The Epidemic of High Profile Sexual Harassment Claims: Solutions and Strategies to Create a Working Environment Where Harassment Can’t Take Hold *(and to Stay out of the News)*
Title VII of the Civil Rights Act of 1964

It shall be an unlawful employment practice for an employer -
(1) to fail or refuse to hire or to discharge any individual, or otherwise 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; or
(2) to limit, segregate, or classify his employees or applicants for
employment in any way which would deprive or tend to deprive any
individual of employment opportunities or otherwise adversely affect his
status as an employee, because of such individual’s race, color, religion,
sex, or national origin.

42 U.S.C. Sec. 2000e-2 [Section 703]
Meritor Savings Bank v. Vinson

Sexual harassment resulting in a hostile work environment is a violation of Title VII of the Civil Rights Act of 1964

477 U.S. 57 (1986)
In the Headlines, 53 (Title VII) and 31 (Meritor) years later

- Charges of Ignoring Harassment [at Ohio University], Year After Year, AAAED Blog, March 20, 2017
- Fox is Said to Settle with Former Contributor over Sexual Assault Claims, New York Times, March 8, 2017
- HP Handled My Sexual Harassment Better Than Uber Would Have, Fortune.com, March 5, 2017
- Silicon Valley’s Dirty Little Secret: The Way it Treats Women, USA Today, March 3, 2017
- Hundreds Allege Sex Harassment, Discrimination at Kay and Jared Jewelry Company, Washington Post, February 27, 2017
- This Woman is Suing Her Work Place [AIG] After Constantly Being Sexually Harassed, CollegeCandy.com, January 24, 2017
In the Headlines (continued)

- Sexual Assault of Home Healthcare Worker Results in OSHA Citation, *Lexology*, August 18, 2016
- Teacher Says District Failed to Act on Sex Claim, *Courthouse News Service*, July 28, 2016
- Sexual Harassment Complaint Against Yale Professor Goes Unanswered for Years, *Laywers.com*, June 15, 2016
In the Headlines (continued)

- Lakers Looking into Incident Involving Nick Young, Jordan Clarkson, *ESPN.com*, March 21, 2016
In the Headlines (continued)

- American Apparel Details Allegations of Sexual Misconduct by Ousted CEO, *CNBC.com*, June 24, 2015
Complained of Conduct in These Stories—

- Business travel together and booking only one hotel room
- Caressing
- Discussing pornography
- Encouragement to cater sexually to bosses
- Graphic sexual conversations
- Groping
- Hiding under women’s desks, looking up skirts, and licking
- Intimate photo sharing
- Ogling
- Propositioning women for sex
- Sex for grades
- Sexual advances
- Sexual assault
- Sleeping with co-workers
- Sleeping with students
- Talking about co-workers’ breasts and buttocks
- Trying to force someone to perform oral sex
- Vulgar, sexual gestures
Remember—

We have no way of knowing what is true. Just because it is in the news, it doesn’t mean it’s true. And just because it may not be true, it doesn’t mean we don’t have to take it seriously.

PR Vulnerability—

From the New York Times to Collegecandy.com
If it’s in the news, most people believe it’s true
The articles never go away
How would you or your CEO answer the Senator’s questions?

https://www.youtube.com/v/H2fL4vldc0g?start=140
2015 EEOC Data—

- Private Employers and State/Local Governments: Approximately 28,000 charges alleging harassment
  - This was approximately 1/3 of all charges, 45% percent of which alleged sex harassment

- Federal Government: Approximately 6,700 charges alleging harassment
  - This was 43% of all charges, 7% of which alleged sex harassment
Legal Obligations in a Nutshell

- STOP the harassment
- PREVENT its recurrence
- REMEDY its effects

Obligation on the Horizon

- Prevent the harassment even before it occurs through intentional diversity and inclusivity* efforts and climate assessment

*Inclusivity: The act or process of using the information, tools, skills, insights, and other talents that each individual has to offer for the mutual benefit and gain of everyone. It also includes providing everyone with opportunities to contribute their thoughts, ideas, and concerns. Inclusiveness results in people feeling valued and respected; a sense of belonging. Lambert, J. and Myers, S. *Trainer’s Diversity Source Book* (2005).
According to the EEOC, “employers must have a holistic approach for creating an organizational culture that will prevent harassment.”

