

PREVENTING SEXUAL HARASSMENT AND RETALIATION

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Speaker's Background

- ▶ 20 years of experience (1995-2015) as EEOC Regional Attorney suing companies for retaliation, discrimination and harassment; recovered over \$300 million; filed over 300 lawsuits
- ▶ Represented victims of rape, dozens of battered immigrant women and several asylum seekers; trained hundreds of sexual assault prevention and victim advocates nationwide
- ▶ As District Director: oversee investigation of companies accused of violating law; ***issue findings of discrimination that could lead to settlements and/or lawsuits***

Under Title VII, Sexual Harassment Is Unlawful

- **Title VII of the Civil Rights Act of 1964** prohibits discrimination on the basis of **race, color, sex, national origin and religion** in hire, promotion, **all terms and conditions of employment**, termination; prohibits retaliation against those who complain or assist in complaining;
- **Sexual harassment is a form of sex discrimination; (*not unlawful pre-1965; not recognized by Supreme Court until 1986*)**
- ***Addressing sexual harassment especially for immigrant and other vulnerable workers (including young workers) is an EEOC priority***

Remedies for Harassment or Retaliation under Title VII

- **\$\$ back pay if terminated or demoted; reinstatement**
- ***\$\$ compensatory damages (emotional distress, pain and suffering); counselor could be the critical witness***
- **\$\$ punitive damages if employer acted with malice or “reckless disregard”**
- **\$\$ for those who were retaliated against as witnesses**
- **Caps on damages up to \$300,000 per employee**
- ***Termination of harasser; bar future hiring***
- **New company policies to encourage complaints without fear of retaliation (as part of court order); training of supervisors and employees**

HARASSMENT IS HUGELY UNDER-REPORTED

EEOC 2016 STUDY: 60% of women experience unwanted sexual attention or sexual coercion or sexually crude conduct or sexist comments in the workplace at some time in their careers.

Upwards of 85% of people never file a formal complaint.

Approximately 70% of employees never complain internally.

WHY THE UNDER-REPORTING? FEAR

- ❑ Fear of **disbelief**, blame and inaction
- ❑ Fear of **retaliation**, including humiliation, ostracism, or damage to career and reputation;
54% of EEOC charges in FY2019 involve retaliation.
- ❑ **Fear is well-justified** -- social and professional retaliation against complainants takes place at incredibly high rates.

THE COSTS

- ❑ From FY2010-15, employers paid **\$698.7 million** during EEOC's enforcement pre-litigation process, to employees alleging harassment.
- ❑ Psychological harm to the target of harassment – depression, general stress and anxiety, PTSD, etc.
- ❑ Physical harm – headaches, sleep problems, gastric problems, etc.
- ❑ Harm to the work - Decreased productivity, negative impact on group dynamics, excessive absenteeism
- ❑ Reputational harm

Sexual Harassment in Agriculture:

- **EEOC v. _____, \$1.855 million for farm worker**, quid pro quo, retaliation (Salinas, CA)
- **EEOC v. _____ Farms, \$260,000 for farm worker**, hand down panties, retaliation (Oregon)
- **EEOC v. _____ Farms, nearly \$1 million**, plus **\$500,000 in attorneys fees** for multiple rapes of farm worker and retaliation (jury verdict) (Fresno)
- **EEOC v. _____ Vineyards, \$1 million** settlement, one woman raped (Cochella, CA)

Sexual Harassment in Agriculture

- **EEOC v. _____ *Trees***, same sex harassment of indigenous farm worker by Mexican supervisors, settled **\$110,000** (Oregon)
- **EEOC v. _____ *Vineyards***, indigenous teenage farm worker sexually harassed and fired; **\$350,000** settlement (Fresno, CA)
- **EEOC v. _____ *Farms*: \$1.5 million for class of poultry workers** (5 raped) (Iowa)
- **EEOC v. _____ *Farms***, farm worker sexually harassed, supervisor told abusive husband to kill worker who was fired in retaliation, **\$150,000** (Hermiston, OR)

