Joint Task Force Hearing

House Task Force on Sexual Discrimination and Harassment

Majority Leader Barbara Flynn Currie, Chairperson
Representative Sara Wojcicki Jimenez, Minority Spokesperson

Senate Sexual Discrimination and Harassment Awareness and Prevention Task Force

Senator Melinda Bush, Co-Chair
Senator Jil Tracy, Co-Chair

Tuesday, March 27, 2018

11:00 a.m., Room C600 – Michael A. Bilandic Building

AGENDA

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I. Opening Remarks

Majority Leader Currie
Representative Jimenez
Senator Bush
Senator Tracy

II. Sexual Harassment Policy and Legislation in Other States

Jon Griffin, Program Principal, National Conference of State Legislatures

III. Federal Policy and Legislation on Sexual Harassment

Muslima Lewis, Senior Attorney Advisor, Equal Employment Opportunity Commission Office of Legal Counsel

Teresa James, Director of Administrative Dispute Resolution Program, Congressional Office of Compliance

Senate Task Force on Sexual Discrimination and Harassment Awareness and Prevention

Senator Melinda Bush, Co-Chair
Senator Jil Tracy, Co-Chair

Member List

President Cullerton's Appointees:

- Senator Omar Aquino
- Senator Scott M. Bennett
- Senator Melinda Bush
- Senator Bill Cunningham
- Julie Curry, Curry & Associates
- Felicia Davis, Olive-Harvey College
- Carrie Herschman, Choate Herschman Levison
- Senator Mattie Hunter
- Senator Toi W. Hutchinson
- Rikeesha Phelon, Phelon Strategies
- Polly Poskin, Illinois Coalition Against Domestic Violence
- Senator Heather Steans

Leader Brady's Appointees:

- Senator Pamela Althoff
- Senator John F. Curran
- Ahlam Jbara, Illinois Coalition for Immigrant and Refugee Rights
- Leslie Quade Kennedy, Odelson & Sterk
- Maureen Maffei, Ice Miller
- Senator Karen McConnaughay
- Julie Proscia, Smith Amundsen
- Senator Dale A. Righter
- Dr. Kathleen Robbins, Equality Illinois
- Anita Rodriguez, Assistant State's Attorney, Adams County
- Maria Rodriguez, Former Mayor of Long Grove
- Senator Jil Tracy

House Task Force on Sexual Discrimination and Harassment

Representative Barbara Flynn Currie, Chairperson
Representative Sara Wojcicki Jimenez, Republican Spokesperson

Member List

Speaker Madigan's Appointees:

- Representative Kelly M. Burke
- Representative Johnathan Carroll
- Representative Kelly M. Cassidy
- Representative Deb Conroy
- Representative Sara Feigenholtz
- Representative Laura Fine
- Representative Natalie Phelps Finnie
- Representative Mary E. Flowyers
- Representative Robyn Gabel
- Representative LaToya Greenwood
- Representative Will Guzzardi
- Representative Gregory Harris
- Representative Elizabeth Hernandez
- Representative Frances Ann Hurley
- Representative Stephanie A. Kifowit
- Representative Robert Martwick
- Representative Rita Mayfield
- Representative Carol Sente
- Representative Juliana Stratton
- Representative Katie Stuart
- Representative Litesa E. Wallace
- Representative Emanuel Chris Welch
- Representative Ann M. Williams
- Representative Michael J. Zalewski

Leader Durkin's Appointees:

- Representative Steven A. Andersson
- Representative Mark Batinick
- Representative Particia R. Bellock
- Representative Avery Bourne
- Representative Terri Bryant
- Representative Tim Butler
- Representative Norine K. Hammond
- Representative Michael P. McAuliffe
- Representative Tony McCombie
- Representative Margo McDermed
- Representative David S. Olsen
- Representative Lindsay Parkhurst
- Representative Nick Sauer
- Representative Allen Skillicorn
- Representative Barbara Wheeler
- Representative Christine Winger

Senate Resolution 1076
Creation and Mandate of the Senate Task Force on Sexual Discrimination and Harassment Awareness & Prevention

SENATE RESOLUTION

WHEREAS, In recent weeks more than 300 legislators, lobbyists, staffers, and policy-makers have signed an open letter acknowledging and condemning the culture of sexual harassment in Illinois politics and government; and

WHEREAS, The problem of sexual harassment extends far beyond government to limit women's professional and educational opportunities in virtually every arena, with recent reports of rampant sexual harassment in entertainment, the media, technology, academia, and more; and

WHEREAS, Sexual harassment imposes steep psychological, physical, and economic costs on victims, which have the effect of reducing women's economic opportunities and lifetime wages, driving women from the workplace, and discouraging women from public service; and

WHEREAS, Sexual harassment also imposes costs on the economy, businesses, and employers by causing decreased productivity, increased job turnover, reputational harm, and costly litigation; and

WHEREAS, Sexual harassment takes a toll not just on women but is also frequently directed toward men or can take the form

of harassment based on sexual orientation or gender identity; and

WHEREAS, Sexual harassment is too often combined with and exacerbated by harassment or discrimination based on race, ethnicity, religion, disability status, or age, and therefore requires an intersectional approach; and

WHEREAS, The Equal Employment Opportunity Commission has found that roughly three out of four people who experience harassment never report it because those who do report encounter disbelief, inaction, blame, or social or professional retaliation; and

WHEREAS, For too long Illinois has not provided victims of harassment with adequate recourse, allowing this culture of sexual harassment to go largely unchecked; and

WHEREAS, The members of the General Assembly recognize it is critical that this conversation continue in a productive and meaningful manner and that appropriate changes be made to maximize legal remedies and protections for those victimized by sexual discrimination and harassment; therefore, be it

RESOLVED, BY THE SENATE OF THE ONE HUNDREDTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that there is hereby created

the Senate Task Force on Sexual Discrimination and Harassment Awareness and Prevention; and be it further

RESOLVED, That the Task Force shall conduct a comprehensive review of the legal and social consequences of sexual discrimination and harassment, in both the public and private sectors; and be it further

RESOLVED, That the Task Force shall study and make recommendations on combating sexual discrimination and harassment in Illinois, including in workplaces, in educational institutions, and in State and local government; and be it further

RESOLVED, That within 10 days after the adoption of this resolution, members of the Task Force shall be appointed as follows:

(1) five legislative members appointed by the President of the Senate, who shall reflect the gender, racial, and ethnic diversity of the caucus appointing them;

(2) five legislative members appointed by the Minority Leader of the Senate, who shall reflect the gender, racial, and ethnic diversity of the caucus appointing them;

(3) two members from a Statewide association representing women or working to advance civil rights, appointed by the President of the Senate;

(4) two members from a Statewide association representing women or working to advance civil rights, appointed by the Minority Leader of the Senate;

(5) five members appointed by the President of the Senate;

(6) five members appointed by the Minority Leader of the Senate; and be it further

RESOLVED, That 2 co-chairpersons, representing different political parties, shall be selected by the members of the Task Force; and be it further

RESOLVED, That meetings of the Task Force shall be held as necessary to complete the duties of the Task Force and that the Task Force shall hold its initial meeting no later than December 15, 2017; and be it further

RESOLVED, That the Task Force shall permit any interested member of the Senate or private citizen to participate in meetings and provide ideas, thoughts, and recommendations; and be it further

RESOLVED, that the Task Force shall work in conjunction with any task force created by the House of Representatives for a similar purpose, and that both entities shall aspire to produce legislation to address the concerns and issues

presented to the Task Force; and be it further

RESOLVED, That the legislative caucuses shall provide administrative and other support to the Task Force; and be it further

RESOLVED, That the members of the Task Force shall receive no compensation for serving; and be it further

RESOLVED, That the Task Force shall study and make recommendations regarding:

(1) best practices for preventing and responding to sexual discrimination and harassment;

(2) proposed legislation or rule-making that would improve the State's existing enforcement efforts to ensure that institutions effectively prevent and respond to sexual discrimination and harassment;

(3) increasing the transparency of the State's enforcement activities concerning sexual discrimination and harassment;

(4) evaluating the existing ethical, civil, and criminal penalties for sexual discrimination and harassment and determining whether they are sufficient and what changes should be made;

(5) broadening public awareness of how to report sexual discrimination and harassment and the remedies available

to victims;

(6) facilitating coordination among agencies engaged in addressing sexual discrimination and harassment;

(7) any other issue related to reducing the incidence of sexual discrimination and harassment or harassment in other forms and protecting the rights of victims; and be it further

RESOLVED, That the Task Force shall submit a report with comprehensive recommendations to the General Assembly no later than December 31, 2018, provided that the Task Force is encouraged to produce interim reports.

House Resolution 687
Creation and Mandate of the House Task Force on Sexual Discrimination and Harassment

HOUSE RESOLUTION

WHEREAS, There is currently a worldwide social and cultural campaign to raise awareness about sexual discrimination and harassment that has led both women and men to publicly report their experiences of widespread sexual discrimination and harassment; and

WHEREAS, The members of the General Assembly recognize it is critical to continue this conversation in a productive and meaningful manner and that legal remedies and protections for those victimized by sexual discrimination and harassment should be appropriately maximized; therefore, be it

RESOLVED, BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDREDTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that there is created the Task Force on Sexual Discrimination and Harassment; and be it further

RESOLVED, That that the Task Force shall conduct a comprehensive review of the legal and social consequences of sexual discrimination and harassment, in both the public and private sectors, and make recommendations to the General Assembly; and be it further

RESOLVED, That the Task Force shall, at a minimum, review

and produce recommendations concerning amendments to the legal definition of the terms "sexual discrimination" and "sexual harassment"; which behaviors should be legally actionable as sexual harassment; review and assess best practices to improve procedures for accepting sexual discrimination and harassment complaints, including methods to increase and improve reporting allegations of sexual harassment; the process and structure for reporting allegations to ethics officers, inspectors general, and others, and whether an independent third party should be assigned to handle complaints; necessary amendments to anti-retaliation and whistleblower protections for individuals making sexual discrimination or harassment complaints; the process for filing complaints with the Department of Human Rights; the process for filing civil complaints, including any applicable statute of limitations; legal remedies available to victims of sexual discrimination and harassment, including whether plaintiffs should be entitled to punitive damages; the need for a code of conduct and zero tolerance policies for units of government; the ability of complainants to seek independent counsel when reporting allegations; and the prevention of sexual discrimination and harassment in the public and private sector; and be it further

RESOLVED, That that the Task Force shall be comprised of members of the House of Representatives appointed by the

Speaker of the House of Representatives and House members appointed by the Minority Leader of the House of Representatives, with each appointing no more than 20 members, and the Chair appointed by the Speaker, and any action of the Task Force shall be approved by a majority of those voting on the question; and be it further

RESOLVED, That the Task Force shall work in conjunction with any task force created by the Senate for a similar purpose, and that both entities shall aspire to produce legislation to address the concerns and issues presented to the Task Force; and be it further

RESOLVED, That the Task Force shall make recommendations to the General Assembly in the form of legislation, as well as a report to the General Assembly no later than December 31, 2018, provided that the Task Force is encouraged to produce interim reports.

National Conference of State Legislatures

Recommendations Regarding Legislative Sexual Harassment & PowerPoint Presentation

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

Deb Peters
Senator – District 9
South Dakota
President, NCSL

Chuck Truesdell
Fiscal Analyst
Office of Budget Review
Legislative Research Commission
Kentucky
Staff Chair, NCSL

William T. Pound
Executive Director

NCSL Recommendations Regarding Legislative Sexual Harassment Policies and Training

In October 2017, NCSL conducted a survey to learn more about legislative policies and training on sexual harassment. After reviewing the survey responses and recommendations by experts in the field—including general harassment guidelines promoted by the EEOC—NCSL offers the following benchmarks for creating a strong legislative sexual harassment policy.

- A clear definition of "sexual harassment."
- Examples of what behaviors are considered inappropriate in the workplace.
- A policy that applies to legislators and staff, as well as nonemployees, such as lobbyists and outside vendors.
- A diversity of contacts within the legislature to whom sexual harassment can be reported, allowing the complainant to bypass reporting to his or her direct supervisor.
- A clear statement prohibiting retaliation for the filing of any claim.
- A statement providing for confidentiality, to the extent possible, for all parties involved.
- Specific examples of potential discipline, if warranted.
- The possibility of involving parties outside the legislature to assist in the investigation, if it is warranted or requested.
- An appeal procedure.
- A statement informing the complainant that she or he can also file a complaint to the Equal Employment Opportunity Commission and/or the state's Human Rights Commission.

NCSL also recommends that an effective sexual harassment training program include the following elements:

- Training should be done in a classroom setting with a live trainer
- Training should be mandatory
- Training should include a summarization of the national laws on sexual harassment, as well as state- and legislature-specific policies
- The legislative HR director, or other individual(s) tasked with receiving sexual harassment complaints, should be present
- Training should be offered at new member or new employee orientations
- Leadership should be engaged in the training
- Training should incorporate case studies and examples of harassment, specifically highlighting situations unique to the legislature
- Annual training should be dynamic and vary by topics covered and in presentation style
- Trainers should ask attendees to fill out evaluations, to ensure the training is meeting their needs
- There should be separate training for legislative staff and membership

Contact: Jonathan Griffin, NCSL. Phone: 303-856-1529; Email: jonathan.griffin@ncsl.org

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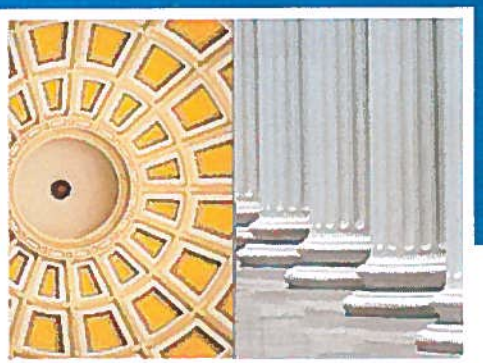
The Forum for America's Ideas



Sexual Harassment Policies and Legislation Among the States

March 27, 2018

Jonathan Griffin
NCSL's Center for Legislative Strengthening

Prior to 2018

- **NCSL produced a LegisBrief on Sexual Harassment Policies and Training in July 2017**
- **NCSL surveyed legislative offices on sexual harassment policies and training in Nov. 2017**
- **Illinois became the first state to pass legislation on sexual harassment in the legislature post-#metoo**

Results from Survey

- **We heard from 26 legislatures and 13 chambers, and roughly 30 policies**
- **The responses from the surveys, along with recommendations from experts in the field, informed NCSL's recommendations on policies and training**

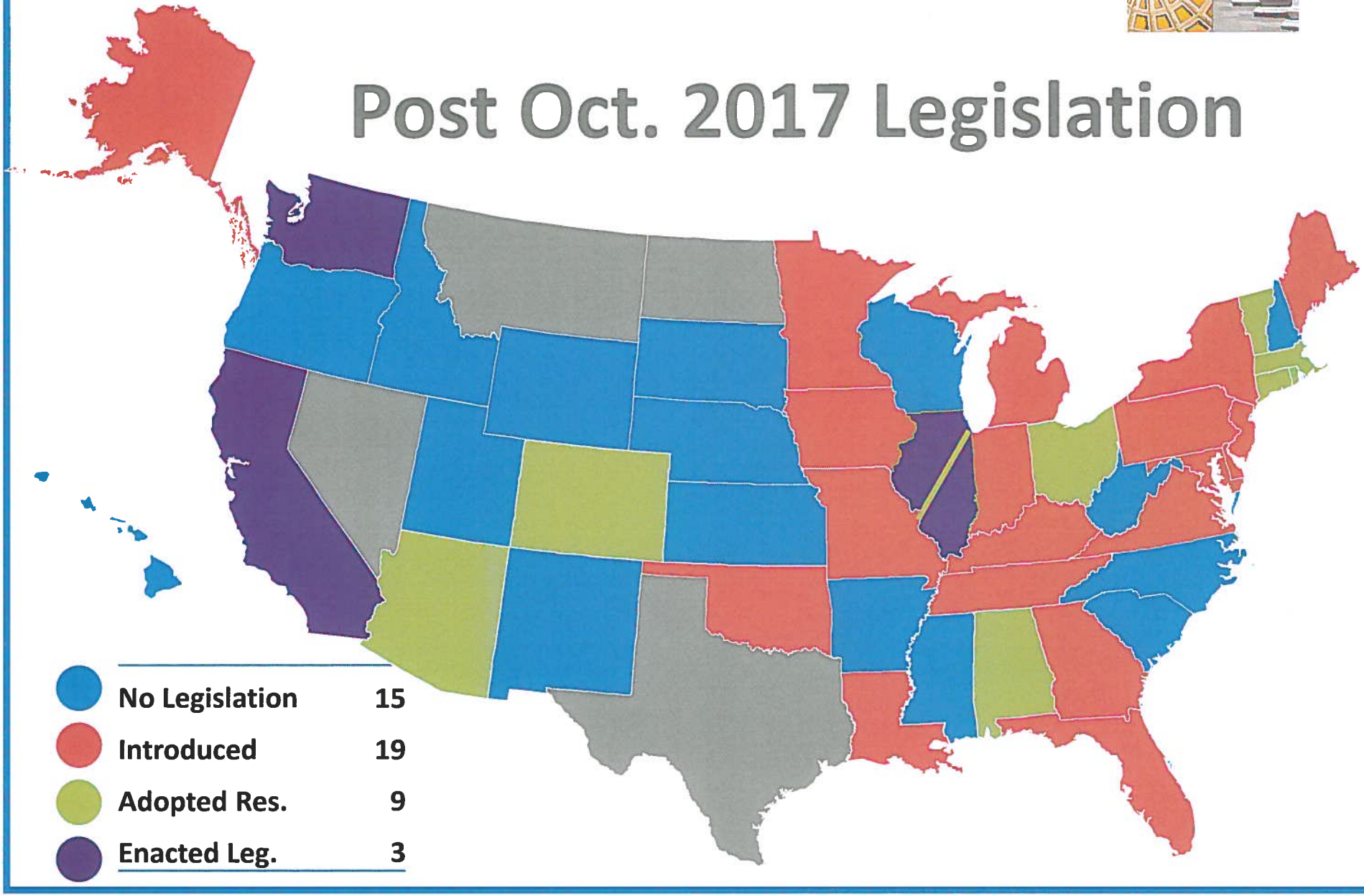
2018

- **11 chambers have created or changed their sexual harassment policies in 2018**
- **Most are minor refinements or attempts to bring clarity to the reporting process**
- **In addition, there is an unprecedented amount of legislation on the topic**

National Conference of State Legislatures

The Forum for America's Ideas

Post Oct. 2017 Legislation



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NCSL Resources on Sexual Harassment

- Policy and Training Recommendations
- Webinar
- LegisBrief
- Sexual Harassment Training

NCSL

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Questions?

Sexual Harassment Landing Page

http://www.ncsl.org/research/about-state-legislatures/sexual-harassment-in-the-legislature-resources.aspx

Contact Information

Jonathan.griffin@ncsl.org

Prepared Statement of Susan Tsui Grundmann

Executive Director,

Congressional Office of Compliance

Prepared Statement of Susan Tsui Grundmann,
Executive Director,
Congressional Office of Compliance

Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance ("OOC"), I thank you for this opportunity to participate in this Committee's comprehensive review of the Congressional Accountability Act ("CAA") and the protections that law offers legislative branch employees against harassment and discrimination in the congressional workplace.

More than thirty years ago, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. Twenty years ago, Congress enacted the CAA, which extends the protections of Title VII, as well as 12 other federal workplace statutes, to over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. Recent events, however, show us that sadly, we still have far to go to eliminate discrimination, harassment and retaliation from the nation's workplaces, including in the legislative branch. Workplace harassment on the basis of sex—as well as race, disability, age, ethnicity/national origin, color, and religion—remains a persistent problem.

I welcome the opportunity to provide this Committee with additional information about the CAA and the important role the OOC plays in educating the legislative branch on combatting workplace harassment and retaliation and providing victims a remedy when it occurs. I also appreciate the opportunity to discuss the Board's views on possible amendments to the CAA to make Capitol Hill a model workplace environment free from the effects of unlawful discrimination.

Overview

The OOC administers the CAA and performs the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority. The OOC is an independent, impartial, nonpartisan office comprised of approximately 20 executive and professional staff and has a 5-member, part-time Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate. All of our current Board members are attorneys in private practice who were chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for carrying out a program to educate and inform Members of Congress, employing offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA, adjudicating workplace disputes, and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. Thus, section 102(b) of the CAA tasks the Board of Directors to report to every Congress on: first, whether or to what degree provisions of federal law relating to employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable, whether such provisions should be made applicable to the legislative branch.

Consideration of possible changes to the CAA, including its dispute resolution procedures, is also a critical component of this Committee's comprehensive review. As I discuss below, the Board strongly recommends that, in conducting its review, the Committee consider existing models under comparable statutes in the federal government when deciding what changes should be made to the dispute resolution procedures under the CAA.

The Board's Views on Possible Changes to the General Provisions and Scope of the CAA

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

The Board has consistently recommended in its past biennial section 102(b) reports that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the Congress and the other employing offices in the legislative branch; and that it adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. We commend the House and the Senate for their recent votes to require all Members, Officers, employees, including interns, detailees, and fellows, to complete an anti-harassment and anti-discrimination training program, as well as the House's vote to also require the posting of a statement advising employees of their rights and protections under the CAA. We remind this Committee, however, that the CAA applies across the legislative branch, and that these mandates do not extend beyond the two houses of Congress. We therefore recommend that any statutory change to the CAA include these broader mandates for the congressional workforce at large.

The CAA is a unique law and its processes and programs are tailored to the legislative branch workforce. The OOC has both the statutory mandate from Congress and the practical experience develop and deliver a comprehensive program of education under the CAA for the entire legislative branch community. Indeed, after years of

delivering in-person training, informational videos, and multimedia campaigns to combat sexual harassment, the OOC has seen a recent and notable jump in requests for our help: a triple-digit percentage increase in the number of in-person anti-sexual harassment training requests by offices; a triple-digit percentage spike in the number of staffers enrolling in online training modules; twice as many visits to the OOC's online information on how to report sexual harassment; and a significant increase in those subscribing to OOC social media channels and e-Alerts (12 percent) to receive updates on sexual harassment issues.

Mandatory training across the legislative branch on the CAA will provide an opportunity to prevent workplace problems from occurring in the first place. The OOC's current training program is not confined to the legal definition of workplace harassment, but further examines workplace conduct which, while not "legally actionable" in itself, may set the stage for unlawful harassment if left unchecked. Our training directly impacts behavior; congressional employees who understand their legal responsibilities will act more responsibly. A comprehensive training program continues to be one of the most effective investments employing offices in the legislative branch can make in preventing harassment and discrimination, reducing complaints and creating a more productive workforce.

Workplace harassment exacts a steep cost from those who suffer its mental, physical, and economic harm. The many legislative staffers who are entering the workforce for the first time are a particularly vulnerable population in particular need of education and awareness on their workplace rights. But workplace harassment can also impact the larger workplace through decreased productivity, increased turnover, and reputational harm. In short, mandatory training on the CAA will benefit the entire legislative branch workplace.

Mandatory training will also greatly benefit managers, who will not only obtain vital information on their workplace responsibilities under the CAA, but will also learn about workplace "best practices" and how to effectively handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Leadership and accountability in this regard are critical. Employing offices must 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.

It is also essential that employing offices in the legislative branch adopt and maintain comprehensive anti-harassment and anti-retaliation policies. We stand ready to work with employing offices through employment counsel to ensure that such policies, including clear instruction on how to complain of harassment and how to report observed

harassment, are communicated effectively to all employees. Employing offices must also be alert to any possibility of retaliation against an employee who reports harassment and must immediately take steps to prevent it. At all levels, across all positions, employing offices must have systems in place that hold employees accountable to these standards. Accountability means that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment are rewarded for doing that job well (or are penalized for failing to do so).

We need to have these conversations in offices all over Capitol Hill. We need to talk with managers about being vigilant, about nipping potential problems in the bud, about taking the time to investigate reports of offensive behavior, and about taking corrective action. It is a new day for combating sexual harassment. The OOC looks forward to working with employees, employing offices, and employment counsel to accomplish this important goal.

Although both the House and Senate have recently mandated discrimination and sexual harassment training, such training remains voluntary in other employing offices throughout the legislative branch. Much of the training done directly by employing offices fails to even mention the OOC as a resource for information or as the agency charged with resolving workplace disputes. To ensure universal awareness of workplace rights and responsibilities, the OOC recommends mandatory training on the CAA for every new employee and biennial update training for all employees and supervisory personnel. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from harassment, discrimination and retaliation.

Congress also must devote sufficient resources to harassment prevention efforts to ensure that such efforts are effective, and to underscore its commitment to creating a workplace free of harassment. To meet this mandate, additional resources will be required, including additional trainers, a technical specialist to provide IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

Require Notice-Posting of Congressional Workplace Rights in All Employing Offices

Workplace harassment too often goes unreported. Common responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, attempt to ignore, forget, or endure the behavior, or simply leave the workplace for another job. According to the EEOC, the least common response to harassment is to take some formal action—either to report the harassment internally or to file a formal legal complaint. The Board has long been concerned that employees in the

legislative branch may also be deterred from taking formal action simply due to a lack of awareness of their rights under the CAA.

The Board has therefore consistently recommended in its section 102(b) reports that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. Although it commends the House for adopting resolutions requiring the posting of a notice advising employees of their rights and protections under the CAA, the Board recommends that the CAA be amended to require that all employing offices throughout the legislative branch post this notice of employee rights. Through permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Although the CAA does require the OOC to distribute informational material "in a manner suitable for posting," it does not mandate the actual posting of the notice. Exemption from notice-posting limits legislative branch employees' access to a key source of information about their rights and remedies. Accordingly, the Board continues to recommend that Congress amend the CAA to adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Name Change

The Board agrees with proposals to change the name of the OOC. The name "Office of Compliance" provides legislative branch employees no indication that it exists to protect their workplace rights through its programs of dispute resolution, education, and enforcement. As the Board advised Congress in 2014, changing the name of the office to "Office of Congressional Workplace Rights" would better reflect our mission, raise our public profile in assistance of our mandate to educate the legislative branch, and make it easier for employees to identify us for their needs.

Extending Coverage to Interns, Fellows, and Detailees

The Board supports proposals to extend the coverage and protections of the anti-discrimination, anti-harassment, and anti-retaliation provisions of the CAA to all staff, including interns, fellows and detailees working in any employing office in the legislative branch regardless of how or whether they are paid. Any amendment to the Act should ensure that these individuals are also covered by the anti-retaliation provision of section 207 of the Act – protections which are not reflected in pending House bills. (Unless otherwise noted, references in this statement to "employees" should be understood to refer to these unpaid individuals.)

Climate Survey

The Board supports the use of climate surveys to ensure that the congressional workforce is free of illegal harassment and discrimination. Because harassment and retaliation in the workplace is often underreported, official statistics underrepresent the extent of the problem. Many employing offices are working to address the problem of sexual harassment, but they lack the assessment tools to understand the scope or nature of the problem. Conducting climate surveys is a best-practice response to fill this gap in knowledge. These surveys can serve as a useful tool in assessing both the general knowledge of CAA workplace rights amongst legislative branch employees and the prevalence of discriminatory or harassing conduct in the workplace.

Climate surveys, however, must be carefully and professionally designed and implemented to be effective. The OOC currently does not have the staff, resources, or expertise to conduct such surveys. Although the OOC is certainly willing to provide its assistance should these surveys be mandated, such an undertaking by the Office would not be possible unless cooperation with the survey process is also mandated. In addition, the OOC would need to be provided with sufficient resources to contract with those who have the expertise to perform these tasks.

Whistleblower Protections

The Board has recommended in its section 102(b) reports, and continues to recommend, that Congress provide whistleblower reprisal protections to legislative branch employees comparable to that provided to executive branch employees under 5 U.S.C. 2302(b)(8), and 5 U.S.C. 1221. If the OOC is to be granted investigatory and prosecutorial authority over discrimination complaints (see below), the Board recommends that the Office also be granted investigatory and prosecutorial authority over whistleblower reprisal complaints, by incorporating into the CAA the authority granted to the Office of Special Counsel ("OSC"), which investigates and prosecutes claims of whistleblower reprisal in the executive branch.

The Board's Views on Possible Changes to the Current Dispute Resolution Procedures under the CAA

As stated above, the Board strongly recommends that the Committee consider existing models under comparable statutes in the federal government in its review of potential change to the dispute resolution procedures under the CAA. To assist the Committee in this important work, I will briefly summarize our current dispute resolution procedures below and convey the Board's considered views on suggested changes to them.

Current Procedures Under the CAA

Like most civil rights statutes, the CAA contains an administrative exhaustion requirement. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, subchapter IV of the CAA currently requires that an employee satisfy two jurisdictional prerequisites: mandatory counseling and mandatory mediation. First, the employee must request counseling within 180 days of the date of the alleged violation of our statute. "Counseling" is a statutory term that equates to intake. The CAA also provides that "[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period." Therefore, an employee can request to shorten the 30-day counseling period and is advised by our Office of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee's concerns, but this is strictly up to the employee.

If a claim is not resolved during the counseling phase and the employee wishes to pursue the matter, the CAA currently requires the employee to file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. The CAA specifies that the mediation period "shall be 30 days," which may be extended only upon the joint request of the parties.

The CAA currently does not grant the OOC General Counsel the authority to investigate claims alleging violations of the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964. (See discussion below.) Therefore, if the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed directly to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee's alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a "cooling off period"—before the employee can proceed.

A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

The Board's Views on Possible Changes to the Dispute Resolution Procedures under the CAA

Counseling and Mediation

Part of the Committee's review entails consideration of proposals that the CAA be amended, including proposals to eliminate counseling and mediation as jurisdictional prerequisites and instead make them optional. Other suggestions concern the confidential nature of those proceedings. To assist the Committee, the Board offers the following observations and recommendations:

The OOC Board is mindful of concerns that the CAA's mandatory counseling procedure may serve to delay the availability of statutory relief or to unduly complicate the administrative process. We nonetheless believe that voluntary OOC counseling can provide important benefits to many employees seeking relief through our office. OOC counselors often provide covered employees with their first opportunity to discuss their workplace concerns and to learn about their statutory protections under the CAA. Although we believe that counseling need not remain mandatory under the CAA, nor a jurisdictional requirement, we recommend against any amendment of the CAA that would eliminate the availability of counseling for those employees who voluntarily seek such assistance from our office.

The EEOC provides a valuable model. Although counseling is not mandatory under Title VII, the EEOC nonetheless offers analogous optional assistance to employees who want or need it. Thus, the EEOC's public website advises potential claimants that discussing their employment discrimination concerns with an EEOC staff member in an interview is the best way to assess how to address concerns and to determine whether filing a charge of discrimination is the appropriate path. Similarly, the Board believes that OOC counseling provides employees a valuable opportunity to discuss workplace concerns with an OOC staff member, to learn about their statutory rights and protections, and to gain assistance in processing their claims.

Under the CAA, the 180-day filing deadline is tolled by filing a request for counseling, not a formal complaint. If the CAA were amended to make counseling optional such that employee were not required to make a request for counseling, the CAA must be further amended to provide that the time limit for filing could also be tolled by filing a document similar to an EEOC charge. The EEOC requires that a claimant initiate the process by filing a formal charge. A charge of discrimination is a signed statement by an employee asserting that an employer engaged in employment discrimination. It is the formal request for the EEOC to take remedial action. An EEOC charge must be filed within the statutorily prescribed limit. A similar procedure could be incorporated into the CAA.

