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Sexual Harassment and Investigations in
the “Me Too” Movement

THE “ME TOO” MOVEMENT

- **Hollywood**
- **Sports**
- **TV Personalities**
- **Elected Officials**
- **Corporate Management**

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MILLENNIALS VS. BABY BOOMERS

- Current focus on harassment is partly generational.
- For many years, the Baby Boomer generation dictated workplace conduct.
- Baby Boomers learned to work in the male-dominated culture and had to work in an environment that had been controlled by men for generations.
- At that time, almost all management and supervisory positions were held by men.
- Moving forward 30 years, women now make up a considerable portion of the workforce and fill many management positions.

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MILLENNIALS VS. BABY BOOMERS (CONT'D)

- In addition, Baby Boomers are aging out of employment.
- Millennials are less likely to tolerate inappropriate conduct and have no fear in reporting bad behavior.
- From the time they were young, Millennial women were told they are equal to men and can do anything a man does.
- In addition, the public perception of harassment has changed drastically over the last few years.

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***For the first time in US History there are
Four Generations in the Workplace***



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Framing The Generations

TRADITIONALISTS 1900 -1945

Influences

- The Great Depression
- The New Deal
- World War II
- The G.I. Bill
- The Cold War
- The Atom Bomb

Traits

- Loyal/Civic Minded
- Patriotic
- Hard working
- Fiscally conservative
- Faith in Institutions
- Work for same employer
- Make do or do without
- Practical
- Respect Authority

Growing Up

- Disciplined
- Conformers
- Personal sacrifice
- Children should be seen and not heard

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Framing The Generations

BABY BOOMERS

1946 – 1964

Influences

- Booming birthrate
- Economic prosperity
- Vietnam
- Watergate
- Assassinations
- Civil rights movement
- Women's movement
- Sex, drugs, rock & roll

Traits

- Confident
- Independent
- Self-reliant
- Competitive
- Optimistic
- Desire to stand out from the crowd
- Work-centric
- Relish long work hours
- Defined by Professional Accomplishments

Growing Up

- Stay-at-home moms
- Suburbs
- TV
- Play well with others

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Framing The Generations

GENERATION X

1965 – 1981

Influences

- Divorce
- Lay-offs
- AIDS
- Personal computer
- MTV & Cable TV
- The Challenger
- Missing children on milk cartons
- 24 hour media

Traits

- Independent
- Resourceful
- Entrepreneurial
- Adaptive to change
- Skeptical
- Work/life balance
- Self-reliance

Growing Up

- Working Moms
- Latchkey kids
- Divorce
- Microwave
- Videogames
- MADD

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Framing The Generations

MILLENNIALS 1982 -

Influences	Traits	Growing Up
<ul style="list-style-type: none"> ▪ Fall of the Berlin Wall ▪ Events of September 11th ▪ Connected 24/7 ▪ iPod, iPad, Smart Phones ▪ Violence Close to home ▪ Drugs and gangs ▪ Hurricane Katrina ▪ Virginia Tech Shooting 	<ul style="list-style-type: none"> ▪ Globally concerned ▪ Diverse/Inclusive ▪ Cyber literate ▪ Media savvy ▪ Realistic ▪ The group is the key ▪ Confidence ▪ Entitled ▪ Most educated 	<ul style="list-style-type: none"> ▪ “You are special” ▪ Helicopter parents – (Boomer parenting) ▪ “Black Hawks!” (Gen X parenting) ▪ Involved dads ▪ Packed schedules

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Managing The Generations

	TRADITIONALISTS	BABY BOOMERS	GENERATION X	MILLENNIALS
COMMUNICATIONS	Face to Face Formal Memo	In Person Formal Memo	Email/ Cell Phone	Text Messaging
FEEDBACK	No News is Good News	Once a year Review with documentation	Instant, Immediate feedback	Individualized Feedback at the push of a button!
REWARDS	The satisfaction of a job well done	Money, title, the corner office	Freedom is the ultimate response	Work that has meaning for me!
BALANCE	Support me in shifting the balance	Help me balance everyone else & find meaning myself	Balance now, not at 60	Flexibility so I can balance all my activities

