. It is true that there is no problem legally with a consensual romantic relationship between employees. There is nothing against the law in falling in love at work. More power to you if you are able to

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do that. However, you should be aware that many employers have a fraternization policy that says that if you are related to or in a romantic relationship with someone who is in your direct line of supervision or even in your same work group or work team, that you need to let a supervisor know. The idea is just that like a family member, you would naturally give preferential treatment to the one you are in a romantic relationship. Now, that is the policy level. At the legal level, where does concern come in? Not when there is a consensual romantic relationship between employees, but when that relationship ends. That is where the problem starts legally, that is where sexual harassment can come from. Just think back on the example of our two animal control officers earlier. When that relationship ended, the male did not accept that the relationship was over and kept behaving right on as he had before. So, whereas his behavior has been welcomed by the female, it was now very unwelcomed by the female, and that itself is a definition of sexual harassment.

Now moving on from our quiz, I want to tell you a little bit about a survey that was done of jurors and what they thought of sexual harassment cases. Jurors were asked, "Do men and women define sexual harassment differently," and 88% percent said yes, only 12% said no. Then jurors were asked, "Is sexual harassment a common occurrence in the workplace?" Listen to this, 72% said yes, only 28% said no. Then jurors were asked, "Is it difficult to determine when sexual harassment has taken place," 67% said yes, 33% said no. So, in other words, 33% say it is not difficult to determine when it happens, and it happens all the time. Then put that together with this next statistic, "Do women report sexual harassment to their employers if it has occurred?" Yes, 17%. No, a whopping 83%. Then in most cases, "Does a woman who says she has been sexually harassed exaggerate?" Jurors said yes 12% of the time, and said no 88% of the time. In other words, a woman who comes forward and reports sexual harassment is brave, it is not that difficult to determine, she is not exaggerating and this is something that happens frequently. Now what else do jurors think about these sexual harassment cases? They were asked, "Typically, executives who have sexually harassed subordinates get nothing more than a slap on the wrist by the company, yes or no?" The jurors said, yes 83% of the time, and no 17% of the time. Then when they were asked what should happen to the supervisor who sexually harasses a subordinate, 92% said the supervisor should be fired, and only 8% said no.

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So imagine if you are a plaintiff female in a sexual harassment case, you go into the courtroom, you sit down at the plaintiff's table, you look up at the jurors there who have yet to hear the first thing about your story. They are going to think that you are not exaggerating, you tell the truth, you are one of the brave few who have stepped forward. It is not going to be that hard to figure out who is telling the truth, whether it really happened here, and they are going to think that the company who did not fire someone who harassed a subordinate should have. So the company is going to be in the wrong. So you can see how jurors get angry and upset, their biases, presuppositions, expectation all lean toward the female plaintiff in these cases. If you are listening to this and you are a business person who has employees, you should know that these cases are losers. Even when we win - and I have been on the defense side and won these cases - it is an uphill battle the whole way. It is long, drawn out and expensive.

Now before we ever get to the courtroom, you should know that the EEOC, Equal Employment Opportunity Commission, and our courts recognize two types of sexual harassment. Those are one with pro quo sexual harassment, which simply means - quid pro quo is Latin for something for something or in exchange or things. So quid pro quo sexual harassment is the classic "sleep with me and you will get a promotion" or "wear more revealing clothing at work and you will not have to work Friday afternoons, you will have light duties around the office, you will get a good performance appraisal, you will get extra vacation or all the time off you want." All of that would be a quid pro quo sexual harassment as would implying that someone needs to wear tight clothing or their career is going to take a downturn, and they might have to work on some undesirable projects, that would also be a quid pro quo sexual harassment. Anytime that submission to or rejection of sexual conduct is used as a basis for employment decisions, then that would be quid pro quo sexual harassment.

The other type of sexual harassment which is in my experience more frequently alleged, at least in lawsuits, is hostile work environment sexual harassment. That is where a conduct that is based upon sex, sexuality or gender so unreasonably interferes

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with someone's job performance or job duties that they feel forced to quit, and a reasonable person would feel forced to quit. The second type of sexual harassment is hostile work environment sexual harassment, and it is this type that is alleged, at least in my experience, more frequently in court. Hostile work environment sexual harassment is unwelcome sexual conduct that unreasonably interferes with job performance or creates an intimidating, offensive working environment, and the conduct does not have to be overtly sexual. In other words, name calling or harassing women just because they are women can be hostile work environment. So if the women are singled out, it would be hostile work environment based on sex or gender. It does not necessarily have to be sexual, although it frequently is.

