



Sexual Harassment in The Workplace

IS ANYONE LISTENING?

Kelly Johnson | Capstone – Thought Piece | July 2022

Problem Statement

Patterns of sexual harassment often reflect cultural norms and beliefs connected with *space*. We must challenge the myth that sexual harassment is no big deal, along with train and educate the workforce more effectively.

We need to reduce these claims by 60% and enforce consequences that support our understanding about the severity of this human rights violation. Sexual harassment occurs in other areas as well.

Overall, sexual harassment was reported at work (by 66% of respondents), — including temporary jobs and internships (38%).

Victims of sexual harassment suffer from an undermined sense of dignity, their competence is threatened, possible compensation loss, and there is definitely an increase in absenteeism. Moreover, a toxic work environment exists.

Culture improvements and awareness will lead to safer workplaces, better morale, low turnover, increased productivity, and innovation the employees and company will benefit from.

OBJECTIVES

To present my knowledge and expertise from a consultant's point of view to help decrease sexual harassment claims.

From the perspective of a consultant, there are multiple objectives and things that can be done to assist supervisors, managers and executives with education and training to improve the reduction of claims and reduce the possibility for this behavior to continue in the workplace.

To explain reinforcement and leverage training and education in the workplace and among corporate leadership.

If consultants reinforce training that has been previously completed by employees, there should be a way to identify where the gap of understanding and application is. We can learn more about how to leverage education in the workplace and among corporate leadership.

To improve morale and increase awareness so that the contributing claims will decrease.

Third-party consultants are important because there is a barrier of safety and confidence involved in the commitments and recommendations. There is no familiarity with management or executives, so we can be confident there is no bias.

If we are serious about improvement and increasing awareness, this will help to ensure effective measures are taking place and claims will decrease.

Most Recent Highly Publicized Cases, Facts, and Outcomes

CVS Case Summary Brief:

CVS CEO Karen Lynch removed several top-level executives after a harassment allegation was not investigated properly or treated seriously. Two female employees in NJ reported that a manager of a CVS store harassed and touched them inappropriately. CVS hired a third party to investigate, which resulted in the firings.

In a memo dated March 11, 2022, to all company employees, CEO Lynch made the strong statement “we absolutely do not tolerate behavior or actions that are harassing, hostile, abusive or discriminatory” and she delivered on it, showing her support for safe workspaces for employees and management at CVS.

This case is still pending filings, litigation, and settlement.

Mitsubishi Case Summary Brief:

Mitsubishi paid out a record 34-million-dollar settlement and issued an apology to over 300 women who were victims of sexual harassment at the auto plant in Normal, IL. This is more than triple the amount paid because just in the previous year, the auto manufacturer paid 10-million-dollars to settle a separate, private lawsuit filed by 29 female employees who raised similar allegations. The EEOC took the case in 1996, and found that women had been groped, grabbed, and pressured for sex. As part of the settlement, 20 employees were fired, and many others were disciplined.

The case took a long time to resolve because at first Mitsubishi's top executives simply didn't see the magnitude of the problem.

EEOC v. Mitsubishi Motor Mfg. of America, Inc., 990 F. Supp. 1059 (C.D. Ill. 1998)

McDonalds Case Summary Brief:

This fast-food giant faces a 500-million-dollar lawsuit because it alleged, they created and encouraged a hostile work environment that set up the playing field for sexual harassment to be common in its Florida restaurants.

There was sufficient evidence to prove McDonalds engaged in a pattern of maintaining a hostile work environment that provoked and supported this behavior and did nothing about it. Female employees stated were told to report any misconduct, but management was not trained on how to investigate the allegations or misconduct. It was also alleged that managers were not held accountable and most if not, all complaints were mis-handled.

The McDonald's Hostile Workplace Class Action Lawsuit is *Fairley et al. v. McDonald's Corp. et al.*, Case No. 1:20-cv-02273, in the U.S. District Court for the Northern District of Illinois.