Further, the CAA, as amended, should expressly state that filing such a charging document is mandatory. A charging document facilitates framing the issues for subsequent proceedings, such as mediation, hearing, or investigation, should Congress provide the OOC General Counsel with investigative authority. See discussion below.

Moreover, requiring the filing of such a document with the OOC furthers the policy goal of parity between the laws made applicable to legislative branch employees through the CAA and the laws that apply in the private sector and executive branch. For example, in the private sector, an employee is required by statute to exhaust administrative remedies by filing a charge with the EEOC before filing a lawsuit under federal law alleging discrimination or retaliation. Similarly, under the Whistleblower Protection Act, individuals who allege that they experienced retaliation because of whistleblowing may seek corrective action in appeals to the Merit Systems Protection Board ("MSPB") only after first filing a complaint seeking corrective action from OSC. The MSPB appeal may be filed only after OSC closes the matter or 120 days after the complaint is filed with OSC, if OSC has not notified the complainant that it will seek corrective action. Administrative exhaustion also can facilitate voluntary resolution of disputes by the parties themselves, and it can assist in identifying those cases lacking in merit, for example those where there is no jurisdiction under the CAA.

The Board also notes that under the CAA, only claims that are raised in counseling can be raised in an OOC administrative hearing or in a lawsuit in U.S. District Court. It can be difficult to determine which claims were raised in counseling because of the confidential nature of the counseling process, discussed below. The CAA could be amended to permit the OOC counselor to assist employees in the technical aspects of drafting the employees' charging document, minimizing this problem in many cases. Granting OOC counselors this authority would also facilitate framing the legal issues and informing the Office of the matters to be investigated, should Congress provide the OOC General Counsel with investigative authority, as discussed below. Finally, granting OOC counselors this enhanced statutory role could serve to assist those employees who are unrepresented by legal counsel and who seek guidance and support in pursuing their legal claims.

The Board believes that the statutory term, "counseling," has led to some public confusion on the nature of the OOC counseling process. For example, some have misunderstood the term "counseling" to entail a form of employee "therapy,"—thereby prompting the question why the CAA would require "counseling" for the victim of sexual harassment rather than for the harasser. "Counseling" in fact entails "providing the employee with all relevant information with respect to the[ir] rights" including information concerning the applicable provisions of the CAA. Therefore, the Board believes that consideration should be given to amending the CAA to refer to "claims counseling" or "statutory rights counseling."

As with counseling, the Board supports the elimination of mediation as a mandatory jurisdictional prerequisite to asserting claims under the CAA. It nonetheless recommends that mediation be maintained as a valuable option available to those parties who mutually seek to settle their dispute. Again, the EEOC model provides useful guidance. After the EEOC notifies the employer of the filing of a formal charge, it offers eligible parties the option to participate in mediation. Both parties must agree to mediation, and unlike the CAA, the voluntary mediation process takes place *after* the administrative complaint, i.e., the charge, has been filed. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also gives the parties an opportunity to explore resolving the dispute themselves without having a result imposed upon them. OOC mediators are highly skilled professionals who have the sensitivity, expertise and flexibility to customize the mediation process to meet the concerns of the parties. The OOC seeks to ensure that mediation proceedings are conducted in a manner that is respectful and sensitive to the concerns of the parties.

The effectiveness of mediation as a tool to resolve workplace disputes cannot be understated. Indeed, according to the EEOC, an independent survey showed that 96% of all respondents and 91% of all charging parties who used the EEOC mediation process would use it again if offered. Similarly, the OOC's experience over many years has been that a large percentage of controversies were successfully resolved without formal adversarial proceedings, due in large part to its mediation processes.

The Board is nonetheless aware of concerns that employees may find the mediation process intimidating—especially those who are legally unrepresented but who face an employing office represented by legal counsel. The Board also recognizes that mediation is most successful when both parties feel comfortable and adequately supported in the process. If the Committee determines that unrepresented employees would benefit from the presence of an advocate or ombudsman in a CAA mediation proceeding, the Board recommends that consideration be given to utilizing the OOC counselor or an employee from the OOC General Counsel's office to perform that role. In considering this option, the Committee should understand the protections already built into the OOC mediation process. Specifically, the CAA provides that mediation "shall involve meetings with the parties separately or jointly." As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some media accounts, there is no requirement that the employee be in the same room as the accused during mediation.

Confidentiality Concerns

The Board is aware of suggestions that the confidential nature of the counseling and mediation process be reconsidered. As to the confidential nature of the counseling process, the Board believes that no changes are required. Although counseling between the employee and the OOC is strictly confidential, this means that the employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Thus, the confidentiality obligation is on the OOC, not the employee. An employee remains free to waive the confidentiality requirement in counseling, to permit the OOC to contact the employing office in an attempt to resolve the dispute. The employee also remains free to speak publicly about the underlying employment concern, and about the fact that he or she has filed a claim with our Office. In short, the confidential nature of the counseling process is intended to provide employees with the ability to contact the CAA regarding their statutory rights knowing that we the OOC will not disclose that contact to the employing office or anyone else.

The Board is also of the view that the limited confidentiality requirements associated with the mediation process serve important policy goals, are consistent with mediation models in the private and executive branch sectors, and should be maintained. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns materials *prepared for the mediation process.* It does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely and candidly, which promotes and enhances the mediation process. The concept that information disclosed during mediation is confidential is an essential part of the process and is widely acknowledged. Indeed, under the EEOC model, all parties to voluntary mediation are also required to sign an agreement of confidentiality stating that information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.

Finally, with respect to the anti-discrimination and anti-harassment provisions of the CAA, the OOC was created to provide legislative branch employees with full, fair, and confidential proceedings to resolve their workplace disputes. These confidential proceedings are offered to employees as an alternative to the public legal proceedings of a United States courtroom. Many employees have chosen the private and confidential proceedings offered by the OOC precisely because the proceedings are private and confidential. Consequently, care must be taken before considering any proposal that would eliminate or weaken the confidentiality protections of the CAA, as such action may have the unintended effect of discouraging employees from reporting illegal conduct.

Settlement Agreements

The Board is aware of many articulated concerns regarding the confidential nature of certain settlement agreements regarding claims brought under the CAA. These are critical issues for the Committee to consider.

Under the CAA, it is for the parties to decide whether and how to settle a claim, and whether any settlement agreement should be confidential. Currently, the only statutory requirement for settlement agreements in the CAA is that they be in writing. The OOC does not have standardized language that parties are required to include in their settlement agreements. The OOC certainly does not require parties to include nondisclosure or confidentiality provisions in those agreements. The contents of settlement agreements—including any provisions governing disclosure—are solely determined by the parties and their representatives.

Some claimants may desire confidentiality because it protects them from unwanted publicity, whereas others may not because it could impede their ability to speak out against unlawful discrimination. Under no circumstances, however, should a confidentiality agreement be imposed on someone who does not want it. The Board stresses that, even if the parties agree to include a nondisclosure provision in their settlement agreement, that provision would be enforceable only to the extent that it is lawful and otherwise consistent with public policy. The Board is of the view, consistent with the EEOC, that a nondisclosure clause in a settlement agreement (as well as a non-disparagement agreement) cannot be interpreted or enforced to restrict an employee's ability to disclose information or communicate with relevant regulatory agencies, or to cooperate fully with such agencies in any investigation.

Finally, the CAA provides that settlement agreements shall not become effective unless they are approved by OOC Executive Director. Because the Act contains no substantive standards for approval, the OOC Executive Director's role in this process is largely ministerial. If Congress desires that the Executive Director conduct a more substantive review of settlement agreements as part of the approval process, the CAA would have to be amended to set forth substantive standards for review.

Amending the Complaint

We ask the Committee to consider reforming the CAA to allow for the amendment of employee complaints in a manner similar to that available to employees in the private sector and in the executive branch. If new events take place after an employee files an EEOC charge that the employee believes are discriminatory, the EEOC can add these new events to the initial charge by amending it. The EEOC then sends the amended charge to the employer and investigates the new events along with the rest.

The CAA does not currently provide for amending complaints in such a manner. If new events take place after an employee files a request for counseling with the OOC that she believes are unlawful—including alleged retaliation for filing the initial claim—she must file a new request for counseling, complete the mandatory counseling and mediation process again before filing a second formal complaint, and potentially consolidate the two complaints if the first complaint remains pending. The Board is of the view that the CAA should be amended to simplify this process by permitting the amendment of pending complaints to relate back to the initial filing in a manner similar to the process used by the EEOC.

Investigative and Prosecutorial Authority

Currently, the CAA only grants the OOC General Counsel the authority to investigate claims alleging violations of the Occupational Safety and Health Act of 1970, the Federal Service Labor Management Relations Statute, and the public access provisions of the Americans with Disabilities Act ("ADA"). The CAA does not authorize the OOC General Counsel to investigate claims concerning the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964 or the ADA; the Rehabilitation Act of 1973; the Family and Medical Leave Act ("FMLA"); the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; and veterans' employment and reemployment rights under chapter 43 of title 38 of the U.S. Code.

Unlike the OOC, when a private sector or executive branch charge is filed, the EEOC/OSC has statutory authority to investigate whether there is reasonable cause to believe discrimination occurred. As part of its investigation, the EEOC asks the employer to provide a written answer to the charge, called a Position Statement. It may also ask the employer to answer questions about the claims in the charge, interview witnesses and ask for documents. If an employer refuses to cooperate with an EEOC investigation, the EEOC can issue an administrative subpoena to obtain documents or testimony or to gain access to facilities.

The Board supports suggestions to grant the OOC General Counsel similar investigative authority. One suggested approach would be to grant the General Counsel investigatory authority mirroring that of the equivalent executive branch agencies – i.e., the EEOC for discrimination complaints and the OSC for whistleblower reprisal complaints. As discussed above, the mechanism for doing this already exists in the CAA: the General Counsel is granted selected parts of the authority of the Federal Labor Relations Authority for labor-management issues (CAA section 220(c)(2)) and of the Secretary of Labor for OSH issues (CAA section 215(c)(1), (c)(2), and (e)(1)). Amending the CAA in this manner with regard to workplace claims of discrimination, harassment and retaliation under the laws applied by subchapter II, part A of the CAA

would best achieve the Act's policy goal of making the legislative branch subject to the equivalent workplace laws and enforcement mechanisms as the executive branch and the private sector. Further, the Office would benefit from the body of law and expertise already developed by the EEOC and OSC in conducting its investigations.

Any legislation granting the OOC General Counsel investigatory authority should also specify that the Office has the ability to file a complaint if the General Counsel determines that violations have occurred, just as the CAA does with the Occupational Safety and Health Act and Federal Service Labor Management Relations Statute. Such legislation should also include administrative subpoena authority for dealing with employing offices or other parties who refuse to cooperate with the General Counsel's investigations. Empowering the OOC General Counsel to prosecute complaints of discrimination and harassment would address many recently expressed concerns regarding both the intimidation and the litigation challenges faced by employees seeking relief under the current statutory framework —especially those without the resources to retain legal counsel.

Several other important issues must be addressed. First, would the General Counsel's investigation be mandatory or optional on the part of the complaining party? Again, executive branch models should be considered. If, at the close of an EEOC investigation, it is not able to determine that the law was violated, the EEOC provides the complainant with a Notice of Right to Sue, which gives the complainant permission to file a lawsuit in court. However, complainants may also request a Notice of Right to Sue from the EEOC if they wish to file a lawsuit in court before the investigation is completed, which effectively makes the EEOC investigation optional. Other models in the federal government require administrative exhaustion. The OSC process for investigating claims of whistleblower reprisal, for example, requires a complainant to allow the agency a specified period of time to investigate a complaint and to issue a "closure letter" before the complainant has the right to independently litigate the case.

Second, if the employee elects an investigation and the investigation determines the law may have been violated, should the OOC General Counsel try to reach a voluntary settlement with the employing office, as the EEOC would with an employer in the private sector, or as the OSC would with a federal agency in investigating a whistleblower reprisal claim? Allowing the General Counsel to play this representative role on behalf of a covered employee may meet some of the concerns explored above regarding employee discomfort in the mediation process.

If a settlement is not reached, should the OOC General Counsel have the discretion to determine whether or not to file a formal complaint on the employee's behalf, similar to the discretion granted to the EEOC? Many, but not all of these details can be addressed in the regulatory process, which can take into consideration differences from the equivalent executive branch regulations as needed.

Investigating and Prosecuting Claims of Retaliation under the CAA

The Board has also recommended to Congress in its biennial section 102(b) reports that the Office of General Counsel be granted enforcement authority with respect to section 207, the anti-retaliation provision of the CAA, because of the strong institutional interests in protecting employees against intimidation or reprisal for the exercise of their statutory rights or for participation in the CAA's processes. Investigation and prosecution by the Office of General Counsel would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes. Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector. In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court.

Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that congressional employees will have the same civil rights and social legislation that ensure fair treatment of workers in the private sector and the executive branch is rendered illusory. Therefore, in order to preserve confidence in the Act and to avoid discouraging legislative branch employees from exercising their rights or supporting others who do, the Board recommends that Congress grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector and the executive branch by the implementing agency.

Under any circumstances, Congress would have to devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Thus, the OOC would

need significant additional resources, including several more FTEs, if investigatory authority were granted.

Eliminating the "Cooling Off" Period

As discussed above, the CAA requires that employees not pursue a formal administrative complaint with the OOC or a lawsuit in a U.S. District Court until not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a "cooling off period"—before the employee can proceed. The Board recommends that the CAA be amended to eliminate this period and instead provide that the employee may proceed with an administrative or judicial complaint any time within 90 days of the issuance of the equivalent of a "right to sue" notice, as discussed above. That notice would be issued to the employee at the conclusion of voluntary counseling, voluntary mediation, the investigation, or at the request of the employee, as the case may be.

Other Recommendations for Improvements to the CAA

Library of Congress

Currently, only certain provisions of the CAA apply to employees of the Library of Congress ("LOC"). The Board supports the proposal contained in the current Senate legislative branch appropriations bill that would amend the CAA to include the LOC within the definition of "employing office," thereby extending CAA protections to LOC employees for most purposes.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

The Board, in several section 102(b) reports, has recommended and the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII. Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under the CAA to do so.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further

requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Approve the Board's Pending Regulations

In an effort to bring accountability to itself and its agencies, Congress passed the CAA, establishing the OOC to, among other roles, promulgate regulations implementing the CAA to keep Congress current and accountable to the workplace laws that apply to private and public employers. The Board is required to amend its regulations to achieve parity, unless there is good cause shown to deviate from the private sector or executive branch regulations. The Board recommended in its 2016 section 102(b) Report to the 115th Congress that it approve its pending regulations that would implement the FMLA, ADA Titles II and III, and USERRA in the legislative branch.

Apply the Wounded Warrior Federal Leave Act of 2015 to the Legislative Branch

In 2015, the 114th Congress unanimously voted to enact the Wounded Warrior Federal Leave Act. The law affords wounded warriors the flexibility to receive medical care as they transition to serving the nation in a new capacity. Specifically, new federal employees, who are also disabled veterans with a 30% or more disability, may receive 104 hours of "wounded warrior leave" during their first year in the federal workforce so that they may seek medical treatment for their service-connected disabilities without being forced to take unpaid leave or forego their medical appointments. The Act amends title 5 of the United States Code and was reportedly passed as a way to show gratitude and deep appreciation for the hardship and sacrifices of veterans and, in particular wounded warriors, in service to the United States. In its 2016 section 102(b) Report, the Board recommended the Congress extend the benefits of that Act to the legislative branch with enforcement and implementation under the provisions of the CAA.

Protect Employees Who Serve on Jury Duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the

Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

Protect Employees and Applicants Who Are Or Have Been In Bankruptcy (11 U.S.C. § 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibit Discharge of Employees Who are or have been Subject to Garnishment (15 U.S.C. § 1674(A))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Thank you for soliciting our views on these most important matters. The OOC stands ready to work with this Committee to ensure a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.

Prepared Statement of Barbara Childs Wallace

Chair, Board of Directors,

Congressional Office of Compliance

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Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance ("OOC"), I thank you for this opportunity to participate in this Committee's review of existing training, policies, and mechanisms in place to guard against, report, and seek remedy for sexual harassment in the U.S. House of Representatives.

In the last few weeks, there have been several media reports that reflect a misunderstanding of the process for legislative branch employees to bring a complaint of discrimination, harassment, or retaliation before the OOC. In particular, the process has been described as cumbersome, lengthy, and one-sided. I welcome this opportunity to clarify the OOC's procedures, explain how they work in practice, and discuss the recommendations that the Board has made to Congress over the years to make them even more effective. As I discuss below, the real problem is that many employing offices are insufficiently aware of their obligations under the Congressional Accountability Act ("CAA") and many employees are unaware of their rights under the CAA, including the right to bring their complaints to the OOC.

Overview

The CAA, enacted more than 20 years ago with nearly unanimous approval, protects over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. The CAA extends to employees of the legislative branch the protections of Title VII of the Civil Rights Act of 1964, as well as 12 other federal workplace statutes. Congress created the OOC to do the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority.

The OOC is composed of approximately 20 executive and professional staff and has a 5-member, non-partisan Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate, and they are chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for adjudicating workplace disputes; carrying out a program to educate and inform Members of Congress, employing

offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA; and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. This Committee's important work in reviewing the policies and mechanisms in place to guard against, report, and remedy sexual harassment must begin with a clear understanding of these functions.

Dispute Resolution Procedures under the CAA

Subchapter IV of the CAA sets forth a 3-step process that requires counseling and mediation before an employee may file a complaint seeking administrative or judicial relief. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, an employee must do 3 things:

First, the employee must request counseling within 180 days of the date of the alleged violation of a law made applicable by the CAA. "Counseling" is a statutory term that equates to intake. Although the OOC intake counselor does not provide the employee with legal advice, she considers the employee's concerns and "provide[s] the employee with all relevant information with respect to the rights of the employee" including information concerning the applicable provisions of the CAA. The employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Neither the CAA nor the OOC's procedural rules require the employee's in-person attendance at intake counseling. The employee may participate in the counseling process over the telephone, or by similar means, and the employee may be represented at counseling by a representative in the employee's absence. This assists the many employees covered under the CAA who live throughout the United States, far from the Nation's capital where the OOC, with its small staff, maintains its only office.

The CAA also provides that "[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period." Therefore, an employee can request to shorten the counseling period and is advised of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee's concerns, but this is strictly up to the employee.

Second, if a claim is not resolved during the counseling phase, and the employee wishes to pursue the matter, the CAA requires that the employee file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns

materials prepared *for the mediation process*—it does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely, which promotes and enhances the mediation process.

The CAA further provides that mediation "shall involve meetings with the parties separately or jointly." As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some inaccurate reports in the media, there is no requirement that the employee be in the same room as the accused during mediation.

The CAA also specifies that the mediation period "shall be 30 days," which may be extended only upon the joint request of the parties. Even if mediation fails to settle the matter within 30 days, it is not uncommon for the parties jointly to request such an extension or to revisit negotiations later in the process. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also allows the parties to craft a resolution of the workplace dispute that meets their unique needs.

If the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee's alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

Although the OOC works with its congressional oversight committees, the CAA explicitly prohibits oversight with respect to the disposition of individual cases. Due to the program's counseling and mediation processes, the OOC's experience has been over many years that a large percentage of controversies were successfully resolved without formal adversarial proceedings. The OOC continues to work with the covered community to encourage compliance with the CAA, and to promote fair, effective, and efficient methods to settle workplace disputes.

Education and Outreach

When it passed the CAA, Congress recognized that ensuring compliance with the incorporated workplace laws would require clear guidance regarding appropriate workplace behavior and the consequences of violating the CAA. The CAA thus requires that the OOC carry out a program of education for Members of Congress and other employing authorities of the legislative branch respecting the laws made applicable to them and a program to inform individuals of their rights under those laws.

For over 20 years, the OOC has been engaged in outreach within the congressional community and in producing educational tools focused on discrimination and retaliation. Generally, the OOC's training programs are tailored to a requestor's needs, ranging from small and informal discussions with employees regarding the CAA to full-fledged training and panel presentations. Training involves staff from all departments in the Office, including the Office of the Executive Director, the Office of General Counsel, and the Office of Alternative Dispute Resolution programs.

All of the OOC educational materials can be accessed at www.compliance.gov, including training videos, online interactive learning modules, hundreds of publications, posters, brochures, Power Point presentations, and a myriad of other information covering all the laws in the CAA. In-person courses listed on the HouseNet include sessions on preventing sexual harassment and other forms of discrimination, requesting family and medical leave, and understanding veterans' rights, to name a few.

Every month, the OOC issues a new publication that highlights an important workplace law incorporated in the CAA and outlines its applicability to the legislative branch. Our most recent OOC Compliance@Work publication features an article written by the Deputy Executive Director for education programs, titled "The Importance of Training."

As a regular presenter at the Congressional Research Service's District/State Staff Institute conferences, the OOC also has an opportunity to connect with hundreds of congressional staffers who live and work outside of Capitol Hill. The OOC also worked with the Congressional Budget Office in 2016 to provide in-person training to their managers and equal employment opportunity counselors. Training included an overview of the CAA processes as well as discussion of the law governing workplace discrimination, sexual harassment, family and medical leave, the Americans with Disabilities Act, and retaliation for exercising workplace rights.

Recognizing that busy schedules, resource constraints, and geography may make in-person training impractical, the OOC has also developed web-based training programs. The OOC's first online interactive training module, entitled "Preventing Sexual Harassment in the Workplace," is intended to foster a safe and productive work

environment by training employees to identify behavior that constitutes sexual harassment and providing them with the resources to prevent and report it. The second online training module covers reasonable accommodation in the workplace for an employee with a qualified disability under the Americans with Disabilities Act. The third module will cover the Family and Medical Leave Act, a fourth will focus on an overview of the OOC, and a fifth will further discuss anti-discrimination and retaliation.

In 2016, the OOC rolled out its Brown Bag Lunch series, which the OOC General Counsel designed to inform legal counsel about the latest case law developments under the laws applied by the CAA, including Title VII disparate treatment and hostile work environment. All of the comprehensive brown bag case law outlines are available on our website and are also accessible through our quarterly electronic newsletter, which is emailed to all legislative branch employees.

The OOC website is frequently updated and enhanced with new features. Current videos on the site cover our claims process and what to expect at mediation or during an appeal of a claim. We use social media platforms to disseminate information as well. Although the OOC has made progress on the education and training front, our challenge has been getting the attention of the legislative branch employees who are very busy and otherwise not engaged on the topic of their workplace rights and responsibilities.

Despite the many educational resources regarding harassment and discrimination available through the OOC, training is not mandatory within the congressional community. Because decisions have been left to the discretion of each employing office, both training and general employee awareness of their rights and responsibilities under the CAA have been inconsistent, at best, throughout the legislative branch. Even a short investment of time with the OOC's resources, however, can help an employing office maintain compliance with workplace laws and promote an inclusive and respectful working environment, and help employees to understand and exercise their rights under the CAA. We look forward to continuing to assist Congress and the legislative branch agencies by providing the necessary educational and informational resources to achieve these goals. Publicizing information about the OOC will result in legislative branch employees realizing that they do have a place to turn when they experience discrimination, harassment, or retaliation, as Congress originally intended.

Board Recommendations to Congress

The CAA was crafted to provide for ongoing review of the workplace laws that apply to Congress. Section 102(b) of the CAA therefore tasks the Board of Directors to do just that. Thus, every Congress, the Board is required to report on: first, whether or to what degree provisions of federal law relating to terms and conditions of employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable to the legislative

branch, whether such provisions should be made applicable to the legislative branch. We continue to believe that the adoption of the recommendations discussed below will best promote a legislative branch free from unlawful discrimination and retaliation.

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

In its 2016 biennial section 102(b) report, the Board recommended, as it has in prior reports, that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the United States Congress and employing offices in the legislative branch.

Education directly impacts employee behavior, and in the area of harassment and discrimination prevention, a comprehensive training program continues to be the most effective investment an organization can make in reducing complaints and creating a more productive workforce. In the interests of prevention, the executive branch requires each federal agency to provide employees training regarding their rights and remedies under anti-discrimination and anti-retaliation laws (Section 202(c) of the Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (No FEAR Act)). The No FEAR Act mandates that all current employees and managers be trained by a date certain, and training thereafter must be conducted no less than every 2 years. New employees must receive training as part of a new-hire orientation program, and where there is no new hire orientation program, new employees are to receive the applicable training within 90 days of their appointment.

Unlike in the executive branch, however, there is no current obligation on the part of Congress to inform or train legislative branch employees on their rights and responsibilities under anti-discrimination laws that apply to them through the CAA. Training for new employees on workplace rights is essential to creating and maintaining workplaces in the legislative branch that are free from unlawful discrimination and retaliation. Failing to educate and update employees on workplace behaviors and rights increases the risk of legal violations that could lead to great harm to employees and costly and disruptive litigation. Additionally, many employees of the legislative branch, especially Member office staff, are entering the workforce for the first time. Enhancing their understanding of how federal workplace laws contribute to a fair, safe, and accessible workplace will be invaluable as they become the employers and leaders of the future.

Currently, however, training is voluntary. In the case of some employing offices, the training does not involve or mention the OOC as a resource for information or assistance in resolving workplace disputes. To ensure that the congressional community is aware of the laws affecting the workplace, we recommend mandatory training on the

CAA for every new employee and biennial update training for all employees and supervisory personnel.

The CAA is a unique law and its processes and programs are unique to the legislative branch workforce. Training on the CAA informs managers of their workplace responsibilities and provides them one more avenue to seek information about best practices and how to handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Where victims receive training, they may recognize that they do not have to endure a harassing and hostile workplace. Studies have found that sexual harassment in any workforce can be grossly underreported based on the high profile and public nature of an allegation and the backlash that an accuser may suffer, and can lead to increased absence from work, decrease in productivity, and eventual resignation from an otherwise suitable position.

The OOC has the statutory mandate from Congress to carry out a program of education under the CAA, and the practical and subject matter expertise to effectively work with Members, employing offices, and individuals as a neutral and independent educator. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from discrimination and retaliation. To meet this mandate, additional resources will be required. Specifically, the OOC needs three (3) additional full-time employees: an individual to further develop content for various training media, a technical specialist who can provide additional IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

Require Notice-Posting of Congressional Workplace Rights in All Employing Offices

In its 2014 biennial section 102(b) report, the Board recommended, as it had in prior reports, that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA, and no longer exempt itself from the responsibility of notifying employees about their rights through this medium.

Almost all Federal anti-discrimination and other workplace rights laws require that employers prominently post notices of those rights and information pertinent to asserting claims for alleged violations of those rights. Indeed, Title VII requires private sector and Federal executive branch employers to notify employees about Title VII's protections and that personnel actions affecting covered employees shall be free from discrimination or harassment on the basis of race, color, religion, sex, and national origin. Because this legal obligation results in permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other

changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Even though Federal law imposes notice-posting on private and public sector employers, most notice-posting requirements do not apply to the legislative branch. Although the CAA does require the OOC to distribute informational material "in a manner suitable for posting," it does not mandate the actual posting of the notice. The failure to require notice-postings in the congressional workplace may explain recent findings by the Congressional Management Foundation that most congressional employees have limited to no knowledge of their workplace rights. Exemption from notice-posting limits congressional employees' access to a key source of information about their rights and remedies.

Accordingly, the Board continues to recommend that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under workplace rights laws to do so in Congress. In its 2012 biennial section 102(b) report, the Board recommended that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

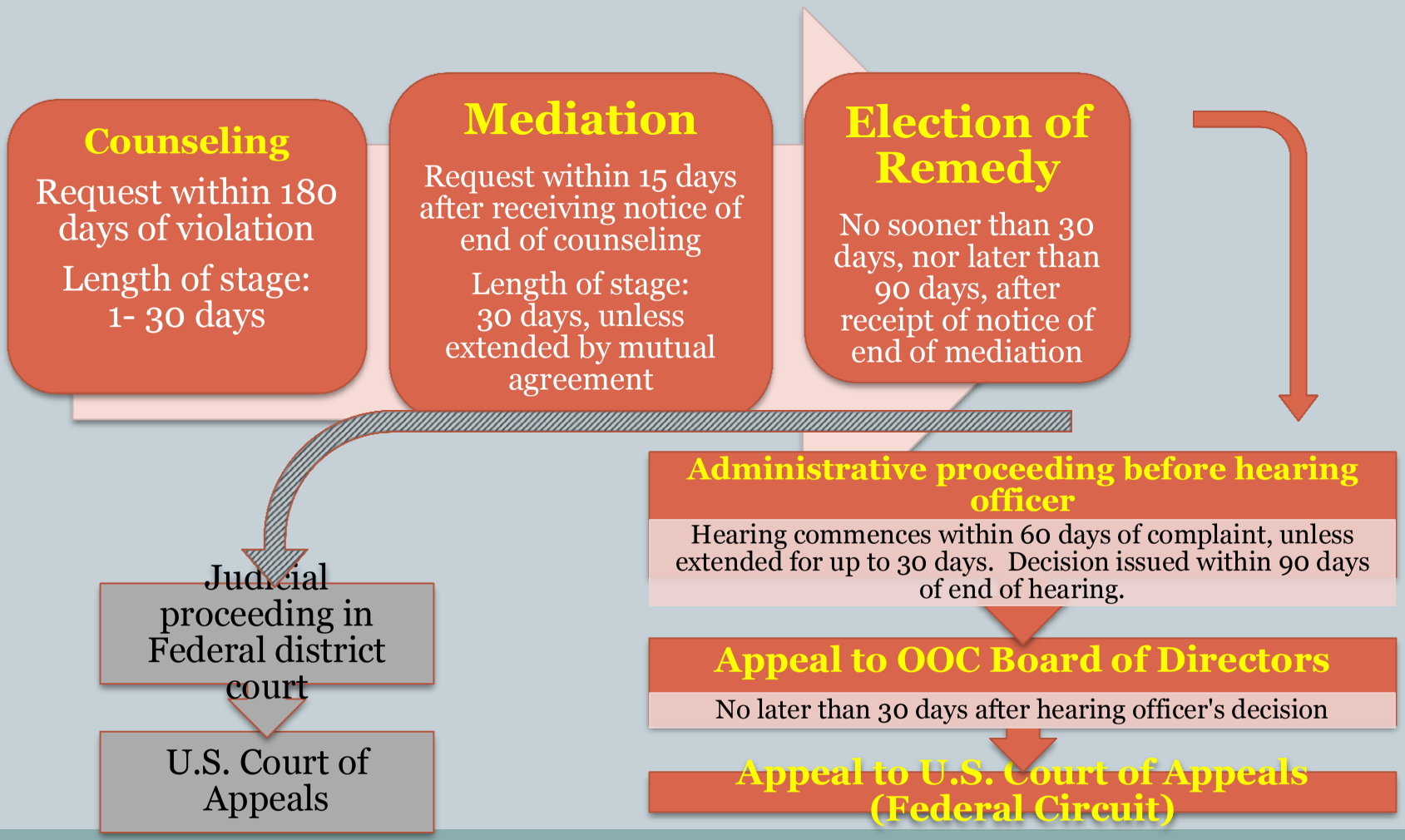
Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Thank you for soliciting the Board's views on this most important matter. The OOC stands ready to work with this Committee in ensuring a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.

