
Practical Advice For Handling Sexual Harassment Complaints In The Post - #MeTooWorld.”

Peter K. Newman, Esq.¹
THE NEWMAN LAW GROUP LLC

I. Introduction

As a result of the publicity over the 2017 high profile sexual harassment cases in Hollywood, Silicon Valley, the Media, and in Politics, our country once again went through what Maureen Dowd described as “a searing seminar on sexual harassment.” Even though we employment lawyers have always seen a steady stream of sexual harassment cases, this time two things are different: (1) *people are starting to believe the women who come forward to complain;* and (2) *it feels like people are finally prepared to hold the harassers responsible.*

The big takeaway for all employers is that sexual harassment affects all businesses because it involves men in power who believe that they are entitled to live by their own rules which includes treating women as sex objects rather than fellow human beings. As Lord Acton observed, “power corrupts, and absolute power corrupts absolutely.”

Unfortunately, this moment of reckoning has left many employers afraid and confused about what they can do to stop sexual harassment in their own workplaces. Although it is undisputed that our country needed to go through this reckoning on sexual harassment, I also believe that in some cases the pendulum of public opinion has swung too far to the point where unfortunately a mere accusation of sexual harassment is treated as proof of guilt. (*e.g.* Senator Al

¹ Peter Newman is the Managing Partner of The Newman Law Group LLC where he practices Employment Law and Litigation, Traditional Labor Law, Business Litigation, Corporate Compliance + Ethics, Title IX Consulting and Litigation, and Dispute Resolution. Since the EEOC issued its 1980 Guidelines on Discrimination Because of Sex declaring sexual harassment a violation of Title VII, Peter has been training executives, managers and supervisors on why they need to take personal responsibility for their actions to avoid getting their companies - *and themselves* - sued. He has also trained employees on how to take personal responsibility by speaking up if they believe they are harassed and to avoid the “bystander syndrome” if they see someone else being harassed or bullied. You can contact Peter at either 937.475.6282 or newmanlawgroup@gmail.com.

Franken's case and the recent story about a young woman who reported having a “bad date” with Comedian Aziz Ansari). Employers need to step back and learn the lessons of the #MeToo Movement and its overreach by adopting a balanced approach to addressing sexual harassment claims. This balanced approach should include: *compassion* for the victims; *respect* for the rights of the accused; and a *collaborative effort* to get find out the truth and then take prompt corrective action if needed.

This article provides some practical advice for all employers and, in particular, for those who may be justifiably confused about what to do next. As an initial matter, everyone needs to step back and get some perspective regarding how we got here, where we are now, and what the future of sexual harassment will be. This article begins with a brief history of the development of sexual harassment law. Next, the article provides the legal framework currently used to analyze sexual harassment claims. Finally, the article concludes with a suggested action plan for employers to adopt to hopefully eliminate sexual harassment from their workplaces, or at least minimize their exposure to sexual harassment claims.

II. A Brief History of the Development of Sexual Harassment Law - the Key Watershed Events

- | | |
|-------------|--|
| 1964 | Title VII of the Civil Rights Act of 1964 is passed which prohibits employment discrimination based on race, color, sex, religion, or national origin. The U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII. |
| 1975 | The term "sexual harassment" arose from a consciousness-raising session that Cornell Professor Lin Farley held with a group of students. During the session, Farley discovered that every woman in the room had been fired or forced out of a job after rejecting a male boss' sexual advances. She realized that the degradation of women could no longer be treated like a joke; it was a serious problem. So, in a book called <u>“Sexual Shakedown: The Sexual Harassment of Women on the Job.”</u> she introduced the public to the concept of sexual harassment for the very first time. |
| 1980 | The EEOC issued its Guidelines on Discrimination Because of Sex , CFR Section 1604.11 declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment. |

