Sexual Harassment Policies: An Employer's Burden or Advantage?

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I. INTRODUCTION

Sexual harassment is an extremely costly problem for employers. Employers can be liable to victims for damages of up to $300,000 if the work environment is hostile. Almost all sexual harassment literature emphasizes the financial costs of liability and explains that resolving cases and preventing sexual harassment litigation requires some basic remedial steps. However, the literature often fails to discuss the reasons for preventing sexual harassment beyond the bottom line. Unless employers make fundamental changes in their organizational culture and personal attitudes, they will lose valuable human resources—in addition to financial resources—due to a hostile workplace environment.

The first and most basic step to overcoming harassment is to write and enforce an anti-sexual harassment policy in the workplace. While the mere presence of a policy will not reduce an employer’s liability, if the employer has a policy that is well-written, known, understood by all employees, and ultimately enforced by the employer, then the employer is more likely to prevail in litigation. The Supreme Court held in Meritor Savings Bank v. Vinson\footnote{1. 477 U.S. 57 (1986).} that courts should “look to agency principles for guidance in this area.”\footnote{2. Id. at 72.} In other words, the courts should consider the extent to which the offender acted in an agency capacity for the employer when the harassing behavior took place. If a court finds that the offender was acting in an agency capacity, then an employer can be liable. The Court also rejected argument that the employer’s “view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent’s failure to invoke that procedure, must insulate [the employer] from liability.”\footnote{3. Id.} Before releasing the employer of liability, the Court will consider how effectively the policy has been publicized, if it is easily understood, and how well it is enforced.

This comment will discuss seven elements of a sexual harassment policy in light of federal law on discrimination, Equal Employment

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2. Id. at 72.
3. Id.
Opportunity Guidelines, and case law. Then it will apply the elements to four sample policies—the State Bar of Michigan Model Employment Policy Prohibiting Sexual Harassment; Universal Campus Credit Union Policy on Personal Conduct: Harassment; the University of Utah Policy on Sexual Harassment and Consensual Relationships; and the U.S. Department of the Navy Policy on Sexual Harassment. Ultimately, this paper will conclude with a discussion of what employers should do, beyond establishing an anti-sexual harassment policy, in order to maintain valuable human resources.

II. THE SEVEN ELEMENTS OF AN ANTI-SEXUAL HARASSMENT POLICY IN THE CONTEXT OF FEDERAL LAW ON DISCRIMINATION, EEOC GUIDELINES AND CASE LAW

The Equal Employment Opportunity Commission (EEOC) has produced new guidelines that explain what employers should do to prevent liability. The last sub-section of the guidelines states that "prevention is the best tool for the elimination of harassment." The guidelines then list several things an employer should do to prevent harassment as follows:

An employer should take all steps necessary to prevent harassment from occurring, including having an explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees on issues of harassment, and informing employees of their rights to raise, and the procedures for raising, the issue of harassment under Title VII, the ADEA, the ADA, and the Rehabilitation Act. An employer should provide an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on them.

Accordingly, the first step employers should take is to have meaningful anti-sexual harassment policies. Employers should adopt a policy that:

1. States that sexual harassment is unlawful.
2. Defines sexual harassment in understandable terms (suggested approach: work from EEOC guidelines but also add examples of situations that meet the definition).
3. Identifies the groups to whom the policy applies.

4. Id.
4. Articulates the employer's expectation that employees report problems of sexual harassment.
5. Sets out the procedure for reporting sexual harassment allowing at least two "complaint routes" to assure that an employee is not required to complain to a person who may have engaged in prohibited conduct.
6. Explains that complaints will be promptly investigated, they will be as confidential as possible, and there will be no retaliation for filing or taking part in investigating a complaint.
7. Confirms that appropriate disciplinary action will be taken and states the range of possible disciplinary action.  

These seven elements are by no means definitive for the elements of a sexual harassment policy. However, they are reasonable guidelines for employers in writing a policy that will help eliminate sexual harassment in the work place. The following discussion defines each of the elements in the context of federal law on discrimination, EEOC Guidelines and case law.

A. Statement of Illegality

Title VII of the Civil Rights Act of 1964, as amended in 1991, makes it unlawful "for an employer to . . . discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin." Discrimination based on sex was added to the Act at the last minute while the Act was being debated in the House of Representatives. There is little in the legislative history to explain how the legislature defined sex discrimination. As a result, case law since 1964 has defined and shaped exactly what is actionable under Title VII. Vinson is a landmark case in this area because the U.S. Supreme Court held that sexual harassment is actionable under Title VII of the United States Code both as quid pro quo and hostile work environment harassment. Furthermore, the Court held that employers are not always absolutely liable for sexually harassing conduct.

