

When #MeToo Means #YouToo: What to do when you're in the sexual harassment hot seat

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Agenda

- + Sexual Harassment and The Law
- + Public Perceptions of Sexual Harassment
- + **#MeToo** and **TimesUp** Movements and Their Implications
- + New Federal and State Laws and Regulations
- + What Should Employers Do Now?
 - Preventive Actions
 - Remedial Actions

Sexual Harassment and the Law

Sexual Harassment is “unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature”

Two Types:

- + Quid Pro Quo
- + Hostile Environment

Types of Sexual Harassment

+ **Quid Pro Quo** = authority figure at your company offers or merely hints that he or she will give employee something in return for the employee satisfying a sexual demand.

- EX: give raise, promotion, hiring or firing

+ **Hostile Environment** = employee's work environment is made hostile due to the unwelcome conduct, and the conduct unreasonably interferes with the employee's performance.

- EX: making offensive sexual comments, displaying sexually-oriented materials
- Does not have to include sexual advance

Sexual Harassment and The Law

Retaliation is prohibited by law.

- ✚ Retaliation = an employee suffers an adverse employment action for filing a sexual harassment complaint.
- ✚ Examples include:

- Termination
- Demotion
- Reassignment
- Failure to award pay increases

- Failure to promote
- Poor performance evaluations
- Isolating the complainant

Sexual Harassment and the Law

Employer's Liability:

- ✚ Employer is directly liable for sexual harassment when:
 - Harasser is victim's supervisor
 - When the company has either failed to have a process in place to prevent harassment or knew (or should have known) about the conduct and did not investigate

- ✚ Faragher-Ellerth Defense = employer can defend against a hostile work environment claim if they can demonstrate:
 - They took reasonable care to stop and efficiently remedy the problem; and
 - The employee failed to take advantage of opportunities for recourse

Sexual Harassment and the Law

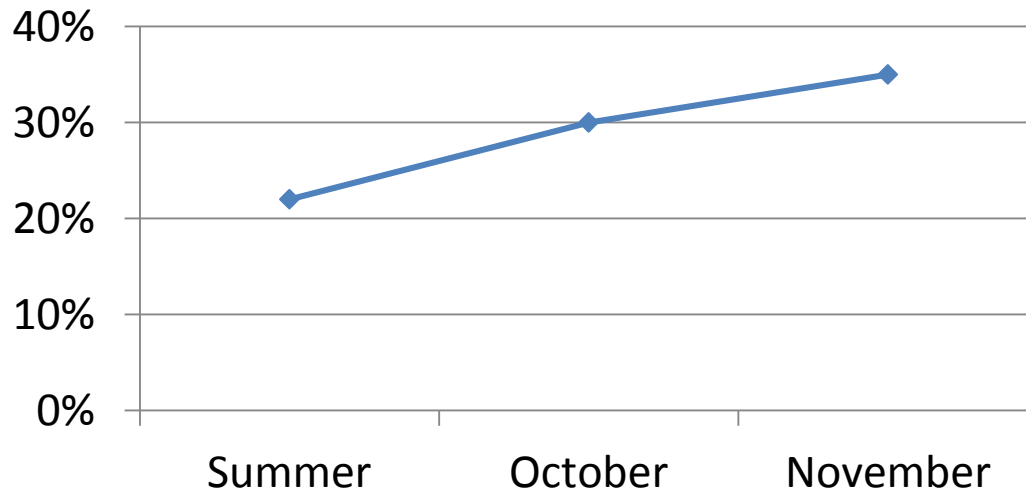
Employer's Liability

- ✚ Employers can also be liable to third parties. (vendors, clients, customers, service providers, etc.)
- ✚ May be held liable if:
 - The employee made an effort to inform the employer of the harassment;
 - The employer knew or should have known that the harassment was occurring; and
 - The employer failed to take prompt and appropriate corrective action that was reasonably likely to prevent the recurrence of harassment
- ✚ EEOC lawsuit against Hurricane Grill and Wings restaurant

