

Ogletree Deakins Full and Fair Investigation of Sexual Harassment Claims in the #MeToo Era

March 28, 2018 • Austin

Presented by:

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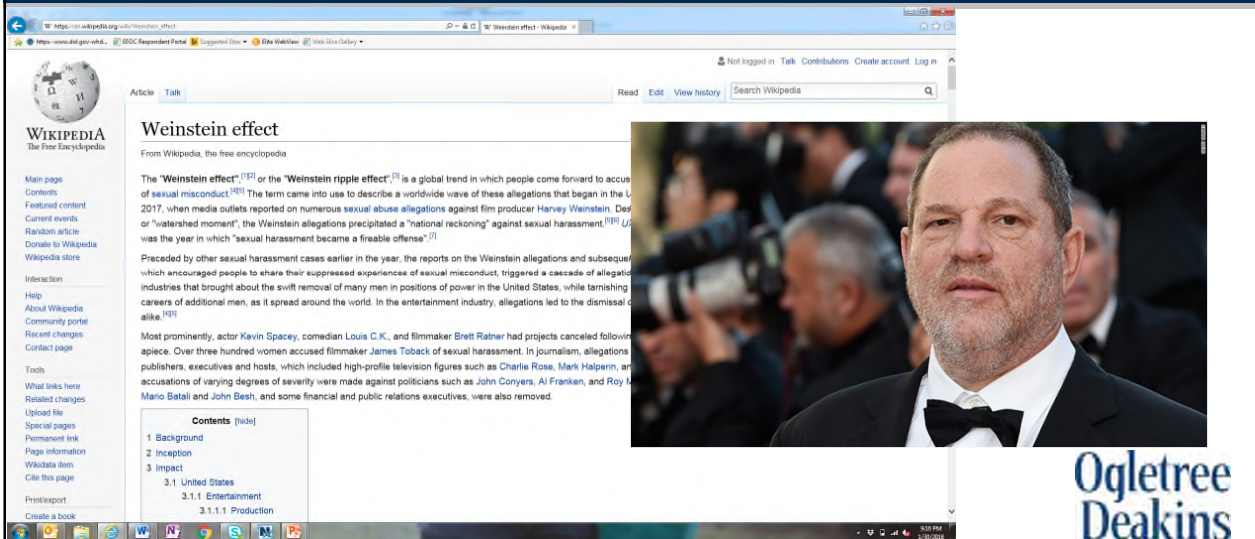
Introduction: The Silence Breakers

- Significant shift in focus on and awareness of sexual harassment in the workplace.
 - 100+ public, high-profile sexual harassment accusations made against celebrities, public figures, politicians and corporations.
- In 2017: 70% of Americans describe sexual harassment as a “very serious problem.”
- In 1998: 36% of Americans described sexual harassment as a “very serious problem.” (Source: CNN/Time)



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From the Harvey Weinstein Effect...



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... to #MeToo

 **Alyssa Milano** 
@Alyssa_Milano

Follow

If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet.

Me too.

Suggested by a friend: "If all the women who have been sexually harassed or assaulted wrote 'Me too.' as a status, we might give people a sense of the magnitude of the problem."

4:21 PM - 15 Oct 2017

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Extent of #MeToo



- Over 500k people responded to Milano's tweet in the first 24 hours



- #MeToo was used by 4.7 million people in 12 million posts during the first 24 hours
- 45% percent of U.S. users have friends with #MeToo posts



Global Reach

- #MeToo in every continent and 85 countries
- Heavily reproduced in the U.S., Europe, India, and Australia.

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Impact of #MeToo for Employers

- Greater employee awareness of workplace harassment
- More complaints of harassment; speak-up culture
- Higher likelihood of other employees joining complaints
- Less tolerance for rehabilitating (habitual) offenders
- Instant credibility before judges/juries
- Threats of large-scale negative publicity

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Scenario 1: GC (or Board) calls and asks “What should we be doing based on the #MeToo movement?”

- Put someone competent and capable (including with actual authority to act) in a position to address this for the Company

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Scenario 1: GC (or Board) calls and asks “What should we be doing based on the #MeToo movement?”

- Put someone competent and capable (including with actual authority to act) in a position to address this for the Company
- Review and update your policies and practices

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Establish The Basics: Comprehensive & Effective Anti-Harassment Policies

- Clear opening statement: Sexual harassment is illegal, unacceptable & won't be tolerated.
- Explain prohibited conduct, with examples.
- Describe
 - complaint & investigative processes.
 - responsibilities of management & staff.
- Assure that
 - complainants & witnesses will not be retaliated against.
 - confidentiality of complaints will be maintained to the extent possible.
 - employer will take prompt & proportionate corrective action when it determines that harassment has occurred.



