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ON BEHALF OF THE
SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESENTED TO THE
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
MEETING ON PREVENTING AND ADDRESSING WORKPLACE HARASSMENT
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Introduction

Chair Yang and distinguished Commissioners Barker, Burrows, Feldblum, and Lipnic, thank you for the opportunity to speak at this public meeting to discuss the issue of harassment in the workplace. I appreciate the opportunity to provide input on this important issue.

I am Patricia Wise, member of the Society for Human Resource Management (SHRM) and a partner at Niehaus, Wise & Kalas Ltd. I have been in practice for 30 years, specializing in employment law, and generally representing management and/or employers. I am also co-chair of the Society for Human Resource Management Labor Relations Special Expertise Panel.

In addition to my law practice, I teach various employment law classes at the University of Toledo College of Law and the Graduate School of Banking at the University of Wisconsin-Madison. I also conduct conference workshops—in fact, I’m currently preparing for the SHRM Annual Conference in Las Vegas with a workshop titled “Labor Relations for Human Resources Managers.”

I have also written a book on harassment, Harassment in the Workplace: Sexual, Racial and Religious Complaints, published in 2012, and a book on retaliation, Understanding and Preventing Workplace Retaliation, the 3rd edition of which was published in 2012.

Today, I come before you as someone experienced in employment law with a focus on preventing and addressing harassment in the workplace as well as in my capacity as an active SHRM volunteer.

As you may know, SHRM is the world’s largest HR membership organization representing over 275,000 members in over 160 countries. It is SHRM’s mission to proactively provide our members with educational resources on workplace law compliance, effective HR practices and strategic workforce issues. We supplement this information with research on critical HR issues and benchmarking data to help our members incorporate the HR strategies of successful organizations. In the area of workplace harassment, we offer training to HR professionals through webcasts and conferences. We also offer articles and information for HR professionals on effective practices for addressing workplace harassment including HR toolkits on the various forms of harassment, effective practices for workplace investigations and retaliation.

Perhaps more than any other human resource management issue, discriminatory workplace harassment and its prevention have been dominant concerns for employers since the 1980s. A 2010 SHRM Survey on sexual harassment found that 64% of respondents had sexual harassment claims made by an employee or employees at their organization within the previous 24 months. 82% indicated that the number of complaints had stayed constant or increased from the previous year. (SHRM Poll: Is Workplace Sexual Harassment on the Rise? April 16, 2010).
HR professionals are on the front line of preventing unlawful workplace harassment of all types. They must be on alert to stop harassment when they see it first hand or hear about it second hand. They must promulgate anti-harassment policies and communicate them to employees. They must educate supervisors to likewise spot and stop unlawful workplace harassment. At the same time, HR professionals must recognize that every employee complaint about being “harassed” by a supervisor or subject to a “hostile working environment” does not rise to the level of illegal workplace harassment. Even so, HR professionals must recognize that employee complaints of any sort must be taken seriously for purposes of changes in organizational policy in a multitude of ways.

In my testimony today, I will highlight some of the key issues -- training, prevention, as well as effective policies, complaint procedures, and investigations -- that should be top of mind for employers regarding workplace harassment.

Harassment Training

Effective harassment training is the single best way for employers to avoid liability. No federal law requires such training, but more than half of the states either require or encourage it. For example, California law requires employers of 50 or more employees to provide at least two hours of “classroom or other effective interactive training” to all supervisory employees once every two years.\(^i\) New supervisors must be trained within six months of becoming supervisors. Ohio, on the other hand, only encourages employers to take preventive measures.\(^ii\) The EEOC also encourages prevention, and specifically recommends training.\(^iii\)

Prevention is the best tool to eliminate harassment in the workplace. Employers should take steps to prevent harassment and should clearly communicate to employees that harassment will not be tolerated. Effective, mandatory, periodic training, whether specifically required by law or not, is a key part of a prevention strategy and can be critical to an employer’s defense against any claim of harassment.

Employee training on a company-wide basis is crucial to implementing an effective harassment policy. Training may be segmented into a series of presentations and workshops, but all workers should be included in the training programs, and attendance should be mandatory. Employers should record attendance. Generally, supervisors and managers should be trained separately from non-managers, since they have additional responsibilities and pose increased liability risks.

In conducting the training, it is important to indicate management’s strong support. Employees will accept the training and better understand its importance if they see that managers consider it to be significant.
In addition to general training, designated supervisors and managers should receive detailed instruction on how to receive, refer and investigate complaints. This more specialized training should include a thorough discussion of:

- appropriate procedures for responding to complaints;
- appropriate procedures for reporting complaints to management;
- appropriate procedures for conducting prompt and fair investigations;
- management’s obligations regarding all involved parties, including the obligation to prevent and prohibit retaliation; and
- recordkeeping requirements.

