

# REBOOTING HARASSMENT PREVENTION

*Presented to:*

*Employment and Labor Law Section, Idaho State Bar*

*January 25, 2017*

*Bobbi K. Dominick, JD, SPHR, SHRM-SCP*


*Gjording Fouser, PLLC*

# What Do We Mean “Reboot”?

- **Reboot means:**  
to make a change in (something) in order to establish a new beginning
- **In harassment prevention, it means:**
  - ▣ **look closely at efforts to prevent harassment,**
  - ▣ **Begin anew to understand what really works in prevention**

# EEOC 2016 Report: Select Task Force on the Study of Harassment in the Workplace

- Stop focusing on legal liability
- Stop focusing merely on “compliance” mentality
- Focus on what really works in prevention
  - ▣ “Preventing harassment from occurring in the first place is far preferable to remedying its consequences.”



In the 1980's, it appeared possible to curtail and even eliminate harassment simply by enacting laws and developing policies. Few foresaw that laws could be “bent,” if not broken; that rigorous legal and grievance processes might be cited as deterrents to reportage; that approaches that worked well in some organizational settings would fail in others; that perceptions of what constitutes harassing behaviors could be influenced by individual, cultural, and generational, as well as gender, variables—in short, that understanding and preventing sexual harassment would be an ongoing, never-quite-final endeavor.

Dziech, Billie Wright & Hawkins, Michael W. **Sexual Harassment in Higher Education: Reflections and New Perspectives**, p. 32 , Garland Publishing (1998)

# Lawyer Role: Employer Attorneys

- Asked to review policies
- Asked to provide internal training
- Asked to conduct internal investigations
- Asked to review potential discipline
- At each of these steps, what can the lawyer do to assure legal compliance (the lawyer's role) but also encourage and not impede real efforts at prevention?

# Lawyer Role: Plaintiff Attorneys

- What did the employer really do to prevent and correct promptly (Faragher Ellerth defense)?
  - ▣ Are the policies really prevention oriented?
  - ▣ What training was provided, and was it effective?
  - ▣ How did employer encourage complaints?
  - ▣ When complaints arose how did the employer react?
  - ▣ Did the employer take prompt corrective action aimed at preventing future harassment?

# Systems

- Requires attorneys to understand organizational leadership, organizational culture and systems
- Requires employer attorneys to become a partner with leadership and HR professionals
- Understanding that fear of complaints and impulse towards protection against complaints is not in best interests of the client

# The Big Picture





# Important to Note

- The legal standard is an absolute minimum, organizations are free to adopt stricter rules.
- Most organizations establish workplace conduct norms that go beyond the minimum that the law provides
- Laws are based on communal interests that may be different from an organization's interests.
- An organization's values can drive behavioral rules as well.
- Leadership and organizational culture are strong drivers of behavior in the workplace~~prevention efforts must account for those elements.

# Some things to think about

- How does leadership of the organization communicate the organizational value of prevention?
- How does the organizational culture support prevention?
- Is the workforce more vulnerable to harassing behaviors, requiring more effort at prevention?

# More vulnerable workforces

- Homogenous workforces (a lack of diversity in the workplace.)
- Minority don't conform to unspoken workplace norms (ex: male behaves "effeminately")
- Cultural and language differences.
- Coarsened social discourse outside the workplace (9/11 or recent election campaign).
- Many young workers not aware of appropriate behavior.
- High value employees like top producers, more leeway for bad behavior.
- Significant power disparities, low status workers.
- Customer service or client satisfaction reliant, livelihood depends on tolerating bad behavior.
- Workplaces with monotonous tasks.
- Isolated workplaces.
- Tolerance of alcohol consumption.
- Decentralized workplaces where leadership is attenuated.

# Rebooting requires

- A proactive approach
- A multifaceted approach
- A close examination at what we know works to prevent harassment, and what we can improve
- Not just sexual harassment, but harassment based on all protected classes

# Leadership: Behaviors that encourage harassment rather than prevent it

- Tolerance of offensive behaviors or materials
- Leaders who are permissive (ignore policies or look the other way, or fail to address the behavior)
- Ineffective policies, or policies not widely known, distributed, talked about, and reinforced
- Nonexistent or ineffective training, not supported by leadership
- Leader models harassing behaviors
- Allowing perception of retaliation

# Culture

EEOC 2016: “...workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. ...leadership and commitment to a diverse, inclusive and respectful workplace in which harassment is simply not acceptable is paramount. ...Second, ...an organization must have systems in place that hold employees accountable for this expectation...An organization’s culture is set by the values of the organization....”

