



Risk Management After Hours

America Outdoors - Orlando, FL 2022

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About



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Recreation Law Group "after hours"



Disclaimer



This presentation is for educational purposes only. I am providing legal information, not legal advice.

If you need legal advice, please reach out.

Overview/Learning Outcomes



Define “after hours”

Identify risks to:

- Employees
- Business/Organization
- Property & Equipment

Employee Housing Agreements

Anti-Harassment Policies

Communication

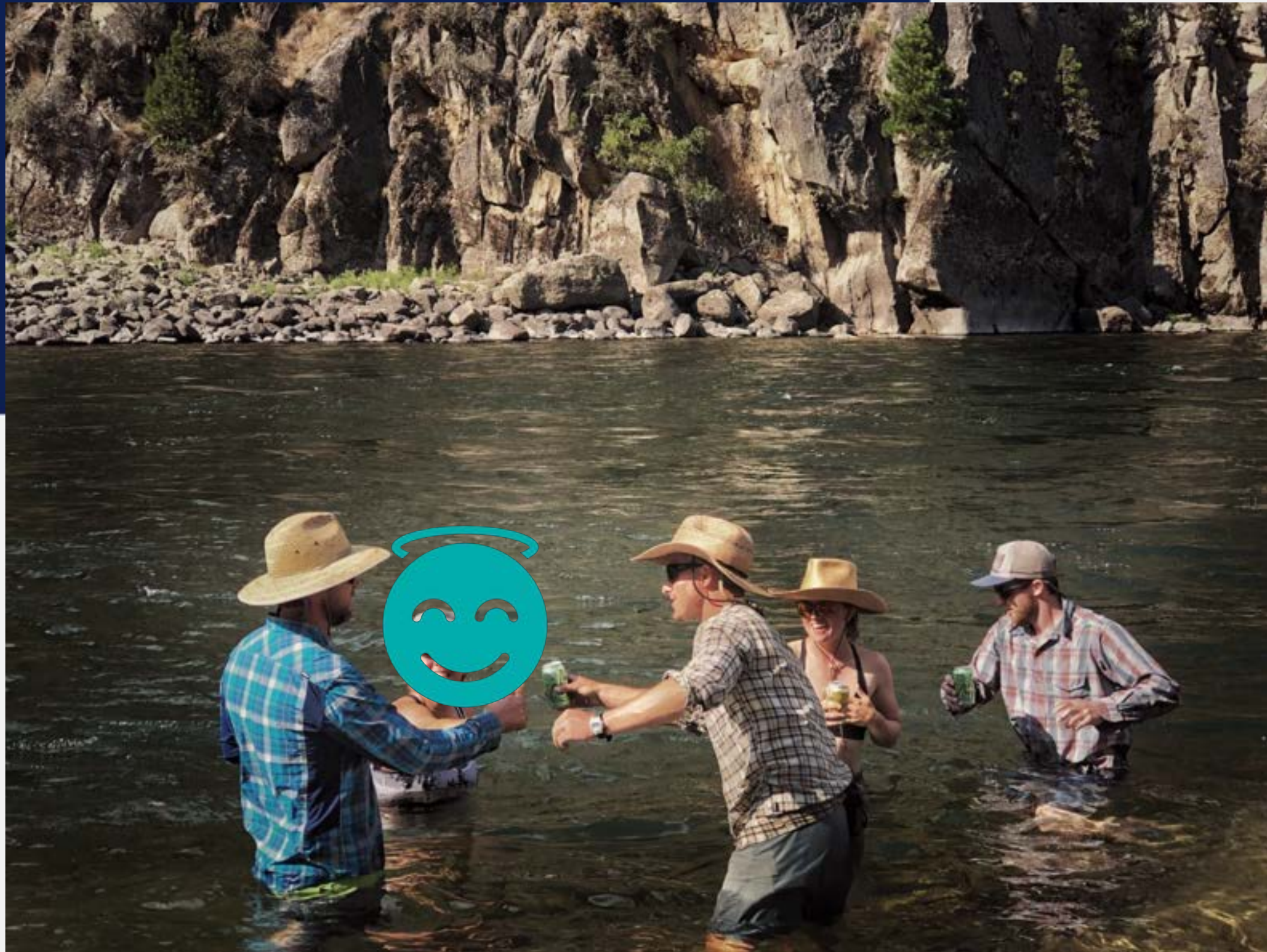
Defining After Hours

Definition – after work activities are complete, employees remain in employer sponsored housing or situation



