Employers Can't Hide Behind Inept Anti-Harassment Training

By **Lindsay Marum** (March 3, 2022)

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On March 3, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act.

The law prohibits employers from inserting oppressive, mandatory arbitration provisions into employment agreements that prevent victims of sexual assault and harassment from litigating their claims.

The secretive process of arbitration often allows perpetrators to continue their careers unscathed, and forces victims to remain silent about the abuse they endure.

Now that the bill has become law, employers will be far more susceptible to public — and often costly — litigation of sexual assault and harassment claims.

Employers will no longer be able to hide behind oppressive forced arbitration provisions, and will likely rely more on other methods to avoid litigating sexual harassment claims. One such common employment practice is training aimed at preventing sexual harassment.

Some states require workplace harassment prevention training, but many employers have willingly doubled down on implementing sexual harassment training in the wake of the #MeToo movement.[1]

On paper, training programs appear to be a positive and proactive tool for preventing sexual harassment in the workplace. In practice, however, trainings often not only fail to prevent sexual harassment, but may have the opposite effect of exacerbating harassment.

If employers continue to implement ineffective sexual harassment trainings for the main purpose of shielding themselves from liability, sexual harassment will continue to run rampant in the workplace.

History of Sexual Harassment Training Programs

Title VII of the Civil Rights Act forbids employers from discriminating against an employee "with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[2]

While Title VII does not use the term "harassment," subsequent case law evolved to recognize that harassment based on protected characteristics also constitutes discrimination under Title VII.[3]

In 1980, the U.S. Equal Employment Opportunity Commission issued its first set of guidelines on how sexual harassment violates the anti-discrimination provisions of Title VII.[4]

The EEOC guidelines emphasized that "prevention is the best tool for the elimination of sexual harassment," and recommended that employers "take all steps necessary to prevent sexual harassment from occurring," such as by training employees on how to report sexual harassment and developing methods to sensitize employees to sexual harassment.[5]

In 1998, the U.S. Supreme Court articulated an affirmative defense to sexual harassment allegations in the twin cases Faragher v. City of Boca Raton and Burlington Industries Inc. v. Ellerth.

Noting that Title VII is "designed to encourage the creation of antiharassment policies and effective grievance mechanisms," the Supreme Court held that an employer can raise the affirmative defense that they "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and the employee "unreasonably failed to take advantage of any preventive or corrective opportunities," in order to avoid liability.[6]

The court further held that while an employer need not provide proof of a sexual harassment policy to assert this defense, such policies "may appropriately be addressed in any case when litigating the first element of the defense."[7]

Subsequent Supreme Court jurisprudence expressly encouraged employers to adopt sexual harassment policies pursuant to Title VII by providing "safe harbor from punitive damages" to employers that adopt anti-discrimination policies, according to law professor Susan Bisom Rapp.[8]

Following the Supreme Court's elevation of sexual harassment training from an ideal standard to an affirmative defense, employers were given a strong incentive to implement trainings.[9]

By 1997, 75% of companies in the U.S. had developed mandatory anti-harassment training programs designed to educate employees on what behavior is forbidden under anti-discrimination law, and 95% of companies had implemented grievance procedures for reporting harassment.[10]

New York requires every employer to have a sexual harassment training policy that meets certain standards. In addition, California, Connecticut, Delaware, Illinois, Maine and New York mandate sexual harassment trainings for employers with at least three employees.

Other states mandate training for certain categories of employees, or at the very least recommend sexual harassment training for all employers.[11]

As a result of the recently enacted law, it is likely that the demand for sexual harassment training in the workplace will continue to gain traction.

Why Training Programs Fail

Despite the widespread use of training programs by employers, sexual harassment continues to permeate the workplace.