# Training

- Compliance vs. behavioral change
- Supported by leadership; reinforce policies
- Cognizant of culture and challenges of particular organization
- Recognition outcomes
- Understanding reactions; reducing victim blaming to encourage reporting
- Understanding harm & impact
- Fit within cultural norms & become part of culture of ethical behavior
- EEOC: Live, interactive training
- Multiple methods (lecture, behavior modeling, role play, case studies, etc.)
- Acknowledges factors such as implicit bias, attitudes
- All types of harassment
- Bystander intervention
- Sustained, effective training

# Fight against common stereotypes

- ❑ Only women are good at taking notes
- ❑ Jewish people are cheap
- ❑ The Irish are alcoholics
- ❑ Native Americans are lazy
- ❑ Muslims are terrorists



# Common Psychological Responses to Harassment (Coping)

- Avoidance
- Denial (relabeling, tolerating, detaching, self-blame)
- Minimizing
- Assertion
- Advocacy or seeking help
- Social coping

# Why do employees hesitate to report discrimination, workplace harassment and sexual harassment?

- ❑ Fear of losing their job
- ❑ Fear of retaliation
- ❑ Fear of getting someone into trouble
- ❑ Fear of disrupting the workplace
- ❑ Fear of being accused of having no sense of humor, or not being a team player
- ❑ Fear of being embarrassed
- ❑ Fear of feeling impotent or not valued
- ❑ Fear of not being believed.

# Policies

- EEOC:
  - ▣ Clear explanation of prohibited conduct
  - ▣ Assurance of nonretaliation
  - ▣ Clear complaint process
  - ▣ Assurance of confidentiality
  - ▣ Prompt, thorough, impartial investigations
  - ▣ Assurance of immediate and appropriate corrective action

# Policies

- Highly publicized-wide dissemination
- Highly regarded by leadership
- Sets organizational expectations
- Establishes a culture of respect
- Defines all types of discrimination and harassment
- Sets framework for accountability for those who harass and for supervisors

# Need more? Contact:

GJORDING | FOUUSER

Bobbi K. Dominick  
*Attorney*  
GJORDING FOUUSER PLLC

121 North 9<sup>th</sup> Street, Suite 600 | Boise, ID 83702  
t. 208.336.9777 | f. 208.336.9177  
[bdominick@gfidaholaw.com](mailto:bdominick@gfidaholaw.com) | [GFIdahoLaw.com](http://GFIdahoLaw.com)

# APPENDIX: EEOC RECOMMENDATIONS



# *Recommendations Regarding Workplace Leadership and Accountability*

- Employers should foster an organizational culture in which harassment is not tolerated, and in which respect and civility are promoted. Employers should communicate and model a consistent commitment to that goal.
- Employers should assess their workplaces for the risk factors associated with harassment and explore ideas for minimizing those risks.
- Employers should conduct climate surveys to assess the extent to which harassment is a problem in their organization.
- Employers should devote sufficient resources to harassment prevention efforts, both to ensure that such efforts are effective, and to reinforce the credibility of leadership's commitment to creating a workplace free of harassment.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the severity of the infraction. In addition, employers should ensure that where harassment is found to have occurred, discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- Employers should hold mid-level managers and front-line supervisors accountable for preventing and/or responding to workplace harassment, including through the use of metrics and performance reviews.
- If employers have a diversity and inclusion strategy and budget, harassment prevention should be an integral part of that strategy.

# *Recommendations Regarding Harassment Prevention Policies and Procedures*

- Employers should adopt and maintain a comprehensive anti-harassment policy (which prohibits harassment based on any protected characteristic, and which includes social media considerations) and should establish procedures consistent with the principles discussed in this report.
- Employers should ensure that the anti-harassment policy, and in particular details about how to complain of harassment and how to report observed harassment, are communicated frequently to employees, in a variety of forms and methods.
- Employers should offer reporting procedures that are multi-faceted, offering a range of methods, multiple points-of-contact, and geographic and organizational diversity where possible, for an employee to report harassment.
- Employers should be alert for any possibility of retaliation against an employee who reports harassment and should take steps to ensure that such retaliation does not occur.
- Employers should periodically "test" their reporting system to determine how well the system is working.
- Employers should devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Investigations should be kept as confidential as possible, recognizing that complete confidentiality or anonymity will not always be attainable.
- Employers should ensure that where harassment is found to have occurred, discipline is prompt and proportionate to the behavior(s) at issue and the severity of the infraction. Employers should ensure that discipline is consistent, and does not give (or create the appearance of) undue favor to any particular employee.
- In unionized workplaces, the labor union should ensure that its own policy and reporting system meet the principles outlined in this section.



# *Recommendations Regarding Anti-Harassment Compliance Training*

- Employers should offer, on a regular basis and in a universal manner, compliance trainings that include the content and follow the structural principles described in this report, and which are offered on a dynamic and repeated basis to all employees.
- Employers should dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information - even before such harassment reaches a legally-actionable level.

# *Recommendations Regarding Workplace Civility and Bystander Intervention Training*

- Employers should consider including workplace civility training and bystander intervention training as part of a holistic harassment prevention program.