



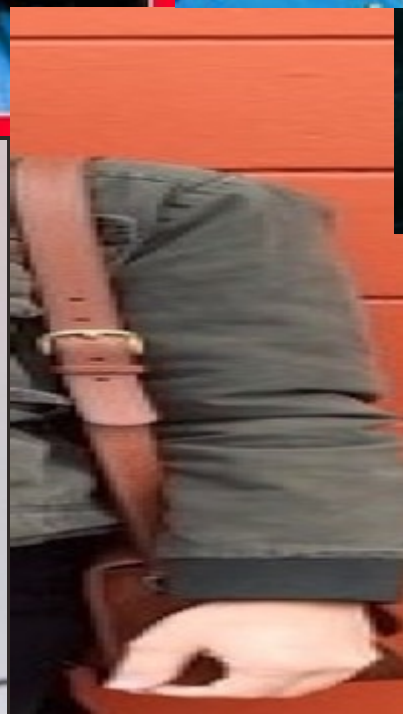
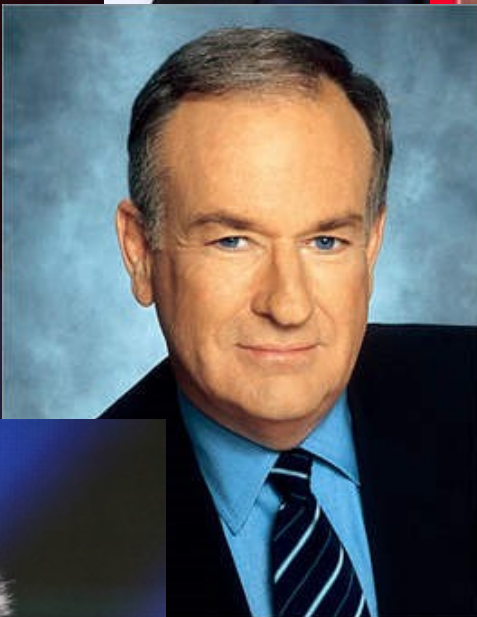
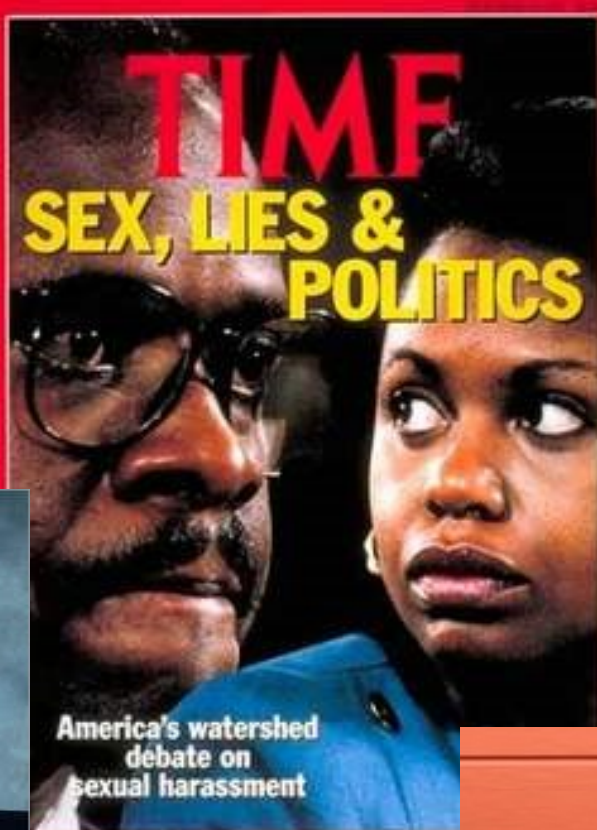
EMERGING TRENDS

Current Legal Landscape and
Organizational Liability



Kimberly J. Korando

May 2018



What conduct can constitute sexual harassment?

