

Sexual Harassment in the Workplace: Minimize Your Legal Risk and Transform Your Culture

Presented by:
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EEOC's Select Task Force on the Study of Harassment in the Workplace

- June 2016: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic
 - One-year study by panel of experts on how to prevent sexual harassment
 - 30 years after U.S. Supreme Court recognized hostile work environment sexual harassment violates Title VII in *Meritor Savings Bank v. Vinson* (1986)
 - Sexual harassment remains a persistent problem that usually goes unreported

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June 2016 Report of Co-Chairs of Task Force on the Study of Harassment in the Workplace

- Recommendations to prevent harassing behaviors even before they are actionable
 - Leadership and accountability
 - Approach reporting and training procedures differently
- “[T]ransform the problem...from being about targets, harassers and legal compliance, into one in which co-workers, supervisors, clients, and customer all have roles to play...”
- Recommendations for all stakeholders, including EEOC
 - Not the law, but will influence what is expected of employers

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Reaction vs. Prevention

- The business case for prevention
 - Legal costs
 - Mental, physical and economic harm to individuals
 - Decreased productivity, increased turnover, reputational harm
- Reaction – a legal issue
 - *Ellerth/Faragher* Affirmative Defense: Employer may avoid liability if:
 1. Employer exercised reasonable care to prevent and promptly correct any harassing behavior; and
 2. Employee unreasonably failed to take advantage of corrective opportunities provided by employer or to avoid harm otherwise
- Focus on prevention, not just reaction
 - Sexual harassment policy and investigation is not enough

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“Reaction” Can Be Ineffective and Costly

Smith v. Rock-Tenn Services, Inc. (6th Cir. 2016)

- **The Conduct:** Male coworker touched male plaintiff’s backside on 4 occasions
- **The Policy:** Victim directed to speak directly to harasser before reporting to management
- **Employer’s Response:** Supervisor meeting, delayed investigation, back to work with alleged harasser, ultimately investigation resulted in 2-day suspension for alleged harasser

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“Reaction” Can Be Ineffective and Costly

- **Plaintiff’s Reaction:** work suffered, anxiety attack, sick leave to get counseling
- **Jury Verdict and Judgment:** \$300,000 awarded to plaintiff
- **Judgment Upheld on Appeal:** Employer failed to take prompt and appropriate corrective action when it was notified of the incidents:
 - No action for ten days
 - Failed to separate plaintiff and the alleged harasser
 - Did not produce a written report as stated in policy
 - Failed to consider alleged harasser’s former misconduct
 - *Investigation was not adequate, thorough or timely*

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Roadmap to Prevention

- You may already be...
 - Designing effective anti-harassment policies
 - Developing effective training curricula
 - Implementing complaint, reporting and investigation procedures
- But are you also...
 - Creating an organizational culture that does not tolerate harassment?
 - Holding employees accountable?
 - Assessing and responding to workplace risk factors?

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What Should an Anti-Harassment Policy Include?

- Clear articulation of prohibited conduct, including examples
- Clear complaint process including multiple avenues to present the complaint
- Assurances that:
 - Employees who report will be protected against retaliation
 - Confidentiality maintained to the extent possible
 - Investigation process that is prompt, thorough, and impartial
 - Immediate corrective action where a complaint is substantiated
- Keep harassment in mind when drafting social media policies
- “Zero tolerance” may deter reporting out of fear of disproportionate discipline

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How Should Reporting Systems Work?

- Multiple avenues: Email and phone; manager and HR; multi-lingual complaint hotline, etc.
- Investigators are well-trained, objective, and neutral
- Timely responses and investigations
- Document all steps taken from the first point of contact, prepare a written report using guidelines to weigh credibility, and communicate findings to all relevant parties
- Supportive culture: Employees who receive complaints must take all complaints seriously; watch for and prevent retaliation
- Discipline is prompt and proportionate
- Fairness to all contributes to faith in the system; bad experiences deter future reporting

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When is Anti-harassment Training Effective?

- Do not limit to legal definition of harassment
- Focus on explaining what conduct is inappropriate
- Explain consequences (i.e. corrective action based on severity of conduct)
- Use examples and scenarios tailored to specific realities of worksite, organization and industry
- Consider conducting trainings in different languages, for different learning styles or levels of education
- Focus on reporting rights and responsibilities
- Provide training on a regular basis for all employees

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Where Does the Right Culture Come From?

- Leadership + accountability = culture
- Leadership must exhibit a commitment to a diverse, inclusive, and respectful workplace
- Accountability systems to enforce expectations
- Holistic, universal commitment to values; not compliance
- Harassment is fostered where management:
 - Does not model appropriate behavior,
 - Tolerates harassing conduct by others, or
 - Fails to support anti-harassment policies with appropriate resources

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When is Accountability Achieved?

- **Individual Accountability:** individual engaging in harassing behavior must be issued proportionate discipline
- **Bystander Accountability:** witnesses voice disapproval, intervene and report harassing behavior
- **Supervisor Accountability:** mid-level managers and front line supervisors must monitor and stop harassing behavior
- **Investigator Accountability:** investigations must be commenced and concluded promptly, fair and thorough, result in appropriate corrective action
- **Employer Accountability:** Reporting systems must be effective and fair
- **Use Metrics and Evaluations:** Accountability is function of formal and informal rewards

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What are Risk Factors for Harassment?

- Homogenous Workforces
- Where Some Workers Do Not Conform to Workplace Norms
- Cultural and Language Differences in the Workplace
- Current Events/Social Discourse Outside the Workplace
- Many Young Workers
- “High Value” Employees
- Significant Power Disparities
- Reliance on Customer Service or Client Satisfaction
- Workplaces Where Work is Monotonous or Consists of Low-Intensity Tasks
- Cultures that Tolerate or Encourage Alcohol Consumption
- Decentralized Workplaces

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Prevention Efforts Enhance Reaction

Stacombe v. New Process Steel LP (11th Cir. 2016)

- Male plaintiff alleged that male coworker hugged him and touched his buttocks
 - Plaintiff reported the incident to his supervisor who reported to manager
 - Plaintiff was taken seriously, moved to a different department and shift, alleged harasser was directed to have no contact
 - Employer initiated investigation
- After another incident, plaintiff quit
 - Employer investigated both incidents, substantiating only that the alleged harasser placed his arm around plaintiff’s shoulder
 - Suspended for three days for inappropriate physical contact

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Prevention Efforts Enhance Reaction

Stancombe v. New Process Steel LP (11th Cir. 2016)

- Summary judgment granted to employer
- Even if incidents constituted sexual harassment, employer would not be liable because employer took “reasonable care to prevent harassment by promulgating an anti-harassment policy” and taking actions “reasonably likely to prevent the misconduct from recurring”
 - Immediately and adequately investigating all incidents
 - Asking plaintiff to speak with an HR representative
 - Separating plaintiff and alleged harasser during investigation
 - Suspending alleged harasser for inappropriate contact, even when it determined that the contact was not of sexual nature or illegal

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Preventing Harassment— What Can Employers Do?

- Identify risk factors and take proactive steps to address them
- Conduct a climate survey of employees to determine whether they feel that harassment exists and is tolerated in the workplace
- Visibly promote an inclusive workplace
- Clearly articulate behaviors that will not be tolerated
- Encourage employees to attain and maintain appropriate work culture
- Conduct effective trainings on anti-harassment policies and procedures
- Commit adequate money and time to prevention and investigation

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