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TITLE IX - LAWS PROHIBITING HARASSMENT

- **Title IX of the Education Amendments Act of 1972 is a federal law that states:**

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

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TITLE IX - LAWS PROHIBITING HARASSMENT

- **Title IX Procedural Requirements:**

- The Title IX regulations outline three key procedural requirements. Each school must:
 1. Disseminate a notice of nondiscrimination;
 2. Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; and
 3. Adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints.

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TITLE VII - LAWS PROHIBITING HARASSMENT

- **42 USC § 2000e-2:** Unlawful Employment Practices
- **42 USC § 2000e-5:** Enforcement to Prevent Unlawful Employment Practices
- **SC Ann. § 1-13-80 (Supp. 2000):** Unlawful Employment Practices

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DEFINING SEXUAL HARASSMENT

Originally:

- Quid Pro Quo
- Hostile Work Environment

Tangible Employment Action

- *Burlington Industries, Inc., v. Ellerth*
- *Faragher v. City of Boca Raton*

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EMPLOYER LIABILITY FOR SEXUAL HARASSMENT

Meritor Savings Bank v. Vinson

The Supreme Court held that employers may be held liable for sexual harassment, irrespective of whether the employee suffered a tangible job detriment, if the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

The court also recognized that the existence of a written, well-communicated policy prohibiting sexual harassment and an effective procedure to report harassment can limit an employer's liability for harassment.

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EMPLOYER LIABILITY (CONT'D)

Harris v. Forklift Systems, Inc

The Supreme Court held that the *Meritor* standard for determining whether conduct is actionable under Title VII as harassment creating an abusive work environment requires an objective finding of a hostile or abusive environment that a reasonable person would find hostile or abusive, as well as the victim's subjective perception that the environment is abusive.

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EMPLOYER LIABILITY

Burlington Industries, Inc. v. Ellerth

Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense.

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EMPLOYER LIABILITY

Faragher v. City of Boca Raton

An employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking at the reasonableness of the employer's conduct, as well as that of the plaintiff victim.

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AFFIRMATIVE DEFENSE

- The affirmative defense described by the court has two elements:
 - The employer must prove “it exercised reasonable care to prevent and correct promptly any sexually harassing behavior” **and**
 - Then the employer must prove that the victimized employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or avoid harm otherwise.”

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SAME-SEX SEXUAL HARASSMENT

Oncale v. Sundowner Offshore Servs., Inc.

“In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context...Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex.”

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Harassment Policy Checklist

- 1 | Develop harassment policies that are distributed to all employees.
- 2 | Employer's policy and grievance procedure should be calculated to encourage victims to come forward.
- 3 | Policy should be endorsed by highest level of management.
- 4 | Besides a written policy, communication through other means (newsletters, performance reviews, etc.) should be considered.
- 5 | Anti-harassment must come from the top. All supervisors, managers and executives must be the anti-harassment team. A zero tolerance approach should be considered.

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POLICY AGAINST SEXUAL HARASSMENT

- In Writing
All companies should implement and strictly follow a comprehensive written policy prohibiting harassment based on sex, age, race, religion, disability, national origin, and any other form of unlawful discrimination. This policy should:
 - Prohibit harassment of employees by co-workers, supervisors, customers, vendors, or other third parties;
 - List multiple persons with whom an aggrieved employee can file a complaint;
 - Ensure confidentiality to the extent possible;
 - List specific examples of the various types of prohibited conduct, such as a fraternization policy or workplace anti-dating policy - "Workplace Romances;"
 - Require employees to cooperate fully in any harassment investigation; and
 - Prohibit retaliation against any employee who files a harassment complaint or participates in such an investigation.

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DEFINITION OF HARASSMENT

“Sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when it affects a team member’s job or creates an offensive work environment.

