

Gender Discrimination at Work: Panelists' Perspectives on Problems & Possibilities in 2018

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

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."

How Big is the Problem?

38% of women reported harassment
in their workplace, January 2018 Survey

35% of women reported experiencing
workplace harassment, November 2017

In the News – Allegations – p. 6

Harasser No. 3:

He invited a female employee to his secluded office, then showed her his penis; he gave female colleague a sex toy with “an explicit note about how he wanted to use it on her,” and he made lewd sexual remarks about colleagues;

II. How would these reports of sexual harassment fare under the scrutiny of the federal courts today?

The Bottom Line:

So long as the environment would reasonably be perceived – and is perceived – as **hostile or abusive**, there is no need for the environment also to be psychologically injurious.

For example ... p. 10

**Just “petty slights or minor annoyances
that ... all employees experience.”**

Alamo Heights Independent School District v. Clark, 544 S.W.3d 755, 786-87 (2018).

III. Most victims of sexual harassment and abuse in the workplace are not reporting it – how would that fare under the scrutiny of the federal courts today?

The Problem: No one is talking about it when it happens – p. 11

75% of those who experienced harassment did not report it to anyone in authority or file any formal complaint

2016 EEOC Task Force on Sexual Harassment

The Problem: The *Faragher/Ellerth* requirement to “avoid harm.” p. 12

The Third Circuit gets it right – rejecting language from earlier cases that, if there’s a policy, any prolonged failure to report was unreasonable as a matter of law. p. 16-18

Minarsky v. Susquehanna County, 895 F.3d 303 (3rd Cir. 2018)

IV. The disappearing ability to hold employers liable for their own negligence when a supervisor is the harasser – *i.e., Negligence is not just for co-workers or customers.*

UNLAWFUL HARASSMENT: LIABILITY UNDER RESTATEMENT OF AGENCY 2D § 219(2)

Does the evidence show ____?	Yes/No	Legal Theory, Employer Liability
Did the harassment result in a tangible employment action?	Yes ⇒ No ⇒	Automatic liability = Quid Pro Quo Check hostile work environment under negligence, vicarious liability, or alter ego theories
The harassment was sufficiently severe or pervasive to alter the terms and conditions of employment?	No ⇒ Yes ⇒	No liability under any theory (continue)
The harasser was a supervisor at a level where he or she was empowered by the employer to take tangible employment actions against the victim.	Yes ⇒ No ⇒	Can invoke <i>either</i> vicarious liability or negligence theory of liability. Cannot use vicarious liability theory, but negligence theory available
Negligence Theory: (1) The employer knew or should have known of the harassment	Yes ⇒ No ⇒	Can use either negligence or vicarious liability theory No liability for negligence; check other theories – vicarious liability or alter ego
(2) Employer nonetheless failed to take action to either prevent it or stop harassment once it obtained that knowledge?	Yes ⇒ No ⇒	Employer liable for its own negligence No liability for negligence; check other theories – vicarious liability or alter ego
Vicarious Liability (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior?	No ⇒ Yes ⇒	Employer is liable under vicarious liability theory. Analyze second factor of affirmative defense.
(2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by defendant or to avoid harm otherwise.	No ⇒ Yes ⇒	Employer liability under vicarious liability theory. No employer liability
Alter Ego – The harasser was “within that class of an employer organization's officials who may be treated as the organization's proxy”?	Yes ⇒ No ⇒	Liability under alter ego doctrine, § 219(2)(a) Check negligence of vicarious liability theories

**See
Restatement of
Agency 2D
§ 219(2)
and CHART on p. 25**

Employers' Negligence for Supervisory Harassment – p. 18

“Negligence sets a minimum standard for
Title VII liability.”

Ellerth, 524 U.S. at 759.

Employers' Negligence for Supervisory Harassment – p. 23-24

The Fifth Circuit's 2014 Pattern Jury Charges (Civil) (rev. 2016) repeat/reinforces this gross misunderstanding of the law:

Employers' Negligence for Supervisory Harassment – p. 23-24

When the alleged harasser is a supervisor, vicarious liability for allowing the harassment, not a negligence theory, is appropriate and Pattern Jury Instruction 11.2 or 11.3 should be used.

Morgan Lewis

NAVIGATING WORKPLACE HARASSMENT ISSUES IN THE #METOO ERA

August 25, 2018



Many claimants coming forward.

