

# Sexual Harassment in the Workplace



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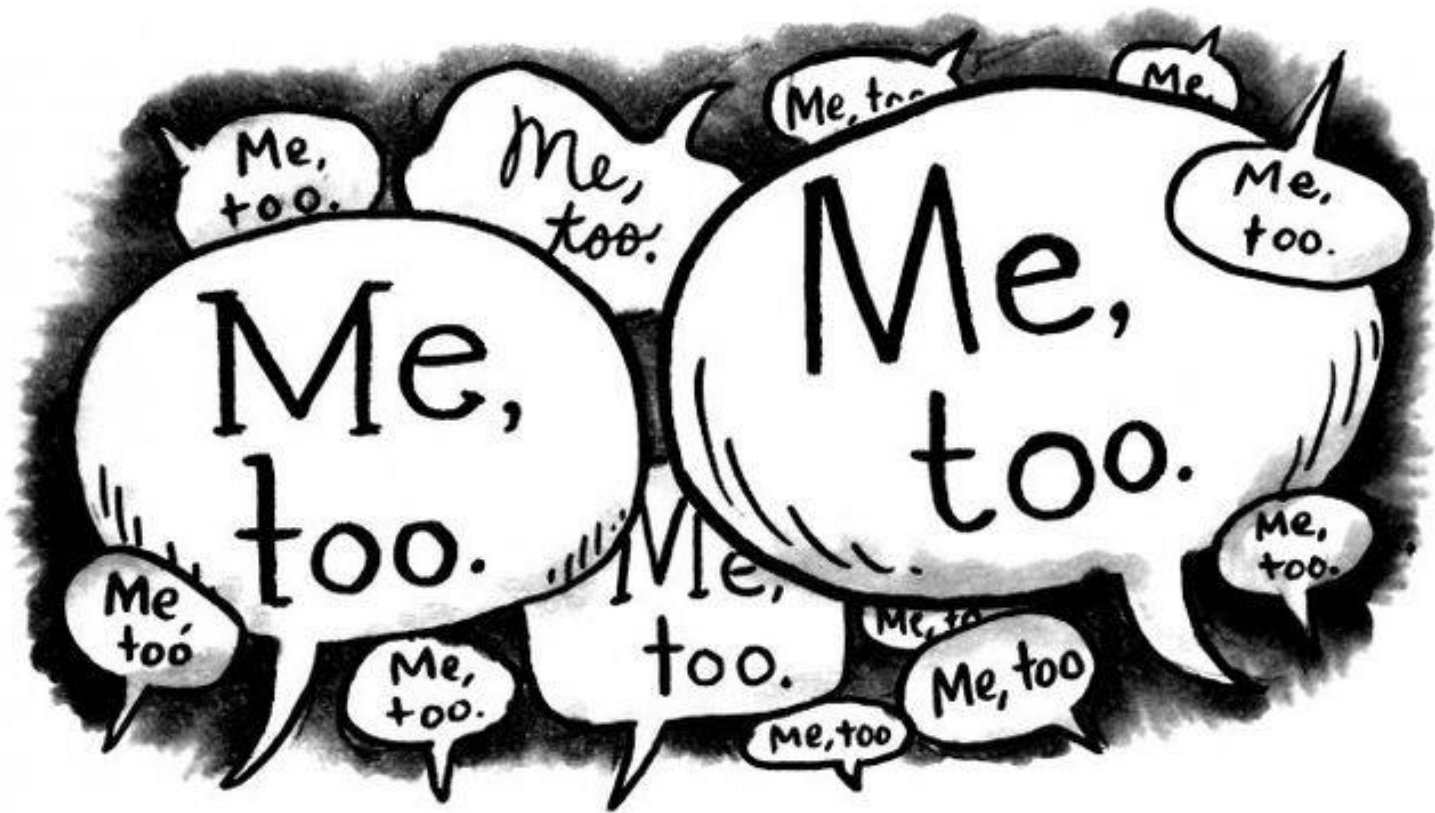
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**Over the past year, more than 200 powerful people — celebrities, politicians, CEOs, and others — have been the subject of sexual harassment or assault allegations.**




# Workplace Costs of Sexual Harassment

- In FY2017, \$46.3 million in monetary benefits were paid out for sexual harassment claims through the EEOC process.
- The largest sexual harassment jury award totaled \$168 million in 2012.

