



Comments to the New Jersey Division on Civil Rights

October 2019

Topic: Sexual Harassment Training

Founded in 1916, the Employers Association of New Jersey (EANJ) is a trade association consisting of over 3,200 small and large private employers, as well as municipalities throughout New Jersey. For the past 103 years, EANJ has dedicated its resources to improving New Jersey's workplaces through improved employee relations and education and to promoting the causes of dignity and respect in the workplace. With these goals in mind, the organization advises private and public employers throughout the state on matters of labor and employment law compliance, helps employers craft and review anti-harassment policies and provides in-house, interactive training on many topics, including preventing workplace harassment. In 2018 alone, EANJ conducted approximately 70 in-house trainings, seminars and webinars, that addressed the prevention of sexual harassment. It is from this wealth of experience and commitment that EANJ recommends that New Jersey implement mandatory sexual harassment training for all employees, both public and private, who work in the state. At present, New Jersey does not require all employees to receive sexual harassment training; it does, however, require state government supervisors and employees to complete an online training regarding the state's Policy Prohibiting Discrimination in the Workplace Training, which covers sexual harassment.¹ While this is a good start, New Jersey can do more to address and prevent workplace sexual harassment through mandating sexual harassment training. As we will demonstrate, these efforts yield many additional benefits for employers and employees alike.

Within the past three years, five states -- California (2018),² Connecticut (2019),³ Delaware (2018),⁴ Maine (2017),⁵ and New York (2019)⁶ -- have implemented rules requiring all private and public employers to offer sexual harassment training on a regular basis, usually annually or biannually. Illinois will join that list in 2020, and will require all employers to provide annual sexual harassment training to employees.⁷ Currently, five states -- Illinois (2019),⁸ Tennessee (2010),⁹ Nevada (2003),¹⁰ Louisiana (2018),¹¹ Utah (2019),¹² and Pennsylvania (2002)¹³ -- require all public employees to receive sexual harassment training or education.

Sexual Harassment Training's Impact on Reporting

Mandatory training for all employees is still relatively new; however, the existing statistics suggests that sexual harassment training increases awareness and, by extension, reporting of sexual harassment. We see this borne out in Maine, which was the first state to mandate training for all employees in 2017. The Equal Employment Opportunity Commission's (EEOC's) 2018 statistics for Maine reveal that the percentage of sex-based charges doubled following the implementation of mandatory training -- from 20% of the state's total charges in

2017 to 40% of the state’s total charges in 2018. Furthermore, while Maine’s overall charge numbers are relatively small, its 2018 charge intake reflected the highest percentage of sex-based complaints the state has received since the EEOC started reporting these numbers in 2009.¹⁴ That revelation may seem alarming at first, but it need not be. Increased reporting can signal employers to manage and change problematic environments, once they become aware of pre-existing harassment.

Although there are no EEOC statistics available yet to show the impact of the more recently-passed mandatory sexual harassment training laws in California, Connecticut, Delaware and New York, it is notable that the percentage of sex discrimination EEOC charges increased in each of these states (and Maine, as reflected in the chart below) from 2017 to 2018 at rates higher than the national average.¹⁵ This may well indicate that employees in those states are aware of the upcoming changes to the law and are becoming more vigilant about their rights. Again, while training can lead to increased reporting, it can also lead employers to increased awareness to identify -- and prevent -- the conduct and situations that result in sexual harassment in the workplace. Training helps everyone.

Sexual discrimination charges as a percentage of EEOC charges received by state

State	Federal	CA	CT	DE	ME	NY
2017	30.4%	27.7%	25.8%	21.2%	20%	30.9%
2018	32.3%	30.6%	30.8%	26.8%	40%	37.3%
Change	1.9%	2.9%	5%	5.6%	20%	6.4%

Jurisprudence on Training

Courts have long appreciated the value of training to improve the workplace. In 1998, the U.S. Supreme Court indicated that employers had to take “reasonable steps to prevent harassment” in order to preserve an affirmative defense to a sexual harassment claim. *Faragher v. City of Boca Raton*, 524 U.S. 775, 764-65 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 806-07 (1998). Since that time, many courts, including the Supreme Court of New Jersey, have concluded that training is an essential step to prevent sexual harassment. Most notably, in *Aguas v. State of New Jersey*, 220 N.J. 494 (2015), the New Jersey Supreme Court expressly cited sexual harassment training among the factors it considers to determine whether an employer has an affirmative defense to a sexual harassment claim or, conversely, whether the employer has allowed sexual harassment to occur through the employer’s negligence.¹⁶

