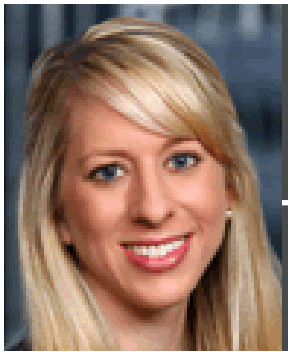

THE EFFECT OF "#METOO" AND "TIME'S UP" IN DISCRIMINATION LITIGATION

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Strict Liability for Workplace Harassment: Is the Faragher-Ellerth Defense Dead?
W. David Harless and Lauren Fisher White

Historically, women have suffered great disparities in treatment, dating back to the right to vote and extending to workplace protections. Even when Title VII to the 1964 Civil Rights Act was enacted, protection for women was not at the forefront, but was literally "back-doored" into the Act. Southern legislators anxious to derail legislation offered to improve civil rights to blacks had included women in the Act for the express purpose of killing the bill. So, the story goes, the southerner legislators believed that northern proponents of the race-based protections would never pass legislation protecting women.[1]

The #MeToo movement has highlighted often long overlooked disparities in pay and treatment within, and outside, the workplace. It is now in the forefront of both traditional and social media. As such, it has impacted how not only our clients, but courts, perceive both the "wrong" and how the laws should correct these wrongs. Perhaps more importantly, and specific to the purposes of this presentation, #MeToo, related events culminating in #MeToo, and the loosening of evidentiary standards regarding "Me Too" evidence may result in an employer's strict vicarious liability for workplace harassment by a supervisor notwithstanding the presence and enforcement of a comprehensive workplace anti-harassment program.

The Statutory Framework Prohibiting Gender-based Treatment

Congress and the courts have long tried to discern between "boorish" workplace behavior and actionable behavior under the civil rights acts designed to end discriminatory workplace treatment. But, often, the courts have not intervened until proof of relatively high standards of outrage and longstanding conduct have been established. Further, courts have wrestled with defining the nature and quantum of proof required to support such claims.

For example, the Title VII standard for a sexually hostile environment requires proof of intimidating, offensive, abusive and/or otherwise offensive conduct going beyond rudeness or casual joking. This includes proof elements of intent, a recurring wrong, and a degree of pervasiveness such that the conduct interfered with the employee's ability to perform his or her job. This was typically coupled with a requirement of a showing of some "longstanding" duration. The rationale is that, for the "terms, conditions or privileges" of employment to be affected, and thus actionable under Title VII to the 1964 Civil Rights Act, it must not be a passing or mildly offensive intrusion. Rather, what is required is proof of conduct so pervasive that it infects the daily workplace.

According to the U.S. Supreme Court, a hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[2] (This is typically the standard for

1 For several articles on the congressional machinations surrounding how women came to be included in the 1964 Civil Rights Act, see Louis Menand, How Women Got In On The Civil Rights Act, The New Yorker, July 21, 2014, https://www.newyorker.com/magazine/2014/07/21/sex-amendment; Linda Napikoski, How Women Became Part of the Civil Rights Act, ThoughtCo, March 25, 2017, https://www.thoughtco.com/women-and-the-civil-rights-act-3529477; Martha Burk, 50 Years After the Civil Rights Act, Is the Joke on Women?, HuffPost, December 6, 2017, https://www.huffingtonpost.com/martha-burk/50-years-after-the-civil_b_5497034.html.

2 Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993).

environmental type hostile environment claims. Tort-type touching and assault/sexual assault falls under different standards, where single incidents can impose liability.) Thus, to prove a hostile work environment claim under Title VII, the plaintiff must show (1) that the conduct in question was unwelcome, (2) that the harassment was based on gender, (3) that the harassment was sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment, and (4) that some basis exists for imputing liability to the employer.[3]

Further, an employer's liability under Title VII for workplace harassment depends on the status of the harasser.

> If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. [Citation omitted.] Under this framework, therefore, it matters whether a harasser is a "supervisor" or simply a co-worker. [4]

An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.[5] A "tangible employment action" typically is associated with "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." "Supervisor" does not extend so broadly as to encompass all persons having the ability to exercise significant direction over another's daily work.[6]

The affirmative defense against imposition of vicarious liability upon an employer for a supervisor's harassing conduct is commonly known as the Faragher-Ellerth defense, named after the two cases decided by the U.S. Supreme Court in 1998 in which it recognized the defense.[7] Recognizing that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character,"[8] the Supreme Court required that the employer undertake reasonable preventative and corrective measures, e.g., a comprehensive anti-harassment policy, periodic training of personnel on its operation, and prompt investigation and remedial action in response to a harassment complaint.