- 1984** *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993) was the Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment.
- 1986** In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court for the first time recognizes that sexual harassment is a violation of Title VII. In formulating its opinion, the Court favorably cited the EEOC's 1980 Guidelines.
- 1990** The EEOC's **Policy Guidance on Employer Liability under Title VII for Sexual Favoritism** (1/12/90) discusses potential employer liability when an employment opportunity or benefit denied to one employee and given to a supervisor's paramour or to an employee who submits to sexual advances or requests.
- The EEOC's **Policy Guidance on Current Issues of Sexual Harassment** (03/19/90) defines when sexual conduct is unlawful harassment.
- 1991** **The Civil Rights Act of 1991** is passed. Congress modified Title VII to add more protection against discrimination in the workplace. Among other things, the Civil Rights Act of 1991 allows harassment and discrimination plaintiffs the right to a jury trial in federal court. It also gives plaintiffs the right to collect compensatory and punitive damages for the first time, subject to a cap based on the size of the employer.
- The confirmation hearings for Supreme Court Justice Clarence Thomas.** Toward the end of the confirmation hearings, **sexual harassment allegations by Anita Hill**, a law professor who had previously worked under Thomas at the United States Department of Education and then at the EEOC, were leaked to the media from a confidential FBI report. The allegations led to a media frenzy and further investigations.
- The Tailhook Convention Scandal.** This scandal involved sexual allegations against the armed forces. This case put the spotlight on what some women had been experiencing for years. Former Navy lieutenant **Paula Coughlin** was one of more than 80 women who alleged they were sexually assaulted. The assailants were drunken Naval and Marine officers attending a conference at Vegas' Hilton Hotel. Coughlin later left the Navy. **She said the organization failed to investigate her allegations and then retaliated against her for being a "whistleblower."**
- 1993** In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) the Supreme Court ruled that in a sexual harassment case, the plaintiff does not have to prove concrete psychological harm to establish a Title VII violation.

1994 The EEOC's **Enforcement Guidance on *Harris v. Forklift System***.

The Violence Against Women Act is passed. This limits acceptability of evidence of the past sexual history of the plaintiff in sexual harassment cases. However, it Permits such evidence to be used against sexual harassers accused of assault.

1995 **Thirty-one years after Title VII was passed, Congress finally passed the Government Accountability Act which makes Congress's own members subject to the same employment laws as the rest of the country.**

1998 **The Bill Clinton impeachment hearings.** The impeachment Clinton was initiated by The House of Representatives began impeachment proceedings against Bill Clinton, on two charges, one of perjury and one of obstruction of justice. **These charges stemmed from a sexual harassment lawsuit filed against Clinton by Paula Jones.** The Senate subsequently acquitted Clinton of these charges. Two other impeachment articles – a second perjury charge and a charge of abuse of power – failed in the House. During the course of Independent Counsel Ken Starr's investigation, Linda Tripp provided Starr with taped phone conversations in which **Monica Lewinsky**, a former White House Intern, discussed having performed fellatio on Clinton. At the deposition, the judge rejected the plaintiff's lawyer's definition of the term "sexual relations" that Clinton claims to have construed to mean only vaginal intercourse. Judge Wright then told the attorneys they could be as explicit as necessary in asking their questions. Starr obtained further evidence of inappropriate behavior by seizing the computer hard drive and email records of Monica Lewinsky. Based on the president's conflicting testimony, Starr concluded that Clinton had committed perjury. Starr submitted his findings to Congress in a lengthy document (**the so-called Starr Report**), and simultaneously posted the report on the internet, replete with lurid descriptions of encounters between Clinton and Lewinsky. After rumors of the scandal reached the news, **Clinton publicly stated in a January, 1998 press conference, "I did not have sexual relations with that woman, Miss Lewinsky."** In his Paula Jones deposition, he swore, **"I have never had sexual relations with Monica Lewinsky. I've never had an affair with her."**^[10] Months later, Clinton was forced to admit that his relationship with Lewinsky was "wrong" and "not appropriate." Lewinsky had engaged in **oral sex with Clinton several times.**

The Supreme Court, in ***Faragher v. City of Boca Raton***, 524 U.S. 775 (1998) and ***Burlington Industries, Inc. v. Ellerth***, 524 U.S. 742 (1998) spelled out the circumstances in which employers will be held liable for acts of sexual harassment carried out by their supervisory personnel. The Court rules that employers are liable when the sexual harassment has culminated in a tangible employment action directed against the harassed employee (*i.e.*, employee is terminated or demoted after rejecting a supervisor's sexual advance). The Court

further ruled that employers are permitted to establish an affirmative defense to the claim, if it can show no tangible action was taken against the harassed employee and two additional elements: (1) the employer had communicated and established an effective procedure for employees to seek redress from sexual harassment; and (2) the harassed employee failed to take advantage of this procedure. If an employer can show all of these elements, then it will not be held responsible for the sexual harassment by its supervisory personnel.

