



Employer Challenges in a #MeToo World

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What is the #MeToo World?



ANNUAL LABOR & EMPLOYMENT SEMINAR



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Is It Really Any Different?



Acting Chair of the EEOC notes that only 30% of women who experience harassment ever complain internally – and fewer still ever file charges with the EEOC.





EEOC 2017 Enforcement Statistics

Fiscal Year 2017:

- 84,254 charges of discrimination filed
- 6,696 of those charges were for sexual harassment (only 7.9% of the total)
 - Since 2010, there has been a slow but steady decline in number of sexual harassment charges filed each year
- 41,907 retaliation charges (48.8%)
- 28,528 race discrimination charges (33.9%)
- 26,838 disability discrimination charges (31.9%)



#Metoo: What can we expect?

- Many experts/pundits predict an uptick in number of sexual harassment charges filed in FY 2018
 - Fiscal year 2017 ended September 30, 2017, before #metoo movement went viral
- October 2017: EEOC announces new training and outreach programs addressing “Respect in the Workplace”
- #Metoo movement has its own website now, providing resources, support and education to encourage women and victims of sexual harassment and violence to speak out.
- Illinois legislature has recently taken action to address sexual harassment within the state government.

What is Sexual Harassment?

Illinois State Law

- Illinois Human Rights Act (IHRA 775 ILCS 5/2-101(B) defines “employer” as any person employing one or more persons when a complaint alleges discrimination based upon sexual harassment (or disability or pregnancy discrimination.)
- Otherwise, to be subject to IHRA an employers must have 15 or more employees.





What is Sexual Harassment?

Illinois State Law

Illinois Department of Human Rights (IDHR) defines sexual harassment as:

- any unwelcomed sexual advances, requests for sexual favors or any conduct of a sexual nature when:
 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
 2. Submission to or rejection of such conduct by an individual is used as the bases for employment decisions affecting such individual; or
 3. Such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.



What is Sexual Harassment?

Federal Law

- Title VII of the Civil Rights Act of 1964 is the federal law that prohibits employers from discriminating against employees on the basis of race, color, national origin, sex, disability and religion.
- Title VII does not expressly define sexual harassment, but the U.S. Supreme Court has held that sexual harassment is discrimination “because of sex” within the meaning of Title VII.





What is Sexual Harassment?

Federal Law

- Per the U.S. Supreme Court, the critical issue in sexual harassment is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.
- Title VII applies to employers who have 15 or more employees.



Harassment Must be Unwelcome

- Under both state and federal law, the conduct at the core of sexual harassment must be unwelcome, meaning it was not solicited or invited, and is undesirable and offensive
 - Did the employee solicit or instigate the alleged conduct?
 - Did the alleged victim participate or encourage the alleged conduct or engage in any alleged sexual banter?
 - Was there a consensual relationship between the alleged victim and alleged harasser?
- Courts will examine the totality of the circumstances:
 - The substance of the conduct
 - The frequency of the conduct
 - The relationship of the parties

Conduct Which May Constitute Sexual Harassment:



- Verbal: Sexual innuendoes, insults, humor, jokes about sex, propositions, threats, repeated requests for dates, etc.
- Non-verbal: Suggestive or insulting sounds, leering, obscene gestures, kissing noises, licking of the lips, etc.
- Visual: Posters, signs, slogans of a sexual nature, viewing pornography at work, etc.
- Physical: touching, unwelcome hugging or kissing, pinching, brushing up against the body, any coerced sexual act or actual assault.
- Textual/Electronic: sexting, cyberstalking, inappropriate electronic communication of all forms (e-mail, text, company intranet, social networks, etc.)



“Quid Pro Quo” Harassment

- Latin phrase meaning “Something for Something” or “This for That”
- Refers to sexual harassment where tangible employment benefits are conditioned on compliance with sexual demands
- Tangible employment benefits include: hiring, firing, promotions, reassigning with significantly different responsibilities, or other decision causing significant change in person’s employment benefits
- The alleged harassment must be sexually motivated

“Hostile Environment” Sexual Harassment

- Unwelcome conduct of a sexual nature, directed at the person because of his or her sex, and that is so severe, ongoing and pervasive that it negatively alters the work environment
- Occasional or offhand teasing or crude remarks of sexual nature, or isolated incidents, do not create a hostile work environment.
- The harassment must be sufficiently severe or pervasive to make a reasonable person feel that the work environment has been altered.
- Courts will analyze the impact of the alleged harassment from both a subjective and objective viewpoint, considering what a “reasonable person” would find hostile or abusive.