21st Century Fox/Fox News Case Summary Brief:

This is a case that generated a lot of attention because of who was involved. *Fox & Friends* co-host Gretchen Carlson accused Fox News' then chairman, Roger Ailes, of sexual harassment.

The parent company, 21st Century Fox paid Carlson 20 million dollars and issued a public apology, which was highly unusual given their platform.

Carlson repeatedly complained about the sexist atmosphere and was subjected to comments from Ailes like *“learn to get along with the boys”* and *“you and I should have had a sexual relationship a long time ago.”*

Ailes would also comment on her figure, asking her to turn around so he could see her rear, and underscored what he could do for her career if she responded to his invitations favorably. Other women, including Megyn Kelly also came forward with similar allegations. It is well-known these problems extend far past Ailes, but it was a sustaining culture at Fox News.

Gretchen Carlson’s Complaint: <https://www.documentcloud.org/documents/2941030-Carlson-Complaint-Filed>

Was anything ever in place to prevent these cases from happening?

As for CVS, there was an established hotline which allowed for anonymous reporting, however, the allegations in the reports were not taken seriously and no action was taken – *no one was listening.*

When several female employees reached out directly to CEO Karen Lynch, she acted immediately. She has been in place as CEO since February 1, 2021, and has been making positive improvements within CVS’s corporate structure. CVS is still working on building an atmosphere of trust at all levels.

At **Mitsubishi**, the executive vice president acknowledged there had been problems at the plant, which required correction, but no steps were taken – *no one was listening*.

Terms of the settlement included the creation of a third-party panel of monitors who will ensure policies are being adhered to at the plant and complaints are promptly and thoroughly investigated.

The monitors are Joyce Tucker, a republican appointed for EEOC Commissioner, Nancy Kreiter, research director at Women Employed, a Chicago based women's rights organization, and George Gallant, a Chicago lawyer who helped bring the sexual harassment lawsuit against Mitsubishi.

McDonald's has faced numerous lawsuits and bad press coverage in the media about the sexual harassment claims made by workers in their restaurants.

They made commitments to put in place practices and training to end sexual harassment in its stores, but per workers, there have been no signs of real efforts to change the culture. As of 2022, it still seems as if *no one is listening*.

Per one worker who has been employed with a McDonalds corporate-owned store for nearly two-decades, she documents that she has never received any substantial sexual harassment training. Only once, two-years ago, she and her co-workers were instructed to watch a video about harassment on tablets.

In the aftermath of the **Fox News** scandal, 21st Century Fox struck a settlement deal with shareholders to overhaul the workplace culture at the network.

Per a press report, the agreement called for the creation of an oversight panel – the Fox News Workplace Professionalism and Inclusion Council. This panel includes two company human resources executives and four independent experts.

The council will provide written reports to the directors and be transparent by publishing their updates and findings on the company’s website.

This settlement helps to recoup the large financial toll that the sexual harassment crisis had on 21st Century Fox.

Although sexual harassment allegations continue, and even after the Bill O’Reilly scandal, Fox News has shown its commitment to making efforts to clean up the workplace. So, it appears someone at this corporation may be *listening*.

Practical Policy Areas: State Comparators

There are nine states which do not have a sexual harassment policy **requirement**, but a ***strong recommendation in place***:

- Colorado
- Iowa
- New Jersey
- New York City
- South Dakota
- Tennessee
- Texas
- Wisconsin

Actions have moved swiftly along in part due to the #metoo movement. Many of these policies are new and they require employers to act, train and socialize detailed policies on anti-harassment.

Not all states and cities with anti-harassment training requirements have policy mandates and conversely, there are some states that do not require training, but do require that employers have a policy with specific language regarding anti-harassment.

Many states specifically require the policy to include reporting mechanisms, both internally and externally, for the EEOC or state agency.

There are several states which do have a sexual harassment policy **requirement and/or recommendation in place:**

- California
- Connecticut
- DC
- Illinois
- Maine
- Massachusetts
- New York State
- Oregon
- Rhode Island
- Vermont
- Washington

For each state with a policy requirement or recommendation, it is noted as a best practice to include these policies in company handbooks and create multiple opportunities to evangelize this information among all employees.

