

# New Jersey Law Journal

Reprinted with permission from the March 19, 2018, issue of the *New Jersey Law Journal*.

Further duplication without permission is prohibited. All rights reserved.

© 2018 ALM Media Properties, LLC.

## A Preview of Proposed EEOC Enforcement Guidance and Effects of #MeToo

Combatting workplace harassment with “fully resourced” complaint systems, independent investigations and a new approach to training

By **Kirsten Scheurer Branigan and Jessica Stein Allen**

Last year’s #MeToo movement thrust the systemic workplace sexual harassment epidemic into the national spotlight. This pervasive crisis, however, has long persisted across all industries. Now, more than ever, employers need specific universal guidance on how to prevent and remediate sexual harassment as well as other forms of workplace harassment. The much anticipated 2017 Enforcement Guidance on Unlawful Harassment from the U.S. Equal Employment Opportunity Commission [hereinafter “proposed Guidance”] will provide critical and concrete methods to combat harassment in the workplace. The proposed Guidance explains the legal standards for unlawful harassment and will replace earlier guidance issued in the 1990s. Significantly, the proposed Guidance has been the culmination of a far-reaching EEOC study, which began even before the recent #MeToo movement fully materialized.

In 2015, the EEOC formed a Select Task Force on the Study of Harassment in the Workplace, co-chaired by Chai R. Feldblum

and Victoria A. Lipnic. The co-chairs released their findings in a comprehensive Report and Executive Summary & Recommendations to the EEOC in June 2016, which focused on identifying ways to renew efforts to prevent harassment. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic (June 2016).

Further, in the wake of the #MeToo movement, on Nov. 22, 2017, the EEOC issued best practices entitled, “Promising Practices for Preventing Harassment,” which includes checklists and other tools identified in the Select Task Force testimony and the Select Task Force Co-Chairs’ Report. The Promising Practices mirror the core principles and much of the information set forth in the proposed Guidance. <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

The statistics on allegations of workplace harassment are staggering. As detailed by the Select Task Force Co-Chairs’ Report,

nearly a third of the 90,000 EEOC charges received by the Commission in 2015 included allegations of workplace harassment, under multiple protected areas, including on the basis of sex, sexual orientation, gender identity, pregnancy, race, disability, age, ethnicity, national origin, color and religion. *See* Executive Summary at 1. Even more troubling is that approximately three out of four harassed employees never report the conduct, and current methods aimed at prevention have been ineffective. *See id.* at 2.

Significantly, the proposed Guidance, which works in tandem with the Select Task Force Co-Chairs' Report and Executive Summary, will serve as a resource for employers, employees and practitioners seeking detailed information about the position of the EEOC on unlawful harassment; and for employers seeking concrete effective measures, such as having a complaint reporting system, investigation procedure and compliance training to fight workplace harassment. *See* Executive Summary at 5.

The proposed Guidance and companion Select Task Force Co-Chairs' Report outline five key measures, which have generally proven effective in preventing and remedying harassment. They are: (1) strong and committed leadership; (2) regular and proven accountability; (3) robust and comprehensive harassment policies; (4) reliable and accessible complaint procedures, which include prompt and thorough investigations of harassment; and (5) routine, interactive (preferably live) training tailored to the specific workforce and workplace. *See* proposed Guidance at 68. These five core principles are interrelated in that effective anti-harassment policies, including complaint procedures and resolution as well as workplace investigations and compliance training cannot be implemented and made a priority

without strong leadership and accountability from senior officials and managers who must develop and maintain a culture of respect. *See id.* at 69. Without a commitment that harassment will not be tolerated from the highest levels of an organization's leadership, and without effective anti-harassment policies and protocols, a culture of harassment, inaction and fear of reprisal will continue to fester.

In addition to having effective anti-harassment policies, which should include a statement that employers will undertake prompt, impartial and thorough investigations, *See id.* at 71, the proposed Guidance provides concrete recommendations for creating and ensuring an effective harassment complaint reporting system, which includes conducting proper and comprehensive investigations. An effective harassment complaint system contains the below measures, as well as others:

- Is fully resourced, enabling the organization to respond promptly, thoroughly and effectively to complaints;
- Welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation;
- Provides prompt, thorough and neutral investigations; and
- Protects the privacy of alleged victims, individuals who report harassment, witnesses, alleged harassers and other relevant individuals to the greatest extent possible, consistent with a thorough and

impartial investigation with relevant legal requirements.

*See id.* at 72.

Further, those employees who are responsible for receiving, investigating and resolving complaints should be neutral, independent and well-trained to perform these critical functions. *See id.* at 72-73. The importance of using professional trained individuals cannot be understated. They must be able to “appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).” *See id.* at 73. Employers often engage experienced external attorney investigators who can independently evaluate harassment allegations and assess credibility.