Now here is the key point to understanding sexual harassment in the workplace. If you are a woman or a man who is listening to this and wondering if you are being sexually harassed at work, if you are someone who fears that they might be accused of sexual harassment at work, this is the key. What I am about to tell you right here is the key to understanding sexual harassment. If you use this as a lens to look through when you go through about your day, you can figure out whether or not something could be sexual harassment, and the lens is unwelcomeness. That may sound weird, so let me unpack it a bit. Sexual harassment is unwelcome, verbal or physical conduct of a sexual nature. So this unwelcomeness standard is a two-edged sword, it cuts both ways.

Let us just say you are a man and you ask a woman out, and she says, "No, thank you. I appreciate it, but no." Will that be sexual harassment? You do not know, of course not, asking someone out one time is not sexual harassment. The key is, that is not unwelcome, most people enjoy being asked out. Even if it is unwelcome, objectively, you cannot assume that everyone would be offended by being asked out a single time. So, that would not be sexual harassment at any level. Now, let us say the next day that the man comes back and says to the woman, "Would you please go out with me. I know you love Mexican food and flamenco dancing, and I know the greatest place to do that. They have the best enchiladas in the state, and we can go flamenco dancing when XYZ band is there on Thursday nights. It would be just a great time." Then add into that that this is the supervisor who is asking out the woman. This time, she says,

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"No, thank you, I really do not like to mix my professional life and my social life. So, no thank you, and I really do not want to mix the two at all."

So, at this point, is it sexual harassment? Probably not, but she has made unwelcomeness clear to the man at this point. That is the part of the sword that cuts her way, she has to make unwelcomeness clear, not necessarily to the accused harasser but to someone. In this example, it is to the person who is potentially the harasser, the male. So our male goes home and thinks, "I really wish that she would go out with me." He comes back the next day and he says, "Joanne, I really want to go out with you." So she comes back in the next day and she finds six dozen roses on her desk, all with cards from her boss saying, "Please go flamenco dancing with me." She looks at the card and says, "What am I going to do now?"

In this situation, do you think she can say no without it affecting her job? Is it sexual harassment now? Yes, I think it is. It is because she has made unwelcomeness very clear to him and he has gone over the line anyway. So her obligation is to make unwelcomeness clear to him. If it was let us say a more graphic situation or she was just terrified by him, she could go to Human Resources or to his supervisor, but she would not necessarily have to go straight to him. She makes it clear that the behavior is unwelcome, and then he has to respect that. That is the part of the sword that cuts his way, that once unwelcomeness is clear you must respect that and respect the person who is expressing that your behavior needs to change.

Now in the area of quid pro quo sexual harassment, the first type, there are actually two types of employees who can be victims of quid pro quo sexual harassment. The first is the one you are probably thinking of, the employee who is offered the benefit in return for sexual favors. The second is the employee who does not have the opportunity to earn the benefit because it is distributed to others in return for sexual favors, and they do not have the opportunity to trade sex for employment benefits. But that one just always cracks me up, I was so shocked when I read that. Then once I got into the reasoning of the case, you can see why it actually makes a little bit of sense.

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First, let me tell you about this cartoon where there is this goofy looking guy behind the desk in an office, a woman comes in who is very unattractive and hair that looks it has been plugged into a wall socket. She says to him, "All of the other women in the office are suing you for sexual harassment. Since you have not sexually harassed me, I am suing you for discrimination." What that cartoon does not quite understand is that she could actually sue him for sexual harassment, it does not have to be discrimination. Here is why, first, the court wants to expand the number of people whom can raise their hand and say something untoward is going on in the workplace here and it needs to stop. So, by making this rule, the court expands the number of people who can raise their hand and complain.

