MAKING #ME TOO #NOT HERE

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More than 30 years have passed since the United States Supreme Court decided *Meritor Savings Bank v. Vinson*,[1] redefining the standards for sexual harassment in the workplace. Yet, with sexual harassment at the forefront of our national conversation, it should come as no surprise that sexual harassment claims have exploded in the past year. The Equal Employment Opportunity Commission (EEOC) is the government agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information. The agency also enforces federal laws on employer retaliation against persons for complaining about discrimination, filing a charge, or participating in an investigation or lawsuit. According to the EEOC, in fiscal year 2018, the Commission saw a 12 percent uptick in the number of sexual harassment charges filed, the first substantial increase in five years. The Commission also recovered $70 million dollars for sexual harassment complainants, an increase of more than $22 million compared to its recovery in 2017.[2]

Ongoing sexual harassment allegations within high-profile organizations serve as potent reminders that the workplace has not become as civilized as we had hoped over the last 30 years. Despite well-intentioned policies and procedures directed at eliminating inappropriate behavior in the workplace, the problem persists. And, a commitment to diversity, inclusion, and a respectful workplace (even from the top) is not enough to combat it. Workplace culture has one of the greatest impacts on allowing harassment to flourish, or conversely, in preventing harassment. An organization's culture is set by the values of the organization. To achieve a

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[1] 477 U.S. 57 (1986).

[2] *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm

workplace without harassment, the values of the organization must put a premium on diversity and inclusion and include a belief that all employees in the workplace deserve to be respected. By implementing the right policies, procedures, trainings, and investigation guidelines, your organization will be well on its way to creating a progressive culture of respect for all people.

There are several proactive measures you can and should implement to prevent discrimination and harassment from occurring at your workplace and reduce your organization's exposure when it does occur. This paper will discuss those measures by looking at effective policies and procedures, reporting and investigation strategies, and first-class training implemented by organizations around the country. It will also explore case strategies and defenses should your organization be faced with a sexual harassment lawsuit.

I. What Is Sexual Harassment?

Sexual harassment is defined by the EEOC as any unwelcomed sexual conduct, such as sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature.[3] It becomes unlawful when:

- submission to such conduct is made either implicitly or explicitly a term or condition of employment;
- submission to, or rejection of, such conduct by an individual is sued as the basis for an employment decision affecting the employee; or
- such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creates an intimidating, hostile, or offensive working environment.[4]

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[3] EEOC Guidance, Facts About Sexual Harassment, available at https://www.eeoc.gov/eeoc/publications/upload/fs-sex.pdf.

[4] There are two types of supervisory sexual harassment claims for which an organization can be vicariously liable (bullet points one and two above): (1) what was formerly known as *quid pro quo* harassment where the harassment results in a tangible employment action; and (2) hostile work environment harassment where the harassment does not result in a tangible employment action. In the former, sexual harassment occurs where plaintiff suffers a tangible employment action that "resulted from a refusal to submit to a supervisor's sexual demands" and something tangible occurs (i.e., termination, demotion, significant change in benefits). *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 753 (1998); Reeves v. CH Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010). Whereas, hostile work

This definition reflects the United States Supreme Court's analysis. Your organization can combat the potential for sexual harassment through the use of effective policies and procedures designed to eliminate and address it.

II. Your Policies Are Your First Line of Defense

Effective policies and procedures of all types are important to creating and maintaining a progressive workplace culture. Policies and procedures help reinforce and clarify the standards expected of employees and assist supervisors and managers in leading employees more effectively. Together policies and procedures provide a roadmap for day-to-day operations. They ensure compliance with laws and regulations, provide guidance for decision-making, and streamline internal processes. Adoption, communication, and consistent enforcement are the most important components of effective workplace policies. Every organization should maintain workplace policies which are provided and explained to new and existing employees. These polices should be easily accessible to all employees for reference should they have questions or concerns. The policies should also be consistently enforced to avoid challenge.

In particular, adopting and maintaining an effective No-Harassment Policy is foundational to a civilized workplace. A No-Harassment policy should state that any form of harassment, including sex-based harassment, is prohibited. The policy is imperative should an employee file a formal charge of sexual harassment with the EEOC or state commission. If an employee files a charge of sexual harassment with the EEOC or state commission, one primary issue will be what,

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environment harassment occurs where conduct does not result in tangible employment action, but is nevertheless so "severe and pervasive" that it creates an abusive environment. *Ellerth*, 524 U.S. at 754; *see also Clark County School District v. Breeden*, 532 U.S. 268, 269 (2001). With respect to non-supervisory harassment (e.g., co-employee and the third bullet point above), an organization may only be liable for the harassing conduct only if it knew or should have known of the conduct and failed to take prompt remedial action. *Vance v. Ball State University*, 570 U.S. 421, 427 (2013); *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

if anything, did the employer do to prevent or stop the harassment. An effective anti-harassment policy will be one way to show the EEOC or state commission what steps the employer took to prevent and address sexual harassment issues.

A. What Does The EEOC Consider An Effective No-Harassment Policy?

The EEOC has published guidance in the form of checklists and tips for crafting effective No-Harassment policies. According to the EEOC, an effective anti-harassment policy contains the following language:

- A statement that discrimination and/or harassment based on race, color, sex, national origin, disability, age (40 or older) or genetic information will not be tolerated;
- Definitions and examples of prohibited conduct, as needed;
- An explanation on how employees can report harassment;
    - Best practices for reporting procedures:
        - Designate at least one person outside of the employee's chain of command who can receive complaints of discrimination and harassment.
        - Permits employees to report discrimination and harassment to *any* manager.
- A statement that the company will protect the confidentiality of employees who report discrimination/harassment, to the greatest extent possible;
- A statement that employees will not be punished for reporting harassment or participating in an investigation or lawsuit;
- A statement requiring managers and human resource employees to respond promptly and appropriately;
- A statement of the process of investigating complaints, including notice to affected employee of the status of their complaint; and
- Describes consequences for violating the policy.[5]

[5]EEOC Guidance Checklist for Harassment, available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/checklist2.pdf.

If an employee brings an EEOC Charge against their employer, often times, the EEOC will request, during their investigation, a copy of the employer's policies to determine what steps the employer took to avoid the possibility of harassment. Ensuring that your organization's policies align with EEOC standards can save you a great deal of time and effort when trying to obtain a "No Cause" determination in an EEOC filing.