B. Definition of Sexual Harassment

In Vinson, the Court relies on the EEOC Guidelines of 1980, although they are not controlling on the courts, to offer "a body of
experience and informed judgment” for the courts to follow. The Guidelines outline for the Court three divisions of harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
3. such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

The Court considers the first two subsections actionable as quid pro quo harassment and the third section as a hostile work environment harassment.

In Vinson, the Court focuses on creating a standard for finding hostile environment sexual harassment. The Court concludes that the correct inquiry is “whether the respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in [them] was voluntary.” From the facts, the Court found that the manager’s actions toward employee Vinson did indeed constitute a hostile environment and the case was remanded.

In November 1993, the U.S. Supreme Court in Harris v. Forklift Systems, Inc. ruled on a hostile environment sexual harassment claim. Harris worked for Forklift Systems, Inc. as a manager. The president of the company repeatedly insulted Harris “because of her gender and often made her the target of unwanted sexual innuendos.” Harris complained to the president of his conduct but he continued to harass her. She quit one month later.

The Court ruled that it was not necessary for Harris to show that the president’s conduct seriously affected her psychological well-being or led her to suffer injury. Instead, the Court decided the environment must be reasonably perceived as hostile or abusive by looking at all the circum-

10. Id. at 65.
13. Id. at 68.
14. Id.
16. Id. at 368.
stances, i.e., the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance.

The Court included a very interesting paragraph in *Harris* that implied that the standards for hostile environment sexual harassment cases apply to hostile environment cases based on race, color, religion, gender, national origin, age, or disability. The Court said:

A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of work place equality.\(^\text{17}\)

The Court continued by stating that the ruling from *Vinson* refers to any type of hostile work environment. The implication is that the Court did not mark the boundary of what is actionable as hostile work environment in *Vinson*, nor will they do so in *Harris*.\(^\text{18}\)

A few months prior to *Harris*, the EEOC took steps to propose new rules on harassment in general, including harassment based on gender. These proposed "[g]uidelines, consolidate, clarify and explicate the Commission's position on a number of issues relating to harassment."\(^\text{19}\)

The guidelines apply to a number of federal laws that are aimed at preventing discrimination in the employment setting.\(^\text{20}\)

The proposed guidelines define harassment more specifically as follows:

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

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\(^{17}\) See B. Hartstein & T. Wilde, *The Broadening Scope of Harassment in the Workplace*, 19 EMPLOYEE REL. L.J. 639 (1994)(discussing further the impact of *Harris*).


(i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
(ii) Has the purpose or effect of unreasonably interfering with an individual’s work performance; or
(iii) Otherwise adversely affects an individual’s employment opportunities.21

According to the proposed guidelines, harassing conduct includes (but is not limited to):

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability; and
(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.22

The proposed guidelines also state that the conduct must be "sufficiently severe or pervasive to create a hostile or abusive work environment."23 The standard for determining if the conduct is sufficiently severe or pervasive is "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive."24 The "reasonable person" standard "includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."25 Additionally, it is not necessary for the plaintiff to make a showing of any psychological harm. The EEOC will rule on the facts on a case-by-case basis, looking at the "record as a whole and at the totality of the circumstances."26

In summary, an employer should use the EEOC definitions from the Code of Federal Regulations and the proposed guidelines in defining sexual harassment in its policy. Using these definitions for writing an accurate policy is the best approach because the courts quote them and hold employers to them. The 1980 Guidelines separate the types of sexual harassment into three categories—two for quid pro quo and the third for hostile work environment. The proposed guidelines expand harassment to include harassment on the basis of the protected character-

22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
istics listed in Title VII of the Civil Rights Act of 1991. The proposed guidelines also include a list of specific types of conduct that are harassing.

C. Persons Affected

Employer liability for sexual harassment makes this element especially important. An employer can become liable for sexually harassing conduct through a number of actions and actors. Thus, the policy should define, according to law, whose conduct affecting which parties is actionable and how the employer is liable.

