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Sexual Harassment in the Workplace: Today's Headlines Create Opportunities for Change for Employers

Instead of hunkering down in fear or denial, employers can and should view this moment as an opportunity to address long-standing issues, improve diversity, and create lasting, positive change.

By Gina Roccanova

Sexual harassment is suddenly a hot topic. With the "#MeToo" movement sweeping across social media, the "Silence Breakers" on the cover of TIME, and new allegations of sexual improprieties against high-profile individuals in the news seemingly every day, many employers are reassessing their risks. Although a few high-dollar, high-profile harassment settlements have made the news, they are far from the norm. Contrary to the public perception generated by these high-profile cases, the threat of litigation has not been a huge driver of employer behavior. There are several reasons for this. There are also several reasons employers should focus on harassment at work to create a culture that discourages it.

When Title VII was originally passed in 1964, the concept of sexual harassment did not exist. The act of sexual harassment did, of course, exist and has been experienced for generations. And while Title VII outlawed discrimination based on sex, it took more than two decades of effort by litigators and feminist theorists such as Katherine McKinnon and Eleanor Holmes Norton before the United States Supreme Court recognized, in *Meritor Savings Bank v. Vinson* 477 U.S. 57 (1986), that a hostile work environment caused by sexual harassment was a form of discrimination prohibited by Title VII.

Several factors and developments since then have blunted the effects of this trail-blazing litigation. The Civil Rights Act of 1991, which Congress intended to broaden access to remedies for discrimination, gave plaintiffs the right to sue for damages

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under Title VII, but capped them at $50,000 to $300,000 in combined compensatory and punitive damages, depending on the size of the employer. Those caps have not risen in 26 years. In *WalMart Stores v. Dukes*, 564 U.S. 338 (2011), the Supreme Court made it more difficult for plaintiffs in discrimination cases

to obtain class certification. In that case, which challenged WalMart's pay and promotion practices nationwide, the court held that an allegation of a "corporate culture" that disadvantaged women and institutionalized bias against them did not suffice to meet the commonality requirement of Rule 23 of the Federal Rules of Civil Procedure. Given the costs of litigation, these developments made Title VII suits less attractive for plaintiffs, and eliminated an arguable incentive for companies to emphasize prevention of harassment.

The widespread use of arbitration clauses, including provisions prohibiting class actions, have also affected the law in this area. In *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the court adopted a broad view of the Federal Arbitration Act and held that it preempts state law that limits the use of arbitration clauses in consumer contracts. The employment bar widely regarded that case as a harbinger of the court's view of similar clauses in employment contracts. The court heard argument in the fall of 2017 in the *Epic Systems Corp. v. Lewis* consolidated cases. Those cases raise the question of whether arbitration clauses containing waivers of all collective and class actions are enforceable under the FAA or prohibited by the National Labor Relations Act. The court has not yet issued a decision in those cases, but based on the Justices' questions during oral argument and their track records in similar cases, it is widely believed that the court will rule in favor of employers in those cases. While plaintiffs in harassment cases can and do win at arbitration, many employee-side practitioners regard arbitration as a relatively unfavorable forum. In addition, having these cases heard in private proceedings means fewer published cases, which makes it difficult for plaintiffs' lawyers to succeed on new theories.

Many states, including California, have anti-discrimination laws on the books that do not cap damages.

In 2012, a California jury delivered a verdict of $168 million — the largest ever awarded to a single plaintiff in a sexual harassment case. In 2016, a woman obtained a verdict of $7.3 million, including $6.4 million in punitive damages, in a case against yoga guru Bikram Choudhury. California courts have also been far more disapproving of arbitration agreements, particularly those that include class action waivers, and have found them unconscionable, and thus unenforceable, in many instances.

Two other factors, however, have impacted claims under both federal and state law. The first of these is the prevalence of confidentiality provisions in settlement agreements — another issue that has been receiving extensive news coverage lately. State law generally prohibits public sector employers from including such clauses in settlement agreements, but their use is common in the private sector. Employers have understandable reasons for wanting to keep the terms of their settlement agreements private, but numerous critics say that confidentiality provisions enable serial harassers to thrive. Legislators in several states, including California, have introduced, or stated their intention to introduce, legislation that would prohibit confidentiality clauses in sexual harassment cases.

The factor that has perhaps had the greatest impact on the way harassment claims are viewed and handled is insurance. Insurers began offering defense and indemnification for harassment claims in the 1990s. While a few high profile and particularly egregious cases still go to trial and make the news, most end up being handled by insurance counsel and settled according to their formulas. As a result, until recently, the financial picture alone has not created a situation that demands expanding the allocation of resources to preventing harassment.

Despite the various factors that have arguably muted employers' attention to preventing and addressing harassment, recent events demonstrate that employers need to pay heightened attention to this issue. The explosion of publicity about harassment has caused even employers outside the high-profile fields of politics, tech and entertainment to rethink their policies and workplace culture. However long this intense public attention continues, employers have other ongoing reasons to deal with harassment. For example:

1. EPLI doesn't cover everything. In some states, including California, the law prohibits coverage for punitive damages. The current publicity around harassment may predispose juries to award punitive damages in a broader array of cases.
2. Harassment chases talented women from the workplace. Survey data published in the *Gender & Society* journal earlier this year indicated that 80 percent of women who experience sexual harassment on the job leave within two years, as compared to 50 percent of women who do not experience harassment.
3. Social media has created innumerable avenues that employees are now using to tell their stories, air their perceptions about workplace culture, and share their grievances in a very public fashion – and these are avenues that employers cannot control.
4. It's the law. However blunted the actual penalties may be, federal and California law prohibit harassment and require employers to take steps to prevent it.
5. It's the right thing to do. This one needs no explanation.

These days, all employers provide some form of training to managers and have procedures in their handbooks for employees to report harassment. Obviously, no policy can prevent a bad actor from engaging in harassment 100 percent of the time. But employers who are committed to changing organizational culture can do more. For example:

1. *Better Training*. The EEOC has noted that the boilerplate trainings offered by most employers likely do little to deter harassment. Tailoring trainings to a specific workplace and engaging employees on a deeper level tends to significantly improve their effectiveness.
2. *Lead by Example*. The top of the organization sets the tone. Set a good example.
3. *Promote diversity*. One of the best ways to let women know they are welcome in an organization is for them to see other women in positions of leadership.
4. *Talk about it*.
5. *Deal with "that guy."* One of the most striking elements of the harassment stories currently in the news is how often organizations have turned a blind eye to the misconduct of powerful men. No company should depend so much on one person that it cannot take action against him.
6. *Enforce* the company's no-retaliation policy.

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