B. Crafting Your No-Harassment Policy

Every employer should have a "No-Harassment" Policy. This policy should state very plainly that any form of harassment, including sex harassment, is prohibited. The policy should also state that it applies not only to the workplace itself, but also to activities connected with the workplace such as travel, conferences, work-related social gatherings, interactions at a client's work site. Your No-Harassment policy should be in written form, communicated to and accessible to all employees. It should also spell out how to report concerns if an employee feels that the policy was violated.

An effective No-Harassment policy should do ten main things: (1) define harassment; (2) prohibit all types of harassment; (3) state that supervisors do not have the authority to harass employees; (4) outline responsibilities; (5) establish consequences for violators; (6) encourage complaints; (7) ensure that complaints will be kept as confidential as possible; (8) provide several ways to complain; (9) assure no retaliation; and (10) hold employees accountable.

1. Define Harassment

Some employers chose to use the EEOC definition of harassment; others use plain language, and others include examples of various kinds of harassment, such as *quid pro quo*. No

matter the approach taken, the policy should prohibit harassment based not only on sex, but also all of the federally protected categories such as race, religion, disability, age, etc.

Of course, many states have similar antidiscrimination laws and unique protected categories which should be included in the policy as applicable. Be sure to check state and local laws to ensure your organization's policy is sufficient. Some employers choose to acknowledge state and local requirements in the policy with general language such as "*and any other category protected by state or local law.*" We also suggest adding language related to checking the employee bulletin board for employment law posters and more information.

2. Establish A Zero Tolerance Stance On Harassment

The policy should prohibit all levels of sexual harassment, from a single suggestive remark to more flagrant harassment such as unwelcomed touching. Many employers have found it beneficial to prohibit all sexual advances, not just those that are unwelcomed. Establishing a zero-tolerance policy takes the guess work out of the equation and reduces an employer's exposure to claims of inconsistent application of policies.

3. State That Supervisors Do Not Have The Authority To Harass Employees

This should go without saying, but it still needs to be in writing. To avoid any possibility that employees may believe that a manager's actions are either impliedly approved or known to the organization, the policy should specifically state that supervisors and managers do not have authority to harass employees.

4. Outline Responsibilities

The policy should advise that all employees are obligated to report any harassment that they observe, have heard about, or believe may be occurring.

5. Establishes Consequences For Violators

The policy should state that disciplinary action will be taken, up to and including immediate termination, for any conduct involving prohibited harassment. The appropriate level of discipline will generally depend on the severity of the conduct. If the harassment is a one-time relatively innocuous occurrence, verbal counseling, or a written warning may be sufficient. If the conduct is aggravated, more severe discipline such as probation, suspension, or even termination, may be appropriate.

6. Encourage Complaints

The policy should require all individuals who believe that they have been victims of harassment, or have observed or heard about harassment, to report it without fear of retaliation. In fact, somewhere in your policy, you should include the following in capital letters or bold type: "DO NOT ASSUME THE COMPANY KNOWS ABOUT ANY PARTICULAR SITUATION. REPORT ALL INSTANCES OF HARASSMENT."

7. Assure Complaints Will Be Kept As Confidential As Possible

Never promise that a complaint or investigation will be kept strictly confidential; this is unrealistic and usually impossible. Rather, you should advise employees that a complaint will be handled in a discreet manner and information will be kept as confidential as possible and only be divulged on a need-to-know basis.

8. Provide Several Avenues For Complaints

An effective reporting system for allegations of harassment is one of the most critical elements of an anti-harassment effort. Your No-Harassment Policy should articulate the several different ways employees can report harassment as well as multiple levels of leaders within the organization to whom reports can be made. Your policy should not require that a complaint be made in writing as to do so makes reporting potentially "too difficult." Instead, consider allowing

employees to report complaints a variety of different ways, such as verbally, by email, in writing, via an online complaint system, or an employee hotline.

As for who to report to, the breadth of sexual harassment jurisprudence shows that the most common reporting procedures involve making a complaint to: (1) an employee's immediate supervisor; (2) to any manager with whom the employee feels comfortable; (3) to the employer's human resources department; (4) to the employer's legal department; and/or (5) to a complaint 1-800 number. Generally, a policy should avoid suggesting a report be made to an employee's "immediate supervisor" as, in many cases, the immediate supervisor is the source of the complainant's discontent. Consider the human resources department, the legal department, and/or an anonymous complaint hotline when determining who can accept reports of potential policy violations.

The list of reporting contacts should have at least three levels – maybe more depending on the size of the organization. The language of the policy should make clear that the complainant can "bypass" various levels to get to the level where they feel action will be taken. Of course, whoever is listed as having authority to address sexual harassment complaints should be trained on how to properly respond.

9. Assure No Retaliation

Your policy should state that employees who report what they believe to be harassment, or who cooperate in any investigation of such harassment, will not suffer any retaliation. The policy should also state that any employee who believes they have been the victim of retaliation for reporting harassment should immediately report the retaliatory acts. The same assurances should be made for those who participate in investigations.

10. Hold Employees Accountable

Accountability is key! Employees must be held accountable to the requirements of your workplace policies. In doing so, employees should first be required to read and acknowledge receipt of all your rules and policies during their initial orientation or onboarding process. Specifically, employees should read and acknowledge receipt of your No-Harassment Policy from the outset of their employment. You may even state that you will require such acknowledgment in your offer letters to employees. It is never too early to set your expectations.

When employees do sign, you should consider having separate acknowledgment forms for supervisors and non-supervisory employees concerning your No-Harassment Policy. The supervisor's acknowledgment should have additional information charging the supervisor to report complaints of sexual harassment higher up in the organization and advising supervisors of their personally liability if they themselves engage in sexual harassment. Supervisory employees can be held directly liable for sexually harassing employees under their control. They may face civil or criminal claims of assault, battery, or intentional infliction of emotional distress, among other claims. Informing supervisory employees of this information deters inappropriate behavior from the start and reinforces the requirement that supervisors must take action if they suspect harassment in any form.

C. Going Further: Adopting a Respectful Workplace Policy

Respect is a fundamental characteristic of an effective, efficient and productive workplace. Businesses, municipalities, and organizations across the United States have begun adopting respectful workplace policies, in addition to or as a replacement for, traditional No-Harassment policies in attempt to capture the importance of employee respect for one another in the workplace. Respectful workplace policies focus not just on whether conduct is illegal, but also on

whether conduct is appropriate, professional, and honest; thus, broadening the scope of conduct and behavior that will not be tolerated.