This prohibition applies to all team members and others (members, board members, vendors, contractors, temporary employees, or any person to whom exposes an employee) working in or for the company. The company strives to treat each person in a non-discriminatory manner, free from prohibited harassment, and expects its team members and others to do the same.”

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COMPLAINT PROCEDURE

- **Alternative means or methods to initiate a complaint should be developed and communicated. Employers can consider a formal harassment report, dedicated telephone answering machines, dedicated toll-free hotlines, etc.**
- **Complaints should be treated confidentially to the extent possible.**
- **Decisive remedial action should be taken and documented.**

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REPORTING PROCEDURE

If you feel that you are being or have been harassed or discriminated against because of your sex, race, color, age, religion, national origin, disability or other protected classification, please report it at once to your immediate supervisor or to the Director of Human Resources.

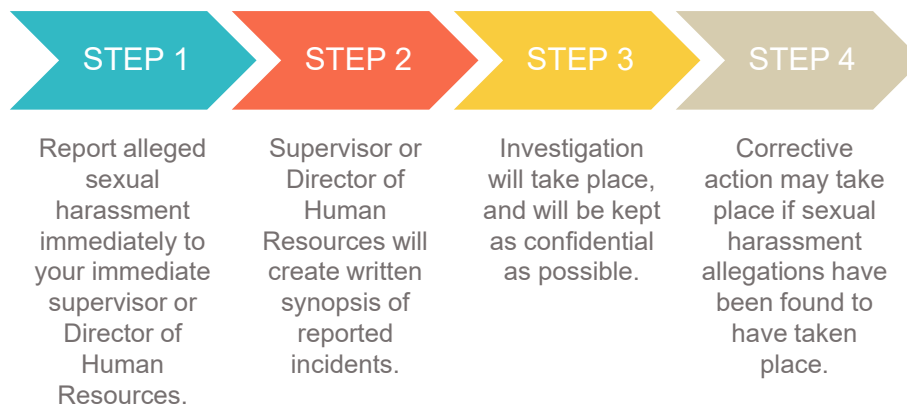
Report sexual harassment immediately to your supervisor or Director of Human Resources.

Your immediate supervisor or the Director of Human Resources will make a written synopsis of any reported incidences. Normally, the Director of Human Resources will investigate the complaint and, after consultation with the necessary parties, will respond back to the team member with any corrective action defined, if deemed necessary.

All reports will be kept as confidential as possible, and there will be no retribution or retaliation against anyone for making a report.

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REPORTING PROCEDURE (CONT'D)



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CONDUCTING A THOROUGH INVESTIGATION

- Train supervisors and employees.
- Treat complaints seriously, confidentially.
- High level manager (Human Resources Manager) responsible for investigation.
- Investigate complaints thoroughly, immediately.
- Discipline should match severity of offense.
- Keep sensible limit on scope of investigation.
- Conducting a thorough investigation can avoid liability.

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DISCIPLINE PROCEDURE

“Any team member found to have been engaging or currently engaging in prohibited harassment or discrimination as set forth above will be subject to appropriate counseling, discipline and/or termination in management’s sole discretion. The purpose of said counseling, discipline or termination being a reasonable good faith attempt to stop any prohibited harassment/discrimination.”

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Training Tips

- Respectful workplace workshop
- Live workshop
- Leadership engagement in workshop
- Focus on culture not liability
- Interactive
- All forms of harassment
- Separate leadership session
- Address “HR as Fun Police”

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Accountability and Transparency

- Evaluate leaders based on respect, civility, and responsiveness to complaints
- Significant consequences for harassment
- Report outcomes to impacted employees
- Annual summary reports of harassment enforcement?

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Costs of Losing a Lawsuit



Back Pay Front Pay Emotional Distress Punitive Damages Attorney's Fees

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Summary:

This case involves alleged sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Homer Ray Howard, an employee of Cromer Food Services ("CFS"), claimed to suffer a daily barrage of lewd comments and gestures by employees of CFS' biggest client. Rather than intervene, CFS told him there was nothing that could be done because the harassers were not under its control. Howard then filed a complaint with the Equal Employment Opportunity Commission ("EEOC").