- 1999** **The EEOC's Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/19/99).** Updates the 1990 Guidance as it pertains to employer liability for harassment by supervisors and makes clear that the same principles apply to only to sexual harassment but also to unlawful harassment on any of bases protected under the federal employment discrimination statutes. Discusses application of Supreme Court cases in *Burlington Indus. Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.
- 2014** On June 20, 2014, the Board of Directors of American Apparel finally removed **Dov Charney** CEO of the company. Charney repeatedly engaged in inappropriate sexual acts with his employees. Charney's sexual behavior went on for a long time before the board decided to act.
- 2015** **Donald Trump and the fallout from the "Access Hollywood" tape.** During the 2016 Presidential campaign, *The Washington Post* uncovered a damning tape of **Donald Trump** speaking on a hot mic during an *Access Hollywood* appearance in 2005. In off-the-cuff comments to host **Billy Bush**, the then presidential candidate was heard making lewd remarks about women, saying that he can do whatever he wants to them because he's famous: "Grab them by the pussy," he said. "You can do anything."
- 2016** In June, 2016, the EEOC released its **Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic on the Select Task On Force on the Study of Harassment in the Workplace.** https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Here are some of the highlights:
- **Nearly one-third of the 90,000 charges which the EEOC received in 2015 included an allegation of workplace harassment.**
 - **Roughly three out of four victims of harassment spoke to a supervisor or representative about the harassment.** It is also common, the report found, for those who experience harassment to either ignore and avoid the harasser, downplay the situation, try to forget the harassment or endure it. The Report noted that **"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."**
 - **Anywhere between 25-85 percent of women reported sex-based harassment.**

- **More men are reporting workplace sexual assault.** According to the EEOC, reports of men experiencing workplace sexual assault have nearly doubled between 1990 and 2009 and now account for 8 to 16 percent of all claims.
- **Seventy-five percent of harassment victims faced retaliation when they came forward.**
- **These are just some of the risk factors associated with workplace harassment:**
 - Workplaces with lack of diversity in terms of gender, race or ethnicity,
And age.
 - Workplaces with many young workers
 - Workplaces with significant power disparities, such as companies with executives, military member, plant managers.
 - Service industries that rely on customer service or client satisfaction
 - Workplaces with monotonous or low-intensity tasks

In addition to being plain wrong, there's a business case for stopping and preventing harassment. The EEOC report found there are a multitude of financial costs associated with harassment complaints, such as time and resources dealing with litigation, settlements and damages. Harassment can also lead to decreased workplace performance and productivity, reputational harm and increased turnover rates.

On June 6, 2016, Santa Clara County Superior Court Judge Aaron Persky gave Stanford University swimmer **Brock Turner** a 6-month sentence after he was found guilty of raping a 23-year-old woman on Stanford University's campus. Judge Persky's lenient sentence drew public outrage. Before the judge announced the sentence, the victim gave a powerful victim impact statement.² In an unbelievable showing of a lack of empathy for the victim, Turner's father complained that his son's life had been ruined for "20 minutes of action" fueled by alcohol and promiscuity.

The fall of Roger Ailes at Fox News. On July 6, 2016, **Gretchen Carlson**, a former Fox News anchor, filed a lawsuit against **Roger Ailes**, the Company's CEO, alleging claims for sexual harassment and wrongful termination. Two months later, 21st Century Fox settled Carlson's suit against Ailes for \$20 million. The network also offered Carlson — who claimed her contract was not renewed earlier this year after she complained about Ailes' unwanted advances —

² On June 15, 2016, a bipartisan group of Congressional lawmakers read aloud on the U.S. House floor the victim's impact statement. U.S. Rep. Jackie Speier (D-Calif.), who hosted the reading, called the victim's letter "gut-wrenching."

a public apology. After dozens of more women came forward with their own sexual harassment complaints against Ailes, he resigned from his CEO position in July. On May 18, 2017, Ailes died at the age of 77.