Companies like Southwest Airlines,[6] Vanity Fair,[7] and Pembina[8] have become champions of the shift toward a more respectful workplace, defining a respectful workplace as one that is free from unlawful discrimination and harassment, but is much more than just compliance with anti-discrimination and harassment laws. A respectful workplace is one that values diversity and inclusion, dignity of the person, courteous conduct, mutual respect, fairness and equality, positive communication between people, and collaborative working relationships.

Respectful workplace policies typically apply not only to the workplace itself, but also to activities connected with the workplace such as travel, conferences, work-related social gatherings, interactions at a client's work site. They apply to interactions between employees and interactions between employees and clients/general public. Respectful workplace policies hold employees to a higher standard than traditional No-Harassment policies.

III. Your Managers And Employees Must Be Well-Trained And Well-Behaved

Some employers erroneously believe that they only need to provide sexual harassment and other forms of workplace training to employees during new-hire orientation. While it is a good practice to provide this training early on, only providing that training once is not enough to curb the potential for sexual harassment in the workplace. Training must be conducted regularly.[9]

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[6] See: https://careers.southwestair.com/culture

[7] See: https://www.vfc.com/our-company/inclusion-diversity; See policy: https://www.youtube.com/watch?v=sbbBdO2v9BA

[8] See policy, available at: http://www.pembina.com/Pembina/media/Pembina/About%20Us/Governance/Respectful-Workplace-Policy-(August-2018).pdf

[9] *Agusty-Reyes v. Department of Education of P.R.*, 601 F.3d 45 (1st Cir. 2010) (court reversed grant of summary judgment and held that employer did not establish affirmative defense where employer made no effort to communicate its sexual harassment policy to any of its employees, regional directors, supervisors, or the plaintiff via training or otherwise); *Clark v. United States Postal Service, Inc.*, 400 F.3d

According the EEOC's 2016 Report on Sexual Harassment in the Workplace, training should be "conducted and reinforced on a regular basis for all employees."[10] If training is only conducted once, employees may not believe that preventing harassment is a high priority for the employer.[11] Conversely, if the training is held regularly, it will send a message to employees that the goal of preventing harassment and maintaining a respectful workplace is important.[12]

Sexual harassment prevention training is so important that some states even have statutes that require private employers to provide such training regularly.[13] Other states recommend that employers provide such training regularly.[14] With harassment frequently on the front page of the news, views on sexual harassment training must shift from a "nice-to-have" to "must have." This paradigm shift should help reduce the occurrence of workplace harassment and protect employers from liability in high stakes harassment lawsuits.

A. It Starts At The Top!

Your managers must be well-trained and well-behaved. They must be well-versed in what to do should they receive a complaint of harassment from anyone – including from someone who does not report to them. Effective training can save employers time and money when faced with

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341, 349-350 ("while there is no exact formula for what constitutes a reasonable sexual harassment policy . . . training must be provided"); *Bishop v. Woodbury Clinical Laboratory, Inc.*, No.3:08-1032, 2010 WL 1525922, at *4 (M.D.Tenn Apr. 15, 2010)(summary judgment on the application of *Faragher-Ellerth* denied where employer failed to show that it provided regular sexual harassment training); *Hanley v. Doctors Hospital of Shreveport*, 821 So.2d 508, 526 (2 La. App. 2 Cir. 2002) (court upheld a jury's award of punitive damages in part because the employer had not provided its employees with sexual harassment training);

[10] Feldblum, Chai & Lipnic, Victoria, EEOC 2016 Report of the Select Task Force on the Study of Harassment in the Workplace, available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

[11] See *surpa* note 10.

[12] See *surpa* note 10.

[13] California (Cal. Gov Code § 12950; S.B. 1343); Connecticut (Conn. Gen. Stat § 46a-54(15)(B); New York (N.Y. Lab. Law § 201-g); Maine (Me. Rev. Stat. § 807(3); Delaware (Del. Code Ann. tit. 19 §711A).

[14] Massachusetts (M.G.L. c. 151B § 3A(e)); Ohio (Ohio Adm. Code 4112-5-05(J)(7)); Rhode Island (R.I. Gen. Laws ch. 118, §§ 28-51-2(c), 28-51-3); Vermont (Vt. Stat. Ann. tit. 21, § 495h(f);

a potential harassment lawsuit. If left untrained, when faced with a complaint of harassment, managers and supervisors might make their own decisions regarding whether or not to act on the allegations, which can cost the employer should litigation ensue.

For example, a manager or supervisor may decide not to take any action to address the employee's complaint or they might take the wrong action and retaliate against the employee for complaining. Thus, managers and supervisors should be trained not only on what is and is not sexual harassment, but also on their duty to respond and report the concern higher up within the organization. Managers should be held accountable in a meaningful, appropriate, and proportional manner for responding to a complaint of harassment and penalized for failing to do so.

Every employee should undergo sexual harassment training. From C-suite level to entry-level, no employee should be exempt. The strongest expression of support for harassment training is for a senior manager to open the training session and attend for the duration. This shows employees a commitment from the top, not just on paper but in practice. Harassment training helps employers comply with legal requirements by educating employees about what forms of conduct are not acceptable in the workplace and about which they have the right to complain.

Harassment training should not be limited to the legal definition of harassment, but should describe conduct that if left unchecked could eventually rise to the level of illegal harassment. If a respectful workplace is the goal, it should also encompass conduct that is not necessarily unlawful but is unprofessional and improper in the workplace.

Training should be tailored to the specific realities of your workplace. It should use examples and scenarios that might realistically arise in the context of your specific worksite,

organization or industry. To be most effective, the training should be conducted by someone who has full command of the subject matter. It should be dynamic, live, and engaging.

Employees should be able to ask questions, participate in scenarios, and answer prompts to gauge their understanding. If for some reason live training is not feasible – because it is cost prohibitive or because employees are geographically dispersed – online, web-based trainings, though not ideal, will suffice. However, the online training should still be tailored to the specific realities of your workplace and capable of interactive engagement. Effective training can have a positive impact on progressing your workplace forward.

B. State-Required Training

In the wake of the #MeToo movement, multiple states now require employers to provide sexual harassment prevention training to employees. The specifics of training, including which employees must receive the training varies by state. Some states require employers to provide training only to supervisors, while others require employers to provide training to all employees, including seasonal and temporary employees. Most state statutes requiring training include robust guidelines, spelling out in great detail the topics to be covered, the number hours to be spent, and the type of employee to be trained. Thus, if your state has a mandated training requirement, it is important that you are aware of and comply with those guidelines.