# Workplace Costs of Sexual Harassment

- Direct Costs
  - Attorneys fees to defend against allegations
  - Costs of investigations
  - Damages may include: placement in the job, backpay, benefits, attorneys' fees, compensatory damages (job search, medical expenses, emotional distress), and punitive damages.

# Harassment Claims are Expensive

- Goodwill and Affiliate to Pay **\$850,000** to Settle EEOC Sexual Harassment Lawsuit - 5/10/2018
  - Candid Litho Settles EEOC Sex Discrimination, Harassment and Retaliation Lawsuit for Over **\$240,000** - 4/12/2018
  - Coral Gables Trust Company to Pay **\$180,000** To Settle EEOC Sexual Harassment and Retaliation Suit - 4/4/2018
  - Stemilt Growers and AG Services to Pay **\$95,000** To Settle EEOC Harassment, Retaliation Suit - 4/3/2018
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# Harassment Claims are Expensive

- Court Orders Scottsdale Wine Bar to Pay **\$100,000** In EEOC Sexual Harassment and Retaliation Suit - 4/2/2018
- GEO Group to Pay **\$550,000** To Settle EEOC Sexual Harassment and Retaliation Lawsuit - 1/8/2018
- Indi's Fast Food Restaurant to Pay **\$340,000** To Settle EEOC Sexual Harassment Lawsuit - 1/8/2018
- Ford Motor Company to Pay up to **\$10.125 Million** To Settle EEOC Harassment Investigation - 8/15/2017

# Workplace Costs of Sexual Harassment

- Indirect Costs
  - Decreased Productivity
  - Absences
  - Increased Turnover
  - Employee morale issues
  - Recruiting difficulties
  - Reputational damage with clients and customers
  - Employee time spent participating in investigations and as a witness away from their regular job duties



# Quick Overview of Sexual Harassment

Any conduct of a sexual nature or based on a person's gender, when submission to or rejection of this conduct

- explicitly or implicitly affects an individual's employment,
- unreasonably interferes with an individual's work performance, or
- creates an intimidating, hostile, or offensive work environment.

# What Kind of Conduct Can Constitute Sexual Harassment?

Verbal or non-verbal.

Non-verbal conduct includes written communications, physical behaviors or visual communication

# Two Types of Sexual Harassment

- Quid Pro Quo
- Hostile Work Environment

# Quid Pro Quo – This For That

- A person with the ability to affect the victim's job
- Demands (explicitly or implicitly) a “sexual favor”
- With negative job consequences if the request is refused

# Hostile Work Environment

- A pattern of repeated offensive behavior
  - Can start small and build over time
- Based on sex (or any other protected characteristic)
- Which is unwelcome, and
- Which a reasonable person would expect would interfere with the victim's ability to do their job

# Hostile Work Environment

- Hostile work environment can be based on language of a sexual nature, unwelcome sexual materials, or unwelcome physical contact
- It can be based on texts, e-mails, cartoons, or posters of a sexual nature; vulgar or lewd comments or jokes; or unwanted touching or fondling

# Critical Action Items for Employers

1. Create trusted and safe avenue for employees to report sexual harassment
2. Ensure management support for anti-discrimination policies and practices
3. Implement accountability measures to ensure timely and effective resolution of sexual harassment complaints

# Critical Action Items for Employers

4. Adopt comprehensive anti-sexual harassment policies and procedures that include **regular, tailored, and interactive** training for employees
5. Provide safeguards against retaliation for employees who report sexual harassment and for those who support them.
6. Create a workplace culture that encourages reporting and discourages harassment



# Avenues for Reporting

- Avoid strict chain of command reporting
- Enact policies that enable employees to report to human resources or anyone in a management position
- Consider enlisting third party providers that enable employees to anonymously report sexual harassment
- Avoid formal requirements (forms, timing, etc.) or any other unnecessary obstacles

# Management Support

- Employers are vicariously liable for harassment by supervisors so it is critical that they be aware of the policies and trained on them
- Management sets the tone for a culture that is receptive to complaints
- Supervisors and managers are often the first to become aware of sexual harassment issues, so they should be equipped to identify harassment and handle and escalate reports (formal and informal)

# Management Support

- Sexual harassment has been historically under-reported
- Management support and knowledge of policies is the key to getting timely information to conduct effective investigations

# Sexual Harassment Policies

- Explanation and examples of prohibited conduct
- Protection against retaliation
- Clear complaint process with accessible avenues to complain
  - Encourage prompt reporting

# Sexual Harassment Policies

- Address, but don't promise confidentiality of complaints
- Commit to a prompt, thorough, and impartial investigation
- Commit to immediate and appropriate corrective action to address harassment

