

IN THE #ME TOO MOVEMENT WHAT'S YOUR ROLE?

STOPPING SEXUAL HARASSMENT AND VIOLENCE in the WORKPLACE

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Bill Tamayo

EEOC San Francisco District

District Director (2015) - Oversee investigations and operations

- Regional Attorney (1995-2015) – Directed litigation (many sexual harassment lawsuits, many on behalf of immigrant workers)
- **Asian Law Caucus Attorney:** political asylum, deportation defense, employment discrimination.
 - Represented four dozen battered immigrant women in immigration proceedings.
 - Co-authored memo to Congress creating **self-petitioning provisions of Violence Against Woman Act**

Bryne Moore

- EEOC investigator since 2004; based in Portland, OR
- Has investigated numerous charges including egregious sexual harassment cases in Oregon involving farm workers and other immigrant workers
- Spanish-speaking
- Trainer and outreach presentations
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



**You have the right
to work free
from discrimination
and harassment**

The MeToo Movement: What's Your Role?

- Hypo: Maria, a college sophomore, comes to you for help. She works 15 hours a week at Trader Moe's and says her supervisor is "bothering" her. He asked her out several times, but she said "no". Two weeks ago in the back storage area he grabbed her breasts from the back and stuck his hand down the front of her pants and thrust himself. She was shocked. She told him to stop it. He said if she told anyone he'd fire her. You're the first person she's told. She is terrified but needs the job. Her parents are on disability income. She doesn't know what to do. She hasn't been able to study nor sleep.
- **What's your role? What do you do?**

What's your role?

A young person who just started working at a restaurant describes these facts to you:



"He always made sure we were alone before he touched me."

My supervisor – male in his 50s - started off professional and I trusted him. But then he started with these awkward hugs which gradually lead to more and more touching. I started to notice also he does this to another co-worker, the hugs and standing behind and pressing his body into yours. When I mentioned this to some co-workers, they said "That is just how he is."

What other questions would you want to ask? What actions or advice would you give?

What keeps people from taking action?

Title VII of the Civil Rights Act of 1964

- **Before Title VII: legal to discriminate, harass and retaliate;**
- “The Butler”; “Mad Men”, “Hidden Figures”, “Selma”;
- Nate Parker’s “Birth of a Nation”, “12 Years a Slave”; ***a nation founded and built on human trafficking and racism; raping slaves was legal***
- ***(Slavery is part of the legacy of labor relations and sexual assault in the workplace)***
- Established **U.S. Equal Employment Opportunity Commission (EEOC)** to investigate charges of discrimination and eventually to sue companies

Under Title VII, Sexual Harassment Is Unlawful

- **Title VII of the Civil Rights Act of 1964** prohibits discrimination on the basis of **race, color, sex, national origin and religion** in hire, promotion, **all terms and conditions of employment**, termination; prohibits retaliation against those who complain or assist in complaining;
- **Sexual harassment is a form of sex discrimination; (not unlawful pre-1965; not recognized by Supreme Court until 1986)**
- ***Addressing sexual harassment especially for immigrant, migrant and other vulnerable workers (including young workers) is an EEOC priority***

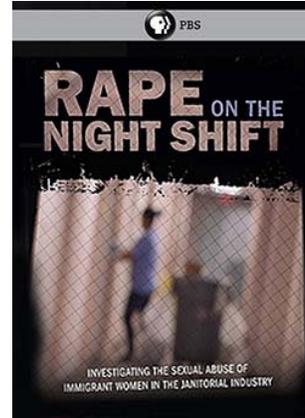
EEOC Priority: **VULNERABLE WORKERS**

“They look at you like they own you, and whenever they want, they can have you.”



Rape in the Fields

Frontline documentary by PBS
Highlights EEOC San Francisco District's focus on sexual assault against farmworkers



Remedies for Harassment or Retaliation under Title VII

- \$\$ back pay if fired or demoted; reinstatement
- \$\$ **compensatory damages (emotional distress, pain and suffering); you could be the critical witness**
- \$\$ **punitive damages if employer acted with malice or “reckless disregard”**
- \$\$ for those who were retaliated against as witnesses
- Caps on damages up to \$300,000 per employee (added state claims could be “uncapped”)
- Termination of harasser; bar future hiring
- New company policies to encourage complaints without fear of retaliation (as part of court order); training of supervisors and employees

EEOC Cases



- ▶ **EEOC v. Tanimura & Antle** Salinas, CA & Yuma, AZ

Farm worker forced to have sex with hiring official in order to work 2 different seasons. *\$1.855 million settlement*



- ▶ **EEOC v. DeCoster Farms** Iowa

Latina poultry workers were raped and threatened with termination and deportation if they cooperated with EEOC. *\$1.5 million settlement*



EEOC Cases



Ms.

