

DON'T LET YOUR COMPANY BE THE NEXT HARASSMENT HEADLINE

FIVE BIG MISTAKES COMPANIES MAKE OVER...AND OVER...AND OVER AGAIN

MULCH & SOIL COUNCIL - ANNUAL MEETING

PRESENTATION BY ANTHONY KUCHULIS OF BARRAN LIEBMAN LLP



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A T T O R N E Y S

WHAT CHANGED?

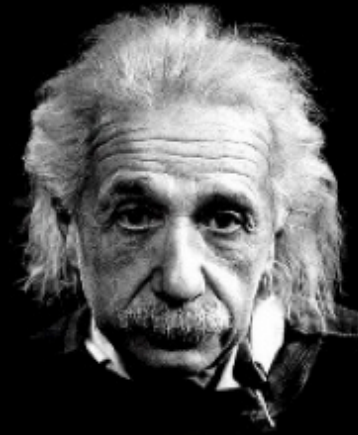
- Not more claims
- More conversation
- More exposure in court of public opinion



CONSEQUENCES HAVE EVOLVED

- The #MeToo movement changed the calculus for businesses
- Old way of thinking:
average no. of claims x average out of court settlement = exposure
- Now public opinion, press, and online reviews are part of calculation

Insanity: doing the
same thing over and
over again and
expecting different
results.



Albert Einstein

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BUSINESSES THAT SEIZE THIS OPPORTUNITY WILL THRIVE

The Washington Post

December 28, 2017

2018's challenge: Too many jobs, not enough workers

By Danielle Paquette

Employers nationwide are grappling with a problem that threatens to stall economic growth: vacancies — and lots of them.

In Maine, where flurries can fall as late as April, the state transportation department is struggling to find snowplow drivers, thanks to the increasingly tight labor market. Ski resorts in the state, meanwhile, are still looking for employees to run the slopes.

Texas, too, is dealing with a labor shortage. As the price of oil climbs, drillers are ramping up production, but they need more truckers to haul it. Energy companies fear a dearth of



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STILL NOT CONVINCED?

- Unemployment at historic low
- No. 1 reason why people leave employer?
- Best businesses recruit and retain the best talent

- A tale of two Koreas: North v. S. Korea



MISTAKE NO. 1

CONTINUING “CHECK THE BOX” TRAININGS

Waste of your time and employees time.

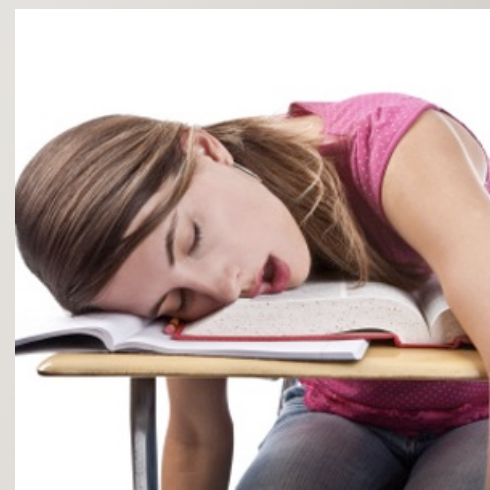
Limited value as a legal defense.

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A T T O R N E Y S

TRADITIONAL TRAININGS ARE BROKEN

- Full of legal definitions and concepts
- Obvious examples of harassment
- “Don’t be Harvey Weinstein”
- Starts from premise that everyone is a harasser
- Only tells people what they cannot do or say



ALTERNATIVE TRAININGS

- Always explain the why!
- Range of conduct at issue:
Some even well intentioned...
- Real examples are more interesting
- Don't let people coast through it – engage!



NEW PRESENTATIONS

- Fun (yes, actually)
- Not afraid to use humor
- Workshops, people in groups
- Mixed media
- Change of pace and tone



MISTAKE NO. 2

ASSUMING LACK OF REPORTING = NO PROBLEMS

Fear of reporting is itself a problem.

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WHAT DID WE LEARN?

- Best way to avoid lawsuit: trust of internal systems
- ...Even when it doesn't go their way
- Pop quiz. What's your reporting/investigation protocol?

CLEAR PROHIBITION ON RETALIATION



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WHAT IF CLAIM FABRICATED?

OR COMPLAINER WAS ALSO AT FAULT?

Award for HR consultant of the year goes to...



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MISTAKE NO. 3

COMPLEX, CONFUSING POLICIES

Simple, clear guidelines are key.

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SEXUAL HARASSMENT POLICY

The policy of this company is to have a zero tolerance for any forms of harassment, discrimination, or violence in the work place. Should any employee be subjected to what they perceive as any form of harassment discrimination or violence in the workplace; that employee shall follow the same procedure for filing a complaint for sexual harassment.