California,[15] Connecticut,[16] New York,[17] Maine,[18] and Delaware[19] all have comprehensive laws that require employers to provide some form of sexual harassment training to their

[15] Cal. Gov. Code § 12950 et seq. (applies to employees with 5 or more employees).
[16] Conn. Gen. Stat. § 46a-54(15)(B); Conn. Agencies. Regs. § 46a-54-204 (applies to employers with 50 or more employees anywhere).
[17] N.Y. Lab. Law § 201-g (applies to all employers with an employee in New York state).
[18] Me. Rev. Stat. § 807(3) (applies to employers with 15 or more employees at a Maine worksite/location).
[19] Del. Code Ann. tit 19 § 711A (applies to employers having 50 or more employees in Delaware).

employees and/or supervisors. In addition, other states, such as Colorado,[20] Massachusetts,[21] Michigan,[22] Ohio,[23] Rhode Island,[24] Tennessee,[25] and Vermont,[26] have laws that "encourage" employers to provide harassment such training.

Maine and Connecticut were among the first states to require private employers to provide sexual harassment training. Since June 1991, Maine has required that all employers located in or doing business with Maine, both public and private, with 15 or more employees, to provide sexual harassment education and training to their employees within one year of beginning employment.[27] Maine requires that employers provide additional training for supervisory and managerial employees, at minimum addressing their responsibility to "ensure immediate and appropriate corrective action in addressing sexual harassment complaints."[28]

Since 1993, Connecticut employers with 50 or more employees have been required to provide harassment training to their supervisory and managerial employees.[29] Specifically, Connecticut law mandates that employers provide two (2) hours of interactive sexual harassment prevention training and education to all supervisory employees.[30]

Since 2005, California law has mandated that employers with 50 or more employees provide sexual harassment training for supervisors within six months of becoming a supervisor,

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[20] 3 Colo. Code Regs § 708-1, Rule 80.11(C).
[21] M.G.L. c. 151B § 3A(e).
[22] Mich. Comp. Laws Ann. § 37.1212.
[23] Ohio Adm. Code 4112-5-05(J)(7).
[24] R.I. Gen. Laws ch. 118, §§28-51-2(c), 28-51-3.
[25] Tenn. Code. § 4-3-1703.
[26] Vt. Stat. Ann. tit. 21, § 495h(f)
[27] Me. Rev. Stat. § 807(3).
[28] *Id*.
[29] Conn. Gen. Stat. § 46a-54(15)(A)-(B); Conn. Agencies. Regs. § 46a-54-204 (applies to employers with 50 or more employees anywhere).
[30] *Id*.

and at least once every two years.[31] Effective January 1, 2019, the law applies to employers with five or more employees.[32] By January 1, 2020, California employers must provide training to all supervisory and non-supervisory employees within six months of employment.[33] The training must include at least two hours of sexual harassment training to supervisory employees and one hour of training to non-supervisory employees.[34] The training and education must be provided every two years thereafter.[35]

Delaware and New York are the newest states to require employers to provide sexual harassment training to employees. In 2018, Delaware passed HB 360, requiring employers with at least 50 employees to provide "interactive training and education to employees regarding the prevention of sexual harassment."[36] Delaware's training law also mandates that employers with 4 or more employees issue information sheets on sexual harassment.[37] Delaware's law went into effect January 1, 2019.[38] Similarly, in 2018, New York passed SB 7507 requiring employers with 15 or more employees to conduct "annual interactive training" using either the state department of labor's training model or a model complaint with state standards.[39] New York's law requires employers to provide training to all employees, every year.[40]

Effective training is powerful tool that can be used to shape an organization's culture. Whether state-mandated or encouraged, it is highly advisable that employers provide sexual harassment training to employees regularly.

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[31] Cal. Gov. Code § 12950 et seq.; A.B. 1825, 2005-2006 Reg. Sess. (Cal. 2005).
[32] S.B. 1343, amending Cal. Gov. Code §12950 et seq.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] H.B. 30, 149th Gen. Assemb. Reg. Sess. (Del. 2018).
[37] *Id.*
[38] *Id.*
[39] N.Y. Lab. Law §201-g, formerly S.B. 7507C §296-d, subpart E, 2017-2018 Leg. Sess. (N.Y. 2018).
[40] *Id.*

C. Cutting-Edge Training Programs Go Further

As organizations are shifting toward a more progressive, respectful workplace, cutting-edge training programs like bystander training, workplace civility training, and implicit/unconscious bias training are making their way into the workplace. These training programs are not displacing traditional anti-harassment training, but are being offered as additional reinforcement for ensuring appropriate and respectful behavior in the workplace.

1. Workplace Civility Training

Employers typically offer workplace civility training as a means to reduce conflict in the workplace. Rather than focusing on eliminating unwelcome behavior based on protected characteristics under the employment discrimination laws, workplace civility training focuses on promoting respect and civility in the workplace generally. The purpose of workplace civility training is to establish expectations of civility and respect amongst employees and provide management with the tools to help cultivate that respect. It explores workplace norms, such as what constitutes appropriate and inappropriate behavior. It also includes practical skill-based components, such as developing interpersonal skills, conflict resolution, and effective supervisory techniques.

According to the 2016 EEOC Report from the Select Task Force on the Study of Sexual Harassment in the Workplace, incivility is often the antecedent to workplace harassment.[41] It creates a climate of general derision and disrespect in which harassing behaviors are tolerated. While workplace civility training is not a harassment prevention tool *per se*, it complements

[41] Feldblum, Chai & Lipnic, Victoria, *EEOC 2016 Report of the Select Task Force on the Study of Harassment in the Workplace*, available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

traditional harassment training in its efforts to cultivate a respectful workplace by promoting civility among employees.

2. Bystander Training

Bystander intervention training encourages employees to take action when they witness harassing and/or discriminatory behavior. It empowers employees to address and prevent harassment in the workplace. With the right knowledge, tools, and motivation, bystanders can intervene, stop, and/or report inappropriate behavior before it rises to the level of unlawful harassment.