On November 8, 2016, Donald Trump is elected as the 45th President of the United States. Seven days later, on November 15, Megyn Kelly's book, "Settle for More" is published. In her book, Kelly explains that months before announcing her candidacy, Trump tried to curry her favor.

Following its 2016 **Report from the EEOC's Select Task Force on the Study of Harassment in the Workplace**, the Commission issued its **Proposed Enforcement Guidance on Unlawful Harassment** on January 10, 2017. The EEOC emphasizes that employers should take a proactive role in preventing harassment, as well as in effectively identifying and eradicating harassment if and when it occurs. Here are some highlights:

- Borrowing from the Occupational Safety and Health Administration's general duty standards, the proposed enforcement guidance urges employers to take active steps to minimize the "known or obvious risks of harassment," and states that failing to do so could mean a failure of a defense to a discrimination claim. As has long been the EEOC's position, the Commission's proposed guidance restates its expectation that employers must respond promptly to harassment of which it is, or reasonably should be, aware.
- Building in part on case law over the past 20 years and in part on positions taken by the commission, the proposed enforcement guidance interprets Title VII of the Civil Rights Act of 1964 expansively to prohibit claims of workplace harassment based on any protected characteristic—not only race and color, national origin, religion, sexual, sex, age, and disability, but also such grounds as sex stereotyping, pregnancy, childbirth or related conditions, gender identity, sexual orientation, and genetic information. Notably, under the proposed guidance, the EEOC would recognize claims for harassment based on the perception that an individual has a particular characteristic, even if that perception is incorrect. Moreover, all bases for harassment claims would create a right of action for an associational discrimination claims.
- In addition to the covered bases for such a claim, the proposed enforcement guidance describes the threshold for bringing hostile work environment claims, causation standards, the bases for holding an employer liable for hostile work environment claims (including a description of the limitations on the affirmative defense to strict liability where no tangible adverse action has been taken against a claimant), systemic and "pattern and practice" harassment claims, and a description of what the commission terms "**promising practices**" for employers. These so-called "promising practices" comprise five core principles that the commission recognizes, not as defenses to claims, but rather as preventative measures designed to avert harassment from occurring in the first place. Many of these are recognized best practices. They include:
 - committed, engaged leadership;

- consistent and demonstrated accountability;
- strong and comprehensive harassment policies;
- trusted and accessible complaint procedures; and
- regular, interactive training tailored to the audience and organization.

While undertaking the “promising practices” may not provide employers with a “safe harbor” against harassment claims filed with the EEOC, instituting such practices would be useful to help establish a culture in which such claims are less likely to occur.

- When finalized, the proposed enforcement guidance would replace the sexual harassment section of the current EEOC Compliance Manual (1990) and various subsequent guidance documents, and would articulate the commission’s updated enforcement stance regarding harassment in the workplace. As with all such documents, the enforcement guidance would not have the force of regulation, however, it would provide a blueprint of how the EEOC will investigate, assess, and potentially litigate harassment cases.

The class action arbitration filed by more than a dozen women against Sterling Jewelers, the multibillion dollar conglomerate behind Jared the Galleria of Jewelry and Kay Jewelers. Although the case was originally filed in 2008, the class action now includes 69,000 women who are current and former employees of Sterling, which operates about 1,500 stores across the country. Although most of the women’s sworn statements were written years ago, the employees’ attorneys were only granted permission to release them publicly on February 26, 2017.

The fall of Bill O’Reilly at Fox News. After allegations of O’Reilly sexually harassing female colleagues prompted protests outside network headquarters and a mass exodus from advertisers, Fox terminated O’Reilly on April 19, 2017, Fox announced its termination decision in a short statement: “After a thorough and careful review of the allegations, the Company and Bill O’Reilly have agreed that Bill O’Reilly will not be returning to the Fox New Channel.” O’Reilly confirmed the news later that afternoon in a press release, saying his ousting was provoked by “completely unfounded claims.”