- Note the focus on **prevention**, rather than addressing harassment after it occurs
- This approach is comprised of:
  - Leadership and Accountability
  - Anti-harassment Policies
  - Harassment Reporting Systems and Investigations
  - Compliance Training

Leadership and Accountability

- Leadership has allocated sufficient resources for a harassment prevention effort
- Leadership has allocated sufficient staff time for a harassment prevention effort
- Leadership has assessed harassment risk factors and has proactively taken steps to minimize those risks
- Imposition of discipline that is prompt, consistent, and proportionate to the severity of the harassment, if it is found to have occurred
  - Note the peril of the zero tolerance standard
- Accountability for managers and supervisors to prevent and respond to workplace harassment
  - They need training to be able to do this
  - They need skills to be able to do this
- It is the job of managers and supervisors to SEE, HEAR, and ACT
- Implementation of metrics for harassment prevention and response in supervisory employees’ performance reviews
Anti-harassment Policies

- Unequivocal statement that harassment based on any protected characteristic will not be tolerated
- An easy-to-understand description of prohibited conduct, using examples
- A description of a reporting system for those who experience harassment and those who observe harassment
- A statement that a report will result in a prompt, thorough, and impartial investigation
  - Who conducts your investigations? What is their training?
  - Do they have capacity? Are they able to do it well? Are they neutral?
- A statement that confidentiality will be maintained to the fullest extent possible
- An assurance that immediate and proportionate corrective action will be taken if it is found that harassment occurred
- A statement that retaliation is prohibited
- Written in clear, simple terms, in all languages commonly used by employees
Harassment Reporting Systems and Investigations

- 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
- An environment in which individuals feel safe to report harassing behavior to management
- Well-trained, objective, and neutral investigators
- Timely responses
- Timely investigations
- Investigators who document all steps taken and who prepare a high quality, error-free written report using guidelines to weigh credibility
- An investigation that protects confidentiality to the fullest extent possible
- Authority to impose sanctions on those who engage in retaliation
- Systems to ensure that alleged harassers are not presumed guilty and are not punished until a complete investigation determines that harassment occurred (equity)
- Communication of the decision following the investigation to all parties, including the communication of any discipline, as appropriate in your environment and in light of the outcome
Compliance Training

- Supported at the highest levels
- Attended by those at all levels, including the highest levels and even Board members
- Repeated and reinforced on a regular basis
- Evaluated with instructors, methods, and content modified as necessary
- Describes illegal harassment and conduct that may rise to the level of illegal harassment
- Uses tailored examples
- Educates employees about their rights and responsibilities
- Educates employees about reporting options if they experience or observe harassment
- Explains the non-retaliation prohibition
- Provides managers and supervisors with methods for dealing with harassment they observe or is reported to them, including sanctions for failing to deal with such behavior
- Provides clear instructions to managers and supervisors regarding how to report harassing behavior within the organization, including sanctions for failing to do so
- Encourages managers and supervisors to assess the workforces within their responsibility for risk factors of harassment
**MERCS: Measures of Commitment to a Harassment-free Environment**

**Mindset: Attitudes and Dispositions**
*who gets to be part of your organization: hiring standards, performance evaluations

**Education**
*meaningful, understandable, ongoing, general and tailored, organization-specific, work team-specific, and person-specific

**Resources**
*people, time, attention, money

**Culture of Respect, Diversity, and Inclusion**
*what is your strategy to build and maintain this culture; is it focused only on individuals even though we don’t experience work as individuals, but as members of teams

**Systems**
*hiring, harassment policies, performance management, proactive risk evaluation and response, reporting, investigation, decision-making

= Commitment
According to the EEOC, the following workplace and external characteristics result in higher rates of harassment—

- Homogeneous workforce
- Workplaces where some employees do not conform to workplace norms
- Cultural and language differences in the workplace
- Coarsened social discourse outside the workplace
- Young workforces
- Workplaces with “high value” employees
- Workplaces with significant power disparities
- Workplaces that rely on customer service or client satisfaction
- Workplaces where work is monotonous or tasks are low-intensity
- Isolated workplaces
- Workplaces that tolerate or encourage alcohol consumption
- Decentralized workplaces