Bystander intervention training typically explores four points: (1) awareness, (2) collective responsibility, (3) empowerment, and (4) resources. The training teaches employees to recognize potentially problematic behaviors, encourages employees to step in and take action when they observe those behaviors, and gives employees the confidence to intervene as appropriate. According to EEOC Commissioner Chai Feldblum in 2016, "with leadership support, bystander training could be a game changer in the workplace."[42]

3. Implicit Bias/Unconscious Bias Training

Implicit/unconscious bias training is taking over the modern workplace. Though somewhat controversial, companies like Google, Microsoft, and Starbucks have all had their employees go through an implicit/unconscious bias training program. Implicit/unconscious bias training programs seek to uncover the biases and stereotypes that employees harbor based on their experiences that work outside of their awareness. The goal of the training is to bring awareness

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[42] EEOC Press Release, Task Force Co-Chairs Call on Employers and Others to Reboot Harassment Prevention, 06/20/2016, available at https://www.eeoc.gov/eeoc/newsroom/release/6-20-16.cfm.

to those biases so the employer can better address the effects those biases have on the workplace.

Most implicit/unconscious bias trainings employ user polls and compare employees based on how common certain attitudes are among them.[43] When implicit biases are outed, some employees may feel attacked or uncomfortable. Therefore, control over the dialogue and discussion surrounding implicit/unconscious bias must be maintained by the instructor. The training is most effective when it is targeting understanding a problem and finding a solution.

IV. Investigations, When Done Right, Can Avoid Litigation

There is no greater challenge for a human resource professional and legal counsel than to investigate a complaint of sexual harassment. There is also no greater opportunity for the HR professional and legal counsel to address and solve the problem, thereby avoiding the potential for costly litigation and to enforce proper workplace culture. Investigating a complaint of sexual harassment, or any complaint of workplace misconduct, begins with an effective reporting process.

Your reporting process, as discussed earlier, should be clearly defined in your No-Harassment Policy. It should provide several avenues for complaints for the convenience and comfort of employees, but also be specifically designed to apprise the employer of issues as they arise. Once a complaint has been made through the reporting process, employers must be prompt in responding. Time is of the essence. Act fast! A high priority response demonstrates

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[43] See Google's Unconscious Bias Training, available at https://rework.withgoogle.com/guides/unbiasing-raise-awareness/steps/watch-unconscious-bias-at-work/; See Microsoft's Unconscious Bias Training, available at https://www.microsoft.com/en-us/diversity/beyond-microsoft/default.aspx; See Harvard's Implicit Association Test (IAT), available at https://implicit.harvard.edu/implicit/

respect for the complainant's step in making the complaint and shows control over the situation immediately.

Based on the allegations of the complaint, do a little digging to see if you can gain a better understanding of the employee complainant's concerns. Review any information you believe may be relevant to the employee's complaint, such as time cards, the employee's personnel file, performance reviews, etc. Thereafter, it is important to quickly secure the full story from the employee complainant.

A. The Initial Interview

Before asking the employee about the allegations of their complaint, you should make a few preliminary statements. These statements should include: (1) a description of the complaint process; (2) confirmation that the interviewer is unbiased; (3) assurance that the employer will not retaliate against the employee for reporting or talking to the investigator; and (4) a statement of confidentiality as to the complaints contents, only to be revealed on a need-to-know basis.

When speaking with the employee complainant, it is important to treat them with respect and appreciation for coming forward with their complaint. Your focus (at that point) should be on listening and understanding rather than evaluating the allegations. The purpose of speaking with the employee complainant is to gather as much information as possible about their complaint. Your goal is to understand the 5 W's: who was involved; what happened and what evidence; when the incident occurred; where did the incident occur; and if pertinent, why. You should also ask if there were any witnesses to the offending conduct. This fact-gathering interview is a set up for how the investigation will proceed going forward.

Before the conclusion of the initial interview with the complainant employee, determine whether any interim emergency steps need to be made in order to keep the employee or anyone

else safe. These steps can include contacting the police, notifying employees or others of the allegation, placing the alleged harasser on paid leave while the investigation is conducted, or reassigning the employee or alleged harasser to avoid interaction until the investigation is complete. If you are considering any of these steps (other than calling the police), you may want to seek the advice of your legal counsel to ensure this is done without substantial risk. Investigations do not have to be perfect. However, they must be conducted in a reasonable and timely manner with a goal of remedying any illegality.

B. Next Steps

After hearing from the employee complainant, you must decide whether it is necessary to conduct a more detailed investigation. In most cases where an employee makes a complaint, a more detailed investigation should take place. This is especially true in the context of a complaint of sexual harassment. A detailed investigation will allow you to learn additional facts and information not known to or shared by the employee complainant. It will allow you to interview witnesses, obtain and review documents, video camera footage (or other evidence), and/or seek the assistance of security professionals or legal counsel.

When planning an investigation, particular consideration should be given to certain items of importance courts have identified, such as who should conduct the investigation, who should be interviewed, how many people should be present for the interviews, when and where the interviews should take place, what details should be divulged to the accused, the employee complainant, and other witnesses. Before beginning, you should have well-defined investigation plan custom-tailored to the particular circumstances.

C. The Investigation

There is no one-size-fits-all approach to investigating a complaint of sexual harassment -- each requires an individualized assessment of the case. This assessment should, however, include a few basic steps:

1. Determining Who Should Conduct The Investigation

After understanding the complaint, decide who should conduct the investigation. Is it best for your team to conduct the investigation internally or should you engage an outside third-party to ensure the investigation is neutral and independent? There are many factors that you should consider when making this determination such as the severity of the complaint, the identity of those involved, the likelihood of a future claim arising from the complaint, and the anticipated use of the investigation.[44]

But perhaps the most important initial decision is whether to engage counsel and to what extent counsel should be involved in the investigation process.[45] As you know, the attorney-client privilege[46] and work-product doctrine[47] come into play when counsel is involved. These evidentiary privileges can be crucial to an investigation. For example, if you want to conduct the investigation in a manner where the process or the results can be used as part of your defense to a later legal claim, you may want to have counsel act only as an advisor to the investigation

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[44] Van Dermyden, Sue Ann & Kochan, Justin, American Bar Association, *An Attorney's Guide to Workplace Investigations*, November 2018, available at: https://www.americanbar.org/content/dam/aba/events/labor_law/2018/AnnualConference/papers/An%20Attorneys'%20Guide%20to%20Workplace%20Investigations.pdf

[45] *Surpa*, note 45.

[46] The attorney-client privilege attaches to confidential communications between an attorney and client for the purposes of securing legal advice. See *In re Grand Jury Investigation*, 842 F.2d 1223, 1224 (11th Cir. 1987).