...Also After Hours

Definition - Includes multiday off-work, on-call hours



"I never really had a problem finding work there," she says. "It's always been the housing."

Borts found most places by word of mouth from coworkers, friends and acquaintances.

A
vy
dr

BUSINESS

Short On Workers, This Resort Town Has Stopped Marketing Itself To Tourists

July 20, 2021 · 4:36 PM ET
Heard on [All Things Considered](#)

CHAD REICH

 **3-Minute Listen**

A Colorado resort town reliant on summer visitors has halted tourism marketing because an affordable housing crisis means businesses don't have enough workers to stay open during their busiest season.

Each person
doesn't involve

OUTSIDE MAGAZINE'S AWARD WINNING TRAVEL JOURNALISM

How to Save a Ski Town

Nov 15, 2021

All over the West, a housing crisis is causing workforce shortages, crippling local businesses, and threatening the culture and existence of mountain towns as we know them. But amid the doom and gloom, some people are fighting for solutions.

After Hours Risk Management
=
Building a More Equitable and
Sustainable Outdoor Industry

Risk Management After Hours

What risks
are you
navigating?



Risks to
Employees



Risks to
Business/
Organization



Risks to
Equipment &
Property

Poll – Do you:

- Provide employee housing
- After-work drinks on property
- Have gatherings or parties off-site
- Allow access to vehicles and equipment
- Have employees who are also friends, lovers, social families

Practice Exercise (Housing) - Identify:

What were 1-3 risks (to employees, to the business, to property) of that housing?

Were these risks discussed or mitigated by the person/entity managing the property? If so, how?

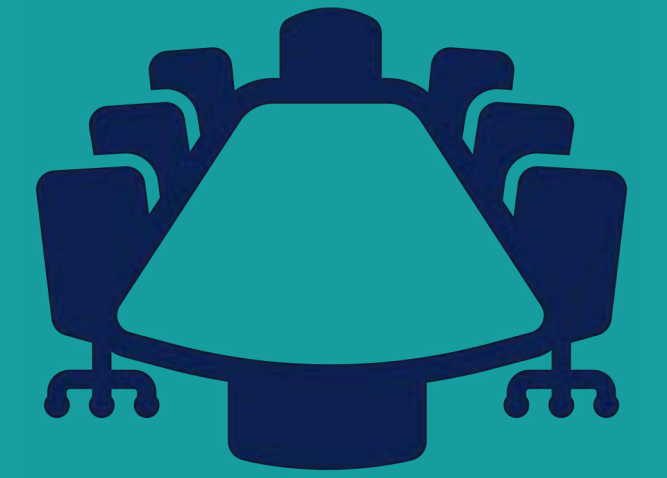
Do employees feel safe and relaxed in this housing? Why/why not?

Employees

- Harassment and unsafe workplace
- "Partying" culture, abuse of alcohol and illicit substances
- Inequitable opportunities/discrimination
- General health/safety concerns



