Understanding the #MeToo Movement

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Julie Dower

Good morning and welcome, everyone. First, I just wanted to thank you for taking the time to join us today. My name is Julie Dower. I am the Marketing Communications Manager for Vensure Employer Services, and I will be your host over the next hour. We'll be spending some time today talking about the #MeToo movement and some of its history. We'll be covering these relevant topics through a Q&A with our panelist. And as always, we will do our best to answer any questions that come in. But any that we're not able to get to today will be responded on an individual basis after the session concludes. This webinar is brought to you today by Vensure Employer Services and all of our PEO partners. Vensure Employer Services is the leader of 20-plus PEO partners located across the country. Our clients are in all 50 states and will generate most of the questions that we will be answering today. Our agenda for today's session includes the definition of sexual harassment, history of sexual harassment, history of the #MeToo movement, how to avoid being accused of sexual harassment, what to do if you've been sexually harassed at work, and of course, our Q&A. If you hear a topic that you need some more clarity on, feel free to submit a question in our Q&A box. So today, we're thrilled to have Robin Paggi joining us as our panelist. Robin is a seasoned human resource practitioner specializing in training on topics such as harassment prevention, communication, team building, and supervisory skills. Okay, Robin, over to you.

Robin Paggi

Sexual harassment is actually a form of sex discrimination and discrimination became illegal in employment with the signing of the Civil Rights Act in 1964. The Civil Rights Act prohibited discrimination in many areas, schools, businesses, but Title VII of the Act pertains to employment. And Title VII made it illegal for employers with 15 or more employees to fail or refuse to hire, to terminate, or otherwise discriminate against any individual with respect to compensation, terms, or conditions of employment because of that individual's race, color, religion, national origin, or sex. So the Civil Rights Act had five what are called protected classes and protected classes are the protection from harassment and discrimination.

Title VII is harassment discrimination in employment. Now, here's a brief history lesson from the Act for you. I think it's important to know a little bit about its history so you can understand why it came to be and then what happened from there.

President Kennedy began the process of gaining support for civil rights legislation in 1963. And this was a result of the violence that occurred during the civil rights protest in Birmingham, Alabama. So the Civil Rights Bill was written by the Justice Department and it was sent to Congress for approval. And the word "sex" was not originally in the bill. So there were only four protected classes – race, color, religion, national origin – in the original bill. "Sex" was added at the last moment and according to West Encyclopedia of American Law, Representative Howard Smith from Virginia added the word "sex." And his critics said that the reason he did it was because he was a conservative Southern opponent of federal civil rights and he thought that if he added "sex," that it would kill the bill. He didn't think that Congress would pass a bill that gave women equal rights; however, they did. The bill passed. President Kennedy, who started the whole thing, did not get to sign it because he was assassinated in November of that year. Lyndon Johnson took his place and it was one of the first things that he did after taking office.

Now let's talk about what sexual harassment is. The Equal Employment Opportunity Commission is a federal agency that enforces the Civil Rights Act, and it says that sexual harassment is a form of sex discrimination, as I said, and it occurs in the workplace when there are unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature. So a little bit more to that. It happens when submission to such conduct – the verbal, visual, or physical conduct of a sexual nature – when submission to it is a term or condition of an individual's employment. So someone has to allow this conduct or engage in this conduct in order to stay employed. The requirement may be stated outright or it might be implied. The submission to a rejection of the conduct is a basis for employment decisions. So if somebody says, "Give me sex, then I'll give you stuff" or "Don't give me sex and I will take things away from you." So submission to or rejection of the conduct is a basis for somebody making employment decisions about you. Conduct of a sexual nature has the purpose or effect of unreasonably interfering with the work performance. And so, maybe a person is subjected to sexual harassment not by their supervisor or employer, but by somebody who is just unreasonably interfering with their ability to do their job because of verbal, visual, or physical conduct of a sexual nature. And this conduct creates an intimidating, hostile, or offensive working environment. "Unwelcome" is the critical word. "Unwelcome" means unwanted and sexual conduct is unwelcome whenever the person subjected to it considers it unwelcome. And so, that's one of the things about harassment in general and sexual harassment. A person does not have to mean to sexually harass someone. Harassment occurs in part on whether the person the behavior is subjected to thinks that they are being harassed. More on that in just a bit.

