

# Subcommittee on Sexual Harassment Prevention & Response

## Witness Hearing Testimony by Topic

### Culture Change

- **Denhardt:** Culture is the primary determinative of human behavior in public sector. Culture wins over rules: “Culture eats strategy for breakfast.” [Drucker] “Culture eats policy for lunch.” [JD]
  - Culture develops slowly, collectively, based on learning/stories, in response to external events.
- **Taylor:** Take your time and do it right
- **Ervine:** Culture change has come out of changing communication technology (*e.g.* Facebook)
  - Public shaming has become problem – across every culture/race
  - More than sexual harassment, now harassment and bullying in school
- **Lipson:** Culture change is everything
  - Need to make some relationships inappropriate, due to power differential
- **Wickham:** Culture change is central. LA County has a culture of reporting
  - County practices led to culture change, which took 3-5 years
- **Davis:** Culture change requires asking those who are in the culture – the employees
  - Circles can break down the barriers between supervisor and employees
- **Wise:** Alcohol is a serious risk factor that needs to be addressed to change culture
- **West:** Most difficult issue is getting buy-in from leadership
  - Power dynamic makes culture change more difficult in Legislature

### What Kind of Culture

- **Denhardt:** Cultures based on respect, inclusion, safety/trust creates more effective, resilient and productive organizations.
  - Best Practices: talk about desired values regularly, react carefully to critical incidents/crises, model behavior, reward and highlight desired behavior, share successes and tell stories
  - Not a women’s issue, it’s an “everyone issue”
- **Nooshin:** Leaders need to take the lead in setting a culture that makes SH unacceptable
  - Next generation will reshape the workplace on these issues

### Tools for Achieving Culture Change

- **Denhardt:** Talk about desired values regularly, react carefully to critical incidents/crises, model behavior, reward and highlight desired behavior, share successes and tell stories
  - Tools: Socialization, Stories, Symbols, Jargon and Language, Statements of Principle
  - Isn’t one thing to do, but many things, but the most important part is starting
    - Start with asking what cultural norms do you want to foster
    - Cultural norms use their talents and be innovative, responsive, resilient
    - Values to Promote: safety, civility, trust, cooperation, collaboration
    - Isn’t an HR issue, it’s about the kind of organization you are
    - It’s about leadership AND everyone talking (men/women, young/old)
  - Data can help – culture survey (but most are really bad)
  - Hold people accountable for doing the right thing – talk about what went right
  - Ask employees what workplace is like now and then what do you want it to be.
    - Surveys are OK, but engaged conversation is better

- **Salvati:** Policy is first step – convey expectations, establish fair process, ensure accountability
  - Assure no retaliation, promotes reporting
  - Appoint central person to track these issues (Title IX officer)
  - Confidential counseling resources have been important
    - Legally privileged because they are trained; independent
    - Best thing we ever did; Napolitano made sure that all campuses have them in 2015
    - Title IX requires assistance (counseling) to victims of sexual harassment
  - Focus on prevention and awareness of problem: listen to community
  - Bystander training helps all students – active bystander
  - Balance victim’s witness’ interest with safety
    - Offer other options than firing
  - Tell complainants what you do and what you can do
  - Show the professionals the damage to the organization and therefore to their reputation
  - Ombudsman is not a required reporter, so it’s confidential but not privileged
    - Come up with options; help make decisions
  - Peer Enforcement – anonymous reporting apps, hold peers accountable (even members)
    - Faculty hold each other accountable – tenure makes it difficult for administrators
  - Leadership at the Top is Critical (Napolitano) –
    - commitment better than mere direction
    - OK for leader to not have the answer
    - Talk about the issue, don’t avoid it (*e.g.* De Vos)
  
- **Emerson:** Litigation is crucial tool, but it means the system has broken down.
  - Healthy, inclusive culture means you can go to work without fear
  - Build diverse organizations, where women are represented in core functions, leadership
    - Look at factors for why women are not in leadership, what are unique barriers
    - Examine data – who’s hired, advancing; Use culture survey
  - holding accountable, training
  - Go beyond the minimum required by law
    - progressive policies that create the culture you want to work in
    - thoughtful anti-harassment training (bystanders)
      - not likely to stop harassers, but helps everyone else to do something
      - more than legal requirements, address ethical dimensions (understand impact)
      - in-person, multi-gender training allows exchange
  - Look at culture beyond harassment – how are women treated, consider women of color difficulty
  - Lack of Safety > less effective workers
  - Culture is critical to organizational success
    - Reward people who support the culture
  