One report from Harvard Business Review in 2020 found that approximately 40% of women and 16% of men say they have experienced sexual harassment at work, a number that concerningly has not changed since the 1980s.[12]

These findings are significantly limited by the lack of empirical data on the effectiveness of sexual harassment training programs.[13]

In a 2016 report on harassment in the workplace, the EEOC conducted a review of this limited empirical data and concluded that much of the sexual harassment training

implemented after Faragher-Ellerth failed as a basic prevention tool.[14]

Other studies have found that sexual harassment trainings may make male participants less willing to report sexual harassment and more likely to blame the victim.[15] Given how sexual harassment training has evolved into a "billion-dollar industry" over the past 30 years, these findings (or lack thereof) are cause for concern.[16]

One reason why sexual harassment trainings fail as a prevention tool is because these trainings often focus on protecting the employer, not the employees.

In the cases following the Faragher-Ellerth holdings, many courts have given credit to employers for simply having sexual harassment training and grievance procedures in place, without examining their effectiveness.[17]

This line of jurisprudence has reduced sexual harassment trainings to "symbolic compliance," where employers are motivated to offer training for the limited purpose of "checking a box" to avoid liability, according to law professor Elizabeth Tippett.[18]

The tendency of some courts to defer to employers' training programs allows employers to prioritize limiting their own liability for sexual harassment claims over promoting equal opportunity in the workplace.

Ineffective sexual harassment training can actually worsen the effects of sexual harassment by reinforcing gender stereotypes, discouraging employees from reporting and reducing victims to legal liabilities.

When the definition of sexual harassment is unclear or framed as being bad for business, it sends an implicit message that the best way to avoid liability for harassment is to avoid potential victims — usually women — altogether.[19]

Accordingly, men often admit to avoiding women in the workplace out of fear that friendly behavior will be interpreted as sexist, or that they will be subjected to false allegations if they interact with female colleagues alone.[20] These attitudes deprive female professionals of valuable mentoring and career opportunities.[21]

Additionally, trainings that tell employees simply how to recognize and report sexual harassment fail to address the larger problem of retaliation against employees who complain.

Approximately 70% of people who reported sexual harassment in the workplace subsequently faced some form of retaliation, while in 37% of these cases the perpetrator faced no punishment.[22]

All of these shortcomings of sexual harassment trainings too often go unexamined by those courts content with deferring to employers' internal structures, regardless of how effective they are in practice.[23]

In short, employer-led sexual harassment trainings are not effective because they fail to address the root causes of sexual harassment.[24] Rather, many of these trainings are designed solely to avoid future litigation.

The lack of meaningful judicial oversight over employers' sexual harassment trainings in the wake of Faragher-Ellerth has rendered many of these trainings ineffective and even

counterproductive, which goes against the broad purpose of Title VII to promote equal opportunities in the workplace.

Solutions

Sexual harassment trainings can be a valuable tool for eliminating discrimination and promoting equal opportunity in the workplace if they are designed and administered with these goals in mind, rather than for the purpose of checking a box.

When faced with the Faragher-Ellerth affirmative defense, legal advocates should harken back to the Supreme Court's underlying rationale that "limiting employer liability is also consistent with Title VII's purpose to the extent it would encourage the creation and use of antiharassment policies and grievance procedures."[25]

Advocates should encourage courts to follow precedent requiring them to examine the sincerity of employers' sexual harassment training programs before awarding employers with the protection of the Faragher-Ellerth affirmative defense in order to fulfill the Supreme Court's purpose in creating this defense.[26]

Employers must also commit to improving their sexual harassment trainings by viewing their employees as partners in the fight against sexual harassment, rather than as future adversaries in litigation.

Some employees have taken it upon themselves to implement worker-led trainings, but the burden should not be on employees to tackle systematic oppression.[27]

Rather, employers must lead the way by creating a culture where all employees are treated with respect. Employers can take the first step in the right direction by evaluating their current anti-harassment policies, and large employers can conduct climate surveys to gauge the effectiveness of their existing programs.

These programs must be administered and evaluated regularly, as a culture safe from harassment cannot be achieved with one-off training programs that do nothing to address the root causes of sexual harassment.