In concert, employers should consistently improve and incorporate a robust program to regularly train employees and enforce sexual harassment policies.

States with sexual harassment prevention mandates include California, Connecticut, Delaware, Illinois, Maine, and New York.

Executive Friendly v. Employee Friendly Policies

There can be many uses for executive agreements and policies as well as many abuses.

One example, as it relates to the corporate workplace, executive agreements can be abusive if they only speak to the “flowery” aspects of the executive role and not to social responsibility or the regard of all employees. Executive agreements should also include behaviors to refrain from, the severity of adverse actions, and consequences of adverse activity should they engage in any. As of now, most executive agreements offer one-sided protection for the executive and not the subordinate, or employees against any harm they may/can cause them.

You will see more liberal laws, on the west coast, in states like California, where more employee friendly policies are emerging. Although it may take some time, the same will happen across the nation.

While the federal government sets the minimum standard for employment protection, including the minimum wage and anti-discrimination laws, states are free to write their own employment laws. California is considered one of the most employee-friendly states in the United States.

Why?

Because legal requirements in California prevail over other state laws, and in some cases, supersede federal laws. Regulations in California are enforced by six different state regulatory agencies. In comparison, other states are only subjected to two or three.

Psychological Safety

In the book “*The Fearless Organization*” written by Amy Edmonson discusses what psychological safety is and is not.

Let’s start with what psychological safety is *not*: It is not about *lowering* performance standards nor is it about becoming “*comfortable*” at work. She explains this is important to understand because although managers appreciate a culture and any ideas that will help employees grow, they do not want to equate this with relaxed performance standards. They still want to be able to hold people accountable.

From reading her book, what we can do is learn how to avoid failure by setting high standards for ourselves and our employees and demonstrate these high standards in how we treat each other, manage priorities, and perform our work every day.

As it relates to sexual harassment, we should incorporate this same strategy for high standards when listening to one another and act when these concerns are brought forward.

Litigation: Top Five States with Highest Workplace Sexual Harassment Claims FY

2020:

- Texas 700
- Florida 673
- New York State 414
- Pennsylvania 414
- Georgia 349

More and more, language and confidentiality clauses are being added to employment contracts to support victims who experience sexual harassment in the workplace.

The process for filing a sexual harassment charge under federal law begins with filing a charge with the Equal Employment Opportunity Commission (EEOC). The charge must be filed within 180 days of the incident.

If a case is found in favor of the plaintiff or victim, there are usually two types of damages (monetary amounts paid) to settle the case:

Compensatory – Payment to victims for out-of-pocket expenses caused by the discrimination and to compensate them for emotional harm (such as mental anguish, inconvenience, or loss of enjoyment of life).

Punitive - Punitive damages are awarded to the claimant for things that can't be calculated. They are intended as punishment for reckless or malicious actions.

Out of Court Settlements - An overwhelming majority of sexual harassment cases are settled out of court for a variety of reasons:

- Both parties want to avoid the costs and long timespan needed to settle in court.
- The outcome of a court case is impossible to predict. A settlement provides a “bird-in-the-hand” of a guaranteed amount.
- Victims of sexual harassment want to avoid the public humiliation of being asked about their sexual history.
- Companies don’t want the publicity of a public trial.

Case History, the Law, Penalties

1974: *Barnes v. Train*, is the first sexual harassment case in the United States. It was tried in the U.S. District court in DC, and Barnes, who at the time worked for the EPA, claimed her job was eliminated because she rejected her supervisor’s sexual advances. Even though there was evidence the supervisor thought Barnes was attractive and he felt rejected, there was no finding of any discrimination.

1975: Lisa Farley, journalist, and author, helped coin the term “*sexual harassment*.”

1976: *Williams v. Saxbe*. Williams was a public information specialist at the U.S. Department of Justice. In 1972, she was repeatedly harassed and humiliated at work and had refused her supervisor’s sexual advances. After bringing her claims to court, she was awarded \$19, 147 in compensation, ruling that the Civil Rights Act shields employees from retaliation for refusing their supervisor’s sexual propositions.

