



The #MeToo Movement – How #YouToo Can Mitigate Your Risk

By Trent Cotney and Marci Britt

Beginning in October 2017, when dozens of women in the entertainment industry came forward with allegations that movie mogul Harvey Weinstein had sexually harassed or assaulted them, the #MeToo Movement was launched, and soon a tidal wave of similar allegations flooded in against a long list of other prominent, high-powered men in Hollywood, the media, Silicon Valley, and politics. Across the world, millions of women joined the movement by voicing their own stories of having experienced sexual harassment and discrimination in the workplace, uniting under the hashtag #metoo across social media platforms and, in the process, sparking a national conversation that over a year later shows no signs of burning out.

Of course, the problem is not new. In 1986, the U.S. Supreme Court held in *Meritor Savings Bank v. Vinson* that sexual harassment is prohibited under federal law as

a type of sex discrimination that violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII applies to all employers who have 15 or more employees. Most states and many municipalities across the country have enacted similar laws or ordinances prohibiting discrimina-

tion and harassment based on sex, with many of those state and local laws effectively expanding the protections of Title VII by applying to employers with fewer than 15 employees.

Empowered by the #MeToo Movement, the sheer volume of women (and some

EEOC CHARGES - FY 2017		
Charges Received	84,254	
Charges Alleging Harassment	26,978	32% of Total Charges Received
Charges Alleging Sex-Based Harassment	12,428	14.75% of Total Charges Received 46.1% of Harassment Charges Received

Figure 1 – EEOC total charges, harassment charges, and sex-based harassment charges received in FY 2017.

men) now speaking out about their own experiences of being sexually harassed in the workplace has forced more and more companies to take a hard look at their own harassment policies, practices, and procedures, and wisely question what more they can be doing.

Upon this backdrop, this article will explore the prevalence of sexual harassment in the workplace, the reasons companies should care about preventing sexual harassment, and how sexual harassment claims can significantly affect a business's bottom line. We will then discuss ways companies can seek to mitigate their risk by recognizing and identifying what sexual harassment is and is not, what steps they should take to create and maintain an inclusive workplace culture that is intolerant of sexual harassment of any sort, and how they should handle harassment complaints, should they occur.

THE PREVALENCE OF SEXUAL HARASSMENT IN THE WORKPLACE

Of the 84,000 charges of discrimination filed in 2017 with the U.S. Equal Employment Opportunity Commission (EEOC)—the agency that enforces federal discrimination laws—approximately one-third included allegations of workplace harassment, with nearly half of those citing sex as the basis for the alleged harassment (Figure 1). Prior to the start of the #MeToo Movement in late 2017, the volume of sexual harassment complaints received by the EEOC had remained relatively steady for the past few years. However, preliminary numbers from the EEOC's 2018 fiscal year show that charges filed with the EEOC alleging sexual harassment have increased by more than 12% from fiscal year 2017.

Even so, a taskforce report issued by the EEOC in 2016 found that workplace harassment remains severely under-reported. Specifically, according to various studies and surveys examined by the EEOC, anywhere from 25% to 85% of

women report having experienced some form of sexual harassment in the workplace. This wide percentage range is due primarily to differences in how the term "sexual harassment" was defined in the various surveys examined, which indicates that many individuals do not label certain forms of unwelcome sexually based behavior—even if they view it as problematic or offensive—as "sexual harassment." However, approximately 90% of individuals who say they have experienced any form of harassment on the job never take any formal action against the harassment, such as filing an EEOC charge or a lawsuit. Roughly 70% never even talk to a supervisor or manager about the harassing conduct.

Reasons posited for the staggering percentage of workplace harassment that goes unreported include victims' fears that they won't be believed, that their employer will not do anything about their complaint, that they will be blamed, or that they will suffer social or professional retaliation for lodging a complaint. Instead of reporting the harassment, the most common workplace-based responses are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior.

WHY SHOULD COMPANIES CARE ABOUT STOPPING HARASSMENT?