The Bill Cosby sexual assault case. On June 17, 2017, Judge Steven O’Neill in the **Bill Cosby** case accusing him of aggravated indecent sexual assault declared a mistrial after a Pennsylvania jury was unable to come to a unanimous decision. Montgomery County District Attorney Kevin Steele immediately announced that the prosecution will retry the case. In this she-said-he-said case with no forensic evidence, it all came down to one question: Did the jury believe **Andrea Constand's** testimony — and Constand herself — was credible?

Silicon Valley Women speak out:

Uber’s bad year for sexual harassment and its toxic company culture:

On February 19, 2017, **Susan Fowler**, a former engineer at Uber Technologies, Inc. (“Uber”), published a blog post detailing allegations of harassment, discrimination, and

retaliation during her employment at Uber, and the ineffectiveness of the company's then-existing policies and procedures.

The next day, Uber retained **Eric Holder and Tammy Albarran, partners at Covington & Burling LLP (“Covington”)** to conduct a thorough and objective review regarding “the specific issues related to the workplace environment raised by Susan Fowler, as well as diversity and inclusion at Uber more broadly.”

A Special Committee established by Uber's Board of Directors instructed Covington to evaluate three issues: “(1) Uber's workplace environment as it related to the allegations of discrimination, harassment, and retaliation in Ms. Fowler's post; (2) whether the company's policies and practices were sufficient to prevent and properly address discrimination, harassment, and retaliation in the workplace; and (3) what steps Uber could take to ensure that its commitment to a diverse and inclusive workplace was reflected not only in the company's policies but made real in the experiences of each of Uber's employees.”

On February 27, 2017, **Armit Singhai**, SVP of engineering, resigns over **sexual harassment allegations against him at his former employer, Google.**

On June 6, the company announced at an all-hands meeting that 20 employees were being fired. The firings were the conclusion of an investigation by law firm Perkins Coie into Susan Fowler's claims of sexual harassment and discrimination. This probe is parallel to the Covington investigation. The firings were for “sexual harassment, discrimination, unprofessional behavior, retaliation, bullying and physical safety - most, but not all, in the company's San Francisco headquarters.”

On June 11, 2017, Uber's Board of Directors unanimously voted to adopt all recommendations put forth by the investigation into the company's culture by Covington. **Covington recommended that Uber focus on four prevailing themes with regard to taking the following remedial measures: tone at the top, trust, transformation, and accountability. The Covington recommendations are divided into nine sections: I. Changes to Senior leadership; II. Enhance Board Oversight; III. Internal Controls; IV. Reformulate Uber's 14 Cultural Values; V. Training; VI. Improvements to Human Resources and the Complaint Process; VII. Diversity and Inclusion Enhancements; VIII. Changes in Employee Policies and Practices; and IX. Address Employee Retention.**

On June 13, Uber releases a statement about the Covington recommendations. **HR Chief Liane Hornsey says “implementing these recommendations will improve our culture, promote fairness and accountability, and establish processes and systems to ensure the mistakes of the past will not be repeated.”**

On June 30, 2017, the New York Times published an explosive article: “Women in Tech Speak Fankly on Culture of Harassment.” <https://nyti.ms/2usUZDG>.

More than two dozen women in the technology start-up industry spoke to The Times in about being sexually harassed. Ten of them named the investors involved, often providing corroborating messages and emails, and pointed to high-profile venture capitalists such as Chris Sacca of Lowercase Capital and Dave McClure of 500 Startups.

The disclosures came after the tech news site The Information reported that female entrepreneurs had been preyed upon by a venture capitalist, Justin Caldbeck of Binary Capital. The new accounts underscore how sexual harassment in the tech start-up ecosystem goes beyond one firm and is pervasive and ingrained. Now their speaking out suggests a cultural shift in Silicon Valley, where such predatory behavior had often been murmured about but rarely exposed.

Women in the entertainment industry speak out: The strange case of Harvey Weinstein:

Weinstein's sexual abuse of women was well known and was even the subject of a Seth McFarlane joke at a 2013 awards ceremony.

