#NOT HERE

Preventing and Properly Responding to Sexual Harassment in the Workplace

Monica Beck, Managing Legal Counsel, The Fierberg National Law Group
Where We Are

- #Me Too
- 1 in 3 women sexually harassed in workplace
- 38% from male boss
- 70% not report
- 2015: 27,893 charges of harassment filed with EEOC; 45% of those based on sexual harassment
OVERVIEW

- What constitutes “Sexual Harassment”?
- Cost of sexual harassment
- Law
- Prevention, Investigation, Response
- If it happens to you
What Is “Sexual Harassment”? 

- Sexual “Joke”
- Inappropriate Comments
- Touching
- Rape
  - Sexual Assault
  - Sexual Battery
- Sexual Innuendo
- Request for Date or Relationship
- Pornography
- Proposition / Request for Sex
Sexual Harassment Costs Everyone

- Psychological / physical / health / economic harm
- Loss of intellectual and human capital
- Interruption to workplace, turnover, reputation, productivity decrease; even “superstars”*
- Women are 9 times more likely than men to quit their jobs, 5 times more likely to transfer, and 3 times more likely to lose jobs because of harassment (National Council for Research on Women)

30 years ago: average company lost $6.7 million a year in low productivity, low morale, and employee turnover and absenteeism, not including litigation or other legal costs*

2011: UBS Financial Services was ordered to pay $10 million+ to sales assistant harassed by her supervisor

2011: 11,300 sexual harassment charges filed with EEOC; 1,400 settled for total of $52 million


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It’s The Law

- Sexual Harassment May Violate an Employee’s Federal Civil Rights
  - Title VII
  - Title IX (Education)
- Victims of Sexual Harassment May Have Additional State Claims
  - State statutes / constitutions
  - Third-party liability
Title VII

Title VII of the Civil Rights Act of 1964:

“It shall be an unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”
Title VII

- Sexual discrimination in terms of:
  - Sexual harassment
  - Pay and compensation (also covered by Equal Pay Act)
  - Fringe benefits
  - Hiring and firing
  - Promotion or lack thereof
  - Other terms and conditions of employment
Title VII

- +15 employees [only Title VII – not safe harbor for other claims]
- Sexual Harassment is unwelcome conduct that is based on sex. Harassment becomes unlawful where:
  - (1) Enduring the offensive conduct becomes a condition of continued employment (quid pro quo), or
  - (2) The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive (hostile work environment).
Title VII (from the EEOC)

- “Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:
  - The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee (e.g. a client or vendor).
  - The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.
  - Unlawful harassment may occur without economic injury to, or discharge of, the victim.” (Source https://www.eeoc.gov/laws/types/harassment.cfm)
IT IS ILLEGAL

Title VII forbids employers from retaliating against an employee for reporting sexual harassment, speaking out against sexual harassment, participating in an investigation, proceeding or hearing involving a co-worker who may have been harassed.
Title VII – Employer Liability

- Automatic liability: Harassment by supervisor \(\rightarrow\) negative employment action
- If supervisor's harassment \(\rightarrow\) hostile work environment, avoid liability only if
  1. employer reasonably tried to prevent and promptly correct the harassing behavior; and
  2. employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.
- With respect to non-supervisory employees or non-employees over whom it has control (e.g., independent contractors, or vendors on property) liable if: knew, or should have known, about harassment and failed to take prompt and appropriate corrective action.

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Administrative Action to Litigation

- EEOC - mediation, lawsuit, close, right to sue letter
- State Civil Rights Offices
- Litigation
How Do We Prevent Sexual Harassment?

Policies  Procedures  Training  Commitment
Policies

- Sexual discrimination is prohibited by law
- Sexual harassment is not tolerated by employer
- Clear outline of procedures (reporting, investigation, outcome)
- Make them easily accessible and easy to understand
  - Provided examples
  - All languages
Procedures: Reporting

- Encourage
- Reporting is VITAL [Title VII: “should have known”]
- How
- To whom
- Confidentiality to extent permitted under law
- Document it!
Procedures: Investigation

- Prompt, equitable, and thorough
- Who investigating: independent and neutral employee or third party
- What considering: statements, witnesses, videotape, email, documents
- Outcome
- Document it!
Procedures: Accountability

- Severity of harassment –
  - Crime?
  - Civil tort?
- Repeat offender – same victim / multiple victims
Training – One Size Does Not Fit All

- Policies are worthless if they are not explained or enforced
- Regular, repeat, easy to understand
- All employees; specialized for HR, investigators
- Description, examples, escalation
- Consequences / sanctions
- Bystander or civility training

**NOT JUST ABOUT AVOIDING LIABILITY**
Commitment

Not enough to talk the talk: Walk the walk!

- Top down
- Important
- Actions often louder than words

WE ARE IN THIS TOGETHER
What Do I Do If I Have Been Harassed?

- Document in detail [date, time, description]
- Observe – others?
- Save any email or documents – safe place
- Report – put it in writing, keep copies
- EEOC (180 days); legal remedies; contact an attorney
Monica Beck, Esq.
The Fierberg National Law Group, PLLC
Washington DC · Michigan · Colorado
(231) 933-0180
mbeck@tfnlgrouplc.com