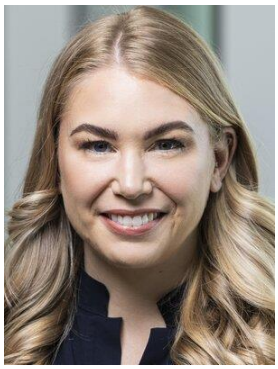
In Focus At The EEOC: Preventing Systemic Harassment

By **Ally Coll and Shea Holman** (October 16, 2023)

Following the recent finalization of the U.S. Equal Employment Opportunity Commission's strategic enforcement plan for fiscal years 2024-2028, this Expert Analysis series examines each of the commission's six priorities — highlighting issues that may arise, and the practices and policies that employers can implement to ensure a safe and equitable workplace for all.



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On Sept. 21, the U.S. Equal Employment Opportunity Commission released its strategic enforcement plan, or SEP, for fiscal years 2024-2028.[1] The purpose of the SEP is to focus and coordinate the agency's work over a multiple-year period.

Among the EEOC's enumerated priorities is a renewed commitment to preventing and remedying systemic workplace harassment, with a focus on strong enforcement and providing targeted equitable relief to address and prevent future harassment.

Six years after Tarana Burke's long-standing #MeToo movement went viral in 2017, harassment — both in person and online — remains a serious issue in our nation's workplaces. Strikingly, over 34% of the charges of employment discrimination filed with the EEOC between fiscal years 2018 and 2022 included an allegation of harassment.[2] Specifically, sexual harassment charges spiked, increasing from 5,581 in fiscal year 2021 to 6,201 in fiscal year 2022.[3]

To combat this persistent problem, the EEOC recommitted to a strong enforcement scheme bolstered by monetary relief and targeted equitable relief to prevent future harassment.

According to the SEP: "The EEOC will also focus on promoting comprehensive anti-harassment programs and practices, including training tailored to the employer's workplace and workforce, using all available agency tools, including outreach, education, technical assistance, and policy guidance."

While the EEOC has been focusing on addressing workplace harassment for decades, the commission's recently proposed harassment guidance accompanying the SEP provides important takeaways and insights for employers seeking to comply with the agency's requirements.

Ensure policies and trainings address virtual and online harassment.

A recent survey conducted by nonprofit newsroom The 19th found that in-person employees "are more than twice as likely to experience sexual harassment at work compared to remote employees."[4] However, this may not be the whole story.

According to research we conducted in collaboration with TalentLMS in 2021, employees

who aren't trained on how to identify remote harassment are less likely to recognize it — and therefore less likely to report it when it occurs. Sexual harassment training significantly increases people's ability to identify incidents when they happen.[5]

Thus, rather than assuming that remote or virtual harassment isn't a workplace problem because people aren't reporting it, employers should ensure that they are training employees on specific examples of remote or virtual harassment. This can include harassment over text, phone, videoconference, internal messaging systems, and even on social media.

Ensuring that anti-harassment training includes specific scenarios that educate employees about such instances of harassment will go a long way toward preventing it, and encouraging employees to report it when it does occur.

The EEOC's SEP demonstrates an understanding that as people have moved into hybrid forms of work, harassment has changed in nature. Further, many employees are ill-equipped to deal with this change since many companies may have failed to proactively adjust policies and procedures for the hybrid workplace, train their workforce on how to recognize new forms of harassment, or inform employees about how to report misconduct if they're not physically present in the office.

One extreme example from the pandemic involved Jeffrey Toobin, the New Yorker staff writer who was fired for exposing himself while live on a Zoom meeting.[6] Most instances of inappropriate online behavior tend to be more subtle and more difficult to recognize as harassment. The use of social media in the workplace has also left many employees feeling like traditional rules don't apply, and like the line between work and home life has been blurred.

To address these new forms of harassment, employers should create a robust social media policy that outlines the company's expectations for social media usage, gives examples of types of prohibited conduct on social media and other virtual technology channels, and communicates the range of corrective action that may be taken in response to violations of this policy.

Make anti-harassment and retaliation policies accessible and relatable.