Per the EEOC, Training Must Be “Effective”

The prevention of sexual harassment is not merely an exercise to preserve a legal defense, however; it should also be a step that employers willingly undertake to ensure that

their workplaces operate in as productive, respectful and inclusive a manner as possible. Indeed, the EEOC, which is charged with enforcing Title VII's prohibition against sex harassment, has endorsed the value of training to impact sexual harassment, but has cautioned that training must be undertaken with sincerity and not just as a "check the box" means of preventing liability. In the June 2016 report issued by its Select Task Force on the Study of Harassment in the Workplace, the EEOC emphatically stated that

Training Must Change. Much of the training done over the last 30 years has not worked as a prevention tool - it's been too focused on simply avoiding legal liability. We believe effective training can reduce workplace harassment, and recognize that ineffective training can be unhelpful or even counterproductive. However, even effective training cannot occur in a vacuum - it must be part of a holistic culture of non-harassment that starts at the top. Similarly, one size does *not* fit all: Training is most effective when tailored to the specific workforce and workplace, and to different cohorts of employees. Finally, when trained correctly, middle-managers and first-line supervisors in particular can be an employer's most valuable resource in preventing and stopping harassment.¹⁷

The Value of In-Person, Interactive Training

To that end, we propose that New Jersey provide in-person, interactive training, rather than online or other forms of passive training, as a way to increase employees' active participation in and their likelihood of benefitting from sexual harassment training. In keeping with its position that training must be effective rather than perfunctory, the EEOC recommends training be conducted by "qualified, live, and interactive trainers."¹⁸ In addition, some states have required (such as California)¹⁹ or, at least, acknowledged a preference for (such as Connecticut and Maine) interactive training.²⁰ Connecticut's Commission on Human Rights and Opportunities indicates that interactive trainings are preferable because participants understand that a trainer is available to respond to their questions.²¹ Finally, psychological studies show that participative trainings involving interactive exercises and discussion are more effective than passive online and video trainings.²²

The High Costs of Sexual Harassment

The cost of sexual harassment in the workplace is a high one, and one that New Jersey cannot afford. Workplace harassment issues generate significant costs. A 2017 study by the business insurance company Hiscox Inc. found that employment charges against small- to medium-sized businesses resulted in average defense costs of \$160,000, in matters that took an average of 318 days to resolve.²³ In addition, employers can spend between \$75,000 and \$125,000 to defend cases through discovery and a ruling on a motion for summary judgment. For employers who lose summary judgment, they can expect to spend \$175,000 to \$250,000 on

average to take a case to verdict at trial.²⁴ This is a risky gambit for many employers, given that trials can bring reputational and financial harm because few employers are able to defend sexual harassment claims successfully. According to a study by the legal analytics firm Lex Machina, between January 2009 and July 2017 only 14% of lawsuits alleging harassment, discrimination or retaliation resulted in employer wins. While the study showed that the number of employee wins are even smaller (1%), it also revealed the cold financial truth: 78% of cases were likely settled.²⁵ That suggests that significant amounts are paid out by employers, if only to conclude the matter.

While there are no readily available statistics specific to New Jersey's public employers, several news reports show that sexual harassment cases have proven costly to them as well. For example, in a 2012 article, "*N.J. pays millions in sex harassment cases*" (which was reprinted and updated in March 2019 by NJ.com), the Associated Press reported that between 2006 and September 2011, New Jersey's state agencies received 913 sexual harassment complaints and paid out \$3.9 million in taxpayer dollars to settle sexual harassment claims. Settlements averaged \$145,000 apiece, with nine totaling at least \$200,000.²⁶ More recently, an August 26, 2019 TapInto.net article reported that "*Union County Says \$395,000 Sexual Harassment Settlement was 'Business Decision.'*"²⁷ As with employers in the private sector, it appears that public employers are also compelled to make costly business decisions to address sexual harassment claims after the fact.

The Costs of Ignoring Workplace Harassment

Ignoring sexual harassment issues is costly even when charges are not formally filed. The negative impacts of sexual harassment on individuals are well-documented by medical, psychological and occupational researchers. In environments where sexual harassment is left unchecked, employers suffer higher rates of employee turnover.²⁸ One 2007 psychological study indicates that even when harassed employees stay with their employer, employers lose an average of \$22,500 per person in productivity costs.²⁹ That study also revealed that sexual harassment experiences can cause decreased job satisfaction, lower organizational commitment, withdrawal from work, ill physical and mental health, a reduction in life satisfaction and well-being, and symptoms of post-traumatic stress disorder.³⁰ More recent studies from medical (2015) and advocacy (2018) groups suggest that employees who have been harassed or bullied at work are more likely to take at least two weeks off from work.³¹ Industrial psychologists and advocacy groups also issued 2018 studies which show that even less severe and pervasive forms of harassment can harm psychological well-being³² and act as dangerous distractions for employees in safety-sensitive positions.³³