Sexual Harassment

- **EEOC v. _____ Farms:** Jury award of **\$17 million for 5 women** (3 were raped by sons of owner) (Tampa FL)
- **EEOC v. _____ Corporation:** **\$650,000** settlement for egg farm worker forced to perform oral sex (Eastern Washington)
- **EEOC v. _____ Foods;** harassment of Latino poultry workers based on sex and national origin **\$3.75 million** settlement (Mississippi)
- **“Rape in the Fields”** (Frontline/PBS, 2013)
- **“Rape on the Night Shift”** (Frontline/PBS, 2015) **(\$5.8 million settlement** for Latina janitors, Bakersfield, CA)

WHAT YOU ARE PREVENTING

SEXUAL HARASSMENT INCLUDES

- Actual or attempted rape or sexual assault.
- Unwanted pressure for sexual favors or dates.
- Unwanted deliberate touching, cornering or pinching.
- Unwanted emails, letters, calls, or materials of a sexual nature.
- Unwanted sexual teasing, jokes, remarks.
- Unwanted sexual looks, staring or gestures.

Leadership: it starts at the top

- ❑ Leaders must **believe** that a **healthy** organization is one in which **harassment does not occur**.
- ❑ Leaders must **communicate a sense of urgency** in stopping harassment.
- ❑ Employees must **believe their leaders are authentic**.
- ❑ Employers must ***issue proper discipline*** to send strong message that harassment will not be tolerated and that it's safe to complain

Know the Context:

How Does This Happen??

- **A weak command structure and a climate of fear** among female personnel **created the conditions** that led to widespread instances of sexual assault of Air Force recruits by their instructors at Lackland Air Force Base in Texas, senior Air Force commanders said yesterday.
- ***New York Times***, Jan 24, 2013, “Air Force Leaders Testify on Culture That Led to Sexual Assaults of Recruits”

Context: How Does This Happen?

- With witnesses rare, sex-crime cases inevitably become **“he said, she said” credibility contests**, further stacking the deck against subordinate victims, **since higher-ranking troops are considered inherently more credible.**
- *Rolling Stone*, Feb 14, 2013: “The Rape of Petty Officer Blumer”

It's All About Power

- Sexual assault and harassment illustrate the disparity of power – **and harassers and predators know this**
- Employee v. Supervisor (she depends on him)
- Employee v. Company
- Employee: needs job, limited English, limited education, fear of retaliation
- Company: has money, connections, holds the livelihood card, may employ victim's family, controls the conditions of work, can fire her and siblings, etc.; ***enables the predator***

Credibility & Sexism

- ▶ “Jose sexually assaulted me in the back of the shed”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you or say those things about you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you) and your sister”.
- ▶ (***You’re a liar, Maria***)

Credibility & Sexism

- ▶ “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
- ▶ “Are you sure Maria? Jose’s a family man. No one has ever complained about him. No one ever saw him attack you. But, weren’t you late for work yesterday? Jose would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you)”
- ▶ (***You’re a liar, Maria***)

Credibility & Sexism

- “Help! Help! Jose’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”
- “Omigosh! Are you okay, Maria??? Who else is working there? Is anyone else hurt? Get everybody to safety!!! Hurry up!! Somebody, call the police!! Get an ambulance!!”
- ***WHY IS THE RESPONSE SO DIFFERENT?***

Common Threads in Harassment Lawsuits

- 1. Supervisors and Managers don't know the laws against sexual harassment; don't know how to handle a complaint; discourage complaints; make threats or otherwise retaliate**
- 2. HR investigators are poorly equipped to investigate; limited resources; no training; scared; lack independence; don't know about retaliation**

Common Threads in Harassment Lawsuits

- 4) HR is conflicted in duties to abide by law and protect the company at all costs; ***think they have to conclude that harassment did NOT occur in order to protect the company;***
- 5) HR unsure of how to assess credibility
- 6) HR erroneously presumes all witnesses feel safe to come forward; unaware of culture of retribution in company