Training should also include instruction on all possible types of workplace harassment. Sexual harassment is the most well-known category of harassment, and still made up approximately 1/3 of all harassment charges filed with the EEOC in fiscal year 2013. But Title VII also prohibits harassment on the basis of race, color, national origin, religion, pregnancy and pregnancy-related conditions. The Age Discrimination in Employment Act (ADEA) prevents harassment on the basis of age and the Americans with Disabilities Act protects employees from harassment on the basis of disability. Other protected categories and characteristics include family responsibilities, sexual orientation, gender identity and expression, family medical history or genetic information, status as a veteran or member of the military. Although not as well known, each of these categories are equally important and any effective workplace harassment prevention programs will include all of these.

Supervisors and managers should attend periodic refresher courses on harassment prevention and complaint procedures. To emphasize a supervisor’s responsibility for preventing and addressing harassment, each supervisor’s annual performance evaluation should take into account his or her role in preventing harassment.

**Harassment Policy**

The EEOC emphasizes the importance of developing, implementing and carefully following a policy prohibiting harassment and retaliation. Employers can prevent harassment, says the EEOC, “by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.” An effective complaint procedure should include the following elements:

- A procedure telling employees how and to whom to make a complaint. An important element of a harassment complaint procedure is identifying specific individuals to receive harassment complaints. These can be supervisors, HR
professionals or other managers. Experts advise against designating just one person to handle complaints to ensure that workers have a resource if the designated person is the alleged harasser, or is unavailable.

- A statement that complaints will be investigated promptly and that appropriate actions will be taken against individuals found to have engaged in harassment or in retaliation.

- A statement indicating that the employer will maintain information in as confidential a manner as possible.\(^x\) (Note: This does not mean employers can guarantee confidentiality — they cannot. Employers need to investigate complaints, and this usually necessitates telling those accused the names of their accusers so they can properly defend themselves. For this reason, employers should avoid promising absolute confidentiality.) The NLRB has also held that confidentiality may only be requested by employees when specific concerns related to a particular investigation justify such a request, including such concerns as the need to protect witnesses, the potential danger of the destruction of evidence, the danger of fabricated or false testimony, or the potential for a cover-up.\(^xi\) These specific justifications and any others should be documented, as applicable, in every investigation.

- A statement promising that the employer will not retaliate against an individual for lodging a complaint nor allow any other employee to engage in retaliatory behavior against a complainant. The employer should, however, retain the right to discipline or fire employees who knowingly lodge false complaints.

Effective communication of the policy statement to employees is essential. Workers have won cases against employers by showing, in part, that the employers’ harassment policies were not disseminated or were unknown to workers\(^xii\). Employers should make sure all new and existing employees receive a copy of their organization’s harassment policy. Employees’ signatures should be obtained electronically or on forms acknowledging receipt.

To further ensure broad dissemination of its policy, an employer should:

- post the policy electronically, or on bulletin boards within each company facility;
- re-disseminate its harassment policy at least annually;
- include the policy in personnel manuals or employee handbooks;
- discuss the policy at employee orientation meetings; and
- discuss the policy during training programs and company meetings.
It is not enough to have a well-drafted policy. It is also critical for an employer to follow its policy.

**Establishing a Complaint Procedure**

An effective complaint procedure not only prevents workplace harassment, but may help employers minimize or avoid liability. Employees who are aware of their organization’s procedures usually are more inclined to file complaints or raise concerns within the organization than to turn to outside agencies or the courts. Furthermore, employers may reduce their liability even when employees pursue external legal remedies if effective complaint procedures are in place and the employer has a track record of dealing effectively and fairly with employees.

Even if no one lodges a complaint, a company can be liable for a hostile or offensive environment if managers become aware of it through other channels and fail to take action to remedy it. Tip-offs include social media posts, pictures on cubicles, writing on bathroom stalls, rumors on the e-mail system. If managers see the pictures or read the writing, the company is considered to be “on notice,” and it must respond. Likewise, if rumors are pervasive and managers hear them, they cannot later feign ignorance or say that they didn’t try to stop the behavior because nobody complained.

Employers should make it easy for workers to lodge harassment complaints. Employees should be assured that their complaints will be handled promptly and discreetly. They also should be reassured that managers will not permit retaliation against workers who file or assist in the investigation of harassment complaints.

