

# Anti-Harassment Training Remains a Defensive Tool for Employers

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# **ANTI-HARASSMENT TRAINING REMAINS A DEFENSIVE TOOL FOR EMPLOYERS**

By: Barbara G. Stephenson

## **I. INTRODUCTION**

This past June, the Equal Employment Opportunity Commission (EEOC) issued a close-to 100-page document which is the result of 14 months of study by an EEOC select Task Force. According to the report, the study was launched because of the agency's concern over the high number of harassment complaints some 30 years after the U.S. Supreme Court first recognized claims of sexual harassment as a form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. In the years since that first case of *Meritor Savings Bank v. Vinson*, sexual harassment concepts have been applied to harassment based on any other status protected under law. In fiscal year 2015, almost one-third of the roughly 90,000 charges filed with the EEOC included an allegation of some form of harassment. It is the overall finding of the EEOC Task Force that most workplace anti-harassment training has been ineffective and focused on simply avoiding legal liability. The report then sets out recommendations for harassment prevention.

## **II. TASK FORCE FINDINGS**

Among the findings of the EEOC Task Force, the following are of note:

- When employees are asked if they have experienced "sexual harassment" without that term being defined, approximately 25% of women reported experiencing "sexual harassment" in the workplace. This percentage rises to approximately 40% of women when these individuals are asked if they have experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion. Such behavior should include "gender harassment," which is hostile behavior that is devoid of sexual interest. The Task Force finds such behaviors differ from unwanted sexual attention in that they aim to insult and reject women rather than pull them into a sexual relationship. When sex-based harassment at work is measured by asking about this form of gender harassment, almost 60% of women report having experienced such.

- In surveys of the LGBT community, 35% of LGB-identified respondents and as much as 50% of transgender individuals reported workplace harassment.
- Race and ethnic-based harassment has been understudied according to the Task Force. This type of harassment can include threatening verbal conduct such as comments, jokes, and slurs related to ethnicity or race, as well as exclusionary behaviors. One survey found that 70% of respondents had experienced some form of verbal harassment and 45% reported experiencing exclusionary behavior. In addition, 69% of respondents reported witnessing at least one ethnically-harassing behavior in the last two years of work.
- Regardless of the form of harassment, the Task Force found that in many cases harassment targets do not complain or confront the harasser. One study found that close to 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.
- Of the charges of harassment filed, however, these come at a steep cost for employers. In fiscal year 2015, resolved charges of harassment resulted in \$125.5 million in benefits for employees. Harassment-related EEOC litigation has resulted in the recovery of an additional \$39 million in monetary benefits for employees.
- Harassment also can cause such indirect costs to employers as decreased productivity, increased turnover, and reputational damage. Employers also face competing economic considerations where the harasser is a “superstar.”
- The report also identified elements in a workplace that might put that workplace more at risk for harassment. The Task Force feels that such factors include, but are not limited to:
  - The homogenous workforce where, for example, a single female works among an otherwise male workforce.
  - Workplaces where some workers do not conform to workplace norms, such as where a feminine-acting man works in a predominantly male environment that includes crude language and sexual banter.
  - Where the workplace is very diverse with significant “blocs” of workers from different cultures.
  - Where coarsened social discourse occurs outside the workplace regarding, for example, anti-Muslim sentiment after the 9-11 attacks.
  - Workplaces with many young workers who either lack the maturity to understand the consequences of their actions or are targets of harassment.

- Workplaces with “high value” employees who may believe the general rules of the workplace do not apply to them.
- Workplaces with significant power disputes where, for example, low status workers may be susceptible to harassment.
- Workplaces that rely on customer service or client satisfaction and where an employee tolerates harassment by a customer or client.
- Workplaces where work is monotonous or consists of low-intensity tasks and workers have time on their hands to engage in inappropriate conduct.
- Isolated workplaces where harassers have easy access to co-workers.
- Workplace cultures that tolerate or encourage alcohol consumption during or around work hours.
- Decentralized workplaces where a harassing climate may go unchecked.

Many of the findings of the Task Force are self-evident. Nevertheless, they may serve as useful reminders for employers.

### **III. RECOMMENDATIONS OF THE TASK FORCE**

The EEOC’s Task Force focuses on the elements of leadership and accountability in preventing workplace harassment. More specifically, the Task Force recommends:

- Employers should foster an organizational culture in which harassment is not tolerated and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas of minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership’s commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have

occurred, discipline is consistent and does not give (or create the appearance of) undue favor to any particular employee.

- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

Overall, the Task Force emphasizes the notion that workplace culture has the greatest impact on allowing harassment to flourish or, conversely, in preventing harassment.