- **Taylor:** Diverse experience (HR lawyer; HR Director, CEO, Non-profit)
  - Foster a culture of respect, more than sexual harassment
  - Consider broader American culture that may tolerate sexual (*e.g.* Clinton)
  - Workplaces that have worst problems include legislatures
    - About power; men in control
    - Young aspiring employees enthralled by powerful people
    - Legislatures need to take the lead in changing culture
  - Repeats “culture trumps compliance” – need to address culture first
    - Relying on compliance, rules, manuals training to address sexual harassment will fail
    - Office romance is going to happen, so deal in reality of the Capitol
    - Gray zone between legal sexual harassment and a culture of inclusion
      - Real damage happens that is not legal harassment
    - Ignore cottage industry of compliance firms

- “Culture, not compliance, guides workplace conduct.”
  - Need bicameral policy and process – current, separate process “is not working”
    - Helps create better culture of inclusion; division does not create unified culture
    - Healthy culture will defeat sexual harassment; “body inoculates itself”
  - Look at policy of workplace relationships – they will pursue each other (human nature)
    - Barring relationships will drive them underground, and leads to firing talent
    - Create a policy of disclosure
  - Need “swift but deliberate action” and transparency
    - Need to examine complaints swiftly, better by independent panel
    - Careful: Avoid assumption of guilty until proven innocent standard
    - Trustworthy process protects accused until adjudicated fairly, quickly and appropriately
    - SHRM can offer tools for how to do this
    - Take every complaint seriously; everyone needs to feel safe
    - Sometimes it takes an example to show even the powerful can be disciplined
      - May need to exercise the expulsion option to build credibility
    - Need to enforce and make message of enforcement public (transparency)
      - Have the guts to eject problem employees
    - Balance with due process; too swift undermines confidence (Matt Lauer example)
  - Healthy cultures run on their own; self-police; self-regulate;
    - Competitive game changer – helps you keep great talent
    - In competitive job market, you can’t afford to lose good people
    - No one is too important to allow sexual harassment in the Legislature – can’t pay off
    - Technology allows monitoring and helps peer-to-peer enforcement
  - Look beyond this one issue, to who are the people you bring into the organization
    - Push for self-honesty, monitor Twitter feeds
  - Ask all employees – give the 10 words about what it means to work here
  - Use exit interview to ask about employee experience, read the organization values
    - Best intervention is have independent party do a review a month later
    - Gives them time to get away from the crisis at work
  - HR employees are the keepers of the culture
    - Judging HR departments: SHRM Body of Competence and Knowledge certification
    - Public agencies have personnel, not HR departments
  - Legislative rules for employees are different for a reason, different circumstances
    - Necessary to explain it
    - Unions do not necessarily fix a culture; there is sexual harassment in union
  - A strong HR that can resolve problems avoid litigation
- **Griffin:** Doing survey on how legislatures address sexual harassment, not a California-only problem
    - State of Oregon has informal reporting to reduce problems early
    - NCSL will do what we ask
  - **Wise:** “Shadow of the leader” affects the whole organization
    - Employers can do a better. Legislature does a pretty good job with “compliance.”
    - Leaders set the tone for the organization – story of Ohio Legislature dinner

## Policy

- **Taylor:** Takes courage to make these decisions. HR works for the organization, not the boss
  - HR can be a force for good; consider who HR answers to – the leadership?
- **Nathan:** SHRM can help create policy, but there is no certification of policies
  - SHRM offers best practices, but not certification
- **Klein-Jimenez:** CalCASA assists colleges on these policies