Business/Organizations

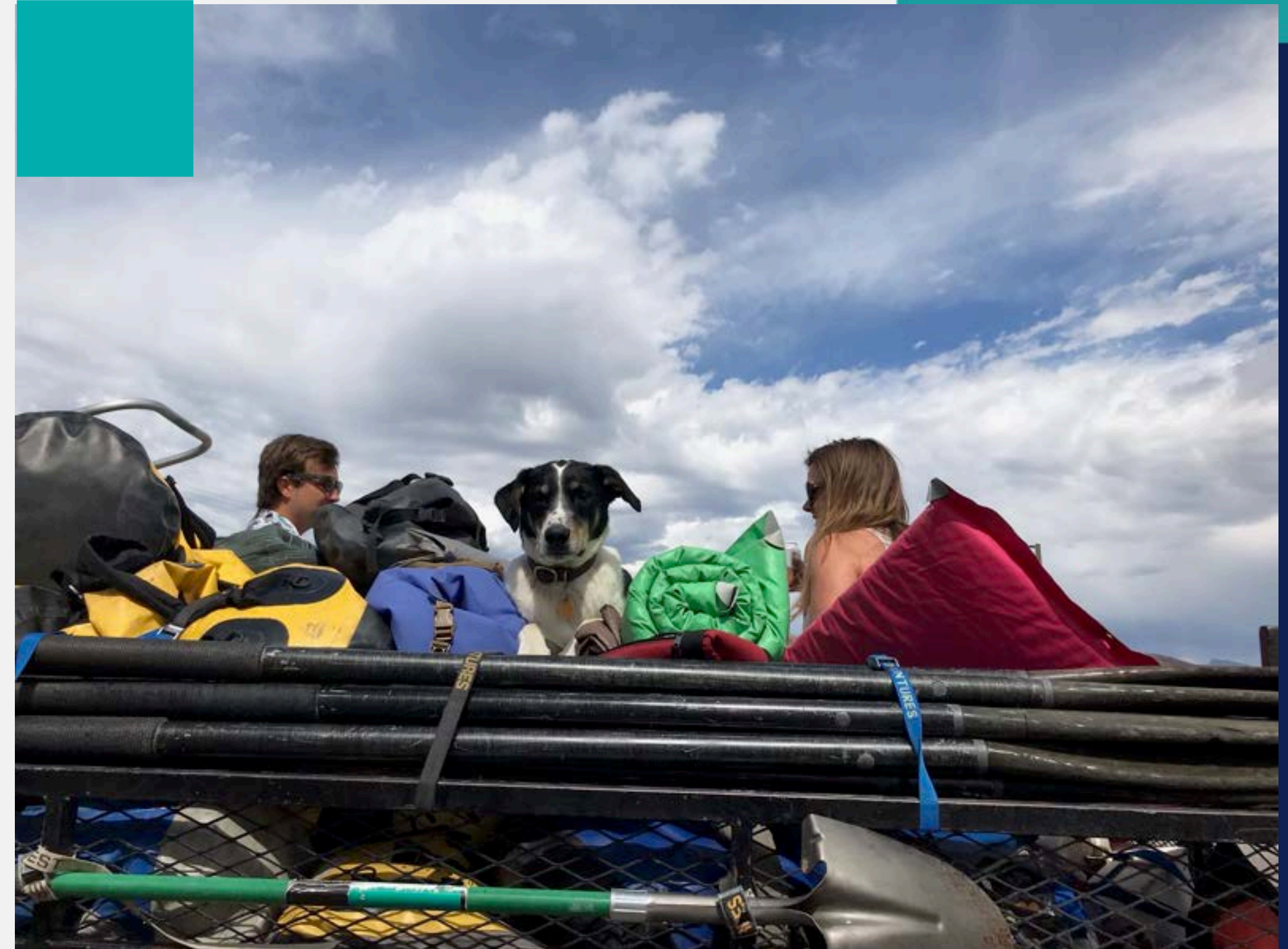


- Employee harassment complaints and litigation
- Insurance claims and coverage
- Liability to Third-Parties
- Reputation harm



Property

- Property and equipment = an important asset to your business
- Equipment assets intermingled with employee housing
- How do you protect property and equipment, from a place of *trust*?