Public Perceptions: Statistics

Sexual Harassment Statistics

Employed women who experienced sexual harassment in the workplace (2017)

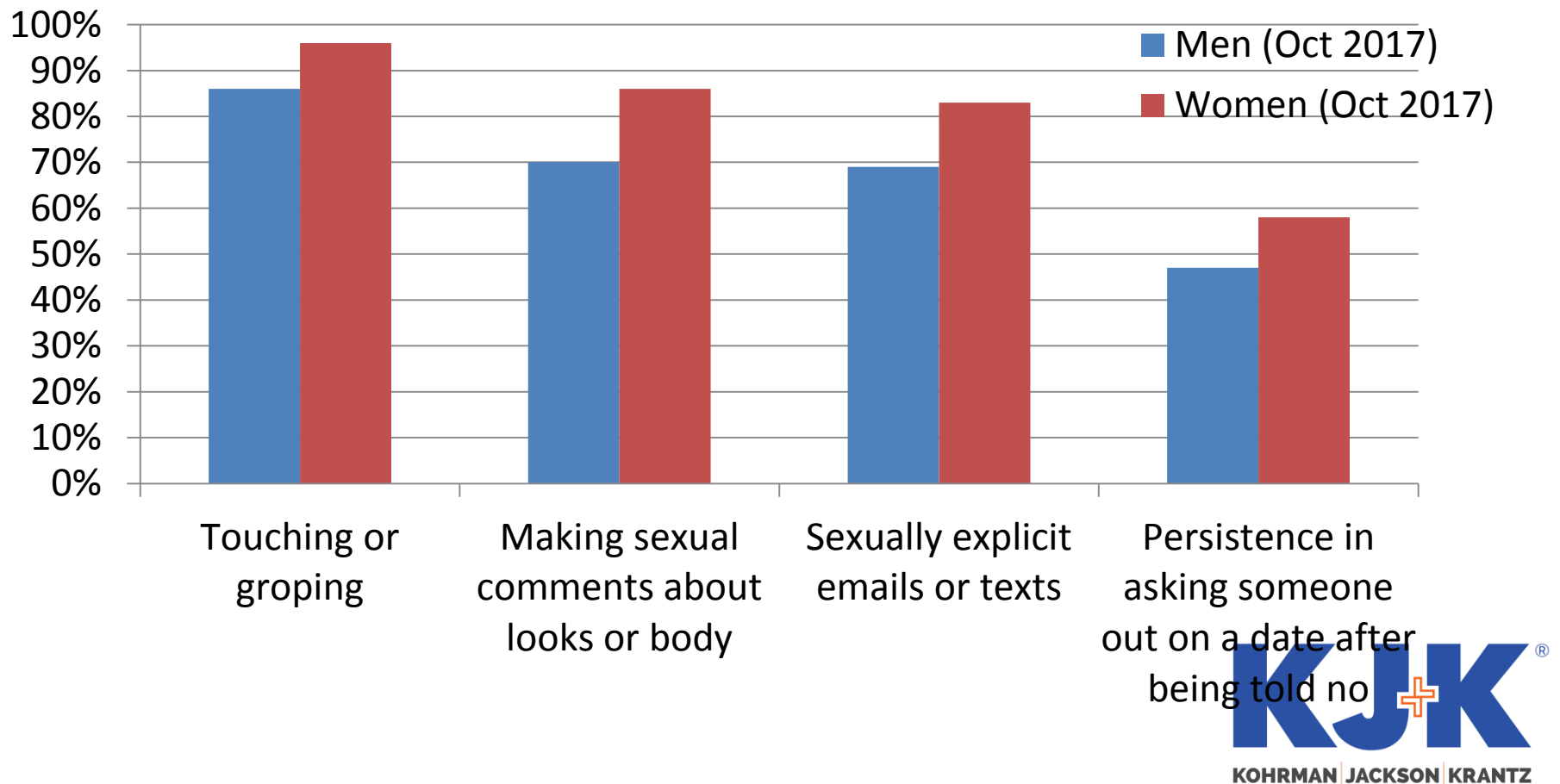


In October, 23% of women said the harassment came from someone who had influence over their work situation.