Title VII of the Civil Rights Act of 1964 (“Title VII”) makes it illegal for employers to allow anyone to be sexually harassed at work by anyone else, regardless of sex, gender, or sexual orientation.

Under Title VII, federal courts recognize two forms of sexual harassment:

- Quid pro quo
- Hostile work environment

The federal law criminalizing sexual assault sets a maximum of 20 years in prison and fines. Also, those convicted of sexual assault must compensate their victims for any expenses directly related to the crime.

Training Effectiveness: Why is this still happening?

The content is not tailored to the industry – according to the EEOC task force on workplace harassment, regular, focused, and interactive training that is specifically tailored to your industry is most effective. For example, if you're in the transportation industry, what might sexual harassment look like among drivers or package handlers?

Limited access to training and training materials – the best results come from training that is optimized, and robust. This means training where interaction is required and as much as possible, instructor led training or in-person workshops. In these types of settings, simulations and role playing is most effective.

Little to no awareness of policies that exist in the workplace – the EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors and other unwanted conduct of a sexual nature that directly or in-directly interferes with a person's work, creates a hostile work environment, or is made as a condition of employment.

Not aware of bystander tactics – bystander tactics has its roots in the military and on college campuses as a tactic to prevent sexual assault. Workplace intervention is one of the most effective ways to stop misconduct oftentimes before it gets out of hand.

Diversity, Equity, and Inclusion are not promoted – training employees and managers on how to support a more inclusive environment and prevent harassment and discrimination. Training should also include raising awareness about unconscious bias and microaggressions. This should be far reaching beyond gender and race.

Reporting is not encouraged – there are still an astounding number of employers who do not yet have a way for employees to report concerns anonymously. This can be viewed as a deterrent as it does not foster reassurance that concerns will be heard and addressed. This also adds to the belief that reports won't be taken seriously and there will be retaliation. Managers should be trained to handle reports and promptly address and investigate complaints to avoid retaliatory behaviors.

Gaps in labor and civil rights laws create vulnerability to sexual harassment among large numbers of Americans – there are workers in sectors other than the traditional workplace, who are not covered by current civil rights laws. This mostly includes independent contractors, entrepreneurs, gig-workers, and domestic workers (housekeepers) who may face other challenges such as immigration laws due to their status.

This has been left out and needs some focus to ensure equal and fair treatment.

Training Effectiveness: Workplace Climate Assessments

When training has not been effective or the wrong elements have been focused on, sometimes assessments and or surveys are a good way to pin-point where gaps are in application and understanding. A well-executed workplace climate survey helps employers discover ways for improvement.

Below are some effective categories and effective questions when conducting a climate assessment.

Assessment Categories:

Prevalence – this is the frequency, nature and impacts of workplace sexual harassment.

We should work to establish a safe space, have broad and inclusive oversight, and always assess multiple behaviors that happen in the workplace.

- Example question: In the past 12 months, how often did someone at work:

Response Options: Never / Once / Once a Month or Less / Two-Three Times a Month / Once a Week or More / One or More Times a Day

Make unwanted attempts to establish a sexual relationship with you, or engage in sexual activities with you, despite your efforts to discourage these attempts or express disinterest?

Make you feel like you were being bribed with some sort of reward or special treatment to engage in sexual behavior?

Make you feel threatened with some sort of retaliation for not being sexually cooperative (for example, by mentioning an upcoming review)?

Touch you in a way that made you feel uncomfortable?

Equity – here is where there is belief in access to equal opportunity and fair treatment.

We can also identify the underpinnings of misconduct.

We should work towards inclusivity, workplace satisfaction, provide advancement opportunities, and empowerment.

- Example question: When participating in work meetings, events, or activities, I was talked over by others. If yes, indicate whether you believe the behavior was based on your:

Gender

Sexual Orientation

Gender Identity

Race or Ethnicity

Disability

Other: _____

Accountability – we should view this from the victim’s perspective, understand perpetrator accountability, ensure there is satisfaction with the complaint process, and search out any victims who may have been deterred.