The new EEOC Guidelines in Part 1609.2 define three ways that employers can become liable for sexual harassment. First, the employer is liable for its own conduct and the conduct of its agents or supervisors where the employer "knew or should have known of the conduct and failed to take immediate and appropriate corrective action" or where, regardless of whether the employer knew or should have known, the "supervisory employee is acting in an 'agency capacity.'" The EEOC will measure agency capacity by looking at the "employment relationship and the job functions performed by the harassing individual." If the employer fails to establish a policy that is communicated to the employees or if the employer fails to establish a reasonable procedure for reporting conduct, then "apparent authority to act on the employer's behalf shall be established" and employer liability is clear.

Second, if the conduct is between co-workers, employers are responsible "where the employer or its agents or supervisory employees knew or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action."

Finally, an employer is responsible for the actions of non-employees "where the employer or its agents or supervisory employees knew or should have known of the conduct but failed to take immediate and appropriate corrective action, as feasible." The EEOC emphasizes that it will consider the extent of the employer's control over and legal responsibilities for non-employees. It is unclear whether the proposed guidelines are referring to the conduct of non-employees directed toward employees or other non-employees. Employers should be concerned with

27. Id.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
the vagueness of this subsection and be aware that the scope of their liability can reach beyond their employees.

With these three instances in mind, it is reasonable to assume that employees will need to know the extent of the employer's duty or willingness to provide an environment free from discrimination. But how can an employer know the scope of their duty when the laws and EEOC guidelines are so vague on this issue? Employers should consider the nature of their company, the duty other similar companies are held to, the type of interaction their employees have with one another and with non-employees, and the type of interaction non-employees have with one another on the company's premises. After considering these factors, employers should specify in their anti-sexual harassment policy who is protected from whose conduct, keeping in mind that a court would hold them to their policy and consider to what extent their actions are in accordance with what it says.

D. Notice Requirements

According to Michael Ogborn, "[t]he goal of the policy should be to encourage employees to report incidents of sexual harassment." Thus, employers must make it clear that they expect any employee who is sexually harassed to report the conduct through the appropriate procedures. By stating this, the employer clarifies that the employees must give notice to the employer of the offending conduct and that the employer wants to know of the behavior.

In addition, this element will make it clear that employers expect employees to treat each other and non-employees with mutual respect. By explaining expected conduct, employers are taking the first step to maintaining a higher level of conduct that can be enforced through disciplinary actions.

E. Reporting Procedures

In defining the procedure for reporting the conduct, the employer can take a number of measures that will make the procedure fair and safe for employees. First, the employer should establish at least two avenues for the employee to report. By establishing two avenues, the employer will protect the employees from reporting to the person who is the offender. Second, the procedure must be clearly defined because in litigation the procedure will most likely be evaluated for clarity, accessibility, and reasonableness. Third, a more proactive procedure will provide that

employees can report to a woman, even if a woman is not in upper management. Fourth, the policy should make it clear to the employees that they will not be fired for reporting harassing conduct.

F. Investigation Procedures

The policy should also promise that immediate action will be taken once the report is made. The action should be done with the promise of confidentiality and professional conduct. The policy should explain who will be interviewed as a consequence of the report. "EEOC Policy Guidance on Current Issues of Sexual Harassment" states that "the investigator should question the charging party and the alleged harasser in detail. . . Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment." 34

G. Discipline

Since an employer is legally required to provide an environment free from discrimination, "an employer is also liable for failing to remedy known hostile or offensive work environments." 35 The employer should take disciplinary action "against the offending supervisor or employee, ranging from reprimand to discharge. . . Generally, the corrective action should reflect the severity of the conduct" and should be not only appropriate, but effective. 36 Also, disciplinary procedures must protect the victims and witnesses against retaliation by the offending employee, especially in cases where the offender is in a position of power over the victim. Stating in the policy the type of discipline the employer will use puts the employees on notice of the consequences of their actions and gives the employer a sound basis for taking the disciplinary measures.

III. Sample Policies Analyzed Under the Seven Elements of an Effective Anti-Sexual Harassment Policy

The seven elements are supported by Federal Law on Discrimination, the EEOC Guidelines, and case law, but an employer’s policy should go beyond these elements to evidence the employer’s commitment to and encouragement of an environment of mutual respect. This comment will

34. EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915-050, at 11 (1990) (on file with the author) [hereinafter Policy Guidance]. To obtain a free copy of this pamphlet, call the EEOC library.
35. Id. at 29; see, e.g., Garziano v. E.I. DuPont deNemours & Co., 818 F.2d 380 (5th Cir. 1987).
now analyze four policies: the State Bar of Michigan Model Employment Policy Prohibiting Sexual Harassment, Universal Campus Credit Union Policy on Personal Conduct: Harassment, the University of Utah Policy on Sexual Harassment and Consensual Relationships, and the U.S. Department of the Navy Policy on Sexual Harassment. First, the paper will describe the policy. Second, it will point out its strengths in light of the seven elements. Third, it will explain some of its weaknesses. Finally, after considering these four policies, the paper will make various observations about anti-sexual harassment policies.

