

Employment Issues in the Age of #MeToo

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Agenda

- **Understanding the power of #MeToo.**
- **The current climate pertaining to sexual harassment.**
- **A history of the evolution of sexual harassment as a violation of the law.**
- **The clairvoyance of the EEOC: EEO Task Force on Harassment in the Workplace.**
- **What an employer should do to prevent sexual harassment in the current climate.**

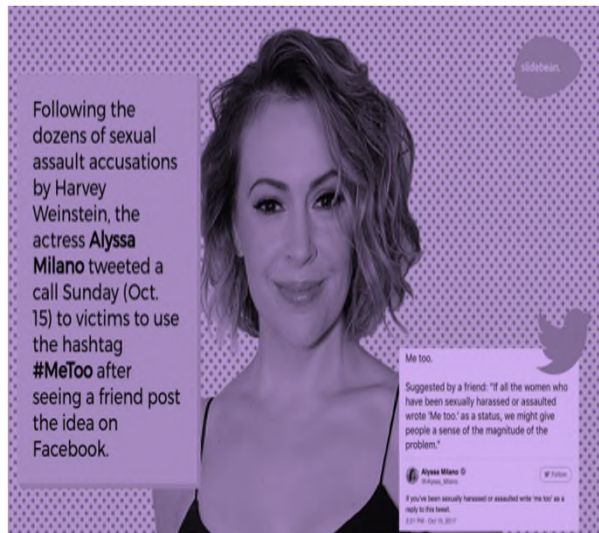
The History of the #MeToo Movement

Creator: Tarana Burke

- Movement was designed to help victims of sexual violence, particularly young women, find pathway to healing.
- Empowerment through empathy.
- Began in 2006.
- Exploded in October 2017.
- Original Purpose of #MeToo was not about taking down powerful men.
- #MeToo was about helping women in their journey of recovery.

The Tweet Heard Around the World

Following the dozens of sexual assault accusations by Harvey Weinstein, the actress **Alyssa Milano** tweeted a call Sunday (Oct. 15) to victims to use the hashtag **#MeToo** after seeing a friend post the idea on Facebook.



Tweet Stats:

- **500,000** people responded to Tweet in the first 24 hours.
- Twitter confirmed that over **1.7 million** Tweets had been made with the hashtag or its translations worldwide in just 9 days.
- Facebook revealed that in the 24 hours after Milano posted her Tweet, **12 million** posts and comments went up, and **45 percent of all U.S. users had friends who'd posted #metoo.**

Source: CBS News, October 24, 2017
www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/

Why Hasn't Sexual Harassment Disappeared?

Progress is measured in decades, not days.

Professor Anita Hill: *"We have to remember where we started on this, we are building, not only on the conversation from 1991, but the conversation that started in the 1970's and early '80s. But it's not a dialogue that's going to be concluded and wrapped up in a very short period of time."*

Video

<https://www.retroreport.org/video/why-hasnt-sexual-harassment-disappeared/>

Recognition of the Law on Sexual Harassment

- Civil Rights Act of 1964.
- The word "sex" added to VII by Southern leaders as an effort to kill the bill.
- Sexual harassment of women is over 200 years old.
 - Slave owners sexually abusing female slaves.
- Changes in the American Workplace in the 1970s.
 - Baby boomers entering the labor force in large numbers including many women.
 - Lin Farley - Cornell University Professor teaching "Women in Work!"
 - 4/1975 Farley testified at the New York City Human Rights' Commission hearings on women in work led by Holmes Norton.
 - Published "Sexual Shakedown: Sexual Harassment of Women in the Working World" (June 1980).
 - The Christian Science Monitor: Book is "an overdue alert to the sexual harassment of working women by male employers which starkly reveals the emotional and physical degradations inflicted on women in the exploitive politics of power at their most base."

Recognition of the Law on Sexual Harassment (cont.)

- Farley the first definition of the term "sexual harassment": "Unwanted sexual advances against women employees by male supervisors, bosses, foremen or managers."
- Farley coined the phrase "Sexual Harassment" after learning that virtually every woman in her class had been forced out of a job or fired after rejecting sexual advances of boss.
- In 1981, Farley collaborated with Woody Clark and Al Brito on the documentary "The Workplace Hustle" which was intended as a training film for workplaces.
- Eleanor Holmes Norton - DC delegate to the House of Representatives, took it seriously.
 - Norton: First woman to head the Equal Employment Opportunity Commission.
 - Under her leadership, EEOC crafted the first set of guidelines to define sexual harassment in the workplace.