90% of the women who experienced sexual harassment said they never formally complained about it.

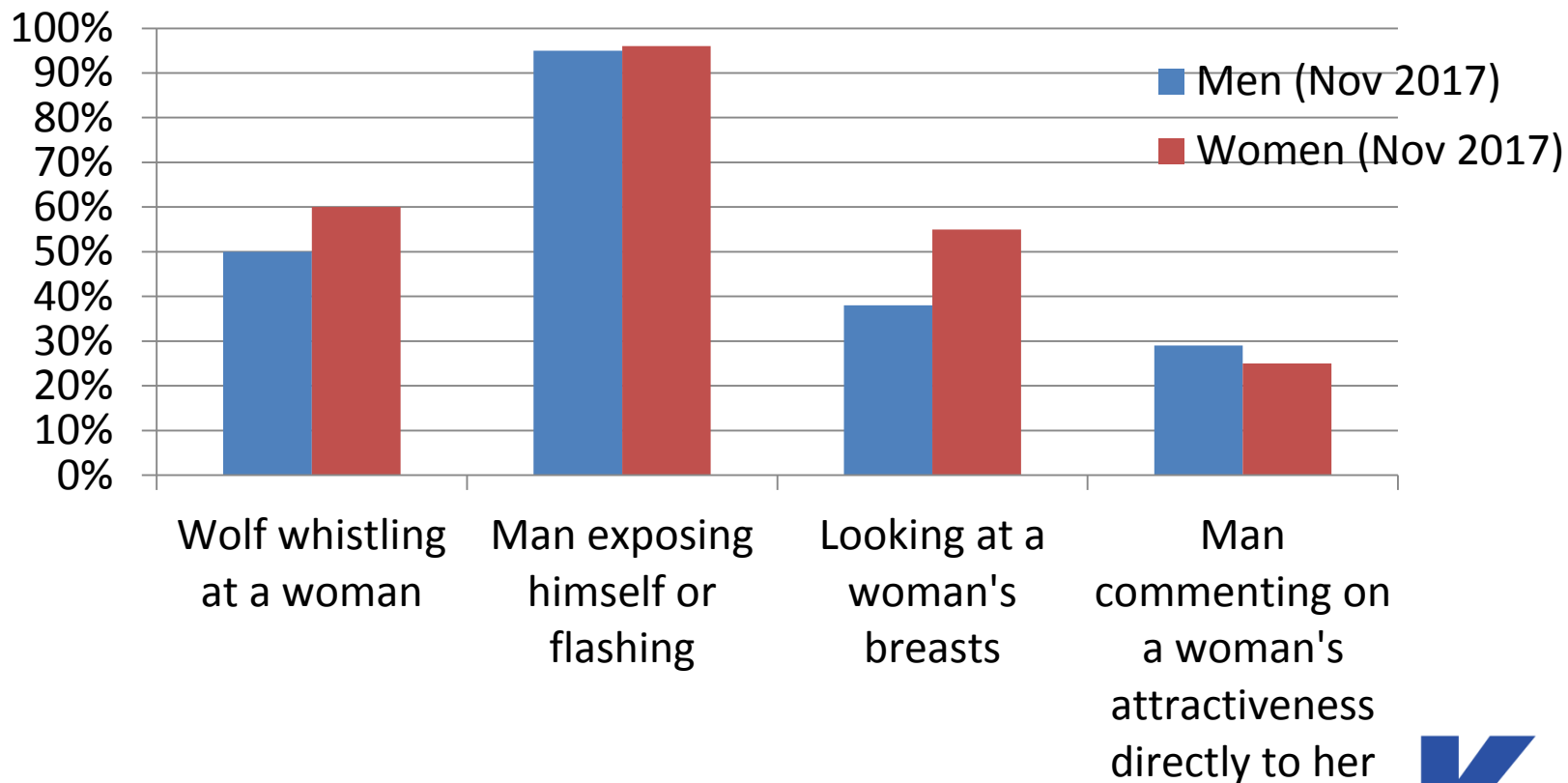
Public Perception: Statistics

What is Sexual Harassment? Men vs. Women



Public Perception: Statistics

What is Sexual Harassment? Men vs. Women



Public Perception: Statistics

How should sexual harassment be handled in the work place?