Then second, imagine that you are in a work group of four people, one of them quit and followed their spouse to a new state because their spouse got transferred. So, now, you have three people doing the work of four. Then imagine that one of the three who is left starts having an affair with the boss. This person is suddenly coming in late, they are leaving mid-afternoon to go on a Starbucks run with the boss that take at least half an hour, then they go for a long lunch with the boss, then they disappear to the bosses' office supposedly to talk about a project. Then mid-afternoon they go on another Starbucks run or for some sort of food, and that takes at least half an hour. Then they cut out early, probably to head down to some happy hour somewhere. So, this person is carrying on with the boss and contributing pretty much nothing to the workload of four people that was being done by three and is now being done by two, you and one other person. Now, are you going to want to stand up and complain about the unfair treatment that you are not getting off easy because you are not able to trade an affair with the boss for workplace benefits, a light load? Yes, you can see how it is more fair. To top things off in this situation, the supervisor brings around the top executives, introduces them to his loved one and praises that person's work, that they have got a career that is really taking off and showing a lot of promise. But the reality is, they are not doing anything. That is what happens, and that is why the court has said that someone whom just witnesses this and it negatively affects their own work can stand up and complain, and even file a sexual harassment lawsuit.

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Now there is an affirmative defense in sexual harassment cases where a supervisor is the harasser that is frequently called the Burlington-Faragher defense that comes out of two Supreme Court cases that were decided on the same day. You guessed right, Burlington and Faragher. If you are an employee, all you really need to know is that these two cases mean that you cannot sit on your hands and not let anyone know what is going on or else the law is not going to help you. If you want the law to help you and you want to have a cause of action against the people who are harassing you, you cannot sit on your hands, you cannot be quiet. You need to go forward and let everyone know that this behavior is unwelcome, and you need to do it right away because their duty to protect you does not start until you let them know that something is wrong.

Now there are a couple of exceptions if the company you are at has no sexual harassment policy at all, seem to encourage supervisors to harass employees, then they may not be able to utilize the defense. But do not even let it get that far, just let someone know that this is unwelcome. If there is absolutely no one at your company, then go to your state's Department of Labor and file a complaint there. But let me just say it one more time, if you want the law on your side, you cannot be silent and you will not have rights until you speak up to somebody. You do not have to confront your accuser, but you do have to speak up.

Now you may recall earlier when I said that the behavior that causes a sexually hostile work environment does not have to be directed toward the employee. That was recently illustrated and cemented as a rule by a case called Reeves versus C.H. Robinson Worldwide, and the date was April 28, 2008. So as of right now, that case has only been out for about 75 days. So, in this case, what happened? Reeves was a salesperson who work in a group of cubicles where she was the only female and the rest of the people in the cubicles talked in a way that was highly degrading to women. In addition to that, they would play a radio in the morning and on it they would play - the court did not say this specifically, but you could tell by what the court described the radio show's topics as being that they had to have been listening to the Howard Stern Show, not that I am a big fan. By playing that in the workplace, the company was in essence was putting its stamp of approval on that language. It was becoming

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the language of the work environment rather than just the language of Howard Stern that someone can turn on or off as they see fit. So Reeves complained about the radio and was told, "You can turn it off." She would change the station and then go back into her cubicle, and a few minutes later it would go back to Howard Stern. That would happen over and over, whenever she is back in her cubicle and cannot see the radio it would go back.

So there was the talk on the Howard Stern show, in addition to that she would walk in to the cubicle of a co-worker and find nude women on the computer screen. She would also have to listen to talk like when a male co-worker failed to make a sale on the telephone, slam down the phone, point at it and say, "F\*\*\* your mother," and talk similar to that. They would frequently use language that was not directed at her. Again, none of this was said to her about her as a person, it was just said about women generally and she is in the vicinity overhearing it, it is part of her work environment. They would use words such as bitch, tramp, slut and other things that the court said were more degrading to women than men, and that daily exposure to such radio programming and such language was particularly offensive to women even if it did not target Reeves as an individual.

Two things really helped Reeves in her case, one was not just Howard Stern and his radio talk but the mountain of things that were degrading to women that went on in the workplace, the radio, plus the way the co-workers talked, plus the computer screen, plus pictures up in people's cubicles, and it just went on and on. So, that evidence. Then the number two thing was Reeves complained to her boss, and the boss merely said, "Hey guys, let us all act like grown men and stop that." You know what happen when the boss says, "Let us all act like grown men and stop that," the boy continued to act like little teenage boys. They do not stop that because it is an empty threat and they know it.

