

A Summary Of The EEOC's “Select Task Force on the Study of Harassment in the Workplace”

by

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OVERVIEW

With harassment and retaliation claims soaring out of control in this country, the EEOC formed a special task force to look into what employers need to be doing not just to deal with these issues as they arise, but more importantly, how to prevent them from occurring in the first place.

In 2016, the task force published its report. The EEOC's task force made some well-defined changes to the methodologies employers need to follow.

WHAT IS THE PROBLEM?

Harassment is an **overwhelming** problem in American workplaces.

- Up to 85% of all women have experienced sexual harassment in the workplace. ¹
- Up to 60% of employees have experienced racial or ethnicity-based harassment. ²
- Up to 41% of LGBT employees have experienced harassment, which includes having their workspaces vandalized ... and the harassment rates for transgender individuals are even higher. ³
- Up to 20% of employees with disabilities have experienced harassment or unfair treatment due to their disability. ⁴
- Up to 25% of workers over the age of 50 have been harassed or subjected to unwelcome comments about their age. ⁵

Up to 94% of all workers who experienced harassment on the job never talked to anyone in management about it. ⁶ The vast majority of victims will not report it to management because they do not feel that it is SAFE. These workers are afraid they will not be believed, nothing will happen, they will be blamed (victim shaming) and/or they will be retaliated against. ⁷

These fears are actually very well-founded. 75% of employees who do speak out against workplace mistreatment have been retaliated against.⁸ Other studies show that reporting sexual harassment to management is often followed by the organization being indifferent to the situation or trivializing the harassment, in addition to the acts of retaliation that are often committed against the victim.⁹

Astonishingly, one researcher concluded that the most “reasonable” course of action for a victim of harassment to take is to **not** report the harassment.¹⁰

SO, WHAT DO VICTIMS OF HARASSMENT *REALLY* DO?

Since reporting the unwelcome or harassing behavior is not a viable option for over 90% of those who are harassed on the job, what do they do? According to the EEOC:

- Up to 75% simply try to avoid the harasser.¹¹
- Up to 73% try to downplay the gravity of the situation.¹²
- Up to 70% try to ignore, forget or endure the behavior.¹³
- Up to 70% turn to friends for support.¹⁴

DEVASTATING PERSONAL EFFECTS

The EEOC took specific notice of the personal harm victims suffer from the harassment they experience, which includes diagnosable depression, anxiety and posttraumatic stress disorder (PTSD), just as our soldiers experience from being subjected to combat.¹⁵

The results of these conditions can be devastating, which can manifest themselves as eating disorders, emotional exhaustion, abuse of drugs and alcohol, sleep problems, gastric problems and respiratory, musculoskeletal and cardiovascular issues, to mention just a few.¹⁶

ENABLING “SUPERSTARS”

The worst thing an organization can ever do when it discovers that one of their “best” employees, or one of its “Superstars,” is a harasser is to ignore it or cover it up, which is what usually happens in when this situation arises in most organizations. That is good old fashioned “ENABLING.”

Why do such “superstars” engage in this behavior? According to psychologists, and the EEOC, “power” can make individuals feel uninhibited and not subject to society’s norms and the rules that govern everyone else. (How many leaders have we seen where this principle applies and organizations fail?)¹⁷

Harvard Business School calls them “toxic workers.”¹⁸

I call them emotional children.

If a loved one was addicted to drugs, you would conduct an “intervention.” You would hold that person accountable and you would do your best to make sure this person does not do it again. However, in most organizations, the so-called leadership does the exact opposite:

They enable the harasser to do it again.

POLICIES

The EEOC also stresses that employer policies **MUST**:

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of making a complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally- actionable "harassment" but which, left unchecked, may lead to the same. ¹⁹

According to the EEOC, it is not enough to simply adopt a policy. **It must be communicated to employees on a regular basis**, with particular emphasis being put on how to file a complaint or report unwelcome behavior. Employers must also communicate to employees that anyone who participates in an investigation will be protected from retaliation. ²⁰

TRAINING: A CULTURAL CHANGE IS NEEDED

One of the biggest problems identified by the EEOC is that most of the training employers have conducted over that last 30 years has failed to prevent harassment because its focus has been on avoiding liability ... NOT on prevention. ²¹ This is the type of training most lawyers give because that is what they know: The law. ²²

Instead, such training should also focus on preventing the harassment from occurring in the first place, which includes civility training, providing real life examples of unwelcome behavior, training attendees in how to properly address such issues when they arise, which is conflict resolution, bystander intervention training and training in how to properly use social media, to mention a few.

The EEOC is very clear:

**Leadership starts at the top.
A true CULTURAL CHANGE must occur in American workplaces.²³**

In other words, a new way of conducting this training is needed, according to the EEOC, and training is key.

The EEOC also states that as with any training, the training must be simple. Making these concepts too complicated will only confuse most people. That is why "simple" is best: ²⁴

Next, such training should differentiate between “unwelcome” behavior and “illegally harassing” behavior. Otherwise, workers tend to think that anything that occurs in the workplace that they find offensive rises to the level of illegal harassment, which is not true. However, employees must also be trained that all such behavior needs to be recognized when it happens and how to address it properly. That means training in proper conflict resolution.²⁵

The EEOC also concludes that one of the results of having harassment or unwelcome behavior in the workplace is that it destroys the trust in the environment. So, how should you define “trust”?

Is It Safe?

That is it. Simple. Is it safe to talk to you? Is it safe to disagree with you? Is it safe to share confidential information with you? Is it safe to be a minority at work? Is it safe to be different?