- ✚ 44% of Americans think it is inevitable that men will “hit on” women while at work
- ✚ 86% of Americans believe that zero-tolerance policies are our best hope to bring about change
- ✚ Bright Line: Americans can see that some change is looming
 - 5 years ago, **almost 75% of Americans** believed that a woman who reported being sexually harassed was risking her career. Today, **only 44%** believe so.
 - Approximately **2/3 of Americans** believed that reports of sexual harassment were generally ignored 5 years ago, as opposed to the **26%** who say they are generally ignored now.

#MeToo Movement

+ Founder: **Tarana Burke**

- Originally coined the phrase over 10 years ago as a way to help women survive sexual violence
- Now, it has become the catchphrase of the most powerful movement in today's society.

#MeToo Timeline

Oct. 5, 2017- Ashley Judd publicly accuses Harvey Weinstein of sexual assault/harassment in a breaking story in the NY Times.

Afterwards, many joined in with their allegations against Weinstein

Oct. 15, 2017- actress Alyssa Milano re-ignites the #MeToo movement on social media. It seems as if overnight the hashtag took the internet by storm, as millions of individuals across the world told their own stories of sexual harassment.

Oct. 18, 2017- McKayla Maroney tweets that she was sexually assaulted by U.S. Olympic team doctor Larry Nasser (recently sentenced to federal prison)

Nov. 9, 2017- publication of investigative piece about Republican Senate nominee, Roy Moore's, alleged misconduct with underage girls

Nov. 29, 2017- The "Today" show opens with stunning revelation that co-anchor Matt Lauer has been fired after NBC received allegations of sexual misconduct

Dec. 7, 2017- U.S. Senator Al Franken says he will resign amid allegations of sexual misconduct

#MeToo Timeline

Feb. 3, 2018-
Uma Thurman
breaks her
silence and
accuses
Harvey
Weinstein and
Quentin
Tarantino of
sexual
misconduct

March, 2018- A
group of women
inside Nike's
Beaverton,
Oregon
headquarters
start a revolt
against an inner
circle of male
executives.
Forced at least six
executives to
resign, including
Trevor Edwards,
Nike's President
of the Nike brand.

Mar. 12, 2018-
James Levine, a
well-established
figure in classical
music, is fired by
the Metropolitan
Opera after an
investigation
found evidence of
sexual
harassment and
abuse

April 23, 2018-
Massage
therapist
accuses Stan
Lee of Marvel
Comics of
sexual
misconduct

April 26, 2018-
Bill Cosby is
found guilty on
all counts of
sexual assault
on retrial,
faces a
maximum
sentence of 10
years in prison

Today, many of
the most
powerful and
high-profile men
have been
rocked by this
movement,
losing their jobs,
companies,
political seats,
and much more.

#MeToo Movement

“It’s about a movement. On one side, it’s a bold declarative statement that ‘I’m not ashamed’ and ‘I’m not alone.’ On the other side, it’s a statement from survivor to survivor that says ‘I see you, I hear you, I understand you and I’m here for you, or I get it.’” – Tarana Burke, interview with CNN

TimesUp Movement

- ✚ Announced January 1, 2018 with an open letter on behalf of more than 300 women in film, television, and theater that ran as a full-page, NY Times ad
 - Spearheaded by many of Hollywood's biggest names today: Oprah, Ashley Judd, Kerry Washington, Jennifer Aniston, Reese Witherspoon, and many others
- ✚ Began as a response to Alianza Nacional de Campesinas, a national alliance of female farmworkers

TimesUp Movement

+ What is it?