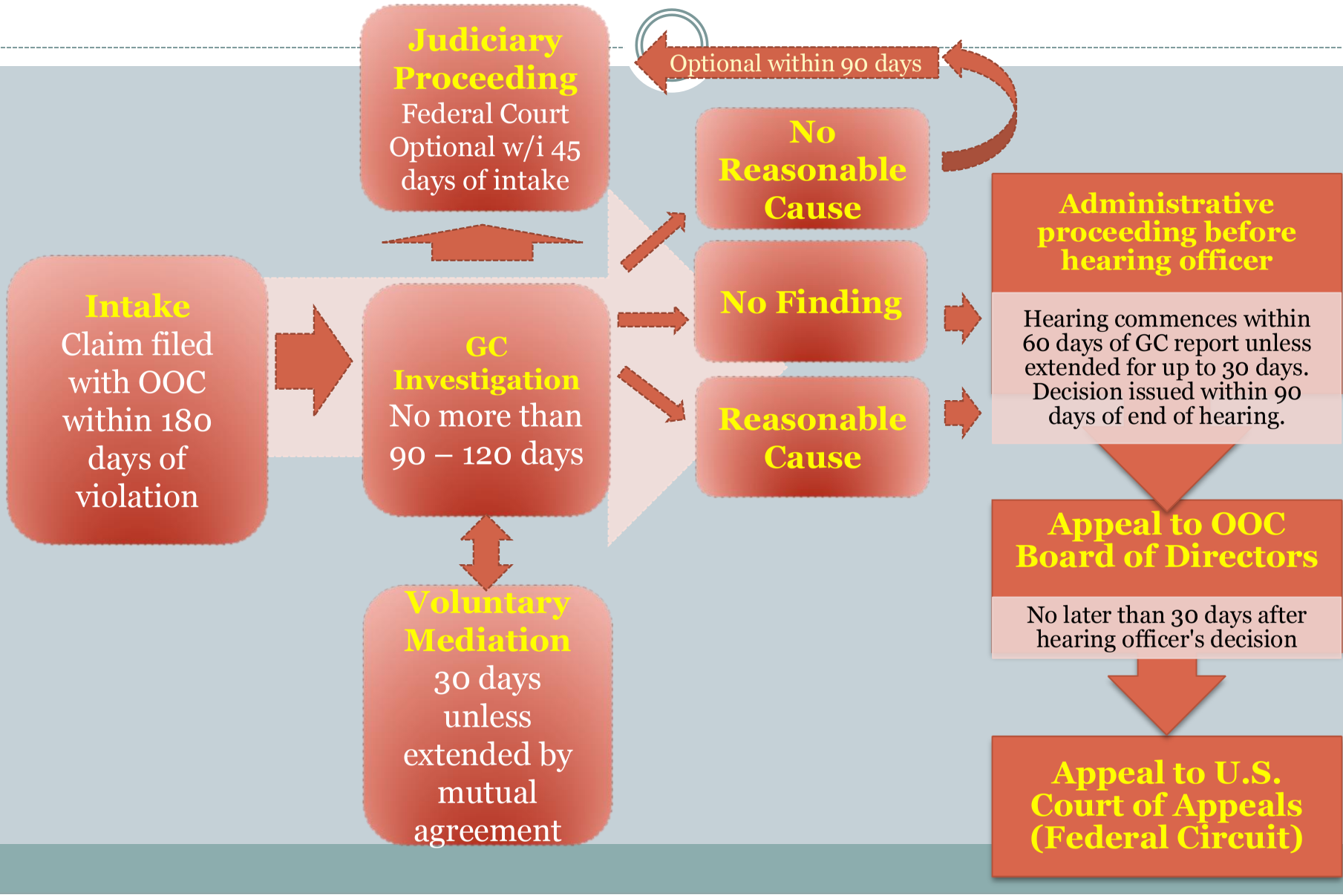
Congressional Office of Compliance

Alternative Dispute Resolution Process

Current Alternative Dispute Resolution Process



Alternative Dispute Resolution Under HR 4924 and S 2401



Training resources from the U.S. Equal Employment Opportunity Commission

- **Respect In The Workplace: Creating a Respectful Environment For All Employees**
- **Leading For Respect: How Supervisors And Managers Can Create Respectful Workplaces**
- **EEOC Checklist for Employers**
- **EEOC Select Task Force On The Study Of Harassment In The Workplace**

RESPECT IN THE WORKPLACE:
CREATING A RESPECTFUL ENVIRONMENT FOR ALL EMPLOYEES

What's different? Rather than dwelling on legal standards and what NOT to do, this training will focus on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Using case studies, trainees strategize about bystander intervention and ways to help others who may be behaving in ways that are disrespectful or who are being targeted by disrespect. Finally, they use a feedback model to practice both giving and getting feedback about behavior that is uncivil or disrespectful.

(*Italicized items unique to employee training* – regular font common to both employee and supervisor trainings)

PART 1: RESPECT

Objectives

- Develop a shared and specific understanding of respectful words and behavior.
- Understand the relationship between perceived respect and organizational performance.

Post-training resource: Workplace-Specific Respectful Cues

PART 2: WHAT GOES WRONG – DERAILERS

Objectives

- Understand all forms of conduct that derail respect, including incivility, abusive behavior and unlawful harassment
- Identify behavior that is problematic and/or unlawful
- Define and understand unlawful harassment
- Understand choices when an employee becomes aware of possible unlawful conduct

Post-training resource: Continuum of Behavior Chart

PART 3: POLICY REVIEW

Objectives

- Be familiar with the organization's policy regarding harassing conduct
- Understand rights and responsibilities under the organization's policy
- Understand different options for reporting
- Understand the process after a report of harassment is filed

Post-training resource: Organization's Anti-Harassment Policy and Procedures

PART 4: STEPPING UP AND STEPPING IN

Objectives

- *Understand the value of peer intervention/bystander intervention and develop a sense of collective responsibility*
- *Identify the ways that bystanders can intervene when they observe or learn about problem behavior in the employee's specific workplace*
- *Explore barriers to bystander intervention and how they can be overcome*
- *Practice applying bystander intervention techniques to a simulated situation*

Post-training resource: *Bystander Options*

PART 5: FEEDBACK – GIVING AND GETTING THE GIFT

Objectives

- *Understand the power of peer-to-peer effective feedback in workplace situations*
- *Identify barriers to effective feedback in workplace situations*
- *Learn a model for giving and getting feedback about derailer behaviors*

Post-training resource: *Feedback Model*

PART 6: LEARNING

Objectives

- Commit to making a change or taking action
- Share that commitment with a colleague and hold each other accountable

NOTE: Three hour training also includes:

- Additional case examples and more opportunities to practice and re-enforce skills
- More interactive discussions rather than lecture format
- Explanation of difference between authority and influence
- Opportunity to practice providing and receiving feedback about derailer Behaviors

LEADING FOR RESPECT:
HOW SUPERVISORS AND MANAGERS CAN CREATE RESPECTFUL WORKPLACES

What's different? Rather than dwelling on legal standards and what NOT to do, this training will focus on WHAT TO DO – the words and actions that promote respect and fairness, and participants' responsibility for contributing to respect in the workplace. Supervisors practice skills in responding appropriately to employee complaints and discuss how they can create a sense of respect for their employees, focusing on the employee's perceptions of fairness and the supervisor's responsibility to respond with emotional intelligence. Finally, supervisors are taught simple but effective ways to coach employees whose behavior might be a problem – early intervention to nip problems in the bud before they rise to the level of illegal harassment.

(*Italicized items below unique to supervisor training* – regular font common to both supervisor and employee trainings)

PART 1: RESPECT

Objectives

- Develop a shared and specific understanding of respectful words and behavior
- Understand the relationship between perceived respect and organizational performance
- *Identify specific supervisory activities that promote and sustain respect*

Post-training resource: Workplace-Specific Respectful Cues

PART 2: WHAT GOES WRONG – DERAILERS

Objectives

- Understand all forms of conduct that derail respect, including incivility, abusive conduct and unlawful harassment
- Identify behavior that is problematic and/or unlawful
- Define and understand unlawful harassment
- *Understand responsibilities when a supervisor or manager becomes aware of possible unlawful conduct*

Post-training resource: Continuum of Behavior Chart

PART 3: POLICY REVIEW

Objectives

- Be familiar with the organization's policy regarding harassing conduct
- Understand rights and responsibilities under the organization's policy (*including supervisor's responsibility to report*)
- Understand different options for reporting
- Understand the process after a report of harassment is filed

Post-training resource: Organization's Anti-Harassment Policy and Procedures

PART 4: HANDLING EMPLOYEE COMPLAINTS WITH FAIRNESS

Objectives

- *Understand the importance of fairness*
- *Apply fairness principles to complaint handling*
- *Understand the psychology of employee complaints*
- *Understand how to deal with request for confidentiality*
- *Understand the essential components of an effective response to employee complaints*
- *Understand the things to avoid when receiving an employee complaint*
- *Identify barriers to effective complaint handling*
- *Practice complaint handling*

Post-training resource: *"Always/Never" Responses to Complaints*

PART 5: COACHING FOR RESPECTFUL BEHAVIOR

Objectives

- *Learn a simple coaching model to deal with early problem behavior*
- *Identify challenges to applying the model*
- *Practice applying the model to rude/uncivil behavior*

Post-training resource: *Coaching Model for Respectful Behavior and Problem Solving*

PART 6: LEARNING

Objectives

- Commit to making a change or taking action
- Share that commitment with a colleague and hold each other accountable

NOTE: Four hour training also includes:

- Additional case examples and more opportunities to practice and re-enforce skills
- More interactive discussions rather than lecture format
- Explanation of difference between "performance management" and abusive behavior
- Discussion regarding three types of fairness and obstacles to fairness

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

☐ Leadership has allocated sufficient *resources* for a harassment prevention effort
☐ Leadership has allocated sufficient *staff time* for a harassment prevention effort
☐ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

☐ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
☐ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
☐ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
☐ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
☐ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
☐ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

☐ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
☐ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
☐ The organization conducts *workplace civility training* and *bystander intervention training*
☐ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

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CHECKLIST FOR EMPLOYERS

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

☐ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
☐ An easy-to-understand description of prohibited conduct, including examples
☐ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
☐ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
☐ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
☐ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
☐ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
☐ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
☐ Is written in clear, simple words, in all languages commonly used by members of the workforce

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CHECKLIST FOR EMPLOYERS

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- ☐ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ☐ Employer representatives who take reports seriously
- ☐ A supportive environment where individuals feel safe to report harassing behavior to management
- ☐ Well-trained, objective, and neutral investigators
- ☐ Timely responses and investigations
- ☐ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ☐ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ☐ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ☐ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ☐ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

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CHECKLIST FOR EMPLOYERS

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
  - ☐ Supported at the highest levels
  - ☐ Repeated and reinforced on a regular basis
  - ☐ Provided to all employees at every level of the organization
  - ☐ Conducted by qualified, live, and interactive trainers
  - ☐ If live training is not feasible, designed to include active engagement by participants
  - ☐ Routinely evaluated and modified as necessary

- Content of Compliance Training for All Employees
  - ☐ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ☐ Includes examples that are tailored to the specific workplace and the specific workforce
  - ☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ☐ Explains the consequences of engaging in conduct unacceptable in the workplace

- Content of Compliance Training for Managers and First-line Supervisors
  - ☐ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

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CHART OF RISK FACTORS FOR HARASSMENT AND RESPONSIVE STRATEGIES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (*e.g.*, team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.
Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
		Language and linguistic characteristics can play a role in harassment.	among and within work groups.
Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events-national and local-that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.
Workplaces with	Executives or senior managers	Management is often reluctant to	Apply workplace rules

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
"high value" employees	Employees with high value (actual or perceived) to the employer, *e.g.*, the "rainmaking" partner or the prized, grant-winning researcher	jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, *e.g.*, administrative support staff, nurses, janitors, etc. Gendered power disparities (*e.g.*, most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.
Workplaces where work is monotonous or tasks are low-intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
			among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (*e.g.*, in person, on line) to share concerns.
Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or	Managers may feel (or may actually be) unaccountable for their behavior	Ensure that compliance training reaches all levels of the

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
	organizationally from front-line employees or first-line supervisors	and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

REPORT OF CO-CHAIRS
CHAI R. FELDBLUM & VICTORIA A. LIPNIC

JUNE 2016

CONTENTS

PREFACE

Thirty years ago, the U.S. Supreme Court recognized claims for sexual harassment as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964. In the years that followed, courts have filled in the legal landscape even further.

Six years ago, when we came to EEOC as commissioners, we were struck by how many cases of sexual harassment EEOC continues to deal with every year. What was further striking to us were the number of complaints of harassment on every other basis protected under equal employment opportunity laws the Commission deals with today. We are deeply troubled by what we have seen during our tenure on the Commission.

With legal liability long ago established, with reputational harm from harassment well known, with an entire cottage industry of workplace compliance and training adopted and encouraged for 30 years, why does so much harassment persist and take place in so many of our workplaces? And, most important of all, what can be done to prevent it? After 30 years – is there something we've been missing?

As commissioners of an enforcement agency, we could have taken a cynical approach. We could have assumed that some people will always engage in harassment and that we cannot expect to control how people behave in increasingly diverse workplaces. That is especially so in an environment where every manner of rude, crude, or offensive material can be accessed and shared with others with a few strokes on a phone. We could have suggested that the Commission simply continue to do what it has done well for decades – investigate and settle charges, bring litigation, provide legal guidance, hear complaints from federal employees, and provide outreach and education.

We set cynicism to the side. We want to reboot workplace harassment prevention efforts.

Accordingly, we present this *"Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace*." We offer this report to our fellow commissioners, the EEOC community nationwide, our state partners, employers, employees and labor unions, and academics, foundations, and community leaders across the country. We present this report with a firm, and confirmed, belief that too many people in too many workplaces find themselves in unacceptably harassing situations when they are simply trying to do their jobs.

While we offer suggestions in this report for what EEOC can do to help prevent harassment, we caution that our agency is only one piece of the solution. Everyone in society must feel a stake in this effort. That is the only way we will achieve the goal of reducing the level of harassment in our workplaces to the lowest level possible.

This report, including the recommendations we set forth, could not have been prepared without the work of the Select Task Force on the Study of Harassment in the Workplace that was established by EEOC Chair Jenny Yang over a year ago. The Select Task Force consisted of a select group of outside experts impaneled to examine harassment in our workplaces – its causes, its effects, and what can be better done to prevent it. We served as co-chairs of this task force.

Our experts included management and plaintiffs' attorneys, representatives of employee and employer advocacy groups, labor representatives, and academics who have studied this field for years – sociologists, psychologists, and experts in organizational behavior. Because our group was heavy on lawyers, we deliberately fashioned an interdisciplinary approach that considered the social science on harassment in the workplace. Some of what we learned surprised us; everything we learned illuminated our understanding of this complex human issue.

We thank the members of our Select Task Force for volunteering their expertise over this past year – asking the difficult questions, shaping our discussions, and sharpening our inquiry. This is not a consensus report. It is the report of the two of us as co-chairs, based on the testimony, research, expertise, and guidance we received and reviewed along with our task force members over the past year. Nor is it a report focused on the legal issues concerning workplace harassment. It is a report focused on prevention of unwelcome conduct based on characteristics protected under our employment civil rights laws, even before such conduct might rise to the level of illegal harassment

We thank all of our witnesses for the expertise they offered at our eight meetings over the past year. We could not have written this report without the work they put into educating us and the members of the Select Task Force.

We do not pretend to have all the answers for a reboot of workplace harassment prevention. We need the active engagement of every reader of this report to provide ideas and solutions on an ongoing basis.

With great appreciation to all those who strive to make our workplaces productive places where we can all go, do our jobs, and be free from harassment, and,

With confidence that we can do better by our workforce,

Chai Feldblum
Commissioner & Co-Chair

Victoria A. Lipnic
Commissioner & Co-Chair

EXECUTIVE SUMMARY

As co-chairs of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace ("Select Task Force"), we have spent the last 18 months examining the myriad and complex issues associated with harassment in the workplace. Thirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, we conclude that we have come a far way since that day, but sadly and too often still have far to go.

Created in January 2015, the Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. The Select Task Force reflected a broad diversity of experience, expertise, and opinion. From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments.

Throughout this past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the worlds of social science, and practitioners on the ground, on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment, but rather included examination of conduct and behaviors which might not be "legally actionable," but left unchecked, may set the stage for unlawful harassment.

This report is written by the two of us, in our capacity as Co-Chairs of the Select Task Force. It does not reflect the consensus view of the Select Task Force members, but is informed by the experience and observations of the Select Task Force members' wide range of viewpoints, as well as the testimony and information received and reviewed by the Select Task Force. Our report includes analysis and recommendations for a range of stakeholders: EEOC, the employer community, the civil rights community, other government agencies, academic researchers, and other interested parties. We summarize our key findings below.

Workplace Harassment Remains a Persistent Problem. Almost fully one third of the approximately 90,000 charges received by EEOC in fiscal year 2015 included an allegation of workplace harassment. This includes, among other things, charges of unlawful harassment on the basis of sex (including sexual orientation, gender identity, and pregnancy), race, disability, age, ethnicity/national origin, color, and religion. While there is robust data and academic literature on sex-based harassment, there is very limited data regarding harassment on other protected bases. More research is needed.

Workplace Harassment Too Often Goes Unreported. Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior. The least common response to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint. Roughly *three out of four* individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct. Employees who experience harassment fail to report the harassing behavior or to file a complaint because they fear disbelief of their claim, inaction on their claim, blame, or social or professional retaliation.

There Is a Compelling Business Case for Stopping and Preventing Harassment. When employers consider the costs of workplace harassment, they often focus on legal costs, and with good reason. Last year, EEOC alone recovered $164.5 million for workers alleging harassment – and these direct costs are just the tip of the iceberg. Workplace harassment first and foremost comes at a steep cost to those who suffer it, as they experience mental, physical, and economic harm. Beyond that, workplace harassment affects *all* workers, and its true cost includes decreased productivity, increased turnover, and reputational harm. All of this is a drag on performance – and the bottom-line.

It Starts at the Top – Leadership and Accountability Are Critical. Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot be overstated – effective harassment prevention efforts, and workplace culture in which harassment is not tolerated, must start with and involve the highest level of management of the company. But a commitment (even from the top) to a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have systems in place that hold employees accountable for this expectation. Accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so). Finally, leadership means ensuring that anti-harassment efforts are given the necessary time and resources to be effective.

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool – it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum – it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.

New and Different Approaches to Training Should Be Explored. We heard of several new models of training that may show promise for harassment training. "Bystander intervention training" – increasingly used to combat sexual violence on school campuses – empowers co-workers and gives them the tools to intervene when they witness harassing behavior, and may

show promise for harassment prevention. Workplace "civility training" that does not focus on eliminating unwelcome or offensive behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally, likewise may offer solutions.

It's On Us. Harassment in the workplace will not stop on its own – it's on all of us to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change themselves. For this reason, we suggest exploring the launch of an *It's on Us* campaign for the workplace. Originally developed to reduce sexual violence in educational settings, the *It's on Us* campaign is premised on the idea that students, faculty, and campus staff should be empowered to be part of the solution to sexual assault, and should be provided the tools and resources to prevent sexual assault as engaged bystanders. Launching a similar *It's on Us* campaign in workplaces across the nation – large and small, urban and rural – is an audacious goal. But doing so could transform the problem of workplace harassment from being about targets, harassers, and legal compliance, into one in which co-workers, supervisors, clients, and customers all have roles to play in stopping such harassment.

Our final report also includes detailed recommendations and a number of helpful tools to aid in designing effective anti-harassment policies; developing training curricula; implementing complaint, reporting, and investigation procedures; creating an organizational culture in which harassment is not tolerated; ensuring employees are held accountable; and assessing and responding to workplace "risk factors" for harassment.

PART ONE

INTRODUCTION

> *"Not everything that is faced can be changed, but nothing can be changed until it is faced."*
>
> *Robert J. Bies, Professor of Management/Founder, Executive Masters in Leadership Program McDonough School of Business, Georgetown University (quoting James Baldwin)*

On January 14, 2015, the U.S. Equal Employment Opportunity Commission ("EEOC") held a public meeting titled "Harassment in the Workplace" to examine the issue of workplace harassment – its prevalence, its causes, and strategies for prevention and effective response.[1] At the start of that meeting, EEOC Chair Jenny R. Yang announced the formation of EEOC's Select Task Force on the Study of Harassment in the Workplace ("the Select Task Force"). We were honored to be asked to co-chair the Select Task Force.

In Chair Yang's words, the goal of the Select Task Force was to "convene experts across the employer, employee, human resources, academic, and other communities to identify strategies to prevent and remedy harassment in the workplace. Through this task force, we hope to reach more workers so they understand their rights and also to reach more in the employer community so we can understand the challenge that they face and promote some of the best practices that we've seen working."[2]

In the weeks that followed that meeting, we assembled the membership of the Select Task Force, drawing from a range of experts and stakeholders, and reflecting a broad diversity of experience, expertise, and opinion. The Select Task Force was comprised of 16 members from around the country, including representatives of academia from various social science disciplines; legal practitioners on both the plaintiff and defense side; employers and employee advocacy groups; and organized labor. On March 30, 2016, the members of the Select Task Force were announced:

- Sahar F. Aziz, Associate Professor of Law, Texas A&M University
- Meg A. Bond, Professor of Psychology and Director of the Center for Women and Work, University of Massachusetts Lowell
- Jerry Carbo, Associate Professor of Management and Marketing, Shippensburg University

[1] WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm.

[2] *Opening Statement of Chair Jenny Yang*, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (January 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/transcript.cfm#yang.

- Manuel Cuevas-Trisán, Vice President, Litigation, Data Protection & Employment Law, Motorola Solutions, Inc.
- Frank Dobbin, Professor of Sociology, Harvard University
- Stephen C. Dwyer, General Counsel, American Staffing Association
- Brenda Feis, Partner, Feis Goldy LLC
- Fatima Goss Graves, Vice President for Education and Employment, National Women's Law Center
- Ariane Hegewisch, Program Director, Employment & Earnings, Institute for Women's Policy Research
- Christopher Ho, Senior Staff Attorney and Director, Immigration and National Origin Program, Legal Aid Society - Employment Law Center
- Thomas A. Saenz, President & General Counsel, Mexican American Legal Defense and Educational Fund
- Jonathan A. Segal, Partner, Duane Morris and Managing Principal, Duane Morris Institute
- Joseph M. Sellers, Partner, Cohen Milstein LLC
- Angelia Wade Stubbs, Associate General Counsel, AFL-CIO
- Rae T. Vann, General Counsel, Equal Employment Advisory Council
- Patricia A. Wise, Partner, Niehaus, Wise & Kalas; Co-Chair, Society for Human Resource Management Labor Relations Special Expertise Panel

From April 2015 through June 2016, the Select Task Force held a series of meetings – some were open to the public for observation, some were closed working sessions, and others were a combination of both. In the course of a year, the Select Task Force received testimony from more than 30 witnesses, and received numerous public comments. The activities of the Select Task Force on the Study of Harassment in the Workplace are set out in detail in Appendix A.

The first part of this report considers what we know (and do not know) about workplace harassment. The second part turns to potential solutions for responding to, and preventing, workplace harassment. Several sections of the report include recommendations based on the information presented in that section. The recommendations are offered to EEOC, employers and employer associations, employees and employee associations, other government agencies, academic researchers, and foundations.

PART TWO

LOOKING AROUND US: WHAT WE KNOW ABOUT HARASSMENT IN THE WORKPLACE

Throughout the past year, we sought to deploy the expertise of our Select Task Force members and our witnesses to move beyond the legal arena and gain insights from the world of social science and practitioners on the ground on how to prevent harassment in the workplace. We focused on learning everything we could about workplace harassment – from sociologists, industrial-organizational psychologists, investigators, trainers, lawyers, employers, advocates, and anyone else who had something useful to convey to us.

Because our focus was on prevention, we did not confine ourselves to the legal definition of workplace harassment. Instead, we looked at unwelcome or offensive conduct in the workplace that: (a) is based on sex (including sexual orientation, pregnancy, and gender identity), race, color, national origin, religion, age, disability, and/or genetic information; and (b) is detrimental to an employee's work performance, professional advancement, and/or mental health. This includes, but is not limited to, offensive jokes, slurs, epithets or name calling, undue attention, physical assaults or threats, unwelcome touching or contact, intimidation, ridicule or mockery, insults or put-downs, constant or unwelcome questions about an individual's identity, and offensive objects or pictures.

When we use the term "harassment" in this report, therefore, we are referring to the conduct described above. This is not limited to conduct that is legally actionable – *i.e*., conduct that must be endured as a condition of continued employment or conduct that is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Nor, on the other hand, does it include all "rude," "uncivil," or "disrespectful" behavior in the workplace. Rather, the focus of this report is unwelcome or offensive conduct based on a protected characteristic under employment anti-discrimination law.

We start with stories from people who have experienced harassment in the workplace. Our commitment to preventing harassment stems from stories such as these, and the devastating impact harassment has on those who experience it. We then move to what we know about the prevalence of harassment; the ways in which employees who experience harassment respond; the business case for stopping harassment; and finally, factors in a workplace that may put a workplace more at risk for harassment.

A. REAL PEOPLE/REAL LIVES

Laudente Montoya

Laudente Montoya worked as a mechanic at J&R Well Services and Dart Energy. From his first days on the job, Mr. Montoya's supervisor called Mr. Montoya and a co-worker "stupid Mexicans," "dumb Mexicans," and "worthless Mexicans." The supervisor told Mr. Montoya that he didn't like "sp*cs" and that Mexicans were the reason Americans have swine flu.

Mr. Montoya fought back. He told his supervisor that "a person in a management position in a large corporation should not talk to their employees like that." In response, the supervisor said something like "welcome to the oil fields. That's how they talk here." According to Mr. Montoya, the supervisor did not limit his offensive comments to Hispanic employees. Mr. Montoya observed the supervisor calling other co-workers names like "n*gger," "lazy Indian," and "wagon burner." When Mr. Montoya and his co-workers complained to the area manager, a friend of the supervisor, the manager did nothing.

As Mr. Montoya explained, "Working that job was one of the worst times in my life. It became so that I could hardly bring myself to go to work in the morning because I hated working with him so much. People were calling me moody. I even saw my doctor about it."

Finally, Mr. Montoya and his co-workers were fed up and filed a charge of discrimination. After filing the charge, Mr. Montoya was laid off.[3]

Contonius Gill

Contonius Gill worked as a truck driver for A.C. Widenhouse, a North Carolina-based trucking company. On the job, Mr. Gill was repeatedly assaulted with derogatory racial comments and slurs by his supervisor, who was also the facility's general manager; by the company's dispatcher; by several mechanics; and by other truck drivers – all of whom are white.

Mr. Gill was called "n*gger," "monkey" and "boy." On one occasion, a co-worker approached Mr. Gill with a noose and said, "This is for you. Do you want to hang from the family tree?" White employees also asked Mr. Gill if he wanted to be the "coon" in their "coon hunt."

Mr. Gill repeatedly complained about the harassment to the company's dispatcher and general manager but the harassment continued unabated. The end of the story? Mr. Gill was fired for complaining about the harassment.[4]

[3] *Testimony of Laudente Montoya*, WORKPLACE HARASSMENT, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Jan. 14, 2015), https://www.eeoc.gov/eeoc/meetings/1-14-15/montoya.cfm.

[4] Mr. Gill intervened in the EEOC's lawsuit against A.C. Widenhouse. *See Jury Awards $200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit,* https://www.eeoc.gov/eeoc/newsroom/release/2-1-13.cfm.

Jacquelyn Hines

Jacquelyn Hines was a single mother, born and raised in Memphis, Tennessee. She didn't finish high school, but she earned her G.E.D. and worked a series of temporary jobs through various staffing agencies to support herself and her family.

In 2008, she found herself working for New Breed Logistics, a supply-chain logistics company with a warehouse in Memphis. Her supervisor made a habit of directing sexually-explicit comments to Jacquelyn and her female coworkers. Indeed, it wasn't only sexually-explicit comments – there were lewd and vulgar gestures, and some days physical harassment as well, like the day he pressed his stomach and private parts into one woman's back. When these women asked him to "stop talking dirty to me" or "leave me alone," his response was that he "wasn't going to get into trouble, he ran the place" and if anyone complained to HR, *they* would be fired.

And sure enough, that's what happened. One of Jacquelyn's coworkers was fired when she complained about the harassment by way of the company's anonymous hotline. When Jacquelyn herself stood up to her supervisor and asked him to stop, suddenly she was contacted by the temporary agency concerning alleged attendance issues (which had never been mentioned before). Her hours were cut, she lost pay, and within a week she was fired. The male coworker who had stood up to the supervisor on behalf of his colleagues, and told him to stop making comments because the women didn't like it? He was fired, too.

And it didn't stop there. Some time later, Jacquelyn applied for and was hired at a different branch of the company, in Mississippi. She worked there for a few weeks and the job was going well, until one day she was abruptly escorted off the premises. The HR manager would later explain that she had recognized Jacquelyn's name from the Memphis plant and had her fired from her job in Mississippi.[5]

* * *

We could continue to chronicle stories of harassment we heard, including harassment based on disability, religion, age, sexual orientation, and gender identity. EEOC's website is replete with such stories. But in this report, we focus on the social science describing the scope of the problem of workplace harassment and our proposed solutions.

B. THE PREVALENCE OF HARASSMENT IN THE WORKPLACE

Real people, like Mr. Montoya, Mr. Gill, and Ms. Hines, are the reason that all of us must do everything we can to prevent workplace harassment. No one in this country – *no one* – should

[5] Testimony of Anica Jones, Trial Attorney, Memphis District Office, EEOC, and Jacquelyn Hines, Claimant, *EEOC v. New Breed Logistics*, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION (June 15, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/jones.cfm and https://www.eeoc.gov/eeoc/meetings/6-17-15/hines.cfm; *see also EEOC v. New Breed Logistics*, No. 13-6250, 2015 U.S. App. LEXIS 6650 (6th Cir. Apr. 22, 2015) (detailing allegations).

have to experience what they did. But for purposes of crafting a strategic approach to preventing harassment, we obviously need to move beyond the anecdotal evidence so that we know the scope of the problem with which we are dealing.

We started our study with the assumption that harassment is a persistent problem, at least based on the continuing number of harassment-based charges EEOC receives from employees who work for private employers or state and local government employers (162,872 charges since FY2010), and the continuing number of harassment complaints filed by federal employees (39,473 complaints since FY2010).[6] We therefore started by learning what we could from the private sector charges and the federal sector complaints filed each year.[7]

During the course of fiscal year 2015, EEOC received approximately 28,000 charges alleging harassment from employees working for private employers or state and local government employers.[8] This is almost a full *third* of the approximately 90,000 charges of employment discrimination that EEOC received that year. Many of the charges alleged other forms of discrimination as well, but harassment constituted either all of, or part of, the alleged discrimination in these charges. During that same year, federal employees filed 6,741 complaints alleging harassment as all of, or part of, alleged discrimination.[9] These complaints made up 43% of all complaints filed by federal employees that year.[10]

[6] U.S. Equal Employment Opportunity Commission, *Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010-FY 2015)*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm; U.S. Equal Employment Opportunity Commission, *Annual Reports on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Years 2010-2015*, https://www.eeoc.gov/federal/reports/.