Not surprisingly, to me anyway, according to the Equal Employment Opportunity Commission, about 75% of the complaints that they receive about sexual harassment are filed by women. About 25% are filed by men. And this is men filing complaints against women and against other men. Now, what is this quid pro quo and hostile work environment about? Well, that's the two forms that sexual harassment can take. "Quid pro quo" means "this for that." You give me this, I give you that. And it's always between someone in a position to give and take away and someone who's not. So it happens when employment decisions like promotions, assignments, whether you get to keep your job or not, are based upon your willingness to submit to the sexual harassment. Again, it's unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature. And it has to be quid pro quo when the submission to sexual conduct is, again, explicitly stated or implied that you've got to do it in order to remain employed, or if you don't do it, you're going to be fired. The other type of sexual harassment is hostile work environment, and it can be created by anyone. Remember, quid pro quo is always someone in a position of power and someone who's not. Hostile work environment can be supervisors. It can be vendors, people who come in to deliver things, to repair things. It can be coworkers. It can be customers. Anyone can

create a hostile work environment by verbal, visual, or physical conduct of a sexual nature that's unwanted. So, again, it makes the workplace an intimidating, hostile, or offensive place and it can be requests for sexual favors. It can be visual in showing photos or making gestures. It can be physical by touching. The victim, as well as the harasser, may be a woman or a man. The victim does not have to be the opposite sex. In California, sexual desire is not a criteria or a requirement for sexual harassment to occur. It's just conduct of a sexual nature. But that might differ based upon the state that you are in. Again, the harasser's victim can be the supervisor, a coworker, a vendor, a customer. The victim does not have to be the person harassed, but can be anyone affected by the offensive of conduct. And so that's one of the things as a bystander harassment is that I am not subjected to the behavior, but I have to witness it. I have to be around it. And that can also be a person who complains about harassment.

Unlawful sexual harassment may occur without economic injury, and so people don't have to necessarily be fired or demoted in order to be harmed by it. And they don't have to be terminated either. And again, it's all about the harasser's conduct being unwelcome. Employers can be legally responsible for sexual harassment against their employees and liable for damages. Here's a couple of situations where that happens.

Harassment by a supervisor. If the harassment results in a tangible employment action, such as firing demotion, unfavorable changes, and work assignments, the employer is going to be liable whether they knew about it or not. So, if a supervisor sexually harasses a subordinate and some type of tangible employment action happens, the employer is going to be liable. If the harassment is a hostile work environment, then the employer can also be liable. But it has a possible defense. It can say, "We tried to prevent it from happening," or "We promptly corrected it," or "The complainant did not complain internally. And that's one of the things we'll talk about is what to do if you've been sexually harassed. Complaining is certainly one of those things, and it depends upon who you complain to, whether you might win your case or not. Harassment by a coworker. The employer is liable if it knew or should have known the harassment took place and significant monetary damages are possible and not uncommon. That's one of the things I talk about in my harassment prevention with supervisors is how much money it costs. The average verdict or jury award is $1.8 Million, so it can get very expensive. Victims of harassment may receive both compensatory and punitive damages, and compensatory is usually, if we fired you, how much money you would have made between the time we fired you and now, and punitive is just when juries punish the defendant for subjecting their employees to such behavior. So, again, on top of jury awards, paying attorneys can get very expensive.

Now, the term "sexual harassment" was created by a group of Cornell University activists in 1975. So, these are people who went to Cornell and worked there and they were talking about the behavior that they were often subjected to – the touching, the catcalls, the comments – and they are the ones who came up with the term. And it became codified in U.S. law as the result of a series of sexual harassment cases in the 1970s and in the 1980s. Now, one of the things that frequently happens is that government legislators create a law and it's kind of vague. And so, lawsuits help to closely define that law. And one of the things that happens is that sometimes courts will rule one way and then a couple of years later, they rule a different way on a very similar case. And so, it changes back and forth. And so, that's one of the things that you have to be aware of when you are an employer or in human resources, is not only what the law says, but what court cases have said, too, because that is usually what we will refer to when we are trying to guide people. Now, many of the early women who sued, such as Barnes and the first lawsuit, were African-American, and they were often former civil rights activists who applied the principles of civil rights to sex discrimination. It's one of the things that I talked about when we were going through the Americans with Disabilities Act (ADA) a couple of weeks ago is that the people who lobbied for the ADA followed the precedents set by civil rights activists. And so, here once again, we have a movement that is based upon the civil rights activist playbook. Now, Barnes v. Train in 1974 is commonly viewed as the first sexual harassment