- Power dynamic makes culture change more difficult in Legislature
- **Taylor:** Zero-tolerance policies have no effect when employees don't feel safe to report
- **Musell:** Legislature is unique – policy must address uniqueness
  - *E.g.* difficulty in changing offices after reporting
  - Deal with power differential, empowering employees
  - Don't require no-rehire clauses in settlements.
  - Confidentiality clauses create problems with transparency
  - Protect disclosures to WEAVE counselors
  - Clarify standard of proof – preponderance? Beyond a reasonable doubt?
  - Advocates zero tolerance workplace.
- **West:** Zero tolerance is confusing. People think they will be terminated, not just punished.
- **Kish:** Zero tolerance should mean “we will respond to everything”—not that someone will be fired.
- **Klein-Jimenez:** Policy AND Culture need to work together – training helps
  - OK with zero tolerance, but do people know about the policy
- **Wise:** Policy needs to be specific to your workplace, so employees can see that situation happening
  - Zero-tolerance is not a good idea, as victims do not want colleague to lose their jobs
  - Zero-tolerance undermines reporting
  - Zero tolerance policy discourages reporting is already a problem
  - Most victims don't want to punish colleague, just want behavior to stop
  - Use of alcohol is a risk factor, needs to be part of discussion of policy

## Training

- **West:** Rigorous training must address bias
  - Princeton study showed judgment as soon as you see a face
- **Nathan:** Supports implicit bias training, which NHM is starting, to deal with customers
  - Power dynamic makes culture change more difficult in Legislature
  - Volunteers need training too
  - Bystander training is one part of comprehensive training
- **Klein-Jimenez:** Training creates environment to encourage re
  - Power dynamic makes culture change more difficult in Legislature
  - Gives employees knowledge AND “tools” for responding
- **Ruffino (SHRM):** Training is critical to changing culture
  - AB 1825 (2006) requires supervisors to take sexual harassment training
  - Factors Important to Successful Training Programs on Sexual Harassment
    - Leaders need to take the lead on supporting training – most important factor
    - Live classes are better – allows discussion in real-time; blended training may work
    - Bystander training is critical to affecting those who are not involved
    - Implicit bias training is helpful – more than awareness; give the tools to change
    - Training for executives/supervisors should be separate – higher level of responsibility
  - Overcoming training obstacles – boredom, redundancy, or lackluster attitude from employees
    - One solution is to break up and spread training over time
    - Incentives – gift cards, food
  - All training is interactive – requires participants to engage (*e.g.* playing cards), a little more fun
    - Engage questions – get them talking about what happens in their workplace
    - Needs to be relevant to your workplace
  - Work within constraints of your workplace, but still create respectful workplace

- Adjust to individual employee needs
  - Avoid making difficult topics “the joke of the day” – keep it to the business
- Label it “Respect in the Workplace” training, not sexual harassment training
  - Not pointing fingers, just showing why/how people need to change
  - Show how it helps the organization
- **Perez (Emtrain):**
  - What Doesn’t Work – check-the-box mentality (focus only on legal compliance)
    - Unrealistic examples, not focused on understanding/changing behavior
    - Stand-alone training – in isolation from actual, real workplace
    - Inauthentic training – organizations that don’t have commitment to respect (could lead to backlash; commitment only to compliance draws no respect)
    - Inadequate Reporting – lack of confidence that reporting changes situation
    - Ignoring early problems, before legal violation occurs (waiting until unlawful is too late)
  - Other Issues Affect this Issue
    - Imbalance of power
    - Culture of Complicity
  - Low Reporting Numbers is Common
    - Alternatives – avoid harasser (33-75%), downplay gravity (54-73%), ignore (44-70%)
    - Culture of truth-telling/reporting (healthy, productive workplace), opportunity to fix
    - Healthy culture may have more reports, not less
    - HR needs training in how to take complaints
  - Five Points for Improving Training
    - Training in line with positive culture
    - Comprehensive program
    - Personalized approach
    - Relevant and nuanced content
    - Micro-learning – brief
    - Collect data and use analytics to see if change is happening
  - Reinforce Good Behavior – performance management system, measurable manager review
    - Communicate expectations at the front, before managers
    - Job description, especially for managers, identify these attributes
    - Structure rewards and “dings” on sexual harassment
  - Relevance to your workplace is critical to success in training and all activities
    - Restorative justice needs to address issues in Legislature
    - Underlying goal is to create culture of empathy, not compliance
    - Discussion of sexual issues happens elsewhere – necessary component of job
      - Set expectations early (in training) and still work within confines of professional
      - Is sexual discussion necessary to your work?
      - Respond to employee needs
    - Use extremes of examples in training to show what’s OK and what’s not
  - Bystander training helps give less combative words for responding (orange, green)
    - Problem is difference in perception of what’s acceptable
    - Gives victims tools to talk about problems
  - Climate survey MAY work – if good data in, good data out
  - Training is a “piece in the puzzle, not the puzzle itself” – combine with other changes
    - Need good investigations and real consequences for bad behavior
  - Micro-learning Works – “bursts,” short videos with learning, reinforces bigger training program