[7] Before an applicant or employee can file a claim of discrimination against such an entity, the individual must file a *charge* with EEOC. EEOC investigates the charge to determine whether there is reasonable cause to believe that discrimination has occurred. If such cause is found, EEOC attempts to end the alleged unlawful practice through a process of conciliation with the entity that has been charged (called a "respondent" in this system). EEOC does not have legal authority to require a respondent to undertake any actions; it has authority only to negotiate with the respondent to effectuate voluntary resolutions during this administrative process. If a respondent does not agree to a voluntary resolution during this process, EEOC (or the charging party) may sue the respondent in court and a court may order relief if the respondent is found to have violated the law. All allegations of discrimination brought under this administrative system are called "*charges*." As a matter of terminology, these are often called "*private sector charges*," even though they encompass charges brought against state and local employers as well as private employers and labor unions. *See* 42 U.S.C. §2000e (covered entities); §2000e-2 (prohibitions); 2000e-5 (enforcement provisions); 29 C.F.R. §1601 (procedural regulations). The federal government is also covered under federal employment anti-discrimination laws. Before an applicant or employee can file a claim of discrimination against a federal agency, the individual must file a *complaint* with the agency alleged to have engaged in the discriminatory practice. The agency is responsible for investigating such complaints and determining whether discrimination has occurred. A federal applicant or employee who disagrees with the agency's conclusion can appeal to EEOC. EEOC issues administrative conclusions in such appeals. If EEOC determines that an agency has engaged in discrimination and orders relief, the agency is required to comply with EEOC's decision and does not have the right to appeal EEOC's decision in court. All allegations of discrimination brought under this administrative system are called "*complaints*." As a matter of terminology, they are called "*federal sector complaints.*" *See* 42 U.S.C. §2000e-16 (prohibitions and enforcement); 29 C.F.R. §1614 (procedural regulations).

[8] EEOC, *All Charges Alleging Harassment*, *supra* n. 6.

[9] U.S. Equal Employment Opportunity Commission, *Annual Report on the Federal Work Force (Part I), EEO Complaint Processing, Fiscal Year 2015* (forthcoming).

[10] *Id.*

Of the total number of charges received in FY2015 that alleged harassment from employees working for private employers or for state and local government employers, approximately:

- 45% alleged harassment on the basis of sex,
- 34% alleged harassment on the basis of race,
- 19% alleged harassment on the basis of disability,
- 15% alleged harassment on the basis of age,
- 13% alleged harassment on the basis of national origin, and
- 5% alleged harassment on the basis of religion.[11]

Of the total number of complaints filed in FY2015 by federal employees alleging harassment approximately:

- 36% alleged harassment on the basis of race,
- 34% alleged harassment on the basis of disability,
- 26% alleged harassment on the basis of age,
- 12% alleged harassment on the basis of national origin,
- 44% alleged harassment on the basis of sex, and
- 5% alleged harassment on the basis of religion.[12]

The numbers of charges (in the private sector) and complaints (in the federal sector) that were filed in FY2015 provide a snapshot of the number of people who sought a formal process to complain about harassment that year. This number is both an over-inclusive and under-inclusive data source for determining the prevalence of harassment in our workplaces. It is presumably over-inclusive because not all charges and complaints of harassment include the type of behavior

[11] Information provided by the EEOC's Office of Field Programs.
[12] EEOC, *Annual Report on the Federal Work Force (Part I), supra* n. 6. The percentages do not total 100%, as individuals sometimes file charges or complaints of harassment on the basis of more than one protected characteristic.

we consider harassment for purposes of this report.[13] Conversely, the number is presumably under-inclusive because approximately 90% of individuals who say they have experienced harassment never take formal action against the harassment, such as filing a charge or a complaint.[14]

Given the limitations of EEOC charge data, we sought out empirical data on the prevalence of harassment in workplaces in the United States. An important fact caught our attention in this review. *There are significantly fewer academic articles on harassment on protected bases other than sex as compared to those about sex-based harassment.* There is an extensive literature on *discrimination* on the basis of various protected characteristics (such as race and ethnicity), but those studies do not disaggregate harassment from other forms of discrimination. In this section, therefore, we explain what we have found with regard to the prevalence of sex-based harassment, and then what little we found on the prevalence of other types of harassment.

Sex-Based Harassment

Based on testimony to the Select Task Force and various academic articles, we learned that anywhere from 25% to 85% of women report having experienced sexual harassment in the workplace. Given these widely divergent percentages, we dug deeper to understand what these numbers could tell us about the scope of harassment based on sex.

We found that when employees were asked, in surveys using a randomly representative sample (called a "probability sample"), if they had experienced "sexual harassment," without that term being defined in the survey, approximately one in four women (25%) reported experiencing "sexual harassment" in the workplace. This percentage was remarkably consistent across probability surveys. When employees were asked the same question in surveys using convenience samples (in lay terms, a convenience sample is not randomly representative because it uses respondents that are convenient to the researcher (*e.g.*, student volunteers or respondents from one organization)), with sexual harassment not being defined, the rate rose to 50% of women reporting they had been sexually harassed.[15]

We then found that when employees were asked, in surveys using probability samples, whether they have experienced one or more specific sexually-based behaviors, such as unwanted sexual attention or sexual coercion, the rate of reported harassment rose to approximately 40% of

[13] For example, some charges may allege objectionable behavior, but not behavior based on a protected characteristic under employment non-discrimination laws. Similarly, not all charges and complaints of harassment based on a protected characteristic ultimately prove to have legal merit. That is, harassing behavior on the basis of a protected characteristic may have occurred, but the behavior alleged may not meet the legal standards for severity or pervasiveness to constitute actionable, unlawful harassment.

[14] Lilia M. Cortina and Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, 1 THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469, 469-96 (J. Barling & C. L. Cooper eds., 2008).

[15] Remus Ilies *et al.*, *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERSONNEL PSYCHOL. 607 (2003). In this article, the researchers reviewed 96 estimates of sexual harassment incidence from 84 independent samples reported in 71 studies. The researchers considered a survey sample to be in the *probability* category if it was based on "(a) a national probability sample (random or stratified random) or (b) a probability sample across multiple organizations or in a multiple-site organization (*e.g.*, government or state employees), or (c) a sample that resulted from the sampling of the entire sampling frame (as defined by the study) in a single-site organization."

women.[16] When respondents were asked in surveys using convenience samples about such behaviors, the incidence rate rose to 75%.[17] Based on this consistent result, researchers have concluded that many individuals do not label certain forms of unwelcome sexually based behaviors – even if they view them as problematic or offensive – as "sexual harassment."[18]

The most widely used survey of harassment of women at work, the Sexual Experiences Questionnaire (SEQ), not only asks respondents whether they have experienced unwanted sexual attention or sexual coercion, but also asks whether they have experienced sexist or crude/offensive behavior.[19] Termed "gender harassment" in the SEQ, these are hostile behaviors that are devoid of sexual interest. Gender harassment can include sexually crude terminology or displays (for example, calling a female colleague a ''c*nt'' or posting pornography) and sexist comments (such as telling anti-female jokes or making comments that women do not belong in management.) These behaviors differ from unwanted sexual attention in that they aim to insult and reject women, rather than pull them into a sexual relationship. As one researcher described it, the difference between these behaviors is analogous to the difference between a ''come on'' and a ''put down.''[20]

When sex-based harassment at work is measured by asking about this form of gender harassment, almost 60% of women report having experienced harassment in surveys using

[16] *Id.* Three of the studies included in the review by Ilies and her colleagues were probability surveys conducted by the Merit Systems Protection Board (MSPB) of federal employees in 1980, 1987 and 1994. U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* (1994) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=253661&version=253948; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government Update* (1988) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=252435&version=252720&application=ACROBAT; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is it a Problem?* (1981) *available at* http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=240744&version=241014&application=ACROBAT. Instead of asking respondents whether they had experienced "sexual harassment," the MSPB surveys asked respondents if they had experienced one or more of the following six behaviors: letters, phone calls or materials of a sexual nature; pressure for sexual favors; touching, leaning over, cornering or pinching (these were denoted as severe behaviors); pressure for dates; sexually suggestive looks or gestures; and sexual teasing, jokes, remarks or questions (these were denoted as less severe behaviors). While the MSPB studies were conducted nearly 20 years ago, they remain the only set of surveys using probability samples taken over a period of 14 years of largely the same type of workforce.

[17] Ilies *et al.*, *supra* n. 15. In the case of one convenience sample, the incidence rate rose to 90%. *Id.*

[18] Vicki J. Magley *et al.*, *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOLOGY, 390 (1999).

[19] Emily A. Leskinen *et al.*, *Gender harassment: Broadening Our Understanding of Sex-Based Harassment at Work*, 35 LAW AND HUMAN BEHAVIOR 25 (2011) (stating that the Sexual Experiences Questionnaire (SEQ), developed by Professor Louise Fitzgerald and her colleagues in 1988, is the most validated and widely used measure of sexual harassment experiences). *See also* Louise F. Fitzgerald *et al.*, *Measuring Sexual Harassment in the Military: The Sexual Experiences Questionnaire (SEQ-DoD)*, 11 MIL. PSYCHOL. 243 (1998).

[20] Professor Fitzgerald and her colleagues developed this description to explain the different forms of sex-based harassment. Louise F. Fitzgerald *et al.*, *Why Didn't She Just Report Him? The Psychological and Legal implications of Women's Responses to Sexual Harassment*, 51 JOURNAL OF SOCIAL ISSUES 1, 117-138 (1995). *See also* Louise F. Fitzgerald *et al.*, *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 JOURNAL OF VOCATIONAL BEHAVIOR 152–175 (1988) (describing gender-based harassment). In 2007, Professor Berdhal recommended use of the term ''sex-based harassment'' in lieu of ''sexual harassment,'' a recommendation adopted by most researchers in the field. Jennifer L. Berdahl, *The Sexual Harassment of Uppity Women*, 92 J. APPLIED PSYCH, 425 (2007) [hereinafter Berdahl (2007)]. Berdahl's study provided evidence that sexual harassment is primarily targeted at women who violated gender ideals.

probability samples.[21] Indeed, when researchers disaggregate harassment into the various subtypes (unwanted sexual attention, sexual coercion, and gender harassment), they find that gender harassment is the most common form of harassment.[22]

Whether or not women label their unwanted experiences as sexual harassment appears to have little influence on the negative consequences of these experiences.[23] As one group of researchers pointed out, data from three organizations "demonstrate that whether or not a woman considers her experience to constitute sexual harassment, she experiences similar negative psychological, work, and health consequences."[24]

Most of the surveys of sex-based harassment at work have focused on harassment experienced by women. One exception has been the surveys conducted by the Merit Systems Protection Board of federal employees in 1980, 1987, and 1994. When respondents were asked whether they had experienced unwanted sexual attention or sexual coercion, 42% of women and 15% of men responded in the affirmative in 1981; as did 42% of women and 14% of men in 1988; and 44% of women and 19% of men in 1994.[25]

Gender Identity-Based and Sexual Orientation-Based Harassment

There are few nationally representative surveys of harassment experienced by transgender and lesbian, gay or bisexual (LGB) employees.[26] Such harassment may include sexually-based behaviors (such as unwanted sexual touching or demands for sexual favors) as well as gender-based harassment (such as calling a lesbian a "d*ke" or a gay man a "f*g").

In one survey using a probability sample and studying social and demographic trends, 35% of LGB-identified respondents who reported being "open" at work reported having been harassed in the workplace.[27] In another survey using a probability sample, LGBT respondents were asked specifically whether they heard derogatory comments about sexual orientation and gender identity in their workplaces. In that survey, 58% of LGBT respondents said they had heard such

[21] Ilies, *supra* n. 15. When responding to the SEQ, across a variety of work environments and based on 86,578 respondents from 55 independent probability samples, 58% of women report having experienced sex-based harassment.
[22] Leskinen *et al*, *supra* n. 19. In a study of approximately 10,000 women in the military, of those who reported harassment, 89.4% reported gender-based harassment. *Id.*
[23] Magley *et al*., *supra* n. 18; Liberty J. Munson *et al*., *Labeling Sexual Harassment in the Military: An Extension and Replication*, 86 J. APPLIED PSYCHOL. 293 (2011).
[24] Magley *et al*., *supra* n. 18.
[25] MSPB surveys, *supra* n. 16.
[26] It is EEOC's position that harassment based on sexual orientation or gender identity is a form of sex-based harassment. *See* Equal Employment Opportunity Commission, *What You Should Know About EEOC and Enforcement Protections for LGBT Workers*, available at: https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
[27] Christie Mallory & Brad Sears, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, The Williams Institute (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (citing finding from the 2008 General Social Survey, a national probability survey representative of the U.S. population.).

comments.[28] A review of nine other surveys using convenience samples of LGBT individuals found that between 7% and 41% of respondents were verbally and/or physically abused at work or had their work spaces vandalized, with transgender individuals generally experiencing higher rates of harassment than LGB people.[29]

In a large-scale survey of transgender individuals (albeit not a probability sample), 50% of respondents reported being harassed at work.[30] In addition, 7% reported being physically assaulted at work because of their gender identity, and 6% reported being sexually assaulted.[31] 41% reported having been asked unwelcome questions about their transgender or surgical status, and 45% reported having been referred to by the wrong pronouns "repeatedly and on purpose" at work.[32]

Race-Based and Ethnicity-Based Harassment

Race-based and ethnicity-based harassment are significantly understudied.[33] Most studies of race- and ethnicity-based discrimination fail to distinguish between harassment and other forms of discrimination, and hence we did not find any nationally representative surveys on such harassment *per se*.

Researchers have combined the concepts of race-based harassment and ethnicity-based harassment into one construct called "racial and ethnic harassment." In one of the first studies of racial and ethnic harassment based on a convenience sample, between 40% and 60% of respondents (some of whom were working undergraduate or graduate students, others who worked for a school district) reported experiencing some form of racial or ethnic harassment. In this study, harassment was defined to include threatening verbal conduct, such as comments, jokes, and slurs related to one's ethnicity or race, as well as exclusionary behaviors, such as being excluded from a social event, not being given necessary information because of one's ethnicity or race, or being pressured to "give up" one's ethnic/racial identity in order to "fit in."[34]

[28] Human Rights Campaign, *Degrees of Equality Report: A National Study Examining Workplace Climate for LGBT Employees* (2009), *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/DegreesOfEquality_2009.pdf.

[29] Mallory and Sears, *supra* n. 27.

[30] Jaime M. Grant *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), *available at* http://endtransdiscrimination.org/report.html. The survey was based on 6,000 online surveys and 500 paper surveys. The survey is not based on a probability sample because the surveys did not come from a random sample of transgender individuals, but rather from individuals who were reached through various community venues.

[31] *Id.*

[32] *Id.*

[33] Tamara A. Bruce, *Racial and Ethnic Harassment in the Workplace in* GENDER, RACE, AND ETHNICITY IN THE WORKPLACE: ISSUES AND CHALLENGES FOR TODAY'S ORGANIZATIONS (Margaret Foegen Karsten, ed., 2006). While Title VII prohibits discrimination on the basis of national origin, the research generally looks at harassment based on ethnicity, rather than national origin.

[34] Kimberly T. Schneider *et al.*, *An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts*, 85 J. APPLIED PSYCHOL. 3 (2000). This was a study based on four convenience samples of predominantly Hispanic men and women.

In another survey based on a convenience sample measuring racial and ethnic harassment, researchers found that 70% of the respondents reported experiencing some form of verbal harassment and 45% reported experiencing exclusionary behaviors.[35] In addition, 69% of respondents reported *witnessing* at least one ethnically-harassing behavior in the last two years at work and 36% of respondents who reported that they had not experienced direct harassment indicated that they had knowledge about the harassment of other co-workers.[36]

There has also been some research on the prevalence of racial harassment in particular industries. For example, in a 2011 survey based on a convenience sample of restaurant workers in Los Angeles, 35% of respondents reported having experienced verbal abuse perceived as motivated by race.[37] The study found that language and national origin were among the major motivations that workers attributed to their experience of verbal abuse.[38]

Disability-Based Harassment

Evidence on the prevalence of disability-based harassment in the workplace was even harder to find than studies of racial and ethnic harassment. In a survey based on a convenience sample of one university's faculty and staff, 20% of respondents with disabilities reported experiencing harassment or unfair treatment at work because of their disability.[39] In addition, 6% of all respondents reported having observed harassment or similar unfair treatment of a coworker with a disability.[40] In a similar study, conducted at a different university, 14% of respondents with disabilities reported experiencing harassment or similar unfair treatment at work because of their disability, and 5% of all respondents reported having observed harassment or similar unfair treatment of coworkers with disabilities.[41]

The only other research on disability-based harassment in the workplace analyzed EEOC charge data – not to determine the prevalence of disability-based harassment in the workplace, but to discern what disabilities were more likely to show up in such charges. In the most recent analysis, the odds of a person with behavioral disabilities (anxiety disorder, depression, bipolar

[35] K.S. Douglas Low *et al.*, *The Experience of Bystanders of Workplace Ethnic Harassment*, 37 J. APPLIED SOCIAL PSYCHOL. 2261 (2007).
[36] *Id.*
[37] Restaurant Opportunities Center of Los Angeles, Restaurant Opportunities Centers United, and the Los Angeles Restaurant Industry Coalition, *Behind the Kitchen Door: Inequality and Opportunity in Los Angeles, the Nation's Largest Restaurant Industry*, 48-49 (Feb. 14, 2011) *available at* http://rocunited.org/wp-content/uploads/2011/06/ROC-LA-Behind-the-Kitchen-Door.pdf. Although the researchers conducted a convenience sample survey, they used stratification to ensure that the sample was as representative as possible of the Los Angeles County restaurant industry.
[38] *Id.*
[39] University of Missouri Persons with Disabilities Committee, *2009 Faculty/Staff Survey on Disability Prevalence, Awareness and Accessibility at MU*: *A Report to the Chancellor and Provost on Findings and Recommendations by The Chancellor's Committee for Persons with Disabilities* (2010), http://committees.missouri.edu/persons-disabilities/docs/2009%20Faculty_Staff%20Disability%20Survey%20Findings.doc.
[40] *Id.*
[41] Jennifer Vanderminden & Carol Swiech, *Report on the Status of People with Disabilities: A Survey of Faculty and Staff at the University of New Hampshire*, Fall 2011, https://www.unh.edu/sites/www.unh.edu/files/departments/presidents_commission_on_the_status_of_people_with_disabilities/PDFs/2011_cspd_survey_full_report_with_appendix_2012.pdf.

disorder, and other psychiatric impairments) filing a harassment charge were close to 1.5 times greater than the odds of a person with another type of disability filing a harassment charge.[42] People with speech impairments, learning disabilities, disfigurements, intellectual disabilities, dwarfism, traumatic brain injuries, and hearing impairments also filed more disability harassment charges than people with other disabilities.[43]

Age-Based and Religion-Based Harassment

We identified two surveys on age-based harassment in the workplace, both of which were conducted by AARP. In a survey based on a convenience sample of workers older than 50, 8% of respondents reported having been exposed to unwelcome comments about their age.[44] When the same question was asked in a survey based on a convenience sample of workers older than 50 in New York City, close to 25% reported that they or a family member had been subjected to unwelcome comments about their age in the workplace.[45]

We received anecdotal information chronicling different types of religion-based harassment in the workplace.[46] We also identified numerous articles describing how religious harassment manifests itself in the workplace, but we were not able to identify empirical data based on probability or convenience samples on the prevalence of such harassment.[47]

Intersectional Harassment

As people hold multiple identities, they can also experience harassment on the basis of more than one identity group. For instance, an African-American woman may experience harassment because she is a woman, but also because of her racial identity.[48] There is increasing evidence that targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion.[49]

[42] Linda Shaw et al., *Employee and Employer Characteristics Associated with Elevated Risk of Filing Disability Harassment Charges*, 36 J. VOCATIONAL REHAB.187 (2012).
[43] *Id.*
[44] Dawn Nelson, AARP, *AARP Bulletin Poll on Workers 50+: Executive Summary*, AM. ASS'N RETIRED PERSONS (2007), *available at* http://assets.aarp.org/rgcenter/econ/workers_poll_1.pdf.
[45] AARP New York, NYC's Most Powerful Voting Group to Carry Concerns & Worries into Primary (2013), https://states.aarp.org/nycs-most-powerful-voting-group-to-carry-concerns-worries-into-primary/.
[46] *See, e.g.*, *Oral Testimony of Zahra Billoo*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015),
[47] As with studies on racial and ethnic harassment, studies of workplace discrimination based on religion do not disaggregate harassment from other forms of discrimination. *See* Sonia Ghumman *et al.*, *Religious Discrimination in the Workplace: A Review and Examination of Current and Future Trends*, 28 J. BUS. PSYCHOL. 439 (2013) ("Empirical research on religious harassment in the workplace is surprisingly sparse… Often, harassment is lumped in with general measures of discrimination, making it more difficult to sort out the antecedents and consequences of harassment from differential treatment in personnel actions.").
[48] Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCHOL. 42 (2006).
[49] Jana L. Raver and Lisa H. Nishii, *Once, Twice, or Three Times as Harmful? Ethnic Harassment, Gender Harassment, and Generalized Workplace* Harassment, 95:2 J. of Applied Psychol. 236 (2010).

In a 2010 study, researchers hypothesized and found that members of racial minority groups report higher levels of harassment than whites, and that women experience higher levels of harassment than men.[50] When the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience higher rates of harassment than white women.[51] Moreover, when the target of harassment is both a member of a racial minority group and a woman, the individual is more likely to experience harassment than men who are members of a racial minority group.[52] One study focusing primarily on gender-based harassment noted that interviews with participants inevitably led to discussions of related race-based harassment, further reinforcing the intersectional nature of harassing behavior.[53] Despite studies on particular aspects of intersectional harassment, a significant amount of research on topics such as sexual harassment is based on the experiences of white women. Similarly, much research on ethnic harassment is based on the experiences of men who are members of racial minority groups. As a result, current research may underestimate the extent and nature of intersectional harassment.[54]

* * *

The bottom line is that there is a great deal we do not know about the prevalence of harassment that occurs because of an employee's race, ethnicity, religion, age, disability, gender identity, or sexual orientation. This is so, despite the fact that there is no shortage of private sector charges and federal sector complaints that are filed claiming harassment on such grounds. We hope that an outcome of this report will be a focus by funders and researchers on collecting better prevalence data on harassment based on these characteristics.

***In light of what we have learned in this area, we recommend the following*:**

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.[55]

- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.[56]

[50] *Id*. at 240-49.
[51] *Id*.
[52] Berdahl, *supra* n. 48, at 432.
[53] Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 Harv. J. L. & Gender 185 (2014).
[54] Berdahl, *supra* n. 48, at 433.
[55] The 2005 Gallup Organization poll regarding discrimination in the workplace, conducted by Gallup with input from EEOC, would serve as a ready model for a harassment poll. The Gallup Organization, Public Opinion Poll, *Employee Discrimination in the Workplace* (2005), http://media.gallup.com/government/PDF/Gallup_Discrimination_Report_Final.pdf. Notably, since 2002, Australia has conducted a national poll on sexual harassment every five years. https://www.humanrights.gov.au/our-work/sex-discrimination/projects/sexual-harassment-know-where-line.
[56] EEOC's Research and Data Plan for 2016-2019 authorized the agency's research division to study EEOC charge data as well as federal sector hearing and appeal statistics, along with EEO survey and Census data, to determine

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.

- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

C. EMPLOYEE RESPONSES TO HARASSMENT

What do employees do when they experience harassment in the workplace? Based on the volume of charges and complaints filed each year, one might presume that many such individuals seek legal relief.

That presumption is incorrect. In fact, based on the empirical data, the extent of non-reporting is striking. As with all the evidence we discuss in this report, almost all of the data on responses to harassment come from studies of sex-based harassment.

Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).[57] In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.[58]

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which private sector and federal, state and local government employers and industries were most frequently subject to allegations of harassment. *See* https://www.eeoc.gov/eeoc/plan/research_data_plan.cfm. Researchers are often dependent on outside funding from private and public sources to conduct their research. Thus, this recommendation is directed toward such funders as well.

[57] Cortina & Berdahl, *supra* n. 14. The range of percentages results from five studies reviewed by Cortina & Berdhal. Three of the studies surveyed women only; two of the studies surveyed men and women. The five studies were: (1) Lilia M. Cortina, *Hispanic Perspectives on Sexual Harassment and Social Support*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 570 (2004) (working Latina women from different companies); (2) Caroline C. Cochran *et al*., *Predictors of Responses to Unwanted Sexual Attention*, 21 PSYCHOL. OF WOMEN Q. 207 (1997) (male and female university staff and students); (3) Amy L. Culbertson & Paul Rosenfield, *Assessment of Sexual Harassment in the Active-Duty Navy*, 6 MIL. PSYCHOL. 69 (1994) (exploring experiences of women in the Navy); (4) Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. OF APPLIED PSYCHOL. 401 (1997) (working women from different companies); and (5) MSPB 1994, *supra* n. 16 (male and female federal employees). Because these percentages come from a review of five studies, they include surveys in which respondents were asked if they had experienced "sexual harassment" (without the term being defined), had experienced any behavior from a list of sexually-based behaviors ("come-ons"), or had experienced any of those sexually-based behaviors and/or any gender-based derogatory comments ("put downs").

[58] The percentages in the four studies for targets of harassment confronting their harasser in some way were wide-ranging: 25% (Cochran – university staff and students); 33% to 57% (Schneider – working women in different companies); and 41% of women and 23% of men (MSPB – federal employees). The highest percentages were in the Navy study by Culbertson *et al.*: 54% of officers and 72% of enlisted personnel.

The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others.[59]

The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.[60] Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, *approximately 70%* of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.[61]

The incidence of reporting appears to be related to the type of harassing behavior. One study found that gender-harassing conduct was almost never reported; unwanted physical touching was formally reported only 8% of the time; and sexually coercive behavior was reported by only 30% of the women who experienced it.[62]

In terms of filing a formal complaint, the percentages tend to be quite low. Studies have found that 6% to 13% of individuals who experience harassment file a formal complaint.[63] That means that, on average, anywhere from 87% to 94% of individuals did *not* file a formal complaint.

Employees who experience harassment fail to report the behavior or to file a complaint because they anticipate and fear a number of reactions – disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation.[64]

The fears that stop most employees from reporting harassment are well-founded. One 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.[65] Other studies have found that sexual harassment reporting is often followed by organizational indifference or trivialization of the harassment complaint as well as

[59] Cortina & Berdhahl, *supra* n. 14.
[60] *Id.*
[61] *Id.*
[62] *Written Testimony of Lilia M. Cortina*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_cortina.cfm (*citing* K. A. Lonsway *et al*., *Sexual Harassment in Law Enforcement: Incidence, Impact and Perception*, 16 POLICE QUARTERLY 117 (Jun. 2013)).
[63] Cortina & Berdhahl, *supra* n. 14. In the Navy study by Culbertson *et al*., 6% to 8% filed a formal complaint; in the survey by Schneider of women in different companies, 6% to 13% had filed a complaint. Two of the studies had very disparate results. Cortina's study of Latina women in different companies showed a 17% to 20% rate for filing a formal complaint, while the study by Cochran *et al.* of university staff and students showed a 2% rate. The MSPB study found that, in 1987, 5% of both female and male employees took some type of formal action. MSPB 1988, *supra* n. 16. In 1994, for the study included in the Cortina and Berdhahl review, the rate had increased to 6%. MSPB 1994, *supra* n.16.
[64] Cortina testimony, *supra* n. 62.
[65] Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003).

hostility and reprisals against the victim.[66] Such responses understandably harm the victim in terms of adverse job repercussions and psychological distress.[67] Indeed, as one researcher concluded, such results suggest that, in many work environments, the most "reasonable" course of action for the victim to take is to avoid reporting the harassment.[68]

These findings raise serious concerns. We discuss the need for a comprehensive strategy to remedy this problem in Part Three of this report.

* * *

Our journey into the academic literature on the prevalence of, and responses to, harassment was illuminating. It taught us some things we did not know at all – for example, how radically different prevalence rates of sex-based harassment can be based on whether respondents are a probability sample or a convenience sample, and based on how survey questions are framed. It reinforced some information we already knew, such as the low level of formal reporting, although the high percentage of those who never talk to a supervisor or file a legal complaint was striking. And it laid bare the absence of empirical data regarding the prevalence of harassment based on protected characteristics other than sex.

D. THE BUSINESS CASE FOR STOPPING AND PREVENTING HARASSMENT

Let there be no mistake: Employers should care about stopping harassment because *harassment is wrong* – and, in many cases, it is *illegal*. Workplace harassment can produce a variety of harms – psychological, physical, occupational, and economic harms that can ruin an employee's life. These effects of harassment – on victims – are primarily why harassment must be stopped. So, again: Employers should care about preventing harassment because it is the right thing to do, and because stopping illegal harassment is required of them.

Moral obligation and legal duty are not the complete story, though. Based on what we have learned, employers should also care about stopping harassment because it makes good business sense.

The business case for preventing harassment is sweeping. At the tip of the iceberg are direct financial costs associated with harassment complaints. Time, energy, and resources are diverted from operation of the business to legal representation, settlements, litigation, court awards, and

[66] Mindy Bergman *et al., The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87(2) J.APPLIED PSYCHOLOGY 230 (2002); MSPB 1994, *supra* n. 16.
[67] Bergman *et al., supra* n. 66; Cortina and Magley, *supra* n. 65.
[68] *Written Testimony of Mindy E. Bergman*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 15, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm. As Bergman notes: "It is actually *unreasonable* for employees to report harassment to their companies because minimization and retaliation were together about as common as remedies and created further damage to people who had already been harassed. Further, because remediating the situation did not make the person whole – that is, did not overcome the damage caused by harassment – and helpful vs. hurtful responses were each found about 50% of the time, reporting is a gamble that is not worth taking in terms of individual well-being."

damages. These are only the most visible and headline-grabbing expenses. They also only address employees who report harassment, which, as we explained, may account for only a fraction of the harassment that occurs.

The business case extends far deeper. It encompasses employees who endure but never report harassment, as well as coworkers and anyone else with an interest in the business who witness or perceive harassment in the workplace. When accounting for all those affected by it, harassment becomes more insidious and damaging. In addition to the costs of harassment complaints, the true cost of harassment includes detrimental organizational effects such as decreased workplace performance and productivity, increased employee turnover, and reputational harm.