While the proposed Guidance does not define “fully resourced” harassment complaint systems, based upon the many areas highlighted, there is a clear expectation that employers devote monetary resources and time to ensure that the mechanisms for reporting and addressing complaints work. If employers fail to devote sufficient resources, such efforts may in fact be deemed unreasonable and lead to an inadequate result. The “fully-resourced” requirement would likewise serve to avoid “sham investigations,” and/or investigations where the conclusions are limited because an investigator is limited from assessing the full breadth of evidence.

Another core principle is providing effective harassment training for all employees so they can identify unlawful forms of harassment and understand how to use the

reporting system. Indeed, the commitment from leadership and anti-harassment policies will only be operative if the entire workforce is aware of them. The EEOC urges that there be comprehensive training that is interactive (and preferably live) for the entire workforce—supervisory and non-supervisory alike—performed by qualified trainers. Such training should be routinely evaluated by the participants and ensure that all employees understand “organizational rules, policies, procedures, and expectations, as well as the consequences of misconduct.” *See id.* at 73. There should be an unequivocal statement that retaliation is prohibited and will not be tolerated, and that no action will be taken against those who make good faith complaints and/or participate in investigations, regardless of whether the alleged conduct is found to violate the harassment policy. *See id.* at 74. The proposed Guidance outlines specific recommendations on additional training guidelines for supervisors and managers who have additional responsibilities concerning identifying and reporting harassment. *See id.* Finally, the proposed Guidance suggests that employers consider implementing new kinds of training, such as “workplace civility training and/or bystander intervention training, to prevent workplace harassment.” *See id.* at 75.

Not only will creating and implementing these effective measures aid in preventing and addressing workplace harassment, but robust anti-harassment policies, along with substantive complaint and investigation procedures, as well as supervisory and non-supervisory compliance training, could mean the difference in terms of an employer’s potential legal exposure for alleged supervisor harassment under New Jersey and federal Law. In the proposed Guidance, the EEOC reiterates its prior findings demonstrating how employers can

establish an affirmative defense for vicarious liability in accordance with the 1998 companion U.S. Supreme Court cases of *Burlington Indust. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), where the employer exercised reasonable care to prevent and promptly correct the harassing behavior, and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. In the 2015 seminal case of *Aguas v. State of New Jersey*, 220 N.J. 494, 499 (2015), the New Jersey Supreme Court provided guidance to employers defending such supervisory harassment claims under the New Jersey Law Against Discrimination and adopted the governing standards set forth by in *Faragher* and *Ellerth*. In *Aguas*, the court noted that an employer will be unable to avail itself of the prospect of an affirmative defense in litigation if the employer does not “unequivocally warn its workforce that sexual harassment will not be tolerated, [] provide consistent training, and [] strictly enforce its policy.” *See id.* at 523.

As the past year’s #MeToo movement has dramatically highlighted, a persistent and pervasive workplace harassment crisis exists—a crisis that must come to an immediate and permanent end. Victoria Lipnic, EEOC Task Force Co-Chair, recently commented that the impact of the #MeToo movement has not yet resulted in increased filing of EEOC Charges, but she has been informed of increases in prelitigation demand letters that may result in filing of EEOC Charges. *See* “EEOC Sees No Increase in Charges Since Start of MeToo” Law360 (March 13, 2018). Employers are poised to play a critical role in combating workplace harassment.

Armed with effective tools, such as a commitment from leadership and

accountability, as well as strong anti-harassment policies, complaint procedures, prompt and independent investigations, and universal interactive compliance training, employers across all industries can help abate and prevent harassment in the workplace. While awaiting the approval of the proposed Guidance by the U.S. Office of Management and Budget, the proposed Guidance cannot be released soon enough. Until such time, employers would be wise now to conduct a review and full audit of their existing anti-harassment policies, complaint procedures, investigation processes and harassment training and proactively update these measures consistent with the EEOC proposed Guidance. In fact, the Promising Practices materials and checklists recently issued by the EEOC are beneficial resources that employers may currently use to assist in their prevention and remediation efforts. *See* <https://www.eeoc.gov/eeoc/publications/promising-practices.cfm>.

*Branigan is the owner of the Law Office of Kirsten Scheurer Branigan in Nutley. Allen is Of Counsel with the Keefe Law Firm in Red Bank. While previously serving as an Assistant Attorney General with the New Jersey Office of Attorney General, Allen successfully argued the Aguas case before the New Jersey Supreme Court. Both Branigan and Allen are experienced employment lawyers and investigators, and serve as employment arbitrators with the American Arbitration Association.*