These elements should be a part of any employer complaint procedure:

- training for all employees on how to lodge a complaint;
- training for supervisors and managers on how to identify and report potential problems;
- procedures for ensuring prompt investigations;
- procedures for documenting complaints;
- instructions for communicating with complainants;
- instructions for maintaining confidentiality to the extent possible; and
- procedures for preparing written documentation.
And finally, an employer must act immediately to stop harassment. Failure to take prompt remedial action to address harassment will result in employer liability, so a prudent employer will implement a remedy reasonably likely to end the harassment even before the investigation is concluded. Examples of swift remedial action include:

- suspending an alleged harasser, with or without pay;
- offering the complainant a paid leave of absence for the duration of the investigation;
- immediately removing any offensive graffiti or materials from the workplace (although physical or photographic evidence should be documented by the employer prior to removal); or
- offering a temporary transfer to either of the parties (note, however, that any job transfer offered during the investigation must not disadvantage either party or the transfer itself may justify a claim against the employer).

An example of an effective reaction in an Ohio case enabled the employer to promptly investigate the allegations of an employee, and ultimately avoid liability.\textsuperscript{xiii} A bank officer overheard a bank employee crying in a vacant office. She would not share details with him, but she told him that she could not stand the situation with her supervisor any longer. The bank officer told her that she must report the problem to the HR department and that if she did not, he would do so. This resulted in her finally reporting ongoing harassment and the bank began an investigation immediately. Even though harassment had occurred, the bank avoided liability, thanks to the bank officer’s initial reaction.

**Conducting Effective Investigations**

Supervisors don’t need to be experts in harassment, nor do they need to bear the entire responsibility for an effective and thorough investigation. What they must understand is the importance of taking all complaints seriously, and notifying HR or the appropriate manager immediately so the employer can initiate the legally required response. Training can ensure that supervisors understand this critical role in avoiding liability.

Employers must take immediate and appropriate corrective action to eliminate harassment in the workplace.\textsuperscript{xiv} This requires employers to take all complaints seriously, and to conduct prompt, objective, fair and thorough investigations.\textsuperscript{xv} Employers must listen carefully to all witnesses, objectively consider their credibility, and distinguish witnesses with first-hand knowledge and eyewitness observations from rumors and gossip. Employers must interview all appropriate witnesses, as well as those likely to have knowledge, and consider all applicable documentation, information and surrounding facts and circumstances. Complete and accurate documentation can
demonstrate the strength of a proper investigation and can assist employers in reaching a just conclusion.

Ultimately, the employer is responsible for taking effective remedial action. While some interim steps may be appropriate to eliminate further risk, the employer must always act to stop harassment. So the conclusion of any investigation, even one that is indeterminate, must ensure that no further harassment or retaliation occurs.

Employers risk liability when they fail to take a complaint seriously, fail to address it promptly, and fail to conduct a proper investigation. Problems can arise when an employer fails to properly train its supervisors regarding these important issues. Employers must ensure that every single supervisor or manager who is designated in an employer’s policy to receive complaints completely understands their role and the critical nature of their role. Depending on the employer, it may be appropriate for only a very limited group of senior managers or Human Resources personnel to be designated to receive complaints on behalf of the company.

Potential employer liability is much greater when the harasser or alleged harasser is a supervisor, and then a proper investigation is even more critical. If harassment by a supervisor results in a tangible adverse employment action such as termination, discipline, or demotion, the employer is automatically liable, with no opportunity to defend. This strict liability standard is appropriate since the supervisor may use the official power of the employer against subordinates. If there has been no tangible employment action, employers may be able to defend against a claim of harassment by a supervisor. This heightened risk of liability is especially serious when the complaint involves a member of senior management.

Whether internal employees or outside investigators are utilized, they must be properly trained. An untrained or inexperienced investigator can create liability for the company and worse, can allow harassment to go uncorrected. Proper investigations are critical for employers to eliminate harassment in the workplace and to avoid liability.

**Preventing Sexual Harassment**

Prevention is the best tool for eliminating sexual harassment in the workplace. The EEOC requires employers to "take all steps necessary to prevent sexual harassment from occurring," including:

- raising the subject;
- expressing strong disapproval of harassment;
- developing appropriate sanctions against it;
- informing employees of their rights under Title VII; and
In terms of sexual harassment, employers must clearly communicate to employees that sexual harassment will not be tolerated. The surest way to do this is by establishing an effective complaint or grievance process and taking immediate and appropriate action in response to every employee complaint. Some states, such as California, require employees to post sexual harassment policies in the workplace and communicate them to employees, and provide training.