Claims lodged against high-profile individuals in the entertainment and media industries.

Claims against executives and high-producing individuals in many other industries.

Claims made against members of Congress, and criticism of the procedure and process for handling such claims.



The #MeToo Aftermath

- Social media quickly spreads information and opinions about conduct claims.
- Companies may be quicker to “pull the trigger” and terminate the alleged harasser based on the allegations.
- Claims frequently involve conduct that allegedly occurred many years ago.
- Claimants often do not want their identities disclosed; some claims are made anonymously.

The #MeToo Aftermath

- Failure to complain and the statute of limitations are still technical or legal defenses, but they are not defenses from a public relations standpoint.
- Boards of directors are consequently concerned about the #MeToo crisis and the potential resulting damage to company brands.
- While the legal standard for what constitutes sexual harassment and the defenses to such claims have not changed, the enforcement standard has changed.

1

Shareholder Lawsuits

- The #MeToo movement could trigger a wave of investor actions.
- Wynn Resorts' board and former CEO were hit with a shareholder derivative suit after the stock fell 20% when allegations against Wynn went public in January 2018.
- The suit claims that the company and its board of directors should be held accountable for breaching their fiduciary duties and exposing shareholders to damages by sweeping accounts of Wynn's conduct under the rug for decades.
- 21st Century Fox settled a derivative lawsuit for \$90 million in February 2018.
- More recently, investors sued Wynn Resorts GC and execs over insider trading.
- [Note: There is intensified focus on SEC disclosures of harassment allegations and investigation against high-level executives.]

2

Insurance Changes

- Carriers offering EPL insurance are now demanding that companies institute or update anti-harassment policies and procedures, and are also making sure that anti-harassment training actually takes place.
- Carriers are not yet increasing EPL rates and deductibles across the board (only selectively); however, “[i]t’s a surge we are waiting to happen.”
- Recently, insurers filed suit asking the court to find that they do not have to defend or indemnify Weinstein for nearly a dozen sexual assault and harassment suits.
- “Every policy . . . includes an ‘intentional acts’ exclusion.”

3

Gender Pay Inequity Claims

- #MeToo has pushed forward the focus on the gender pay gap.
- In a recent survey, 48% of companies say that they are reviewing their pay policies with an eye toward closing the gender pay gap.
- Some companies have recently announced that they are providing raises to even out salaries among men, women, and minority employees.
- Other companies have implemented salary transparency policies that eliminate the secrecy surrounding pay.

4

EEOC's New Harassment Guidance

- Currently awaiting approval from the Office of Management and Budget. The draft was a 75-page document.
- Will supersede several previously issued EEOC documents on harassment from the 1990s.
- The final part of the EEOC guidance includes four core principles of “Promising Practices”: leadership and accountability, comprehensive and effective harassment policy, an effective and accessible harassment complaint system, and effective harassment training.
- Will include specific recommendations: live training, regular anonymous employee surveys, and other specifics.

5

Inclusion Riders and the Like

- Frances McDormand closed her acceptance speech at the Academy Awards: “I have two words to leave you with tonight—inclusion rider.”
- It is a stipulation that actors and actresses can demand to have inserted into their contracts, which would require a certain level of diversity among a film’s cast and crew.
- How could this impact corporate America? A leader can say, “I will not accept this role if the team isn’t diverse”; powerful allies can do the same; boards can demand more diversity, equity, and inclusion of their CEOs and executive teams; executive teams can create ways to hold people accountable.

In Light of the #MeToo Movement, Companies Must:

Take a comprehensive approach to making “zero tolerance” for sexual harassment a permanent reality.

React more quickly and decisively to harassment claims.

Engage in greater attempts to investigate anonymous claims.

Provide more transparency regarding investigations and their outcomes.