*If you see your workplace in this list, the EEOC has proposed risk-factor specific strategies to reduce harassment.*
Investigations—Tips

- Set a tone of congenial control
- Explain your job as investigator and expressly enlist the interviewee’s help in making sure you do a good job
- Make clear that it is a conversation, not an interrogation
- Be really comfortable with silence
- The best investigators are quiet
- They let the person with whom they are meeting think
- They let the person have time in case they are upset
- People sometimes fill silence with information that is useful
- Engage in active listening

Investigations Trend—The use of external investigators

For example, Uber is using Eric Holder = $$$$$
Investigations—The Importance of the Investigative Report

- The investigative report is, by far, the most important document in the process
- All lawsuits and challenges are about what’s on the paper
- The report must be well-written, logical, clear, organized, professional, polished, and error-free
- Documentation is critical—you are creating the record
- The outcome must be based on reliable information—you need to make sure evidence is credible
- Remember that the report is being written for multiple audiences—internal and external
- Planning: It takes a long time to write
Components of the Investigative Report—

- The final investigative report should include a detailed and neutral recitation of the investigation
- Identify all witnesses interviewed and the dates of the interviews, including the time the interview began and concluded
- List any other information and evidence collected and date of collection
- Where applicable, explain reasons for unsuccessful attempts to interview witnesses or failure to collect pieces of evidence
- Presentation of facts
- Describe the circumstances of the initial report
- Describe the allegations as presented in the initial report
- Must include details of the alleged harassment
- Explain the roles of the parties and witnesses and their relationships to one another
- Provide a detailed summary of all of the information received and supporting facts
- Highlight key facts related to each allegation
- Highlight areas of agreement and disagreement
- Reference all applicable policies and include relevant definitions
Lessons Learned—Culture and Work Environment

- Focusing only on legal compliance will never be enough
  - The legal standard is the floor not the ceiling
  - Organization’s commitment to a harassment-free workplace should not be based on a compliance mindset, but part of a diversity and inclusion strategy
- Focusing only on non-harassment training will never be enough
  - This education is not just the “don’ts” but more importantly the “dos”
  - While the training of those who implement your system is of vital importance, you must make difficult decisions regarding who has the appropriate skills and attitudes to carry out this work
- Proactively creating and maintaining a culture of respect and inclusion is necessary
  - There is little to no harassment in a respectful culture
- Mean what you say—the policy should apply to everyone
Lessons Learned—Employee Development

- All employees, at every level, must be able to reflect on their conduct, learn, and grow
  - If they cannot, a difficult decision may be necessary
- Don’t assume applicants and employees have the attitudes, skills, and awareness to be part of a respectful and harassment-free workplace
  - You have to know whether they do
  - It can’t matter what role they play in the organization
  - If your superstars are engaging in misconduct and you do not act on it, expect negative and significant ripple effects within your organization
Lessons Learned—If You See Something, Say Something

• Teaching people what to look for and how to intervene when they see something is the new normal
• Bystander intervention

Lessons Learned—If You See Something, DO Something

• It is managers’/supervisors’/leaders’ jobs to SEE and ACT
• If they don’t, state legislatures, Congress, and the court may do it for them…
In its 2016 Study of Harassment in the Workplace, the EEOC makes frequent reference to the work that has been done on college campuses to prevent and address sexual misconduct under Title IX

- Title IX prohibits sex discrimination in the academic environment

- Review the Office for Civil Rights guidance regarding Title IX for what may be coming in non-academic workplaces
  - April 4, 2011 DCL (Sexual Harassment and Sexual Violence)
  - Questions and Answers on Title IX and Sexual Violence (April 29, 2014)

The 2016 report encourages bystander training and climate surveys, both of which are common on college campuses; in fact, NY colleges are required to conduct climate surveys

The 2016 report also advocates for an “It’s On Us” campaign, similar to the one the White House recommended be carried out on college campuses
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