New York Times' explosive article: Jodi Kantor and Megan Twohey, "Harvey Weinstein Paid Off Sexual Hassment Accusers for Decades," New York Times, October 5, 2017. https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0. The sexual harassment allegations uncovered by The Times stretched back decades and came from actresses as well as former employees of the Weinstein Company and Miramax, the previous company that Mr. Weinstein and his brother founded.

On Sunday, October 8, 2017 - three days after the New York Times's explosive article - the Weinstein Company fired Harvey Weinstein. The statement announcing the firing said the decision had been made "in light of new information about misconduct by Harvey Weinstein that has emerged in the past few days." The firing was an escalation from Friday, when one-third of the company's all-male board resigned and four members who remained announced that Mr. Weinstein would take a leave of absence while an outside lawyer investigated the allegations.

The #MeToo Movement. The most positive response to the Weinstein revelations came from actress Alyssa Milano who urged survivors to tweet #MeToo, started by Tarana Burke, an organizer and youth worker who is a sexual assault survivor herself. The movement quickly gained momentum, with celebrities like Anna Paquin and Debra Messing among those chiming in. #MeToo quickly became the top trending topic on Twitter in both the U.S. and globally, with both men and women sharing harrowing stories of rape and assault. Milano, who said she was "sickened and disgusted" to hear the dozens of allegations against Weinstein, said she hoped the public discussion of rape would help survivors. "When we hear cases of sexual abuse, harassment, and assault play out in a public way, it gives us all extreme heartache but also, strength and fortitude," Milano told the *New York Daily News*.

"Enough": California's Women in Politics Call Out Sexual Harassment:

A bipartisan group of more than 140 of some of California's most powerful women — including lawmakers, lobbyists and consultants — are calling out pervasive sexual harassment in politics and across all industries, penning a public letter with one simple message: “Enough!” “We're done with this,” the letter states. “Each of us who signed this op-ed will no longer tolerate the perpetrators or enablers who do. **What now? It's time for women to speak up and share their stories. We also need the good men, and there are many, to believe us, have our backs, and speak up. Until more women hold positions of power, our future is literally dependent on men. It's time.**”

III. The Legal Framework For Analyzing Harassment Claims:

1. Two Theories For Harassment Claims.

The federal anti-discrimination laws created protected classes of individuals who could file claims based on the 4 primary theories of discrimination: (1) disparate treatment; (2) disparate impact; (3) **harassment**; and (4) retaliation. A victim of harassment can bring two claims: (1) *quid pro quo*; and (2) **hostile work environment**.

The Equal Employment Opportunity Commission (EEOC) 1980 Guidelines on Discrimination Because of Sex define sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. submission to such conduct is made either explicitly or implicitly a term or condition of employment;
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
3. such conduct has the purpose or effect of unreasonably interfering as the basis for employment decisions affecting the individual; or

The first two parts of the definition is the *quid pro quo* claim; the third part is the **hostile work environment claim**.

2. Employer liability for harassment:

a. Co-Worker Harassment.

For co-worker harassment, the employer is liable only if it knew or should have known about the harassment but failed to take prompt corrective action.

b. Supervisor Harassment.

For supervisor harassment that results in a tangible employment action such as termination or demotion, the employer is held strictly liable even if it did not know about the supervisor's harassment. However, when the supervisor's harassment does not result in a tangible employment action, the employer can raise an affirmative defense by showing: 1. it exercised reasonable care to prevent and correct sexually harassing behavior; and 2. the employee unreasonably failed to take advantage of this protection. (Translation: if an employer has an anti-harassment policy with a complaint procedure, and the employee does not file a complaint, the employer can defeat the employee's claim).

IV. Suggested Action Plan On How To Effectively Avoid and Handle Sexual Harassment Claims.

1. Follow the “promising practices” listed in the EEOC’s 2017 Proposed Enforcement Guidance on Unlawful Harassment:

- Committed, engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization.

2. Management has to set the right tone at the top. This is important because although employees do not always pay attention to what management says, they pay attention to what management Signals.