Employers should care about stopping workplace harassment, first and foremost,

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Charges Received	7,944	7,809	7,571	7,256	6,862	6,822	6,758	6,696
Total Resolutions	8,959	9,195	8,924	7,758	7,037	7,289	7,433	7,511
Merit Resolutions	2,322	2,258	2,190	1,929	1,738	1,829	1,713	1,682
	25.9%	24.6%	24.5%	24.9%	24.7%	25.1%	23.0%	22.4%
Settlements	995	1,039	977	879	786	834	698	662
	11.1%	11.3%	10.9%	11.3%	11.2%	11.4%	9.4%	8.8%
Withdrawals w/Benefits	548	523	537	518	526	597	595	588
	6.1%	5.7%	6.0%	6.7%	7.5%	8.2%	8.0%	7.8%
Administrative Closures	2,086	1,962	1,892	1,763	1,637	1,690	1,701	1,623
	23.3%	21.3%	21.2%	22.7%	23.3%	23.2%	22.9%	21.6%
No Reasonable Cause	4,551	4,975	4,842	4,066	3,662	3,770	4,019	4,206
	50.8%	54.1%	54.3%	52.4%	52.0%	51.7%	54.1%	56.0%
Reasonable Cause	779	696	676	532	426	398	420	432
	8.7%	7.6%	7.6%	6.9%	6.1%	5.5%	5.7%	5.8%
Successful Conciliations	242	238	243	212	152	152	192	146
	2.7%	2.6%	2.7%	2.7%	2.2%	2.1%	2.6%	1.9%
Unsuccessful Conciliations	537	458	433	320	274	246	228	286
	6.0%	5.0%	4.9%	4.1%	3.9%	3.4%	3.1%	3.8%
Monetary Benefits (Millions)	\$41.2	\$45.1	\$43.0	\$44.6	\$35.0	\$46.0	\$40.7	\$46.3

Figure 2 – EEOC charges alleging sexual harassment with resolutions by type for FY 2010-2017.

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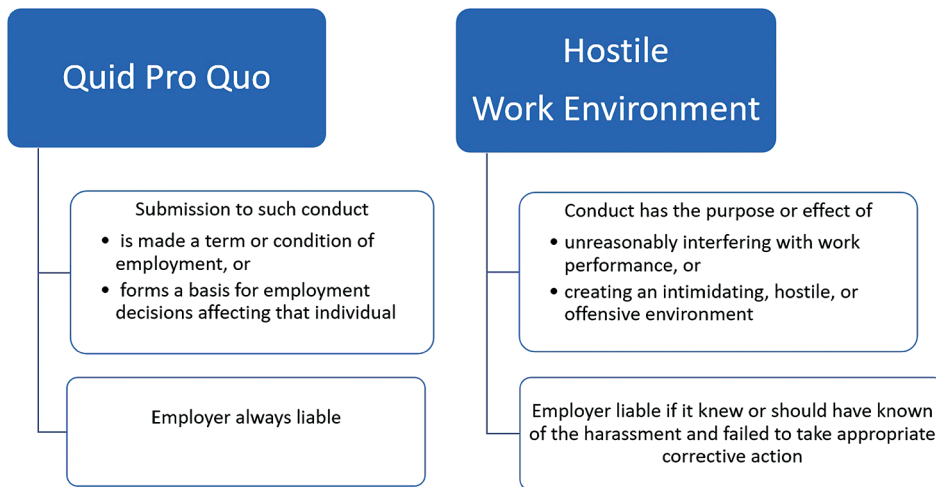


Figure 3 – Overview of the two types of sexual harassment.

because it is illegal and because it produces psychological, physical, occupational, and economic harms that can ruin an employee's life. According to the EEOC's 2016 report, employees who have been the victims of sexual harassment report symptoms of depression, difficulty sleeping, headaches, general stress and anxiety, post-traumatic stress disorder, and overall impaired psychological well-being.

Besides these legal and ethical reasons, employers should care about combating workplace harassment because it makes good business sense. Contesting and resolving a charge of discrimination filed by an employee with the EEOC (or with a similar state or local agency) can be a very expensive undertaking for an employer. In 2017, the EEOC resolved 31,411 charges alleging some form of workplace harassment. Of those, 5,017 were resolved through the administrative process in favor of the claimant, resulting in \$125.5 million paid out to prevailing employees on harassment claims in 2017.