The Green Motor

Rebecca Clamen

That's what some women farmworkers call the fields and orchards

in which they face the persistent threat of sexual assaults.

Summer 2005



- **EEOC v. Harris Farms** Coalinga, CA
Mexican mother of 5 raped at gunpoint (twice in the fields, once in her house) by supervisor who threatened to kill her husband if she reported rapes.
Jury verdict for nearly \$1 million (2005)



- **EEOC v. Rivera Vineyards** Coachella, CA
Farm workers subjected to sex segregation and constant sexual harassment including rape.
\$1.1 million settlement

EEOC Cases



- **EEOC v. ABM** Bakersfield, CA
21 Latina janitors sexually harassed by supervisors on a regular basis. Propositions for sex, grabbing, groping, one rape and retaliation including termination.
\$5.8 million settlement (2010)



- **EEOC v. Koch Foods** Morton, Mississippi
Latino/a poultry workers were harassed on the basis of sex, race and national origin, and fired in retaliation.
\$3.75 million settlement (2018)

EEOC Cases



- **EEOC v. Moreno Farms** Felda, FL
Several women raped multiple times by the sons of the owner.
Jury verdict \$17 million. (2015)



- **EEOC v. Favorite Farms** Dover, FL
Farm worker raped by supervisor. Company failed to investigate: told her to go home, supervisor continued to supervise women.
Jury Verdict for \$850,000 - \$450K emotional distress, pain and suffering \$400K punitive damages

EEOC Cases

- **EEOC v. Ford Motors** (Chicago) sexual and racial harassment of women and African-Americans; **\$10 million settlement** (2017)
- **EEOC v. Karen Kim Market** (NY) sexual harassment of teens by mid-30's manager; \$1.2 million verdict
- **EEOC v. Wilcox Farms** (Oregon); sexual harassment of farm worker, retaliation \$260,000 settlement (co-counsel with Legal Aid Services of Oregon & Oregon Law Center)
- **EEOC v. River Point Farms** (Oregon); sexual harassment of farm worker, retaliation \$150,000 settlement (co-counsel with LASO)
- **Uber** (San Francisco); sexual harassment of office workers; \$4.4 million settlement (pre-litigation)

Sexual Harassment of Developmentally-Disabled African-American Women Janitors

- **EEOC v. Goodwill Industries of the East Bay and Calidad Industries:** (Oakland, California) EEOC alleged that six female janitors working **the night shift at the Oakland Federal Building** faced routine sexual harassment by their direct supervisor, and the women had complained several times. Suit also alleged that two managers were unfairly criticized and disciplined in retaliation for supporting the women's sexual harassment claims, and one manager was forced to resign. One claimant was 19 years old.
- Settlement: (May 2018); **\$850,000**; reporting and monitoring

Male-on-Male Sexual Harassment

- ***EEOC v. Discovering Hidden Hawaii Tours, Inc., Hawaii Tours and Transportation Inc., and Big Kahuna Luau, Inc.*** (Honolulu, HI): EEOC alleged that the male president engaged in a pattern of sexually harassing male employees, many of whom were forced to quit as a result of the egregious harassment or were retaliated against for reporting the harassment.
- Settlement: (May 2018) \$570,000; 3 year consent decree; harasser removed from operations and forced to divest control of companies; independent complaint process

VIOLENCE and CONTROL in the WORKPLACE

- Sexual violence in the workplace is violence; ***sexual violence is a form of sexual harassment***
- **Sexual Harassment at Work: target is company for \$\$ and changes in the workplace so that it's safe;**
- **Not surprisingly with \$\$ and reputations at stake, companies fight these cases by seeking to destroy the claimant, attack her credibility, force her into dismissing the case or accepting a low settlement and settling confidentially**
- ***Bystanders, co-workers, fellow students, friends can help a claimant move forward***

It's All About Power

- Sexual assault and harassment illustrate the disparity of power – **and predators know this**
- Employee v. Supervisor (she depends on him)
- **Employee v. Company**
- Employee: needs job, limited English, limited education, fear of retaliation, no other options
- Company: has money, connections, holds the livelihood card, may employ victim's family, controls the conditions of work, can fire her and siblings, etc.; **enables the predator**
- **What other weapons are in his arsenal?**

Parties under Title VII

- Victim or harasser may be man or woman
- Victim and harasser may be of same sex
- Harasser can be supervisor, agent of employer, co-worker, or **third party**
- Victim can be someone not directly targeted but nevertheless affected by the hostile work environment
- **Key factor:** The employer **controls** the conditions of work and has a **duty** to make sure the workplace is safe

What is Sexual Harassment?