Delay in Enforcing Title VII

- Title VII: Passed in 1964.
- Workplace sex harassment not recognized until 1977.
 - *Barnes v. Castle*, 561 F.2d 987 (D.C. Cir. 1997).
 - First appellate decision recognizing sexual harassment.
 - Court found that invitation was made "because of" plaintiff's sex.
- Earlier cases before that refused to recognize sexual harassment.
 - *Corne v. Bausch & Lomb*, 390 F.Supp. 161, 163 (D. Ariz. 1975).
 - Supervisor-defendant's "conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, [supervisor] was satisfying a personal urge. Certainly no employer policy is here involved..."
 - *Tomkins v. Public Service Electric & Gas Co.*, 422 F.Supp. 553, 556 (D.N.J. 1976)
 - "[Title VII] is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley..."

Additional Laws Prohibiting Sex Discrimination

- 1972: Title IX of the Education Amendments was issued.
 - It prevented sex discrimination in schools that received federal funding.
- 1980: EEOC states that sexual harassment is a form of sex discrimination prohibited by Title VII.

The Law Continued to Evolve Very Slowly

- 1986: *Meritor Savings Bank v. Binson*.
 - U.S. Supreme Court recognized sexual harassment as a violation of Title VII.
 - Court focused on whether conduct was "welcome" rather than "voluntary."
 - Opinion clarified levels of employer liability.
 - Recognized that sexual speech or conduct could create a hostile environment of sexual harassment and violate Title VII.

Media Reaction to *Meritor* Decision

- Peter Jennings reporting for ABC on 6/19/86:
 - "A very clear victory for working women. The court says that sexual harassment in the workplace is a form of discrimination and therefore against the law."
- Tim O'Brien reporting for ABC News on 6/19/86:
 - "It indirectly requires employers to ensure an atmosphere that is not conducive to sexual harassment and warns them that should they fail, they may be held legally accountable."
- Lin Farley's reaction:
 - "There is now a way to talk about a hostile work environment, where there wasn't before, for women. And there is a way for women to get redress. We have the tools, we have the information, and it still goes on -- women are still intimidated. And that's frustrating."

Effect of *Meritor*

- With guidance given by U.S. Supreme Court in *Meritor*, courts began recognizing two types of sexual harassment:
 1. Quid pro quo; and
 2. Hostile work environment.
- Before 1986, an average of only 10 sexual harassment charges were filed with the EEOC.
- After *Meritor*, in 1986, there were 624 charges of sexual harassment filed with the EEOC.
- Four years later, in 1990: 2,217 sexual harassment charges were filed.

Confirmation Hearings: Clarence Thomas - U.S. Supreme Court Nominee 1991

- CBS News reported on 10/6/91 that Anita Hill, a University of Oklahoma Law Professor, had confidentially given information about sexual harassment she said she endured years earlier as an employee of Thomas' at the EEOC, and was reluctantly thrust into the spotlight.
- 10/7/91, CBS reported that Thomas categorically denied the charges.
- Thomas supporters accused Hill of bringing sleaze into the Supreme Court nomination process.
- 10/12/91, Anita Hill was called on by the Senate Judiciary Committee to testify before the nation on live TV.
- Hill's testimony: "My working relationship became even more strained when Judge Thomas began to use work situations to discuss sex. And he also spoke on some occasions of the pleasures he had given to women with oral sex."
- 10/14/91, Judge Clarence Thomas: "I find it particularly troubling that she never raised any hint that she was uncomfortable with me."
- Professor Hill's response: "I told him that I did not want to talk about these subjects."

Confirmation Hearings: Clarence Thomas - U.S. Supreme Court Nominee 1991 (cont.)

- Professor Hill had told friends that Thomas had sexually harassed her.
- Senator Joe Biden, then Chair of the Senate Judiciary Committee, had heard about Professor Hill's allegations but did not delay the Judiciary Committee's vote on Thomas.
- It was only after the vote after Professor Hill was identified in the press and under pressure from women in Congress that Biden reopened hearings to allow Hill to testify.
- The procedure favored Thomas:
 - Thomas testified before *and* after Hill.
 - Three women were willing to testify in support of Hill's account but Senator Biden failed to call them.
- The hearings became a referendum on sexual harassment in the workplace.
- EEOC Chair, Eleanor Holmes-Norton: "I think both her testimony and Thomas' ability to overcome it before an all male Senate panel got to women."

Other Laws Prohibiting Sexual Discrimination

- 1991: The Civil Rights Act of 1991.
 - Modified Title VII to add more protection against discrimination in the workplace.
 - Gives plaintiff the right to a jury trial in federal court.
 - Compensatory and punitive damages up to \$300,000 are recoverable.
 - Designed to address limitations imposed by Supreme Court decisions, primarily *Patterson v. McLean Credit Union*, 491 U.S. 164 (1988).
 - Holding: an employee could not sue for damages caused by racial harassment on the job because even if the employer's conduct were discriminatory, the employee was not denied the "same right...to make and enforce contracts...as is enjoyed by white citizens," which was the language used in the Civil Rights Act of 1866.
- 1995: Government Accountability Act.
 - Made members of Congress subject to the same employment laws as the rest of the country.