In turn, the employee is required to use the harassment policy protections by reporting harassment to the employer and thereby avoiding further harm. This requirement seemingly is based on a contributory negligence concept – "If the plaintiff unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so…. [I]f damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided."[9]

Understandably then, under the Faragher-Ellerth defense, courts have routinely found that the passage of time since the alleged incident coupled with the employee's failure to take advantage of the employer's anti-harassment policy is unreasonable, thereby entitling an employer to exoneration from vicarious liability. Further, juries traditionally have been skeptical, at best, of charges of sexual harassment made years after the onset of the offensive conduct.

#MeToo, and all that preceded and has followed the Movement, may have changed all of this.

The Origins Of The #MeToo Movement and Associated Events

The cultural tsunami that we have come to know as #MeToo did not arise in isolation. Instead, #MeToo was fueled by earlier events that cultivated increasing social consciousness and encouraged public opposition to the reported prevalence of sexual assault and harassment in the workplace and other social settings.

- In 2006, a community organizer and civil rights activist, Tarana Burke, began using the term "Me Too" on a MySpace social networking platform to promote "empowerment though empathy" to address sexual and domestic abuse against women and girls, particularly in underprivileged communities.
- In 2008, President Barack Obama took office at a time when college and university administrations had suffered longstanding criticism for mishandling or otherwise disregarding students' complaints of

3 See, e.g., EEOC v. Central Wholesalers, Inc. 573 F.3d 167, 175 (4th Cir. 2009).

4 Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

5 Id.

6 Id. at 430–31.

7 Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

8 Ellerth, 524 U.S. at 763.

9 Faragher, 524 U.S. at 806–807; see also Ellerth, 524 U.S. at 765.

sexual violence on university campuses.

- In response, the Obama Administration issued in 2011 a "Dear Colleague Letter" in which the U.S. Department of Education's Office of Civil Rights ("OCR") outlined mandatory procedures to be followed by private and public universities in investigating and adjudicating claims of sexual violence or harassment on campus. On April 19, 2014, OCR published a series of Q&As intended to clarify the legal requirements under Title IX for campus investigations of sexual violence and associated procedures, including burden and standard of proof. The Q&As addressed specifically the fact-finding process and any hearing and decision-making protocol used to determine (1) whether or not the conduct occurred, and (2) if the conduct occurred, what actions would be undertaken to end the sexual violence, eliminate the hostile environment, and prevent its recurrence. Failure to address the problems identified by OCR would result in the institution's loss of federal funding or the referral of the matter to the U.S. Department of Justice for enforcement proceedings against the institution.[10]
- On October 7, 2016, The Washington Post published a video that captured then-presidential candidate Donald Trump speaking in lewd terms of his unwelcome contact with and behavior toward two female associates. One month later, the nation elected him President. As one commentator has observed:

  > The election of Donald Trump redefined the politics of publicly claiming sexual victimization. Now it's an unpopular president whose legitimacy is in question, one who has been caught on tape explicitly asserting that he could grab any woman by the genitals because he is a star. He did not repent. Many women were outraged by this and by the fact that charges of sexual abuse leveled against him by 22 women did not matter enough to even jar, less even derail, his candidacy or his election.[11]

- The spark that ignited the fire was Harvey Weinstein. On October 5, 2017, the New York Times published an article, entitled Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, wherein the journalists Jodi Kantor and Megan Twohey documented Weinstein's 20-year history of sexual assaults and harassment of co-workers and actresses who worked for the Weinstein Company. The article proclaimed, "[a]n investigation by The New York Times found previously undisclosed allegations against Mr. Weinstein stretching over nearly three decades, documented through interviews with current and former employees and film industry workers, as well as legal records, emails and internal documents from the businesses he has run, Miramax and the Weinstein Company."[12]
- On October 15, 2017, Alyssa Milano, a victim of sexual abuse by Weinstein, reported her experience on a Twitter hashtag she created, #MeToo. She invited victims of sexual violence to respond if they had experienced sexual violence or harassment. The tweet went viral, and the response was overwhelming,
- Organizational/employer responses to charges of sexual violence or misconduct prompted by the #MeToo movement have resulted in the resignation or firing of many celebrities, including the following notables – U.S. Senator Al Franken, U.S. Representative John Conyers, Conductor James Levine, Political Columnist Mark Halperin, Charlie Rose, Matt Lauer, Kevin Spacey, Mario Batali, Steve Wynn, Garrison Keillor, and CBS's Leslie Moonves.[13]

