

# Reframing Workplace Behavior in 2019



**Sheila Gladstone**

[sgladstone@lglawfirm.com](mailto:sgladstone@lglawfirm.com)

512.322.5863

Lloyd Gosselink Rochelle & Townsend, P.C.

[www.lglawfirm.com](http://www.lglawfirm.com)

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# THE LAW OF SEXUAL HARASSMENT HASN'T CHANGED MUCH

- Severe or pervasive
- Based on sex
- Knew or should have known
  - Good, publicized policies
  - Clear reporting
  - No retaliation
  - Training
- Fair investigation
- Prompt remedial action
- 300-day limitations

# SO WHAT HAS CHANGED?

- Speed of exposure
- Age of allegations
- Expectation of ethical leadership
- Less stigma
- New ways employers “should have known”
  - #MeToo posts on social media
  - Can employee show employer (any manager or supervisor) “knew or should have known”?



# USE OF MOBILE DEVICES

- Personal vs city-issued
  - Both should be addressed in policy
- Seeing more issues with showing screens at work
- Managers sending inappropriate messages through personal devices
- Posts to social media
  - From work
  - Affecting work
  - Conduct unbecoming/  
prejudicial to good order
- 1<sup>st</sup> Amendment concerns
  - Matter of public concern
  - Balancing test



# How to respond to a post?



**Example 1**

@abc123



Following

**#MeToo** - my boss creeps me out!

← Reply ↻ Retweet ★ Favorite ⋮ More

11:24 AM - 4 Jun 18 · Embed this Tweet



**Company123**

@company123



Following

We support your willingness to share your experiences. We don't tolerate sexual harassment at [employer], and we need employees like you to come forward so we can investigate and work to stop it. Please share your information with us.

← Reply ↻ Retweet ★ Favorite ⋮ More

11:24 AM - 4 Jun 18 · Embed this Tweet

- Oct 1991 Clarence Thomas/Anita Hill televised confirmation hearing
- FY 1992 sexual harassment charges up 53%
  - Most dramatic in Q1 (Oct-Dec '91)
  - Despite vilification of Hill, compared to valorization of #MeToo claimants

# Already showing up in litigation

- Demand letters
  - “As a result of the #MeToo movement, we have become aware of numerous employers who allow sexual harassment to exist without recourse in the workplace. . .”
- Jury arguments
- Lawyer marketing

# HOW ARE EMPLOYERS RESPONDING?

- Updated policies
- More training
- Crisis management plans
- Focus on more than legal limits
  - Even claims without legal basis cause publicity & economic damage
  - New policies on legal behavior
    - Bullying, equal opportunity harassment
    - Civility, political discourse, especially when racial, gender or immigrant overtones
    - Senior management's off-duty behavior (walk the walk)
    - Conferences and parties
    - Off-duty communications and social media



- Employers criticized for
  - Not immediately taking action
  - Questioning the allegations
  - Giving the accused some benefit of the doubt
- Law still requires full and fair investigation
- Automatically believing women over men could be sex discrimination



# UNINTENDED CONSEQUENCES

- Backlash against women based on fear?
  - 2017 “Pence Rule”?
  - 12/18 Bloomberg interviews of Wall Street execs
    - No private meetings
    - Don’t sit together on planes/separate hotel floors
  - “Prophylactic gender separation” affects career opportunities/bonding
  - Hiring of close assistant
  - 2017 City exec reprimanded for refusing to take meetings with women vendors
    - “I’ve been told it is not appropriate for a married man to have lunch with a single lady”

# Next steps

- Review anti-harassment policy for strength, reporting procedures and anti-retaliation statement
  - Consider expanded behavioral policy for leaders
  - Discuss use of mobile devices in computer policy and harassment policy
- Reissue, remind, reinforce policy to employees
- EEOC task force: Train all employees and managers
  - Repeated regularly
  - Supported at highest levels
  - Separate training
  - “Live whenever feasible”
- Respond to concerns with prompt, serious, thorough investigation
  - Finding based on employer’s “reasonable belief”
- Follow-up/monitor

# What to do if you get a complaint?

- PROMPT response
- Take all complaints seriously
- Initial documentation of
  - how it got on your desk
  - what it is you have
- Tell who you need to tell
- Don't tell who you don't need to tell

# What's a complaint?

● “EMPLOYER” KNEW OR SHOULD HAVE KNOWN

● Formal Written

Verbal

Implication

Venting

Observations

Report from another

Rumor Mill

Off-Duty Report/Social Media



# Investigations of electronic communications

- Can review employer systems, if policy provides no expectation of privacy and employer right to view
  - But not a link to personal email or social media kept on work computer, especially when password saved
- Stored Communications Act does not allow intrusion into private social media accounts
  - Authorized User Exception: Someone with “friend” or “follower” status can provide employer screenshots,
  - Lose exception if access is coerced; easy test to fail/don’t ask
  - Beware of “Surreptitious Friending” - don’t use third party to engage in pretext

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**THANK YOU!**