Employer Liability: Harassment by a Supervisor

- If harassment by a supervisor results in an adverse or tangible employment action, the employer is ***strictly liable***.
- A supervisor is “someone empowered by the employer to affect the terms and conditions of a person’s employment, i.e. to hire, fire, transfer and discipline the employee.”
- If no adverse or tangible employment action is taken, an employer may escape liability by proving that:
 - The employer exercised reasonable care to prevent and correct any harassing behavior, and
 - The plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

See, Faraqher v. City of Boca Raton

Burling Industries, Inc. v. Ellerth



Employer Liability: Harassment by a Co-Worker

- Employer is liable for sexual harassment by an employee's co-worker only when the employee can show that the employer "has been negligent in either discovering or remedying the harassment."
- The employer must have notice or knowledge that the harassment is occurring before the employer can be liable.
- If an employer does not have a good Anti-Harassment Policy in place, the employer may lack an adequate defense to any claim of sexual harassment even by a co-worker.



Retaliation Claims

Under both federal and state law, no supervisor or agent of the employer shall take any retaliatory action against any employee due to the employee's:

1. Disclosure or reporting of any sexual harassment;
2. Providing information related to any investigation, hearing or inquiry into sexual harassment conducted by any public body or agency ; or
3. Assisting or participating in a any proceeding to enforce the provisions of the employer's policy prohibiting sexual harassment.

Even if the employer finds no sexual harassment occurred there can be no retaliation if the report was made in good faith.

BUT, employers may discipline employees for filing bad-faith claims of sexual harassment.





Damages Which May Awarded to An Alleged Victim of Sexual Harassment

1. Back pay
2. Front pay
3. Compensatory damages
 - Emotional distress
 - Pain and suffering
 - Harm to reputation
4. Punitive damages
5. Attorney's fees





What Can Employers Do to Protect Themselves?

Develop and Implement a Strong Anti-Harassment Policy

- Must include policy on prohibition of all forms of harassment, including specific reference to sexual harassment
- Policy should define what constitutes sexual harassment and provide examples
- Policy should provide alternative methods for an employee to report sexual harassment
- Policy should provide a procedure for investigation of complaints of sexual harassment, including procedures for making findings and decisions based upon the investigation
- Policy should include statement prohibiting retaliation



Should the Employer Investigate?

What are the possible Triggering Events:

- Potential violations of Employment Discrimination Law
 - Civil Rights Act of 1964, ADA, ADEA, GINA, State Law (IHRA)
- Personal Observations by Supervisor/Management
- Complaint by Employee
- Retaliation or Whistleblowing claims
- Rumors of Inappropriate Conduct





Conducting an Investigation

Why conduct One?

- Allows employer to gather relevant facts that can lead to proper employment decision
 - Prompt investigation may well satisfy an otherwise upset employee, preserve morale (and possibly avoid a lawsuit)
 - Proper and thorough investigation may serve as a defense in any lawsuit related to conduct at issue
- Remember, an Employer may avoid liability for co-worker's conduct if:
 - it can show it exercised reasonable care to prevent/correct behavior; and
 - employee failed to take advantage of corrective opportunities

Conducting an Investigation

Be Objective



Be Impartial

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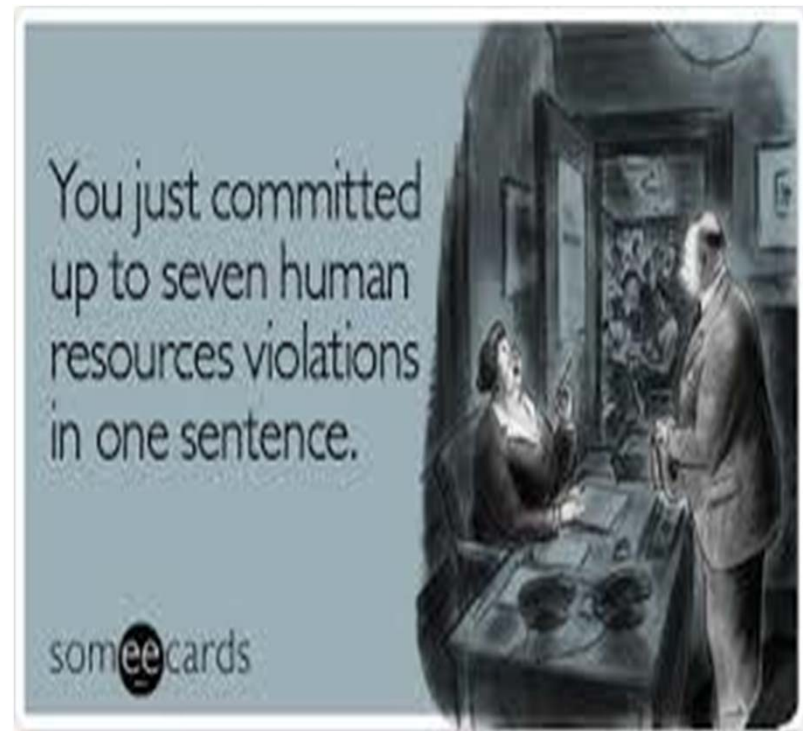
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Conducting an Investigation

“I complained, but the company did nothing”

- In cases where alleged misconduct is minor, many attorneys will focus on employer investigation
- If fail to promptly and properly investigate, the employee will use this to make the employer look bad – as either complicit, inept or indifferent





Conducting an Investigation

Who should conduct the investigation?