#### **IV. POLICY AND TRAINING INITIATIVES**

When the Task Force's report was issued, it generated attention because of the overall conclusion that training has had little effect on preventing workplace harassment. The Task Force, of course, does not recommend eliminating training, but rather changing the approach of anti-harassment policies and training on those policies. Regarding policies, the Task Force recommends:

- Employers should adopt and maintain a comprehensive anti-harassment policy, which prohibits harassment based on any protected characteristic and which includes social media considerations.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees in a variety of forms and methods.
- Any anti-harassment policy should offer reporting procedures that are multi-faceted with a range of methods, multiple points of contact, and geographical and organizational diversity, where possible, for an employee to report harassment. The Task Force's checklist for a reporting system is attached as **Exhibit A**.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.
- Employers should periodically "test" their reporting system to determine how well the system is working.

- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable. *See Exhibit A.*
- Any policy should recognize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.
- Where harassment is found to have occurred, discipline should be prompt and proportionate to the behaviors at issue and the severity of the infraction. Discipline should be consistent so that it does not create the appearance of undue favor to any particular employee.

Overall, any policy should be written in clear, simple terms in the language used in the workplace. Any policy also should make it clear that harassment on the basis of any protected status is prohibited. The Task Force’s report included a checklist for an effective harassment prevention policy, which is attached as **Exhibit B**.

The Task Force’s report includes a lengthy discussion about the value of appropriate compliance training. The Task Force notes that all employees need to receive compliance training; however, managers and supervisors need additional training if the employer seeks to address conduct before it rises to the level of illegal harassment. At the same time, supervisors and managers must receive clear messages of accountability. Training also should take place at the highest level so that a clear message is sent that compliance is expected at all levels.

Additional recommendations regarding training included:

- Employers should offer, on a regular basis and in a universal manner, compliance training that includes the content and follows the structural principles described in the Task Force’s report. Some of these principles include looking at the nature of the workplace and being aware of factors which make harassment more likely.
- Employers should dedicate sufficient resources to train middle management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or

information. This should be the case before such harassment reaches a legally-actionable level.

- Employers should be receptive to the EEOC's recommendations in settlement and conciliation agreements for the adoption and maintenance of compliance training that comports with the content and follows the structural principles described in the Task Force's report.
- Compliance training should be done by qualified, live, and interactive trainers who are dynamic, engaging, and have full command of the subject matter. The Task Force recognized, however, that where live trainers are not feasible, online or video-based training may be used, provided programs are tailored to specific workplaces and workforces and designed to include interactive engagement.
- Compliance training should be evaluated. A questionnaire may be given to participants immediately after the training asking if they found the training useful.

The Task Force's report also discussed "workplace civility training" as a way to reduce bullying or workplace conflict. Research used by the Task Force found that incivility is often an antecedent to harassment as it creates a climate of "general derision and disrespect" where harassing behaviors are tolerated. Bystander intervention training also was discussed and is increasingly used by educational institutions to prevent sexual assault. Such training is aimed at enabling bystanders to recognize problematic behaviors and motivating them to step in and take action. The Task Force's checklist for compliance training is attached as **Exhibit C**.

## **V. CONCLUSION**

There is not anything particularly new or surprising in the Task Force's report and the bottom line is not that anti-harassment training be thrown out. Rather, the Task Force takes the position that the training needs to be part of what it calls a "holistic committed effort" to combat harassment, focusing on the specific culture and needs of a particular workplace. Further, merely having a good reporting and response system is not enough if employees fail to use these systems for fear of subsequent retaliation. Above all, it seems that employees must be repeatedly trained and retrained on the system in an attempt to engender faith in the system.

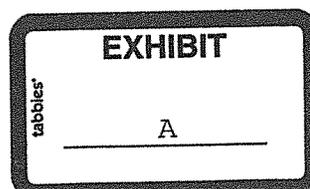
**Checklist Three: A Harassment Reporting System and Investigations**

*A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.*

*Check the box below if your anti-harassment effort contains the following elements:*

- A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- Employer representatives who take reports seriously
- A supportive environment where individuals feel safe to report harassing behavior to management
- Well-trained, objective, and neutral investigators
- Timely responses and investigations
- Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not “presumed guilty” and are not “punished” unless and until a complete investigation determines that harassment has occurred
- A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

*A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.*

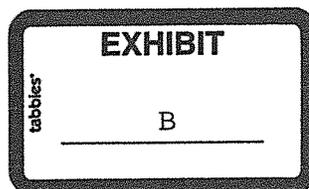


**Checklist Two: An Anti-Harassment Policy**

*An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:*

- An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- An easy-to-understand description of prohibited conduct, including examples
- A description of a reporting system – available to employees who experience harassment as well as those who observe harassment – that provides multiple avenues to report, in a manner easily accessible to employees
- A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
- A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- Is written in clear, simple words, in all languages commonly used by members of the workforce

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**Checklist Four: Compliance Training**

*A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:*

- Structural Principles
  - Supported at the highest levels
  - Repeated and reinforced on a regular basis
  - Provided to all employees at every level of the organization
  - Conducted by qualified, live, and interactive trainers
  - If live training is not feasible, designed to include active engagement by participants
  - Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
  - Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - Includes examples that are tailored to the specific workplace and the specific workforce
  - Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-line Supervisors
  - Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

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