

Sexual Harassment Continues...
And So Do the Challenges Employers Face to Stop It
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More than thirty years ago, the United States Supreme Court declared in *Meritor Savings Bank v. Vinson* that sexual harassment in the workplace was a form of illegal sex discrimination under Title VII of the 1964 Civil Rights Act. California's Fair Employment and Housing Act (FEHA) has been in place since 1980 and expressly prohibits sexual harassment in the workplace. For over ten years, since the enactment Assembly Bill 1825 in 2007, California law has mandated that large employers train supervisors on how to recognize and prevent harassment. And for decades, both federal and state courts have heard and settled questions about what does and does not constitute sexual harassment under the law.

Nevertheless, despite this well-settled body of law, sexual (and other forms) of harassment continue to plague the workplace and create challenges for employers. Why is this? To be sure, there are employers who have failed to take appropriate steps to protect their employees and comply with the law. However, even in the case of responsible employers who have made a commitment to a harassment-free workplace, and have implemented reasonable measures to try and ensure compliance with their legal obligations, harassment continues.

Faced with this truth, the EEOC established a Special Task Force ("Task Force") in 2015 to examine the complex issues associated with harassment in the workplace. In June 2016, it issued its report and essentially concluded that in the thirty years since the *Meritor Savings Bank* case, "we have come a far way since that day, but sadly and too often still have far to go." The EEOC's report pointed to two critical components that must be present in a workplace culture in order to have a better chance at preventing, or at least, reducing harassment. Those are: **leadership and accountability**. A workplace's culture will ultimately be determined from the values and examples handed down by its leadership. Leadership that is committed to diversity, inclusion and respect across the organization will impart those values and expectations to employees. Also, an organization must have accountability systems in place that ensure that those who engage in harassment are held responsible in a meaningful and appropriate manner.

Unfortunately, even those employers who have leadership that is committed to a workplace culture free from harassment and who have an accountability system in place, still face challenges - both in the effective administration of their anti-harassment programs, and in connection with their legal liability. However, just as all workplaces are not the same, not all challenges are the same. For example, as the EEOC pointed out, employers with a large number of young workers face challenges due to the maturity level of employees which can lead to inappropriate conduct (in person and/or through social media) and an unawareness of the legal consequences to both the alleged harasser and the employer. Also, decentralized workplaces (e.g. chain restaurants) create special problems with respect to proper oversight by human

resources and upper management who are usually at a separate corporate office. Moreover, work environments with significant power disparities between certain classes of employees, and/or between the sexes, can lead to abusive or harassing conduct.

Another big challenge for employers is that unfortunately workplace harassment often goes unreported (at least initially). As a result, employers face challenges in protecting employees. Under federal and state law, employers have an obligation to take prompt corrective action to address claims of harassment. In doing so, they must conduct a neutral investigation that provides all involved with appropriate due process. Once the employer reaches a reasonable conclusion based on the evidence collected, if it finds the complaint is substantiated, it must take appropriate remedial actions to correct the situation and deter future misconduct. Nevertheless, the EEOC Task Force found that roughly three out of four individuals who experienced harassment never reported it. The reason for this, understandably, is that these individuals fear they will suffer negative employment or social consequences if they come forward. For an employer who has an anti-harassment program in place for employees to report harassment without suffering retaliation, however, the failure of employees to report such conduct prevents the employer from addressing it. This results not only in the potential for the misconduct to continue and potentially escalate and cause serious distress on the individual, but also in the possibility of legal liability for the employer if and when the facts of the misconduct are brought to light.

Finally, even though employers may face different challenges depending on the make-up of their workplace, and despite the measures an employer has put in place to try and prevent harassment, the legal standard for employer-liability is the same. If the sexual harassment is committed by a supervisor, the employer is **strictly liable** even if management had no knowledge of the supervisor's propensity to engage in this type of conduct. While federal law provides for a limited defense under Title VII pursuant to the *Ellerth/Faragher* defense, there is no defense to liability under California law.¹ Consequently, employers are faced with the harsh reality that even if they have a robust anti-harassment programs in place (comprised of comprehensive policies tailored to their workplace; effective training; secure reporting mechanisms; fair and impartial investigations; appropriate and effective discipline and remedial systems; and protections against retaliation), they will still be subject to legal liability if a supervisor violates that anti-harassment program and engages in harassing conduct.

The fact is, there is no omniscient or omnipresent "employer" that can guarantee the protection of its employees against harassment. It is people who harass people, and it is people who must ensure harassment does not occur. Consequently, every workplace must embrace the two core cultural components identified by the EEOC's Task Force – leadership and accountability – and conduct training across the organization in an effort to stop harassment before it happens. Training is one of the most important elements of

¹ Although damages may be reduced under the Avoidable Consequences Doctrine.

an employer's anti-harassment program, and it should not merely focus on how to avoid sexual harassment liability.

Instead, effective training should:

- Be tailored to the specific workplace;
- Clearly explain all aspects of the employer's anti-harassment program (including a secure report mechanism and protections against retaliation for coming forward);
- Focus on recognizing and combating conscious and unconscious biases;
- Promote respect for gender, cultural, and generational differences;
- Encourage employees to speak up, and provide practical and productive strategies on how to address difficult people and difficult situations;
- Stress that every person must take responsibility for their own conduct and will be held accountable for violations of the employer's anti-harassment program.
- Emphasize for supervisors and managers that they are the managing-agents of the employer. Therefore, they not only must comply with the anti-harassment program with regards to their own conduct, but they have an affirmative duty to enforce the program with their subordinates and will be held accountable if they fail to do so.
- Refreshed and reinforced on a regular basis.

Holding people personally accountable for their inappropriate conduct or, worse yet, illegal harassment is absolutely imperative. However, if employers (leadership) wish to protect their employees and minimize potential legal liability, they must invest the time and resources necessary to try and prevent it from occurring in the first place. There are both private and governmental resources (the EEOC and California's DFEH) available to employers and they should take advantage of them. As the EEOC Task Force concluded in its report when talking about its future campaigns - "*It's on Us!*"