

December 2017

## **WHAT HAPPENED?!?**

### ***Five Reasons Why Your Sexual Harassment Training Isn't Working***

By: Sally R. Culley, [sculley@rumberger.com](mailto:sculley@rumberger.com), Linda Bond Edwards, [ledwards@rumberger.com](mailto:ledwards@rumberger.com)  
Nicole Sieb Smith, [nsmith@rumberger.com](mailto:nsmith@rumberger.com)

Each day brings news about yet another sexual harassment claim against a high-profile and powerful man. Just to name a few in the broadcasting industry: Bill O'Reilly, Charlie Rose, and now Matt Lauer. As women continue to come forward, all employers should be nervous enough about their own liability to re-think their approach to dealing with sexual harassment in the workplace.

Following the 1998 decision by the United States Supreme Court in *Faragher v. City of Boca Raton*, a case which involved a claim of sexual harassment, employers rushed to implement anti-harassment policies and training. In that case, the Court provided a defense for employers in sexual harassment cases, where the employers (1) implemented a policy prohibiting sexual harassment, (2) trained employees about the policy, (3) took prompt remedial action when a complaint of sexual harassment was received, and (4) proved that the victim failed to take reasonable action to prevent the harm. The *Faragher* decision gave employers a sense of security, because of the thought that anti-harassment policies and training would eradicate harassment or, at minimum, insulate employers from liability for any harassment.

Despite all the efforts businesses have dedicated to formulating policies and implementing training, sexual harassment still happens and employers are still finding themselves potentially liable for such harassment. 21<sup>st</sup> Century Fox has reportedly paid out \$50 million to settle sexual harassment claims made against Fox News during 2016-2017. And a recent study has found that 1 in 3 women aged 18 to 34 has been sexually harassed at work. Even more disturbing, the EEOC has found that “[r]oughly *three out of four* individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.” With this in mind, and given all the work

that many employers have put forth in response to the *Faragher* case, the obvious question is: *what happened?*

Perhaps the answer lies in the anti-harassment training provided by employers. Is the training intended to change the culture of the organization or merely to “check the box?” Do victims really believe the employer will give their complaints thoughtful consideration resulting in real change, or will the employer simply slap the harasser on the hand? Real organizational soul-searching may shed some light. If an organization is more concerned with avoiding liability for sexual harassment rather than promoting respectful and safe workplaces that maximize the potential of *all* employees, the effectiveness of its policies and training will be undercut. No amount of training will overcome a business environment that refuses to acknowledge the existence of unprofessionalism and disrespect. For most employers, though, the following reasons may help to explain why sexual harassment training simply isn’t working. If one of these applies to your organization, then you need a different strategy for your anti-harassment training and the implementation of your anti-harassment policy:

1. Employees do not understand what sexual harassment is.

This seems impossible, given the amount of time and effort that employers have invested in training employees on this issue. But the sheer number of sexual harassment claims that are now being asserted, coupled with jaw-dropping behavior exhibited by the alleged harassers, leads to this inescapable conclusion. Anti-harassment policies should clearly define sexual harassment and should include specific examples of prohibited behavior. Employees need to know and understand that sexual harassment does not always include an unwelcome sexual advance, and that it may include other verbal or physical harassment of a sexual nature or even offensive remarks about a person’s sex. The gender of the harasser can be either male or female, and the same applies to the gender of the victim. Also, the gender of the harasser and the victim can be the same.

2. Only lower-level employees receive training.

Many employers provide sexual harassment training only to lower-level employees but excuse management, especially upper-level management, from the training. The message this sends to the workforce is that anti-harassment training really isn’t that important. Limiting who is trained also conveys that the employer is going through the motions (“We have a policy!” “We provide training!”), without any effort to ensure that the *entire*

workforce has a common understanding of what sexual harassment is, the shared obligation to recognize and report suspected harassment, and what will happen once a claim is made. The fact of the matter is that organization-changing sexual harassment training for managers -- particularly upper level managers -- is crucial. From a practical perspective, upper management should actually be held to a higher standard, because they are leaders who should model appropriate behavior to the rest of the workforce.