A. Four Examples of Sexual Harassment Policies


In April 1994, the State Bar of Michigan approved the State Bar of Michigan Model Employment Policy Prohibiting Sexual Harassment. “This policy was drafted by the Model Personnel Policy Committee in response to the recommendations of the Michigan Supreme Court Task force on Gender Issues in the Courts.”37 The policy is comprehensive and can be tailored to many business environments but is essentially designed for the members of the Bar—attorneys, the judiciary, and those employed by either of these groups.

a. Description of the Policy. The policy is divided into three main sections that cover basically all seven elements. Section One is the actual “Policy Prohibiting Sexual Harassment.” This section begins by stating that sexual harassment is unlawful discrimination. Also, it states that the policy and law prohibit both this conduct and “retaliation for having brought a complaint of or having opposed sexual harassment and/or for having participated in the complaint process.”38 The next subsection defines sexual harassment, patterned after the EEOC proposed guidelines on sexual harassment.39 However, it goes on to give examples of types of sexually harassing conduct delineating it as verbal, visual, and physical. The third subsection describes which persons and settings are covered by the policy—prohibiting “[s]exual harassment of any individual, whether an employee or not, by attorneys . . . , judicial officers, or any employee or agent of the employer . . . inside or outside the workplace.”40 The non-employees it covers are “clients, customers,

38. Id.
40. Model Policy, supra note 37.
vendors, independent contractors, applicants for employment, or visitors to the workplace." The policy also states that the employer does not condone sexual harassment by any of the non-workers listed above.

Section Two of the policy explains the complaint procedure, first stating that the employer "is responsible for fostering a workplace free from sexual harassment . . . and for implementing and enforcing this policy." Although employees are encouraged to report instances of sexual harassment or retaliation for having participated in the complaint procedure, the employer maintains that its responsibility (stated above) is continuing "whether or not complaints of sexual harassment have been brought to the attention of the Employer." Next, it explains the role of the two Policy Advisors who will handle the policy in the delineated fashion. They are to conduct the investigation promptly and with confidentiality. The committee in this section recommends that at least two policy advisors be available to provide alternatives to the complainant and that the advisors be "high-ranking members or officers of the Employer."

This section lists all the elements of an effective complaint procedure that should vary with the size and complexity of the employer. It states that the policy advisors should document the complaint, interview the complainant and witnesses, review evidence submitted by the complainant, witnesses or harasser, interview the alleged harasser, and provide the employer with a written recommendation on the validity of the complaint.

Section Three of the policy describes how to resolve the complaint in several instances by following specific steps: (1) when a violation of the policy is found—transfer the parties, terminate the offender, remove the offending material, etc.; (2) if no violation of the policy is found—provide training of the policy and make sure no retaliation takes place; (3) if no determination is possible—make it clear that if any harassing conduct occurs, the policy will be enforced, and; (4) in addition to investigation, the employer should prevent retaliation against the person complaining, the witnesses or anyone participating in the investigation.

b. Policy Strengths. The model policy of the Michigan Bar is comprehensive and detailed in several ways. The policy clearly states the employer’s desire to foster an environment free of sexual harassment. It gives notice of all the possible conduct that can be considered sexual harassment and outlines clearly the procedure for bringing and investiga-

41. Id.
42. Id.
43. Id.
44. Id.
ing the complaint. Additionally, the policy outlines the discipline for harassing a protected party. The policy also protects people beyond employees—even clients and visitors to the workplace who could be victims of sexual harassment.

c. Policy Weaknesses. Although comprehensive, the policy dangerously creates employer liability for actions of its clients or visitors away from the workplace. The exact words of the policy are: "The Employer does not condone, either explicitly or implicitly, sexual harassment by clients, customers, vendors, independent contractors, applicants for employment, or visitors to the workplace." Potentially, the employer could be held liable for the actions by these parties anywhere because the policy doesn't state where the conduct takes place and to whom it is directed. However, given the context of the statement, the intent may be clear—that is, to protect the employees from the harassment of clients and other visitors while in the workplace or performing duties within the scope of employment outside of the workplace.