# Practices: Response to Sexual Harassment Allegations

## Protecting Victims

- **Sherry:** Meeting with Boxer led to better policy, including victim counseling
  - Investigator needs access to prior complaints
  - Talked about how they adopted the confidential advocate program.
  - Contracted with studentsuccess.org—they provide “not anymore.”
    - It is an online program for students.
    - Helps students understand what sexual assault is.
    - They have tasked student leaders to talk about this program and promote it.
  - Students, faculty and staff all have access to the confidential advocate.
  - Use WEAVE as a confidential counselor (college did not have qualified counselors)
    - They have a WEAVE e-mail and phone number—the email and messages are only accessible to the advocate.
    - WEAVE will help them navigate the system and explain their options.
    - WEAVE advocate is with the person when the person needs them.
  - Each college has equity officer and district-wide HR has 3 staff trained in equity
    - Investigation takes 90 days or less

## Reporting

- **Ervine:** Created Bridg-It to counter school bullying, now building *We Said Enough* App
  - Reporting creates transparency and counters anonymous bullying – puts it in public
  - Apps can provide greater data about problems, helps solve the problems
  - Identity threat is biggest risk today – for both victim and perpetrator
  - “Moderators” who read reports are trained in state and federal law, anti-retaliation
  - Lesser infractions have restorative justice
  - Start with opt-out, so everyone is in the system but can opt out – makes it easier
  - Push technology, responds to reports, engages
  - Orientation period is most critical period
- **Schroeder:** Reporting does not happen for many reasons, around 25% of victims come forward
  - Don’t remember where to call, don’t want the hassle, can’t find handbooks
  - Created Kendr app to make it easy to report, even anonymously, can attach evidence
  - App allows interaction with anonymous reporting person, it’s an engagement tool
  - Millennials like to be engaged, they are more productive with engagement
  - All communication is confidential – reports between employer and employee
  - App is a pressure valve – let’s employees vent
  - Culture against reporting is strong, in all industries
  - Feedback So Far – many are just management issues, not sexual harassment
    - One firm has 800-number, but has gotten many more on app
- **Fleming:** USF students do not know what sexual harassment is (Title IX), so they don’t report
  - Students get training before they move into residence halls (video) and learn about resources
  - Apps offer all kinds of services to college students – consent, dating
  - Reporting is a concern for many reasons
  - Use Calisto app and website – support services, notes about experiences
  - Everyone gets training, widespread awareness of services promotes reporting
  - Creating a separate office (not discipline or HR) encourages reporting (from 15 to 100)
  - Contact survivor first to support healing, ask them what they want to do, but may move forward regardless of what survivor wants if more than one report
  - 90% of perpetrators are repeat offenders, but victims don’t know and don’t report