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Additional Policies To Consider

Consensual Romantic Relationships & Dating Policies

- Establish guidance on how to handle, especially between supervisor/manager and an employee
- Love contracts?

Internet Access and Electronic Mail

- No expectation of privacy
- Block adult-themed websites
- Cannot use company property to violate other policies, e.g., anti-harassment

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Additional Policies To Consider

Social Media Policy

- Supervisors should not be “connected” with subordinates
- Same policies apply to online conduct

Travel Policy

- Same rules apply on the road!

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- Review and update your policies and practices
- Prepare a training plan for employees at all levels
 - Then execute it
 - Not a one time PowerPoint

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Regular Training For All

- Distribute policies at time of hire and when revisions are made
- At least once a year – and change it up. Don't make it the same each time.
- Separate training for employees and for management
 - For employees, emphasize rights and reporting procedures
 - For managers, emphasize responsibilities and duties
 - Consider Board of Directors training



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Regular Pulse Checks

- Consider use of
 - Culture surveys
 - 360 reviews
- HR should be visible and accessible – open door
- Conduct at least annual review of complaints/concerns to identify and proactively address trends
- Consider “Speak-up” campaigns



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 - Not a one time PowerPoint
- Determine if past transgressions need to be reviewed and addressed now

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Scenario 2: GC walks in and says a key executive has been accused of sexual harassment, what now?

- Prepare for the fallout – internally and externally
 - Put together a PR plan in case you need to distribute it quickly
 - Consider internal PR as well
 - What do you communicate?
 - To whom?
 - When?

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Scenario 2: Key executive has been accused of sexual harassment, what now?

- Prepare for the fallout – internally and externally
 - Put together a PR plan in case you need to distribute it quickly
 - Consider internal PR as well
- Conduct a thorough and impartial investigation
 - Select an appropriate person/team—potentially outside counsel—to conduct the investigation;
 - Think Special Counsel Robert Mueller
 - Give the investigator access to all that he/she/they need

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Hallmarks of a Good Investigation

- Professional and impartial
- Respectful and fair
- Thorough and prompt
- Properly documented
- Confidential *as possible*
- Reasonable conclusions based on documented facts
- Appropriate disciplinary and remedial actions are taken
- Results are communicated

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Investigatory Mistakes That May Prove Costly

- Unexplained delay in receipt of the complaint and the investigation
- Having inexperienced HR professionals handle the investigation without guidance or oversight
- Protecting the accused because of his/her position
- Relying on unsigned statements
- Conclusory investigations



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- Conduct a thorough and impartial investigation
 - Select an appropriate person/team—potentially outside counsel—to conduct the investigation; Give the investigator access to all that he/she/they need
- Treat transgressions the same, if not more seriously, as other employees

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What action should you take?

- **Disciplinary Measures** – depend upon:
 - Nature and seriousness of the offense
 - Whether it is a first violation or a repeat offense
 - Whether it is part of a broader pattern of harassment
 - Employer’s disciplinary guidelines and past precedent
- **Remedial Actions**
 - Must be “reasonably calculated” to stop the harassment and prevent further occurrences



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Disciplinary Measures:

- Termination
- Suspension
- Place on probation with warning
- Last Chance Agreement
- Reprimand
- Demotion/preclude promotion
- Salary reduction/denial of salary increase
- Rescind bonus

Remedial Actions

- Change reporting relationship
- Transfer
- Require offender to avoid contact with complainant
- Sensitivity training
- Executive coaching
- One-on-one counseling

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Scenario 3: Executive walks in – GC has put on Facebook an #Ididthat post. What now?

- Know that conduct outside the office needs to be treated like it occurred in the office
- Prepare a PR plan
- Have a proper person conduct a thorough and impartial investigation
 - Determine if this occurred on your watch or while employed by you (or elsewhere)
 - Provide appropriate remedial action
- Consider updating related policies, e.g. Social Media

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Scenario 4: News break! Current employee is part of a suit involving allegations of sexual harassment while at his/her prior employer. What now?

- Investigation?
 - Probably not for the lawsuit against the employee
 - BUT...
 - Speak to the employee and find out the scope of the allegations
 - If the employee is the accuser, beware of acts that may look like retaliation
 - Review your records to determine if you have received similar complaints about employee
 - Consider options for confirming accused harasser has not committed similar acts in your employ
 - Beware of legal action by a wrongfully terminated individual

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Scenario 5: You find out two employees have started dating—what now? What if one is promoted to or is already in management?

- Establish a dating policy if you don't have one
 - Permissible reporting structure
 - Notify HR
 - Sign a Love contract
- Meet with both employees
- Modify reporting structures as necessary
- Voluntary resignation

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Questions?

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