lawsuit. But, if you are looking closely at a timeline here, it happened before sexual harassment even became a term. And so, what they were trying to figure out in Barnes is whether the defendant violated the Civil Rights Act. Barnes claimed she was fired after refusing to have an affair with her boss. She said he violated her civil rights. Now, sexual harassment wasn't a term yet, and the District of Columbia court that heard her case ruled that was not a violation of civil rights. So, let me go back. She was fired for refusing to have sex with her boss and the court said that was not a violation of the Civil Rights Act. It wasn't a violation of any law. It was not against the law to get fired for refusing to have sex with your boss. So, that's how they ruled then, but they ruled differently, or a different court ruled differently, a couple of years later. So, I'm going to go through some court cases and I'm not going to name the plaintiffs and the defendants. I'm just going to tell you what year these court cases happened, so you can get an idea of how court cases change the legislation. In 1976, a federal district court ruled that there was a connection between a supervisor's conduct and a victim's employment status. So, this was the first sexual harassment suit to succeed in federal court. So 1976, this court said that, yes, whatever the supervisor was doing to the complainant was against the law. And there were a couple of cases in 1977, said Civil Rights Act protects women from sexual harassment if it adversely affects their job condition. And so, it's against the law if women are fired or demoted or transferred or that kind of thing. And then, another court case said employers may be held liable for acts of their employees. So, now employers are being sued because of the things that their employees do. In 1978, the Equal Employment Opportunity Commission (EEOC) created regulations defining sexual harassment. But remember, the EEOC was put into place in 1964/1965 because of the Civil Rights Act, and it took until 1978 for them to, based upon these court cases, to realize, "Oh, sexual harassment is a form of sex discrimination, which is a violation of the Civil Rights Act. And so, we need to put out some information to employers about what sexual harassment is.".

And in 1978, when they created these regulations defining sexual harassment, I was a hostess in a restaurant. And I was in my mid-teens and I had a male manager who would come up behind me and massage my shoulders. And I hated it, especially when I was wearing a little sundress and he was touching my skin. Now, I wasn't the only one he was doing that to, and it was not sexual in nature, I'm sure. I'm sure he just thought I was tense and uptight and needed a good massage on my shoulders. But I hated it. But in 1978, I didn't hear about sexual harassment. There was no requirement for employers to provide the information to employees. And so, it took years for me to learn what sexual harassment is and for most other people, too. And I'll tell you when I learned about it and the rest of the country did in just a moment. So, let's keep going here with our old timeline.

Nineteen eighty-six, a court ruled that pinups of nude women did not create a hostile work environment in a male-dominated workplace. And that was frequently the excuse for employers, is that, "Hey, there's a bunch of guys at work here and if you don't like it, don't work here." In 1988, a court ruled that an employee may be a victim of sexual harassment, even if the conduct was not aimed at her because of being forced to work in a hostile work environment. And that's that third party that I talked about before. You don't have to be the recipient of sexual harassment. If you have to be subjected to it because other people are the recipient of it, then you can be a complainant. Now, in 1989, a court ruled that a male plaintiff was sexually harassed by women and he was awarded $1,500 as a result of that. 1989 dollars. 1991, managers who posted nude pinups of women did sexually harass female employees. So, you can see how courts change their mind as they go along and we become privy to more information. In 1991, the Reasonable Woman Doctrine was created by the court. Let me explain this. I said a little bit earlier harassment does not have to be intentional, and it usually isn't. People don't mean to harass other people and it is not whether somebody harassed somebody or not is not dependent upon what they intended to do. Conduct is unwelcome when the recipient says it's unwelcome, but that doesn't necessarily mean the recipient gets to decide whether they've been harassed or not. When I'm doing harassment prevention training, that's a question that I have on a quiz that I give to people is, "If I feel I'm being harassed, I'm being harassed. True or false?" And the answer to that is false. That's not what the court uses to determine whether somebody