Once policies are clearly established, it is critical to ensure that employees are trained on them through annual anti-harassment training. Clear and accessible information is critical not only for promoting compliance with federal equal employment opportunity laws and informing individuals of their rights, but also for creating a workplace where employees feel comfortable coming forward and speaking up about misconduct.

According to a recent Monster poll, 45% of workers are unaware of their company's workplace discrimination policies.[7] The best policies are moot if employees don't know where or how to access them.

Thus, employers should establish clear standards of behavior and be upfront in communicating their policies regularly to employees. Policies shouldn't be shrouded in unnecessary legalese, but should be comprehensible to employees at all levels of the organization.

Be clear about the difference between the law's definition of harassing and discriminatory behaviors versus the company's values or expectations that go above and beyond the legal

definitions, and use specific examples to demonstrate how the policies play out in the workplace. Tailoring anti-harassment training to each employer's unique industry, and providing examples that resonate with an employer's unique workforce, can go a long way toward ensuring employees understand company policy.

Once leaders have drafted comprehensive policies addressing harassment, discrimination and workplace expectations, they must go a step further. Employer responsibility also includes protecting employees who report misconduct.

A recent report from Ethisphere found that between 42% and 47% of employees across generational lines did not report misconduct because they feared retaliation.[8] This data exemplifies why it's important to create and enforce an anti-retaliation policy.

Further, employers should proactively share information about misconduct more broadly, including data about the number of reports made each year, the basis for those reports, and the various actions taken in response to substantiated reports. Employees will feel more comfortable accessing the resources listed in company policies if they recognize that the company takes issues seriously and they feel protected by their employer.

Address workplace harassment through an intersectional lens.

The EEOC's SEP makes clear that the agency is focused on addressing harassment as a systemic problem, and has renewed its commitment to protecting vulnerable workers and persons from underserved communities. The #MeToo movement exposed a systemic problem not only with sexual harassment, but also other forms of workplace discrimination.

The EEOC's new SEP makes clear that the agency will focus on "combatting systemic harassment in all forms and on all bases," including harassment on the basis of race, disability, religion, gender identity, and sexual orientation. This commitment reflects the reality that individuals often are subjected to harassment on the basis of more than one identity group, and that harassment therefore compounds, particularly for employees with overlapping marginalized identities.

For example, an employee may be subjected to harassment on the basis of race and gender, or ethnicity and religion. Women of color in particular are not only more likely to be subjected to harassment, but also less likely to be believed when they report it.[9]

According to a report from New America, "workers in low-wage, female-dominated industries have the highest reported incidences of sexual harassment and assault by sector."[10] Further, they are often hired as independent contractors.

As a result, they are frequently not protected by anti-discrimination or labor laws, which typically only cover employees. This means they don't have standing under the law to seek legal recourse in the event that they're sexually harassed, and they are not covered by employer sexual harassment policies

Any holistic anti-harassment policy must acknowledge and address the problem's intersectionality — a term coined by Kimberlé Crenshaw, a professor at Columbia Law School and UCLA School of Law, to explain how people who share one identity characteristic, such as race, may experience discrimination and subordination differently based on divergent intersecting identity characteristics.

Practically, this means ensuring that written policies contain definitions of various forms of

harassment, and that anti-harassment trainings contain realistic scenarios demonstrating how people with overlapping marginalized identities experience compounding harassment and discrimination in the workplace.

Employers should also ensure that investigation and corrective action procedures and timelines don't prioritize one category of harassment — such as sexual harassment — over other categories in their thoroughness or immediacy.

Recommit to diversity, equity and inclusion.

Given the importance of addressing harassment as an intersectional problem, and despite recent lawsuits challenging corporate diversity, equity and inclusion, or DEI, programs, organizations should recommit to such programs as part of a holistic effort to create safe and inclusive workplaces.

In Students for Fair Admissions Inc. v. President and Fellows of Harvard College, the U.S. Supreme Court on June 29 departed from decades of its own affirmative action precedent and struck down race-conscious admissions programs at Harvard University and the University of North Carolina at Chapel Hill for violating the 14th Amendment's equal protection clause.