Organizations have to prove to everyone it is SAFE to come to work.

Unfortunately, when it is not safe to come to work, workers become disengaged, production drops, errors increase, absenteeism rises and turnover rises, which the EEOC refers to as “organizational stressors.”²⁶

This means organizations need to develop “Emotionally Intelligence” in their workplaces. This requires a culture that is well defined and committed to “tolerance.”

What is “tolerance”?

We are not going to persecute you because you are different.

That is it. Again, Simple.

It is also important to differentiate between “tolerance” and “acceptance.”

If you tell your employees who they have to **accept**, we are telling them how to think. Employers simply do not have that right and that is pretty oppressive towards your workers.

However, telling employees that they must be “tolerant,” which simply means that **we are not going to persecute, or bullying, someone because they are different**, is simply telling employees how they must behave ... not how to think.

Emotional intelligence, or tolerance, is critical in building trust and preventing unwelcome behavior in the workplace.

Trainers must also be engaging. Unfortunately, most attorneys do not meet this requirement. Trainers must not only know their subject matter, but they must be engaging. Otherwise, employee retention will simply not exist. Having a trainer that mutters, “Bueller? Bueller?” will not cut it.

Also, trainers must not only know the law, but they must also be able to address and train in the areas of workplace civility, which includes such topics as trust, tolerance and conflict resolution, all of which focus on how to handle such situations in a more positive manner, rather than from an attacking or punitive standpoint.²⁷

Unfortunately, most attorneys do not meet these new requirements. While they know the law, that is only a part of these new requirements. Most employers have provided legal training on these issues, and it has failed miserably.

Bystander intervention has been shown to be especially effective in preventing unwelcome and harassing behavior.²⁸ In fact, studies show that when a bystander speaks up when they see offensive or unwelcome conduct, the harassing behavior ends within 10 seconds 57% of the time.²⁹

Bystander intervention training is effective because it:

- Creates awareness, enabling bystanders to recognize potentially problematic behaviors.
- Creates a sense of “collective responsibility,” which motivates bystanders to step in and take action when they see “problematic” behavior.
- Creates a sense of empowerment in others. Educating bystanders in how to properly address and resolve provide them with the skills and confidence to intervene appropriately. This means not attacking the other person, and not retreating from the situation.
- Educates bystanders as to who to contact to get support with their intervention.³⁰

Again, a totally new approach to designing and conducting this training is needed.

TRAINING: SOCIAL MEDIA

Clearly, with the eruption of social media, such harassing acts cannot be ignored. The EEOC also recommends that employers address the use of social media as a mechanism for committing unwelcome and harassing acts.³¹

ZERO TOLERANCE POLICIES DO NOT WORK: CIVILITY & CONFLICT RESOLUTION IS NEEDED

Traditionally, employers have been told to take a very punitive approach to dealing with incidents of “unwelcome” behavior and harassment. As a result, many “Zero Tolerance Policies” require the immediate termination of the harasser. Such “corporate capital punishment” policies have been shown to often cause more harm than good. They tend to bring a true punitive approach to the topic of harassment, rather than conflict resolution. They also tend to encourage under-reporting of harassment³²

Instead, training employees in civility and properly addressing and resolving the issue has been shown to provide much better long term solutions.

INVESTIGATIONS

In most federal circuits, the law is very clear:

Investigations must begin immediately.

This means the organization must take action and start the investigation within a matter of days. Unless special circumstances exist, failure to do will be viewed by the courts as the employer not fulfilling its obligation to promptly address the situation and liability will attach.

The EEOC said that several aspects need to be included in the investigation process:

- The reporting system must provide timely responses and investigations,
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution,
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees,
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation and
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all relevant parties.³³

For these reasons, it is often best to use an outside expert to conduct a harassment investigation. Not only are outside investigators viewed as being more objective, but it is also much easier for the investigator to maintain confidentiality. Also, conducting such investigations is not for amateurs. An expert harassment investigator will understand:

- How to ask non-leading questions. This method has been adopted by the FBI and is commonly referred to as the “Funnel Approach.” This method requires the investigator to begin with broad, non-leading questions, which then become more and more specific as the witness mentions pertinent issues,
- The legal and employee relations issues involved in such investigations,
- How to properly document what the investigator is told in these interview sessions,
- The legal avenues employers are allowed to use in conducting such investigations, and which are not, and
- How to properly draft a final report on the matter.

It is also important to note that most circuit courts require that the alleged harasser be separated from the alleged victim immediately. The alleged harasser should not have any contact with the alleged victim in order to protect everyone from retaliation. Of course, the alleged harassers also should never under any circumstances continue to have any supervisory authority over the alleged victim until the investigation is completed.

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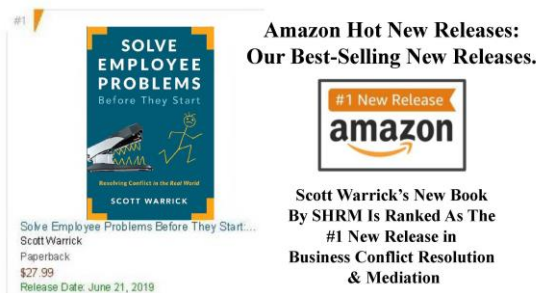
Scott’s “**MASTER HR TOOL KIT SUBSCRIPTION**” is a favorite for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First’s 20 People To Know In HR, CEO Magazine’s 2008 Human Resources “Superstar,” a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

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