- **Unwelcome** verbal or physical conduct of a sexual nature, including
- Comments or suggestions about attire, sexual advances, requests for sexual favors, demeaning terms, etc.
- Grabbing, touching, fondling
- Rape, assault, battery
- *Must be severe or pervasive enough to alter an employee's working conditions that it creates an intimidating, hostile or offensive work environment*
- *"Reasonable woman" would find it objectionable and claimant herself found it objectionable*

Liability: Sexual Harassment by Supervisor or Manager

Quid Pro Quo	Hostile Work Environment
 <p>THIS sexual favors FOR THAT terms of employment</p>	<ul style="list-style-type: none"> • Unwelcome • Severe or Pervasive • Objectionable
<p>Tangible employment action: No employer defense</p>	<p>Employer: some defenses, but could still be liable</p>

Defenses if Harasser is **Supervisor** under Title VII

- If no tangible employment action, e.g. quid pro quo, termination related to not granting sexual favors, termination for complaining, etc. employer has a defense **if it establishes that**
- - employer had a reasonable system for complaining and charging party failed to take reasonable steps to complain, AND
- - once employer knew about the harassment it took prompt and corrective action to both stop and deter future harassment
- (employer must generally show that it conducted a reasonable investigation and properly disciplined harasser; **reality: many HR staff don't know how to conduct the investigation, have biases, are not "neutral", fear retaliation themselves**)
- **Many supervisors don't know what to do once Maria has complained; often they retaliate**

Sexual Harassment by **Non-Supervisor**

Non-supervisor can include **co-workers** or **third parties** (non-employee such as a customer or delivery person)



Claimant must show that

- 1) Employer knew **or should have known** about the harassment **and**
- 2) Failed to take prompt and corrective action to stop the harassment and to deter future harassment
- 3) **Fuller v. City of Oakland** (9th Cir.) the fact that harassment stopped is not enough to escape liability

Proving Harassment

- **Charging Party: is she credible?** (Do not assume that CP is lying.)
- Emotionally upset? Crying? (but she could also be stoic)
- Describes details? Physical touching, grabbing? Frequency? (***But trauma may affect memory.***)
- Verbal harassment? What was said?
- Any threats by harasser? Manager? Co-workers? Human Resources? Discouraged from complaining?
- **CAVEAT: She may be the only witness (aside from the perpetrator) to the assaults. Need to assess her credibility fairly and reasonably. Don't expect to rely on evidence that is not reasonably available.**

Credibility & Sexism

Jose sexually assaulted me in the back of the shed!



Are you sure, Maria? Jose's a family man. No one has ever complained about him. No one ever saw him attack you or say those things about you. But weren't you late for work yesterday? Jose would never do such a thing. He's been with us since he was a teenager. He hired you (and he can fire you... and your sister)

You're a liar, Maria

Credibility & Sexism

Help! Help! Jose's got a gun,
and he just shot someone in the
back of the warehouse!
There's blood everywhere!



Are you sure, Maria? Jose's a family man.
No one has ever complained about him.
No one ever saw him attack you or say
those things about you.
But weren't you late for work yesterday?
Jose would never do such a thing.
He's been with us since he was a teenager.
He hired you (and he can fire you...
and your sister)

*You're a liar,
Maria*

Credibility & Sexism

Help! Help! Jose's got a gun,
and he just shot someone in the
back of the warehouse!
There's blood everywhere!



Omigosh! Are you okay, Maria?
Who else is working there?
Is anyone else hurt?
Get everybody to safety!
Hurry up! Somebody, call the
police! Get an ambulance!

**Why is the response
so different?**

*If she's not believed,
what is the impact on her
existing trauma?*

Proving Harassment: Your Role



Telling her story:

- Describes details? Physical touching, grabbing? Frequency? Location? (**Memory impacted by trauma?**)
- Verbal harassment? What was said?
- Threats by harasser? Manager? Co-workers? Human Resources? Discouraged from complaining?
- Other harassed individuals?
- Did she complain to or tell anyone about the harassment? Who? What was said?
- Any physical evidence? Torn dress? Bruises? Texts? Ims? Phone records?

