

#MeToo Challenges in the Legal Profession A Talk with Paulette Brown

The problem

- In the current climate of #MeToo, many sexual harassment cases are coming to light across industries like politics, media, and academia. The movement has had less explosive impact on the legal profession, even though the law is in the top five professions with the highest reports of sexual harassment.
- Sexual harassment tends to be underreported across all industries. Surveys indicate even lower rates of reporting in the legal profession.
 - In a survey of 6,890 attorneys from 135 countries conducted by the International Bar Association, 1/3 of female attorneys reported being sexually harassed at work. Among those surveyed in North America, 43.3% reported experiencing sexual harassment at work.¹
 - In a 2018 survey of 3,000 businesses and law firms by the ABA Journal, 68% of female respondents reported having experienced sexual harassment but only 30% reported it.²

What is sexual harassment

- Title VII of the Civil Rights Act prohibits employers from discriminating against employees based upon sex, race, color, national origin, and religion.
 - Generally applicable to employers with 15 or more employees and governmental agencies. Sexual harassment is a form of sex discrimination.
 - Sexual harassment is defined as:
 - *... unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when any of the three criteria is met: (1) submission to such conduct is made explicitly or implicitly a term or condition of the individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affect such individual; (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. 29 CFR § 1604.11(a).*

¹ International Bar Association 2019 report, *Us Too? Bullying and Harassment in the Legal Profession*: <https://www.ibanet.org/bullying-and-sexual-harassment.aspx>

² ABA Journal and Working Mother Media 2018 survey, *#MeToo Workplace Study*: http://www.abajournal.com/news/article/tackling_harassment_survey_women_men

- Sexual harassment claims
 - Quid pro quo: employer demands sexual favors from an employee in return for job benefits. 29 CFR § 1604.11(a)(1)-(2).
 - Hostile environment: conduct is so severe or pervasive that it creates an abusive working environment. 29 CFR § 1604.11(a)(3)
- Sexual harassment can include offensive remarks about a person's sex. Does not include simple teasing, offhand comments, or isolated incidents that are not very serious.
- Prohibits employers from retaliating against employees for reporting harassment or for filing a charge, testifying, assisting, or participating in Title VII investigations, proceedings, or hearings.
- EEOC
 - Enforces workplace discrimination laws and investigates allegations of discrimination. When investigating allegations, the EEOC looks at the entire record, including the circumstances, the nature of the alleged harassment, and the context in which the incidents occurred.
- Employer vicarious liability
 - Employer is vicariously liable for sexual harassment by supervisors if supervisor's harassment culminated in a tangible employment action.
 - Employer's affirmative defense:
 - Employer exercised reasonable care to prevent and promptly correct harassing behavior, and
 - Employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer or to avoid harm otherwise.
- State laws
 - Most states have adopted sexual harassment laws that vary widely.
 - E.g. California and Connecticut laws protect independent contractors and unpaid interns and mandates 2 hours of training for supervisors in workplaces with 5 more employees. Includes protection based on sexual orientation and gender identity, with exemption for religious organizations.
 - E.g. Arizona has largely adopted federal provisions.
 - In the few states that have not adopted workplace sexual harassment laws, such cases are governed by fed law and must be reported to the local fed EEOC office: e.g. Alabama, Arkansas and Mississippi.
- In the profession
 - The reality still, unfortunately, in the legal profession is that employees have to be prepared for repercussions when filing a complaint. They may fear, among many things, alienation by colleagues, of losing credibility, not advancing at work, or difficulty finding another job.

- In the legal profession, it was not uncommon for sexual harassment cases to be handled quietly, with both employee and employer motivated to keep the matter confidential. Employees may get large severance packages to resign quietly.
- Power structure and gender imbalance in leadership in the legal profession lent itself

Best practices

- In 2016, the ABA amended Model Rule 8.4 to include prohibitions on harassing and discriminatory conduct. Model Rule 8.4:
 - It is professional misconduct for a lawyer to:*
 - (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.³*
- In 2018, the ABA adopted Resolution 302 urging the profession to adopt policies to address harassment on the basis of not only sex and gender, but also gender identity, sexual orientation, and the “intersectionality of sex with race and/or ethnicity.” The Resolution outlines what such policies and procedures should encompass, including policy communication and investigation procedures and trainings and other initiatives.⁴
- EEOC recommends that every employee be provided a copy of the policy and complaint procedure that is redistributed periodically. The policy and procedure should be easily understandable and should include, at minimum:
 - Explanations of prohibited conduct
 - Assurances against retaliation for complaints
 - Explanation of complaints process
 - Assurance that employer will protect confidentiality of claims to the extent possible
 - Procedure that includes a prompt, thorough, and impartial investigation, and
 - Assurance that employer will take appropriate corrective action.
- Confidentiality

³ ABA Model Rule 8.4: Misconduct:

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/

⁴ ABA Resolution 302: https://www.americanbar.org/content/dam/aba/events/women/2018_mm_302.pdf

- Employer cannot guarantee complete confidentiality since certain information must be revealed to conduct a thorough investigation.
- If an employee informs a supervisor about alleged harassment but asks to keep the matter confidential, the employee's desire for confidentiality may conflict with the employer's duty to investigate. The supervisor's inaction could lead to employer liability.

Additional Resource:

- EEOC Policy Guidance on Current Issues of Sexual Harassment:
<https://www.eeoc.gov/policy/docs/currentissues.html>