- Example question: Did any of the outcomes listed below occur as a result of the making of an oral and/or written complaint?

Response Options: Yes / No / Don't Know

No action was taken.

Someone talked to the harasser to ask him/her to change behavior.

My workstation location or duties were changed to avoid the person.

I was encouraged to "drop" the issue.

The person stopped the behavior.

My leadership punished me for bringing it up (e.g., denial of promotion/training, transfer, reassignment to a less favorable work site or duties, scheduling changes).

There was an adverse action taken against the harasser for his/her behavior (e.g., demotion, loss of pay, termination).

Department Of Justice – Guidance & Outcomes

The **DOJ** has established guidelines for corporations to abide by within corporate structures. These guidelines are designed for the protection of employees without regard to race, national origin, gender, or sexual orientation. All persons should be able to be in a workplace free from sexual harassment and sexual misconduct, even if it does not rise to the level of harassment actionable under Title VII of the Civil Rights Act of 1964.

The DOJ has helped us to be more open and impactful in the following ways:

- Affirmed for survivors that they are not alone.
- Shifted social norms and opinions about the issue.

- Exposed belief systems that enable abuse.
- Increased compassion for survivors.
- Updated and enacted laws and policies.
- Created avenues for survivors to speak up and share their stories.
- Broke the silence surrounding sexual harassment, sexual assault, and sexual bullying.
- Destigmatized the issue and made it safe for discussions.
- Punished many powerful men through legal action and negative public opinion.
- Highlighted the need for formal anti-harassment policies.
- Prompted several states to ban non-disclosure agreements, which help powerful people hide their actions by buying survivors' silence.
- Created the Time's Up Legal Defense Fund, which has provided legal representation to thousands of survivors.

Costs of Mitigation

Most consultants are promoters of in-person/instructor-led, on-site training. Documented professional experiences show how this style of training has proven to be the best approach when creating awareness in the workplace regarding sexual harassment. While this preference may be more costly, your company will receive the benefit of having a more informed workforce, better relations among employees, lower turnover, improved productivity, and the possibility of reducing sexual harassment claims in the workplace.

Your investment will create a tone from the top that shows you promote a culture of respect in your organization and ensure you are in legal compliance at the same time.

These in-person training and interactive sessions are valuable and give a personal touch to groups, teams, and executive-level staff.

In addition to creating awareness among your employees, your management staff will understand and practice techniques on how to handle complaints and reports in accordance with company policies and federal and state laws.

A Need for Better Auditing

Most reporting systems don't work – still, in most companies, victims are required to report claims of sexual harassment through a strict chain of command that more than likely includes the perpetrator or their “friends.” This effectively silences victims or freezes complaints. This must be changed across all sectors in all industries.

We need more data – even with producing this document for capstone, it was extremely difficult to find robust, consistent data, on a national or industry level. Due to privacy laws, and non-disclosure agreements and private settlement agreements, it is difficult to find solid research about the causes, findings, mitigation, and remedies for workplace sexual harassment cases. We do need more, available data to shine a light on these findings to allow for more creative solutions.

Solutions must be targeted and aimed at changing culture, systems, and structures – right now companies handle sexual harassment complaints in three ways: ignoring complaints, firing the harasser, or offering canned sexual harassment training that proves to be ineffective. This must change because obviously these approaches are not working. Combating sexual harassment must come from the top-down and be supported and executed by everyone in between.

Keeping it all together: Crisis Management & Business Resiliency in the Workplace

Sexual harassment is often driven by narratives, myths, and norms about women, men, and workers. It's unfortunate, but the truth is we deal with one another based on our shaped realities in our lives and personal cultures. It's fueled by the stories we tell ourselves and what we choose to believe.

Harassment comes in two basic varieties: gender-based sexual harassment and sex-focused sexual harassment. Gender harassment is generally not about sexual attraction or sexuality. Gender-harassing physical, verbal, and symbolic behaviors insult and degrade one's gender to assert power, control behavior, or force those who don't conform out of a particular job or out of the profession entirely.