Any unwanted conduct of a requisite severity that is imposed on a person in his or her employment because of his or her sex.

Generally, sexual harassment falls into one or more of three categories:

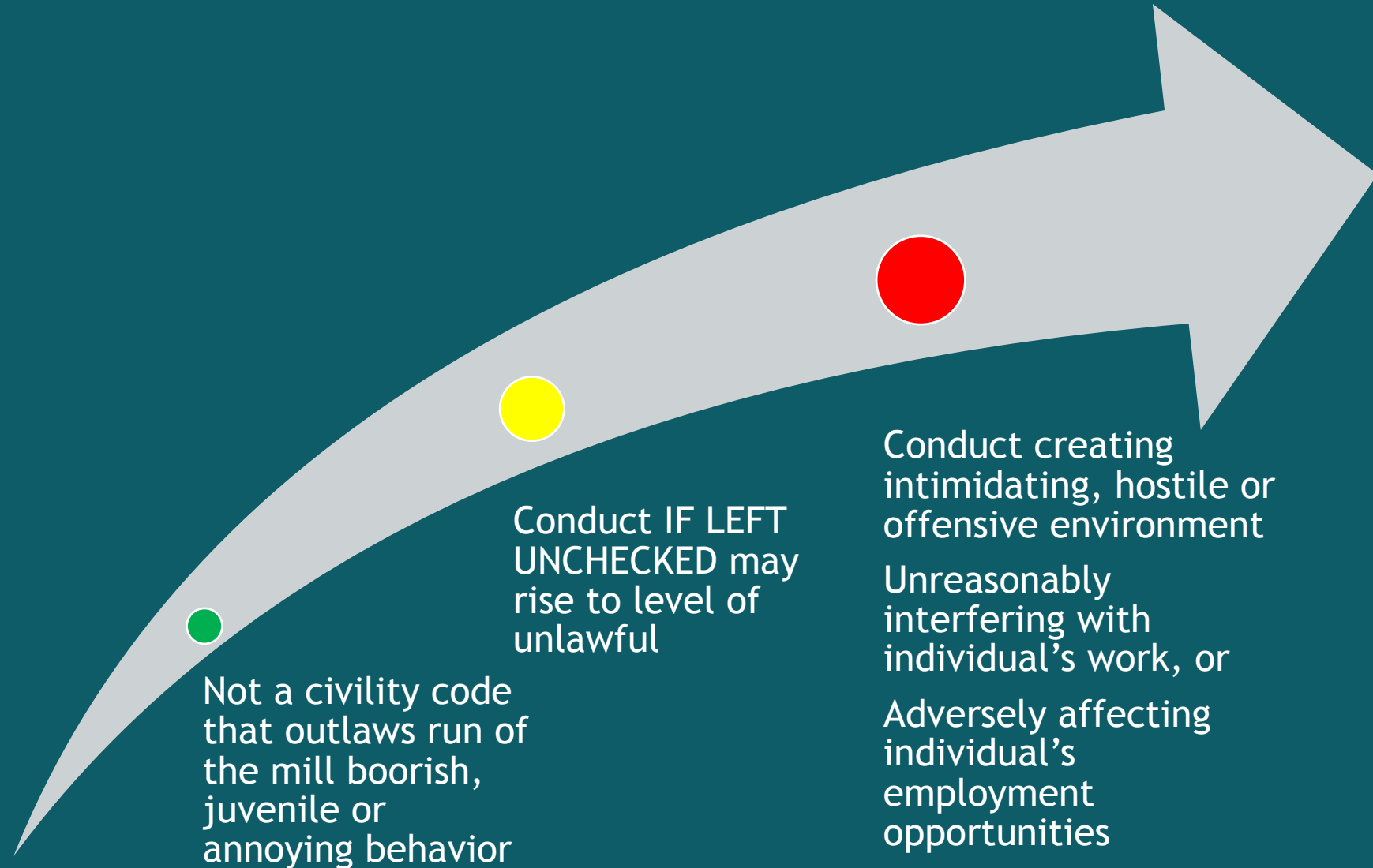
- unwelcome sexual advances
- a sexually-charged workplace
- gender-based animosity