has been harassed. They use the reasonable person standard. Would a reasonable person think that this behavior meets the definition of harassment and then the court decides or the jury decides. So, it's not for the complainant to decide whether they've been harassed. If that were the case, everybody would win their lawsuits. So, the standard of what a reasonable person thinks, well, in 1991, this particular court said now women are more adversely impacted by sexual harassment than men are. And so the standard, if a woman complains of harassment, should be what a reasonable woman considers to be harassment. And in training, I always say, "If I were a guy, I'd be scared silly over that," because I know that men and women, in general, tend to take things differently. And a lot of times behavior by one sex is deemed okay by that sex, but by the opposite sex it is not. And so that's one of the reasons that training is so important. And I know sometimes people think that training is silly. Everybody knows what sexual harassment is. Everybody knows not to sexually harass people. That's not the case. And so, when I first started doing this training in 2009 or '10, whatever it was, there was quite a lot of backlash by people that just thought it was stupid to have to sit through being told to keep your hands to yourself. But the nuances of court cases, and things change all the time, it makes it a little bit more complicated than that. And I don't get that backlash in training anymore. Even when people have gone through my training – they have to go through it every two years – even when they've gone through it five times by now, they know that things change and there's a little bit more complicated than you think.

Now, one more thing to tell you about before we move on. Despite all of these court cases and the regulations created by the EEOC, people really didn't know what sexual harassment was. I mean, outside of academia or legal circles, people weren't really talking about it. And there were just a handful of court cases, a dozen or so, by 1991. And as I said before, in 1978, when these regulations came out and I had a manager who was giving me unwanted massages, I didn't find out what sexual harassment was until about the rest of the country did. So, what happened in 1991 that made all of us understand or even to start talking about it? A woman named Anita Hill witnessed and testified against Supreme Court nominee Clarence Thomas. He was being vetted by the Senate to be on the Supreme Court. And she came forward and she testified that he had sexually harassed her while the both of them worked at the Equal Employment Opportunity Commission. Well, he went on to the Supreme Court and she went back to Oklahoma where she was teaching law. But, all of that was televised. And so, we started learning about sexual harassment and the lawsuits became even more prevalent.

Now, a #MeToo was first used, or the term "me too," was first used in 2006 on MySpace, and I don't know how long MySpace has been gone, but some of our younger viewers might not even know about MySpace. But it was coined a term by sexual assault survivor and activist Tarana Burke. And she wanted to do something to help women and girls of color who had also survived sexual violence. But it didn't really take off in the public domain until 2017. Lots of things happened in October of 2017. It's hard to believe that's almost three years ago now. On October 5, 2017, actress Ashley Judd accused media mogul Harvey Weinstein of sexual assault in a New York Times story. And then on October 12, Roy Price, head of Amazon Studios, resigned after accusations of sexual harassment in The Hollywood Reporter. Then, on October 15, actress Alyssa Milano posted on Twitter, "If you've been sexually harassed or assaulted, write #MeToo as a reply to this tweet." And then the #MeToo movement was born and quickly spread.

Widespread media coverage and discussions of sexual harassment, particularly that happened in Hollywood at the very beginning, led to many high-profile firings, resignations, and lawsuits. Now, one of the things that I hear in training frequently is people get upset because they think that people's lives were destroyed because of accusations. These women made accusations and these people lost their job. It's not exactly how it works. And so one of the things we'll talk about toward the end is what are employers supposed to do if they receive a complaint. There are accusations, which are followed by investigations, and it's because of the investigations that people typically lose their jobs. But those investigations are not usually reported in the media. And so, that's one of the things that people really need to understand

because if you are really afraid, “If somebody accuses me of sexual harassment, I’m going to automatically lose my job.” No, that’s not the case. There has to be investigations. But sometimes people just went ahead and stepped down, and sometimes there was no resignation – it was just that people didn’t get hired again for the next movie or what have you. Hundreds of mostly men, actors, producers, directors, comedians, musicians, politicians, journalists, celebrity chefs, corporate executives, businessmen, academics, sports figures – there was hardly any industry that did not get hit with harassment claims and high-profile firings, etc. There were a couple of notable women that were accused. In August of 2018, Italian actress Aisha Argento – and she was one of the most prominent activists of the #MeToo movement – she settled a complaint filed against her by a young actor and musician who said she sexually assaulted him when he was 17. And that was reported in The New York Times. And then, here in California in October of last year, Southern California Representative Katy Hill resigned amidst allegations that she engaged in an inappropriate sexual relationship. And this was the first time that the House Ethics rule forbidding sexual relationships with subordinates forced a lawmaker out of Congress. So, as a result of the #MeToo movement, the House Ethics Committee created a law or a rule that said that politicians cannot engage in sexual relationships with their employees. And she was the first one who got fired for it.