Admissibility of "Me-Too" Evidence

In 2008, shortly after Tarana Burke created the "Me Too" social network, but unrelated to that initiative, the "Me Too" moniker was employed by critics of the U.S. Supreme Court's ruling in Sprint/United Management Co. v Mendelsohn.[14] In Mendelsohn, the Court addressed whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff. The Court observed that such evidence is not per se admissible or per se inadmissible, and held that admissibility depended on "how closely the related evidence is to the plaintiff's circumstances and theory of the case."[15] Critics derided such evidence as "me too" evidence, suggesting that the "piling on" of similar circumstances in the workplace going to workplace culture was not relevant to an individual claim or was somehow less credible or worthy of belief.

Following Mendelsohn, federal courts adopted tests for "Me Too" evidence that were roughly equivalent: (1) whether the past discriminatory or retaliatory behavior

10 American College of Trial Lawyers, White Paper On Campus Sexual Assault Investigations, at 3–4, March 2017, https://www.actl.com/docs/default-source/default-document-library/position-statements-and-white-papers/task_force_allegations_of_sexual_violence_white_paper_final.pdf.

11 Catherine A. MacKinnon, Where #MeToo Came From, and Where It's Going, The Atlantic, March 24, 2019, https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/.

12 Jodi Kantor & Megan Twohey, Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades, N.Y. TIMES, Oct. 5, 2017, https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?searchResultPosition=40.

13 Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel and Zach Wichter, #MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women, N.Y. TIMES, updated October 29, 2018, https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html.

14 552 U.S. 379 (2008).

15 Id. at 388.

is close in time to the events at issue in the case; (2) whether the same decisionmaker was involved; (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.[16] However, many jurisdictions have been hesitant to admit such evidence for a myriad of reasons, the most prevalent being a belief that each alleged instance of similar conduct will require the defendant to respond to each witness's claims, thereby create numerous mini-trials within the primary trial, and ultimately distract and confuse the jury.[17]

Resistance to the admissibility of "Me Too" evidence may be waning. For example, in 2016, the U.S. Fourth Circuit Court of Appeals reversed a trial court's grant of summary judgment to an employer defendant in a sex and age discrimination-based case following the district court's rejection of "Me-Too" evidence proffered by the plaintiff.[18] Despite an exhaustive analysis by the district court of why the proffered "Me Too" evidence did not meet the factors outlined above, the appeals court nonetheless reversed, explaining that the trial court "did not individually analyze each piece of other employee evidence," or "determine the relationship between the evidence and the circumstances and theory of the plaintiff's case." The appellate court also concluded that the trial court had "placed too much emphasis on its concerns with 'mini-trials,'" explaining that accommodating this "legitimate" concern in every case would tend always to result in the exclusion of such evidence.[19]

Generally, when deemed admissible in an employment discrimination case, "Me Too" evidence of the treatment by a defendant employer of employees other than the plaintiff is powerful proof of an employer's discriminatory intent. This is particularly supportive of a plaintiff's proof that the employer's proffered nondiscriminatory reason for any action against the employee is a pretext for unlawful discrimination based on the employee's protected status. Now, a recent decision by the U.S. Third Circuit Court of Appeals may broaden substantially the admissibility of "Me Too" evidence in sexual harassment cases to eviscerate effectively the Faragher-Ellerth affirmative defense.

Minarsky, #MeToo, And The Future of Faragher-Ellerth

In July of 2018, a panel of the Third Circuit rendered its decision in Minarsky v. Susquehanna County.[20] Minarsky was a part-time employee who worked alone every Friday with the alleged harasser, Yadlosky. She alleged that Yadlosky regularly attempted to kiss her on the lips, engaged in unwelcome embraces, groping, fondling, and massaging, and transmitted sexually explicit messages to Minarsky by email. However, this conduct had continued for four years unreported by Minarsky, despite her knowledge of her employer's comprehensive harassment policy that she had read and signed at the outset of her employment.

