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Sexual Harassment and Bullying in the Workplace

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A (Very) Short American History of the Social Practice of Sex Harassment in the Workplace



- Two premises: (1) **our view of whether certain contemporary, well entrenched social practices are acceptable evolves** and (2) **the law evolves (sometimes quickly) to recognize our new social order**
- At common law, sexual assault of female employees would only give rise to an action for damages insofar as it inflicted *an injury on a man's property interest in the woman who was assaulted*

The Shocking Infanticide Trial That Exposed Sexual Harassment in 1868

BY ERIN BLAKEMORE // JANUARY 19, 2018



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Contemporary Sex Harassment . . .



- *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975)
- Jane Corne and Geneva DeVane worked in a clerical capacity for Bausch and Lomb, Inc. and were supervised by Leon Price
- *“plaintiffs’ employment conditions became increasingly onerous in that they were repeatedly subjected to verbal and physical sexual advances from defendant Price; defendant Price’s illegal activities were directed not only to plaintiffs but also to other female employees . . . ; cooperation with defendant Price’s illegal activities resulted in favored employment. . . ; immediately before the filing of the complaint with the E. E.O.C., defendant Price’s activities directed to plaintiffs became so onerous that plaintiffs were forced to resign.”*

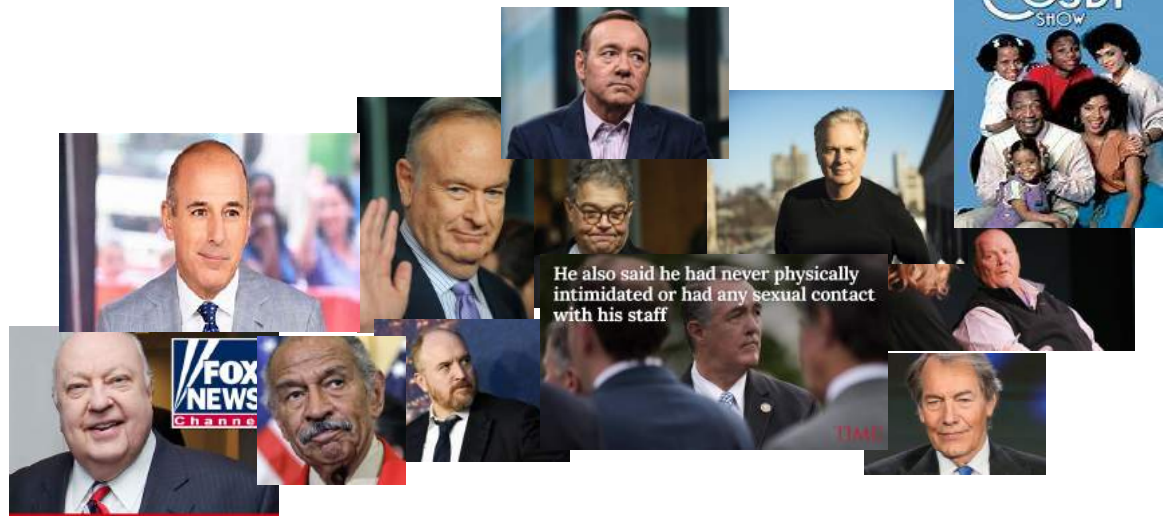
B&L Files Motion to Dismiss – and wins!



- “In the present case, Mr. Price’s conduct appears to be **nothing more than a personal proclivity, peculiarity or mannerism**. By his alleged sexual advances, Mr. Price was satisfying a personal urge.”
- “It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of **holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another**. The only sure way an employer could avoid such charges would be to have employees who were asexual.”



How Things Have Changed...