Writing for the majority, Chief Justice John Roberts reiterated his long-standing view that "eliminating racial discrimination means eliminating all of it," and made clear that programs designed to promote diversity must treat applicants "based on his or her experiences as an individual — not on the basis of race."[11]

Although the SFFA ruling does not have direct precedential effect on similar diversity programs in the private sector — which is not generally subject to either the 14th Amendment's equal protection clause or Title VI of the Civil Rights Act — opponents of corporate DEI efforts have been quick to point out its potential implications for corporate DEI programs.

America First Legal, a politically conservative organization led by Stephen Miller — who served as former President Donald Trump's senior policy adviser — issued a statement on the same day as the Supreme Court's SFFA decision "putting woke corporations…on notice that all DEI programs, and all 'balancing' in employment, training, scholarships, and promotions, based on race, national origin, or sex are illegal."[12]

A few days after the SFFA decision, 13 Republican state attorneys general sent a letter to chief executives of the 100 largest U.S. companies reminding them of their "obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise."

Furthermore, in the months following the SFFA ruling, America First Legal urged the EEOC to investigate Activision Blizzard Inc. and Kellogg Co. over the companies' alleged use of gender and racial preferences in hiring and internship programs. Additionally, the organization brought direct litigation on behalf of individual plaintiffs against Target Corp. and Amazon.com Inc. challenging the companies' DEI programs.

The recent spate of lawsuits against organizations that support diversity and inclusion has led some companies to backtrack on DEI initiatives. But remember, even in the wake of the SFFA ruling, it remains lawful for employers to implement programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.

Plus, according to a recent report by Benevity, employees continue to vote with their feet: "95% of employees ... weigh a prospective employer's DEI efforts when choosing between job offers with similar salary and benefits" and 78% "would not consider working for a company that fails to commit significant resources to DEI initiatives."[13]

Rather than abandoning DEI initiatives, companies should adhere to guidance, such as a recent diversity advancement report issued by the New York State Bar Association,[14] on how to promote such efforts while minimizing liability risk.

Conclusion

Workplace harassment is not a new problem — as the EEOC points out in the introduction to its draft enforcement guidance on workplace harassment, it has been 37 years since the Supreme Court first held in Meritor Savings Bank, FSB v. Vinson[15] that workplace harassment can constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964.

Yet the EEOC's renewed commitment to the issue in its SEP reflects the reality that, while the workforce has changed dramatically since that 1986 decision, the problem of workplace harassment remains pervasive and systemic. Rather than seeing the issue as one from a bygone era, employers should take the time to understand the evolving nature of workplace harassment and, in doing so, enhance the safety and inclusivity of their workplaces while adhering to the EEOC's enforcement guidelines.

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[1] https://www.eeoc.gov/strategic-enforcement-plan-fiscal-years-2024-2028.

[2] Id.

[3] Id.

[4] https://19thnews.org/2023/09/poll-remote-work-decrease-sexual-harassment/.

[5] https://www.talentlms.com/employee-harassment-training.

[6] https://www.cnn.com/2021/06/10/media/jeffrey-toobin-returns-cnn/index.html.

[7] https://hiring.monster.com/resources/blog/monster-poll-workplace-discrimination/.

[8] https://ethisphere.com/2023-culture-report/.

[9] https://weasourselves.org/learn-more/.

[10]https://www.newamerica.org/better-life-lab/reports/sexual-harassment-severe-and-pervasive-problem/making-ends-meet-in-the-margins-female-dominated-low-wage-sectors/.

[11] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. _____ (2023) (slip op.).

[12] America First Legal Puts Woke Corporations, Law Firms, and Hospitals on Notice: All DEI Programs and Workplace "Balancing" Based on Race, National Origin, and Sex Violate the Law, America First Legal (June 29, 2023), https://aflegal.org/america-first-legal-puts-woke-corporations-law-firms-and-hospitals-on-notice-all-.dei-programs-and-workplace-balancing-based-on-race-national-origin-and-sex-violate-the-law/.

[13] https://cdn.bfldr.com/ZZ11QL2O/at/6bpw94vrt588vtc8gr3fgw5/C001_Benevity_TheStateofWorkplaceDEI_.Final.

[14] https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf.

[15] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).