[47] Attorney work product protection extends to material obtained or prepared by counsel in the course of their legal duties provided that the work was done with "an eye toward litigation." See Fed. R. Civ. P. 26(b)(3)(A0; *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1421-22 (11th Cir. 1994); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (Work product protection prevents most inquiries into an attorney's work files and mental impressions.).

process. Otherwise, if your counsel were to conduct the investigation, you may risk having your counsel as a fact witness – thereby waiving the attorney-client privilege and/or work product doctrine to all or part of any communications surrounding the investigation.[48]

However, there are some situations where having counsel conduct the investigation is very beneficial including situations where high-level individuals are involved and/or when there is a need for the investigation to remain cloaked in the protection of the attorney-client privilege. The intricacies of these evidentiary privileges can be complicated even further when inside counsel is involved in the investigation process.[49] Thus, it is best to consult with counsel to navigate the nuances of the intersection of the attorney-client privilege and the use of your investigation as an affirmative defense. Your counsel can guide you through this decision-making process.

2. Interviewing The Complainant Employee

The next step in investigating any complaint of sexual harassment is interviewing the complainant employee. Quickly secure the full story from the complainant. If possible, have two HR professionals present to hear the complainant employee's concern: one to ask the questions and another to transcribe the complainant employee's answers. Having two HR professionals present also helps minimize the risk of later disputes over what was communicated during the interview. The goal is to identify the problem.

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[48] *Koss v. Palmer Water Dept*., 977 F. Supp. 2d 28 (D.Mass. 2013)(finding that employer waived attorney-client privilege "for not only the [investigation] report itself, but for all documents, witness interviews, notes and memoranda created as part of or in furtherance of the investigation"); *See also Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 317-319 (N.D.Ill. 2010); *Walker v. County of Contra Costa,* 227 F.R.D. 529, 535 (N.D.Cal. 2005).

[49] If an attorney acts in a non-legal capacity – for example, interviewing fact witnesses in an investigation – the attorney-client privilege will likely not apply. *In Re: Grand Jury Subpoena*, 662 F.3d 65, 72 (1st Cir. 2010). Similarly, when an in-house attorney provides business, rather than legal, advice, those communications are also unlikely to be privileged. See e.g. *U.S. v. Windsor Capital Corp*., 524 F. Supp. 2d 74, 81 (D.Mass. 2007).

3. Interviewing The Accused

While every complaint of sexual harassment should be taken very seriously, it does not follow that the alleged harasser should be treated with any less respect than that given to the complainant employee. The accused must be given a fair chance to tell their side of the story. The accused should be informed of the allegations against them and be allowed to respond. The investigator(s) should ask any follow-up questions, beginning with broad topics and then narrowing in.

An employer can require the accused's cooperation. If the accused denies the allegation, the investigator should ask why they believe the complainant employee would make a false accusation. Before the interview ends, the accused should be instructed to avoid any communication or contact with the complainant employee until the investigation is complete. The accused should also be instructed to maintain strict confidentiality and not to talk to employees/witnesses about the investigation. It is often appropriate to place the accused on paid leave during the pendency of the investigation.

4. Identifying Witnesses And Supporting Documentation

An essential element of any investigation is to identify relevant documents and witnesses. Investigators should ask both the complainant and the accused if they have any relevant documentation or witnesses that can attest to their claims. Investigators should also ask the complainant if they spoke to any other employees, supervisors, or managers about their concerns as they too could serve as potential witnesses or have relevant information.

5. A Decision Regarding Whether Or Not To Interview Witnesses

Depending on the facts and information gathered during the interviews of the complainant employee and the accused, it may or may not be necessary to interview additional witnesses. The need for witness interviews is determined by the material facts in dispute.

If additional witnesses are interviewed, identify the specific issues to be addresses and what relevant information the witness may possess. Consider whether there is a need for a written statement, questionnaire, or if in-person interview should be conducted. Regardless of the form of interview, ask the witness to maintain strict confidentiality.

6. Findings And Conclusions

After the fact gathering is complete, the investigators must reach a conclusion. Legal advice is especially valuable at this stage, especially if there is the prospect of an EEOC or state commission charge, lawsuit, or arbitration. The investigators should set aside time to carefully review the information gathered during the investigation, including any documents obtained, any notes made during witness interviews, and any other materials discovered.

When reviewing the materials, investigators should consider a number of points, such as: (1) the timeliness of the complaint; (2) the previous patterns of the accused and others; (3) the motivation for the alleged impropriety; and (4) the credibility of the witnesses. In instances where there are multiple witnesses, it may be helpful to create a chart of key facts in order to compare the statements made by each witness, and identify any gaps in the information. After careful review of the evidence, the investigators should determine if the evidence corroborates the allegations. If so, corrective action is necessary.

When recommending corrective action, the investigators should take into account, among other things, the nature of the offense, the weight of the evidence, whether the offending employee was aware of the policy prohibiting such conduct and elected not to comply, and

whether the offender has a track record of misconduct. Based on those considerations, the investigators should recommend the appropriate corrective action. The investigator along with counsel should determine whether a formal report is necessary.

7. Final Communication With The Complainant Employee

The investigation should include a final oral and written communication to the complainant. The details of the communication varies depending on the facts, conclusions, and judgment the investigation. At a minimum, the communication should express the employer's appreciation for the complainant employee reporting his or her concerns, emphasize the employer's commitment to a professional and respectful workplace, and assure no retaliation.

D. Implementing The Results Of The Investigation

The appropriate and documented completion of a workplace investigation is a key step in the investigative process. The actions human resources and other professionals took in conducting the thorough and expeditious investigation and remedying any wrongdoing must be properly communicated and documented.

First, those involved—namely the complainant employee and the alleged harasser—should have a memorandum addressed to them which summarizes the findings of the investigation. These documents will vary depending on the recipient. For example, the alleged harasser's memorandum may include, depending on the outcome of the investigation, specific information on discipline. The complainant employee's memorandum would not contain such information. Second, should there be a lawsuit stemming from the investigation, the documents will likely increase the employer's chances of prevailing in court or administrative proceedings.

V. Case Strategies And Defenses

Most complaints of sexual harassment do not start with the intent to file a lawsuit. Effective and respectful personal interaction with the employee complainant, combined with appropriate investigation and action, can often prevent a lawsuit. However, where a lawsuit does arise, there are certain case strategies and defenses of which employers should be aware.