Direct Financial Costs of Harassment

When employers consider the costs of workplace harassment, they often focus on tangible, monetary costs associated with charges filed with EEOC, and with good reason. As previously noted, nearly one in three charges filed with the Commission in fiscal year 2015—27,893 of 89,385 charges – alleged some form of harassment.[69] That averages to approximately 76 harassment charges filed *daily* – a number that has, unfortunately, remained steady over the years. Indeed, since 2010, employees have filed 162,872 charges alleging harassment.[70]

Charges of harassment come at a steep cost for employers. The Commission resolved 28,642 harassment allegations in 2015. Of those, 5,518 charges involving allegations of harassment were resolved in favor of the charging party through the administrative process, resulting in $125.5 million in benefits for employees. Since 2010, employers have paid out $698.7 million to employees alleging harassment through the Commission's administrative enforcement pre-litigation process alone.[71] While we do not have strictly comparable cost data with respect to the various agencies of the federal government, we surmise it would likely be similar, given the diverse and varied nature of the federal workforce and its worksites.[72]

[69] *See* U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Statutes (FY 1997 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm; U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 - FY 2015) http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

[70] *See* U.S. Equal Employment Opportunity Commission, Enforcement & Litigation Statistics, All Charges Alleging Harassment (FY 2010 – FY 2015), http://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

[71] *Id.*

[72] As we heard from one witness at the first public meeting of the Task Force: "The federal government is the most diverse workforce in the world. We have federal grocery stores – over two hundred federal grocery stores, federal butchers, federal cashiers. We have park rangers who spend two months surveying the wilderness and VA hospitals that have the full range of medical professionals, doctors, and nurses. We have police departments, we have fire departments, so when people think of the federal government you think of bureaucracy you don't think of the traditional employment." *Oral Testimony of Dexter Brooks*, WORKPLACE HARASSMENT: EXAMINING THE SCOPE OF THE PROBLEM AND POTENTIAL SOLUTIONS, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 17, 2015).

EEOC 2015 Statistics in the Private Sector

- *27,893 charges received (31%) alleged harassment*
- *28,642 charges resolved (31%) alleged harassment*
- *$125.5 million secured for employees alleging harassment in EEOC's pre-litigation process*
- *33 lawsuits filed by EEOC (23% of all suits filed) alleged harassment*
- *42 lawsuits resolved by EEOC (27% of all suits resolved) alleged harassment*
- *$39 million in monetary benefits secured for employees in EEOC lawsuits involving harassment*

A recent study by Hiscox, a liability insurance provider, paints the picture of the costs of employment disputes (albeit not only harassment claims) more broadly.[73] Studying a representative sample of closed employment dispute claims from smaller- and mid-sized companies, they found that 19% of the matters resulted in defense and settlement costs averaging $125,000 per claim.[74] And of course, for the 81% of studied charges that did not result in a payment by the insurance company, precious time, energy, and resources were still required to handle them internally – for 275 days, on average.[75] Beyond their study of the closed claims, Hiscox estimated, based on 2014 data, that U.S. employers had at least an 11.7% chance of having an EEO charge filed against them.[76] While this data applies to a broader range of employment disputes, not just harassment claims, the time, energy, and resources devoted to those claims would apply to harassment claims, as well.

Litigation of harassment claims tends to be even more expensive. One estimate of settlement payments and court judgments solely in 2012 for harassment lawsuits clocked in at over $356 million.[77] The largest sexual harassment jury award in 2012 totaled $168 million.[78]

Harassment litigation initiated by EEOC has also cost employers. In fiscal year 2015, the Commission filed 33 lawsuits containing a harassment allegation.[79] During the same time, it resolved 42 lawsuits involving harassment, recovering over $39 million in monetary benefits for

[73] *See* Hiscox, The 2015 Hiscox Guide to Employee Lawsuits: Employee Charge Trends Across the United States, *available at* http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf.
[74] *Id.* at 6.
[75] *Id.*
[76] *Id.* at 4.
[77] eBossWatch, *National Boss Day Report: Employers paid over $356 million for workplace harassment and discrimination complaints* (Oct. 16, 2012), http://blog.ebosswatch.com/2012/10/national-boss-day-report-employers-paid-over-356-million-for-workplace-harassment-and-discrimination-complaints/.
[78] *Id.*
[79] Data provided by EEOC Office of General Counsel.

employees.[80] Simply put, the direct financial costs of workplace harassment are significant. But by no means are financial costs the only repercussions.

Indirect Costs: Decreased Productivity, Increased Turnover, and Reputational Damage

Direct costs tied to harassment complaints are largely visible. An employer consciously moves resources away from its business plan to respond to the complaints. However, there are a host of indirect costs that, while often invisible, can tower over the direct costs.

It begins with the reality that harassment causes personal harm to the victim. Numerous studies have identified the damaging effects of mistreatment in the workplace, mainly focusing on sexual harassment. Employees experiencing sexual harassment are more likely to report symptoms of depression, general stress and anxiety, posttraumatic stress disorder (PTSD), and overall impaired psychological well-being.[81]

The Personal Effects of Harassment:
Selections from Stories Shared with the Select Task Force

"I have faced sexual discrimination as well as unwanted sexual harassment on my job and retaliation by my employer for addressing the issue. The distress and mental anguish that I have endured has affected my health. I was recently diagnosed with hypertension on July 13, 2015, and I am only 36 years old."

"[The harassment has] caused devastating loss of income, reputation, missed opportunities, mental health and physical health problems."

One study found that the psychological effects of sexual harassment can rise to the level of diagnosable Major Depressive Disorder or PTSD.[82] Sexual harassment has also been tied to psychological effects such as negative mood, disordered eating, self-blame, reduced self-esteem, emotional exhaustion, anger, disgust, envy, fear, lowered satisfaction with life in general, and abuse of prescription drugs and alcohol.[83]

Physical harm can also result. Studies have linked sexual harassment to decreased overall health perceptions or satisfaction, as well as headaches, exhaustion, sleep problems, gastric problems,

[80] *Id.* To be clear, many of these suits involved allegations in addition to harassment. As a result, not all of the $39 million in monetary benefits may be directly tied to allegations of harassment.
[81] *See* Cortina testimony, *supra* n. 62; Cortina & Berdahl, *supra* n. 14; Lilia M. Cortina & Emily A. Leskinen, *Workplace Harassment Based on Sex: A Risk Factor for Women's Mental Health Problems*, *in* VIOLENCE AGAINST WOMEN AND MENTAL HEALTH 139 (C. GarcÍa- Moreno & A. Riecher-Rössler eds., 2013).
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[82] *See* Cortina & Leskinen, *supra* n. 81 (citing B. S. Dansky & D. G. Kilpatrick, *Effects of Sexual Harassment, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 152 (W. O'Donohue ed., 1997)).
[83] *Id.*

nausea, weight loss or gain, and respiratory, musculoskeletal, and cardiovascular issues.[84] These potential effects, both mental and physical, become increasingly likely when the harassment occurs over time.[85]

The damaging personal effects of harassment are not limited to victims. There is growing understanding that employees who observe or perceive mistreatment in their workplace can also suffer mental and physical harm. One study found that employees, female and male alike, who observed hostility directed toward female coworkers (both incivility and sexually harassing behavior) were more likely to experience lower psychological well-being.[86] These declines in mental health were, in turn, linked to lower physical well-being.[87] According to the study, the drivers of these effects can stem from empathy and worry for the victim, concern about the lack of fairness in their workplace, or fear of becoming the next target.[88] Whatever the case, if there is harassment in the workplace, more people than just the victim can be harmed.

It follows, then, that when employees are suffering harassment, the work can suffer. It is well-established that workplace harassment and conflict can result in decreased productivity. Studies – again, focusing largely on sexual harassment – have found that harassment is associated with debilitating job dissatisfaction and work withdrawal.[89] This largely takes form as disengagement from work, which is manifested as distraction, neglecting a project, malingering, tardiness, or even excessive absenteeism.[90] Often, work time is spent talking about the harassment with others, seeking personal treatment or assistance, reporting the harassment, and navigating the complaint and investigation processes.[91]

Work withdrawal and disengagement due to harassment can also go beyond the individual to affect team and group relationships.[92] The mere awareness of sexual harassment among a work group can create a tense environment,[93] negatively influencing the group's day-to-day functioning.[94] At the most basic interactional level, one study found that three-quarters of U.S. workers have avoided a coworker merely because of a "disagreement" [95] – let alone because of harassment. Ultimately, this kind of response to workplace conflict can become a contagion and

[84] *See* Cortina & Berdahl, *supra* n. 14 at 481.
[85] *See* Jennifer L. Berdahl & Jana L. Raver, *Sexual Harassment*, 3 APA HANDBOOK INDUS. & ORGANIZATIONAL PSYCHOL. 641 (2011).
[86] *See* Kathi Minder-Rubino & Lilia Cortina, *Beyond Targets: Consequences of Vicarious Exposure to Misogyny at Work*, 92 J. APPLIED PSYCH. 1254, 1264 (2007).
[87] *Id.*
[88] *Id.*
[89] *See* Cortina & Berdahl, *supra* n. 14 at 481 (summarizing studies); Berdahl & Raver, *supra* n. 85, at 649; Laurent LaPierre *et al*., *Sexual Versus Nonsexual Workplace Aggression and Victims' Overall Job Satisfaction*, 10 J. Occupational Health Psych. 155 (2005).
[90] *See* Cortina & Berdahl, *supra* n. 14 at 481 (summarizing studies); Donald Zauderer, *Workplace Incivility and the Management of Human Capital*, THE PUBLIC MANAGER 38 (Spring 2002).
[91] *See* MSPB 1994, *supra* n. 16.
[92] *See* Jana Raver & Michele Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48 Academy of Mgmt. J. 387, 388 (2005).
[93] *See id.* (citing T.M. Glomb *et al*., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 Org. Behavior and Human Decision Processes 309-28 (1997)).
[94] *See id.* at 394.
[95] CPP Global, *Workplace Conflict and How Businesses Can Harness It to Thrive* 6 (2008), *available at* https://www.cpp.com/pdfs/CPP_Global_Human_Capital_Report_Workplace_Conflict.pdf.

an "organization stressor."[96] It can pervade and break down a work group, damaging its ability to function.[97] All of this is a drag on performance – and the bottom line.

A Sketch of the Cost of Lost Time Due to Harassment in the Federal Workplace

[I]magine an employee who's being bothered by a coworker who leers at her or makes comments full of innuendo or double entendres, or who tells jokes that are simply inappropriate in a work setting. The time this employee spends worrying about the coworker, the time she spends confiding in her office mate about the latest off-color remark, the time she spends walking the long way to the photocopier to avoid passing his desk, is all time that sexual harassment steals from all of us who pay taxes.

Adding up those minutes and multiplying by weeks and months begins to paint a picture of how costly sexual harassment is. Increase this one individual's lost time by the thousands of cases like this in a year, and the waste begins to look enormous. And this may well be a case that doesn't even come close to being considered illegal discrimination by the courts. Whether or not they're illegal, these situations are expensive.

U.S. Merit Systems Protections Board, Sexual Harassment in the Federal Workplace (1994).

Perhaps most costly of all, workplace harassment can lead to increased employee turnover. Some have hypothesized that turnover costs are the largest single component of the overall cost of sexual harassment.[98] Even conduct that is not harassment can lead to employee turnover. To summarize one commentator: Acts of incivility can incite people to exit the scene.[99]

Combining these various factors can add up to a significant sum of money. In 1994, the Merit Systems Protection Board conservatively estimated that over two years, as a result of sexual harassment, job turnover ($24.7 million), sick leave ($14.9 million), and decreased individual ($93.7 million) and workgroup ($193.8) productivity had cost the government a total of $327.1 million.[100]

An additional cost to consider is the damage workplace harassment can inflict on a firm's reputation. For example, studies have linked sexual harassment to negative effects on a firm's ability to attract employees.[101] A 2008 study of the impact of sexual harassment on a consumer brand found that prospective employees' perceived sexual harassment in a sales workplace was negatively related to their intentions to work for the firm.[102] Indeed, fostering an organization's image through internal brand strategies aimed at alleviating workplace sexual harassment may lead to the attraction and retention of qualified employees.[103]

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[96] *Id.*
[97] *Id.*
[98] *See* Rebecca Merkin & Muhammad Kamal Shah, *The Impact of Sexual Harassment on Job Satisfaction, Turnover Intentions, and Absenteeism: Findings from Pakistan Compared to the United States*, Springer Plus 4 (2014), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4028468/.
[99] *See* Zauderer, *supra* n. 90, at 41.
[100] *See* MSPB 1994, *supra* n. 16, at 26.
[101] *See, e.g.*, Jeremy Sierra *et al*., *Brand Response-Effects of Perceived Sexual Harassment in the Workplace*, 14 J. OF BUS. & MGMT. 157 (2008).
[102] *Id.* at 185.
[103] *Id.* at 190 (referencing John Sullivan, *Measuring Employment Brand*, 2 STRATEGIC HUM. RES. REV. 7 (2003)).

Even behavior that doesn't rise to the level of harassment can adversely affect the ability of employers to attract talent. In the 2007 Level Playing Field Institute study, roughly one-fourth (27%) of respondents who experienced "unfairness" at work within the past year, and over 70% who suffered bullying, said their experience strongly discouraged them from recommending their employer to potential employees.[104] And approximately 58% who experienced unfairness said that their experience would "to some degree" cause them to discourage potential employees.[105]

The ability of a firm to retain customers and clients, or attract new ones, could also be affected. Studies demonstrate that perceived sexual harassment in the workplace has a negative effect on attitudes toward the brand and brand image.[106] Conversely, when internal stakeholders understand, embrace, and execute organizational brand values, the company has an opportunity to gain a competitive advantage in the marketplace and the brand has an opportunity to flourish. In this sense, internal brand strategies are critical for overall business success.[107]

Again, even behavior that does not n't rise to the level of harassment can adversely affect a brand. A majority of respondents in the Level Playing Field Institute's study replied that "unfairness" they had suffered in the workplace led them "to some degree" to discourage others from purchasing products or services from their employer.[108] Studies have also shown that "incivility" among employees in a workplace, when merely observed by a consumer, can lead the consumer to feel anger.[109] That anger then "fosters rapid, negative generalizations about the firm and other employees that extend into the future."[110] As a result, consumers observing uncivil forms of behavior among employees become "less likely to repurchase from the firm and express less interest in learning about the firm's new services."[111]

[104] *See* Corporate Leavers Study, Level Playing Field Institute, *The Cost of Employee Turnover Due Solely to Unfairness in the Workplace* (2007) at 7, http://www.lpfi.org/corporate-leavers-survey/.
[105] *Id.* Much of the research in this area examines the negative effects of incivility or rudeness in the workplace, not specifically harassment. However, we believe this research still merits consideration, as, arguably, the negative effects of incivility would similarly emerge were the focus squarely on harassing behavior.
[106] Sierra *et al.*, *supra* n. 102.
[107] *Id.* at 190 (citing Rodney Peter Gapp & Bill Merrilees, *Important Factors to Consider When Using Internal Branding as a Management Strategy: A Healthcare Case Study*, 14 J. BRAND MGMT. 162 (2006)).
[108] Christine Porath *et al.*, *It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company*, J. SERV. RES. 1 (2011); Christine Porath *et al.*, *Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies*, 37 J. CONSUMER RES. 292 (2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.
[109] *See* Christine Porath, Debbie MacInnis, & Valerie Folkes, *It's Unfair: Why Customers Who Merely Observe an Uncivil Employee Abandon the Company*, Journal of Service Research (Feb. 22, 2011); Christine Porath, Debbie MacInnis, & Valerie Folkes, *Witnessing Incivility Among Employees: Effects on Consumer Anger and Negative Inferences about Companies*, Journal of Consumer Research (Vol. 37) 292-303 (Aug. 2010). The studies generally define "incivility" as insensitive, disrespectful, or rude behaviors directed at another person that display a lack of regard.
[110] Porath, *et al.*, 2010, *supra* n. 110, at 301.
[111] Porath, *et al.*, 2011, *supra* n, 110, at 3.

The Case of the "Superstar" Harasser

Finally, an often competing economic consideration bears discussion. Employers may find themselves in a position where the harasser is a workplace "superstar."[112] By superstar, think of the high-earning trader at an investment bank, the law firm partner who brings in lucrative clients, or the renowned professor or surgeon.[113] Some of these individuals, as with any employee, may be as likely to engage in harassment as others. Often, however, superstars are privileged with higher income, better accommodations, and different expectations.[114] That privilege can lead to a self-view that they are above the rules, which can foster mistreatment.[115] Psychologists have detailed how power can make an individual feel uninhibited and thus more likely to engage in inappropriate behaviors.[116] In short, superstar status can be a breeding ground for harassment.

When the superstar misbehaves, employers may perceive themselves in a quandary. They may be tempted to ignore the misconduct because, the thinking goes, losing the superstar would be too costly. They may wager that the likelihood or cost of a complaint of misbehavior is relatively low and outweighed by the superstar's productivity. Some employers may even use this type of rationale to cover or retaliate for a harasser.

Employers should avoid the trap of binary thinking that weighs the productivity of a harasser *solely* against the costs of his or her being reported. As a recent Harvard Business School study found, the profit consequences of so-called "toxic workers" – *specifically including* those who are "top performers" – is a net negative.[117] Analyzing data on 11 global companies and 58,542 hourly workers, the researchers found that roughly one in 20 workers was fired for egregious company policy violations, such as sexual harassment.[118] Avoiding these toxic workers, they found, can save a company more than twice as much as the increased output generated by a top performer.[119] As a result, the study urged employers to "consider toxic and productivity outcomes together rather than relying on productivity alone as the criterion of a good hire."[120] No matter who the harasser is, the negative effects of harassment can cause serious damage to a business. Indeed, the reputational costs alone can have serious consequences, particularly where

[112] Michael Housman & Dylan Minor, *Toxic Workers*, Harvard Business School, Working Paper 16-057, 3 (Nov. 15) (defining "superstar" as "workers in the top 1% of productivity"), *available at* http://www.hbs.edu/faculty/Publication%20Files/16-057_d45c0b4f-fa19-49de-8f1b-4b12fe054fea.pdf.
[113] *Written Testimony of Fran Sepler*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/sepler.cfm; *see also* Michael Housman & Dylan Minor, *Toxic Workers*, HARV. BUS. SCH. (2015), at 22 ("For example, an investment bank with a rogue trader who is making the firm millions in profits might be tempted to look the other way when the trader is found to be overstepping the legal boundaries.")
[114] Sepler testimony, *supra* n. 114.
[115] *Id.*
[116] Dacher Keltner *et al.*, *Power, Approach, and Inhibition*, 110 PSYCHOL. REV. 265 (2003).
[117] Housman & Minor, *supra* n. 113, at 23. The authors define a "toxic worker" as "a worker that engages in behavior that is harmful to an organization, including either its property *or people*." *Id.* at 2 (emphasis added). Further, the term "toxic" includes "both the basic definition of toxic as being something harmful and also the notion that toxic workers tend to infect others with such behavior." *Id.* at n.1.
[118] *Id.* at 10, 12.
[119] *Id.* at 20.
[120] *Id.* at 23.

it is revealed that managers for years "looked the other way" at a so-called "superstar" harasser.[121]

E. RISK FACTORS FOR HARASSMENT

Our efforts over the past year with the Select Task Force focused broadly on unwelcome conduct in the workplace based on characteristics protected under anti-discrimination statutes. We wanted to find ways to help employers and employees prevent such conduct before it rose to the level of illegal harassment.

Several members of the Select Task Force suggested that we identify elements in a workplace that might put a workplace more at risk for harassment. The thought was that if we could identify "risk factors," that might give employers a roadmap for taking proactive measures to reduce harassment in their workplaces. Indeed, as we delved into the question, we found that academic research and practical knowledge gained on the ground by investigators, trainers, diversity leaders, and human resources personnel have identified a number of such risk factors.

Some of the findings around risk factors (both from academic work and practical work) look at the characteristics of those who might be more prone to engage in harassment or to be the victims of harassment. We decided to focus instead on a number of environmental risk factors – organizational factors or conditions that may increase the likelihood of harassment. Indeed, numerous studies have shown that organizational conditions are the most powerful predictors of whether harassment will happen.[122]

Most if not every workplace will contain at least some of the risk factors we describe below. In that light, to be clear, we note that the existence of risk factors in a workplace does not mean that harassment is occurring in that workplace. Rather, the presence of one or more risk factors suggests that there may be fertile ground for harassment to occur, and that an employer may wish to pay extra attention in these situations, or at the very least be cognizant that certain risk factors may exist. Finally, we stress that the list below is neither exclusive nor exhaustive, but rather a number of factors we felt were readily identifiable.

[121] For just a sampling of news stories on such situations, *see, e.g.*, Rick Rojas, *Columbia Business Professor Files Sexual Harassment Lawsuit Against University*, N.Y. Times, Mar. 24, 2016, at A23; Tamar Lewin, *Seven Allege Harassment by Yale Doctor at Clinic*, N.Y. Times, April 14, 2015, at A11. *See also* Katie J.M. Baker, *Ethics and the Eye of the Beholder*, BuzzFeedNews (May 20, 2016, 2:56 PM), https://www.buzzfeed.com/katiejmbaker/yale-ethics-professor?utm_term=.skpralLvX#.dm1YJWA4K; Katie J.M. Baker & Adam Serwer, *Administrator at Iconic Comedy Theater Fired Over Harassment Allegations*, BuzzFeedNews (Feb. 19, 2016, 7:30 PM), https://www.buzzfeed.com/katiejmbaker/administrator-at-iconic-comedy-theater-fired-over-sexual-har?utm_term=.rso68Y0zM#.ij30DLbPe.

[122] Cortina testimony, *supra* n. 62; Chelsea R. Willness *et al.*, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60:1 PERSONNEL PSYCHOL. 127 (2007).

Homogenous Workforces

Perhaps not surprisingly, harassment is more likely to occur where there is a lack of diversity in the workplace.[123] For example, sexual harassment of women is more likely to occur in workplaces that have primarily male employees, and racial/ethnic harassment is more likely to occur where one race or ethnicity is predominant.[124] Workers with different demographic backgrounds than the majority of the workforce can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others.[125] They may speak a different language, observe different customs, or simply interact in ways different from the majority. Conversely, workers in the majority might feel threatened by those they perceive as "different" or "other." They might be concerned that their jobs are at risk or that the culture of the workplace might change, or they may simply be uncomfortable around others who are not like them.[126]

Workplaces Where Some Workers Do Not Conform to Workplace Norms

Harassment is more likely to occur where a minority of workers does not conform to workplace norms based on societal stereotypes.[127] Such workers might include, for example, a "feminine" acting man in a predominantly male work environment that includes crude language and sexual banter, or a woman who challenges gender norms by being "tough enough" to do a job in a traditionally male-dominated environment.[128] Similarly, a worker with a manifest disability may engender harassment or ridicule for being perceived as "different," as might a worker in a "rough and tumble" environment who for any number of reasons chooses not to participate in "raunchy" banter.

Cultural and Language Differences in the Workplace

It might seem ironic (given the first risk factor of homogenous workforces) that workplaces that are extremely diverse also pose a risk factor for harassment.[129] This has been found to be the case especially when there has been a recent influx of individuals with different cultures or nationalities into a workplace, or where a workplace contains significant "blocs" of workers from

[123] Cortina testimony, *supra* n. 62; Sepler testimony, *supra* n. 114; Meg A. Bond, *Prevention of Sexism* in ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014).
[124] Sepler testimony, *supra* n. 114.
[125] *Id*.
[126] *See generally* Alistair Bell, *Americans Worry That Illegal Migrants Threaten Way of Life, Economy*, REUTERS (Aug. 7, 2014), http://www.reuters.com/article/us-usa-immigration-worries-idUSKBN0G70BE20140807 (reporting that 70% of Americans believe that undocumented immigrants threatened U.S. beliefs and customs); Cristina Silva, *Undocumented Immigrants Taking Jobs From US Citizens? Most Americans Believe Immigration Is Bad For Economy*, INT'L BUS. TIMES (Aug. 14, 2015), http://www.ibtimes.com/undocumented-immigrants-taking-jobs-us-citizens-most-americans-believe-immigration-2054509 (citing survey data that 51% of Americans believe they are competing for jobs against immigrants living in the county without work permits).
[127] Bond, *supra* n. 124.
[128] Cortina & Berdahl, *supra* n. 14.
[129] *Written Testimony of Sindy Warren*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/warren.cfm.

different cultures.[130] Alternately, different cultural backgrounds may cause employees to be less aware of laws and workplace norms, which can affect both their behavior and their ability to recognize prohibited conduct.[131] Workers who do not speak English may not know their rights, and may be more subject to exploitation. The Select Task Force heard testimony from one expert who discussed how language and linguistic characteristics can play a role in cases of harassment or discrimination.[132]

Coarsened Social Discourse Outside the Workplace

In both homogenous and diverse workforces, events and coarse social discourse that happen outside the workplace may make harassment inside a workplace more likely or perceived as more acceptable. For example, after the 9/11 attacks, there was a noted increase in workplace harassment based on religion and national origin. Thus, events outside a workplace may pose a risk factor that employers need to consider and proactively address, as appropriate.

Workforces with Many Young Workers

Workplaces with many teenagers and young adults may raise the risk for harassment.[133] Workers in their first or second jobs may be less aware of laws and workplace norms – *i.e.*, what is and is not appropriate behavior in the workplace.[134] Young workers who engage in harassment may lack the maturity to understand or care about consequences.[135] Young workers who are the targets of harassment may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable.[136] Finally, young workers who are in unskilled or precarious jobs may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions.

Workplaces with "High Value" Employees

As noted in the discussion regarding the business case, there are workforces in which some employees are perceived to be particularly valuable to the employer – the "rainmaking" partner or prized, grant-winning researcher.[137] These workplaces provide opportunities for harassment, since senior management may be reluctant to challenge the behavior of their high value employees, and the high value employees, themselves, may believe that the general rules of the workplace do not apply to them.[138] In addition, the behavior of such individuals may go on outside the view of anyone with the authority to stop it.

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[130] Mary M. Meares *et al.*, *Employee Mistreatment and Muted Voices in the Culturally Diverse Workplace*, 32 J. OF APPLIED COMM. RES. 4 (2004).
[131] *Id.*
[132] *Testimony of Guadalupe Valdés*, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016), https://www.eeoc.gov/eeoc/task_force/harassment/3-11-16/valdes.cfm.
[133] *Written Testimony of Michael A. Robbins*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/robbins.cfm; Warren testimony, *supra* n. 130.
[134] Robbins testimony, *supra* n. 134.
[135] *Id.*
[136] *Id.*
[137] Sepler testimony, *supra* n. 114.
[138] *Id.*

Workplaces with Significant Power Disparities

The reality is that there are significant power disparities between different groups of workers in most workplaces. But such significant power disparities can be a risk factor.[139] For example, workplaces where there are executives and administrative support staff, factories where there are plant managers and assembly line workers, and all branches of the military pose opportunities for harassment.[140]

Low-status workers may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them. Low-status workers may be less likely to understand internal complaint channels, and may also be particularly concerned about the ramifications of reporting harassment (*e.g.*, retaliation or job loss).[141] Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.[142] Finally, research shows that when workplace power disparities are gendered (*e.g.*, most of the support staff are women and most of the executives are men), more harassment may occur.[143]

Workplaces that Rely on Customer Service or Client Satisfaction

Few employers would say that their business does *not* rely on excellent customer service and client satisfaction. As a risk factor, we are specifically speaking about those workplaces where an employee's compensation may be directly tied to customer satisfaction or client service. For example, a tipped worker may feel compelled to tolerate inappropriate and harassing behavior rather than suffer the financial loss of a good tip.[144] A commissioned salesperson may stay silent in the face of harassment so as to ensure he or she makes the sale. Finally, in order to ensure customer happiness, management may, consciously or subconsciously, tolerate harassing behavior rather than intervene on the workers' behalf.[145]

Workplaces Where Work is Monotonous or Consists of Low-Intensity Tasks

We heard that workplaces where workers are engaged in monotonous or low-intensity tasks may be more likely to see workplace harassment. In jobs where workers are not actively engaged or have "time on their hands," harassing or bullying behavior may become a way to vent frustration or avoid boredom.[146]

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[139] Warren testimony, *supra* n.130.
[140] *Id.*; Sepler testimony, *supra* n. 114.
[141] *Written Testimony of Daniel Werner*, RETALIATION IN THE WORKPLACE: CAUSES, REMEDIES, AND STRATEGIES FOR PREVENTION, (June 17, 2015), https://www.eeoc.gov/eeoc/meetings/6-17-15/werner.cfm.
[142] Southern Poverty Law Center, *Injustice on our Plates: Immigrant Women in the U.S. Food Industry* 1, 22-25 (2010); Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the U.S. to Sexual Violence and Sexual Harassment* 1 (2012).
[143] Meg A. Bond, *Prevention of Sexism, in* ENCYCLOPEDIA OF PRIMARY PREVENTION AND HEALTH PROMOTION (Thomas Gullotta & Martin Bloom eds., 2014).
[144] Restaurant Opportunities Centers United, *The Glass Floor, Sexual Harassment in the Restaurant Industry*, (October 7, 2014), *available at* http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf.
[145] *Id.*
[146] Sepler testimony, *supra* n. 114.

Isolated Workspaces

Harassment is also more likely to occur in isolated workspaces, where the workers are physically isolated or have few opportunities to work with others.[147] Harassers have easy access to such individuals, and there generally are no witnesses to the harassment.[148] For example, janitors working alone on the nightshift, housekeepers working in individual hotel rooms, and agricultural workers in the fields are all particularly vulnerable to sexual harassment and assault.[149]

Workplace Cultures that Tolerate or Encourage Alcohol Consumption

Alcohol reduces social inhibitions and impairs judgment. Not surprisingly, then, workplace cultures that tolerate alcohol consumption during and around work hours provide a greater opportunity for harassment.[150] Workplaces where alcohol is consumed by clients or customers are also at higher risk of harassment.[151] In some workplaces, alcohol consumption may become an issue once or twice a year – holiday parties, for example. In other workplaces, particularly those where social interaction or client entertainment is a central component of the job (sales, for example), alcohol use may be more ritualized and thus present more of a potential risk factor.

Decentralized Workplaces

Decentralized workplaces, marked by limited communication between organizational levels, may foster a climate in which harassment may go unchecked.[152] Such workplaces include retail stores, chain restaurants, or distribution centers – those enterprises where corporate offices are far removed physically and/or organizationally from front-line employees or first-line supervisors, or representatives of senior management are not present. In such workplaces, some managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Others may simply be unaware of how to address workplace harassment issues, or for a variety of reasons may choose not to "call headquarters" for direction.[153]

* * *

We close this section by observing once more that, obviously, every workplace has some of these risk factors, and some workplaces have many of them. But the instinct of our Select Task Force members that we should devote time and resources to exploring and categorizing possible risk factors is borne out by what we have learned. The objective of identifying risk factors is not

[147] Robbins testimony, *supra* n. 134.
[148] *Id*.
[149] *Rape on the Night Shift* (PBS Frontline Broadcast June 23, 2015); *Rape in the Fields* (PBS Frontline Broadcast June 25, 2013).
[150] Samuel B. Bacharach *et al.*, *Harassing Under the Influence: The Prevalence of Male Heavy Drinking, the Embeddedness of Permissive Workplace Drinking Norms, and the Gender Harassment of Female Coworkers*, 12 J. OCCUP. HEALTH PSYCHOL. 232 (2007).
[151] Restaurant Opportunities Center United, *supra* n. 145.
[152] Sepler testimony, *supra* n. 114.
[153] *Id*.

to suggest that having these risk factors will necessarily result in harassment in the workplace. A single risk factor may make a particular workplace more susceptible to harassment; more broadly, industries with numerous risk factors may be at greater risk of harassment in their workplaces and greater risk of the harassment not being identified and remedied.

The objective of identifying and describing these risk factors is to provide a roadmap for employers that wish to take proactive actions to ensure that harassment will not happen in their workplaces. We stress that employers need to maintain "situational awareness" – an employer noting surprise that women were being sexually assaulted on the night shift when they worked in isolation and their schedules were controlled by men is cold comfort to the victims of these assaults. The next Part of our report describes a number of actions that employers can take to prevent harassment, including an assessment of these risk factors. In addition, Appendix C includes a chart with suggestions for addressing each of these risk factors in a proactive manner.