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The Movement of #MeToo



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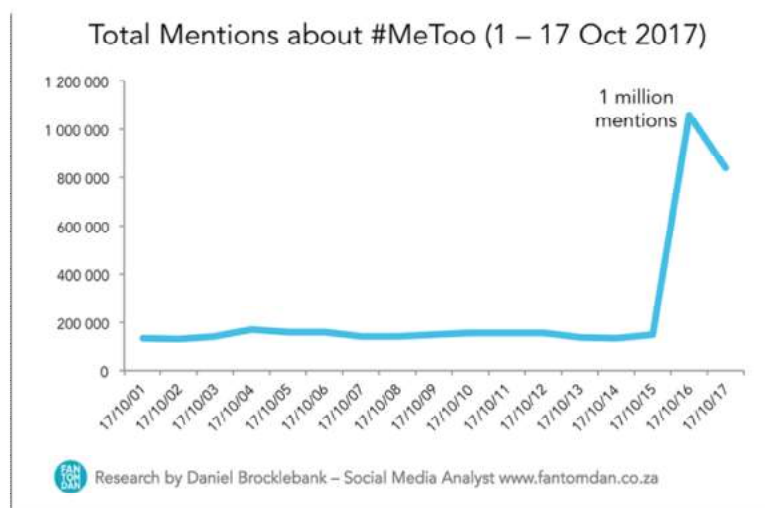
How it all got started . . .



- The goal of #MeToo, as Milano's friend told her, was simply to give people a sense of "the magnitude of the problem."



What it has become . . .



Time's Up Campaign



- The Time's Up campaign will push for a marked increase in women hires along with equal pay and benefits across professions.
- "The struggle for women to break in, to rise up the ranks and to simply be heard and acknowledged in male-dominated workplaces must end," the group said in a statement. "Time's up on this impenetrable monopoly."
- The initiative will also feature a legal defense fund for both women and men who believe they've been discriminated against or harassed in their workplace.

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How Sex Harassment Will Evolve (Eventually)



1. More complaints to process in general & about acts that past employees did not complain about (maybe)
2. More scrutiny of investigations and reports (especially of prominent personnel)
3. Presumption of guilt by juries (maybe)
4. The rise of "backlash litigation" (maybe)
5. Evolution in law re: severity/pervasiveness & *Faragher/ Ellerth*, both of which have objective components that are influenced by larger culture



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Workplace Bullying



As defined by the framers of the “Healthy Workplace Bill,” Workplace Bullying is repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that takes one or more of the following forms:

- Verbal abuse, or
- Threatening, intimidating or humiliating behaviors (including nonverbal), or
- Work interference – sabotage – which prevents work from getting done, or
- Some combination of one or more.

<http://healthyworkplacebill.org/problem/>

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Bullying v. Harassment: Similar But Different



Harassment

- Often involves physical contact
- Target selected because of who they are, i.e. member of a protected class
- Often a clear overt incident – i.e. grabbing
- The target knows they have been harassed virtually immediately
- Harassment is revealed by use of recognized offensive vocabulary and gestures
- Harassment occurs in and out of work, i.e. texting, emails, social media

Bullying

- Almost exclusively psychological
- Target selected because they are vulnerable and, typically, competent
- Typically an accumulation of small incidents
- The target may not realize for weeks or months that they are being bullied
- Bullying tends to fixate on trivial criticisms, casual insults, exclusion from the “in” group
- Bullying occurs mostly at work, but increasingly now on social media as well

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The New Normal – Changing the Culture



- Employers today have to approach workplace culture from the perspective of **creating a professional and respectful environment for all employees**
- The EEOC's focus is now on respectful and professional workplace training
- It means focusing on more than just what NOT to do in the workplace
- Employers need to focus on teaching employees the real elements of a respectful workplace

The Elements of a Respectful Workplace



- Teach **ALL** employees your organization's policy about discrimination and harassment.
- Make sure you reference bullying and abusive behavior in your policies.
- Teach **ALL** employees that when they see something inappropriate, they have to intervene or seek supervisory intervention.
- Teach supervisors to understand their role in creating a respectful workplace.

What Steps Can Work to Change Culture?



- First and foremost, train your supervisors more effectively and more often.
- Enhance online training with experiential training to teach supervisors how to recognize and respond to inappropriate behavior.
- This should include analysis of hypothetical scenarios; role playing and other intensive techniques to emphasize that maintenance of a respectful workplace is a **major part of their job, not mere lip service**.