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Facts of the case:

- *Co-worker left a note in the hospital canteen calling Homer Ray Howard gay.*
- *Howard continued to be harassed on a daily basis by two co-workers who called him “Homo Howard.”*
- *The two co-workers made unwanted sexual comments in nearly every encounter they had with Howard, including graphic discussions of oral sex that featured the two men groping themselves and propositioning Howard.*
- *Howard felt stalked by the two co-workers.*
- *Howard spoke to his supervisor, telling him “there was some gentlemen at the hospital that were asking me homosexual questions, asking me was I gay.”*
- *Supervisor made light of the events, telling Howard to let it go, that the men were only joking.*

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Facts of the case:

- *The company’s employee sexual harassment policy, which Howard signed upon being hired, requires employees to report harassment to the president of the company.*
- *Howard never reported the harassment to the president of the company, and testified that he did not know who the president was.*
- *Howard also reported the problem to his direct supervisor.*
- *His direct supervisor also made the comment that “it was just a joke” and not to take things too seriously because “faggots are ignorant, retarded people, and Homer, I know you’re not retarded.”*
- *Howard then told ANOTHER supervisor about the problem.*
- *This supervisor told Howard that it was unfortunate that the situation was being handled as it was, but that his first supervisor had already dealt with it.*

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Facts of the case:

- *Howard then spoke to Chet (C.T.) Cromer, one of the sons of the chairman of the Board of Directors and a manager with the company about the issue.*
- *C.T. was visibly upset by the situation and said “[d]o you not realize this could cost me everything?”*
- *C.T.’s response, which directly contradicted the company harassment policy, was that he was not responsible for the hospital but only responsible for CFS employees.*
- *Howard continued to report the issue, this time directly to Greenville Hospital, speaking to an unidentified woman in the HR department.*
- *He also reported the issue to the two harassing co-workers’ supervisor.*
- *Howard then asked if he could switch to another second-shift route he believed was available that would not entail him going to the hospital, the harassing co-workers’ supervisor told him to stop whining and that he was under contract at the hospital.*

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Facts of the case:

- *The harassing co-workers supervisor’s version of the facts differs from Howard’s, and the supervisor did not report the complaint as he did not consider it to be sexual harassment.*
- *On March 6, 2007, Howard reported the daily harassment to the EEOC.*
- *CFS received a report shortly thereafter.*
- *The same day, C.T. called Howard into his office and told him he got “this stupid letter from the EEOC” and told Howard he did not want to hear about it.*
- *C.T. decided that it was unacceptable for Howard to continue working at the hospital. He immediately and in writing offered him a position on the first shift, which was from 4:00 am to 3:30 pm Monday-Fridays, with a thirty-minute unpaid lunch break.*
- *Because the shift was a “take it or leave it” offer, Howard claims he was terminated as a result of his choice to report the harassment to the EEOC.*

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EXAMPLE OF WHAT NOT TO DO

EEOC v. Cromer Food Services

Result:

The EEOC brought suit on his behalf. After discovery, CFS moved for summary judgment, which the district court granted. Because Howard articulated sufficient facts to show that it would be reasonable to conclude his employer had actual or constructive notice of the harassment and failed to take any corrective action, the 4th Circuit Court of Appeals vacated and remanded for trial.

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QUESTIONS?

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ABOUT REGGIE GAY



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Reggie's primary areas of practice include labor and employment law, workers' compensation, litigation and appellate advocacy. Reggie represents business and governmental clients by providing consultation on employment and other matters, conducting preventive training, and litigating in both federal and state courts. He represents companies, manufacturers, governmental entities, educational institutions, health care providers, nonprofits and insurance companies in employment litigation and general business litigation. He frequently lectures on employment topics such as FMLA, FLSA, ADA, harassment, discrimination, and Workers' Compensation.

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