PART THREE

MOVING FORWARD: PREVENTING HARASSMENT IN THE WORKPLACE

Harassment in the workplace can sometimes feel like an intractable problem. The question is whether there is anything we can do to prevent harassment to a significant degree. We believe the answer to that is "yes."

We also believe that it will not be easy to achieve this goal. If it were easy, it would have happened a long time ago.

The following sections lay out our analysis, based on what we have learned over the past year, for achieving what some may see as a quixotic goal, but which we see as a moral and legal imperative.

A. IT STARTS AT THE TOP

Over and over again, during the course of our study, we heard that workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. We heard this from academics who testified to the Select Task Force; we heard it from trainers and organizational psychologists on the ground; and we read about it during the course of our literature review.

Two things – perhaps two faces of the same coin – became clear to us. First, across the board, we heard that leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable is paramount. And we heard that this leadership must come from the very top of the organization.

Second, we heard that a commitment (even from the top) for a diverse, inclusive, and respectful workplace is not enough. Rather, at all levels, across all positions, an organization must have *systems* in place that hold employees *accountable* for this expectation. These accountability systems must ensure that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for doing that job well, or penalized for failing to do so.

These two sides of the coin – leadership and accountability – create an organization's culture.

An organization's culture is set by the values of an organization. To achieve a workplace without harassment, the *values* of the organization must put a premium on diversity and inclusion, must include a belief that all employees in a workplace deserve to be respected, regardless of their race, religion, national origin, sex (including pregnancy, sexual orientation, or gender identity), age, disability, or genetic information, and must make clear that part of respect means not harassing an individual on any of those bases. In short, an organization's commitment to a harassment-free workplace must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy.

Organizational culture manifests itself in the specific behaviors that are expected and formally and informally rewarded in the workplace. As one of our witnesses explained, "[O]rganizational climate is an important driver of harassment because it is the norms of the workplace; it basically guides employees . . . to know what to do when no one is watching."[154]

Organizational cultures that tolerate harassment have more of it, and workplaces that are not tolerant of harassment have less of it. This common-sense assumption has been demonstrated repeatedly in research studies.[155] If leadership values a workplace free of harassment, then it will ensure that harassing behavior against employees is prohibited as a matter of policy; that swift, effective, and proportionate responses are taken when harassment occurs; and that everyone in the workplace feels safe in reporting harassing behavior.[156] Conversely, leaders who do not model respectful behavior, who are tolerant of demeaning conduct or remarks by others, or who fail to support anti-harassment policies with necessary resources, may foster a culture conducive to harassment.[157]

Leadership

What steps can an organization's leadership take to ensure that its organizational culture reflects the leadership's values of not tolerating harassment and promoting civility and respect?

First, leadership must establish a *sense of urgency* about preventing harassment. That means taking a visible role in stating the importance of having a diverse and inclusive workplace that is free of harassment, articulating clearly the specific behaviors that will not be acceptable in the workplace, setting the foundation for employees throughout the organization to make change (if change is needed), and, once an organizational culture is achieved that reflects the values of the leadership, commit to ensuring that the culture is maintained.[158]

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[154] Bergman testimony, *supra* n. 68 (*citing* work of Charles A. O'Reilly & Jennifer A. Chatman, *Culture as Social Control: Corporations, Cults, and Commitment*, 18 ORGANIZATIONAL BEHAV. 157 (1996). We note that there is an extensive academic and lay literature detailing the differences between organizational "culture" and "climate." *See, e.g.*, Edgar H. Schein, *Sense and Nonsense About Culture and Climate*, *Commentary for* Handbook of Culture and Climate (1999); JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE (1992). See also http:/www.cultureuniversity.com/workplace-culture-vs-climate-why-most-focus-on-climate-and-may-suffer-for-it/. An in-depth analysis of the distinction between organizational "culture" and organizational "climate" is beyond the scope of this report. For our purposes, we posit that an organization's *values* – its "culture" – is demonstrated through the *actions and behaviors it encourages and fosters, or conversely, discourages and sanctions* – its "climate."

[155] Bergman *et al.*, *supra* n. 66 (citing numerous studies).

[156] *Id.*

[157] Cortina testimony, *supra* n. 62; Bergman testimony, *supra* n. 68.

[158] *Oral Testimony of Robert J. Bies*, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Mar. 11, 2016). Stephen Paskoff, the founder of a group called Employment Learning Innovations, notes that many organizations have a values statement with regard to respect, non-discrimination, and/or anti-harassment. But for purposes of workplace culture, Paskoff explains, leaders must be able to articulate the *specific behaviors* that are expected of employees to carry out those values. Paskoff, *Foundations of a Civil Workplace*, Employment Learning Innovations, Inc. (2010), http://cdn2.hubspot.net/hub/139296/file-17758962-pdf/downloads/foundations_of_a_civil_workplace.pdf.

One way to effectuate and convey a sense of urgency and commitment is to assess whether the workplace has one or more of the risk factors we describe above and take proactive steps to address those. For example, if employees tend to work in isolated workspaces, an employer may want to explore whether it is possible for the work to get done as effectively if individuals worked in teams. In a workplace where an employee's compensation is directly tied to customer satisfaction or client service, the employer may wish to emphasize that harassing conduct should be brought immediately to a manager's attention and that the worker will be protected from retaliation. In workplaces with many teenagers and young adults entering the workforce, the employer may wish to have an orientation in which conduct that is not acceptable is clearly described and workers are encouraged to come forward quickly with any concerns.

Another way to communicate a sense of urgency is to conduct a climate survey of employees to determine whether employees feel that harassment exists in the workplace and is tolerated. Several researchers have developed such climate surveys, and the military has adopted them on a widespread scale in recent years.[159] After a holistic approach to prevention has been put into place (as described in the remainder of this section), such climate surveys can be repeated to ensure that change has occurred and is being maintained.

Second, an organization must have *effective policies and procedures* and must conduct *effective trainings* on those policies and procedures. Anti-harassment policies must be communicated and adhered to, and reporting systems must be implemented consistently, safely, and in a timely fashion. Trainings must ensure that employees are aware of, and understand, the employer's policy and reporting systems. Such systems must be periodically tested to ensure that they are effective. Our detailed recommendations concerning these policies and trainings are discussed in the following sections.

Third, leadership must back up its statement of urgency about preventing harassment with two of the most important commodities in a workplace: *money and time*. Employees must believe that their leaders are authentic in demanding a workplace free of harassment. Nothing speaks to that

[159] In the study done by Professor Magley and her colleagues, the researchers used various tools to determine the climate of the employer: the *Sexual Experiences Questionnaire-SE*, an approach to the measurement of sexual harassment experiences which inquires into the behaviors that comprise a single harassment incident (see Suzanne E. Mazzo *et al.*, *Situation-Specific Assessment of Sexual Harassment*, 59 J. VOCATIONAL BEHAV., 120, 121-22 (2001); the *Organizational Tolerance for Sexual Harassment Inventory* (OTSHI) to assess employees' perceptions of the degree to which an organization tolerates sexual harassment of female employees by other organizational members (either a co-worker or supervisor. The measure consists of brief scenarios depicting sexual harassment followed by three questions about (1) the risk to the victim for reporting the incident; (2) the likelihood that a complaint would be taken seriously; and (3) the likelihood that the harasser would receive meaningful sanctions by the organization; and the *Intolerance for Sexual Harassment Inventory* that measures employees' personal attitudes about the seriousness of sexual harassment in organizations. It uses a 7-point scale, with higher scores indicating a stronger belief that harassment *is* a "big deal."). Vicki Magley *et al.*, *Evaluating the Effectiveness of Sexual Harassment Training*, in Burke & Cooper ed. THE ORGANIZATION'S ROLE IN ACHIEVING INDIVIDUAL AND ORGANIZATIONAL HEALTH (2013). In the armed services, Air Force active duty, Air Force National Guard, Air Force Reserve and civilian personnel take the Total Force Climate Survey. http://www.belvoir.army.mil/climate_survey/military_survey.asp. *See* Air Force Personnel Center Public Affairs, 2015 Total-Force Climate Survey (Mar. 2, 2015), http://www.af.mil/News/ArticleDisplay/tabid/223/Article/572259/2015-total-force-climate-survey-slated-for-march.aspx.

credibility more than what gets paid for in a budget and what gets scheduled on a calendar. For example, complaint procedures must be adequately funded in the organization's budget and sufficient time must be allocated from employee schedules to ensure appropriate investigations. Similarly, sufficient resources must be allotted to procure training, trainings must be provided frequently, and sufficient time must be allocated from employee schedules so that all employees can attend these trainings. Moreover, if an organization has a budget for diversity and inclusion efforts, harassment prevention should be part of that budget.

Finally, in working to create change, the leadership must ensure that any team or coalition leading the effort to create a workplace free of harassment is vested with enough power and authority to make such change happen.[160]

Accountability

Because organizational culture is manifested by what behaviors are formally and informally rewarded, it all comes down to accountability – and accountability must be demonstrated. An employer that has an effective anti-harassment program, including an effective and safe reporting system, a thorough workplace investigation system, and proportionate corrective actions, communicates to employees by those measures that the employer takes harassment seriously. This in turn means that more employees will be likely to complain if they experience harassment or report harassment they observe, such that the employer may deal with such incidents more effectively.[161] This creates a positive cycle that can ultimately reduce the amount of harassment that occurs in a workplace.

With regard to *individuals who engage in harassment*, accountability means being held responsible for those actions. We heard from investigators on the ground, and we read in the academic literature, that sanctions are often not proportionate to the inappropriate conduct that had been substantiated.[162] If weak sanctions are imposed for bad behavior, employees learn that harassment is tolerated, regardless of the messages, money, time, and resources spent to the contrary. Similarly, if high-ranking and/or highly-valued employees are not dealt with severely if they engage in harassment, that sends the wrong message loud and clear.[163]

[160] Bies testimony, *supra* n. 159.
[161] Robbins testimony, *supra* n. 134.
[162] *Written Testimony of Heidi-Jane Olguin*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/olguin.cfm; Sepler testimony, *supra* n. 114; Magley, *et al.*, *supra*, n. 160.
[163] Bergman testimony, *supra* n. 68; Bies testimony, *supra* n. 159.

> *One organization I worked with several years ago asked me if I had new courseware for use with some previously trained managers. When I asked them what they wanted to accomplish, they indicated that several individuals were continuing to tell off-color jokes and make inappropriate comments. While I welcomed the opportunity to be of service, it seemed to me that the issue was not what training to do next but rather why these decision-makers hadn't taken steps to deal with these individuals' behavior and failure to perform to clear standards.*
>
> *Stephen Paskoff,* 8 Fundamentals of a Civil Treatment Workplace

With regard to *mid-level managers and front-line supervisors,* accountability means that such individuals are held responsible for monitoring and stopping harassment by those they supervise and manage.

For example, if a supervisor fails to respond to a report of harassment in a prompt and appropriate fashion, or if a supervisor fails to protect from retaliation the individual who reports harassment, that supervisor must be held accountable for those actions. Similarly, if those responsible for investigations and corrective actions do not commence or conclude an investigation promptly, do not engage in a thorough or fair investigation, or do not take appropriate action when offending conduct is found, that person must be held accountable.

> *When C-level employees [i.e., senior headquarters executives] take a critical look at, and aggressively deal with, supervisors that are involved in or not reporting harassment, we have seen this translate into higher morale and higher productivity among the rest of the workforce. Everyone notices what the C-Suite notices.*
>
> *Heidi Olguin*
> *CEO and Founder, Progressive Management Resources, Inc.*

Accountability also includes reward systems. If leadership incentivizes and rewards responsiveness to anti-harassment efforts by managers, that speaks volumes.[164] When the right behaviors (*e.g.*, creating civil and respectful workplaces, promptly reporting and investigating harassment claims, aggressively managing employees involved in or not adequately responding to harassment) are rewarded, that sends a message about what an organization's leadership cares about. For example, a number of witnesses noted that companies who were successful in creating a culture of non-harassment were those that acknowledged and "owned" its well-handled complaints, instead of burying the fact that there had been a complaint and that discipline had been taken.[165]

[164] Bies testimony, *supra* n. 159.
[165] *See, e.g., Written Testimony of Patti Perez,* WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/perez.cfm.

Perhaps counter-intuitively, rewards can also be given to managers when – at least initially – there is an increase in complaints in their division. We heard that using the metric of the number of complaints lodged within a particular division, with rewards given to those with the fewest number of complaints, might have the counterproductive effect of managers suppressing the filing of complaints through formal and informal pressure. In contrast, if employees are filing complaints of harassment, that means the employees have faith in the system. Thus, using the metric of the number of complaints must be nuanced. Positive organizational change can be reflected in an initial increase of complaints, followed by a decrease in complaints and information about the lack of harassment derived from climate surveys.

Before moving on to detailed recommendations, we pause to highlight a radically different accountability mechanism that we find intriguing, and solicited testimony regarding at one of our public meetings. A number of large companies, such as McDonald's and Wal-Mart, have begun to hold their tomato growers accountable by buying tomatoes only from those growers who abide by a human rights based Code of Conduct, which, among other elements, prohibits sexual harassment and sexual assault of farmworkers. This effort, called the Fair Food Program, was developed and is led by the Coalition of Imokalee Workers (CIW), a farmworker-based human rights organization in Florida. The companies agreed to the program because of consumer-driven market pressures, and most of the agricultural companies that entered the program did so because of the resulting financial pressures.[166]

As part of the program, the CIW conducts worker-to-worker education programs. There is also a worker-triggered complaint resolution mechanism, which can result in investigations, corrective action plans, and if necessary, suspension of a farm's "participating grower" status, which means the farm could lose its ability to sell to participating buyers.[167] There are currently 14 businesses and 17 growers participating in the program.[168]

* * *

The most important lesson we learned from our study is that employers must have a holistic approach for creating an organizational culture that will prevent harassment. If employers put a metric in a manager's performance plan about responding appropriately to harassment complaints, but then do nothing else to create an environment in which employees know the employer cares about stopping harassment and punishing those who engage in it – it is doubtful that the metric on its own will have much effect. If an employer has a policy clearly prohibiting

("At this company, an increase in complaints is viewed positively – as a testament to the comfort and trust employees put in the system. This is a workforce who believes the process works – they feel they are awarded procedural justice at work.").

[166] *Written Testimony of Judge Laura Safer Espinoza*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/espinoza.cfm. Some growers affirmatively embraced the program and have championed it. We heard from one of those forward-thinking growers, Jon Esformes, the Chief Executive Officer of Pacific Tomato Growers of Sunripe Certified Brands, at the public meeting held by the Select Task Force in Los Angeles, CA.

[167] FAIR FOOD STANDARDS COUNCIL, http://www.fairfoodstandards.org/about/.

[168] *Id.* The 17 growers do not include sub-growers.

harassment that is mentioned consistently at every possible employee gathering, but does not have a system that protects those who complain about harassment from retaliation, the policy itself will do little good. It is not that policies and metrics are not important. To the contrary, they are essential components of a harassment prevention effort. But holistic refers to the whole system. Every activity must come together in an integrated manner to create an organizational culture that will prevent harassment.

In light of what we have learned in this area, we offer the following recommendations:

- 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.

B. POLICIES AND PROCEDURES

Policies, reporting procedures, investigations, and corrective actions are essential components of the holistic effort that employers must engage in to prevent harassment. In this section, we set forth what we have learned about how to make each of these components as successful as possible.

Anti-Harassment Policies

An organization needs a stated policy against harassment that sets forth the behaviors that will not be accepted in the workplace and the procedures to follow in reporting and responding to harassment. Employees in workplaces without policies report the highest levels of harassment.[169]

EEOC's position, which after our study we believe remains sound, is that employers should adopt a robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy.[170] EEOC recommends that a policy generally include:

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

An employer's policy should be written in clear, simple words, in all the languages used in the workplace. The points we note above describe the content of an effective policy, but the words of the policy itself should be simple and easy to understand. Similarly, an effective policy should make clear that harassment on the basis of *any* protected characteristic will not be tolerated.

It is also not sufficient simply to have a written policy, even one written in the most user-friendly fashion. The policy must be communicated on a regular basis to employees, particularly information about how to file a complaint or how to report harassment that one observes, and how an employee who files a complaint or an employee who reports harassment or participates in an investigation of alleged harassment will be protected from retaliation.[171]

Finally, we urge employers who may read this and conclude that their policies are currently effective and in line with EEOC's recommendations to consider this report as an opportunity to take a fresh and critical look at their current processes and consider whether a "reboot" is

[169] James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301 (1998).
[170] https://www.eeoc.gov/policy/docs/harassment.html
[171] Olguin testimony, *supra* n. 163; Warren testimony, *supra* n. 130.

necessary or valuable. Appendix B includes a checklist for an effective harassment prevention policy.

Social Media

An additional wrinkle for employers to consider, as they write and update anti-harassment policies, is the proliferation of employees' social media use. The Pew Research Center recently found that 65% of all adults – 90% of those 18-29 years olds, 77% of those 30-49 – use social media.[172] Safe to say, employers can expect a time when virtually the *entirety* of their workforce is using social media.

Arguably, the use of social media among employees in a workplace can be a net positive. As noted by a witness at the Commission's 2014 meeting on social media, social media use in the workplace can create a space for "less formal and more frequent communications." Via social media, employees can share information about themselves, learn about and understand better their colleagues, and engage each others' personal experiences through photos, comments, and the like.[173] If this leads to improved work relationships and collegiality, social media can benefit a workplace.

Unfortunately, social media can also foster toxic interactions. Nearly daily, news reports reflect that, for whatever reasons, many use social media to attack and harass others.[174] During the Commission meeting on social media, witnesses talked about social media as a possible means of workplace harassment.[175] For that reason, harassment should be in employers' minds as they draft social media policies and, conversely, social media issues should be in employers' minds as they draft anti-harassment policies.

For example, an anti-harassment policy should make clear that mistreatment on social media carries the weight of any other workplace interaction. Supervisors and others with anti-harassment responsibilities should be wary of their social media connections with employees. And, procedures for investigating harassment should carefully delineate how to access an employee's social media content when warranted.

In context, social media – specifically its use in the workplace – is relatively new. Plus, it seemingly changes at an exponential pace. For now, however, the constant for employers is that

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[172] http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/.

[173] *Written Testimony of Renee Jackson*, SOCIAL MEDIA IN THE WORKPLACE: EXAMINING THE IMPLICATIONS FOR EQUAL EMPLOYMENT OPPORTUNITY LAW (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-14/jackson.cfm.

[174] *See, e.g.*, Juliet Macur, *Social Media, Where Sports Fans Congregate and Misogyny Runs Amok*, THE NEW YORK TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/29/sports/more-than-mean-women-journalists-julie-dicaro-sarah-spain.html?_r=0. for workplace point; Petula Dvorak, *Was a Virginia Firefighter Humiliated by Co-Workers Online Before She Killed Herself?*, THE WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/local/was-a-va-firefighter-humiliated-by-co-workers-online-before-she-killed-herself/2016/04/25/c.

[175] *See* SOCIAL MEDIA IN THE WORKPLACE: EXAMINING THE IMPLICATIONS FOR EQUAL EMPLOYMENT OPPORTUNITY LAW, MEETING OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Mar. 12, 2014), https://www.eeoc.gov/eeoc/meetings/3-12-14/.

social media platforms are potential vehicles for workplace-related interactions. And wherever that exists, employers must be aware that harassment may occur.

"Zero Tolerance" Policies

Finally, we have a caution to offer with regard to use of the phrase "a 'zero tolerance' anti-harassment policy." We heard from several witnesses that use of the term "zero tolerance" is misleading and potentially counterproductive. Accountability requires that discipline for harassment be proportionate to the offensiveness of the conduct. For example, sexual assault or a demand for sexual favors in return for a promotion should presumably result in termination of an employee; the continued use of derogatory gender-based language after an initial warning might result in a suspension; and the first instance of telling a sexist joke may warrant a warning. Although not intended as such, the use of the term "zero tolerance" may inappropriately convey a one-size-fits-all approach, in which every instance of harassment brings the same level of discipline. This, in turn, may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-worker to lose their job over relatively minor harassing behavior – they simply want the harassment to stop. Thus, while it is important for employers to communicate that absolutely no harassment will be permitted in the workplace, we do not endorse the term "zero tolerance" to convey that message.

Reporting Systems for Harassment; Investigations; Corrective Actions

Effective reporting systems for allegations of harassment are among the most critical elements of a holistic anti-harassment effort. A reporting system includes a means by which individuals who have *experienced* harassment can report the harassment and file a complaint, as well as a means by which employees who have *observed* harassment can report that to the employer.

Ultimately, how an employee who reports harassment (either directly experienced or observed) fares under the employer's process will depend on how management and its representatives act during the process. If the process does not work well, it can make the overall situation in the workplace worse. If one employee reports harassment and has a bad experience using the system, one can presume that the next employee who experiences harassment will think twice before doing the same.[176] Finally, ensuring that the process that commences following a report is fair to an individual accused of harassment contributes to *all* employees' faith in the system.

For employers that have a unionized workplace, the role of the union in the employer's reporting system is significant. If union representatives take reports of harassment seriously, and support complainants and witnesses during the process, that will make a difference in how employees who are union members view the system. Similarly, because unions have obligations towards all

[176] Bergman testimony, *supra* n. 68; Cortina & Berdahl, *supra* n. 14 (*citing* Cortina & Magley, *supra* n. 65; Barbara A. Gutek, *Sexual Harassment Policy Initiatives, in* SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT 185 (William O'Donohue ed., 1997); Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures,* 46 AM. PSYCHOL. 497 (1991); Paula McDonald *et al.*, *Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment,* ASIA PACIFIC J. HUMAN RESOURCES 53 (2015)).

union members, the union must work with the employer to have a system that works in a fair manner for any individual accused of harassment.

There is a significant body of research establishing the many concerns that employees have with current reporting systems in their workplaces. [177] In response to some of those concerns, we heard broad support for reporting systems that are multifaceted, including a choice of procedures, and choices among multiple "complaint handlers."[178] Such a robust reporting system might include options to file complaints with managers and human resource departments, via multi-lingual complaint hotlines, and via web-based complaint processing.[179] In addition, a multi-faceted system might offer an employee who complains about harassment various mechanisms for addressing the situation, depending on the type of conduct and workplace situation.[180] For example, an employee may simply need someone in authority to talk to the harasser in order to stop the behavior. In other situations, the employer may need to do an immediate intervention and begin a thorough investigation.

Of course, the operational needs and resources of small businesses, start-up ventures, and the like, will differ significantly from large, established employers with dedicated human capital systems or "C Suites" of senior leadership. But the principle of offering an accessible and well-running reporting system remains the same.[181]

As noted in the previous section, a safe and timely reporting system that operates well also communicates to employees the leadership's commitment to the words it has set forth in its anti-harassment policy. We heard some innovative ideas for making that commitment clear. One witness described a company that established a small internal group of key "C-Suite" personnel who were informed immediately regarding any harassment complaint (unless a conflict of interest existed). The small group of senior leaders was then regularly updated regarding investigation outcomes and prevention analysis. In a smaller business, this "group of senior

[177] McDonald *et al.*, *supra* n. 177 (collecting sources).

[178] Cortina testimony, *supra* n. 62; Olguin testimony, *supra* n. 163: Perez testimony, *supra* n. 166; Cortina and Berdahl, *supra* n. 14 (*citing* Gutek, *supra* n. 177; Riger, *supra* n. 177; Laura A. Reese & Karen A. Lindenberg, *Employee Satisfaction with Harassment Policies: The Training Connection*, 33 PUB. PERSONNEL MGMT. 99 (2004); Mary P. Rowe, *Dealing with Harassment: A Systems Approach*, *in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVE, FRONTIERS, AND RESPONSE STRATEGIES, WOMEN AND WORK 241 (Margaret S. Stockdale ed., 1996); and Pamela P. Stokes *et al.*, *The Supreme Court Holds Class on Sexual Harassment: How to Avoid a Failing Grade*, 12 EMP. RESPS. & RTS. J. 79 (2000)).

[179] Olguin testimony, *supra* n. 163.

[180] One interesting approach brought to our attention in the course of our study was the implementation of "information escrow" systems designed to address a harassment victim's possible reluctance to be the initial individual to allege harassing behavior by a co-worker. Information escrow systems allow claims to be transmitted to a designated, confidential intermediary who subsequently submits the claim to relevant authorities if – and only if – certain pre-specified conditions are met (such as a certain number of claims filed) regarding the same accused harassing party. Given the relative novelty, and the lack of data as to the utility and success of these "information escrow" systems, we do not have sufficient information to endorse them at this time. We do, however, encourage employers and other stakeholders to seek out and explore new and creative methods like these for the prevention of harassment, and encourage researchers to further examine escrow systems and gather evidence of their utility. *See* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 Mich. L. Rev. 145 (2012).

[181] We commend EEOC for the work it has done, and continues to do, with respect to the special needs of small employers, specifically, through its Small Business Task Force, discussed in greater detail in this report's discussion of outreach, *infra*.

leaders" may be the business's owner or the highest-ranking members of management.

We heard strong support for the proposition that workplace investigations should be kept as confidential as is possible, consistent with conducting a thorough and effective investigation. We heard also, however, that an employer's ability to maintain confidentiality – specifically, to request that witnesses and others involved in a harassment investigation keep all information confidential – has been limited in some instances by decisions of the National Labor Relations Board ("NLRB") relating to the rights of employees to engage in concerted, protected activity under the National Labor Relations Act ("NLRA"). In light of the concerns we have heard, we recommend that EEOC and NLRB confer and consult in a good faith effort to determine what conflicts may exist, and as necessary, work together to harmonize the interplay of federal EEO laws and the NLRA.

Based on what we have learned over the last year, we believe there are several elements that will make reporting systems work well and will provide employees with faith in the system. These are largely consistent with the recommendations made above regarding the content of an effective anti-harassment policy:

- Employees who receive harassment complaints must take the complaints seriously.[182]
- The reporting system must provide timely responses and investigations.[183]
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution.[184]
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.[185]
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and conducting a thorough, effective investigation.[186]
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all relevant parties.[187]

The bottom line, however, is that we need better empirical evidence on what type of reporting systems are effective. Many witnesses told us it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes

[182] *See* McDonald *et al.*, *supra* n. 177; Barry M. Goldman, *Toward an Understanding of Employment Discrimination Claiming: An Integration of Organizational Justice and Social Information Processing Theories*, 54 PERSONNEL PSYCHOL. 361 (2001); Karen Harlos, *When Organizational Voice Systems Fail: More on the Deaf-Ear Syndrome and Frustration Effects*, 37 J. APPLIED BEHAV. SCI. 324 (2001). A study of federal management personnel who handle EEO complaints found that managers often recast harassment complaints as personality clashes or interpersonal difficulties. Howard S. Erlanger *et al.*, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 L. & SOC'Y REV. 497 (1993).
[183] Goldman, *supra* n. 183; Harlos, *supra* n. 183; Amy Oppenheimer, *Investigating Workplace Harassment and Discrimination*, 29 EMP. REL. L. J. 56 (2004).
[184] Harlos, *supra* n. 183.
[185] *Id*.
[186] Cortina & Berdhal, *supra* n. 14.
[187] McDonald *et al.*, *supra* n. 177.

a reporting system effective. We agree with that suggestion, although we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from its workplace will be used, and equally important, not used.

In light of what we have learned in this area, we offer the following recommendations:

- 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.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.

- 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.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[188]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

C. ANTI-HARASSMENT COMPLIANCE TRAINING

There are many reasons why employers offer anti-harassment trainings. Employers who care deeply about stopping harassment use training as a mechanism to do so. After EEOC's 1980 guidelines suggested methods for preventing sexual harassment, many employers started to offer training as one of those methods.[189] Trainings got a boost after the Supreme Court's decisions in *Ellerth* and *Faragher* provided employers an incentive to demonstrate they had taken appropriate steps to prevent harassment.[190] Finally, requiring employers to put training into place is a staple of the conciliation agreements and consent decrees that EEOC and private plaintiff attorneys negotiate every year. California and Connecticut have mandated such training for employers with 50 or more supervisors, and Maine has mandated such training for employers with 15 or more supervisors. supervisors.[191]

[188] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.
[189] EEOC's 1980 guidelines suggested that to prevent harassment an employer should: (a) express strong disapproval of harassment; (b) develop appropriate sanctions for those who engage in harassment; (c) inform employees how to complain about harassment; and (d) develop means to sensitize employees. 29 C.F.R. §1611(f).
[190] *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *See* Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession,* 24 U. ARK. LITTLE ROCK L. REV. 147 (2001); Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, *22* BERKELEY J. EMP. & LAB. L. 1 (2001) (raising concerns regarding employers' use of training programs as a means to avoid liability, when empirical evidence supporting the effectiveness of such programs is mixed or non-existent).
[191] Cal. Gov't Code § 12950.1(a) (West 2016); Conn. Gen. Stat. § 46a-54-204 (2016); Me. Rev. Stat. tit. 26, § 807(3) (2016).

Given the amount of resources employers devote to training, and the fact that training is one of the primary mechanisms used to prevent harassment, we explored whether training is effective in preventing harassment, and if so, whether there are some forms of training that have better outcomes than others.

We came to two overarching conclusions:

- There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, *empirical* data does not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment.

- The deficiencies notwithstanding, based on the practical and anecdotal evidence we heard from employers and trainers, we conclude that training *is* an essential component of an anti-harassment effort. However, to be effective in stopping harassment, such training *cannot stand alone but rather must be part of a holistic effort* undertaken by the employer to prevent harassment that includes the elements of leadership and accountability described above. In addition, the training must have specific goals and must contain certain components to achieve those goals.

Research on the Effectiveness of Training

Witnesses who provided testimony to the Select Task Force, and our own reading of the literature, exposed the problems of the empirical evidence to date regarding the effectiveness of training programs standing alone.

First, most of the studies use researcher-designed training, and each of those trainings has different content, lengths, and leaders. It is hard to know if something works when the "what" that you are studying is not the same.

Second, our research (which was thorough, if admittedly not an exhaustive review of all literature over the past three decades) discovered only two studies based on large-scale evaluations of anti-harassment training designed by employers (not researchers) that were given to a significant number of employees who were taking the trainings in their actual workplaces. A set of studies, conducted in the late 1990s by Professor Magley and her colleagues, evaluated trainings at two large employers – a large regulated utility with one location and a large agribusiness with several worksites.[192] Another study, published in 2001 by Professors Bingham

[192] Magley *et al.*, *supra* n. 160. The researchers studied trainings that had been put in place by employers as a result of settlement agreements and included two employers. The first employer was a large regulated utility organization in the Northwest that did a half-day training on sensitizing employees. The overall sample was nearly 90 percent Caucasian. The second employer was an agribusiness organization in the intermountain region that did trainings at several worksites. That employer did a two-day training for managers and supervisors and a three-hour educational and sensitization training for employees. Nearly half of the workforce at this organization was Hispanic.

and Scherer, evaluated an anti-sexual harassment program provided to employees at a medium-sized university.[193]

Third, because it is difficult for researchers to gain access to workplaces to study (which is why there are so few research studies of this kind), many researchers design experiments using student-volunteer samples or other small volunteer samples in organizational settings. In many studies, the researchers survey participants pre- and post-training and evaluate the effectiveness of the training based on self-reported answers immediately following the training. These studies are not to be discounted, but their limitations must be acknowledged.[194]

Finally, all of the evidence regarding the effectiveness of training is based on studies of sexual harassment training, not general harassment training.