- Establishes a legal defense fund to provide subsidized support to women and men who have suffered from sexual harassment, assault or abuse in the workplace or while pursuing careers
- Encourages Hollywood studios and agencies to strike a 50-50 gender balance of power
- Clearly spells out the definition of “sexual harassment” for all
- Pledge of solidarity, frames survivors as a unified group

+ Large presence during award season

And Their Implications...

+ Positive:

- De-stigmatized sexual harassment. Women are more comfortable coming forward with their own stories, and more complaints being made in the workplace than ever before
- Shifted discussions in the workplace regarding sexual harassment
- Demonstrates that sexual harassment/abuse is ubiquitous, not distant or rare

+ However, some believe we have gone too far:

- Frenchwomen's open letter accusing the movement of lumping all men together
- Matt Damon's statements concerning a "spectrum" of harassment
- Unexpected consequences in the workplace

New Federal and State Laws and Regulations

- ✚ Newly-enacted federal tax law
 - Settlement of a claim “related to” sexual harassment or sexual abuse is NOT deductible as a business expense if the settlement is subject to a nondisclosure agreement.

- ✚ Trend that companies are moving away from mandatory arbitration language for workplace sexual harassment claims

New Federal and State Laws and Regulations

+ New Laws in the State of New York

- April 12, 2018- Governor Cuomo signed into law a state budget bill, that makes big changes for New York employers
 - Effective immediately, the law extends protections to certain non-employees in the workplace (vendors, service providers, consultants)
 - July 11, 2018= NDAs and mandatory arbitration provisions are prohibited in sexual harassment settlements. Must also give 21 days to consider and 7 days to revoke, similar to ADEA provisions
 - Oct. 9, 2018 = employers must distribute anti-harassment policies and conduct annual anti-harassment training
 - Jan. 1, 2019 = employers wishing to bid on government contracts must first prove that it has implemented written sexual harassment policies
- April 11, 2018 – New York City Council passed the Stop Sexual Harassment in NYC Act, a comprehensive package of legislation aimed at curtailing sexual harassment in the workplace.

New Federal and State Laws and Regulations

+ New Laws in the State of Washington

- Mar. 21, 2018- Governor Jay Inslee signed into law several new restrictions on an employer's ability to require nondisclosure agreements concerning sexual harassment
 - Cannot require employee to sign, as a condition of employment, an NDA preventing them from disclosing sexual harassment/assault in the workplace
 - Carve out for confidentiality provisions contained in settlement agreements
 - Retroactive application

New Federal and State Laws and Regulations

✚ New Laws in the State of Maryland

- Senate Bill 1010 passed through Maryland legislature, now awaits the Governor's signature
- Set to be effective Oct. 1, 2018, the Disclosing Sexual Harassment in the Workplace Act of 2018 voids any provision in an employment contract or agreement that waives substantive or procedural right based on sexual harassment
- Retroactive application
- Caveat:
 - The Act requires employers with 50 or more employees to electronically submit certain information to the Maryland Commission on Civil Rights
 - The Commission will retain this information for public inspection under the Maryland Public Information Act
 - The Commission will also publish and make accessible the aggregate number of responses from employers

New Federal and State Laws and Regulations

- ✚ EEOC's 2017 Enforcement Guidance on Unlawful Harassment
 - Much anticipated
 - Culmination of far-reaching EEOC study, which began even before the #MeToo movement began
 - 5 Key Measures for preventing and remedying harassment
 1. Strong, committed leadership
 2. Regular and proven accountability
 3. Robust and comprehensive harassment policies
 4. Reliable complaint procedures
 5. Routine, interactive training
 - 75-page draft proposal is currently available online

New Federal and State Laws and Regulations

✚ The American Bar Association has also joined in:

- At the 2018 ABA Midyear Meeting, the House of Delegates approved a resolution urging all employers to create and enforce sexual harassment policies
- Gave specific suggestions for what such policies should address and how investigations should be undertaken

What Should Employers Do Now?