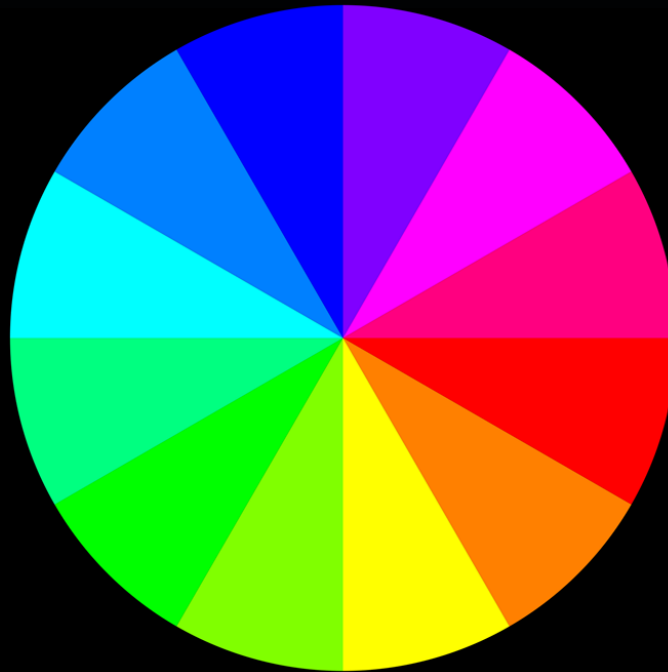
Provide employees with improved and updated training.

Proactively evaluate workplace culture issues.

Common Themes Across Companies and Sectors

- The power phenomenon in the workplace is real; relationships in the workplace involving the power dynamic (superiors/subordinates) cannot be truly consensual.
- Men question whether companies are “pulling the trigger too quickly.”
- Most employees lack knowledge regarding procedures for complaining.
- Employees are reluctant to complain for fear of retaliation and retribution.
- There is considerable concern over unintended consequences such as undermining the mentoring and development of women by senior male leaders for fear of sexual harassment claims.

LGBTQ Issues – p. 63-69



Oncale (1998)

(unanimous)

“... male on male sexual harassment was assuredly not the principal evil Congress was concerned with when it enacted Title VII. **But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,** and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits ‘discriminat[ion] . . . because of . . . sex’ in the ‘terms’ or ‘conditions’ of employment.”

Price Waterhouse (1989)

Female accountant was denied partnership.

Her reviews said she was “macho”, should “take a course in charm school,” “overcompensated for being a woman”, should “walk ... talk ... [and] dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

Multiple Theories



- Disparate Treatment
- Sex Stereotyping
- Associational
Discrimination

Recent LGBTQ Cases

Hively v. Ivy Tech. Cmty. Coll., 853 F.3d 339
(7th Cir. 2017) (*en banc*)

Zarda v. Altitude Express
883 F.3d 100 (2d Cir. 2018) (*en banc*)

Wittmer v. Phillips 66 Co.,
304 F.Supp.3d 627 (S.D. Tex. 2018)

Gender Discrimination and Federal Contractors:

U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)

(p. 70-92)



Laws Enforced by OFCCP



- Executive Order 11246 (E.O.)
 - Includes legal requirements for federal contractors to take affirmative action
 - Cannot discriminate on the basis of sex, gender identity and sexual orientation (as well as prevents discrimination based on race, color, religion, national origin, disability, or status as a protected veteran).
 - No private right of action.

Contract Coverage



- Contract(s) greater than \$10,000 are subject to the EO if:
 - It contracts directly with the federal government
 - One of its divisions, branches, sections or departments contracts directly with the federal government
 - It is a sub-contractor of a federal contractor
 - It is so closely related to a separate contractor with a covered contract that both entities are considered operating as a single entity

Contract Coverage (cont.)

- The following contractors are covered regardless of amount of contract
 - Companies with government bills of lading
 - Depositories of federal funds in any amount
 - Financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes
- 41 CFR 60-1.5

Compliance Evaluations

- OFCCP conducts compliance evaluations of federal contractors to determine whether they maintain nondiscriminatory hiring and employment practices.
- May include reviewing the contractor's affirmative action program (AAP); interviewing witnesses; touring the facility to understand the jobs; and analyzing data and other documents.