What can we learn from these studies, limited as they are?

First, it appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment and hence unacceptable in the workplace. The most interesting study in this regard was of federal employees. Rather than conducting a large-scale evaluation of a particular training, researchers compared results from the three surveys done by the Merit Systems Protection Board of federal employees over the course of a decade and a half – in 1980, 1987, and 1994.[195] Their analysis found that participation in training was associated with an increased probability, particularly for men, of considering unwanted sexual gestures, remarks, touching, and pressure for dates to be a form of sexual harassment. The training seemed particularly successful in clarifying for men that unwanted sexual behavior from co-workers, and not just from supervisors, can be a form of sexual harassment.[196]

Ensuring that employees know what an employer considers to be harassment is obviously an essential element for effective implementation of an employer's anti-harassment policy. In the 2001 study by Professors Bingham and Scherer of a 30-minute training, participants demonstrated more knowledge about sexual harassment than those who had not participated in the training.[197] In the 1997 study by Professor Magley and her colleagues, some attendees of the trainings (but not all) evidenced increased knowledge of sexual harassment. Given that Hispanic employees in that study did not evidence increased knowledge, the researchers observed that

[193] Shereen G. Bingham & Lisa L. Scherer, *The Unexpected Effects of a Sexual Harassment Educational Program*, 37 J. APPLIED BEHAV. SCI. 125 (2001). The study evaluated a thirty-minute anti-harassment program consisting of three components: a 3-minute videotaped speech by the chancellor; a hand-out and oral presentation by mixed-sex, two person teams of the university staff and faculty; and a 5-minute discussion. Bingham and Scherer pointed out that other studies done in actual workplaces, as of 2001, were not of the same scale as their study.
[194] Cortina & Berdhal, *supra* n. 14; Magley, *et al*., *supra* n. 160.
[195] See *supra* n. 16 for a fuller description of the MSPB surveys.
[196] Heather Antecol & Deborah Cobb-Clark, *Does Sexual Harassment Training Change Attitudes? A View from the Federal Level*, 84 SOC. SCI. Q. 826 (2003). The researchers also found that the proportion of agency staff receiving training was positively related to the propensity that an individual employee had a definition of sexual harassment that includes these forms of unwanted sexual behavior. In addition, widespread training within the agency had an effect over and above that attributable to the individual's receipt of training itself.
[197] Bingham & Scherer, *supra* n. 194.

culturally-appropriate training might have made a difference.[198] Other studies also suggest that trainings have a positive impact on knowledge acquisition.[199]

Second, it is less probable that training programs, on their own, will have a significant impact on changing employees' attitudes, and they may sometimes have the opposite effect. The 2001 study by Professors Bingham and Scherer evaluated a 30-minute training focused on sensitizing attendees to sexual harassment. Men who completed the training were more likely to say that sexual behavior at work was wrong, but they were also more likely to believe that both parties contribute to inappropriate sexual behavior.[200] Other experiments indicate that participants who come into the training with more of a tendency to harass or with gender role conflicts (based on questionnaires completed prior to the training) are more likely to have a negative reaction to the training.[201]

In the 1997 study conducted by Professor Magley and her colleagues, there was no evidence of any backlash to the trainings. However, the personal attitudes of participants toward sexual harassment were minimally changed or completely unchanged.[202] Finally, a few lab-based

[198] Magley, *et al.*, *supra* n. 160. In the agribusiness employer, which had greater diversity, non-Hispanic employees who took the training answered more of the knowledge questions correctly than did untrained non-Hispanic employees. However, training did not improve Hispanic employees' knowledge about sexual harassment. With regard to this finding, the researchers observed the need for culturally appropriate training programs and evaluation tools. In addition, in this worksite, some participants displayed decreased knowledge of an employer's practices in responding to harassment following the training.

[199] Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 SIGNS 130 (1986) (increased ability on the part of resident hall staff at a university to recognize sexual harassment); Robert S. Moyer & Anjan Nath, *Some Effects of Brief Training Interventions on Perceptions of Sexual Harassment*, 28 J. APPLIED SOCIAL PSYCH. 333 (1998) (men were less likely than women to recognize sexual harassment before training, but after training, men and women were equally likely to do so). *See also* Gerald L. Blakely *et al.*, *The Effects of Training on Perceptions of Sexual Harassment Allegations*, 28 J. APPLIED PSYCHOL. 71 (1998); Kenneth M. York *et al.*, *Preventing Sexual Harassment: The Effect of Multiple Training Methods*, 10 EMP. RESPS. & RTS. J. 277 (1997). One study found no effect of training on the capacity of attendees to recognize harassment. James M. Wilkerson, *The Impact of Job Level and Prior Training on Sexual Harassment Labeling and Remedy Choice*, 29 J. APPLIED PSYCHOL. 1605 (1999).

[200] Bingham and Scherer, *supra* n. 194. The study revealed that men who participated in the training were also "significantly less likely to view coercion of a subordinate or a student as sexual harassment than were nonparticipating males . . . or females."

[201] Lisa K. Kearney *et al.*, *Male Gender Role Conflict, Sexual Harassment Tolerance, and the Efficacy of a Psychoeducative Training Program*, 5.1 Psychol. of Men & Masculinity 72 (defining gender role conflict as "a psychological state in which socialized gender roles have negative consequences on the person or others.") (internal quotations omitted) (*citing* J. M. O'Neil *et al.*, *Fifteen Years of Theory and Research on Men's Gender Role Conflict: New Paradigms for Empirical Research* (1995) *in* A NEW PSYCHOLOGY OF MEN, 164-206 (R.F. Levant & W.S. Pollack eds.) (1996)). This study revealed that for men who scored high on Gender Role Conflict, the training reinforced their tolerant attitudes toward harassment. *Id.* In another study, researchers first assessed men's likelihood to sexually harass (LSH). After watching a one-hour video, high LSH men showed greater acceptance of harassment, while low LSH men showed lesser acceptance. Lori A. Robb & Dennis Doverspike, *Self-Reported Proclivity to Harass as a Moderator of the Effectiveness of Sexual Harassment-Prevention Training*, 88 PSYCHOL. REP. 85 (2001)

[202] Magley, *et al. supra* n. 160. An in-depth examination of the social science research on attitudes, attitude/behavior consistency, and attitude change generally is beyond the scope of this report. For a summary of available research in this area, *see* Robert B. Cialdini, INFLUENCE: SCIENCE AND PRACTICE (Carolyn Merrill *et al.* eds., 4th ed. 2001), http://www.cfs.purdue.edu/richardfeinberg/csr%20331%20consumer%20behavior%20%20spring%202011/cialdini/robert_cialdini-influence-science_and_practice.pdf.

experiments have shown some positive effects on attitudes or behaviors following training.[203]

Third, in the study by Professor Magley and her colleagues (the only study to test for this result), there was no evidence that the training affected the frequency of sexual harassment experienced by the women in the workplace or the perception by women that certain sexual conduct was sexual harassment. However, on the positive side, complaints to the human resources department did increase after the training. The researchers postulated that the increase was the result of a multi-faceted approach taken by the employer and not the result of the training alone. For example, prior to the training, the employer had provided employees with a number of additional resources to lodge complaints (including hotlines) and had begun improving its procedures for complaint follow-up.[204]

As Professor Magley and her colleagues have pointed out, a common theme among the research studies is that effective training does not occur within a vacuum. Researchers have suggested a range of ideas for creating harassment-free and supportive work environments in which non-training factors are included together with training.[205]

In sum, the existing empirical evidence is conflicting and sometimes surprising. It leaves us with a few conclusions:

- Many anti-harassment trainings offered today seek to achieve two goals – give employees information about the employer's anti-harassment policy (including how to file complaints) and change employees' attitudes about what type of behaviors in the workplace are wrong.

- The limited empirical data we have to date indicates that training can increase knowledge about what conduct the employer considers unacceptable in the workplace. In particular, training may help men understand that certain forms of sexual conduct are unwelcome and offensive to women.

[203] In one study, training heightened participants' sensitivity to the sexual harassment, with men in particular responding positively to the training experience. Beauvais, *supra* n. 200. Another study found that for attendees who demonstrated increased proclivity for engaging in unwanted sexual behavior (based on a questionnaire completed prior to the training), training reduced that proclivity. It was unclear, however, whether that result held beyond the short-term. Elissa L. Perry *et al.*, *Individual Differences in the Effectiveness of Sexual Harassment Awareness Training*, 28 J. APPLIED PSYCHOL. 698 (1998).

[204] Magley *et al.*, *supra* n. 160.

[205] Magley, *et al.*, *supra* n. 160, at 243 (*citing* Bell, Quick and Cycyota (2002); Elissa L. Perry *et al.*, *Sexual Harassment Training: Recommendations to Address Gaps Between the Practitioner and Research Literatures*, 48 HUM. RESOURCE MGMT. 817 (2009). Professor Magley and her colleagues have also stressed that cynicism and motivation on the part of attendees influence the effectiveness of sexual harassment training. Lisa M. Kath & Vicki J. Magley, *Development of a Theoretically Grounded Model of Sexual Harassment Awareness Training Effectiveness, in* 3 WELLBEING: A COMPLETE REFERENCE GUIDE 319 (P. Cohen & C. Cooper eds., 20140) (making case that "cynicism and motivation are critical factors" that can influence effectiveness of sexual harassment awareness training and "identifying possible training design, individual factors, and contextual factors that may influence trainees' cynicism, motivation, and outcomes").

- The limited empirical data we have to date indicates that sensitivity training (as currently done) in some instances might be mildly positive, often is neutral, and in some circumstances actually may be counterproductive.

- It is possible that individuals who receive training may be more likely to file a complaint, if the training does not stand alone and the employer has taken other steps to convince employees that the employer will be intolerant of sexual harassment.

We cautioned above, and we caution again, that the results of these studies implicate only the effectiveness of the specific trainings that were evaluated. The data cannot be extrapolated to support general conclusions about the effectiveness of training.

Indeed, our most important conclusion is that we need better empirical evidence on what types of training are effective and what components, beyond training, are needed to make the training itself most effective. As we noted above, many witnesses told us that it would be extraordinarily valuable for employers to allow researchers into their workplaces to conduct empirical studies to determine what makes training effective. We agree with that suggestion, although as we noted above, we are cognizant of the concerns that employers may have in welcoming researchers into their domains. For example, we recognize that employers will want to have control over how data derived from their workplaces will be used, and equally important, not used.

Experience on the Ground

Regardless of the empirical data from research studies, we heard from practitioners with decades of experience that training – especially compliance training – is a key component of any harassment prevention effort.[206] We also heard that training must have certain components to be successful. We provide below the insights we learned from these practitioners.

[206] See Sepler testimony, *supra* n. 114; Warren testimony, *supra* n. 130; Robbins testimony, *supra* n. 134; Olguin testimony, *supra* n. 163; Perez testimony, *supra* n. 166.

> *"[Compliance training] is not training to change your mind. It's training to keep your job."*
>
> *Jonathan A. Segal, Select Task Force Member*

Compliance Training for All Employees

Compliance training is training that helps employers comply with the legal requirements of employment non-discrimination laws by educating employees about what forms of conduct are not acceptable in the workplace and about which they have the right to complain. We do not believe that such trainings should be limited to the legal definition of harassment. Rather the trainings should also describe conduct that, *if left unchecked*, might rise to the level of illegal harassment. For example, some instances of gender-based harassment or sexually-motivated harassment will be legally actionable only if they are sufficiently pervasive to create a hostile work environment, as defined by the law. But compliance training should focus on the unacceptable behaviors themselves, rather than trying to teach participants the specific legal standards that will make such conduct "illegal." In addition, compliance training should explain the consequences of engaging in conduct that is unacceptable in the workplace, including that corrective action will be proportionate to the severity of the conduct.

Compliance training that teaches employees what conduct is not acceptable in the workplace should not be a canned, "one-size-fits-all" training. Effective compliance trainings are those that are tailored to the specific realities of different workplaces. Using examples and scenarios that realistically involve situations from the specific worksite, organization, and/or industry makes the compliance training work much better than if the examples are foreign to the workforce. In addition, depending on the makeup of the workforce, employers may wish to consider conducting training in multiple languages, or providing for different learning styles and levels of education.

Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

Compliance training should also educate employees about their rights and responsibilities if they experience conduct that the employer has stated is not acceptable in the workplace. Again, the training need not focus on legal issues regarding notice and liability. Rather, the training should make clear to employees the (hopefully) multiple avenues offered by the employer to report unwelcome conduct based on a protected characteristic, regardless of whether the individual

might or might not describe that conduct as "harassment." Compliance training should also describe, in simple terms, how an employee who witnesses harassment can report that information.

Finally, compliance training should describe, in simple terms, how the formal complaint process will proceed. This includes information on how an investigation will take place and what confidentiality a complainant can expect. The training should make clear that the employer will take all reports seriously, investigate them in a timely fashion, and ensure that complainants or those who report observing harassment will not experience retaliation for using the reporting system. (Of course, for participants to believe this, the employer's reporting system must indeed operate in this fashion).

Compliance Training for Middle-Management and First-Line Supervisors

All employees need the compliance training described above. But managers and supervisors need additional training if the employer wants to address conduct before it rises to the level of illegal harassment and wants to ensure compliance with employment non-discrimination laws.

As noted previously, to create an organizational culture in which employees believe that the organization will not tolerate harassment, managers, and supervisors must receive clear messages of accountability. Compliance training translates those expectations into concrete actions that managers and supervisors are expected to take – either to prevent harassment or to stop and remedy harassment once it occurs.

Compliance training provides managers and supervisors with easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information. This includes practical suggestions on how to respond to different levels and types of offensive behavior, and clear instructions on how to report harassing behavior up the chain of command. It should also stress the affirmative duties of supervisors to respond to harassing behavior, even in the absence of a complaint. Again, this training should be tailored to the specific worksite, organization, and/or industry, so that the examples used are helpful to managers and supervisors.

Managers and supervisors are the heart of an employer's prevention system. As one witness with decades of experience in the practice of workplace training and investigation noted succinctly:

> If I had limited assets to improve the climate of any organization, I would invest ninety-five percent of them in middle managers. These are the people who make all of the difference in the day-to-day lives of organizations and people. When we train middle managers, we don't just train them about how to spot and address problem behavior –we teach them empirically sound things to do and say when an employee seeks them out to discuss a problem.[207]

[207] Sepler testimony, *supra* n. 114.

What we set forth above concerns the *content* of effective compliance training. There are also principles for the *structure* of successful compliance trainings.[208]

- *Training should be supported at the highest levels*. As noted previously, employees must believe that the leadership is serious about preventing harassment in the workplace. Training alone is not sufficient to establish the credibility of the leadership in this regard – but compliance training provides a moment at which the focus is on achieving this goal and thus, leadership should take advantage of that moment. The strongest expression of support is for a senior leader to open the training session and attend the entire training session. At a minimum, a video of a senior leader might be shown at the beginning of the training and a memo from leadership to all employees sent prior to the training can underscore the importance and purpose of the training. Similarly, if all employees at every level of the organization are trained, that both increases the effectiveness of the training and communicates the employer's commitment of time and resources to the training effort.

- *Training should be conducted and reinforced on a regular basis for all employees*. Again, as we noted earlier, employees understand that an organization's devotion of time and resources to any effort reflects the organization's commitment to that effort. Training is no different. If anti-harassment trainings are held once a year (or once every other year), employees will not believe that preventing harassment is a high priority for the employer. Conversely, if anti-harassment trainings are regularly scheduled events in which key information is reinforced, that will send the message that the goal of the training is important. While this is one area where, in general, repetition is a good thing, we caution against simply repeating the same training over and over, which risks becoming a rote exercise. Rather, we urge employers to consider training that is varied and dynamic in style, form, and content.

- *Training should be conducted by qualified, live, and interactive trainers*. Live trainers who are dynamic, engaging, and have full command of the subject matter are the most likely to deliver effective training. Since one of the goals of compliance training is to provide employees information about the type of conduct the employer finds unacceptable in the workplace, it is important for a trainer to provide examples of such conduct, or have individuals portray scenarios of such conduct, and then be able to answer questions. In addition, compliance training teaches supervisors and managers how to respond to a report or observance of harassment. These can be difficult situations and a live trainer is most suited to work through questions with the participants.

    - For some employers, however, providing live trainers will not be feasible because they are cost prohibitive or because employees are physically dispersed. In such cases, online or video-based trainings should still be tailored to specific workplaces and workforces and should be designed to include active engagement by participants.

[208] Similar principles have been identified in research about prevention programs in other issue areas, such as youth violence and substance abuse. Maury Nation *et al.*, *What Works in Prevention: Principles of Effective Prevention Programs*, 58 AM. PSYCHOLOGIST 449 (2003).

- *Training should be routinely evaluated.* Employers should obviously not keep doing something that does not work. Trainers should not only do the training, but should evaluate the results of the training, as well. By this, we mean more than handing a questionnaire to participants immediately after the training asking if they found the training to be helpful. Evaluations are most effective if they are done some time after the training and participants are asked questions such as whether the training changed their own behaviors or behaviors they have observed in the workplace. The evaluation should occur on a regular basis so that the training can be modified, if need be. Similarly, training evaluation should incorporate feedback from all levels of an organization, most notably, the rank-and-file employees who are being trained, lest "evaluation" becomes a senior leadership "echo chamber."

Based on our year of examination – and cognizant of the limitations of empirical, academic data – we still conclude that effective compliance training is a necessary tool to prevent harassment in the workplace. Every employer should have in place, at a minimum, compliance training that includes the content and structure described above. However, since compliance training only goes so far, the following section presents additional ideas for training that may help the holistic effort of preventing harassment in a workplace.

In light of what we have learned in this area, we make the following recommendations:

- 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.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or

that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[209]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

D. WORKPLACE CIVILITY AND BYSTANDER INTERVENTION TRAINING

Employees need to know what conduct is unacceptable in the workplace (whether or not they might describe such conduct as harassment), and managers and supervisors need effective tools to respond to observation or reports of harassment. But regardless of the level of knowledge in a workplace, we know from the research that organizational *culture* is one of the key drivers of harassment. We therefore explored trainings that might have an impact on shaping organizational cultures in a way that would prevent harassment in a workplace.

Among the trainings we explored, two stood out for us as showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander intervention training.

Workplace civility training is not new to the workplace. Many employers have put such trainings into place, often in response to concerns about bullying or conflict in the workplace. Bystander intervention training, by contrast, is not prevalent in workplaces. Such training has proliferated in recent years in colleges and high schools as a means of stopping sexual assault. We hope the information presented in this report will encourage employers to consider implementing these trainings as a means of preventing workplace harassment.

Workplace Civility Training

Employers have offered workplace civility training as a means of reducing bullying or conflict in the workplace. Thus, such training does not focus on eliminating unwelcome behavior based on characteristics protected under employment non-discrimination laws, but rather on promoting respect and civility in the workplace generally.

[209] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used.

According to researchers, incivility is often an antecedent to workplace harassment, as it creates a climate of "general derision and disrespect" in which harassing behaviors are tolerated.[210] For example, in studies of attorneys and court employees, researchers found significant correlations between incivility and gender harassment.[211] Researchers also have found that uncivil behaviors can often "spiral" into harassing behaviors.[212]

Incivility can also sometimes represent covert manifestations of gender and racial bias on the job.[213] In other words, facially neutral, uncivil behaviors may actually be rooted in animus against members of a protected class and may subtly contribute to a hostile work environment.[214] We fully recognize that Title VII was not meant, and should not be read, to be "a general civility code for the American workplace."[215] But promoting civility and respect in a workplace may be a means of preventing conduct from rising to the level of unlawful harassment.

Workplace civility trainings focus on establishing expectations of civility and respect in the workplace, and on providing management and employees the tools they need to meet such expectations. The training usually includes an exploration of workplace norms, including a discussion of what constitutes appropriate and inappropriate behaviors in the workplace. The training also includes a heavily skills-based component, including interpersonal skills training, conflict resolution training, and training on effective supervisory techniques.[216]

The beauty of workplace civility training is that it is focused on the positive – what employees and managers *should* do, rather than on what they should not do. In addition, by appealing to all individuals in the workplace, regardless of social identity or perceived proclivity to harass, civility training might avoid some of the resistance met by interventions exclusively targeting harassment.[217]

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[210] Cortina testimony, *supra* n. 62; Lilia M. Cortina, *Unseen Injustice: Incivility as Modern Discrimination in Organizations*, 33 ACADEMY OF MANAGEMENT REVIEW 55 (2008)*;* Lynne M. Andersson & Christine M. Pearson, *Tit for Tat? The Spiraling Effect of Incivility in the Workplace*, 24 ACAD. OF MGMT. REV. 452 (1999).
[211] Cortina testimony, *supra* n. 62; S. Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483 (2005).
[212] Andersson & Pearson, *supra* n. 211.
[213] Cortina testimony, *supra* n. 62.
[214] *Id.*
[215] *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). (Noting that Title VII cannot be interpreted as a general "civility code" because "[a]s we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex . . . it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.")
[216] Christine M. Pearson & Christine L. Porath, *On the Nature, Consequences and Remedies of Workplace Incivility: No Time for "Nice"? Think Again*, 19 ACAD. OF MGMT. EXEC. 7 (2005); *The Academy of Management Symposium on New Directions to Understanding Motivation to Learn*, J.S. Shapiro, *What Makes Civility Training Effective? Engagement, Cynicism and Motivation to Learn* (Aug. 2012).
[217] Cortina, *supra* n. 212. We learned in a meeting with directors and staff of federal EEO offices that many agencies have a contract with a training company called ELI to conduct "Civil Treatment Training for the Federal Government." The EEO officials found that the civility training was helping in reducing the incidents of harassment in their agencies.

We heard some concern that a focus on workplace civility might reinforce stereotypes (*e.g.*, that women need to be treated with special care and concern). Empirical data to support this concern appears lacking. In contrast, there is some empirical data (and many anecdotes) to support the effectiveness of civility training in enhancing workplace cultures of respect that are subsequently incompatible with harassment.[218]

Workplace civility training has not been rigorously evaluated as a harassment prevention tool *per se*,[219] but we believe that such training could provide an important complement to the compliance training described in the previous section. Moreover, it would be helpful to have additional research on the possible effects of workplace civility training in reducing the level of workplace harassment based on EEO protected characteristics.

Finally, we recognize that broad workplace "civility codes" which may be read to limit or restrict certain forms of speech may raise issues under the NLRA, which is outside of the jurisdiction of EEOC.[220] In light of that potential tension, we recommend that EEOC and NLRB confer and consult, and attempt to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes.

Case Study: Los Angeles Department of Water and Power

In response to a significant number of workplace harassment allegations, LADPW established a proactive strategy to safeguard the personal dignity of its employees and empower them to contribute to a workplace free of harassment and discrimination.

- *LADPW began with an eight-hour, instructor-led, mandatory training for all its employees that focused on mutual respect in the workplace. The training included a discussion regarding individual differences related to diversity and cultural characteristics, focused on identifying and resolving workplace interpersonal conflict, set forth the roles and expectations of employees and leaders, and provided an overview of EEO laws, employment policies, and procedures.*

- *That training was followed by a mandatory training for all executives, supervisors, and lead personnel that focused on the practical implications of EEO laws and provided tools and techniques to address inappropriate behavior.*

- *LADPW also established a "boot camp team" to quickly address inappropriate conduct and provide one-on-one coaching and group training.*

LADPW continues to provide department-wide training to its employees on a regular basis, including training on topics such as "A Manager's Guide for a Respectful Workplace," "The POWER of Diversity - Workplace Diversity Training for All Employees," as well as targeted trainings for smaller groups on harassment and discrimination awareness.

During the first three years after LADPW initiated its training program, the number of internal EEO complaints rose – perhaps because employees had a greater understanding of their rights and where to go to file complaints. Since that time, however, complaints have decreased by 70%, and the severity of the types of harassment complaints has decreased as well. According to Renette Anderson, Director of LADPW's Equal Employment Opportunity Services, "Much of this is due to our tenacious and steadfast commitment to our training efforts."

[218] Michael P. Leiter *et al.*, *The Impact of Civility Interventions on Employee Social Behavior, Distress, and Attitudes*, 96 J. OF APPLIED PSYCHOL. 1258 (2011).
[219] Cortina testimony, *supra* n. 62.
[220] *See Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (2012); *First Transit, Inc.*, 360 N.L.R.B. No. 72 (2014).

Bystander Intervention Training

Bystander intervention training has long been used as a violence prevention strategy, and it has become increasingly utilized by colleges and high schools to prevent sexual assault.[221] The training has been shown to change social norms and empower students to intervene with peers to prevent assaults from occurring.[222] Most bystander intervention trainings employ at least four strategies:

- *Create awareness* – enable bystanders to recognize potentially problematic behaviors.
- *Create a sense of collective responsibility* – motivate bystanders to step in and take action when they observe problematic behaviors.
- *Create a sense of empowerment* – conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate.
- *Provide resources* – provide bystanders with resources they can call upon and that support their intervention.[223]

One organization that provides training on campuses, Green Dot, creates a sense of empowerment by focusing its training on "three D's:" (1) confront the potential perpetrator of sexual assault in a *direct* manner, and ask the person to cease the behavior; (2) *distract* the potential perpetrator of sexual assault, and remove the potential victim; or (3) *delegate* the problem to someone who has the authority to intervene.[224]

We believe that bystander intervention training might be effective in the workplace. Such training could help employees identify unwelcome and offensive behavior that is based on a co-workers' protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

The founder of Green Dot told us that, although the training was originally applied to the reduction of sexual assault, domestic violence, and stalking, she believed the training framework

[221] *Sexual Violence: Prevention Strategies*, Injury Prevention and Control: Division of Violence Prevention, Centers for Disease Control and Prevention, available at http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html.
[222] *Id.* (summarizing research).
[223] White House Task Force to Protect Students from Sexual Assault, *Bystander-Focused Prevention of Sexual Violence*, The Nat'l Ctr. for Campus Pub. Safety (2014), https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf.
[224] *Written Testimony of Dorothy Edwards*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/edwards.cfm.

could be successfully applied to harassment in the workplace.[225] Similarly, a few researchers have explored the potential of using bystander intervention training in the workplace, and they are encouraged by the possibilities.[226] The studies caution, however, that suggested bystander responses must be crafted for use in the typical situations in which workplace harassment takes place. In addition, the organizational culture must encourage and support bystander intervention and reporting, and provide a safe system in which bystanders may do so.[227]

As with workplace civility training, more research is needed to determine the effectiveness of bystander intervention training as a workplace harassment prevention measure. But we believe such training has real potential to positively impact organizational culture. We know that most co-workers are not comfortable when harassment occurs around them, even when they are not the direct victims of the harassment. Bystander training could teach co-workers how to recognize potentially problematic behaviors; motivate and empower employees to step in and take action; teach employees skills to intervene appropriately; and give them resources to support their intervention.

Organizational culture starts from the top. But reinforcing that culture can and must come from the bottom, middle, and everywhere else in between. Bystander intervention training provides that reinforcement in a particularly concrete manner.

[225] *See, e.g.*, Paula McDonald *et al.*, *Action or Inaction: Bystander Intervention in Workplace Sexual Harassment*, 27 INT'L J. HUM. RES. MGMT. 548 (2016). *See also* Paula McDonald & Michael Flood, *Encourage. Support. Act!: Bystander Approaches to Sexual Harassment in the Workplace*, AUSTRALIAN HUM. RTS. COMM'N (2012), available at https://www.humanrights.gov.au/sites/default/files/content/sexualharassment/bystander/bystander_june2012.pdf.

[226] *See, e.g.*, McDonald, *supra* n. 226 (documenting the types of interventions co-workers use when they observe sexual harassment); Maura Kelly & Sasha Basset, *Evaluation of the Potential for Adapting the Green Dot Bystander Intervention Program for the Construction Trades in Oregon*, SOCIOLOGY FACULTY PUBLICATIONS AND PRESENTATIONS 1 (2015) (evaluating the potential of bystander intervention training to reduce harassment in the construction trades); McDonald and Flood, *supra* n. 226; Lynn Bowes-Sperry & Anne M. O'Leary-Kelly, *To Act or Not to Act: The Dilemma Faced by Sexual Harassment Observers*, 30 ACAD. MGMT. REV. 288 (2005); Cortina & Berdhal, *supra* n. 14.

[227] McDonald & Flood, *supra* n. 226 (outlining some of the elements that should be included in the design of a bystander program to prevent workplace harassment, including information on how to recognize harassment; content on different forms of bystander intervention, including both individual and collective responses; the links between harassment and other forms of inequality; training to demonstrate how bystanders can assist; and training to all employees). The paper suggests principles and strategies for developing and implementing bystander approaches to sexual harassment, but we believe the suggestions are generalizable to harassment based on other protected characteristics, as well.

Case Study: Green Dot in Anchorage, Alaska

"Green Dot" is a violence prevention program focused on providing bystanders with the strategies and techniques they need to: (1) identify situations that can lead to acts of violence (represented on incident maps by a red dot); and (2) intervene safely and effectively. A "green dot" represents "any behavior, choice, word, or attitude that promotes safety . . . and communicates utter intolerance for violence." The goal is to have sufficient positive interventions such that the green dots totally overwhelm the red dots.

The city of Anchorage, Alaska received a grant to implement the Green Dot program at the community level, including at bars and restaurants. When discussing early warning signs of violence, bar and restaurant groups often shared examples where violent or potentially violent behaviors were happening to staff. Examples ranged from intoxicated patrons violating physical boundaries of servers to discussions of bar cultures that accepted or even encouraged some levels of harassment of staff by customers - all in the spirit of keeping the party atmosphere going and the drinks and tips flowing.

As a result of the Green Dot training, bar and restaurant owners in Anchorage began to develop new cultural norms. They hosted trainings, developed policies, included relevant messaging in their signs and bulletins, and engaged in a host of creative ideas such as Green Dot trivia, contests, and competitions. Both staff and patrons acquired new skills to respond to potential harassment or violence.

Based on what we have learned in this area, we offer the following recommendations:

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

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."

- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest

that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.[228]

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

E. GETTING THE WORD OUT

We spent a significant amount of time discussing outreach and education with the Select Task Force members and witnesses. Outreach is needed for workers, employers, and the general public. On-the-job, employer-sponsored training is one form of outreach and education for employees. In this section, we highlight a number of other approaches worthy of consideration.

> *EEOC resources can provide invaluable guidance for employers. Employers should view the Commission as a source for education and assistance in addressing these critical issues.*
>
> *Patricia A. Wise, Select Task Force Member*

Getting the Word Out: Providing Simple and Easy-to-Access Information

There is a significant amount of information regarding workplace harassment available on the web. But information on the web can be overwhelming and is not always correct. This is a problem for both employers (especially small business employers with limited resources) and employees.

As Jess Kutch, the co-founder and co-director of Coworker.org told us: "[Internet search results] either give very basic advice (sometimes even wrong advice) or they give you dozens of links to deep legalese that wouldn't be helpful for most people." She also noted that very few search results lead to mobile friendly websites, which is problematic because many workers – low-wage workers, in particular – rely on their mobile phones to access information on the internet.[229] Of course, some workers cannot get their information from the internet at all – either because they do not have access to the internet, cannot find sufficient information in their own language if they do not read English, or are not literate.