Unwanted conduct because of one's sex (often called the Come-ons and Put-downs)

- Offensive jokes, comments, slurs, epithets, name calling, insults
- Undue attention, propositions, innuendo
- Unwelcome touching, contact
- Intimidation, ridicule, mockery
- Threats, physical assault
- Gestures, signs, cartoons, pictures, paraphernalia; email and internet usage

Harassment as form of unlawful sex discrimination

Resulting in change to terms or conditions of employment



It's not just about sex...

Effective harassment prevention extends to all legally protected characteristics

- Race, color
- Religion
- National origin
- Age
- Disability
- Veteran status
- Other legally protected characteristics

Organization Liability Standards

○ Executives



No Affirmative Defense (per EEOC)

○ Supervisors



Tangible Act - No Affirmative Defense

No Tangible Act - Affirmative Defense **IF**

- Reasonable Prevention +
- Prompt Effective Remedial Action +
- Employee Unreasonably Failed to Take Advantage of Employer Corrective Opportunities

○ Coworkers



Defense **IF** Once Knew or Should Have Known Took Prompt Effective Remedial Action

EXPECT EXCELLENCE®

SMITH
ANDERSON

Me too.



Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."



Alyssa Milano ✓

@Alyssa_Milano



If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

3:21 PM - Oct 15, 2017



68,366



25,129



53,685

Emerging Trends

- Lower tolerance for inappropriate but not unlawful behavior
- Stale claims not discounted
- Public disclosures and reputational impacts driving prevention (regulatory agencies, courts not so much)
- StopIt and other reporting apps
- Outsourcing investigations to outside subject matter experts
- Outlawing confidential settlements, arbitration and other secrecy efforts
- Executive employment agreement Cause clauses under scrutiny

Diversity



Sexual harassment / assault at Deloitte

Deloitte / Other · [ParPaper](#)

Dec 11, 2017

Anyone else experience sexual harassment, assault, misconduct at Deloitte?

I was 'Weinsteined' by a Partner in NYC and am looking for others who've experienced the same.



16



52



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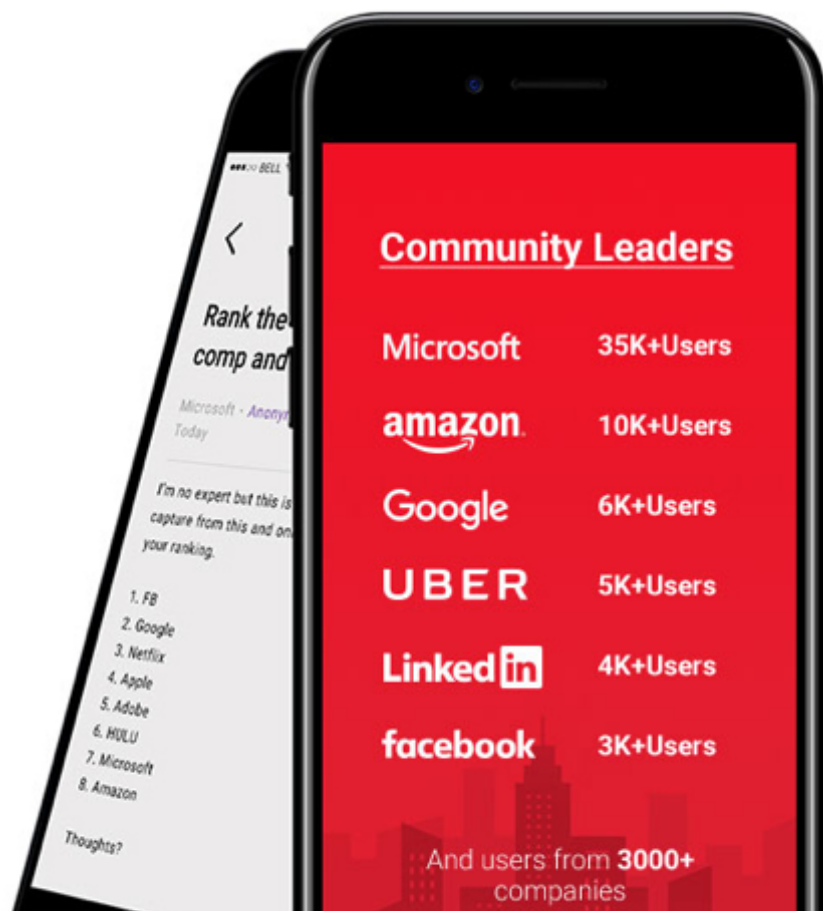
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EMERGING TRENDS