During this period, Minarsky learned that Yadlosky had engaged in similar conduct toward other female employees. Further, she learned that the employer had reprimanded Yadlosky for at least one instance of similar conduct, and that Yadlosky thereafter joked about the incident to a fellow female employee. Minarsky was unaware that Yadlosky had received a second reprimand for similar conduct. After both incidents, there was no further action or follow-up by the employer, nor were these incidents noted or reported in Yadlosky's personnel file.

Yadlosky repeatedly told Minarsky that she could not trust County administrators, or other supervisors, and warned her that she should always appear busy in their presence, or otherwise risk termination. Further, he responded harshly in response to any complaints that Minarsky made regarding her work or working conditions. Minarsky never reported Yadlosky's conduct to his supervisors or County administrators, explaining that Yadlosky's warnings, his harsh responses to her other complaints, and his past unsuccessful reprimands for his inappropriate advances toward others prevented her from reporting his misconduct.

Yadlosky was terminated ultimately for his conduct toward Minarsky after an administrator overheard Minarsky confiding to a co-employee. Minarsky resigned from employment several years later, explaining that she was uncomfortable in her role after Yadlosky was fired because her workload increased, and because her new supervisor inquired on more than one occasion about what had transpired with Yadlosky and who else she had caused to be fired.[21]

The district court awarded summary judgment to the employer against Minarsky's sexual harassment claims,

16 See, e.g., Griffin v. Finkbeiner, 689 F.3d 584, 599 (6th Cir. 2012); Hayes v. Sebelius, 806 F. Supp. 2d 141, 144–45 (D.D.C. 2011).

17 See, e.g., Hall v. Mid-State Mach. Prods., 895 F. Supp. 2d 243, 271 (D. Me. 2012) ("me too" evidence is "'too attenuated' to justify admission"); Bell v. Crowne Mgmt., LLC, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012); Jones v. St. Jude Med. S.C., 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) ("me too" evidence is unwelcome because it is only slightly relevant and is always highly prejudicial).

18 Calobrisi v. Booz Hamilton, Inc., 660 Fed. Appx. 207 (4th Cir. 2016).

19 Id. at 210. See also Emami v. Bolden, 241 F. Supp. 3d 673, 690 (E.D. Va. 2017).

20 895 F.3d 303 (3d Cir. 2018).

21 Id. at 306–309.

reasoning under the Faragher-Ellerth affirmative defense that Minarsky's employer had acted reasonably by maintaining an anti-harassment policy, reprimanding Yadlosky for his inappropriate conduct twice, and promptly terminating Yadlosky once his misconduct against Minarsky became known. Further, the district court found that Minarsky had acted unreasonably as a result of her "refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of County officials."[22]

The court of appeals reversed. As to the first prong of the Faragher-Ellerth defense, the court held that a jury should have been allowed to determine whether the County's policies and actions were reasonable under the circumstances of the case. Noting that the County had knowledge that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, and that Minarsky worked alone with Yadlosky, the court questioned whether someone should have ensured that Minarsky was not being victimized. Further, the court posited that a jury could conclude Yadlosky's termination could likely be viewed as evidence of the County's exasperation with Yadlosky, rather than a reflection of the effectiveness of its harassment policies.[23]

As to the second prong of Faragher-Ellerth defense, the court noted the recent firestorm of the #MeToo movement, and how it had presented plausible explanations for why victims had plausible fear of serious adverse consequences from disclosing inappropriate sexual conduct by persons of authority exploiting their power over a victim:

> While the policy underlying Faragher-Ellerth places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.[24]

The court identified countervailing factors in the evidence that required the jury to decide the reasonableness of Minarsky's failure to report Yadlosky's misconduct – the particular isolated working arrangement with Yadlosky, Yadlosky's aggressive response to Minarsky when she attempted to assert herself in the workplace, Yadlosky's cultivation of mistrust in County officials, the persons to whom she would report Yadlosky's misconduct, the County's prior ineffective efforts to punish Yadlosky's behavior, and the pernicious nature of Yadlosky's conduct, and its frequency and duration.[25]

In light of Minarsky, the scope of admissible evidence under the "Me Too" analysis of Mendelsohn has expanded considerably. The reasonableness of an employer's harassment policies and its associated responses arguably may be challenged by presenting evidence of how the employer has administered such policies in response to all complaints. Further, the infrequency of harassment complaints in comparison to the size of an employer's workforce may as likely demonstrate the ineffectiveness of the employer's policies as prove that the employer has been extremely effective in policing inappropriate workplace conduct.