There has been some criticism of the movement. For example, author and motivational speaker Tony Robbins denounced the movement, saying “It amounts to little more than women trying to gain significance by claiming victimhood.” And there’s been some backlash. Surveys show that an increasing number of male managers are uncomfortable working closely with women. And a 2018 survey showed that 41% of the men surveyed said they’re more reluctant to have a one-on-one meeting alone with a woman. And more than one in five men say they’re more inclined to exclude women from social interactions like meeting for drinks after work. A study released earlier this year suggests even greater concern among senior men in the workplace with 60% of male managers saying they’re uncomfortable mentoring, socializing, or having one-on-one meetings with women. So, that’s one of the things that happens frequently is that you have an action and you have a reaction. And so, of course, there’s always going to be a reaction against the #MeToo movement, because that’s science, isn’t it? For every action, there is a reaction. Those survey findings don’t surprise a woman named Divya Timlin, who is in New York City and runs a crisis management firm. And she said, “Yes, I think there is a #MeToo backlash, but I don’t think it’s serious. I don’t think it’s lasting. And I think #MeToo is here forever.” She said, “This is incredibly uncomfortable and the morals of our culture are really changing right now in real time. And of course, change is uncomfortable.” And #MeToo, of course, is now an international movement. So, let’s go to the next slide and talk about how to avoid being accused of sexual harassment.

I understand the fear that the men in these surveys expressed about being afraid that they are going to be accused of sexual harassment when they have done nothing. That’s one of the things that my husband expressed to me. How do I prevent myself from being accused of sexual harassment? Well, I don’t think he really needs to worry about it. But if that’s a question that you have, then here are things to be mindful of.

First of all, we want to keep business and pleasure separate. And what I mean by that is it is dangerous to date people you work with, especially if you’re in a supervisory position or if you are an employer. Now, there are companies that even have policies against it. And so, this is a question I ask on my quiz during training, “Is it illegal for supervisors to date their subordinates?” And the answer is no, it’s not illegal. May employers have policies against it? Yes. And I encourage you to do so. And the reason for that is that when supervisors date their subordinates, first of all, there is the danger of favoritism and everybody begins to think that the only reason the person, the employee in the dating relationship, is getting a promotion or a raise or a good parking spot or whatever is because of that relationship. So, that’s always the danger of dating somebody who you work with is that allegations of favoritism sometimes take place and people don’t think that you actually deserved the promotion or what have you. One of the things that happens sometimes, too, is when the people

in the dating relationship bring it into the workplace so that it's evident for everyone to see. And it's evident because of the looks that they give each other and the touches that they give each other and the little giggling and all of the things that happens when people are infatuated with each other. And I have worked with people who have dated each other and had a discussion with the employee who was dating her supervisor. And I said, " You know, you guys really need to be mindful of your interactions with each other in the workplace because they're starting to make people uncomfortable." And her response was, "Why can't people just be happy for us?" Well, that's one of the things to remember. If people have to watch the touching and the looks and all of the little innuendos and things that go back and forth between some people, then they can file a claim of harassment. So, that's what happens when people are happy in their relationship. But often people break up, and if a supervisor breaks up with a subordinate, the subordinate might claim, "I just went out with my supervisor to keep my job because that's what he or she implied I needed to do." And that then is a charge of quid pro quo. Or if the subordinate breaks up with the supervisor, the supervisor might fire that subordinate, transfer them, demote them, what have you, and then that can be seen as retaliation. And as I said previously, an employer is always going to pay or be found guilty for sexual harassment when it involves a tangible employment decision made by a supervisor, even when the employer didn't know about it. So therefore, it is wise to have policies that say employers may not date employees. So keeping business and pleasure separate. Try not to date in the workplace, especially if you're in a supervisory position. Now, employers cannot say that peers can't date each other. You can't have a policy like that, but that's what that means.

Next, be mindful of personal space. And this is one thing that is really personal and one of the things that happens is, what I have read about, is that people who live in very dense areas, for example, New York City or Los Angeles, where people are really crammed into a small space, the personal space is different than places where like I live in Bakersfield, California, where we've got a lot of space around us. So personal space is really personal and being mindful of invading somebody's personal space – getting too close to them when you are talking to them. So, how do you know how close you can get? Well, just pay attention to how close other people are standing. And right now, it's supposed to be six feet apart. So, we're Okay, right? But when we go back to normal times, just be mindful of the reactions people are giving you. If you are standing too close, chances are they will start backing away from you. And so, don't keep going forward.