Common Problems in Employer Harassment Investigations

- Unresolved biases
- Failing to clear up contradictions
- Working towards one conclusion
- Failing to get all relevant evidence
- Gathering irrelevant evidence
- Not coming to a conclusion despite enough evidence to do so
- **“I couldn’t decide who was telling the truth” = “Mary is lying. I don’t believe her, she wasn’t harassed.”**
- **“Nobody could corroborate what Mary alleged. Joe denied it.” (What do you expect?)**

Common Threads in Management When Sexual Assault Occurs

- Out of sight, out of mind
- “Policies, policies?? We don’t have any policies. These are just farm workers.....I mean we’re just a family farm.”
- “We have state of the art production and marketing.
(But ineffective human resources)
- “Oh yeah, we train them about OSHA. Sexual harassment?
We just tell them not to do it.”
(Doesn’t sexual assault threaten health and safety??)

Common Threads

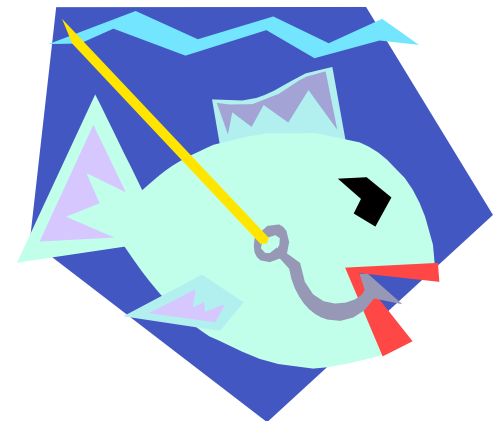
- ▶ **The Manager/Harasser is given virtually unchecked power; not told that retaliation could lead to termination; long time employee**
- ▶ If there's a policy, no one knows what it is and what it means; no accountability; no training; no consequences;
- Use of weapons and threats to kill or do other physical harm; threats to terminate, demote, ruin careers, etc.
- ***A strong culture of fear; lack of trust that management will protect them***
- Indifference by management; retaliation

When is the Employer on the Hook? Liability Depends on Harasser's Status

- Alter-ego or proxy – high-echelon officials of an employer organization such as a proprietor, partner or corporate officer: strict liability – **no defense if proven**
- (e.g. FOX News settled harassment cases against Bill O'Reilly for \$13 million; Roger Ailes for \$20 million+)
- Supervisor: ***Ellerth/Faragher*** affirmative defense

Supervisors & Managers

- If supervisor/manager harasses and it results in a
 - **TANGIBLE EMPLOYMENT ACTION**
Company is automatically on the hook !
 - **NO TANGIBLE ACTION**
Employer could get off the hook with 2 part defense



Tangible Employment Action examples

- Hiring / Firing
- Promotion / Failure to Promote
- Demotion
- Work Assignment / Reassignment
- Significant Change in Benefits
- Compensation Decisions
- Threats of harm to employee or relatives (see **EEOC v. _____ Wholesale** (threat to kill CP, her children and her siblings); **EEOC v. _____ Farms** (threat to kill husband of CP))

IF no tangible job action...

2-Part Defense

- 1) EMPLOYER *must prove* that it took reasonable care to prevent and correct the harassment, AND
- 2) EMPLOYEE unreasonably failed to prevent the harassing behavior

This is all dependent on whether there is a mechanism to complain and management conducts a proper investigation.