2. Universal Campus Credit Union Policy on Personal Conduct: Harassment.

Universal Campus Credit Union (UCCU) is located in Provo, Utah. Their policy on sexual harassment emphasizes the seriousness of sexual harassment, yet lacks some elements that a policy should include.

a. Description of the Policy. The UCCU's policy on sexual harassment definition is based on the EEOC proposed guidelines like the Michigan State Bar Model Policy. According to the definition in this policy, however, harassment is not limited to sexual harassment but any harassment that interferes or disrupts another's work performance "or which creates an intimidating, offensive, or hostile environment... All forms of harassment are prohibited, including sexual harassment." The employees are encouraged to approach the offender and demand that it cease. Then, if the conduct does not cease, the employee should report to either the supervisor or the vice president of human resources. If the victim is not an employee but rather a volunteer, they should report to the board chair or the executive committee.

According to the policy, the complaint will be investigated promptly, impartially, and confidentially, and will include interviews with the parties and witnesses. UCCU requests that the complainant document "the occurrences and identify any witnesses who could substantiate the

45. Id.
allegations." but it will investigate the complaint without such documentation. The appropriate corrective action will be taken upon the employer, supervisor, or manager that is found guilty of the conduct "up to and including termination."  

b. Policy Strengths. The policy has several strengths. First, it carries a serious tone, implying that harassing another is a serious offense, and it extends the policy to cover all other types of harassment. Second, it explains how the employee should prepare to prove the conduct to the employer but adds that even without proof, the employer will investigate the claim. Third, the policy states that offenders may be terminated for their conduct. Fourth, the policy anticipates the EEOC proposed guidelines and prohibits all forms of harassment, including sexual harassment.

c. Policy Weaknesses. The policy has several potential weaknesses. It does not address the problem of credit union members harassing employees of UCCU or other members on the premises. Judging from the nature of the credit union's business—that of a service organization—this is a potential problem. Also, the policy does not list examples of offending conduct in order to help the employees understand it. Potentially, this could create a problem because the offender could claim they didn't realize their conduct was offensive. However, the policy does mitigate this problem by requesting that the victim demand the offender cease the conduct first before reporting it. Last of all, the policy does not outline various disciplinary actions that the offender might face, nor remedies for which the victim might be eligible. Even with the few specifics included in the policy, its vagueness might cause problems for UCCU.

3. The University of Utah Policy on Sexual Harassment and Consensual Relationships.

Recently, the University of Utah (University) rewrote its anti-sexual harassment policy, adding a university policy on consensual relationships between professors and students. Although controversial, the policy addresses potential liability problems the University might face and recommends appropriate protective solutions.

a. Description of the Policy. The policy is broken into four sections. Section One states that the purpose of the University's policy

47. Id.
48. Id.
49. University of Utah Policy and Procedures Manual [hereinafter University of Utah Policy] 2-6a (accepted by the Board of Trustees in July 1994).
is to outline the policy against sexual harassment and "to set forth the University’s policy regarding romantic or sexual relationships between a supervisor and an employee or between a faculty or staff member and a student or between peers in order to foster an academic and work environment free of sexual harassment for students, faculty, staff and participants."\textsuperscript{50}

Section Two lists references from the University Policy and Procedures Manual. Section Three gives definitions of terms used in the policy. The definition given of sexual harassment parallels the EEOC proposed guidelines and is similar to the definition given in the Michigan Bar Model Policy and UCCU’s policy. The policy notes that discussions in an academic or professional setting of sexuality and gender are appropriate unless they target "the discussion to an individual or [carry] out the discussion in terms that are both patently unnecessary and gratuitously offensive."\textsuperscript{51} Also, the policy states that the harassment will be evaluated "by considering the totality of the particular circumstances,"\textsuperscript{52} including the frequency of the conduct, with the reasonable person standard. Section Three also gives definitions of the parties that could be involved, i.e. faculty, participant at the University, staff, student, employee. The definition of a participant is an interesting addition because it includes anyone other than students, staff, faculty, including "applicants for admission, applicants for employment, patients, clients, spectators, visitors, and volunteers."\textsuperscript{53}

Section Four contains the language of the policy against sexual harassment, the requirement of confidentiality, and the policy against consensual relationships. The policy against sexual harassment begins with a statement that the University desires to maintain an "academic and work environment free of sexual harassment for students, faculty, staff and participants. . . . Sexual harassment will not be tolerated at the University of Utah."\textsuperscript{54} The claim may be brought by any of the listed parties to the Office of Equal Opportunity and Affirmative Action (OEO/AA) who will handle the complaint according to procedures in the Policy and Procedures Manual 2-32, Discrimination Complaints. However, the policy lists five different parties to whom the victims could turn, but whomever receives the complaint must immediately turn it over to the OEO/AA office. In addition, the policy states that sexual harassment is a serious offense and anyone taking it lightly, even by

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
intentionally filing a false complaint, will have disciplinary action taken against them.