“

On their third day out, as the guides were getting ready to tuck in for the night on their rafts—clients sleep on land, guides generally on top of their boats—the man drunkenly lingered on Jessie’s raft, making her uneasy. “He wouldn’t leave me alone,” she says. Another guide saw what was happening and invited her to sleep on his boat.

The next night, as Jessie was getting ready for bed, the same man crawled onto her boat, put his hand on her hip, and asked if he could sleep with her. She demanded that he leave.

Courts Weigh in on After-Hours Liability

The trial court found evidence to show an intoxicated Walsh groped, molested, and made at least five women uncomfortable at the party and that multiple state park employees filed written sexual harassment complaints. Nevertheless, it ultimately dismissed Phelps' lawsuit because the sexual assault didn't happen "in the workplace." The court noted the after-party took place at a private residence, attendance was voluntary, and the event wasn't connected to work.

Phelps appealed the dismissal of her claims, and her lawsuit against her employer was reinstated. Looking at the "totality of the circumstances," the appeals court found the conduct at the after-party could be considered harassment at work. The court considered the proximity in space and time to the workplace, the pressure for employees to attend, and the following facts:

- The majority of the people at each party were employees;
- The employer sponsored the initial party;
- It provided alcohol and encouraged employees to drink;
- The after-party was a continuation of the first party; and
- The employer may have known about Walsh's previous inappropriate behavior.

Phelps v. State of Tennessee, Case No. M2020-00570 (Tenn. Ct. App., 3/10/21).

Source: Employee Misconduct at Off-Site Party May Qualify as Workplace Harassment – McAfee & Taft - 2021

The defendant in *Kemper* argued there was no liability because its employees were off-duty at the time of the assault, and the assault resulted from personal malice unrelated to the work at hand. The court rejected these arguments. Specifically, the court reasoned Kemper permitted its employees to remain on site in the “dry house” after their shift ended as a matter of mutual convenience. By keeping off-duty employees on site, Kemper could draw upon them if extra hands were needed. Additionally, it was customary for workers to remain on site and drink beer after their shift. In other words, the assailants’ presence in the “dry house” was conceivably of benefit to Kemper, and the after-hours social activity in the “dry house” occurred with the express or implied permission of the employer. (*Id.* at 620.)

Source: Rogers v Kemper Construction 1975 – Can an Employer Be Held Liable for an Off-Duty Employee’s Tortious Conduct – Jacob Felderman - 2017

An employer will be held liable if the injury occurred 1) with the employer's stated or implied permission, and 2) the conduct provided a benefit to the employer or has become customary.

An employer, however, cannot be held liable for an off-duty (or on-duty) employee's tortious conduct motivated by personal malice. For employer liability, the conduct must be an "outgrowth" of the employment, "inherent in the working environment," or "typical of or broadly incidental to the enterprise."

Source: Rogers v Kemper Construction 1975 – Can an Employer Be Held Liable for an Off-Duty Employee's Tortious Conduct – Jacob Felderman - 2017

How do you mitigate these risks?

- Policies and Procedures
- Codes of Conduct
- Employee Housing Agreements
- Communication
- Building a culture of “positive peer pressure”

Employee Housing Agreement

- Tenant or under license?
- Who may occupy property?
Visitors?
- What are property rules?
- Who pays for utilities?
- Do you charge rent?
- What rights do you have to inspect property?
- Access to company assets and gear?



Source: Avoiding hidden liabilities with employee housing agreements – McAfee & Taft AgLINC – July 2012

Anti-Harassment Policy

Covers:

- Equal opportunity and anti-discrimination
- Harassment
- Consent and consensual relations
- Sexual relations between employees
- Prohibited activities
- Reporting Structure
- Investigation Structure



Anti-harassment Training is NOT OPTIONAL! To defend a case, you need to prove the following:

- That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior;