CAVEAT: There may be no other witnesses (aside from perpetrator). Need to assess credibility fairly and reasonably.

Proving Harassment: Your Role



- Corroboration by Witnesses: **Co-workers**, supervisors, parents, spouse, other relatives, **medical professionals, counselors**
 - Actual eyewitnesses? NOTE: Most egregious harassment happens "behind closed doors".
- **What was observed? What did claimant say? Injuries? Treatment? Describe trauma?**
 - Emotionally upset? Crying? Trembling?
 - Could also be stoic, giggling – individuals respond to trauma differently
- **Witness notes, testimony, observations are extremely important**



Proving Harassment: Impact of Ally/Witness

- **EEOC v. Footaction:** Harasser twice threatened to break 17-year-old sales associate's neck if she reported harassment.



Mother

- Learned of harassment after she found teen curled up in fetal position on the couch after the 2nd threat (after harasser put hands on teen's neck).
- Got her daughter to talk, and to report to EEOC.
- Served as witness that something traumatic occurred.

Proving Harassment: Was police report filed?

Police Report Template

POLICE REPORT	
Case No: _____	Date: _____
Reporting Officer: _____	Prepared By: _____
Incident: _____	

Non-conclusive

NOTE: Less than 10% of sexual assault crimes are reported.



- **EEOC v. Willamette Tree Wholesale** Oregon
In view of perpetrator's repeated threats to kill plaintiff if she reported the sexual assaults, **court bars employer's inquiry into plaintiff's immigration status, prior sexual history and her reasons for not contacting the police**

Proving Harassment: Investigation Standard

Criminal	Civil
beyond a reasonable doubt	preponderance of evidence i.e. $\geq 51\%$

EEOC v. Harris Farms: Farmworker sexually assaulted by supervisor at gunpoint 3x.

- Deputy sheriff: *Victim is lying. I don't believe her.* (Deputy doesn't speak Spanish)
- Jury: *We believe her and here's \$1 million*

Hurdles in Proving Harassment

- **Charging Party:** may be afraid to tell parents, spouse, relatives, friends, co-workers;
- stigma; shame; peer pressure; fear that co-workers will tease;
- need the job to support family; other retaliation
- actual threats of physical harm
- ***trauma may impact recollection and the ability to articulate what happened***
- Immigration status; fear of deportation for her and family;
- **EEOC provides certifications for U-Visas (see U-visa regulations)**

Hurdles in Proving Harassment

- afraid that spouse or boyfriend may not believe her and may harm her or others;
- Other hurdles???
- It takes a lot of courage to come forward
- ***Just because she doesn't tell someone right away doesn't mean she's lying; threats of retaliation or retaliation may chill her out***
- ***Just because there are no other witnesses doesn't mean she's lying***
- ***What she tells you the advocate might be critical evidence;***
- ***Remember the impact on the victim if she is not believed;***

RETALIATION

Percentage of all EEOC charges received

2005	2010	2015	2018	2020
29.5%	36.3%	44.5%	51.6%	55.8%



- **Nearly 100% of sexual harassment lawsuits also have retaliation claim**
- **Claimants don't come to EEOC to complain about harassment. *They first complain that they were fired.***
- **ISSUE: Does the adverse action (termination, demotion, threats to harm or other activity) *discourage a reasonable employee to file a claim?***

Make sure to ask: "Were you discouraged from making a complaint? Who discouraged/ threatened? When? How was threat made? Have others have been threatened or deterred?"

RETALIATION: Elements of Claim

- 1) Charging Party engaged in **protected activity** by either a) opposing what she reasonably believed was unlawful discrimination or harassment or b) by participating in a proceeding (e.g. EEOC investigation, court hearing, deposition, etc.);
- 2) Charging Party was subjected to an **adverse action**, e.g. demotion, suspension, termination, threats to destroy career, etc. and
- 3) Charging Party can establish that there was a **nexus between the adverse action and the protected activity**
- ***Burlington Northern v. White***: the action of the employer had the effect of chilling or attempting to deter the charging party from pursuing her civil rights claim

Sexual Harassment + Retaliation

19 y.o. America Rios was harassed via text by the Assistant Store Manger. When her immediate supervisor Ka Lam reported the harassment, Lam is fired.