- + **Preventive Actions** = best practices to prevent a complaint of sexual harassment from being filed at your company
- + **Remedial Actions** = best ways to respond to a complaint of sexual harassment and make sure you don't get sued

Preventive Actions

+ Set The Tone at the Top

- Top management employees and supervisors must set tone for the entire company.
- Assure a professional tone and make it clear that harassment will not be tolerated

+ Encourage Employees to Speak Up

- Multi-channel complaint processes
- Anonymous reporting

Preventive Actions

+ Strong Sexual Harassment Policies

- Zero-Tolerance
- Discuss the policies during onboarding process and redistribute regularly
- What to include in your policy:

Reiterate EEO Policy and prohibit any type of sexual harassment

Provide company's policy on sexual harassment and retaliation

Easy to read and understand

Provide convenient and reliable mechanism for reporting

Encourage prompt reporting

Explain that the employee must use the internal procedures set forth in the policy

Inform employees that disciplinary action may be taken against any violator, and give examples

Preventive Actions

- ✚ Training for all employees
 - Executives, supervisors, staff, personnel, etc.
 - What you should include in training:
 - Review current state and federal law as well as company policy
 - Specific training for supervisors and/or those that oversee the work of employees
 - Emphasize what types of behaviors can be considered sexual harassment
 - Responding to complaints
 - Training for other non-supervisory employees
 - Incorporate into new hire orientation and re-train annually if possible

Preventive Actions

- + **Love Contracts** = consensual agreements for in-office romances
 - More and more common in the workplace
 - Signed by both parties to ensure that each has entered the relationship willingly, and neither is being pressured or coerced
 - May be best to use legal counsel in drafting

- + **Educate Educate Educate!**
 - Employers should have baseline understanding on:
 - (i) definition of sexual harassment, and what it includes
 - (ii) how to prove/defend it in court, and
 - (iii) your responsibilities in reviewing complaints

Preventive Actions

- ✚ Preventive Actions for Third Party Harassment:
 - Make sure your sexual harassment policies are not restricted to only employees. They should include clear language that harassment of any kind will not be tolerated in the workplace.
 - Training should include some discussion about third-party harassment as well
 - However, if you do receive this type of complaint, you should act quickly:
 - Remove employee or third party from the situation immediately
 - If the third-party is an employee of another company with which you do business, contact the company to inform them of the incident(s) and steps taken
 - Finally, if you are the employer of the third party, you should also act quickly to address the problem (follow own sexual harassment policies)

Remedial Actions – Responding to a Sexual Harassment Complaint

+ Take it **SERIOUSLY**

+ **Investigate** promptly

- Legal and ethical obligation
- Prompt, thorough, independent reviews
- Essential to a good legal defense (if needed)
- Interviews with the complainant as well as any witnesses
- Document at all stages

Remedial Actions – Responding to a Sexual Harassment Complaint

- + Be respectful
- + Avoid getting angry
- + Do not retaliate

Remedial Actions- Avoid a Lawsuit

- ✚ After completing your investigation, take appropriate action against alleged harasser
 - If harassment is confirmed
 - If harassment is not confirmed
- ✚ Always follow up with the complainant to tell them about your investigation

Remedial Actions- Avoid a Lawsuit

- ✚ If terminating the harasser, take steps to reduce the risk of litigation at the end of employment:
 - Obtain waivers and releases from employee
 - Document all termination and lay-off decisions
 - Treat terminated employee with respect

Remedial Actions- Avoid a Lawsuit

- ✚ Addressing a Public Relations concern
 - Be prepared
 - Have an action plan in place
 - Communication Strategy- who is going to respond to media? (human resources, public relations specialists, etc.)
 - Hire expert?

Questions/Comments

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