REGIONAL POOL WORKSHOPS
RESOURCES AND SOLUTIONS FOR COUNTIES
VARIOUS LOCATIONS I FALL 2018
How to Investigate a Sexual Harassment Complaint in the Era of #MeToo and “Time’s Up”

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Disclaimer

This training is designed to provide general information about the subject matter covered. Neither TAC nor the trainers are engaged in rendering legal advice. If you need legal advice, TAC recommends that you seek the services of a competent attorney who is familiar with your specific situation.
Our Unconscious Networks

• What colors are the following lines of text?

1. Sky
2. Grass
3. Dirt
4. Sunshine
5. Stop sign
Same Drill

• What **colors** are the following lines of text?

1. **Green**
2. **Blue**
3. **Brown**
4. **Red**
5. **Yellow**
Objectives

• Culture Change, Public Revelations and Press
• How to Avoid Potential of Harassment and Hostile Claims
• Develop Proper Policies
• TOOLKIT
Culture Change, Public Revelations and Press
First it was a story. Then a moment. Now, months after women began to come forward in droves to accuse powerful men of sexual harassment and assault, it is a movement.

Time magazine has named “the silence breakers” its person of the year for 2017, referring to those women, and the global conversation they have started.
#MeToo

In October 2017, Harvey Weinstein, a very powerful producer in the movie industry for decades, was accused of secular harassment by more than thirty women, including:

- Gwyneth Paltrow
- Kate Beckinsale
- Ashley Judd
- Rose McGowan
- Angelina Jolie
- Unknown Nurse from Texas
A Movement Grows
How to Avoid the Potential of Harassment and Hostile Claims
Obligations of Employers

• Make the **workplace free of unlawful** discrimination, harassment and retaliation

• Promptly and confidentially **investigate** complaints of discrimination, harassment and retaliation

• Where discrimination, harassment and retaliation may have occurred, **take prompt and appropriate remedial action**
  
  (i.e., discipline commensurate with the offense)
Why Should You Care?

• You are a Steward of County Assets
• Workplace discrimination and harassment are prohibited by law
• Retaliation is also prohibited by law
• Your County has a policy
Why Should You Care?

• Ongoing harassment and discrimination affect morale and productivity
• As a supervisor, you should respect your employees and want to avoid liability

County and Personal Liability May Exist
Why Should You Care?

- Employers should prevent harassment and limit the harm caused by harassment
- Employees should be encouraged to avoid harassment and report harassment immediately
- Question of liability exists only after a determination of unlawful harassment occurred

Retaliation can occur after the complaint
Vicarious Liability Standard

Vicarious Liability is a legal doctrine which was established in the Supreme Court Cases of:

Fragher v. City of Boca Raton (1998)

Why Should You Care?

• Employers are subject to liability on the basis of their supervisors tangible actions (usually inflicts economic harm)

• Tangible Actions Are:
  • Hiring
  • Promotion or Failure to Promote
  • Demotion
  • Undesirable Reassignment
  • Significant Change in Benefits
  • Compensation
  • Work Assignments
What is Sexual Harassment?

- Conduct of a sexual nature in the workplace
- Includes any *unwelcome*:
  - Sexual advances
  - Requests for sexual favors
  - Verbal and physical conduct of a sexual nature
  - Display of sexually explicit or suggestive materials
Watch Out for...

• The half complaint

• Does what happens in Vegas really stay in Vegas?

• Direct and indirect

• Fighting the inevitable
  *(dating at work, and the eventual fallout)*

• The customer isn’t always right
Discovering Workplace Problems...

Once an Elected Official or Supervisor knows of a problem
=The County Knows!
ACTION IS REQUIRED
Discovering Workplace Problems...

• Your Response:

“I know this is hard and you want to keep it quiet...but I have an obligation to do something about it. That’s the only way we can improve the situation.”
The Perfect Investigator

- Trustworthy
- Loyal
- Helpful
- Friendly
- Courteous
- Kind
- Obedient
- Cheerful
- Thrifty
- Brave
- Clean
- Reverent
Investigation! OH NO!!!

Have effective investigative process to include:

• Interviews of complainant, accused and witnesses
• Look for facts
• Take intermediate actions to assure no further harassment
• Reach a determination
• Take proper corrective action as required
In Event of Complaint

• Report unwelcome harassment to management
• All reports must be documented
  
  *There is no Off-The-Record*

• Management will investigate all complaints
• Corrective action will be taken to stop illegal harassment
  
  *May include discipline or termination*

• Have closure with complainant and alleged source of harassment
• Document thoroughly and keep confidential
One Person’s Word Against Another’s

EEOC says the employer will have to weigh each parties credibility.