In 2016, the EEOC Select Task Force on the Study of Harassment in the Workplace cited in its report findings by researchers comparing multiple studies of sexual harassment and workplace-based responses to such conduct. The findings were troubling.

> Common workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%). In many cases, therefore, targets of harassment do not complain or confront the harasser, although some certainly do.
>
> The most common response taken by women generally is to turn to family members, friends, and colleagues. One study found that 27% to 37% of women who experienced harassment discussed the situation with family members, while approximately 50% to 70% sought support from friends or trusted others.
>
> The least common response of either men or women to harassment is to take some formal action - either to report the harassment internally or file a formal legal complaint. Two studies found that approximately 30% of individuals who experienced harassment talked with a supervisor, manager, or union representative. In other words, based on those studies, approximately 70% of individuals who experienced harassment never even talked with a supervisor, manager, or union representative about the harassing conduct.[26]

22 Id. at 311.

23 Id. at 312–13.

24 Id. at 313, n.12.

25 Id. at 314–17.

26 Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, June 2016, https://www.eeoc

If these findings remotely correspond to the actual frequency of reporting of sexual harassment in the workplace, the corresponding assessment of the effectiveness of an employer's anti-harassment programs will be rigorous.

Further, under Minarsky, an employer's historical response to prior misconduct complaints, actions by a supervisor or a work culture that cultivates bona fide fear of reprisals, and the employee's subjective response to such circumstances will be relevant to assessing the reasonableness of the employee's conduct in addressing or reporting sexual misconduct.

Conclusion

The Faragher-Ellerth affirmative defense has served for more than twenty years as an effective shield to an employer's vicarious liability for a supervisor's sexual misconduct in the workplace. The Supreme Court has explained that the rationale for the defense is that a victim of unwelcome sexual misconduct will promptly complain of such conduct and seek the employer's protection to avoid further harm.

However, #MeToo, and the events occurring before and since that movement's origin in 2017, have undermined this rationale. Our society and courts are disregarding the traditional judgment that the credibility of a sexual misconduct claim is undermined by the victim's failure to report, or significant delay in reporting, such misconduct. Instead, they are advancing the presumption that a victim will not submit to the personal embarrassment, emotional strain, and ridicule associated with an inquiry into such claims unless the allegations of sexual misconduct are, in fact, true. As a result of this shift and the trend of courts to admit "Me Too" evidence from other similarly situated employees, juries increasingly will be permitted to resolve sexual harassment claims, and summary judgment will be unavailable to an employer, notwithstanding the employer's anti-harassment efforts or the employee's failure to report, or promptly report, such harassment.

Women and the Civil Rights Movement

Title VII of the Civil Rights Act of 1964

Early Developments

- 1970's: "Sexual harassment"
- 1986: *Meritor Savings Bank*
  - Title VII violation
  - "Hostile environment"
  - Employer liability

Sexual Harassment

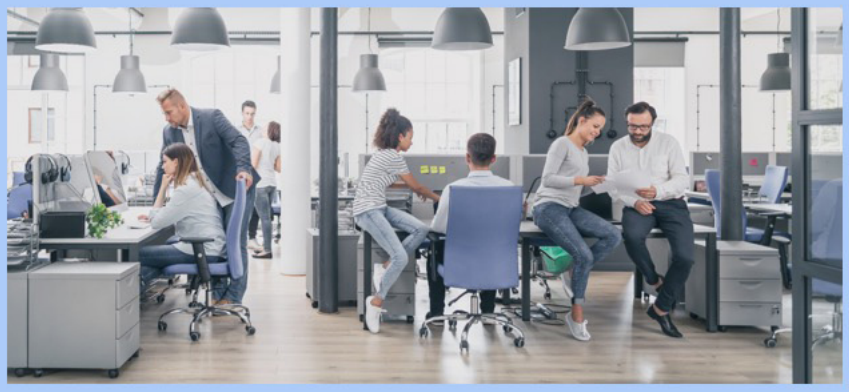
Prima Facie case:

- Unwelcome;
- Because of sex;
- Severe and/or Pervasive; and
- Employer liability.

When is the employer liable?

Vicarious Liability

Supervisor or Coworker?



The *Faragher/Ellerth* Defense for Supervisor Harassment

Was there a tangible employment action?

Yes → Strict liability

No → ***If*** Employer took reasonable care to prevent and correct harassment; ***and***

Employee unreasonably failed to take advantage; ***then***

Employer may escape liability

Faragher: "Reasonable Care"

Employer Measures:

- Published policy;
- Training/education;
- Clear reporting structure;
- Mandatory reporting;
- Investigation;
- Swift action; and
- Anti-retaliation.