INTRODUCTION

It is the goal of the Company to promote a workplace that is free of sexual harassment. This policy applies to all employees at all levels of this organization. Sexual harassment of employees occurring in the workplace or in other settings in which employees may find themselves in connection with their employment is unlawful and will not be tolerated by this organization. Further, any retaliation against an individual who has filed a sexual harassment complaint is similarly unlawful and will not be tolerated. To achieve this organization's goal of providing a workplace free from sexual harassment, this organization will not tolerate the conduct that is described in this policy, and has provided a procedure by which inappropriate conduct will be dealt with, if encountered by employees.

Because the Company takes allegations of sexual harassment seriously, we will respond promptly to complaints of sexual harassment and where it is determined that such inappropriate conduct has occurred, we will act promptly to eliminate the conduct and impose such corrective action as is necessary, including disciplinary action where appropriate. Please note that while this policy sets forth our goals of promoting a workplace that is free of sexual harassment, the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace conduct which we deem unacceptable, regardless of whether that conduct satisfies the definition of sexual harassment.

DEFINITION OF SEXUAL HARASSMENT

The legal definition of sexual harassment is this: "sexual harassment" means any unwelcome sexual advances, requests for sexual favors, and/or verbal or physical conduct of a sexual nature when:

- (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; or
- (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment.

EXAMPLES OF SEXUAL HARASSMENT

The legal definition of sexual harassment is broad and in addition to the above examples, other sexually oriented conduct, whether it is intended or not, that is unwelcome and has the effect of creating a work environment that is hostile, offensive, intimidating, or humiliating to male or female workers may also constitute sexual harassment.

While it is not possible to list all those additional circumstances that may constitute sexual harassment, the following are some examples of conduct which if unwelcome, may constitute sexual harassment depending upon the totality of the circumstances including the severity of the conduct and its pervasiveness.

- Direct or implied requests by a manager or supervisor, whether male or female, or sexual favors in exchange for actual or promised job benefits such as favorable reviews, salary increases, promotions, increased benefits;
- Sexual advances – whether they involve physical touching or not;
- Sexual epithets, jokes, written or oral references to sexual conduct, gossip regarding one's sex life; comment on an individual's body, comment about an individual's sexual activity, deficiencies, or prowess;
- Displaying sexually suggestive objects, pictures, cartoons;
- Leering, whistling, brushing against the body, sexual gestures, suggestive or insulting comments;
- Inquiries into one's sexual experiences; and
- Discussion of one's sexual activities.

All employees should take special note that, as stated above, retaliation against an individual who has complained about sexual harassment, and retaliation against individuals for cooperating with an investigation of a sexual harassment complaint is unlawful and will not be tolerated by this organization.

SEXUAL HARASSMENT POLICY

COMPLAINTS OF SEXUAL HARASSMENT

If any of our employees believes that he or she has been subjected to sexual harassment, whether by a manager, a supervisor, a co-worker, or any other person in the work environment, that employee has the right to file a complaint with our organization. This may be done in writing or orally. If you would like to file a complaint you may do so by contacting your Company Branch Office.

SEXUAL HARASSMENT INVESTIGATION

When we receive the complaint we will promptly investigate the allegation in a fair and expeditious manner. The investigation will be conducted in such a way as to maintain confidentiality to the extent practicable under the circumstances. We will strive to release information arising out of a complaint or investigation only on a need-to-know basis. Employees should be aware, however, that information must be shared for an effective investigation to be conducted.

Our investigation will include (but it is not necessarily limited to) a private interview with the person filing the complaint and with witnesses. We will also interview the person alleged to have committed sexual harassment. When we have completed our investigation, we will, to the extent appropriate inform the person filing the complaint and the person alleged to have committed the conduct of the results of that investigation.

If it is determined that inappropriate conduct has occurred, we will act promptly to eliminate the offending conduct, and where it is appropriate we will also impose disciplinary action.

DISCIPLINARY ACTION

If it is determined that inappropriate conduct has been committed by one of our employees, we will take such action as is appropriate under the circumstances.

Such action may range from counseling to termination from employment, and may include such other forms of disciplinary action, as we deem appropriate under the circumstances.

STATE AND FEDERAL REMEDIES

In addition to the above, if you believe you have been subjected to sexual harassment, you may file a formal complaint with the state agency responsible for discrimination and/or your local EEOC office. Using our complaint process does not prohibit you from filing a complaint with these agencies. Each of the agencies has a specific time period to file a complaint so contact them immediately.

THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC")

1 Congress Street - 10th Floor
Boston, MA 02114
(617) 565-3200

Policy acknowledgement and signature required under Employee Hourly Contract and Obligations (REF 051)

KEEP IT SIMPLE – DITCH THE LAW TALK

Be Nice.

We strive to treat one another, and those we encounter in our workday and beyond, with the upmost respect, dignity, and understanding.

Don't Make Things Weird.