The confidentiality subsection states that confidentiality will be observed "insofar as it does not interfere with the University's legal obligation to investigate allegations of misconduct and to take corrective action."\textsuperscript{55}

The consensual relationship subsection explains that such relationships are "generally unwise because of the power imbalance in the relationship,"\textsuperscript{56} conflicts of interest, and unfairness to others. If a faculty member has any relationship of power over a student, the situation can be remedied by reassigning responsibilities to other qualified individuals. These rules also apply to faculty and students with intimate familial relations. Discipline in these situations are defined in the University Policy and Procedure Manual sections.

\textbf{b. Policy Strengths.} The University's policy gives a clear definition and reasons for the rules. It outlines potential problems that could arise in the setting where students and faculty, faculty and staff, or staff and other staff are in close working relationships with one another and points out the potential areas of liability for the University, especially with problems in consensual relationships. The policy clearly states who is protected under the University's policy and refers to other documents that outline disciplinary measures. The policy also gives several avenues through which a victim may report the offender and gives the OEO/AA authority to investigate the claim.

\textbf{c. Policy Weaknesses.} Although the policy seeks to protect people from the potential problems arising from consensual relationships, these relationships are consensual and a way to remedy the imbalance of power may not exist. For example, there might not be another professor that can advise this particular thesis topic if a consensual relationship develops between the current advisor and student. Also, the policy includes participants at the University as potential victims. The definition of "participants" may be general enough to include visiting spectators at a football game who are harassed by University students. The University may not want to extend its liability to spectators because a court could extend the policy to include discrimination based on sexual orientation or by analogy under Title VII to include liability based on religion, two heated issues at the University. However, it is possible that the University might want to include either issue in its policy.

\textsuperscript{55} Id.
\textsuperscript{56} Id.
4. The U.S. Department of the Navy Policy on Sexual Harassment.

In the wake of Tailhook (September 1991), the U.S. Department of the Navy (DON) rewrote its policy on sexual harassment and developed a thorough implementation plan for educating about and enforcing the new policy. These changes require significant behavioral changes; thus the policy includes elaborate and detailed plans for training and application. Additionally, the policy alone is effective in defining and establishing a procedure for disciplining offenders.

   a. Description of the Policy. The DON policy is divided into 10 sections with 3 enclosures. Section One explains that the purpose of the policy is to aid military and civilian personnel "on the identification, prevention, and elimination of sexual harassment and to establish regulations to enforce that policy." Section Two is a cancellation of the previous policy and Section Three defines the range of people protected by the policy:

   All DON civilian personnel, including non-appropriated fund employees; active-duty military personnel, both Regular and Reserve; Midshipmen of the Naval Academy and in the Reserve Officer Training Corps; and Reserve personnel when performing active or inactive duty for training, or engaging in any activity directly related to the performance of a Department of Defense (DOD) duty or function.

Section Four lists major changes in the policy to its current format. Section Five refers to enclosure (1) for the definition of sexual harassment and enclosure (2) for the definition of terms. Enclosure (1) defines sexual harassment in almost the same language as the other three policies in this paper (using language coming from the EEOC guidelines). But the definition adds that anyone in a supervisory or command position who uses or condones the offending behavior and any military member or civilian employee who "makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature" is guilty of sexual harassment.

Enclosure (2) is a glossary of terms to aid in the interpretation of the policy. Some of those terms include such words as career or employment decisions, condition, discrimination, hostile environment, quid pro quo,
Section Six is a background section, explaining that the Navy-Marine Corps Team "must be able to work together to accomplish the mission" in an environment that is free of unlawful discrimination. The DON recognizes not only the economic costs of sexual harassment but also "the negative effects of sexual harassment on productivity and readiness, including increased absenteeism, greater personnel turnover, lower morale, decreased effectiveness, and a loss of personal, organizational, and public trust." The DON desires and seeks to ensure that all personnel are "treated fairly with dignity and mutual respect." 

