



# Stopping Sexual Harassment Before It Starts

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The #MeToo movement sparked a national conversation about sexual harassment, forcing many employment lawyers to re-examine gender-specific power dynamics in the workplace. It seems now more than ever, we must consider differently the way we do business and *how* we interact with one another.

In light of this national movement, which has led to many political and societal debates in the workplace, a good number of well-intentioned professionals have asked, “Can I give a compliment anymore?” To that, the short but frustrating response is “It

depends.” In training, we reassure these concerned professionals that the key ingredient to harassment stems from *unwelcomed* behavior and to be attuned to body language and non-verbal cues. But what is sexual harassment really?

In *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court ruled that sexual harassment is a form of sex discrimination and thus, falls within workplace discrimination under Title VII of the Civil Rights Act of 1964. Nevada’s Fair Employment Practices Act, NRS 613.3310 *et seq.*, prohibits sexual harassment in the workplace. The legal standard for sexual harassment in Nevada is *unwelcome* sexual conduct that is severe (i.e. genital grabbing) or pervasive (i.e. constant; persistent jokes or sexual advances, or comments relating to genitalia or sex in general) that a reasonable person would feel creates a hostile work environment. Further, quid pro quo harassment occurs when a superior conditions terms of employment on engaging in sexual conduct. Keep in

mind the reality is that the sexual harasser can be anyone; the victim does not have to be of the opposite sex, and third-party bystanders may also be affected.

Let’s be clear: sexual harassment is bad business. Also keep in mind that victims of sexual harassment are not just women. A recent national online survey reported that 43 percent of men stated they had experienced sexual harassment or assault in their lifetime.<sup>1</sup> This survey seems to indicate the gap regarding who is harassed is not as wide as some believe.

## Preventing Sexual Harassment

Indeed, gender sensitivity and common sense play a big role in eliminating harassment. This may mean handshakes — not hugs — are more appropriate. Policies that are both clearly and inconspicuously (i.e. on bathroom door stalls) displayed so that an employee may anonymously report harassment, coupled with interactive trainings are all great recommendations to a client. Most employees that are attuned to human

dynamics, particularly dynamics relating to sex, can sense when harassment or conduct has gone too far (i.e., a turned cheek to avoid a kiss) proving that on some level, awareness even without a full understanding of the law does exist. The key to prevention lies somewhere in understanding power dynamics with a strong emphasis on zero tolerance at the highest level of management. Yet, despite the cautionary tales nationally depicted in the media, we are often surprised that many organizations do not invest in prevention until it is too late.

Nevada is not immune to the national claims of sexual harassment allegations. Notably, in his first official act, Executive Order 2019-1, Governor Steve Sisolak created a task force of up to 11 members, led by Attorney General Aaron Ford, to create a “gold standard” of sexual harassment *prevention*. The task force is commissioned to review federal and state sexual harassment and discrimination laws and policies, plus prevention and training procedures, and existing policies of state agencies. To that end, it will also recommend program and policy improvements. Nevada is stepping up its efforts to prevent and address workplace harassment.

Here are a few key points to pass on to your clients:

- Establish a policy that clearly defines sexual harassment and clearly conveys that this type of harassment is illegal and will not be tolerated;
- Provide a clear procedure for employees to report harassment that includes at least two different avenues and persons of different gender and clearly communicate that retaliation for reporting is prohibited;
- Encourage human resource professionals to ditch the archaic and uncomfortable boilerplate videos or programs and to provide live practical training tailored to the employer’s workforce. Good

practice is to provide separate training for managers, supervisors and human resources professionals as they have a higher level of responsibility under the law;

- Do not ignore! Act immediately upon any complaints (formal and informal) with competent, unbiased investigators who will keep the investigation confidential. Do not hesitate to employ outside resources if the alleged harasser is someone with significant power with the employer; and
- Do not retaliate! Act immediately to take corrective and preventative action that does not adversely impact the complainant.