3. Because sexual harassment, like rape, is really about the abuse of power, every employer should consider adjusting the imbalance of power that may exist in its management team by hiring more women decision makers.

4. You must have a zero tolerance policy that covers all forms of harassment and bullying and explains to employees in plain English what is expected of them and the serious penalties for violating this standard of conduct.

- 5. Make sure everyone in your company or organization receives a copy of your anti-harassment policy and signs a receipt. Put a copy of the signed receipts in your employees' personnel files.**
- 6. On a regular basis train everyone in your company on what is unlawful harassment and how everyone involved in a potential harassment situation (the harasser, the victim, and the bystander witnesses) must take personal responsibility for their actions by conducting their own cost-benefit analysis.**
- 7. Take every harassment complaint seriously and use a balanced approach to your investigation that shows empathy for the victim, respect for the rights of the accused, and a collaborative approach to get to the facts and determine what, if any, corrective action is needed.**
- 8. Conduct a thorough investigation and document everything you do so you have a "paper trial"**
to use if you have to defend your investigation at a later date:
 - Use trained and experienced investigators from either inside or outside your company or organization.
 - Begin by getting the accuser's complete story, witnesses, and all relevant documents. Follow the *Law & Order* example and ask the accuser to write it all down on a legal pad and then sign and date the statement.
 - Confront the accused with the allegations against him or her, get the accused complete story, witnesses, and documents. As with the accuser, ask the accused to write it all down and sign and date the statement.
 - Warn both the accuser and the accused not to engage in any retaliation.
 - After the initial interviews with the accuser and the accused, identify all the relevant issues to be investigated and plan the investigation.

- Give the investigation the time and resources needed to do it right.
 - Try to minimize your investigation's disruption on the workplace. For example, doing as much of the fact-finding off site as you can, or requiring that employees do not discuss the case with anyone else, at least until the conclusion of the investigation.
 - Interview all of the potential witnesses identified by both the accuser and the accused and make credibility determinations.
 - Be prepared to deal with other evidence that will almost inevitably emerge as the investigation progresses. An investigator's worst nightmare is when, after you conclude your investigation, someone or something crawls out of the woodwork with evidence that you should have gathered. That evidence may contradict your findings. Even something as simple as failing to ask at the end of an interview if there is anything the interviewee wants to add, can be fatal. "I would have told you, but you never asked me," is a sentence an investigator never wants to hear.
 - Although you should tell both the accuser and the accused that you will keep the investigation confidential, you should explain that at some point you may have to make disclosures.
 - Keep the parties updated on the status of your investigation. Let parties know where you are in the process and when the investigation is likely to be concluded.
9. **Complete your investigation as quickly as possible and make an objective assessment of the evidence.** A case often boils down to an investigator's assessment of credibility, which can be challenging. Your assessment should be based on actual evidence, not speculation or personal feelings. Explain why you think you have **sufficient, relevant, reliable** evidence to support whatever your conclusion is. Deal openly and transparently with evidence you discount, explaining why you reject it.
10. **Based on an objective review of the evidence, make a recommendation regarding possible**

corrective disciplinary action, up to and including termination. In making your recommendation, be sure to check on how you have handled similar cases in the past to avoid possible disparate treatment claims. Also, make sure that the proposed “penalty fits the crime.” However, before proceeding have someone who was not involved with the investigation (e.g. your V.P. of Human Resources or your outside counsel) review your recommendation for approval.

11. Tell both the accuser and the accused the results of your investigation.

12. If appropriate, implement the approved disciplinary action and properly document it for the disciplined employee’s file.

III. Conclusion and Takeaways

The key takeaway for avoiding and defending against harassment claims is this: even though today we are focused on sexual harassment claims in Hollywood, Silicon Valley, and in the media, sexual harassment is really about all businesses. Harassment is about people who misuse their power to get an advantage over powerless women and other members of legally protected classes.

In light of the recent media focus on harassment, employees will file more harassment claims and the plaintiffs’ employment bar is ready to help them. **The big question for any company or organization is whether you are going to change your culture and truly embrace a zero tolerance anti-harassment policy before you are forced to do so.**