AND

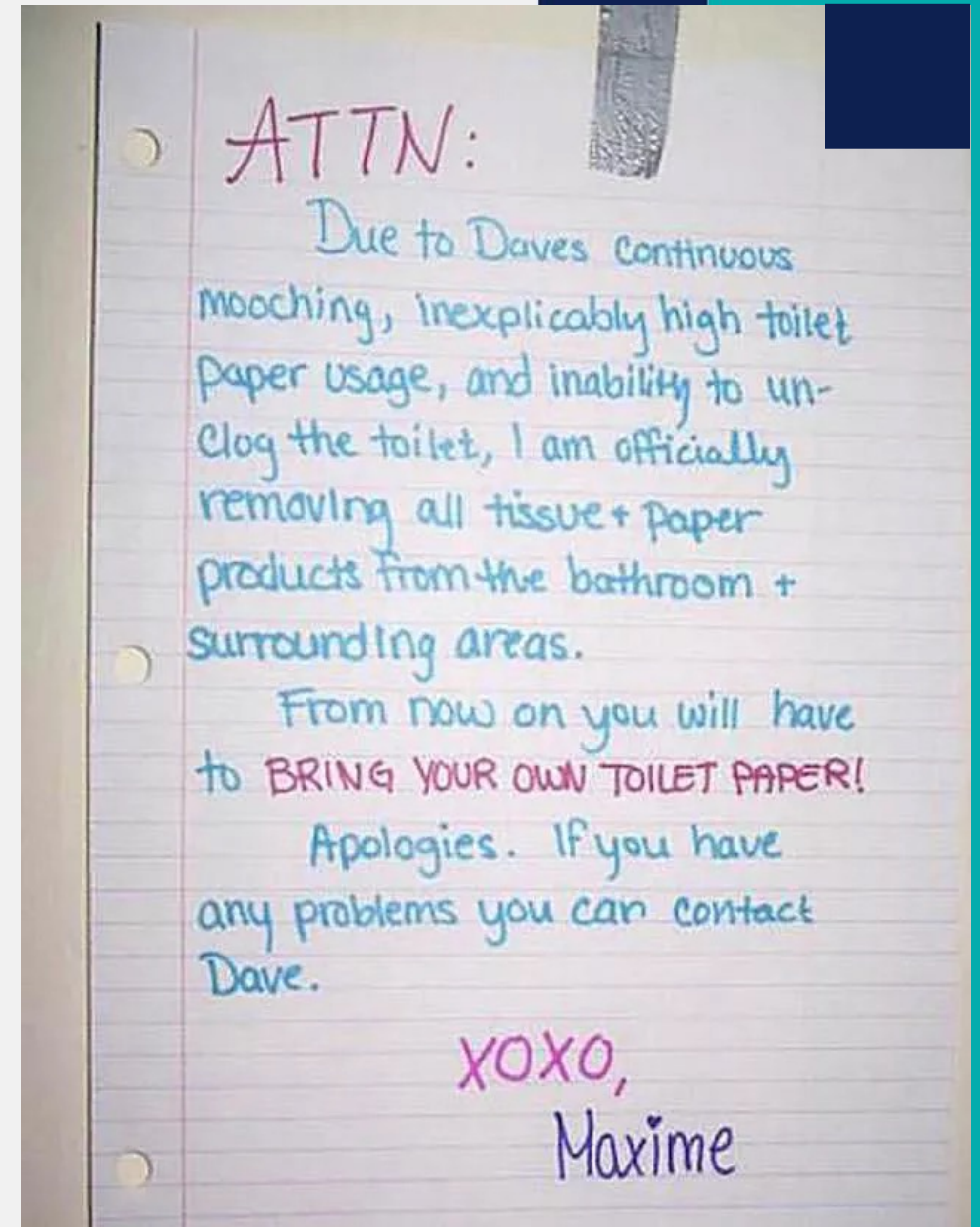
- That the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

How do you mitigate these risks?

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Communication

- Be proactive – prevention is key
- Engage employees – what community agreements do they want to see?
- Codes of Conduct for employees and guests?
- Building a culture of “positive peer pressure.”



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