### 3. Training is boring.

In many organizations, sexual harassment training has become a routine, nothing-new-here, waste-of-time yearly requirement. Employees often are required only to log into a video that they watch from their computer station, such that there is no way to ensure that the employees actually watch the video or understand the content. Even in-person training, where someone stands at the front of a room and preaches to the group about what they are allowed and not allowed to do, is often seen as a chore. This mundane training format conveys to employees that the company cares only about avoiding liability rather than protecting its employees from unwelcome and harmful harassment. But training does not have to be boring and mundane. With careful thought and preparation, training sessions *can* be impactful, focused, short, and informative. The trainer should be positive, encouraging, and engaging. If your organization lacks that skill set, then consider retaining an outside attorney or professional trainer.

### 4. The Power Factor.

Sexual harassment, of course, is less about sex and more about power. Those in power -- by rank, reputation, revenue generation, or long service -- are the ones who are generally able to harass others with impunity. This is often because those with less status in the company, including HR and sometimes legal, are themselves affected by the power.

Lawyers and HR directors worry about job security, just like other employees. When even the HR directors are afraid to report sexual harassment by those in power or seek severe consequences for those high-level harassers, the organizational culture is infected by fear and even the best training will lose effectiveness. If the fear is allowed to fester and remain untreated, chances are the infection will eventually lead to a lawsuit or, in severe cases, the loss of the entire company brand. The Weinstein Company, for example, could soon be a name from the past. Resist the urge to think that it is cheaper to pay off complainants rather than risk the loss (and revenue) of a high-producer. Employers who ignore the

problem must account for the everyday costs to the business caused by employee absenteeism and loss of productivity as well as the cost of settlements and litigation.

5. Retaliation with all eyes watching.

Training also will not be effective if those who complain in accordance with the company policy experience retaliation. As shown by recent studies, this is a real problem, as many of those who complain of sexual harassment have reported retaliation. This retaliation can take many forms, from demotion or termination to being shut out of internal opportunities to do interesting, productive work. Complainants may be branded as trouble-makers who do not have the best interests of the company in mind. Other employees then see what happens to those who complain. Employers must take care to ensure that complaining employees are treated with respect and given the same opportunities as other employees. Allowing a complaining employee to be ostracized or otherwise treated differently undermines anti-harassment training by discouraging other employees from reporting sexual harassment, and also opens the door to a retaliation claim.

Anti-harassment training is absolutely necessary, but it must be effective. To combat the above common problems and hopefully avoid the fate of the various companies that are currently embarrassed and facing lawsuits over sexual harassment claims, employers must give thoughtful and intentional consideration to the organization's culture, its actions over time, and whether there is past or ongoing questionable conduct by an employee. The goal is to create a productive, respectful place of employment. Revamping anti-harassment training to address the above problems is an important step to accomplish that goal.

*Rumberger, Kirk & Caldwell provides litigation and counseling services in a wide range of civil practice areas including labor and employment law, and it is available to assist employers with drafting anti-harassment policies, conducting anti-harassment training, and investigating harassment claims. Offices are located in Orlando, Tampa, Miami, Tallahassee and Birmingham, Alabama. For more information, please visit [www.rumberger.com](http://www.rumberger.com).*

References are made in the above article to the following:

*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

Battaglio, Stephen, 21<sup>st</sup> Century Fox has paid out \$50 million in costs and fees to settle harassment claims against Fox News (August 15, 2017), retrieved from [www.latimes.com/business/hollywood/la-fi-ct-fox-harassment-20170815-story.html](http://www.latimes.com/business/hollywood/la-fi-ct-fox-harassment-20170815-story.html)

Golshan, Tara, Study finds 75 percent of workplace harassment victims experienced retaliation when they spoke up (October 15, 2017), retrieved from [www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts](http://www.vox.com/identities/2017/10/15/16438750/weinstein-sexual-harassment-facts)

Langer, Gary, Unwanted sexual advances not just a Hollywood, Weinstein story, poll finds (October 17, 2017), retrieved from [abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id+50521721](http://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id+50521721)

EEOC Select Task Force on the Study of Harassment in the Workplace, Executive Summary & Recommendations, June 2016