Employers should take these basic steps to discourage sexual harassment:

- Establish a written policy that expressly prohibits sexual harassment by supervisors, co-workers and non-employees in the workplace, and provides examples as guidance to employees.
- Develop a complaint procedure for all workers explaining how and where to lodge complaints or raise questions about sexual harassment. To ensure prompt investigation and remedial action, this should be separate from the organization's general complaint procedures.
- Designate carefully chosen supervisors or managers to receive and investigate complaints and train them to identify, handle and resolve complaints and problems.
- Communicate the written policy and complaint procedure to all employees.
- Take every complaint seriously.
- Train all employees to recognize and avoid sexually harassing behaviors. In SHRM’s 2010 survey, 82% of employers required all employees to take sexual harassment training with the majority, 59%, providing training every year or every other year. Not surprisingly, large organizations were more likely to provide annual training (53%) than small (32%) or mid-sized organizations (28%).
- Train all employees to recognize and avoid sexually harassing behaviors.
- Make employees understand that everyone is responsible for preventing sexual harassment.

And while sexual harassment has certainly not been eliminated from the workplace, it is one of many forms of harassment, including some newly recognized categories. The specific suggestions above can be incorporated into training and prevention initiatives to address all types of harassment. Employers’ goals should be to eliminate all harassment from the workplace.
Conclusion

Employers seek to eliminate and prevent harassment in the workplace. Achieving that goal is an ongoing process.

SHRM and its members would welcome additional collaboration with the EEOC to provide employers with education and resources they need to put effective policies and processes in place to combat workplace harassment.

Smaller employers would particularly benefit from training materials and sample policies.

Large multi-state employers would benefit from dialogue with the EEOC to promote mutual understanding of goals and current issues.

Effective practice guidelines are a welcome resource for all employers. Every client I talked with in preparing for this hearing, from the smallest financial institution, to the manufacturer with 140 global locations, to the amusement park operator with 19 parks, agreed that collaboration would be welcome.

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Calif. Section 12950.1. Other states such as Connecticut (46a-54-204 Connecticut General Statutes) and Maine (Title 26 Section 807 Maine Revised Statutes) also require harassment training.

ii Ohio Rev. Code §4112-5-05(J)(7). Other states also encourage preventive measures, including training, such as Colorado (3 Colo. Code Regs Section 708-1), Hawaii (Administrative Rule 12-46-109(g)), Maryland (the Maryland Commission on Human Relations encourages employers to prevent sexual harassment by training staff), Massachusetts (General Laws, Chapter 151B, Section 3A), Michigan (the Department of Civil Rights offers education and harassment training to employers), Rhode Island (General Laws 28-51-2), and Vermont (Title 21, Section 495(h)).

iii 29 CFR §1604.11(f).


viii See, for example, EEOC Enforcement Guidance: Unlawful Disparate Treatment of Employees with Caregiving Responsibilities (illustrating circumstances in which caregivers of family members might be discriminated against in violation of existing laws); Executive Order 13672 prohibiting federal contractors and subcontractors from discriminating against LGBT employees (the Rule modifies Executive Order 11246 and will be enforced by the DOL’s office of Federal Contract Compliance Programs); Title II of the Genetic Information Act of 2008 (GINA) (which prohibits discrimination on the basis of genetic information); and Veterans Opportunity to Work (VOW) to Hire Heroes Act of 2011 (enforced by the Department of Labor to facilitate employment and employment training to veterans and eligible spouses of veterans).

ix 29 CFR §1604.11(f).

x EEOC Enforcement Guidance Number 915.002.

xi Banner Health Systems, NLRB Case No. 28-CA-023438 (July 30, 2012).


xiv 29 CFR Section 1604.11(d)).

xv Harassment in the Workplace: Sexual, Racial and Religious Complaints, Chapter 6.
Vance v. Ball State University, 570 U.S. ___, No. 11-556 (2013). Vance limited the legal definition of “supervisors” for purposes of potential liability to an employee who is empowered to take tangible employment actions against the victim or alleged victim. The Court specifically rejected several definitions of the term “supervisor” previously set forth in enforcement Guidance No. 915.002 issued 6/18/99. These include the proposed definitions of supervisors as individuals with the authority to recommend tangible employment actions, individuals with the authority to direct another employee’s day-to-day work activities, and individuals with no actual authority over the employee when the employee believes the individual has that power. These proposed definitions have been incorporated into more recent guidance, including Enforcement Guidance Number 915.003 on Race and Color Discrimination (2006) and Questions and Answers for Small Employers on Employer Liability for Harassment by Supervisors (modified 4/1/2010).

29 CFR §1604.11(f).