As for sexual harassment charges specifically, in 2017, the EEOC resolved 1,682 charges alleging sexual harassment in favor of the claimant, resulting in \$46.3 million paid out in benefits (Figure 2). Since 2010, employers have paid roughly \$341.9 million to employees on successful sexual harassment claims through the EEOC's administrative process alone. Notably, these figures do not include charges or amounts paid on charges that were settled by the parties, withdrawn by the employee after receiving the requested benefits, or withdrawn and followed by a lawsuit against the employer.

Litigating harassment lawsuits is usually even more expensive for an employer, with settlement payments and jury awards

potentially reaching into the hundreds of thousands, and even millions of dollars, for a single case. For instance, in the 2012 court case *Chopourian v. Catholic Healthcare West*, a federal jury awarded \$168 million to the prevailing employee in what is believed to be the largest judgment entered for a single victim of workplace sexual harassment in U.S. history. Although this case represents the extreme, it still serves as a potent cautionary illustration of the potential liability employers can face in a sexual harassment lawsuit, not to mention the significant additional amounts for attorneys' fees and legal costs that companies can expect to incur in defending against such a lawsuit.

Simply put, the direct financial costs of sexual harassment in the workplace can be significant, and employers who fail to take steps to prevent, address, and mitigate such claims will likely find themselves shelling out hefty sums at some point down the road.

In addition to these more obvious direct costs of workplace sexual harassment that employers face, numerous indirect financial costs must also be considered as they often have even broader consequences for the company than the direct costs described above. For example, sexual harassment in the workplace often leads to decreased productivity and performance by the victims of

the harassment, as stress, discomfort, fear, and anxiety cause those employees to lose focus and motivation for doing their jobs. This in turn can lead to increased turnover in the company's workforce, causing the company to incur significant amounts in hiring and training costs each year that could have been prevented. Finally, sexual harassment claims can strike a quick and heavy blow to a company's reputation by giving rise to a public perception that the company fosters or abides a culture of sexual harassment, which will inevitably scare off customers and potential employees and ultimately cause a dramatic impact on the company's bottom line.

These and other detrimental organizational effects make it imperative for employers to understand what sexual harassment is and what steps they can take to mitigate their risk by fostering a workplace culture of inclusivity and intolerance against harassing behaviors of any sort.

WHAT CONSTITUTES SEXUAL HARASSMENT?

Employers sometimes admit to us that although they have every intention of banning sexual harassment from their workplace entirely, in reality, they're not exactly sure what qualifies as harassing behavior and what does not. This question is a common one, though the answer is unfortunately not as specific as employers would hope.

The EEOC defines sexual harassment very broadly as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Although it can come in many forms, sexual harassment is generally broken down into two types known as "quid pro quo" harassment and "hostile work environment" harassment (Figure 3).

However, it is important to note that for any type or form of sexual harassment, the victim as well as the harasser may be a woman or a man. Indeed, approximately 16% of EEOC sexual harassment complaints come from men each year (Figure 4). The victim and the harasser also do not

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Charges Received	7,944	7,809	7,571	7,256	6,862	6,822	6,758	6,696
% of Charges Filed by Males	16.2%	16.1%	17.8%	17.6%	17.5%	17.1%	16.6%	16.5%

Figure 4 – Percentage of EEOC charges alleging sexual harassment filed by men during fiscal years 2010 – 2017.

have to be of the opposite sex—same-sex harassment is equally actionable.

The classic example that comes to mind for most people when the topic of sexual harassment is mentioned is called quid pro quo harassment, or tangible employment action harassment. This type of harassment occurs when a manager or supervisor requests a subordinate employee to do something of a romantic or sexual nature with the manager/supervisor, such as going on a date or performing sexual favors, in exchange for a raise, promotion, favorable assignment, or the like, or under threat of firing, demotion, reassignment, cut in pay, or some other tangible loss of job benefits.

Because supervisors and managers are considered to be acting directly on behalf of their employer, the employer is always liable for any tangible employment action taken against an employee as a result of quid pro quo sexual harassment, even if the employer did not know about the harassment until after the harassment lawsuit or charge was filed. This liability may include payment of the employee's back wages and compensatory damages for medical expenses, pain and suffering, and economic losses. Punitive damages may also be imposed against an employer if the employee proves that the employer either failed to act, or acted with malice or reckless indifference.

