Sexual Harassment in the Post-Weinstein World

JOANNA L. GROSSMAN
ELLEN K. SOLENDER ENDOWED CHAIR IN WOMEN AND LAW
AND PROFESSOR OF LAW
SMU DEDMAN SCHOOL OF LAW
#MeToo #TimesUp #NotHere

- Tarana Burke and #MeToo (2006)
- Alyssa Milano and #MeToo (2017)
- #MeToo hashtag has been used millions of times on social media platforms—in at least 85 different countries
- #TimesUp: Advocates and celebrities teamed up to raise millions for legal representation of harassment victims across the economy
- #NotHere: Institutions pressured to stop covering for harassers
- Over 200 high-profile men in media, law, finance, academia, politics, tech, and Hollywood have lost their jobs over credible accusations of harassment
"The #MeToo movement is accomplishing what sexual harassment law to date has not."

CATHARINE A. MACKINNON, NYT Op-Ed, Feb. 4, 2018
## The Prevalence and Nature of Harassment

### Prevalence
- 2016 EEOC Task Force: 60% of American women surveyed reported having experienced gender harassment
- In any 2-year period, 4 in 10 women will experience harassment at work
- Rates steady over several decades
- Millennials cite more harassment

### Nature
- 85-90% of victims of harassment are female
- Most perpetrators are male
- Co-worker harassment more common than supervisory
- Harassment and sexism go together
- “Bullying” is gendered
Sexual Misconduct in Academia

- Sexual harassment by faculty and staff is a significant problem, especially at the graduate level
  - 7% of harassment reported by undergraduates students is by faculty or administrators; 38% of harassment of female graduate students
  - 1/10 female graduate students report experiencing harassment by a faculty member
  - Open-source Sexual Harassment in the Academy includes 2500 entries of harassment by faculty, staff, and peers
- Research shows that sexual harassment in education has a negative impact on a student’s education, academic performance, professional life, and psychological wellbeing
The Law of Sexual Harassment

- Sexual harassment is a kind of intentional sex discrimination
  - Quid Pro Quo
  - Hostile Work Environment
  - Retaliation
- Federal and State Anti-Discrimination Laws Prohibit Sexual Harassment
  - Title VII of the Civil Rights Act of 1964
  - Title IX of the Education Amendments of 1972
  - State Laws
- Institutions can be held liable under these laws, but individuals cannot
The Crux of the Problem

- Sexual harassment continues to be a pervasive problem in the American workplace, educational institutions, and elsewhere.
- Harassment harms physical and emotional health, career advancement, and economic well-being.
- Harassment exacerbates existing problems in recruiting and retaining women and reinforces gender stereotypes.
- Harassment culture impairs productivity and the advancement of knowledge.
- The law provides incentives for institutions to implement cosmetic measures, regardless of whether they work.
- When harassment does occur, victims often do not complain quickly or forcefully enough to preserve their rights under Title VII.
Standard Methods for Addressing Sexual Harassment

**Required Measures**

- Anti-harassment policies (97%)
- Internal grievance procedures (95%)
- Training and response to complaints

**Effects**

- Isolated preventative measures do not reduce the amount of harassment
- Offering training without goals or assessments
- Conducting investigations in faulty or biased ways
- Reluctance to study workplace climate and culture
The “Open Secret” and Culture of Silence

- Most harassment victims do not report to an authority figure either in the workplace or outside it
- Filing a formal complaint is the least common response of women who experience harassment (8-15%)
- Most HR professionals say that unreported harassment is rare; but most employees who experienced it did not report it
- Individual and institutional factors affect reporting rate
- “Closed institutions” (highly insular, discrete norms and rules, membership confers a distinctive identity) are particularly challenging environments for reporting
“Why Didn’t She Just Report It?”

- Top reasons for non-reporting
  - Fear of retaliation/blacklisting
  - Believe that report will be futile—no effective response
  - Reframing/denial ("not a big deal")
  - Fear of not being believed
  - Fear loss of privacy

- Rationality of non-reporting
  - Gap between expected and actual response causes harm
  - Victims who complain typically end up worse off in some tangible way than those who do not
Organizational Culture

“Organizational climate is an important driver of harassment because it is the norms of the workplace; it basically guides employees . . . To know what to do when no one is watching.”

Mindy Bergman, Psychology Professor & Sexual Harassment Researcher

Leadership and accountability are two most significant movers of culture.

Values and culture come from the top, but must be reinforced at every level with concrete actions.

Policies and procedures are not self-executing; effective enforcement matters.

Well-handled complaints help change culture.
“Pass the Trash”

- Known harassers put in position to continue misconduct with a new employer
- Business as usual:
  - Channel complaint into arbitration or mediation, shielded from public view
  - Include non-disclosure agreement in any settlement
  - Do not disclose misconduct to future employers
  - Provide financial incentive for quiet departure
- Effect of business as usual:
  - Person credibly accused of harassment can remain employed with no consequences or seek new employment without a black mark
“Gender Sidelining”

- Women are sidelined by reduced access to networking, mentoring, informal training, socialization
- Men react to harassment culture by avoiding women at work
  - Harvard Business Review found that 64% of male executives were reluctant to meet one-on-one with junior female colleagues.
  - New York Times survey found that 45% of men felt it was inappropriate to have dinner alone with a female co-worker, 22% at a meeting.
  - NYT article interviewing women finalists for CEO found many experienced difficulty breaking into inner circle of male camaraderie.
- Women face catch-22, as sidelining blocks access to mentorship and interpersonal connections that are necessary for successful career advancement.
Implications of #MeToo

- #MeToo has changed the landscape
  - Raised awareness
  - Increased reporting
  - Increased believability
  - Escalation in responses
  - Public pressure
  - Triggered legal and ethical reforms
- #MeToo highlights connection between harassment and gender inequity
Cultural Moment or Cultural Shift?

- The long-term impact of #MeToo will turn on many factors
  - Continued momentum
  - Institutional accountability
  - Impact on low-profile work settings
  - Backlash
  - Cultural change?