Section Seven is the actual policy. In it the DON states that "leadership is the key to eliminating all forms of unlawful discrimination. . . . Sexual harassment is prohibited . . . All DON personnel, military and civilian, will be educated and trained . . . using the three tiered behavioral zone approach to explain the spectrum of sexual harassment, as outlined in enclosure (3). . . . [Victims] will be afforded multiple avenues to seek resolution and redress." Additionally, all reports of sexual harassment will be "investigated and resolved at the lowest appropriate level," promptly and with confidentiality. The DON will also provide counseling for those involved in the incident.

Enclosure (3), included for training purposes, outlines the range of behaviors which constitute sexual harassment in terms of a traffic light—green means go or "it's acceptable"; red means stop or "don't do it"; yellow means "use caution." The enclosure lists specific types of behavior within each zone. For example, the green zone includes "performance counseling, touching which could not reasonably be perceived in a sexual way, counseling on military appearance, social interaction, showing concern, encouragement, a polite compliment, or friendly conversation." The yellow zone includes behaviors that many people would find unacceptable, such as "violating personal space, whistling, questions about personal life, lewd or sexually suggestive comments, off-color jokes, leering, staring, unwanted letters or poems," etc. The red zone lists behaviors that are always considered harassment.
such as "sexual favors in return for employment rewards, sexually explicit pictures or remarks, obscene letters or comments," or criminal conduct.

Section Eight explains accountability for harassing conduct. This section states that "sexual harassment is prohibited" and that no one in the DON shall "commit sexual harassment," retaliate against someone that has reported harassing conduct, "knowingly make a false accusation of sexual harassment," or as supervisor/leader "condone or ignore sexual harassment." These actions are punishable according to Uniform Code of Military Justice (UCMJ) and disciplinary action. Also, Section Eight acknowledges the wide range of offending behaviors and likewise the wide range of disciplinary actions, such as "informal counseling, comments in fitness reports and evaluations, administrative separation, and punitive measures under the UCMJ." In cases of quid pro quo or "physical contact of a sexual nature . . . charged as a violation under the UCMJ," for the first violation, the offender will be discharged from the DON (administrative separation).

Section Nine states that commanders and supervisors are responsible for setting an "example in treating all people with mutual respect and dignity, and fostering a climate free of all forms of discrimination and eliminating sexual harassment." This high level is important because "such a climate is essential to maintain high morale, discipline, and readiness." Leaders must also not condone any harassing behavior, or retaliate against the person reporting the behavior.

Additionally anyone who believes they have been sexually harassed should first approach the offender. Then the victim should report the offender through the chain of command if the behavior does not stop, if it is not reasonable to address the offender, or if the behavior is criminal. If the victim cannot report the behavior to the direct superior for any reason, they should report it through other available means. It is emphasized that "all personnel are responsible for treating others with mutual respect and dignity." Finally, Section Ten states that the leadership in the DON shall make sure all personnel comply with the policy, that "education and training programs are in place at all levels within the DON," and that a system to manage complaints is effective and functioning at the lowest possible
level. This section emphasizes that the DON should ensure that the system is effective in eliminating sexual harassment and educating about harassment.

b. Policy Strengths. The policy of the DON is comprehensive, covering the responsibilities of all parties, the DON expectations of their employees, and reporting procedures. The policy also provides training procedures to help leadership educate the employees. The three tiered system (the traffic light) is a positive model for defining problematic behaviors to personnel. Disciplinary action is outlined clearly, so that employees know the consequences of their actions. But beyond all the elements, the policy establishes that the DON intends the working environment to be one of mutual respect for one another.

c. Policy Weaknesses. The DON will be held to its policy. If the Navy fails to establish an effective system for handling harassment incidents, the court will hold it liable. A question is whether this policy will be accessible to all employees. Potentially, information may not be accurately communicated. However, if this is the case, the DON will hold leadership liable at different levels within the department.

Possibly, the traffic light model is not quite appropriate because the DON intends that yellow light conduct is conduct to be avoided to be on the safe side. However, for many people a yellow light means go faster, instead of slow to a stop. The model fails to show that yellow light conduct is really meant to be considered like the red light conduct—against DON policy. Instead, yellow light conduct should be defined as conduct that could lead to red light conduct. For example, forming consensual relationships with direct superior or inferior officers is a yellow conduct because it could lead to red light problems. The University of Utah policy contains a section on consensual relationships that is applicable here too.  

