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PERSPECTIVE

Workplace sexual harassment in 2017: Who is to blame?

By Judy Droz Keyes

For over 30 years, it's been the law of the land that sexual harassment in the workplace (at least most workplaces) violates equal employment laws. Unwelcome conduct of a sexual nature that either is a condition of employment or creates a hostile environment is almost certainly illegal if one of the employer's agents (a manager or supervisor) either engages in it or is aware of it and condones it or tolerates it. Companies are required to investigate complaints of harassment and to take prompt and effective remedial action if it has occurred — and to take steps to be sure it doesn't happen again. Some states, like California, require frequent and focused training of managers to be sure they know the rules around harassment, and the consequences of failing to abide by them. Pamphlets and posters and policies inform employees of their right to a harassment-free workplace and of their right to report harassment — to human resources, to management, to hotlines, to government agencies. Employees are told not only that reporting harassment is their duty, but also that retaliation for doing so is illegal.

In view of all this, the recent spate of claims of horrific harassment is dispiriting, to state it mildly. As one who has practiced employment law for over 40 years, I have to join in the chorus of voices asking: How can this be? Who is to blame? What can we do?

Who Is to Blame?

"Blame" may not be the right word. A better question may be: Who is responsible for allowing sexual harassment in the workplace to remain as rampant as it appears to be, more than 30 years after it became illegal and long after it should have been recognized simply as wrong? Here are some of those who bear some of the responsibility.

The Harassers. The (usually powerful) people who know or should know that it's wrong but either don't think the rules apply to them, or don't think they will be caught, or don't care (because they are powerful).

The Leaders. Directors and chief officers of corporations, elected officials in government — those at the top who are supposed to set the tone and draw the line, and who do not.

Human Resource Professionals. Those whose job it is to write and implement policy and to enforce the policy and the law, and who too often either are powerless to do the right thing, or interpret the "right" thing as protecting the organization and/or the harasser and silencing the victim.

Supervisors and Coworkers. Those all-too-frequently numerous employees who become enablers by remaining silent about harassment, even covering it up.

The Harassed. Those who experience harassment, but do not promptly speak up, report it, challenge it, expose it.

The System. Government agencies like the EEOC that are underfunded and do not provide the kind of oversight and en-

forcement that once was imagined, and the legislatures that do not respond.

What Can We Do?

There is no magic cure. But I submit that acquiescing in the status quo is not an option. Here are some ideas for shaking things up a bit, actions that may in time have a positive impact.

Set the Tone at the Top. No policy will ever be as effective as a leader who makes clear that harassment goes against the very grain of the organization and will not be tolerated not only because it is against the law and violates policy, but because it is wrong. CEOs and directors who talk this talk, and walk this walk even when it's hard, will make a huge difference. Having more women as CEOs and directors might help.

Empower Human Resources. Until an organization is of a certain size, having an HR department may not be feasible. But even in these situations, there should be someone — either inside the organization or outside of it — who is identified as a go-to person for perceived harassment and discrimination, and that person should have a direct line to, and the respect of, the founder or CEO. Once an organization is big enough, it should have an HR executive who is skilled and savvy and respected within the organization. He or she should report directly to the CEO and should have access to the Board, and should be recognized as a leader. Most importantly, the HR Executive should be charged with, and rewarded

for, preserving the organization's commitment to a harassment-free workplace — not for pretending that problems don't exist, or shoving them under the rug if they do.

Conduct Meaningful Training. Sex harassment training is too often ineffectual, designed more to "check the box" in order to protect the company than to rout out and eliminate the scourge of harassment. Much of the available online training is hackneyed; although it may be better than no training at all, such training can backfire in its suggestion that the company trivializes the issue. Serious, professional, credible training for both rank-and-file employees and managers seems the least that should be done. Seminars designed specifically for senior executives and boards of directors, focusing on their unique role and responsibility, should be added to annual planning sessions or monthly meetings.

Hold Harassers Accountable. Harassment should be viewed as the serious threat to the organization that, in fact, it is. It should be treated as seriously as embezzlement, or the theft of a trade secret. No company considers a written warning and sensitivity training to suffice as punishment for an embezzler; neither should it for a harasser. And, a propos the confidentiality issue described below, consideration should be given to (appropriately) publicizing the discipline of a harasser, so the word gets out that the organization is serious about not tolerating it.

Hold Enablers Accountable. Everyone knows it's easier to look the other way than to report harassment — especially when the harasser is a person of power. No one, no one, should blame the victim of harassment for causing the harassment. But still, it must be said that part of the responsibility for the current state of affairs is the failure of those who witness harassment, and those who experience harassment, to speak up, to report it, to challenge it, to expose it. Aiding and abetting a crime is a crime. Aiding and abetting harassment may be a violation of law and should certainly be a violation of policy. Serious discipline of employees who know of harassment and fail to report it should help eliminate it. The other side of that coin, it must be said, is serious discipline of anyone who retaliates against an employee who has in good faith reported harassment.

Investigate Fully and Carefully. Not every claim of harassment has merit, and not every report of harassment is fully accurate. There may be conflicting reports, or relevant background facts. There may be a malicious motive in making a false claim of harassment. In these and

similar situations, the law and logic require an investigation. This is a serious responsibility. The absence of a “formal complaint” or a complaining “victim” doesn't make it any less so. It's not easy to conduct a proper investigation, one that is prompt, objective, and thorough, and it's especially hard when the claim is made anonymously through a hotline (as companies are encouraged to have). It's further complicated when some of the players are former employees, or are on leave, or work in far flung places. It's challenging when the accused plays an important role in the company or is a public figure. Protecting the privacy of everyone involved and the confidentiality of the investigation while being as thorough as the situation requires, is tricky. Making a determination when it is “he said, she said” requires particular expertise. Too often, Human Resources personnel, as skilled as they may be at their jobs, are called upon to do investigations when they really can't. It's not fair to them, to the participants, to the organization — to anyone. Using an outside professional investigator, as unattractive an option as that may be, may be the only solution in

one of these hard situations.

Reevaluate Confidentiality. Confidentiality of settlement agreements, including separation agreements and release agreements, has become the norm. Except when governmental entity is a defendant or, sometimes, when a government agency is actively involved, organizations and employees alike often expect that their settlement will be confidential. Companies' concerns of reputational harm and “copy-cat” claims are legitimate, as are employees' concerns of being “black-balled” in their profession or industry. Where individuals and companies are confident in their position that there was no harassment, they may nonetheless want to settle just to be rid of the claim if they can do so without creating an inference of guilt. Confidentiality addresses these concerns, to be sure. But what if, instead, there was an agreed-upon statement about what would be said about the settlement? A statement that included a measure of disclosure, and assurance of the company's commitment to a harassment-free workplace? What if a light were shone on the positive aspects of an employee's having the courage to con-

front harassment and an organization's having the integrity to accept responsibility and to right a wrong? Might that become the new norm?

As long as there are human beings in the workplace, there will be friction, including harassment. As T.S. Eliot posited in “Choruses from the Rock,” it is foolish to imagine that we can, “dream[] of systems so perfect that no one will need to be good.” But as we enter 2018, maybe we can be imagining that doing a few things differently might just result in at least the most rampant, most repugnant forms of sexual harassment becoming rarer — and eventually, just maybe, becoming unimaginable.

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