Effective Harassment Prevention and
Risk Management



Kimberly J. Korando

February 2018



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Safeguarding Your Success

Why does my company need a policy on harassment?

- Prevents harassment
- Protects employees
- Potential to minimize employer liability
- Eliminates the excuse of: “I didn’t know what I said (or did) was considered harassment”
- EEOC more favorable to employers who are proactive
- A top down approach to policy and prevention is key to success



Harassment Policy Checklist

An effective harassment policy:

- Fully defines harassment
- Includes examples
- States company's "no tolerance"
- Ensures all claims will be investigated
- Includes remediation assurance
- Ensures against retaliation
- Requires employees to follow reporting procedures
- Identifies who the employee can report to



Harassment Training 101

- Senior leaders should attend
- EEOC recommends 3-hour training for employees; 4 hours for supervisors
- No one-size fits all – should be tailored to your company – interactive
- Include examples of what does, and doesn't, rise to the level of harassment
- Cover the consequences of engaging in unacceptable conduct
- Cover reporting procedures and the investigation process



Harassment reporting: The proper response

When an employee makes a complaint, the manager should:

1. Thank the employee for coming forward
2. Remain calm, unbiased and open minded
3. Gather the necessary facts from all parties involved, and witnesses
4. Assure the employee the claim will be investigated promptly, thoroughly
5. Inform the employee that the information will remain as confidential *as possible*, without inhibiting a thorough investigation



Harassment Investigations

- Preparing for the investigation
 - Review the personnel file of complainant and accused
 - Collect and review relevant documents, including applicable policies and work rules.
 - Prepare a preliminary list of persons who may have knowledge of the matter and establish a plan for conducting interviews
 - Consider consulting with legal counsel who can advise you regarding the most effective way to complete the investigation.
- Thoroughly and Immediately Investigate ALL complaints
 - Keep the investigation and facts derived on a strict “need to know basis”. Do NOT promise information will remain confidential.
 - Interview the complainant, accused, immediate supervisors and witnesses as soon as possible & take written statements.



Investigation: Interview the complainant

Interviewer Should:

- Remain objective
- Determine identity of the accused
- Ask—when, where, how?
- Ask--one-time incident or pattern?
- Ask—how did you react? How did the accused react?
- Ask—any witnesses to the incident? Who did you tell?
- Offer assurance--complain taken seriously, thoroughly investigated
- Kept as confidential as possible
- DON'T--forego an investigation due to confidentiality concerns



Investigation: Interview the accused

- Remain objective but wary—avoid bias
- Ask—do you know about reported incident?
- Ask—prior consensual relationship?
- Ask—what is your working relationship with the complainant?
- Ask—why would the accused make an allegation?
- Ask—do you have any authority over this person's job?
- Ask—were you recently granted or denied job benefits/promotion?
- Assure—complaint will be kept as confidential as possible