The second type of sexual harassment occurs when an employee is subjected to hostile, intimidating, or offensive conduct based on the employee's sex that is unwelcome and is so severe or pervasive it creates a work environment that a reasonable person would consider intimidating, hostile, or abusive. This type of harassment can be committed not only by the victim's supervisor, but also by a coworker, a supervisor in another area, an agent or independent contractor of the employer, or even a non-employee such as a vendor or customer. An employer will be liable for harassment by a nonsupervisory employee or a third party over whom it has control, if the employer knew, or should have known, about the harassment and failed to take prompt and appropriate corrective action. Notably, under a hostile work environment claim, the victim does not have to be the person actually harassed, but can be anyone affected by the offensive conduct. Additionally, unlawful hostile work environment harassment may occur without economic injury to or discharge of the victim.

There is no definitive line establishing

what actions rise to the level of creating a hostile work environment because the determination depends on the particular circumstances of each case. Generally, an employee is required to provide evidence of a pattern of hostile or offensive behavior, though in some circumstances, proof of a particularly egregious single instance of harassing conduct may be enough to establish a hostile work environment claim. Courts consider various factors to make this determination, including the frequency and severity of the conduct, whether the conduct is threatening or humiliating, and whether the conduct unreasonably interferes with the victim's job performance.

Examples of harassing conduct may include offensive jokes, slurs, or epithets; name-calling; physical assaults or threats; obscene gestures; unwelcome physical contact, touching, or rubbing; intimidation; ridicule, mockery, or insults; posting or sharing offensive objects, videos, or pictures; and interfering with work performance. However, simple teasing, offhand comments, isolated incidents that are not extremely serious, and sporadic gender-related jokes or abusive language usually are not legally actionable sexual harassment on their own, though they could still be subject to disciplinary action by the company. Likewise, complimenting an employee's outfit or appearance or even asking a colleague out on a date, without more, would likely be insufficient to establish a hostile work environment claim. Nevertheless, when such comments are combined with unwelcome physical acts or touching, obscene gestures, or other inappropriate behaviors (such as showing up uninvited at the victim's house, sending multiple inappropriate texts, refusing to take 'no' for an answer, etc.), the result may well be different.

PROACTIVE PREVENTION

Under Title VII and similar state and local laws, employers have a legal duty to provide a workplace free from unlawful harassment and discrimination. Prevention is the best tool to fulfill this duty and can perhaps best be achieved when employers proactively take responsibility for creating, fostering, and maintaining a workplace culture of nondiscrimination, inclusiveness, and intolerance of harassment of any kind. Some key components for building such a workplace culture include implementing and enforcing well-written policies and investigation procedures, providing



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comprehensive management trainings, and leading by example through strong management leadership and accountability.

First, employers should adopt a clear written policy, usually contained in the company's employee handbook, which expressly prohibits sexual harassment and any and all harassing conduct or behavior of any sort, and which establishes an effective complaint and grievance procedure. The policy should clearly communicate that harassing behavior will not be tolerated by anyone at any level of the organization; should define and give examples of the prohibited conduct; and should explain the consequences for violating the policy, including facing disciplinary action up to and including termination. The policy should provide a description of how and to whom employees can report a violation and should contain a "bypass" reporting procedure so that employees have more than one member of management to whom they can report, for instances such as when an employee's immediate supervisor is the alleged harasser. The employer's written policy should contain a statement that the employer will provide a prompt, impartial,

and thorough investigation and that the identity of the relevant individuals involved and information disclosed will be kept confidential to the extent possible and permitted by law, consistent with a thorough and impartial investigation. The policy should emphasize the importance of reporting discriminatory or harassing conduct immediately or as soon as possible to the person or persons identified in the policy so that the company can expeditiously and appropriately investigate and address the complaint and the offending behavior as necessary. The written policy should also contain an assurance that employees will not be retaliated against for making a complaint.