A 2018 study by the U.S. Merit Systems Protection Board confirmed that these adverse effects are prevalent in the public sector. The study found that 1 in 7 federal employees experienced sexual harassment in 2014 and 2015. 12% of these employees changed jobs or locations and 22% of harassed employees reported that productivity was reduced. 17% used annual leave, 17% used sick leave, 13% were denied a promotion, pay increase, good performance rating, or good reference, 6% transferred or quit, and 5% were reassigned or

transferred against their wishes. Employees who observed or experienced sexual harassment felt less inspired to do their best work.³⁴

The numbers confirm that which we all likely know: when sexual harassment goes unchecked, it disrupts the workplace, lowers productivity, and demoralizes employees.

Conclusion

In light of the indisputable benefits of raising awareness on the prevention of harassment, as well as the dire costs of allowing sexual harassment, we respectfully urge the New Jersey Division on Civil Rights, along with its partners at the New Jersey Coalition Against Sexual Assault and Rutgers Law School International Human Rights Clinic, to recommend that New Jersey mandate in-person, interactive sexual harassment training for all New Jersey employees.

¹ Assembly Concurrent Res. 10, 218th Leg., 1st Sess. (N.J. 2018).

² SB 1343 (Cal. 2018); AB 1825 (Cal. 2004); “Sexual Harassment FAQs.” California Department of Fair Employment and Housing. Accessed October 14, 2019. <https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/>.

³ Conn. Gen. Stat. § 46a-54-200 - 46a-54-207 (1993); Pub. Act No. 19-16, Reg. Sess. (Conn. 2019); Pub. Act No. 19-93, Reg. Sess. (Conn. 2019).

⁴ House Substitute 1 for HB 360, 81:399, 149 Gen. Assembly (Del. 2018).

⁵ 26 Me. Rev. Stat. Ann. § 807 (2017).

⁶ “Combating Sexual Harassment in the Workplace: Employers.” New York State, June 14, 2018. <https://www.ny.gov/combating-sexual-harassment-workplace/employers>; Stop Sexual Harassment in NYC Act, Local Law No. 96, 2018 Leg. (N.Y. City 2018).

⁷ Pub. Act. No. 101-0221, 101st Reg. Sess. (Ill. 2019).

⁸ Ill. Comp. Stat., Chap. 775, § 2-105(B)(5) (2019).

⁹ Tenn. Code § 4-3-1703 (2010).

¹⁰ Every 2 years. Nev. Admin. Code ch. 284 § 496 (2003).

¹¹ Annual. HB 524 (La. 2018).

¹² Utah Admin. Code r. 477-15-6 (2019).

¹³ Pa. Code § 7.595 (2002).

¹⁴ “FY 2009-2018 EEOC Charge Receipts by State (Includes U.S. Territories) and Basis.” U.S. Equal Employment Opportunity Commission. Accessed October 9, 2019. https://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm.

¹⁵ Ibid.

¹⁶ Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, Executive Summary & Recommendations; https://www.eeoc.gov/eeoc/task_force/harassment/report_summary.cfm.

¹⁷ Ibid.

¹⁸ Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

¹⁹ “Sexual Harassment FAQs.” California Department of Fair Employment and Housing. Accessed October 14, 2019. <https://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/sexual-harassment-faqs/>.

²⁰ “Maine Human Rights Commission Suggests Interactive Training Under Sexual Harassment Prevention Law.” Jackson Lewis P.C., March 30, 2005; Connecticut Commission on Human Rights and Opportunities Informal Opinion Letter, May 19, 2003.

²¹ Connecticut Commission on Human Rights and Opportunities Informal Opinion Letter, May 19, 2003.