- Rios: “This was my first job... It really meant a lot to have my supervisor speak out for me, and it was horrifying to see him lose his job over it.”

Upstander: Direct Supervisor

RETALIATION

- ▶ ***EEOC v. Fry's Electronics*** (Seattle 2012)
- ▶ Top performing Chinese-American supervisor fired two weeks after he reports complaint of Latina teenage employee that she's receiving **sexting messages** from Asst. Store Manager; Latina eventually fired; company destroys records of prior sexual harassment complaints against Asst Store Manager AND Store Manager who was investigating the harassment!!
- ▶ \$2.3 million settlement; \$100,000 sanctions against Fry's for destroying records

Why File a Charge with the EEOC?

- “Exhaust administrative remedies” - Requirement for filing lawsuit in federal (and some state) court
- EEOC can investigate, see if there are other victims, and determine whether discrimination occurred
- EEOC can try to settle the case for \$ and other relief

EEOC Intake appointment
<https://publicportal.eeoc.gov>

1-800-669-4000

Phone



Mail



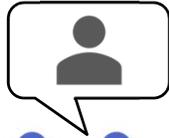
In person



EEOC: Who can file a charge?



- ▶ All workers employed by an entity in U.S. and its possessions with 15 or more employees. U.S. citizens working abroad for U.S. companies.



- ▶ Third parties (union, church, relative, organization **including sexual assault program**)



- ▶ Commissioner's charge



EEOC & Immigration Status

Title VII makes no distinction based on immigration status. Undocumented workers are protected and can file charges of discrimination. (EEOC & *Castrejon v. Tortilleria "La Mejor"*)

- ▶ EEOC will not ask status
- ▶ EEOC will fight company inquiries into immigration status during litigation
- ▶ **EEOC can certify for a U-Visa where charging party or witness is victim of "serious crime activity"**
 - ▶ Raise questions of immigration status with EEOC **Regional Attorney or Trial Attorney**



EEOC Procedures: TIMELINESS

Charge must be filed within **180 days*** of the discriminatory act; (**300 days** in jurisdictions with fair employment practice agency like Colorado, Idaho and California)

- **Termination:** clock starts when employee is notified that she will be terminated (*Ricks v. Delaware State College*)
 - For continuing pattern of **harassment** (no meaningful break in conduct), at least one act within last **180 days*** (or 300 days if FEPA has agreement with EEOC)
 - See *EEOC v. Harris Farms*: Rapes in 1993, 1994, 1995, charge filed in 1999.



TIMELINESS & EQUITABLE TOLLING

EEOC v. Willamette Tree Wholesale (Oregon)



- Farm worker sexually assaulted from first day, then once a week for 10-12 weeks. Warned that she, co-employee relatives and family in Mexico would be killed if she told anyone.
- She filed EEOC charge 62 days after **300 day deadline**: Company filed Motion to Dismiss on timeliness grounds. Can she still pursue claims?

Court grants **equitable tolling** citing *Stoll v. Runyon* (9th Cir. 1999). Company can't benefit from having traumatized claimant so badly that she can't complain. **Relied on psychologist and therapist reports.** Case allowed to proceed.



EEOC Investigations: Are there Other Victims?

- EEOC can also investigate whether there are other “similarly situated” victims of discrimination or harassment and obtain \$ for them
- If you believe that other individuals have been harassed and/or retaliated against, alert the EEOC; we can investigate!

Resolving Charges

- Dismissal: “insufficient evidence to support a finding of a violation at this time”
- Employee gets Notice of Right to Sue and has 90 days to file suit in Federal court (may vary for state law suits)

Resolving Charges; Litigation

- **Letter of Determination:** reasonable cause to believe that a violation has occurred
- **Conciliation:** negotiation between the company and the EEOC and the charging party; EEOC is a party; confidential voluntary settlement
- **If conciliation fails, then EEOC can sue in federal court**
- EEOC v. X Company, on behalf of the charging party

LITIGATION

- EEOC can obtain relief for the charging party and the **class of similarly situated workers** even if they did not file charges
- Settlement authority rests with Regional Attorney (does amount of \$ serve the public interest and reasonably compensate victims?); **Settlement is Public Document**
- **Intervention:** CP has a right to intervene in the lawsuit and bring Title VII claims and related state claims (unlimited damages)
- **Challenge:** **how does claimant stay involved and engaged and not give up hope over years of investigation and litigation?** see *EEOC v. Harris Farms*

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