Anything that occurs before, during, or after work, that risks making things weird or awkward at work, will be an issue.

Look Out for Each Other.

If you see, hear, or learn of something small or large that could create a conflict later, talk with the person you are concerned about, and advise a supervisor.

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A T T O R N E Y S

DON'T AIM FOR THE BASELINE



DITCH ZERO TOLERANCE POLICIES

- Low level infractions should be treated on sliding scale
- People won't report if worried about an overreaction
- Fair and evenhanded leadership strengthens your organization



CBC

NEWS HOUR

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MISTAKE NO. 4

MAKING DISTINCTION BETWEEN PROTECTING COMPANY V. EMPLOYEES

Not mutually exclusive.

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PROTECTING EMPLOYEES ALSO PROTECTS COMPANY

- Employees that trust internal process less likely to bring a claim
- Transparent, fair investigation process is essential
- Good employee morale and culture is good for the company

BUT ALSO EDUCATE ON WHAT IS NOT UNLAWFUL HARASSMENT OR DISCRIMINATION

- Long hours
- Difficult boss
- Someone you don't like
- Not getting a promotion
- Conflict

MISTAKE NO. 5

KEEPING THE EQUAL OPPORTUNITY A**HOLE

Not worth the risk.

Many good candidates behind them.

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WHAT IS AN EOA?

- Doesn't pick on people because of a protected class...
- Just a jerk to everyone, equally
- Technically, not in violation of your old policies

Example:

In 2017, a young female producer accuses Bill O'Reilly of yelling at her and humiliating her based on her youth and gender...

but 20 years ago

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WHY A PROBLEM AND WHAT TO DO

A problem because...

- Terrible for culture
- Ticking time bomb for claims – hard to defend claims
- Ultimately bad for business

What to do...

- Update policies, counsel, and provide opportunity to change
- If no change, discipline and terminate

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MAJORITY OF CLAIMS WE DEFEND

- Person experiences negative event at work
- Believes treated unfairly
- Doesn't think anyone is listening
- Feels powerless
- Goes to attorney



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SOLUTION

- Make expectations clear and simple, with established processes
- Be vigilant: known or should have known standard
- Document like crazy

EVERYTHING YOU SAY IS SEXUAL HARASSMENT: AND 9 OTHER

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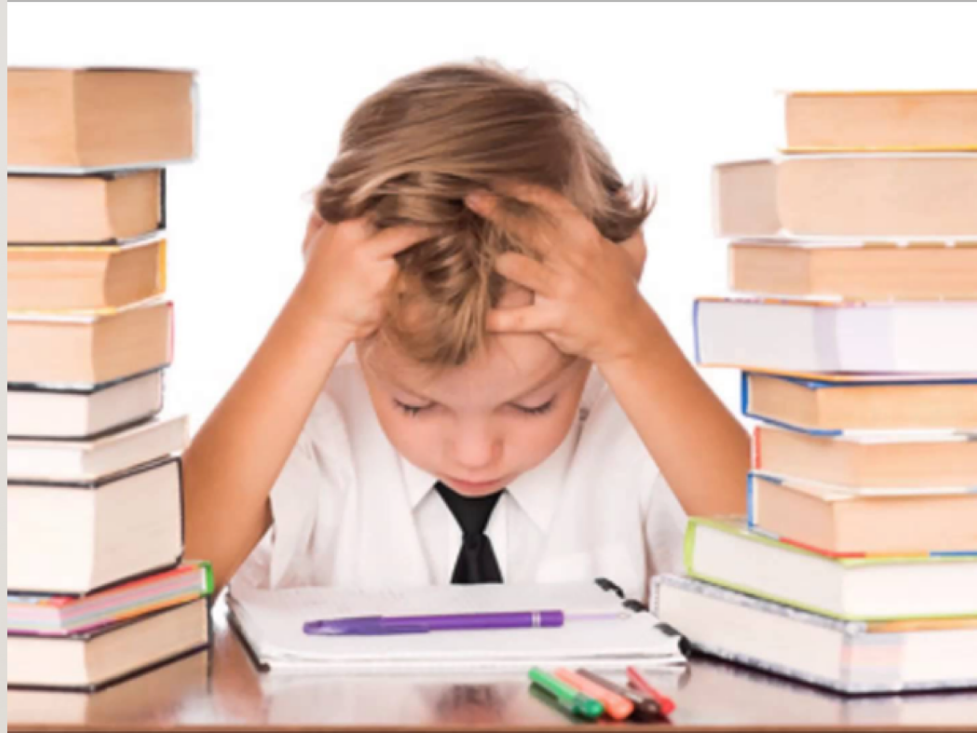
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ATTORNEYS

IN CLOSING

- This is a process
- Must be more than one training
- Workshops are key
- Hold your leaders to higher standards
- Make your employees engaged bystanders

THANK YOU!



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