- **Wickham:** Lower standard of “inappropriate conduct toward others” led to culture of reporting
  - Because standard is lower, employer has notice before it’s a problem,
  - Early notice allows fixing much sooner
  - More reporting shows healthy workplace, people feel safe
  - Implicit bias training helps build understanding of what’s not appropriate – takes time
  - Tied to protected class, inappropriate joke is example
  - Gets to problem before it becomes a violation
  - Culture supports filing of complaint – 5000-6000 complaints/year
    - more complaints is sign of strong culture, safe to report
  - Commitment to educating the workplace is required to change the culture
    - did training before implementing policy
  - Centralized intake unit – don’t have to go through supervisor or HR
    - makes it safer for employees to report, outside their own organization
    - staffed by subject matter experts
    - overwhelming majority come in online
  - Assesses complaint – everyone gets initial investigation, talks to reporter or victim
    - need to give both sides due process – hear from perpetrator
    - looks at evidence and decide whether there is a need for further investigation
    - determines whether there is further investigation
  - Further investigation if there is need for County Equity Oversight Panel
    - not county employees; work for very low-cost – CEOP hearings
    - hearings are about the department, not the perpetrator
    - hearings allow exchange
    - panel makes recommendation to the department
  - Supervisors have affirmative duty to report violations of policy – subject to discipline for failure
  - Mediation available to complaining party – have their points addressed
  - Best model will never eliminate all harassment –
  - Cut litigation costs in half – down to \$15 m from \$30 m
  - Must have workplace experts come together and figure out what works best for you, needs to be tailored to your organization’s need
  - Supervisors have subjected themselves to the policy; leadership at the top must support policy
  - Subject-matter expertise for unit staff and panelists is critical
- **Kish** Tell complainant “thank you,” not “oh no.”
- **Nathan:** Encourage reporting, through education, at start of employee service
  - Unwelcome behavior needs to be reporting, before it becomes a problem.
  - Anonymous – victims commonly want to start there, due to discomfort,
    - Most anonymous complaints are “soft” complaints (uncomfortable comment)
    - Hired 3<sup>rd</sup> party to take reports and employer can respond without knowing identity
    - Unclear if 3<sup>rd</sup> party “owns” the information as to anonymous person’s identity
    - Anonymous complaint is public, but identity does not become public
    - Reports do not go into any personnel file; and has initial investigation
  - Operates “Speak Up Natural History Museum” through 3<sup>rd</sup>-party vendor
    - Supports confidentiality and anonymity
    - May submit reports directly to HR as well
  - Start with “Do you feel safe” and deal with victim ASAP
  - Need consistent procedures to respond to reports (investigation, etc)
- **Schroeder:** Kendr App responds to employees’ loss of how to make reports
  - People don’t lose their phones, so app is easily available
- **Musell:** There are reasons for anonymous reporting, then you have a duty to do something
  - Extend statute of limitations, one-year is too short.

- False reporting is minimal, due to effect on reporting person
- **West:** Anonymous reporting may be necessary
  - Investigator needs access to prior complaints
- **Johnson:** Climate survey may offer an alternative way to get information/reports
- **West:** Don't put a time-limit on reporting
- **Klein-Jimenez:** Employees have many barriers to reporting
  - Barriers: complexity of sexual violence, shame, lack of knowledge of complaint process, trauma-response (burying feelings), fear of consequences/ "trouble-maker" label, lack of confidence in system, not sure it will be taken seriously, historical discrimination Losing job
  - Policies, training, leadership can overcome barriers to reporting,
    - Culture of respect,
    - Gather information via climate survey to get sense of problem
    - Training creates environment that encourages reporting
    - Talking openly and regularly about harassment encourages reporting (campus example)
  - Trauma-informed approach encourages reporting, makes them comfortable
  - Technology is one part of comprehensive approach (including training)

## Investigation

- **Musell:** Need to hire independent investigator, not one who works mostly for employers
  - Investigator needs access to prior complaints
  - Issues: who gets reports? what is response? attorney-client privilege?
  - Does investigator go beyond investigation?
  - Who makes decision to investigate?
  - Need PROMPT investigation – to put down frivolous complaints and give victims confidence
- **West:** Supervisors should not do any investigation, without training
  - Investigator need training so you can have confidence with the results
  - Training helps prevent allegations getting out
- **Ravel:** Recommends independent commission for investigations
  - Trained investigators are critical, but not necessarily an outside law firm
  - Having an outside body can do better investigations
  - Independent commission needs "ample budget" to do its job
  - Could accept outside reporting
  - Would require a new law to set up a separate system
  - Judges may not be sensitive to the kinds of issues that arise in Legislature
  - Independent groups try to balance all the interests
  - Timeliness is critical and FPPC has not always had a great record (set targets)
  - Investigative process needs to be completely confidential and professional
    - Mere allegation can end career
- **Kevin Kish (DFEH)**
  - DFEH put together a guide for investigation
  - Due Process – employees have NO due process rights, only what employer creates
    - Due process is important to ensure perception of fairness, but is not required.
    - Due process does not require interviews of everyone
    - Employer can act on employee (without union contract) "with good reason, bad reason or no reason (provided there is no discrimination)" – absent an agreement
  - Timeliness: Need to move swiftly; protect victim, sometimes immediately
    - Contact reporter ASAP
  - Impartiality: Not required to farm out an investigation or handle it internally