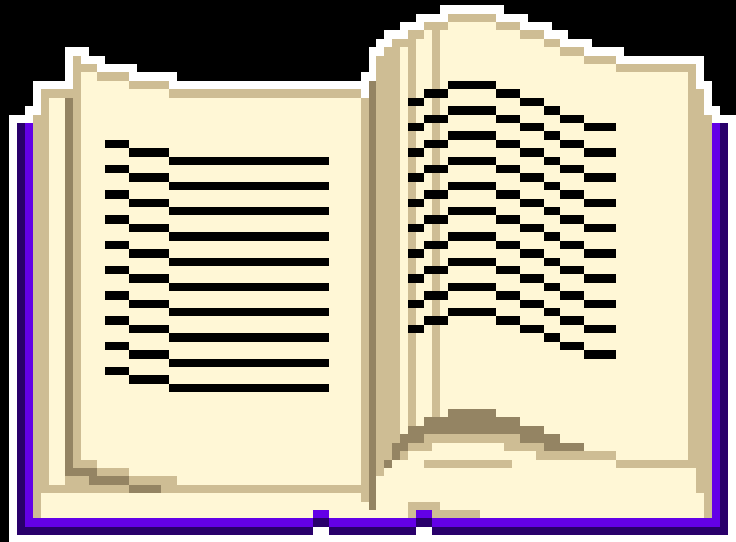
Written AAP



- Each non-construction (supply and service) contractor must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:
 - Has a contract of \$50,000 or more, or
 - Has government bills of lading that total or can be expected to total \$50,000 or more in a year, or
 - Serves as a depository of government funds, or
 - Is a financial institution that issues and pays savings bonds and notes

Two Main Theories

- Disparate Treatment
- Disparate Impact



Pattern or Practice

- Pattern or Practice
 - Where discriminatory conduct is the employer's standard or usual procedure, not merely an isolated incident
 - Example: Looking at the process an employer follows when it hires employees (applicant pools can be thousands or tens of thousands)



Prima Facie Case – Pattern or Practice

- In a systemic pattern or practice case, a prima facie case of discrimination can be proven by statistical evidence
- The plaintiff must demonstrate through statistics a pattern of underrepresentation or a difference in treatment of a protected class that is not explained by chance
 - 2 or 3 standard deviations can be sufficient to infer discrimination
 - *Hazelwood School District v. United States*

Statistically Significant Disparities

- Statistically significant differences in the treatment of similarly situated persons
 - Two or more standard deviations
- Unlikely that results occurred by chance
 - Another factor usually explains the disparity
 - Inference of discrimination
 - However, disparity may be explained by legitimate, nondiscriminatory factors

Probability or Chance

Standard Deviation

Chance

1 SD

3.2 in 10

2 SD

5 in 100

3 SD

3 in 1,000

4 SD

6 in 100,000

5 SD

6 in 10 million

6 SD

2 in 1 billion



Multiple Regression Analysis

- Used to determine the impact of multiple factors (*independent variables*) on an individual factor (*dependent variable*).
- Can isolate the effect of *one* of the independent variables while controlling, or holding constant, all the others.

Multiple Regression Analysis

- Explains whether or not the effect of each variable is *statistically significant*.
- Can provide the exact average effect of group membership (*i.e., being female*) on the dependent variable (*i.e., salary or likelihood of being hired*).

Expert Witnesses



- Statistical Experts
 - Labor Economists, often professors
- Testing Experts
 - Industrial Organizational Psychologists
- Other Experts
 - Experts on local labor market factors such as demographics
 - Experts on a certain industry, such as jobs in the banking industry

OFCCP Regulations

41 C.F.R. Part 60

https://www.ecfr.gov/cgi-bin/text-idx?SID=bffbd2b245f571d8dd17a584ce220266&mc=true&tpl=/ecfrbrowse/Title41/41cfr60-1_main_02.tpl

Remedies

- Hiring/job offers or reinstatement,
- Back pay with interest,
- Salary Adjustments,
- Retirement contributions,
- Leave and other benefits.

Key OFCCP Regional Personnel SWARM

- Melissa Speer, Regional Director
- Aida Collins, Deputy Regional Director
- Ronald Sullivan, Director of Regional Operations



District Offices & Key Personnel

- Dallas District Office
 - Vacant, Dallas DD
- Denver District Office
 - Nicole Huggins, Denver DD



District Offices & Key Personnel

- Houston District Office
 - Karen Hyman, Houston DD
 - LaToya Smith, ADD
- San Antonio District Office
 - Dinorah Boykin, DD
- New Orleans District Office
 - Rachel Woods, New Orleans DD



National Office Key Personnel

- Craig E. Leen, Acting OFCCP Director (Ondray Harris resigned on July 27, 2018).
- Craig E. Leen, Deputy Director
- Dr. Marika Litras, Acting Deputy Director,
Director of Enforcement
- Deborah A. Carr, Director of Policy, Planning
and Program Development