Compare: CALIFORNIA STATE LAW: Strict liability if harasser is a supervisor or manager

Co-Workers and 3rd Parties

- ▶ Employer can be liable for harassment by co-worker and third parties (e.g. customers, couriers, repair persons, vendors, etc.)
- ▶ knew – or should have known – of the harassment AND (*what is notice?*)
- ▶ failed to take reasonable action to end the harassment and deter future harassment
- ▶ See ***Fuller v. City of Oakland*** (harassment ended but no discipline...could still be liable because no deterrence efforts)

Have a Strong Anti-Harassment Policy

- Company policy should reflect the law against harassment
- Describes what types of behavior are unlawful and will not be tolerated
- Stresses that those who reasonably believe harassment or discrimination has occurred will not be retaliated against
- State that all complaints are taken seriously
- ***Is distributed to all employees in the language that they understand***
- ***Is accessible to all***
- Constant and regular training of all staff
- Gives options of where to complain, e.g. any supervisor, HR

Elements of a Complaint Procedure

- ▶ encourage employees to report harassment **before** severe or pervasive stage
- ▶ designate **more than one** individual to take complaints; suppose employee does not speak English? What should you do?
 - ensure they are in **accessible** locations.
 - ***instruct all supervisors to report complaints of harassment to appropriate officials and NOT TO RETALIATE***
- ▶ assure employees of **confidentiality** to the extent possible.

Employee: Duty to complain

Potential issues

- Provide information to support allegation?
- Truthful information?
- Cooperate with investigation?
- Any unreasonable delay? Why?
- Equitable tolling: did harassment and threats of violence prevent her from complaining?
Did company do nothing?

Employee: Duty to complain

- Is complaint procedure risk-free?
 - Was it useless to complain?
 - Were other employees who complained of harassment ignored or retaliated against?
 - Does fear for personal safety justify failure to complain?
- Can employee complain outside set procedure?
Written v. oral?

Retaliation & Harassment

- Virtually every EEOC lawsuit alleging sexual, race or national origin ***harassment has a companion retaliation claim.***
- Many victims of sexual harassment don't file a charge of harassment ***until after they've been fired or demoted or had their hours reduced*** because they protested the harassment.
- **Consequence:** makes victims of harassment, in particular, stay silent thereby leading to more assaults and violations.

Agriculture Retaliation Cases

- ▶ **EEOC v. _____ Corporation** (E.D. WA)
EEOC alleges that single mother is forced to perform oral sex weekly upon demands of supervisor in egg house; **co-workers meet with manager to complain about sexual harassment of supervisor; all fired**
\$650,000 settlement (2013)
- ▶ **EEOC v. _____ Company** (fired after reporting - \$1.855 million settlement) (Salinas, CA)
- ▶ **EEOC v. _____ Wholesale** (fired after she won't perform oral sex anymore in the fields) (Willamette Valley, Oregon)

ELEMENTS OF A RETALIATION CLAIM

1. Employee engages in **protected activity**
2. Is subjected to an **adverse employment action** (termination, threats, suspension, demotion, reduced hours, relative fired, etc.)
3. **Causal connection** between the protected activity and the adverse employment action

Timing

- ▶ **Legitimate Non-Retaliatory Reason (LNRR):** “we fired her because she was late”
- ▶ **Pretext:** no one else who was late was fired, but she had complained of harassment

RETALIATION: PROTECTED ACTIVITY

1) PARTICIPATION

▶ *Bryant v. District of Columbia*

Subordinate of officer Bryant alleged that managers had sexually harassed her. Bryant told investigators and Deputy Superintendent that he would testify that subordinate was harassed (“tell the truth”). Two months later, Bryant was terminated without explanation.

▶ *EEOC v. Railroad company*

Manager testified in deposition and at trial on behalf of Latino employee alleging discriminatory denial of promotion. Manager fired despite excellent record. \$175,000 settlement (San Francisco)

RETALIATION: PROTECTED ACTIVITY

2) OPPOSED DISCRIMINATION

- Must have reasonable, good faith belief that the matter complained of is a violation of the statute.
- During internal investigation, employee describing acts of sexual harassment can constitute “opposition” to discrimination.
***Crawford v. Metro Govt of Nashville* (2008)**
- (U.S. Supreme Court)

RETALIATION

- ▶ **EEOC v. _____ *Electronics*** (Seattle 2012)
- ▶ Top performing Chinese-American supervisor fired two weeks after he reports complaint of Latina teenage employee that she's receiving **sexting messages** from Asst. Store Manager; Latina eventually fired; company destroys records of prior sexual harassment complaints against Asst Store Manager AND Store Manager who was investigating the harassment!!
- ▶ **\$2.3 million settlement; \$100,000** sanctions against company for destroying records