Lastly, employers must stay up to date on current research and guidance that analyzes how the effectiveness of sexual harassment training can be maximized. Many scholars recommend bystander intervention training that focuses on how to empower employees to stand up for their coworkers in harassing situations.[28]

Now that the law banning arbitration pacts will allow many victims of sexual harassment to have their day in court, employers should not be able to further deprive victims of this opportunity by hiding behind ineffective and superficial training programs.

In order to fulfill the purpose of Title VII in promoting equal opportunity in the workplace, the Faragher-Ellerth affirmative defense must be reserved for employers that design and implement effective sexual harassment trainings that address the root causes of sexual harassment.

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[1] Elizabeth C. Tippett, Harassment Trainings: A Content Analysis, 39 Berkeley J. Emp. & Lab. L. 481, 484 (2018); Rhana Natour, Does sexual harassment training work? PBS (Jan. 8, 2018), https://www.pbs.org/newshour/nation/does-sexual-harassment-training-work.

[2] 42 U.S.C. § 2000e-2 (2012).

[3] Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971); Meritor Sav. Bank v. Vinson, FSB, 477 U.S. 57 (1986); Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

[4] 29 C.F.R. § 1604.11.

[5] Id.

[6] Faragher v. City of Boca Raton, 524 U.S. 775, 764 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 807 (1998).

[7] Id.

[8] Susan Bisom-Rapp, An Ounce of Prevention Is A Poor Substitute for A Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law, 22 Berkeley J. Emp. & Lab. L. 1, 3 (2001); Kolstad v. American Dental Ass'n, 527 U.S. 526, 545 (1999).

[9] Chai R. Feldblum & Victoria A. Lipnic, Report Of The Co-Chairs Of The EEOC Select Task Force On The Study Of Harassment In The Workplace, 44 (2016).

[10] Frank Dobbin and Alexandra Kalev, Why Sexual Harassment Programs Backfire, Harvard Business Review (May-June 2020), https://hbr.org/2020/05/why-sexual-harassment-programs-backfire.

[11] N.Y. Lab. Law § 201-g; Cal. Gov't Code § 12950.1; Conn. Agencies Regs. 46a-54-204; Me. Rev. Stat. tit. 26, § 807; Del. Code Ann. tit. 19, § 711A; 775 Ill. Comp. Stat. Ann. 5/2-109.

[12] Supra note 12.

[13] Susan Bisom-Rapp, Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession, 24 U. Ark. Little Rock L. Rev. 147, 148 (2001).

[14] Supra note 11 at v.

[15] Shereen G. Bingham & Lisa L. Scherer, The Unexpected Effects of a Sexual Harassment Educational Program, 37 Applied Behav. Sci. 125, 142-44 (June 2001).

[16] Supra note 15 at 162-63.

[17] LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 168-77, 184-92 (2016).

[18] Supra note 3 at 496.

[19] Id. at 487.

[20] Natour, supra note 3; Cynthia Fuchs Epstein et. al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession A Report to the Committee on Women in the Profession, the Association of the Bar of the City of New York, 64 Fordham L. Rev. 291, 376 (1995).

[21] Supra note 3 at 487.

[22] Jocelyn Noveck, Time's Up study: Many who report harassment face retaliation, ABC News (Oct. 15, 2020), https://abcnews.go.com/Entertainment/wireStory/times-study-report-harassment-face-retaliation-73630420.

[23] Supra note 19.

[24] Claire Cain Miller, Sexual Harassment Training Doesn't Work. But Some Things Do, NY Times (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html.

[25] Supra note 8.

[26] Lowery v. Cir. City Stores, Inc., 206 F.3d 431 (4th Cir. 2000).

[27] Carter Sherman, McDonald's Workers Are Setting Up Their Own Sexual Harassment Training, VICE News (Jan. 25, 2022), https://www.vice.com/en/article/y3vngw/mcdonalds-workers-sexual-harassment-training.

[28] Supra note 12, 26.