## Sexual Harassment Claims

Of course, the above key points are not a guarantee that a complaining employee will not take further reporting action or that an employer has eliminated sexually harassing behavior altogether. A complainant can file a state or federal charge with either the Nevada Equal Rights Commission (NERC) or the U.S. Equal Employment Opportunity Commission (EEOC) within 300 days of the alleged discriminatory conduct. NERC and EEOC will request a position statement from the employer, which makes it imperative to document internal complaints and investigations to resolve harassment. Failure to document could be perceived as a failure to act or result in an adverse inference finding from NERC.

*continued on page 22*

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**SCENARIO:** *You have been asked by your client to provide a position statement to the EEOC regarding claims of sexual harassment that include male supervisors commenting about the size of their genitals, commenting on female employees' chest and buttocks, as well as invitations to engage in sex, including oral sex. The same claims include female supervisors commenting on physical attributes of male employees and constantly asking male employees on dates. What do you do?*

In the above scenario, when you are faced with unchecked sexual harassment, no clear policies, and the failings of human resource staff and management to address the harassment despite ongoing repeated complaints by employees, the only option may be to settle with EEOC (or NERC) as did the company on which this scenario is based.

In *U.S. EEOC v. Alorica, Inc.*, Alorica agreed to settle this case for \$3.5 million. The EEOC's huge victory not only included monetary relief provided to victims, but Alorica also agreed to a three-year consent decree, which included the hiring of a third-party monitor, the creation of an internal EEO officer, sexual harassment training, revision of its policies and to maintain its records of any future harassment and retaliation complaints, audits and reporting.

## Nevada Equal Rights Commission

In the last two years, NERC has settled 227 cases of sexual harassment, despite the belief that more victims of sexual harassment exist. If a case does not settle, NRS 233.170 permits NERC to determine whether an unlawful practice has occurred by way of a public hearing. An example of this occurred in 2017.



PHOTO CREDIT: SHUTTERSTOCK

In its most recent and rare public hearing, NERC brought Fat Tuesday, which is operated by Bar Two, LLC, before its five-member commission to answer to the administrator and the state of Nevada for egregious claims of misconduct and sexual harassment by one of its owners. Allegations included inappropriate comments and touching ("slapping" buttocks) that management failed to correct or prevent when repeatedly reported. As is the case with many complaints, NERC's deputy attorney general was finally able to forge a settlement prior to the public hearing. The settlement resulted in:

- 1) A revision of Fat Tuesday's employee manual;
- 2) Mandatory training by the EEOC;

- 3) Prohibition of the offending owner to visit its location; and
- 4) Implementation of a reporting hotline.

NERC is currently in collaboration with the UNLV Greenspun College of Urban Affairs to identify possibilities for low reporting. Perhaps victims in Nevada fear humiliation, retaliation and/or internalize the harassment long past the 300 days from harm required to preserve legal rights? Or perhaps victims fear deportation? NERC does not question citizenship during its investigation. And what are the real reasons male victims

under-report? It has been suggested that men have been more reluctant to report sexual harassment, perhaps because of embarrassment or perceived societal norms such as being "unmanly" or even "too manly."

All these plausible reasons will be researched

in the coming year. However, in the meantime, the EEOC is an excellent resource for national statistics, and in 2016, the EEOC's Select Task Force on the Study of Workplace Harassment ("Select Task Force") published its findings at: [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf). NERC also has been busy with seeing an uptick in sexual harassment training and prevention courses to both public and private employers.

NERC is a state-wide agency that offers training at no cost to employers to prevent harassment and updates in state and federal laws pertaining to the equal employment and enjoyment of its citizens. If you have any questions, please contact NERC at (702) 486-7161 in Las Vegas or at (775) 823-6690 in Reno. **NL**



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1. <http://www.stopstreetharassment.org/wp-content/uploads/2018/01/2018-National-Sexual-Harassment-and-Assault-Report.pdf>.