All employees should receive a copy of the policy when they are hired and should be provided an adequate opportunity to ask questions. The policy should ideally be translated into all languages commonly used by the employees. Employers should require all employees to sign and date an acknowledgement form stating that they have read, understood, and received a copy of the policy. To the extent possible, the policy should be posted centrally and in easily visible locations, such as near employee time

clocks, in employee break rooms, and in other commonly used areas or locations, as well as being posted on the company's internal website. Finally, the policy should be periodically reviewed, revised, republished, and disseminated to employees to ensure continued compliance and awareness.

Next, regular, interactive, and comprehensive training of all employees—but especially all managerial employees—is an essential component of a successful harassment prevention plan. Employers should train their supervisors about the policy against sexual harassment in clear, easy-to-understand terms, explaining and giving examples of types of harassing behaviors that are prohibited, detailing the range of possible consequences for violating the policy, and explaining the process for handling employee complaints. The training should emphasize the importance of taking all complaints seriously and informing upper management or human resources when a complaint is received.

In addition, supervisors should be trained to take action when they see something that could be a violation of the policy, even if no complaint has been made, and to identify potential risk factors for harassment and specific actions that may minimize or eliminate the risk of harassment. Ideally, employers should provide regular, interactive training to supervisors at least annually to ensure their continued attention and commitment to compliance and enforcement of the policy.

The next component necessary for a successful harassment prevention strategy is for executives and supervisors to lead by example through consistently stating, promoting, and demonstrating the company's commitment to creating and maintaining a culture of inclusivity in which harassment is not tolerated. Needless to say, if executives and supervisors are not following the rules, other employees will soon begin to follow suit. Executives and supervisors should provide sufficient oversight to ensure that the company's anti-harassment policies and procedures are being followed and applied fairly and consistently. Executives should also make sure sufficient time and resources are allocated to implement and maintain effective harassment prevention trainings and strategies.

HANDLING A CLAIM

Finally, now more than ever, it is essential for companies to take all harassment



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complaints seriously, investigate them quickly, and take prompt remedial action. When a complaint is received, an investigation should be launched immediately; otherwise, the complainant may interpret the delay as an attempt to dissuade him or her from pursuing the claim. Interim measures should be taken as necessary to alleviate the circumstances of the situation and prevent any further alleged instances of harassment, such as separating the involved employees, with care taken to ensure such measures do not appear to be punishment taken before the investigation is complete.

The scope of the investigation may vary depending on the facts of the situation, but should be sufficient to obtain the information needed to determine the appropriate remedial action to be taken. Usually this will involve interviewing and preparing or obtaining written statements from the complainant, the alleged harasser, and any other employees who were witnesses or have first-hand knowledge. Investigators should be careful to avoid offering opinions on the facts they are provided and should remain neutral and nonjudgmental, focusing on gathering a full and accurate record of the facts without persisting to the point of intimidating the complainant or other employee witnesses. The investigator should thoroughly document every stage and activity in the investigation in writing, including all interviews, phone calls, conversations, and meetings, and should maintain confidentiality of the individuals involved to the extent possible.

Once the investigation is completed, the responsible supervisors or members of management should decide if any violations of the company's anti-harassment policy have been committed and who, if anyone, is at fault. Management must also determine what actions should be taken to punish any inappropriate behavior and ensure the misconduct stops and does not reoccur. Examples of corrective measures include oral or written warning or reprimand, transfer or reassignment, demotion, suspension, reduction of wages, counseling, retraining, and, of course, termination. Finally, management must also ensure that the complainant is not retaliated against by any members of management or other employees.

CONCLUSION

Uniform, fair, and rigorous enforcement of an employer's reporting and investigation

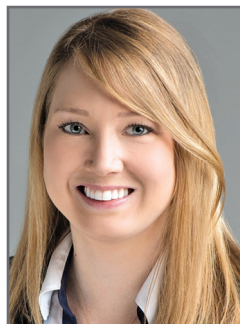
policies builds confidence and trust among employees in the efficacy of such policies and consistently reinforces the message that harassment is not tolerated and perpetrators will be held accountable. These efforts are essential to creating and maintaining a workplace culture that embraces diversity and inclusivity and prohibits harassment of any kind. By fostering such a culture of inclusion, employers can help prevent harassment complaints from turning into expensive EEOC charges or lawsuits, as well as preventing harassment from occurring in the first place, which ultimately will lead to a better, more productive work environment for all. 



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