- Look at qualifications and training of investigator
    - Credibility determinations of factors
  - Burden of Proof: Preponderance of the evidence—civil standard.
  - Anonymous Complaints
    - If you get a bunch of these, you probably need to do a **climate survey**.
  - What happens if victims say “don’t do anything”? If it is serious you still need to take action.
  - Retaliation Prevention: Keep checking in, to make sure that no retaliation is occurring.
    - Consider perspective of both the victims and the accused.
  - Most of the complaints are small—very few false claims, maybe misinterpretation, exaggeration, misremembering, but not intentionally false.
    - Treat allegations against staff and members differently.
    - Many complaints are not clear—many complaints are misunderstandings.
  - What are the solutions?
    - Restorative justice, mediation, etc.
    - Need a process for folks to air grievances.
  - Should limit cases to a specific timeframe—need to look at every case.
  - Key decision to make is: Who will handle the investigations?
  - Investigations are confidential, but results are often maintained so others can know in the future
  - Investigations may look at “good faith belief” for why action was taken
    - May allow employer to intervene to explain how the other person interpreted action
  - DFEH does not have sufficient budget to investigate all complaints
- **Oppenheimer:** Policy should focus on “garden variety” of cases, not the worst cases
  - Due Process Hearing: not for every case, but perhaps for some
  - Employer should determine who investigates and how (not based on complainant)
  - Confidentiality: Only goes so far, as everyone in office knows
    - Key concern is retaliation
  - Not every complaint requires investigation
  - Anonymous complaints – investigate as best you can
  - Outside investigator has to be attorney or licensed private investigator
  - No bad facts, just facts; should be no consequence of delivering facts
  - Most complaints are based in fact, particularly sexual assault/serious allegations
    - Not all are discrimination claims; DFEH mediation can help address issue (Kish)
  - Implicit bias is central to training of investigators and responding to clients
  - Investigations look at intent of actions as well (*e.g.* demotion was based on problem)
  - Supervisors have to accept reports, but then move investigation to professionals
  - Investigations impose costs on employer and workplace
    - Employer needs to determine when to investigate
    - Look for another way to address the complaint, don’t need to investigate everything
  - Not appropriate for investigators to do a psychological review – “facts are the facts”
- **Musell:** Objects to gagging victims; Sec 232.5 prohibits barring discussion of working conditions
  - Should not gag victims because it allows conduct to continue; prevents remedial measures
  - Leave it to victim to determine confidentiality; don’t require victims
  - Confidentiality clauses enable crime
- **West:** *Banner* decision makes confidentiality admonition a violation of NLRA Section 7
  - Problem for investigators; one witness may influence other witnesses
- **Klein-Jimenez:** Trauma-informed approach respects requests for confidentiality
  - Help victim through confidentiality issue; how does it help them move forward
  - Careful with re-traumatization
- **Wise:** “Shadow of the leader” affects the whole organization

- Employers can do a better. Legislature does a pretty good job with “compliance.”
- Leaders set the tone for the organization – story of Ohio Legislature dinner
- Recommended bystander intervention training and implicit bias training.
  - Training on “civility and respect” go at the top of the training list
- She is a proponent of internal investigations—to a point.
  - Internal investigators need to have additional training.
  - If internal investigator is subordinate to target, hire independent investigator
- Talked about the value of an ombudsman – issues that don’t rise to harassment.
- Risk factors for harassment include alcohol and age.
- Young staffers have particular needs; this may be first job, so we set expectations
  - Training needs to address their particular needs; leaders need to show them
  - EEOC has a program/training for high school students.
- Make conscious choices about culture – profanity, risk factors
  - Engage your workforce in making decisions (do a climate survey)
  - Not a one-time change – culture is a continuing project
  - Look to the “popular people” to help effect a culture change.
- Test reporting system to see if it works (create a claim and see if it moves)
- There needs to be accountability for managers.
- Asking victim whether they have talked to perpetrator may be an investigative tool
  - How they respond may tell the investigator a lot about the problem
    - May show situation is emergency, or has long history
  - BUT, it is NEVER the victim’s responsibility to talk to the perpetrator
  - Restorative justice is an OPTION, not cannot be required
- Allowing appeal of investigation is wrong – “no, no, no”
  - Undermines authority of investigator and investigation
  - Wastes investigation resources
  - Not a problem for accused, no right to have investigation appealed