How Do Victims Respond?

Victims of sexual harassment typically *do not report* harassment.

Sexual Harassment in Politics and Culture

2017-2018: The #MeToo Movement

"Yes, I did offer them acting jobs in exchange for sex, but so did and still does everyone. But I never, ever forced myself on a single woman."
– Harvey Weinstein (since retracted)

Is "Me Too" Evidence Admissible?

Sprint/United Management Co. v. Mendleson, 552 U.S. 379 (2008)

Key questions:

- Is the evidence relevant; and
- What is the *purpose* of the evidence?

Case Law Developments

Test for admissibility of "Me Too" evidence:

- Close in time;
- Same bad actor or decision-maker;
- Same treatment; and
- Similarly situated.

If #MeToo Evidence is in, is the *Faragher* Defense Out?

Minarsky v. Susquehanna County
895 F.3d 303 (3d Cir. 2018)

What is an Employer to Do?

1. Encourage reporting *and* listen to whispers;
2. Conduct trainings, *then* conduct thorough and meaningful investigations; and
3. Take "prompt and effective remedial action."

#MeToo Defamation Lawsuits

Jay Asher / Larry D. Moore CC BY-SA 3.0

Confidentiality of Sexual Harassment Settlements

2018 Tax Cuts and Jobs Act

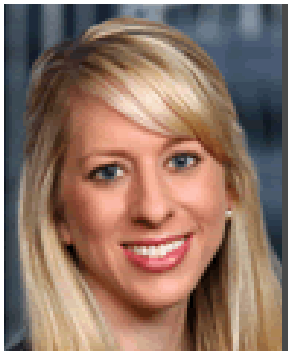
No longer business expenses:

- Settlement amount; and
- Attorneys' fees.

Executive Summary

- Sexual harassment is un(der)reported;
- In the #MeToo era, employers cannot rely on policies alone;
- #MeToo defamation lawsuits are a real possibility; and
- Confidentiality can be expensive.

Thank you!



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Lauren Fisher White is an associate in the firm's Labor and Employment and Litigation practice groups. She assists clients with employment and personnel matters including implementation and adherence to state and federal laws governing the workplace, and the investigation and response to harassment, discrimination, and retaliation complaints. She counsels clients on the enforceability of restrictive covenants, disciplinary decisions, and employee handbooks, and prepares employment agreements and independent contractor agreements. As part of the Litigation practice group, Mrs. Fisher White assists clients with contract and business tort disputes as well as general litigation issues.

Practice Areas

- Employment Issues and Executive Agreements
- Non-Competition and Trade Secrets
- Trials/Appeals/Alternative Dispute Resolution

Representative Matters

- Served as lead counsel in federal court litigation arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Employee Retirement Income Security Act (ERISA).
- Represented employers before the Equal Employment Opportunity Commission, the Virginia Employment Commission, the Department of Health and Human Services Office of Civil Rights, the Department of Labor, the Office of Federal Contract Compliance Programs, and the National Labor Relations Board.
- Mediated employment law disputes before the Equal Employment Opportunity Commission, private mediators and federal magistrate judges.
- Counseled clients on the enforceability of restrictive covenants, such as non-competition, non-solicitation, confidentiality, and trade secret clauses, and represented clients in negotiation and litigation involving such covenants.
- Prepared employment agreements, independent contractor agreements, severance agreements, settlement agreements, and employment handbooks.
- Assisted clients with creation and implementation of social media and Bring Your Own Device (BYOD) policies.
- Regularly advises institutions of higher education regarding faculty, student, administrative and compliance matters, including Title IX compliance and university and faculty policies and procedures.
- Advised employers concerning the investigation of and response to data breaches.

Select Presentations

- Presenter, "Employment Law in Health Care Transactions," Virginia Bar Association's 14th Annual Health Care Practitioners' Roundtable, October 2018
- Panelist, "EEOC Investigations," Virginia Bar Association's 48th Annual Conference on Labor and Employment Law, October 2018

Education

- Washington & Lee University, J.D., 2010 - Cum Laude; Managing Editor, Journal of Civil Rights and Social Justice; Roger D. Groot Scholarship Recipient
- Vanderbilt University, B.A., English and Psychology, 2006 - Magna Cum Laude