



WORK-RELATED HARASSMENT

What #metoo reveals about the last 20 years of “prevention practices” and what employers must do now to effectively prevent and correct work-related harassment.

By Chris S. Thrutchley, Paula Williams, and Lauren Oldham

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Since the Supreme Court’s 1998 landmark decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, employment lawyers and HR pros have spent the last 20 years preaching no tolerance and aggressive implementation of robust harassment prevention practices to minimize risk of costly and potentially brand-destroying harassment claims. So, what should we learn from the #metoo movement and what should employers do now?

No employer wants to subject his or her personal reputation or business to the destructive stigma of work-related harassment, much less the costly legal liability. Not only can a harassment claim prove costly to an employer’s bottom line, but workplace harassment can also cost employers heavily in lost goodwill, morale, productivity, and employee turnover.

In the age of #metoo, employers often narrow their focus to sexual harassment claims. Harassment involves any protected trait, however, and many harassment claims involve traits such as an employee’s race, national origin, or disability. Harassment may involve same sex or opposite sex harassment, and a harasser may originate from inside or outside your organization, on or off duty. And, while courts require the conduct to be “severe and pervasive,” a one-time instance of harassment may give rise to a hostile work environment if it is very severe. Similarly, more muted harassment may give rise to a hostile work environment as the number of incidents grow.

The *Ellerth* and *Faragher* cases still set the standard for the critical steps employers must genuinely and regularly take to send a very strong and credible message that they will not tolerate any form of unlawful harassment, will protect employees from harassment in the workplace, and will help the business avoid liability for a supervisor’s harassment.

Workplace Policies

The first step is to develop and implement antidiscrimination policies and practices that prove a business is exercising reasonable care to prevent and promptly correct any harassing behavior. Employers should review and update harassment, discrimination, and retaliation prevention policies annually. Moreover, it is not enough to just formulate policies; employers need to be able to prove that all of their employees, including temporary workers, have received the policies.

To foster a corporate culture that does not tolerate harassment, an employer should consider employees’ perception of human resources, and whether any employees are perceived within the organization as “untouchable.” Providing a culture where employees know where to report and have confidence in the organization’s response is crucial to ensuring employers will be alerted if harassment occurs.

Training

The next step is to have a training program that includes all employees, not just managers and supervisors. All employees should be educated on what constitutes harassment and the company's policy against harassment in the workplace. Courts have consistently found training only specific employees significantly weakens an employer's defense of a harassment claim. Additionally, the Equal Employment Opportunity Commission recently issued new guidance that emphasizes its expectation that all employees be trained regularly. It's a good practice to document employee participation and maintain those records.

The third step is making sure that every employee knows in writing (e.g. policies) and during training the actual procedures for reporting harassment, as well as how claims will be investigated. Employers need to make sure that employees know to whom they should report harassment and what actions that individual will take when he or she receives a harassment complaint. Posting a notice in the break room isn't enough.

Investigating Harassment Complaints

Today's harassment complaints require swift action by an employer. A delay in investigation may be perceived as tolerance. When investigating a harassment complaint, be sure not to pre-judge the allegations before conducting the investigation, keeping an open mind throughout the process. An employer should consider which person is the most appropriate investigator, and whether to involve legal counsel. Interviews should occur with the victim, any witnesses, as well as the accused. To the extent possible, require confidentiality, and document each phase of the investigation.

Taking Corrective Action

While many employers have a "zero tolerance" policy, employers must be sure they are willing to follow-through with such a policy. An employer's exceptions for certain accused employees will fuel potential discrimination and harassment claims. To deter further "misconduct," an employer may also discipline, suspend, or re-assign an employee, often in conjunction with remedial training or referral to an employee assistance program.

The #MeToo Missing Ingredient

Most employers have implemented various methods for incorporating the foregoing basic harassment prevention and correction steps. So, what's the #metoo missing ingredient? For that, attend our **upcoming webinar!**

To learn more about creating a positive workplace that does not tolerate harassment, register for GableGotwals' free webinar on February 15, from 10:30-11:30 a.m. <http://www.gablelaw.com> or <http://www.gablelaw.com/wp-content/uploads/2018/01/2018-02-Harassment-Webinar.pdf>

Chris Thrutchley, Paula Williams and Lauren Oldham are attorneys of GableGotwals who advise and defend clients in the area of Labor and Employment Law. For help auditing and updating your employment policies and practices contact:

Chris Thrutchley

(918) 595-4810

cthrutchley@gablelaw.com

Paula M. Williams

(405) 235-3302

pwilliams@gablelaw.com

Lauren C. Oldham

(918) 595-4820

loldham@gablelaw.com

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