[228] In addition, as we noted above, we recognize that employers may be reluctant to have their workplaces turned into a research experiment, that data collection will require the willingness of an employer to participate in this research, and that this in turn may necessitate spelling out the purposes for which this data will and will not be used..

[229] *Written Testimony of Jess Kutch*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec.7, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/12-7-15/kutch.cfm.

We also heard a fair amount about the utility of EEOC's resources on the web. Some Select Task Force members felt that EEOC's guidance on harassment was overly legalistic, and with regard to some issues, outdated. In addition, they noted that EEOC's website is neither mobile-friendly nor fully accessible to non-English speakers. One Select Task Force member sought more information on prevention strategies and noted a dearth of user-friendly tools (such as model harassment policies, effective investigation outlines, and promising practices) that could help employers in their efforts to prevent harassment. One witness suggested that EEOC's information on how to file a complaint is difficult to understand, and that the actual process of filing a complaint can be difficult and cumbersome for potential charging parties.

We took all suggestions to heart about what EEOC could do in terms of outreach and education, and a number of our recommendations at the end of this section reflect ideas that we heard. We also recognize the many successful outreach efforts EEOC has done in the past and continues to be engaged in, including the extensive (and highly regarded) outreach training EEOC conducts through its field offices and personnel.[230] EEOC has also made outreach and education for small businesses a priority through its Small Business Task Force, which in 2016 issued a simplified, one-page fact sheet designed to help small business owners better understand their responsibilities under the federal employment anti-discrimination laws.[231]

But we wanted to expand our ideas beyond what EEOC might do. To reach all the people who need to be reached, we need more than just one (or even several) government agencies involved in the effort.

The good news is that many non-profit organizations are using innovative mechanisms to get the word out. For example, as we described above, the Fair Food Program, run by the Coalition of Imokalee Workers in Florida, has developed educational materials created by farmworkers themselves. With these materials, the Coalition of Imokalee Workers provides in-person worker-to-worker education on worker rights at all farms that participate in the Fair Food Program.[232]

Similarly, ROC-LA, a restaurant worker center in Los Angeles, California, provides "know your rights" trainings both individually and to groups. The trainings focus on real-life application of employee rights, including protection from retaliation and the importance of gathering evidence

[230] EEOC provides extensive training via its Technical Assistance Program Seminars and EEOC Training Institute. EEOC representatives are available to make presentations and participate in meetings, conferences and seminars with employee advocate and employer organizations, professional associations, students, non-profit entities, community organizations and other members of the general public. Training programs are also available for tailored to federal sector needs. *See* http://www.eeotraining.eeoc.gov/index.html and https://www.eeoc.gov/field/mobile/training.cfm.

[231] EEOC's Small Business Task Force is led by Commissioner Constance S. Barker. The Task Force was launched in 2011 to address the need to provide small businesses ready access to plainly written, easily understood information, through the use of the internet, social media, and other sources. The Task Force focuses on the needs of startups and companies that are too small to afford human resource professionals or lawyers. The small business fact sheet is the first in a series of products the Task Force is in the process of developing; the Task Force is also working on producing a series of short YouTube videos designed to provide quick, easy answers to questions often asked by small business owners.

[232] Espinoza testimony, *supra* n. 165.

in cases of harassment.[233] ROC-LA also provides a free, weekly legal clinic for its members and has posted a simple "know your rights" brochure on its website that it is available in English, Spanish, and Chinese.[234]

On the employer side, membership organizations like the Society for Human Resource Management maintain libraries of resources on their websites, and provide webinars and conferences for their members that address a number of employment issues, including prevention of harassment.[235] And of course, there are many conferences, webinars, training programs, and written materials on legal issues concerning harassment.

The Commission is in the process of updating its Enforcement Guidance on Harassment, and we believe it will be a useful guide for employers and employees. Similarly, EEOC's Communications and Outreach Plan proposes upgrading the technology and user experience of EEOC's website, including making its website mobile-friendly and accessible in a number of languages.

There is, however, much more to be done to reach various audiences that would benefit from learning about how to prevent harassment, and how to complain about it or report it when necessary.

Based on what we have learned in this area, we offer the following recommendations:

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.

- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.

- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.

- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

[233] *Written Testimony of Sophia Cheng*, WORKPLACE HARASSMENT: PROMISING PRACTICES TO PREVENT WORKPLACE HARASSMENT, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Oct. 22, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/10-22-15/cheng.cfm.
[234] *See* http://rocunited.org/la/for-workers/.
[235] *See* https://www.shrm.org/pages/default.aspx.

Getting the Word Out to Youth

We heard from a number of Select Task Force members and witnesses that there needs to be explicit and focused outreach to youth, even before they enter the workforce. As one witness explained:

> Students who are about to be in their first-ever work situations need to be informed about (a) their rights to work in an environment free from harassment, intimidation, and /or discrimination, based on race, color, national origin, sex (including sexual orientation and transgender status), disability, and age… (b) what conduct is not permitted in the workplace (which may differ somewhat from what is acceptable at school); and (c) what they should do when they see or are subjected to any conduct they believe may be prohibited discrimination or harassment.[236]

Another witness explained that some teenagers and young adults "either are unaware of what constitutes harassment or, given their youth, simply don't care."[237] Select Task Force members and other witnesses stressed the importance of reaching youth *before* they enter the workforce, so that they understand workplace norms and how they differ from classroom or social norms. We also heard that traditional outreach mechanisms (materials posted on a website, worker centers, conferences, etc.) may not be the most effective in reaching youth, and that more creative approaches are necessary.

We commend the work EEOC has already done, and is continuing to do, in outreach to youth through its Youth@Work initiative. Youth@Work is EEOC's national outreach and education campaign targeted to young workers, which was launched in 2004. Since that launch, EEOC has maintained and periodically updated the campaign. Most recently, in 2016, the agency redesigned the Youth@Work website, made it mobile-friendly, expanded the campaign's social media strategy, and expanded its substantive treatment of a number of developing areas of employment non-discrimination law. We encourage EEOC to continue to make this program current, meaningful, and accessible to youth.

In light of what we have learned in this area, we offer the following recommendations:

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.

- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

[236] *Written Testimony of Rita Byrnes Kittle*, INDUSTRY SPECIFIC HARASSMENT ISSUES, MEETING OF THE E.E.O.C. SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Sept. 18, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/9-18-15/kittle.cfm.
[237] Robbins testimony, *supra* n. 134.

- EEOC should partner with web-based educational websites, such as Khan Academyor YouTube channels that have a large youth following, to develop content around workplace harassment.

- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

F. IT'S ON US

Harassment in the workplace will not stop on its own. The ideas noted above are helpful, but ultimately, may not be sufficient. It is on *all of us* to be part of the fight to stop workplace harassment. We cannot be complacent bystanders and expect our workplace cultures to change on their own.

For this reason, we suggest exploring an *It's On Us* campaign for the workplace. The *It's On Us* campaign for colleges and high school campuses is an outgrowth of the White House Task Force to Protect Students from Sexual Assault that recognized the need to change the *cultures* of educational institutions. The campaign is housed at Civic Nation, a non-profit organization focused on engaging millennials. The *It's On Us* campaign is premised on the idea that sexual assault is not just about a victim and a perpetrator. It calls upon everyone to do his or her part to be a part of the solution.

As the former leader of the *It's On Us* campaign explained to us, if students, faculty, and campus staff are passive observers when they see the possibility of sexual assault, they reinforce a culture that tolerates such behavior. But if students, faculty, and campus staff are empowered to be part of the solution to preventing sexual assault, and are given the tools and resources to do so, their role as engaged bystanders will make a significant difference in changing the educational culture.[238]

It would be an audacious goal to launch a similar *It's On Us* campaign in workplaces across our country – in large and small workplaces, in urban and rural areas. But doing so would transform the problem of workplace harassment from being about targets, harassers, and legal compliance, and make it one in which co-workers, supervisors, clients, and customers all have roles to play in stopping harassment.

The campaign focuses on three core pillars: increasing bystander intervention, defining consent, and creating an environment to support survivors. These pillars can be adjusted to better fit the scope of anti-harassment efforts in the workplace – particularly when it comes to bystander

[238] *Testimony of Anne Johnson*, FACES OF WORKPLACE HARASSMENT AND INNOVATIVE SOLUTIONS, MEETING OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (Dec. 7, 2015), https://www.eeoc.gov/eeoc/task_force/harassment/12-7-15/johnson.cfm. The *It's on Us* campaign uses a variety of mechanisms to communicate its message, including public service announcements featuring celebrities, large scale digital engagement campaigns, posters at bus stops and in train stations, collaboration with national partners, peer to peer education, engagement with local leaders and not-for-profit organizations, and engagement with policymakers. It is an effort that works in an integrated fashion with the various bystander intervention trainings that take place across educational settings. *See http://itsonus.org* .

intervention and creating an environment where targets feel comfortable coming forward to report.

We have no illusions that such a campaign would be easy to launch. But witnesses who testified before the Select Task Force believed it was possible to transfer to the workplace the principles of the *It's On Us* campaign, and the skills that bystanders would need.[239] We agree. If successful, such an effort could pay high dividends in the workplace well beyond the impact of any policy, procedure or compliance training.

An *It's On Us* campaign for the workplace would require the active engagement of business partners, employee advocacy partners, and ordinary people across the country. But we have a blueprint from the existing *It's On Us* campaign in the educational setting. The campaign was successful due in large part to its multi-faceted approach of using a wide-scale awareness campaign with a robust local organizing model to engage people both online and offline.

We are not starting from scratch with this idea. But someone has to bring the campaign to the workplace. Why not all of us?

In light of what we have learned in this area, we offer the following one, very big, recommendation:

- EEOC assists in launching an "*It's on Us*" campaign to end harassment in the workplace.

[239] *See* Johnson testimony, *supra* n. 239; Edwards testimony, *supra* n. 225.

PART FOUR

SUMMARY OF RECOMMENDATIONS

Our goal over the past year has been to learn everything we could about workplace harassment and the means to prevent it. Based on that work, we now call for a reboot of workplace harassment prevention efforts. We hope the information provided in this report, as well as our concrete recommendations for action, will energize individuals and organizations across the country to join us in that effort.

EEOC has an essential role in rebooting workplace harassment prevention efforts. But we will always only be one piece of the solution. Everyone in society must feel a sense of urgency in preventing harassment: individual employers and employer associations; individual employees and employee associations; labor union leadership and rank-and-file; federal, state, and local government agencies; academics, foundations, and community leaders. That is the only way we will achieve the goal of reducing the level of workplace harassment to the lowest level possible.

To that end, we set forth below a compilation of the recommendations set forth throughout the report.

It's on Us.

* * *

Recommendations Regarding the Prevalence of Harassment in the Workplace

- EEOC should work with the Bureau of Labor Statistics or the Census Bureau, and/or private partners, to develop and conduct a national poll to measure the prevalence of workplace harassment based on sex (including pregnancy, sexual orientation and gender identity), race, ethnicity/national origin, religion, age, disability, and genetic information over time.

- Academic researchers should compile baseline research on the prevalence of workplace harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity.

- EEOC should confer with the Merit Systems Protection Board to determine whether it can repeat its study of harassment of federal employees, and expand its survey to ask questions regarding harassment based on race, ethnicity/national origin, color, religion, age, disability, genetic information, sexual orientation, and gender identity in the federal government, and to disaggregate sexually-based harassment and gender-based harassment.

- EEOC should work within the structure established by the Office of Personnel Management to offer specific questions on workplace harassment in the Federal Employee Viewpoint Survey.

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.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage.

- 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.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined above.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the impact and efficacy of the policies, reporting systems, investigative procedures, and corrective actions put into place by that employer. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of their policies, reporting systems, investigative procedures, and corrective actions put into place by those employers, in a manner that would allow research data to be aggregated in a manner that would not identify individual employers.

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.

- EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that employers adopt and maintain compliance training that comports with the content and follows the structural principles described in this report.

- EEOC should, as a best practice in cases alleging harassment, seek as a condition of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer to assess the climate and level of harassment in respondent workplaces pre- and post-implementation of compliance trainings, and to study the impact and efficacy of specific training components. Where possible, this research should focus not only on the efficacy of training in large organizations, but also smaller employers and newer or "start up" firms. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of trainings, particularly in the context of holistic harassment prevention efforts, in a manner that would allow research data to be aggregated and not identify individual employers.

- EEOC should compile a resource guide for employers that contains checklists and training modules for compliance trainings.

- EEOC should review and update, consistent with the recommendations contained in this report, its anti-harassment compliance training modules used for Technical Assistance Seminars, Customer Specific Trainings, trainings for Federal agencies, and other outreach and education programs.

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.

- EEOC and the National Labor Relations Board should confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible content of workplace "civility codes."

- Researchers should assess the impact of workplace civility training on reducing the level of harassment in the workplace.

- EEOC should convene a panel of experts on sexual assault bystander intervention training to develop and evaluate a bystander intervention training module for reducing harassment in the workplace.

- EEOC should, as a best practice in cases alleging harassment, seek as part of its settlement agreements, conciliation agreements, and consent decrees, an agreement that researchers will be allowed to work with the employer in assessing the efficacy of workplace civility training and/or bystander intervention training on reducing the level of harassment in the workplace. While we encourage EEOC to seek such an agreement when appropriate, we do not suggest that the agency must do so in all instances, or that failure to obtain such an agreement should derail otherwise acceptable settlement proposals.

- Groups of employers should consider coming together to offer researchers access to their workplaces to research the effectiveness of workplace civility and bystander intervention trainings in a manner that would allow research data to be aggregated and not identify individual employers.

Recommendations Regarding General Outreach

- EEOC should develop additional resources for its website, including user-friendly guides on workplace harassment for employers and employees, that can be used with mobile devices.

- Non-profit organizations should conduct targeted outreach to employers to explain the business case for strong harassment prevention cultures, policies, and procedures.

- Non-profit organizations (including employee advocacy organizations, business membership associations, and labor unions) should develop easy-to-understand written resources and other creative materials (such as videos, posters, etc.) that will help workers and employers understand their rights and responsibilities.

- EEOC should partner with internet search engines to ensure that a range of EEOC resources appear high on the list of results returned by search engines.

Recommendations Regarding Targeted Outreach to Youth

- EEOC should continue to update its Youth@Work initiative (including its website) to include more information about harassment.

- Colleges and high schools should incorporate a component on workplace harassment in their school-based anti-bullying and anti-sexual assault efforts.

- EEOC should partner with web-based educational websites, such as Khan Academy, or YouTube channels that have a large youth following, to develop content around workplace harassment.

- EEOC should establish a contest in which youth are invited to design their own videos or apps to educate their peers about workplace harassment.

Recommendation Regarding an* It's on Us *campaign:

- EEOC assists in launching an "*It's on Us*" campaign to end harassment in the workplace.

ACKNOWLEDGEMENTS

The work of the Select Task Force on the Study of Harassment in the Workplace, and the report from the two of us as co-chairs of the Select Task Force, could not have happened without the invaluable assistance of many individuals over the past year.

We want to acknowledge and thank the following individuals:

Chair Jenny Yang, for her leadership in convening the Select Task Force;

Sarah Crawford, Special Assistant to Chair Yang, for organizing the Commission meeting on harassment in the workplace in January 2015 and for being our liaison to the Office of the Chair;

Christine Park Gonzalez and her colleagues at the EEOC Los Angeles District Office, for hosting us and helping us produce a full-day meeting of the Select Task Force in Los Angeles, California in October 2015;

Brett Brenner, Adam Guasch, Justine Lisser, and Kimberly Smith-Brown, from our Office of Communications and Legislative Affairs, for press, website, and other communications support;

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We also want to acknowledge and thank all the EEOC staff that engaged us in conversation, provided us with data, and took the time to review and comment on drafts of this report. We appreciate their guidance and counsel.

We want to acknowledge and thank all the witnesses, listed in Appendix A, who took the time to share their expertise with us. Every one of them has helped us in our work during this process.

None of the work required to convene the Select Task Force and write this report could have been done without the assistance of many individuals in our respective offices. We would like to acknowledge and thank:

Sara Fernandez, Confidential Assistant to Commissioner Feldblum, Anupa Iyer, former Confidential Assistant to Commissioner Feldblum, and Pierce Blue and Steven Zanowic, Special Assistants to Commissioner Feldblum, for research, logistical, and general support;

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Three of our staff members stand apart in terms of making this effort possible: Sharon Masling, Chief of Staff to Commissioner Feldblum, and Jim Paretti, Senior Counsel, and Donald McIntosh, Counsel, to Commissioner Lipnic.

Sharon, Jim, and Donald spent countless hours identifying members of the Select Task Force, planning meeting agendas, finding and working with witnesses, preparing legal and policy materials, dealing with logistics, sitting through endless hours of meetings with each other and with us, communicating with Select Task Force members, and preparing draft sections of the report. It goes without saying (but we will say it anyway) that nothing would have gotten done without the incredible work of these three staff members.

Finally, we would like to thank the members of the Select Task Force on the Study of Harassment in the Workplace, for their time, their thoughtfulness, their insights, and their commitment to this project. While this report is by the two of us, it would not have been possible without them.

APPENDIX A

ACTIVITIES OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE

On April 7, 2015, the Select Task Force on the Study of Harassment in the Workplace held its first meeting, a private working session in Washington, DC. At that meeting, members of the Select Task Force provided their initial thoughts on how the group might proceed in its work. The bulk of the day was devoted to framing the Select Task Force's mission, and building relationships among the members.

The first public meeting of the Select Task Force, entitled "*Workplace Harassment: Examining the Scope of the Problem and Potential Solutions*," was held on June 15, 2015, at EEOC headquarters in Washington, DC. At that hearing, members of the Select Task Force heard testimony from six invited witnesses:

- Dexter Brooks, Director, Federal Sector Programs, Office of Federal Operations, EEOC
- Ron Edwards, Director, Program Research and Surveys Division, Office of Research, Information and Planning, EEOC
- Lilia Cortina, Professor of Psychology and Women's Studies, University of Michigan
- Mindy Bergman, Associate Professor of Psychology, Texas A&M University
- Eden King, Associate Professor of Psychology, George Mason University
- Louise Fitzgerald, Professor *Emerita* of Gender and Women's Studies and Psychology, University of Illinois.

The witnesses focused their remarks on the prevalence of workplace harassment in both the private and public sector. Their testimony included an examination of existing research, as well as gaps in current literature and data.

Information on the June 2015 meeting is available at: Select Task Force Meeting of June 15, 2015 - Workplace Harassment: Examining the Scope of the Problem and Potential Solutions.

At this meeting, we announced the formation of the Select Task Force's public website, which assembled in one place a range of existing EEOC resources relating to harassment, and provided an online "suggestion box" for public comment.

On August 12, 2015, we gave a presentation concerning the work of the Select Task Force at the annual EXCEL conference, "Examining Conflicts in Employment Law," and heard feedback from the more than 70 attendees regarding their experience in preventing and addressing workplace harassment in federal worksites.

On September 18, 2015, the Select Task Force held a closed working session in Washington, DC. The focus of the session was to explore "risk factors" or problematic issues that might relate to specific workplaces. The Select Task Force heard testimony from three experts in workplace harassment investigations and training who had experience with a range of industries:

- Michael A. Robbins of EXTTI, Inc.
- Fran Sepler of Sepler & Associates
- Sindy Warren of Warren & Associates LLC.

The Select Task Force also heard from Wendi Lazar, a partner at Outten & Golden LLP, on the risk factors faced by women in the legal profession. Finally, the Select Task Force heard from two members of EEOC's legal staff, Los Angeles Regional Attorney Anna Park and Denver Senior Trial Attorney Rita Byrnes Kittle, about lessons learned from large-scale EEOC investigations and litigation.

On October 22, 2015, the Select Task Force held a day-long public meeting in Los Angeles, California, focused on "Promising Practices to Prevent Workplace Harassment."

At this meeting, the Select Task Force heard testimony from:

- Judge Laura Safer Espinoza, Director, Fair Food Standards Council
- Jon Esformes, Chief Executive Officer, Pacific Tomato Growers; Sunripe Certified Brands
- Sophia Cheng, Community Organizer, Restaurant Opportunities Center of Los Angeles
- Dorothy Edwards, Executive Director, Green Dot
- Melissa Emmal, Deputy Director, Abused Women's Aid in Crisis
- Patti Perez, Shareholder, Ogletree Deakins, and Member of the California Fair Employment and Housing Council
- Renette Anderson, Executive Assistant to the General Manager and Director of Equal Employment Opportunity Services, Los Angeles Department of Water and Power
- Heidi Jean Olguin, CEO, Progressive Management Resources.

The witnesses presented testimony on innovative approaches to combatting workplace harassment and new or non-traditional models of training and outreach. The witnesses also testified on the importance of corporate culture and strong leadership in promoting harassment-free workplaces.

Information on the October 2015 meeting can be found at: Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment.

On December 7, 2015, the Select Task Force convened in Washington, DC, "Faces of Workplace Harassment and Innovative Solutions." The public portion of the meeting was devoted to two topics: (1) harassment on the bases of disability, religion, ethnicity, sexual orientation, gender identity, and age; and (2) solutions using general awareness campaigns and social media.

The first panel, "Faces of Workplace Harassment," consisted of:

- Lisa Banks, Partner, Katz, Marshall & Banks, LLP
- Zahra Billoo, Executive Director, Council on American-Islamic Relationa – San Francisco Bay Area
- Tara Borelli, Senior Attorney, Lambda Legal
- Dan Kohrman, Senior Attorney, AARP Foundation Litigation

The second panel, "Innovative Solutions," consisted of:

- Anne Johnson, Executive Director, Generation Progress, Center for American Progress ("It's on Us" campaign)
- Jess Kutch, Co-Founder, Coworker.org

Information on the December 2015 meeting can be found at: Select Task Force Meeting of December 7, 2015 - Faces of Workplace Harassment and Innovative Solutions.

In a closed working session in the afternoon, Select Task Force members gathered into five working groups focused on: (1) Outreach; (2) Research; (3) Training; (4) Employer Best Practices; and (5) Harassment "Risk Factors."

On February 11, 2016, we met with representatives from the federal sector, including equal employment opportunity directors and specialists from federal agencies, to discuss how the federal government is working to prevent harassment, and solicit their feedback, experience, and concerns regarding harassment in the federal-sector workplace.

On February 25, 2016, the Select Task Force met in closed session in Washington, DC to discuss the reports of several of the working groups. At that meeting, the Select Task Force also heard from Nathan Galbreath, Senior Executive Advisor, Sexual Assault Prevention and Response Office, Department of Defense, which oversees the military's sexual assault policy and programs.

On March 1, 2016, we met with the senior leadership of EEOC, including district directors and regional attorneys, to discuss the ongoing work of the task force.

On March 11, 2016, the Select Task Force met in closed session to continue its discussion of the working group reports. The Select Task Force also heard testimony about harassment based on race from Coty Montag, Deputy Director Litigation, NAACP Legal Defense and Education Fund, and about harassment based on national origin and language characteristics from Guadalupe Valdés, Bonnie Katz Tenenbaum Professor of Education, Stanford Graduate School of Education. In addition, the Select Task Force received a briefing on organizational behavior from Robert J. Bies, Professor of Management & Founder of Executive Master's in Leadership Program, McDonough School of Business, Georgetown University, and heard a presentation from Jennifer Abruzzo, Deputy General Counsel, U.S. National Labor Relations Board, on issues relating to harassment arising under the National Labor Relations Act.

The Select Task Force held a closed working session on June 6, 2016, in Washington, DC. The session was devoted to a discussion of the Co-Chairs' draft report, and its release later that month.

APPENDIX B

CHECKLISTS FOR EMPLOYERS

Checklist One: Leadership and Accountability

The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated. Check the box if the leadership of your organization has taken the following steps:

- ❑ Leadership has allocated sufficient *resources* for a harassment prevention effort
- ❑ Leadership has allocated sufficient *staff time* for a harassment prevention effort
- ❑ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

Based on the commitment of leadership, check the box if your organization has the following components in place:

- ❑ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- ❑ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- ❑ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- ❑ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- ❑ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
- ❑ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

Bonus points if you can check these boxes:

- ❑ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
- ❑ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
- ❑ The organization conducts *workplace civility training* and *bystander intervention training*
- ❑ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Two: An Anti-Harassment Policy

An anti-harassment policy is a key component of a holistic harassment prevention effort. Check the box below if your anti-harassment policy contains the following elements:

- ❑ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- ❑ An easy-to-understand description of prohibited conduct, including examples
- ❑ A description of a reporting system – available to employees who experience harassment as well as those who observe harassment – that provides multiple avenues to report, in a manner easily accessible to employees
- ❑ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- ❑ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ❑ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ❑ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- ❑ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
- ❑ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- ❑ Is written in clear, simple words, in all languages commonly used by members of the workforce

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Three: A Harassment Reporting System and Investigations

A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.

Check the box below if your anti-harassment effort contains the following elements:

- ❑ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ❑ Employer representatives who take reports seriously
- ❑ A supportive environment where individuals feel safe to report harassing behavior to management
- ❑ Well-trained, objective, and neutral investigators
- ❑ Timely responses and investigations
- ❑ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ❑ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ❑ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ❑ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ❑ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

Checklist Four: Compliance Training

A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations. Check the box if your organization's compliance training is based on the following structural principles and includes the following content:

- Structural Principles
  - ❑ Supported at the highest levels
  - ❑ Repeated and reinforced on a regular basis
  - ❑ Provided to all employees at every level of the organization
  - ❑ Conducted by qualified, live, and interactive trainers
  - ❑ If live training is not feasible, designed to include active engagement by participants
  - ❑ Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
  - ❑ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ❑ Includes examples that are tailored to the specific workplace and the specific workforce
  - ❑ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ❑ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ❑ Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-line Supervisors
  - ❑ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ❑ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ❑ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is* not *in compliance.

APPENDIX C

CHART OF RISK FACTORS AND RESPONSES

Risk Factor	Risk Factor Indicia	Why This is a Risk Factor for Harassment	Risk Factor-Specific Strategies to Reduce Harassment*
Homogenous workforce	Historic lack of diversity in the workplace Currently only one minority in a work group (*e.g.*, team, department, location)	Employees in the minority can feel isolated and may actually be, or at least appear to be, vulnerable to pressure from others. Employees in the majority might feel threatened by those they perceive as "different" or "other," or might simply be uncomfortable around others who are not like them.	Increase diversity at all levels of the workforce, with particular attention to work groups with low diversity. Pay attention to relations among and within work groups.
Workplaces where some employees do not conform to workplace norms	"Rough and tumble" or single-sex-dominated workplace cultures Remarks, jokes, or banter that are crude, "raunchy," or demeaning	Employees may be viewed as weak or susceptible to abuse. Abusive remarks or humor may promote workplace norms that devalue certain types of individuals.	Proactively and intentionally create a culture of civility and respect with the involvement of the highest levels of leadership. Pay attention to relations among and within work groups.
Cultural and language differences in the workplace	Arrival of new employees with different cultures or nationalities Segregation of employees with different cultures or nationalities	Different cultural backgrounds may make employees less aware of laws and workplace norms. Employees who do not speak English may not know their rights and may be more subject to exploitation. Language and linguistic characteristics can play a role in harassment.	Ensure that culturally diverse employees understand laws, workplace norms, and policies. Increase diversity in culturally segregated workforces. Pay attention to relations among and within work groups.

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Coarsened Social Discourse Outside the Workplace	Increasingly heated discussion of current events occurring outside the workplace	Coarsened social discourse that is happening outside a workplace may make harassment inside the workplace more likely or perceived as more acceptable.	Proactively identify current events—national and local—that are likely to be discussed in the workplace. Remind the workforce of the types of conduct that are unacceptable in the workplace.
Young workforces	Significant number of teenage and young adult employees	Employees in their first or second jobs may be less aware of laws and workplace norms. Young employees may lack the self-confidence to resist unwelcome overtures or challenge conduct that makes them uncomfortable. Young employees may be more susceptible to being taken advantage of by coworkers or superiors, particularly those who may be older and more established in their positions. Young employees may be more likely to engage in harassment because they lack the maturity to understand or care about consequences.	Provide targeted outreach about harassment in high schools and colleges. Provide orientation to all new employees with emphasis on the employer's desire to hear about all complaints of unwelcome conduct. Provide training on how to be a good supervisor when youth are promoted to supervisory positions.

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Workplaces with "high value" employees	Executives or senior managers Employees with high value (actual or perceived) to the employer, *e.g.*, the "rainmaking" partner or the prized, grant-winning researcher	Management is often reluctant to jeopardize high value employee's economic value to the employer. High value employees may perceive themselves as exempt from workplace rules or immune from consequences of their misconduct.	Apply workplace rules uniformly, regardless of rank or value to the employer. If a high-value employee is discharged for misconduct, consider publicizing that fact (unless there is a good reason not to).
Workplaces with significant power disparities	Low-ranking employees in organizational hierarchy Employees holding positions usually subject to the direction of others, *e.g.*, administrative support staff, nurses, janitors, etc. Gendered power disparities (*e.g.*, most of the low-ranking employees are female)	Supervisors feel emboldened to exploit low-ranking employees. Low-ranking employees are less likely to understand complaint channels (language or education/training insufficiencies). Undocumented workers may be especially vulnerable to exploitation or the fear of retaliation.	Apply workplace rules uniformly, regardless of rank or value to the employer. Pay attention to relations among and within work groups with significant power disparities.
Workplaces that rely on customer service or client satisfaction	Compensation directly tied to customer satisfaction or client service	Fear of losing a sale or tip may compel employees to tolerate inappropriate or harassing behavior.	Be wary of a "customer is always right" mentality in terms of application to unwelcome conduct.

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Workplaces where work is monotonous or tasks are low-intensity	Employees are not actively engaged or "have time on their hands" Repetitive work	Harassing behavior may become a way to vent frustration or avoid boredom.	Consider varying or restructuring job duties or workload to reduce monotony or boredom. Pay attention to relations among and within work groups with monotonous or low-intensity tasks.
Isolated workplaces	Physically isolated workplaces Employees work alone or have few opportunities to interact with others	Harassers have easy access to their targets. There are no witnesses.	Consider restructuring work environments and schedules to eliminate isolated conditions. Ensure that workers in isolated work environments understand complaint procedures. Create opportunities for isolated workers to connect with each other (*e.g.*, in person, on line) to share concerns.

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Workplaces that tolerate or encourage alcohol consumption	Alcohol consumption during and around work hours.	Alcohol reduces social inhibitions and impairs judgment.	Train co-workers to intervene appropriately if they observe alcohol-induced misconduct. Remind managers about their responsibility if they see harassment, including at events where alcohol is consumed. Intervene promptly when customers or clients who have consumed too much alcohol act inappropriately.
Decentralized workplaces	Corporate offices far removed physically and/or organizationally from front-line employees or first-line supervisors	Managers may feel (or may actually be) unaccountable for their behavior and may act outside the bounds of workplace rules. Managers may be unaware of how to address harassment issues and may be reluctant to call headquarters for direction.	Ensure that compliance training reaches all levels of the organization, regardless of how geographically dispersed workplaces may be. Ensure that compliance training for area managers includes their responsibility for sites under their jurisdiction Develop systems for employees in geographically diverse locations to connect and communicate.

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