B. General Observations about Anti-Sexual Harassment Policies

In light of the strengths and weaknesses of the anti-sexual harassment policies analyzed above, there are three general observations to make about well-drafted policies. First, a large portion of every policy is focused on the statement of illegality, the definition of sexual harassment and the explanation of persons affected. The policies state that sexual harassment is prohibited and define sexual harassment, under Title VII of the Civil Rights Act of 1991, the EEOC guidelines and the EEOC proposed guidelines. Because the scope of liability for every employer

76. University of Utah Policy, supra note 49, § 3.
will be different depending on the nature of the business, it is essential that the employer explain who is covered by the company’s policy.

Second, all the policies explain the complaint and investigation procedures in varying degrees of specificity. This element is absolutely essential. Without the procedure for reporting and investigating a complaint, the policy just becomes a statement of the employer’s liability. To be on the safe side, it appears that the employer should err on the side of specificity, so that the employees have no doubt that they can report the conduct, that they will be heard, and that action will be taken. However, employers should be sure they follow their specifically outlined procedure as accurately as possible because a court will hold them to it.

Additionally, it is important to note that procedures for investigating sexual harassment should be different than the procedure for investigating other types of employee complaints. A higher level of confidentiality must be maintained. In sexual harassment situations, the supervisor may be the offender and it would be inappropriate for the employee to complain directly to that supervisor. Also, in a male dominated work force, the issue of sexual harassment from a woman’s perspective may be ignored or downplayed. There must be a woman to whom an employee may bring a complaint.

Third, it is essential that the policies be understandable. The employees must not only know the employer has a policy, but understand the definition, what behaviors are prohibited, and how to report conduct. If the policy is not understandable, the employees may not invoke the complaint procedure or stop their harassing behavior, and the employer will be held liable in court. To be understandable, a policy should not be written in legalese, but in direct and clear language. It is also helpful to have a model to be used in training employees about prohibited behavior, such as the DON’s traffic light model. However, the model should be simplistic but also accurate, so that no one can mistake what the employer means.

III. EMPLOYERS SHOULD TAKE ACTION BEYOND THE ANTI-SEXUAL HARASSMENT POLICY

Providing a work environment free of harassment is one of the primary responsibilities of an employer. Otherwise, they will waste valuable human resources because “[i]n a hostile environment, a person tends to tuck away a new thought rather than face the inevitable fight to get others in the organization to hear and accept the deal.”

ly, "[e]mployers must do more than merely endorse ethical standards in [sexual harassment issues]. They must also attempt to educate employees on the subtleties of sexual harassment and to develop policies to address the growing problems." But unless the employer has a personal attitude of mutual respect for all employees, their policies and training will fail. Employers need to look closely at their assumptions about people based on all diversity factors (race, color, religion, gender, national origin, age, or disability) because their assumptions manifest themselves in their actions and words. In response to this challenge, employers may need to take a diversity training course for themselves. If employers do not promote an environment of mutual respect, the employees will not follow even a well-written policy. The proper attitude must come from top down.

Employers should also conduct a confidential harassment audit in order to learn about the attitudes of their employees. The audit questionnaire should be written to measure the extent to which employees understand diversity and harassment and the extent to which employees can recognize harassment. With this type of information, employers will know where to begin training and talking about harassment with their employees.

After examining their own assumptions and those of their employees, employers "also should develop a corporate culture that treats employees as their most important asset and does not condone . . . other forms of discriminatory conduct." This culture can be created through the well-drafted anti-harassment policy coupled with proactive steps, such as training and enforcing the policy. Employers should be involved in training and discussing the problems of hostile work environments with their managers and employees. The preventative measures listed above are important steps to establishing a new culture; yet they must be supported by the employer's anti-harassment attitudes.

In addition to the standard anti-harassment policy, organizations must also develop a policy of mutual respect, separate from or integrated in the anti-harassment policy. A policy of mutual respect will support the new culture and establish a standard that says: "If the organization is to function most effectively, employees need to respect each other's gender, race, religion, age, and so on. They need to know that any form of

80. See id. (giving examples of audit questionnaires).
81. Mishkind, supra note 6, at 147.
harassment is unacceptable. With such a policy, an organization communicates the importance it places on the idea of mutual respect."

VI. CONCLUSION

In the growing scope of hostile work environment cases, employers have an increasing responsibility to prevent harassment in their organization. If they want to stop harassment in any form, their preventive measure must go beyond simply preventing litigation and avoiding liability. By examining their own assumptions, understanding the extent of their employees' knowledge and beliefs, and by fostering a new culture of mutual respect, employers will do more than avoid litigation; they will tap the creative power of their work force and operate in a socially responsible manner.

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82. See Champagne et al., supra, note 79, at 81 (giving an example of a policy of mutual respect).