- Knowledgeable about applicable laws, employer policies, and/or collective bargaining agreement
- Experience with investigations, skilled in interviewing and assessing credibility
 - IMPORTANT: Will he/she make a good witness
- Unbiased, no relationships with parties involved, ability to remain impartial
 - IMPORTANT: Must also be perceived as unbiased
- Job Titles/Positions of employees involved in alleged misconduct or wrongdoing



Conducting an Investigation

MAKE A PLAN FOR THE INVESTIGATION

1. What is being investigated?
2. What employer policies, guidelines or terms of a collective bargaining agreement apply?
3. What type of documentary or other evidence is likely to exist and/or needs to be collected?
4. Who will be interviewed (and in what order)?
5. How has agency/employer handled similar situations in the past (better to be consistent)
6. Is specialized expertise needed to understand the situation, laws or policies at issue?



Conducting an Investigation

PREPARING FOR THE INTERVIEWS

- Don't just go into the interview and plan to wing it
- Gather as much documentary evidence as possible before commencing the interviews
- Consider the order of the witnesses to be questioned
 - Start with the complaining employee
 - Interviewing other identified witnesses next, considering:
 - Likelihood the witness has actual or relevant knowledge;
 - Risk of that employee witness feeding the rumor mill;
 - Bias of the witness
 - Generally prefer to conclude with the accused employee
- Outline and compile the questions you wish to ask each witness



Conducting an Investigation

CONDUCTING THE INTERVIEW



- Take Notes (take a lot of notes)
 - Consider having another person sit in on the interview
 - Particularly for interview of the complainant and the accused
 - One person takes notes while the other questions witness
 - Interviewer should still feel free to take own notes as well
- Assess the Credibility of the Witness [EEOC Factors]
 - Demeanor: Is witness nervous, combative? Appear truthful?
 - Motive: Does the witness have a reason to lie?
 - Plausible: Does the witness' story make sense?
 - Supportable: Are there documents/evidence which support story?
 - Prior Record: What is the disciplinary or performance review history of the witness?



Conducting an Investigation

OTHER CONSIDERATIONS IN COURSE OF INVESTIGATION:

- Record the Interviews?
 - May make witness more hesitant to open up
 - Cannot record without consent
 - Violates Illinois Eavesdropping Act to record without consent of all parties, Act makes it a criminal offense in Illinois
- Review of Emails and/or Text Messages
 - Do you go into accused's computer at work and start reviewing?
 - Again must have consent of the parties to do so
 - Can have implied consent based on Employer's computer usage policies – but the policy must be clear that all work emails are monitored and no privacy expectation by employees
 - Run the risk of violating Electronic Communication Privacy Act, Stored Communication Act, and even Illinois Eavesdropping Act



Conducting an Investigation

MAKE CONCLUSIONS AND TAKE ACTION

- Have a meeting to discuss Report/Make Decision
 - Investigator should present Report to Decision Makers
 - Decision Makers should include HR Director, relevant Managers and/or Department Heads, and even agency or outside attorney if deemed appropriate
 - Answer Question: Were employer policies violated and/or did misconduct occur?
- Make the Decision as to what action should be taken based on conclusions, facts and information contained in the report, and on the advice of counsel as necessary



Conducting an Investigation

IF HARASSMENT/DISCRIMINATION OCCURRED:

- Employer **MUST** remedy harassment/discrimination
- Remedies as to the accused wrong-doer include (depending on severity and aggravating and mitigating factors):
 - Transfer, demotion, loss of bonus, reduction in pay
 - Counseling
 - Training
 - Discipline (including suspension without pay, written reprimand in file, verbal warning, etc.)
 - Termination of employment



Conducting an Investigation

FOLLOW UP WITH COMPLAINANT AFTER INVESTIGATION

- Prepare a written memo and meet with complainant to inform of the findings/conclusions of the investigation
- Confirm what action, if any, will be taken as a result of the investigation
- Confirm that retaliation against the complainant is prohibited, and request that complainant immediately report any perceived retaliation
- Encourage complainant to discuss any concerns or disappointment with results and/or action taken



Conducting an Investigation

FOLLOW UP WITH ACCUSED WRONG-DOER

- Prepare memo and meet with the Accused and Union Rep, if applicable, to advise of conclusions and findings of the investigation and any action to be taken
- Remind accused of prohibition against retaliation and consequences of same
- Inform accused that he may discuss any concerns or disappointment with results and/or action taken (unless the decision is to terminate, then do not engage in discussion/argument during termination)
- If terminating, advise accused to put concerns in writing to the company for appropriate response