The application of law always depends on the facts of the case. But, generally, a prompt and effective response by the employer provides a defense that can significantly reduce, if not eliminate potential liability. As discussed below, decisions by federal and state courts have shown that employers who fail to adopt policies, fail to provide training, and/or fail to adequately investigate allegations of sexual harassment properly can lose their ability to raise affirmative defenses in a harassment suit.[50] Thus, with those measures are in place, employers will often avoid liability in a lawsuit.

A. Employer Liability For Sexual Harassment Under Title VII

Employer liability for sexual harassment differs based on whether the alleged harasser is the employee's supervisor or co-worker. Under certain circumstances, an employer may be held strictly liable for harassment by a supervisor.[51] Contrastingly, an employer may only be held liable

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[50] *See e.g., Marrero v. Goya of P.R., Inc.* 304 F.3d 7, 21 (1st Cir. 2002) (employer never implemented or disseminated its sexual harassment policy to employees); *Stockmar v. Col. Sch. Of Traditional Chinese Medicine*, Inc., 2015 WL 3568132, at *3 (D.Colo. June 8, 2015) (employer failed to adequately address the plaintiff's complaints of sexual harassment); *Miller v. Kenworth*, 82 F.Supp.2d 1299, 1310-1311 (M.D. Ala. 2000); *EEOC v. R&R Ventures,* 244 F.3d 334 (4th Cir. 2001)(employer could not escape liability where it did not interview the complainant or the alleged harasser, thus failing adequately investigate the complaint of harassment").

[51] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-762(1998) (where a supervisor subjects an employee to sexual harassment and takes a tangible employment action against the employee, the employer will be held strictly liable).

for harassment by a co-worker if the employer knew or should have known about the harassment and failed to discovery or remedy it.[52]

The linchpins of co-worker harassment are knowledge and action. If an employee communicates the harassment to **any** member of management, courts typically find that the employer had knowledge of its existence, whether actual or constructive.[53] Once the employer has knowledge of the alleged harassment, it **must** take prompt remedial action likely to prevent the misconduct from recurring.[54] If an employer can show that it did not have knowledge of the harassment and/or took prompt action to prevent the misconduct from reoccurring, the employer can successfully defend a claim a co-worker sexual harassment.[55]

B. *Faragher-Ellerth* Affirmative Defense

Pursuant to the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964,[56] an employer may be held strictly liable for the sexual harassment of an employee by a supervisor.[57] However, where the harassment by a supervisor[58] does not culminate in a tangible employment action to the employee, the employer can assert what is known as the *Faragher-Ellerth* affirmative

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[52] *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir. 2006); *Miller v. Kenworth of Dothan*, Inc., 277 F.3d 1269, 1278 (11th Cir. 2002); *E.E.O.C. v. Harbert-Yeargin, Inc.*, 266 F.3d 498 (6th Cir. 2001); *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006); *Duch v. Jakubek*, 588 F.3d 757, 762 (2nd Cir. 2009).

[53] *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Watson v. Blue Circle, Inc.,* 324 F.3d 1252, 1258 n.2 (11th Cir. 2003); *Duch v. Jakubek*, 588 F.3d 757, 762 (2nd Cir. 2009); *Rhodes v. Illinois Dept. of Transp*., 359 F.3d 498, 507 (7th Cir. 2004).

[54] *Henson*, 682 F.2d at 905; *Kilgore v. Thompson & Brock Mgmt., Inc.* 93 F.2d 752, 754 (11th Cir. 1996); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990).

[55] *Chavez-Acosta v. Sw. Cheese Co., LLC*, 610 F. App'x 722, 731 (10th Cir. 2015) (the employer cannot be held liable where the employer did not have actual or constructive knowledge of the harasser's conduct nor did the plaintiff ever report the harasser's conduct to the employer); *Sutherland v. Wal-Mart Stores, Inc.,* 632 F.3d 990 (7th Cir. 2010) (held that the company's reprimand of the harasser, adjustment of the harasser's schedule to keep him away from the plaintiff, and physical separation of their work duties were reasonably likely to end the harassment).

[56] 42 U.S.C. § 2000(e) et seq.

[57] See surpa, note 41.

[58] A "supervisor" is someone empowered to take tangible employment action against an employee, i.e., hire, fire, promote or refuse to promote, reassign work, and change benefits. *Vance v. Ball State University*, 570 U.S. 421, 464 (2013).

defense. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.[59]

In the joint cases *Faragher v. City of Boca Raton*[60] and *Burlington Industries, Inc. v. Ellerth*[61], the United States Supreme Court ruled that an employer could escape liability for harassment committed by a supervisor if it could prove that the employer took reasonable care to "prevent and correct promptly" any harassing conduct and the harassment victim failed to complain.[62] Specifically, to establish the defense, an employer must show that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[63]

To satisfy the first element of the *Faragher-Ellerth* defense, the employer may show that it maintained a detailed anti-harassment policy that was effectively communicated to employees. The policy must provide a meaningful process whereby an employee can express his or her concerns. The mere adoption of a policy is not enough to satisfy the first element of *Faragher-Ellerth*. Rather, the policy must "not only be effective on paper, but also in practice."[64] Once the employer has successfully asserted that it took reasonable care to prevent and correct any harassing behavior through adoption of policies, training, and communicating a reporting procedure, the employer must show that the employee unreasonably failed to take advantage of

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[59] *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 762 (1998); *Murray v. Chicago Transit Auth.*, 252 F.3d 880, 887 (7th Cir. 2001).
[60] 524 U.S. 775 (1998).
[61] 524 U.S. 742 (1998).
[62] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. 765.
[63] *Id*.
[64] *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 435 (7th Cir. 2012).

the preventive or corrective opportunities. An employee's unreasonable delay in reporting harassing conduct may constitute an unreasonable failure to take advantage of preventative and corrective measures.[65] However, no matter when an employee makes a report, the employer should still promptly respond to the complaint. Prompt, remedial action is the hallmark of the second prong of the *Faragher-Ellerth* defense.[66]

Since the Supreme Court's decisions in *Faragher* and *Ellerth,* courts around the country have made clear that to raise affirmative defenses to harassment claims, employers cannot simply just adopt harassment policies. They must also provide their employees with adequate harassment training and investigate any reports of harassment promptly. For example, in *Pullen v. Caddo Parish School Board*, the Fifth Circuit held that an employer was not entitled to summary judgment in a harassment case, in part because the employer had not provided its employees with harassment prevention training.[67] Likewise, in *Marrero v. Goya of Puerto Rico, Inc.,* the First Circuit ruled against an employer, stating as part of its reasoning that the employer failed to provide harassment prevention training to its employees.[68]

Moreover, in *EEOC v. Management Hospitality of Racine, In*c., the Seventh Circuit affirmed a jury verdict for the employee where a jury found that a company supervisor failed to report complaints of sexual harassment, training on the company's sexual harassment policy was inadequate, the company's sexual harassment policy itself was inadequate, and the company's investigation of the employee's complaint did not begin for two months.