The second thing to know is that there is a sliding scale when it comes to sexual harassment. The court will look at factors of an alleged hostile work environment and say, "Are these factors present?" One of them is frequency, how frequent is the conduct that is supposedly is causing a hostile work environment. In here you can see

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it is very frequent, everyday. The radio was on every day, co-workers are talking in language that is demeaning to women everyday. The second, and also equally important category that the court looks at and factor, is severity, how severe are the things and then how frequent are they. You could kind of put them on a graph with severity being the X axis and frequency being the Y axis. So if something is very severe but not very frequent, it can be a hostile work environment. If something is very frequent but not all that severe, it could still be a hostile work environment. But either together or one of the two has to be satisfied. Then the third and fourth factors are does the alleged behavior interfere with work, and finally is it something that is intimidating or physically threatening? The court did not find that this was physically threatening but it did interfere with Reeve's work, was so frequent and severe enough that it could be a hostile work environment, and the court let it go to a jury.

In your own case, however, you need to make sure that the behavior is unwelcomed and everyone knows that, then keep records of when things happen and what they are so that you can show later on how severe they were and how frequent they were. Those are the things, unwelcome, severity, frequency. If you are able to show all that, then you will win. As an aside, the court and Reeves analogized to a race case. It was a case where a black male got a job at a car dealership selling cars and was the only black male working there. He had to listen to the other salespeople say things like the low volume seller amongst the salespeople each month was called a "the black ass" and a car that was in need of a lot of repair that came into the dealership for repairs, it was called the N\*\*\*\* rig. This was not directed at him, but it just happened around him. He went to the boss, the sales manager, and said, "Hey I am not cool with this. This is not acceptable. I do not want to be around this and have to put up with this kind of talk." The sales manager did the same old thing, "Okay, boys, let us all act like men. I want this to stop and we all be grownups." Well, do they? No, the keep right on talking the same way they always do. Our salesperson sued and rightfully won. That established that the rule that the discriminatory language did not have to be directed at the individual person that was the salesperson, it did not have to be about them as a person, it just had to be in their vicinity. So discriminatory language in the vicinity of someone who is part of that protected class, a female, a

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minority member, that language can cause a hostile work environment even if it is not directed specifically at the person.

If you want to get really advanced and look at either of these two cases yourself, I will put a site to those in the show notes so that you can download them for free and read them. Now because this is getting far past the half hour mark that I have said I would try to hold to, I am going to break off the straight male to straight male, straight female to straight female sexual harassment and make that a bonus segment that will come out sooner than in two weeks. But I am not going to go into that on this specific show in order to keep the length closer to our goal. So, to be continued on the sexual harassment.

So now we are going to move to the quick tip. The quick tip of today is to know that you have two personnel files, and you should have two by law. Your employers are required to keep two. One is all the stuff about your discipline, your pay raises, your benefit elections, all the stuff that you traditionally think of as a personnel file. Then the second one that has to be a separate file kept in a secure location - as if the first one does not have to be kept secure - is your medical personnel file. So if you have any medical records at all that your employer has been given or has received due to health insurance reasons or because you have filed a worker's compensation claim in the past even if it was not approved, if you just filed one, or FMLA because you need a time off for medical reasons, you went out due to a pregnancy, any of those health record issues and documents must be kept in a separate personnel file, separate from your regular performance file. So if you ever ask for a copy of your personnel file, ask for a copy of that file, too. If they do not know what you are talking about, then you already know more than them, and they will have got themselves into trouble for not having your medical records kept separate.

Then finally, when it comes to performance records, some supervisors will say they keep a working file with them when they are out in the field, when they are supervising employees where they jot down notes or they just keep their notes in a binder of all employees and do not put it in the employee's files, and they claim that that is not in the file. Employers have this belief that if a piece of paper is not

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physically present in the personnel file, then the employee does not have a right to get it when they request a copy of their file. Baloney! You have a right, absolutely everything that records anything, positive or negative about your performance. When I say a right, almost every state in the union has a law that says if you request a copy of your personnel file in writing, then your employer must give it to you. That is something that you should do regularly, and for sure if you are having problems at work.

So that is our quick tip of the day, know that you have two personnel files, ask for them both and ask for everything relevant to your performance whether or not it is physically located in your personnel file because you are entitled to it. Now if you have additional questions or you want clarification on something that I have spoken about here today or I almost got to the issue that you thought and hoped that I would cover and I did not, join us in continuing the conversation at The Undercover Lawyer forums which is simply UndercoverLawyer.com, then click on the button that says forum. You will see right there in the middle of the front page at UndercoverLawyer.com, this little box where it say recent topics, you can see what the recent topics are, who posted them and how long ago. So join us in continuing the conversation there, I hope you have a safe and discrimination free work week, and we will see you at the forum soon.

-End-