Investigation: Interview continued

- Interview the immediate supervisor
 - Ask—any disciplinary issues or behavioral problems?
 - Ask—any relationship, to your knowledge?
 - Ask—did complainant make prior report of any kind?
- Interview witnesses
 - Remain objective
 - Review witness' personnel file prior to interview
 - Don't give out unnecessary information (privacy)



Taking Corrective Action

Before taking action:

- Does information contradict or corroborate allegation?
- Prepare a summary report setting forth **factual** findings

Take necessary corrective action

Document action and include investigation summary

Make sure to follow through:

Inform complainant and collect signed statement

Complete an investigation report

Additional incidents, workplace training





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The Case for EPLI

- ✓ Implement harassment policy
 - ✓ Initiate best practices
 - ✓ Conduct the proper workplace training
- Chance of still getting sued: Good
Chance of winning in court, if sued: 50%

Do you need insurance? Yes.
Even if you've done everything "right"? Yes.
Even if you have the best employees in the world? Yes.

Here's why:

EPLI is the primary insurance product to manage harassment liability. It covers more than just sexual harassment claims:

- Discrimination, wrongful termination, hostile work environment
- Insurance covers your defense, even if you did nothing wrong



- Airline pilot claimed there were derogatory statements posted by co-workers on the “Crew Members Forum” – an online company bulletin board accessible to all pilots and crewmembers.
- Airline denied responsibility, arguing that the harassment occurred outside the physical workplace.
- While employers are not required to monitor all private communications between employees, they do have a duty to stop harassment in settings related to the workplace if they know or have reason to know about it.
- Pilot sued the airline and other pilots for defamation and emotional distress.
- The court decided that the employer was liable because this online forum was a setting related to the workplace.
- Total defense costs and settlement exceeded \$600,000.



- A female employee working for a service company alleged that several employees made inappropriate sexual comments towards her, including suggestions that she was having a sexual relationship with another employee.
- She also alleged that her boss and co-workers asked her inappropriate questions concerning her personal life.
- Plaintiff alleged that after she complained, her manager engaged in a practice of retaliation. She contended that she was excluded from certain meetings, taken off certain projects and assignments, treated rudely and received a negative evaluation.
- Total defense costs and settlement exceeded \$550,000.



- Several female employees at a company complained that the CEO was sexually harassing them.
- As required by law, the President proceeded to investigate the complaints.
- Within one month of the start of the investigation and without apparent backing of the board of directors, the President was terminated by the CEO under the pretext of performance issues. This was despite the fact that he was given a raise a few months earlier.
- The President filed a separate wrongful termination suit due to the conflict between the Board of Directors and the CEO.
- The settlement and Defense Cost exceeded the policy's Limit of Liability.



- A volunteer at an assisted living facility alleged that a resident created a hostile environment through intimidation and harassment.
- The volunteer claimed that the facility was liable since it did nothing to curtail the intimidation and harassment when she advised the administrator.
- The insurer provided a defense costing \$125,000 through summary judgment rendered in favor of the Insured.



EPLI Checklist – Be prepared to answer the following:

- What states do you have employees in?
- Number of terminations over a three-year period?
- Are terminations reviewed by HR and someone well versed in employment law?
- Is severance provided to terminated and laid off employees?
- Do all potential employees complete a uniform employment application?
- Is an employee handbook distributed to all employees?
- Are employees required to acknowledge, by signature, receipt of the handbook?
- Is regular training conducted on the topics contained in the handbook?
- Does the employee handbook contain the following policies:
 - Discrimination
 - Harassment
 - FMLA
 - Reporting, Investigating and Resolving Employee Complaints
 - Written Performance Reviews
 - Retaliation
 - Discharge/Termination



EPLI: All Policies are Not Created Equal

The Essentials:

- Defense outside the limits
- Punitive damages included
- Prior acts coverage
- Softened hammer clause
- Broad definition of “employee”
- Risk management helpline



Questions about EPLI Coverage, Terms, Cost?

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