# Investigation Procedures

- Preliminary measures pending investigation (e.g. transferring the alleged harasser, placing alleged harasser on paid leave)
  - No action should be taken against complainant
- Set deadlines to ensure prompt investigation and decision-making
- Ensure impartiality of investigator

# Investigation Procedures

- Interview complainant, alleged harasser, and third parties who might have relevant information
- Ask who, what, when, where, and how
- Document the investigation (notes from witness interviews, written statements, any other relevant documents)
- Assess credibility of witnesses

# Resolving Complaints

- Involve HR in reviewing proposed actions to ensure consistency in treatment of similar situations
- Discipline should be designed to
  - Stop harassment
  - Correct its effect on employee
  - Ensure harassment does not reoccur
  - Discourage retaliation
- Proportional



# Resolving Complaints

- Do not take adverse action against complainant unless it falls into one of these categories:
  - A demonstrably provable bad faith complaint
  - A disciplinary action not connected to the complaint, and based on a solid, documented, objectively provable legitimate business reason

# Remedies

## Harasser

- oral or written warning or reprimand
- transfer or reassignment
- demotion
- reduction of wages
- suspension
- discharge
- training or counseling
- monitoring

## Victim

- restoration of leave
- expungement of negative evaluation
- reinstatement
- apology by the harasser
- monitoring treatment of employee
- correction of any other harm caused by the harassment (e.g., compensation for losses)

# Training

- Conduct training annually
- Separate managers from employees
- Small groups
- Interactive – avoid webinars where employees can tune out
- Tailored to employees' jobs
- Choosing a presenter
  - Third party
  - In-house counsel
  - Company executive

# Training – Topics to Cover

- Define sexual harassment
- Summarize Company's policy and where to find it
- Give examples – what is and is not harassment
- What to do if you experience harassment
  - Practical steps and company harassment policy
- What to do if you witness harassment
  - Encourage employees to create culture that discourages harassment
  - Effectiveness of bystander intervention
- Legal protections from retaliation

# Workplace Culture

- Encourage employees to:
  - Identify sexual harassment when it is occurring
  - Stop harassment in the moment
  - Report it immediately
  - Discourage future conduct

# Workplace Culture

- Encourage employees to:
  - Intervene even where they are not the target of the conduct but witness it or become aware of it
  - Support co-workers who are the victims of harassment
  - Put themselves in someone else's shoes
  - Follow up with human resources if remedial measures are ineffective or they suspect retaliation

# Workplace Culture: Encouraging Victims to Speak Up

- Encourage employees to let an alleged harasser know that his/her conduct is unwanted and unwelcome
- Remind employees to have thorough documentation where possible (dates, times, specific occurrences)
- All allegations of harassment should be reported to human resources
  - Even minor incidents may be part of a larger pattern
  - The employer cannot change the culture if it is not aware of issues

# Workplace Culture: Bystander Intervention

- Co-workers should put a stop to inappropriate conduct while it is occurring
  - If no one reacts to a sexist joke, or tells the person telling the joke it isn't funny, it discourages future conduct
  - Avoid re-victimizing – “Don't say that in front of Sally” – If it potentially offends one employee it offends all employees
- Support one another if someone tries to stop sexual harassment



# Workplace Culture: Bystander Intervention

- Co-workers should report incidents, even if victim doesn't come forward
- Speak to each other after an incident and reinforce norms about appropriate workplace behavior
- Educate co-workers about different perspectives

# Workplace Culture: Bystander Intervention

- Victims are more likely to report if they feel supported by co-workers
- Encourage co-workers to demonstrate empathy
  - “This isn’t your fault”
  - “I was uncomfortable when I heard that, were you?”
- Employees who know the reporting procedure can encourage one another to go to human resources
  - Reinforce the victim is positively contributing to a better workplace culture and will not be retaliated against

# Allegations of Past Conduct

- Many of the recent allegations relate to conduct that occurred years ago, sometimes even at prior employers
- Even though the “statute of limitations” may have run on legal claims, consider the following factors to determine whether to conduct an investigation:
  - Age of the allegations
  - Availability of evidence
  - Seriousness of the allegations
  - Complainant’s wishes

# Allegations of Past Conduct

- Company is not prohibited from taking action based on allegations of conduct that occurred in the past or at a prior employer if they are determined to be credible
- Company is now on notice of a potentially serial harasser
- If employee harassed one person, there are often others

# Questions?



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