EEOC Procedures

- ▶ Who can file a charge? All workers employed in an entity in U.S. and its possessions with 15 or more employees; US citizens working abroad for US companies
- ▶ Third parties (unions, church, relative, organization ***including sexual assault program***)
- ▶ Commissioner's charge
- ▶ **Charge must be filed as prerequisite to federal court lawsuit and state court lawsuit in California**

EEOC Procedures; immigration status issues

- ▶ Title VII makes no distinction based on immigration status, i.e. undocumented workers are protected and can file charges of discrimination (*EEOC & Castrejon v. Tortilleria “La Mejor”*);
- ▶ EEOC will not ask status
- ▶ EEOC will fight company inquiries into immigration status during litigation
- ▶ **EEOC is specifically designated as an agency that can certify for a U-Visa where charging party or witness is victim of “serious crime activity”**
- ▶ Raise questions of immigration status with EEOC *Regional Attorney or Trial Attorney*

EEOC Procedures: TIMELINESS

- A charge must be filed within 180 days of the discriminatory act (**300 days in jurisdictions that have a fair employment practice agency like California**)
- In **termination** cases, clock starts when employee is notified of termination
- In harassment cases involving a continuing pattern of harassment (no meaningful break in the harassment), at least one act must occur within the last 180 days (**or 300 days in California**) (see *EEOC v. _____ Farms*; rape in 1993, charge filed in 1999; jury verdict in 2005)

EEOC Investigation After Charge is Filed

- ▶ Company receives charge in 10 days
- ▶ EEOC can obtain statements, interview witnesses, visit the facility, review documents
- ▶ Employer has opportunity to present its side of the story (Request for Information)

- ▶ **CAVEAT:** Communications with **EEOC investigator are not confidential** privileged communications; might be disclosed in litigation; but in litigation, **CP and EEOC Trial Attorney** have confidential attorney-client privilege

EEOC Investigations

- EEOC can subpoena employer's records, have access to officials and interviews; employer must cooperate with EEOC
- EEOC can enforce subpoena in federal court; granted 99% of the time; existence of confidential investigation becomes a matter of public record; may encourage other victims or witnesses to step forward

EEOC Investigations: Are there Other Victims?

- EEOC can also investigate whether there are other “similarly situated” victims of discrimination or harassment and obtain \$ for them
- If you believe that other individuals have been harassed and/or retaliated against, alert the EEOC; we can investigate!

Resolving Charges

- Dismissal: “insufficient evidence to support a finding of a violation at this time”
- Employee gets Notice of Right to Sue and has 90 days to file suit in Federal court (may vary for state law suits)
- Equitable tolling of deadline might apply if victim is so traumatized by the sexual violence (***Stoll v. Runyon***)

Resolving Charges; Litigation

- **Letter of Determination:** reasonable cause to believe that a violation has occurred
- **Conciliation:** negotiation between the company and the EEOC and the charging party; EEOC is a party; **confidential voluntary settlement**
- **If conciliation fails, then EEOC can sue in federal court; public matter**
- EEOC v. X Company, on behalf of the charging party

LITIGATION

- EEOC can obtain relief for the charging party and the **class of similarly situated workers** even if they did not file charges
- Settlement authority rests with Regional Attorney (does amount of \$ serve the public interest and reasonably compensate victims?); **Settlement is Public Document**
- **Intervention:** CP has a right to intervene in the lawsuit and bring Title VII claims and related state claims (unlimited damages)

Last minute tips

- Train employees and managers regularly on sexual harassment duties and obligations
- Conduct **timely quality** investigations
- Take appropriate corrective action, i.e. discipline that 1) stops harassment, and 2) deters future harassment
- ***Punish those who retaliate***
- Create a culture where it's safe to complain about harassment
- Lawsuits can wreck funding, potential investors, future employees, reputations, etc.

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