Changes Brought About in 1998 in *Faragher* and *Ellerth*

- *Faragher v. City of Boca Raton*.
- *Burlington Industries v. Ellerth*.
- Both decided on the same day.
- Holding: An "employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" and if the conduct results in a tangible employment action, such as discharge or demotion, the employer has no affirmative defense to liability.
- In the event of no tangible employment action, the employer may prevail on an affirmative defense if the employer can prove:
 1. "That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and
 2. "That the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."
- Before these decisions, the U.S. Supreme Court had never recognized an affirmative defense in Title VII actions.

Impact of Faragher and Ellerth

- Courts prior to Ellerth and Faragher found employers were automatically liable for quid pro quo harassment by its supervisors but not for hostile work environment harassment.
- Supreme Court provided a different analysis for determining supervisory liability in Ellerth and Faragher.
- Instead of focusing on the differences between the two types of sexual harassment, the Court stated that the real issue is whether the harassment resulted in a TANGIBLE EMPLOYMENT ACTION.
- If it did, the employer would be automatically liable for the harassment of its supervisors.
- Employers adopted policies and implemented training of all employees.
- Supervisors and managers trained to report all harassment to company officials even if the victim never actually complained, failed to follow formal complaint procedures, or even when victim asked that no action be taken

As law evolved, how did it affect charges of sexual harassment

Charges		Charges	
<u>Year</u>	<u>Filed</u>	<u>Year</u>	<u>Filed</u>
• 1997	- 15,889	• 2008	- 13,867
• 1998	- 15,618	• 2009	- 12,696
• 1999	- 15,222	• 2010	- 11,717
• 2000	- 15,836	• 2011	- 11,364
• 2001	- 15,475	• 2012	- 12,569
• 2002	- 14,396	• 2013	- 12,379
• 2003	- 13,566	• 2014	- 12,146
• 2004	- 13,136	• 2015	- 12,573
• 2005	- 12,679	• 2016	- 12,860
• 2006	- 12,025	• 2017	- 12,428
• 2007	- 12,510		

EEOC Task Force on the Study of Harassment in the Workplace June 2016

- **EEOC issues report of select task force on the study of harassment in the workplace.**
 - Co-Chairs are Chai R. Feldblum and Victoria A. Lipnic.
 - Co-Chairs joined EEOC as Commissioners in 2000.
 - 30 years after the *Meritor* decision, they were troubled by the continued prevalence of sexual harassment claims.
 - Task force was convened in 1/2015 by EEOC Chair, Jenny R. Yang.
 - Spurred by the 30th anniversary of *Meritor*.
- **Task force comprised of representative members:**
 - Attorneys on both sides of the docket.
 - Representatives of both employee and employer advocacy groups.
 - Labor representatives.
 - Professors, including psychologists.

Findings of the Task Force

- No evidence that training and policies had any effect on preventing workplace harassment.
- Training alone does not work to curb harassment.
- "For [training] to matter, employees have to feel their leaders are being authentic." Feldblum.
- "They have to believe that leaders mean what they say" in claiming that they want to stop harassment. Feldblum.
- "The best way to [change behaviors]...is to create a culture where it's just not cool to sexually harass someone or racially harass someone." Feldblum.
- EEOC Task Force adopted a broad definition of harassment.
- Harassment is "unwelcome or offensive conduct in the workplace that:
 - Is based on sex (including sexual orientation, pregnancy, and gender identity)...; and
 - Is detrimental to an employee's work performance, professional advancement, and/or mental health."
 - Harassment is not limited to conduct that is illegally actionable according to the Task Force.

EEOC has Created Checklist for Employers

1. Leadership and accountability.
2. An anti-harassment policy.
3. Harassment reporting system and investigations.
4. Compliance training.

EEOC has Identified Risk Factors

1. Homogenous workforce.
2. Workplace where some employees do not conform to workplace norms.
3. Cultural and language differences in the workplace.
4. Coarsened social discourse outside the workplace.
5. Young workforces.
6. Workplaces with high value employees.
7. Workplaces with significant power disparities.
8. Workplaces that rely on customer service or client satisfaction.
9. Workplaces where work is monotonous or tasks are low intensity.
10. Isolated workplaces.
11. Workplaces that tolerate or encourage alcohol consumption.
12. Decentralized workplaces.