Start With a Look at Policies and Practices



- **Revamp** HR policies to encourage **civility**
- Take steps that **encourage reporting**
 - Rewards and penalties
 - Multiple avenues for reporting
 - Outside vendor for complaints or complaint hotline
 - Proportionality of consequences
- Conduct quarterly anti-harassment **check-ins / surveys**
- Identify **risk factors** and employ strategies to reduce risk

Focus on What Supervisors Can/Should Do



- Teach supervisors the skills necessary to make them effective supervisors.
- Give supervisors verbal and physical tools to help make them more engaged and effective, i.e. how to complement; how to criticize; how to intervene; how to coach employees on respectful behavior; how to be a role model.

Supervisory Evaluation



- From the very top of your organization down, evaluate supervisors and managers, in part, on their knowledge of respectful workplace factors; their commitment to a respectful workplace; and their role in intervening to stop inappropriate behavior.
- Take appropriate action against supervisors who do not take the elements of a respectful workplace seriously.
- Terminate supervisors who are bullies.
- Terminate supervisors who tolerate harassment, bullying or abusive conduct by employees.

Employee Training



- Adopt a regular schedule of required employee training about harassment, bullying and maintaining a respectful workplace. Make sure your policies are clear and understandable.
- Discuss how to speak up; how to intervene; and how to communicate in a respectful manner in the workplace.
- Discuss barriers to speaking up or intervening.
- Discuss how employees can give meaningful feedback to others who engage in disrespectful behavior.

Bystander Intervention



- Bystander intervention techniques are strategies employees should use to intervene when they observe instances of inappropriate behavior
- There are a variety of such strategies, including:
 - Interrupting the behavior
 - Publicly supporting the victim
 - Naming or acknowledging the offense
 - Use body language to show disapproval
 - Encourage dialogue
 - These strategies can be taught and practiced

Investigating Claims in the #MeToo Era



- Investigate all claims, whether time-barred or not
- Follow policies/procedures – **EVERY TIME!**



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Employers Should Ask These Questions . . .



- Under what circumstances should an employer retain independent investigators?
 - actual or appearance of conflicts
 - inexperience in conducting workplace investigations
 - allegations of systemic conduct



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Investigating Claims



- Key Steps:
 - Preliminary Interview with Complainant
 - Emergency Action (if needed)
 - Formal Investigation
 - Planning
 - Conducting Interviews
 - Documentation
 - Reaching Conclusion
 - Recommending Action/Outcome
- Implement Action

Five Recommendations on “Professionalizing” Workplace Investigations



1. Be mindful of the “he said / she said” trap
2. Meaningfully assess credibility – which is more likely than not?
3. Recording interviews? Other ways to memorialize statements while protecting self and company?
4. Confidence that we have uncovered everything?
5. Clear, professional reports with robust analysis which can withstand scrutiny

Discipline - One Size Does Not Fit All



- **Reminder** to the accused employee, in writing, of workplace expectations
- Requiring accused to complete **remedial training – one-on-one**
- **Separation** of complainant and accused
- **Termination** of employee found to have engaged in unlawful conduct



Once the Dust Settles . . .



- Assure the complainant that the **allegations were taken seriously** and reinforce importance of continued reporting
- Continue to **monitor the situation** to assure that the problematic conduct has stopped
- Periodically meet with the complainant to **confirm no retaliation has occurred**

DOCUMENT!! DOCUMENT!! DOCUMENT!!

Settlement Confidentiality Provisions



SEC. 13307. Denial of deduction for settlements subject to nondisclosure agreements paid in connection with sexual harassment or sexual abuse.

(q) Payments **related to sexual harassment and sexual abuse**. No deduction shall be allowed under this chapter for:

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) **attorney's fees related to such a settlement or payment.**

(b) Effective date.—The amendments made by this section shall apply to amounts paid or incurred after the date of the enactment of this Act.



Final Questions



THANK YOU

FOR THIS OPPORTUNITY

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