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[65] *Hardy v. Univ. of Illinois at Chicago*, 328 F.3d 361, 365 (7th Cir. 2012).
[66] *EEOC v. Mgmt. Hospitality of Racine, Inc.,* 666 F.3d 422, 436 (7th Cir. 2012).
[67] 830 F.3d 205, 210 (5th Cir. 2016).
[68] 304 F.3d 7 (1st Cir. 2002).

Employers who successfully assert *Faragher-Ellerth* have policies, procedures, training programs, and investigation guidelines that are effective in counteracting harassment. For example, in *McKinnish v. Brennan*, the Fifth Circuit held that were an employer had a "clear and comprehensive" anti-harassment policy that identified individuals to whom the plaintiff could have complained and took "swift action to correct the harassment," it is entitled to the benefit of the *Faragher-Ellerth* affirmative defense.[69] Additionally, where an employer shows that it had all of the appropriate preventive and corrective mechanisms in place and the plaintiff employee failed to avail himself to those mechanisms, the employer will be entitled to the benefit of the *Faragher-Ellerth* defense.[70]

C. The *Kolstad* Defense

Under Title VII, punitive damages may be recovered where a plaintiff employee establishes that the employer engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of the aggrieved employee.[71] In *Kolstad v. American Dental Association*, the United States Supreme Court provided employers with a defense to punitive damages liability under Title VII.[72] Punitive damages are damages awarded over and above simple compensatory damages and aimed at punishing the employer for its lack of responsiveness. Circumstances under which a court might submit the issue of punitive damages to a jury include instances where: (1) the employer's policy is deficient or is not sufficiently distributed or publicized;[73] (2) the employer

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[69] 630 Fed. Appx. 177, 179 (4th Cir. 2015).
[70] *McKinnish*, 630 Fed. Appx. at 179; *Taylor v. Solis*, 571 F.3d 1313 (D.C. Cir. 2009); *Fontanez v. Jansen Ortho LLC*, 447 F.3d 50 (1st Cir. 2006); *Arnold v. Tuskegee University*, No. 0611156, 2006 WL 3724152 (11th Cir. Dec. 19, 2006).
[71] 42 U.S.C. § 1981 a(b)(1).
[72] 527 U.S. 526, 545 (1999).
[73] See e.g., *Marrero v. Goya of P.R., Inc.* 304 F.3d 7, 21 (1st Cir. 2002) (employer never implemented or disseminated its sexual harassment policy to employees); *Miller v. Kenworth*, 82 F.Supp.2d 1299, 1310-1311 (M.D. Ala. 2000); *Copley v. Bax Global, Inc.,* 97 F.Supp.2d 1164, 1169 (S.D. Fla. 2000).

failed to properly educate and/or train its employees on its policies;[74] (3) the employer's response an employee's complaint of harassment was inadequate;[75] or (4) the supervisor or manager responsible for enforcement demonstrated ignorance or negligence toward company policies and anti-harassment laws generally.[76]

In *Kolstad,* the United States Supreme Court held that employers could avoid punitive damages in harassment and discrimination cases if the employer could show that it had made "good faith efforts" to prevent harassment.[77] When determining whether "good faith efforts" were made, the court held that "[t]he purposes underlying Title VII are …advanced where employers are encouraged to adopt anti-discrimination policies and to educate their personnel on Title VII's prohibitions."[78] Hence, one way to show such "good faith efforts" and avoid punitive damages is by adopting, communicating, and consistently enforcing your No-Harassment Policy.

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[74] *EEOC v. New Breed Logistics*, 783 F.3d 1057. 1074 (6th Cir. 2015) (the good faith needed to avoid punitive damages does not exist where an employer failed to effectively publicize its sexual harassment policies to 80% of its workforce); *See* also *EEOC v. Walmart Stores, Inc.*, 187 F.3d 1241, 1249 (10th Cir. 1999*).*

[75] *See* e.g., *Knowlton v. Teltrust Phones, Inc*., 189 F.3d 1177, 1187 (10th Cir. 1999) (held that jury should have been allowed to consider claim for punitive damages because of managements "unmistakable awareness" that supervisor was creating a sexually hostile work environment); *Deters v. Equifax*, 202 F.3d 1262, 1270-1271 (10th Cir. 2000) (manager's inadequate response to plaintiff's workplace complaints of sexual harassment prevented the employer from asserting *Kolstad* defense to the imposition of punition of punitive damages); *Blackmon v. Pinkerton Security & Investigative Services*, 182 F.3d 629 (8th Cir. 1999)(upheld award of punitive damages in sexual harassment case where plaintiff complained to three different levels of supervisors and was retailed against for doing so); *Marrero*, 304 F.3d 7 (1st Cir. 2002) (employee complained about her supervisor's sexual harassment to other managers and was "cautioned to keep in mind that her supervisor was vice president and had worked at Goya for many years, whereas she was a relative newcomer" and told to "ignore" it); *Stockmar v. Col. Sch. Of Traditional Chinese Medicine, Inc.*, 2015 WL 3568132, at *3 (D.Colo. June 8, 2015) (employer failed to adequately address the plaintiff's complaints of sexual harassment).

[76] *Cadena v. Pacesetter Corp*., 224 F.3d 1203, 1210 (10th Cir. 2000) (manager failed to make good faith efforts to comply with company sexual harassment policy or Title VII).

[77] 527 U.S. 526, 545 (1995).

[78] *Kolstad*, 527 U.S. at 545-546.

VI. Conclusion

Bottom line: your policies are your first line of defense, managers and employees must be well-behaved and well-trained on sexual harassment, complaints must be promptly investigated, and appropriate action must be taken. With the spotlight on harassment shining brightly, failing to protect employees may come with significant consequences.

The #MeToo phenomenon has become a cultural tidal wave with rippling effects are impacting the everyday workplace. Your workplace can defend itself by implementing some of the proactive measures regarding policies, procedures, training, and investigations discussed in this paper. By doing so, your organization will be well on its way to creating a progressive culture of respect for all employees.