As we take the issue of sexual harassment in the workplace from crisis to opportunity, we should recognize the five C's when planning a communications strategy to discuss sexual harassment with executives and employees:

- Care
- Commitment
- Competency
- Community
- Continuity

Resilience is the continued pursuit of goals despite adversity and it's an important asset to have in an organization. Although adversity is inevitable and each of us will have to endure adversity at one point or another, it is something we can learn.

As we work to turn around workplace culture for the better, keep the following in mind:

Workplace Resilience is adaptive and malleable and trainable. With the right perspective, the appropriate training, growth, and development can take place and the right setting can happen for constructive work to improve the workplace.

Human Speak v. Legal Speak

Make conversations about sexual harassment easier – offer to take off your “manager hat” and put on your “human hat.”

Knowing how to effectively communicate is key to having productive conversations with employees. Sometimes a direct line in a message campaign such as “*Keep Your Hands to Yourself*” or “*Respect Personal Space*” sends a huge, positive message and it works to drive the message that doing the opposite causes problems in the workplace.

Some of the best skills a manager can have to foster and navigate a trusting relationship are:

- Building rapport
- Active listening
- Clarity
- Showing understanding
- Flexibility
- Conflict resolution
- Being available
- Assertiveness

Establishing Procedures & Enforcement of Complaints

In some of the cases we reviewed, we saw complaints that were not addressed, botched investigations, and even some concerns totally ignored.

To ensure *someone listens*, be sure to act and appropriately address claims:

- Take every complaint seriously
- Thoroughly investigate every complaint
- Do not make credibility judgements based on the perceived “reputation” of the person
- Don’t assume the person making the complaint is being overly sensitive or dramatic
- Don’t leave it to the parties involved to work it out
- Remember that not all employees will label unwelcome conduct as harassment

Create A Zero Tolerance Harassment Policy

An important part of preventing claims and protecting your business is socializing and evangelizing a written policy stating harassment will not be tolerated.

This by *all means* should include:

- A definition of harassment
- The law
- Instructions about how to file a complaint
- Discipline and consequences
- A statement of protection against retaliation

Conclusion

It is important to define exactly what type of conduct is acceptable and unacceptable in the workplace. Stating this clearly helps us to enforce policy and helps employees understand what your objectives are.

- **Point one:** Harassment is hostile verbal or physical conduct that harms a person by inflicting shame, emotional distress, and mental distress upon them.

Show the effects of creating an intimidating and offensive work environment.

- **Point two:** Harassing conduct includes negative stereotyping, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, or disability.

Can also include written or graphic material that shows hostility toward an individual or group.

- **Point three:** Be sure to tell employees how to make a complaint and what they can expect once they have filed a complaint.

Include the time frame the report will be investigated and when the complainant can expect to receive a response.

- **Point four:** Be sure to communicate any complaint or report made will be kept in full confidence and promptly investigated.

Create case codes or report numbers to ensure confidentiality.

- **Point five**: Socialize and evangelize and **ENFORCE** consequences for sexual harassment if an employee is found to have engaged in such conduct.

Any employee who engages in harassing behavior is subject to discipline up to and including termination of employment.

- **Point six**: Ensure employees there is protection against retaliation.

Employees have the right at any time to make a complaint *with no fear* of retaliation.

Thought Piece – Reflection

Working in corporate legal, I have been on the reactive end of employment law regarding complaints and EEOC investigations. This Capstone class and thought piece assignment has helped me to understand both sides of the employee experience more and realize my desire is to be on the proactive side.

This graduate master's program in law in corporate compliance has equipped me to create a program and awareness to prevent more setbacks and victims of workplace harassment. I feel I am also equipped to help people grow and flourish from these same experiences if they have ever been a victim.

I am thankful for the knowledge gained in this program and I will move forward looking for opportunities to help shape the future corporate workplace in the legal compliance *space*.

Citations:

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