Factors to consider are:

• Inherent Plausibility: Is the testimony believable at face value?
• Demeanor: Did the person seem to be telling the truth?
• Motive to Falsify: Is there a reason to lie?
• Corroboration: Is there a witness?
• Past Record: Is there a history of similar behavior?
Credibility & Sexism

• “Joe sexually assaulted me in the back of the shed”

• “Are you sure Mary? Joe’s a family man. No one has ever complained about him. No one ever saw him attack you or say those things about you. But, weren’t you late for work yesterday? Joe would never do such a thing. He’s been with us since he was a teenager. He hired you (unsaid --and he can fire you) and your sister.”

• (You’re a liar, Mary)
Credibility & Sexism - Take 2

“Help! Help! Joe’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”

“Are you sure Mary? Joe’s a family man. No one has ever complained about him. No one ever saw him attack you. But, weren’t you late for work yesterday? Joe would never do such a thing. He’s been with us since he was a teenager. He hired you (and he can fire you) and your sister.”

(You’re a liar, Mary)
Credibility & Sexism - Take 3

• “Help! Help! Joe’s got a gun, and he just shot someone in the back of the warehouse! There’s blood everywhere!”

• Omigosh! Are you okay Mary? Who else is working there? Is anyone else hurt? Get everybody to safety! Hurry up! Somebody call the police! Get an ambulance!

• *Why is the response so different?*
Policies Make a Difference!

• Absence of Policies
• Outdated Policies
• Inconsistently followed Policies
  = Risk of Substantial Damages in Litigation
Policies Make a Difference!

- Assurance of no retaliation
- Complaint process that assures accessibility, confidentiality to extent possible, quick and thorough investigation
- Clear explanation of prohibited conduct
- Immediate corrective action when harassment has occurred

Elements of a good policy
A Complaint is Made – What Now?

• First impressions are lasting impressions
• Be neutral
• Take notes. Don’t rely on your memory
• Ask about immediate needs
• Who, what, when, and where
• ID issues to be resolved, witnesses and documents
• Discuss retaliation (not a one time discussion)
Investigate Thoroughly

- Who, what, when, where, how
- How did the complainant react to the alleged incidents?
- Affect?
- Witnesses (to the incidents, to the fact pattern, or to others who may have also been harassed)
- Note any physical evidence
- Working environment
- Assessment of credibility
- Resolve or immediate relief
But Don’t Forget!

• The harassment policy
• How, when and where was it disseminated?
• Were there other formal complaints made?
• What were the results?
• Explain anti-retaliation provisions to complainant and witnesses
• Follow up with the complainant (reasonable care to prevent
Take Appropriate Action

If it is determined that the allegations did occur:

- Corrective action should be undertaken immediately.
- Correction actions should be designed to end the conduct and ensure that it does not recur.
- Severity of disciplinary action should depend on factors such as severity and frequency, impact on victim and whether the accused previously engaged in misconduct.
- Document the action taken.
Making a Decision

- Conducted the interviews
- Reviewed the documents
- Gathered any additional information
- Prepare report that contains description of issues at hand, list witnesses and documents used as evidence, summarize information, make credibility assessments and present a finding of fact.
- Recommend action, if appropriate
Retaliation—Don’t Do It!

Retaliation means treating someone differently because:

- They oppose an action at work they believe is unlawful or discriminatory
- They file a complaint – Harassment, Wage, Workers’ Comp, Discrimination
- Participate as a witness regarding a complaint

- **Remember**...Retaliation lawsuits can outlive the original complaint...even if the original complaint did not violate the law
How to Stay Out of Trouble

• Email
• Internet Use
• Pictures
• Posters
• Practical Jokes
• Horseplay
How to Stay Out of Trouble

• Love at work
• Leering
• Swearing
• Profanity
• Pet names
What Do You Think?

• “Hey, everyone acts this way!”

“Who cares anyway? This is normal stuff.”

“What’s the big deal?”
Toolkit

- Sample Policies
  - Harassment
  - Sexual Harassment
  - Grievance
  - Whistleblower
- EEOC Harassment Prevention Report
- Employer Liability for Workplace Harassment
- Four Steps in a Progressive Discipline Procedure
- EEOC Contact Information
Questions?
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