## Consequences

- **West:** discipline should be proportionate
  - Investigator needs access to prior complaints
  - Employers struggle with strict liability for supervisor behavior – no defense
  - Don’t over-react, hurts women (example of partners not taking female associates on trips)
  - Retaliation claims are more common than actual sexual harassment
  - Settlement of litigation may be done for many reasons
- **Moreno:** Spectrum of Actions and Consequences; Due Process
  - Spectrum of actions and consequences compared to other systems: Progressive discipline
    - Words and Gestures →→→→Sexual Assault
    - For Convicted Criminals: sentencing
    - For attorneys: consequences range from training to disbarment.
    - For judges: discipline ranges from probation to censure to expulsion (CJP/Court)
  - Factors for consideration in imposing consequences
    - factors of aggravation and mitigation
    - performance on probation
  - Due process is important; opportunity to be heard,
    - Accused must be able to talk to an investigator and body.
    - Is there a right to cross-examine witnesses?
    - What is our duty here? Unclear here
    - Courts give legislative branch deference—just need a minimum amount of due process.
  - Power Differential – powerful person cannot have consent (factor in aggravation)
    - Violation of position of trust over the employee

- Determinant sentencing is not helpful; there are so many sets of facts, rely on precedent
  - Don't require mandatory firing for certain actions
- Rights of the constituency—how do we balance this?
  - We shouldn't take it out on the constituency.
  - Punish the one who did the wrongdoing, not “the client” (the voters)
- **Oppenheimer/Kish:** Discipline should be proportionate
  - Investigator needs access to prior complaints
  - Zero-tolerance policies should be everything gets response, not every complaint leads to firing
    - Assembly policy is contradictory – zero tolerance beyond law, but narrow definition
  - Confidentiality: How do we manage the fallout? How do you protect from retaliation?
    - Confidentiality Clauses: Lots of cases get settled because of confidentiality clauses.
    - All state departments have open settlements
    - Confidentiality disappears as soon as you tell the charges
    - Retaliation happens often
    - Attorney-client privilege can help make investigator reports more frank
    - Confidentiality: How do we manage the fallout? How do you protect from retaliation?
  - If complaint is not substantiated, you need to tell the principals the results
  - DFEH put together a guide for investigation
  - Due Process – **employees have no due process rights**, only what employer creates
    - Due process is important to ensure fairness, but it is not required.
    - Due process does not require interviews of everyone
    - All state departments have open settlements.
  - Many complaints are not clear—many complaints are misunderstandings.
  - What are the solutions?
    - Restorative justice, mediation, etc.
    - Need a process for folks to air grievances.
  - Zero Tolerance
    - Should mean “we will respond to everything”—not that someone will be fired.
  - Should not limit cases to a specific timeframe—need to look at every case.
  - Firing for a micro-aggression is going too far; zero-tolerance
- **Davis:** Learned about restorative justice in travels to Africa. Founded Restorative Justice for Oakland Youth—it is now in 40 schools in Oakland.
  - Justice system harms people who have harmed other. Restorative justice offers alternative.
    - Recent report documented a reduction in 50% for reoffending for kids going through restorative justice in Oakland. Reduces dropouts, increases graduation rates.
    - Restores relationships after wrongdoing. Sees crime as broken lives/relationships
  - Restorative justice uses peacemaking circles. Students ask for circles instead of fighting.
    - Not just when harm happens. Use to gain trust and build community.
    - Restorative justice process takes a lot of time—time consuming but lasting change.
  - Dalhousie University: male students posted comments on Facebook re fellow women students.
    - Criticized women asked for restorative justice to rebuild their program.
    - Took 5 months of discussion for males to understand the harm and restore relationships
  - Legislature could hold peace circles now to deal with sexual harassment problem, not wait for complaints to spur circles after harm has occurred
    - Community-building circles, not conflict circles
    - Draw on community ideas for how to resolve sexual harassment problems
    - Train facilitators within the Capitol community
    - Circles are powerful, which is difficult to explain
  - Creating culture requires listening to the people in the culture, not top-down
  - Use circles in all non-criminal conflicts
    - But it is the victim's call