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- ²² Kalinoski, Zachary T., Debra Steele-Johnson, Elizabeth J. Peyton, Keith A. Leas, Julie Steinke, and Nathan A. Bowling. "A Meta-Analytic Evaluation of Diversity Training Outcomes." *Journal of Organizational Behavior* 34, no. 8 (November 5, 2012): 1076–1104; Cascio, Jessica L. "Sexual Harassment Training: A Comparison of Didactic, Online, and Participative Methods." Lamar University - Beaumont, 2010.
- ²³ "The 2017 Hiscox Guide to Employee Lawsuits." New York, NY: Hiscox Inc., November 2017.
- ²⁴ Hyman, Jon. "How Much Does It Cost to Defend an Employment Lawsuit?" LexisNexis Legal NewsRoom, May 14, 2013.
- ²⁵ Captain, Sean. "Workers Win Only 1% Of Federal Civil Rights Lawsuits At Trial." Fast Company, July 31, 2017.
- ²⁶ The Associated Press. "N.J. Pays Millions in Sex Harassment Cases." NJ.com, March 30, 2019.
- ²⁷ Haydon, Tom. "Union County Says \$395,000 Sexual Harassment Settlement was 'Business Decision.'" TapInto.net, August 26, 2019.
- ²⁸ Chan, Darius K-S, Suk Yee Chow, Chun Bun Lam, and Shu Fai Cheung. "Examining The Job-Related, Psychological, and Physical Outcomes of Workplace Sexual Harassment: A Meta-Analytic Review." *Psychology of Women Quarterly* 32, no. 4 (December 1, 2008): 362–76; Fitzgerald, Louise F., Fritz Drasgow, Charles L. Hulin, Michele J. Gelfand, and Vicki J. Magley. "Antecedents and Consequences of Sexual Harassment in Organizations: A Test of an Integrated Model." *Journal of Applied Psychology* 82, no. 4 (1997): 578–89; Sims, Carra S., Fritz Drasgow, and Louise F. Fitzgerald. "The Effects of Sexual Harassment on Turnover in the Military: Time-Dependent Modeling." *Journal of Applied Psychology* 90, no. 6 (2005): 1141–52; Purl, Justin, Kathleen E. Hall, and Rodger W. Griffith. "A Diagnostic Methodology for Discovering the Reasons for Employee Turnover Using Shock and Events." In *Research Handbook on Employee Turnover*, edited by George Saridakis and Cary L. Cooper, 213–46. New Horizons in Management. Northampton, MA: Edward Elgar Publishing, 2016; McLaughlin, Heather, Christopher Uggen, and Amy Blackstone. "The Economic and Career Effects of Sexual Harassment on Working Women." *Gender & Society* 31, no. 3 (May 10, 2017): 333–58; Boushey, Heather, and Sarah Jane Glynn. "There Are Significant Business Costs to Replacing Employees." Center for American Progress, November 16, 2012; Shaw, Elyse, Ariane Hegewisch, and Cynthia Hess. "Sexual Harassment and Assault at Work: Understanding the Costs." Institute for Women's Policy Research, October 15, 2018.
- ²⁹ Willness, Chelsea R., Piers Steel, and Kibeom Lee. "A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment." *Personnel Psychology* 60, no. 1 (February 22, 2007): 127–62.
- ³⁰ Ibid.
- ³¹ Khubchandani, Jagdish, and James H. Price. "Workplace Harassment and Morbidity Among US Adults: Results from the National Health Interview Survey." *Journal of Community Health* 40, no. 3 (June 2015): 555–63; Shaw, Elyse, Ariane Hegewisch, and Cynthia Hess. "Sexual Harassment and Assault at Work: Understanding the Costs." Institute for Women's Policy Research, October 15, 2018.
- ³² Schneider, Kimberly T., Suzanne Swan, and Louise F. Fitzgerald. "Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations." *The Journal of Applied Psychology* 82, no. 3 (June 1997): 401–15; Schneider, Kimberly T., Joe Tomaka, and Rebecca Palacios. "Women's Cognitive, Affective, and Physiological Reactions to a Male Coworker's Sexist Behavior." *Journal of Applied Social Psychology* 31, no. 10 (2001): 1995–2018; Shaw, Elyse, Ariane Hegewisch, and Cynthia Hess. "Sexual Harassment and Assault at Work: Understanding the Costs." Institute for Women's Policy Research, October 15, 2018; Fitzgerald, Louise F., and Lilia M. Cortina. "Sexual Harassment in Work Organizations: A View from the 21st Century." In *APA Handbook of the Psychology of Women: Perspectives on Women's Private and Public Lives, Vol. 2*, 215–34. APA Handbooks in Psychology Series. Washington, DC, US: American Psychological Association, 2018.
- ³³ Sugerman, Lauren. "#MeToo in Traditionally Male-Dominated Occupations Preventing and Addressing Sexual Harassment." National Center for Women's Equity in Apprenticeship and Employment at Chicago Women in Trades, June 2018.
- ³⁴ U.S. Merit Systems Protection Board Office on Policy and Evaluation. "Update on Sexual Harassment in the Federal Workplace," March 2018.