Keep your hands to yourself. One of the things, a cultural thing, is how much people touch. And so, I did some training for one workplace and they said, "We're huggy people here. We like each other, we hug each other." And for people like me who, I'm not a hugger, it's easy for me to say, "Keep your hugs to yourself." But again, you just really have to be mindful of your friendly hug or touch being misinterpreted by someone else. And again, realize what the culture is in your workplace. Watch what other people are doing. But the best practice, simply, is just keep your hands to yourself.

Now, "watch what you say" is very ambiguous. So, let me define it a little bit more. Be careful of jokes. And that's one of the biggest things that gets people into trouble is jokes because the person telling the joke doesn't mean to be offensive, but the person on the receiving end is offended. Little innuendos – stories of a sexual nature – is what gets people in trouble. So, we don't want the workplace to be devoid of humor or devoid of personal interactions where stories are told and just be very careful that you're not talking about sex, and focusing on skills and achievements. What that means is that when you compliment somebody, it's best to compliment them on their skills and achievements as opposed to what they're wearing or how they look.

And finally, remember, company events are work-related. And again, that's one of the things that I have on my quiz is that, "If you go to a company work party, can what you do there be used against you?" Yes, it can. And that's one of the reasons that it's not much fun being in human resources and having to go to those work parties is because you're on duty.

And if people are saying or doing inappropriate things, then you have to shut it down, and then you have to take care of it when everybody goes back to work. The thing that I learned long ago, when you go to a work party, it's work – not getting paid for it – but it is work and anything I say or do there can be used against me. And just be mindful that that is legal.

Now, what to do if you've been sexually harassed at work. First of all, if you can, write down as much as what was said or done when it happened, where it happened, were there any witnesses available – all of that. You want to memorialize things as quickly as you possibly can. And by memorialize I mean, just write it down. And the reason for that is that our memory is very tricky. And once we start telling ourselves the story in our head about what happened, we start misremembering. And once we start telling somebody about our story, then we misremember anymore. Our memory is very flexible and we think we remember all sorts of things that happened that did not happen. So, it's really important to write things down immediately. And that goes for if you're a victim of sexual harassment or anything where you need to repeat the information to someone else, that immediacy is really important. So, again, dates, times, specific actions, who's involved – all of those things – is really important. And if you feel comfortable talking to the person in real time who's doing something that bothers you, then you'll do that. But let's go to the next one as far as reviewing workplace policies and procedures.

First, you want to know what your policies in the workplace are and a lot of times people don't know. They're given a handbook when they come on board, they never look at it, no one ever explains it to them. So, you want to get out that handbook or go onto your employer's website and find out what exactly is our policy on this. And you should follow the steps in the policy. So, the policy should give you various options for reporting harassment, including the option of filing a complaint and how to do it. And if there is no policy, then you want to talk to a supervisor. So, find out what the policy is and what you're supposed to do. Now, again, as I said, if you are comfortable talking to the perpetrator or the person who said or did something that made you uncomfortable, then I encourage you to do it. But how you do it is really critical. Any time you bring someone's behavior to their attention, they're going to get defensive if you go on the offense. So, instead of saying something like, "Keep your hands off me!" you would want to quietly say, "I don't really like it when you massage my shoulders, and I would appreciate it if you didn't in the future." And so, that person doesn't have to go on the defense immediately. So talk to the person if you can. But a lot of times people are just really uncomfortable doing that. I never said anything to my manager, first of all, because I didn't know what sexual harassment was. And second of all, because it was just part of the way what the workplace was. I mean, you just tried to avoid him as much as you possibly could. That was just how we dealt with it back then. Things are different now. And you know what sexual harassment is. And, you know you have the right to work in a workplace that is free of it. And so, now, if you're comfortable talking to that person, do so. If you're not, then talk to a supervisor or human resources. And you can talk with your own supervisor, but you don't have to. Chances are it's your supervisor who's doing it. So, you can talk to any supervisor in the organization or human resources. And you can talk to the government, too. But one of the things that you need to do is try to complain internally before you go to the government. And the reason for that is because most of the time, the employer has to be given the opportunity to address the situation. And if you do not give the employer the opportunity to address it by bringing it to the employer's attention, if you do sue and go to court, the employer's defense of "I didn't know it was happening," is one of the defenses that gets them off the hook. So before you go to the government, try to file a complaint internally. There are a couple of exceptions to that. Most specifically, if the person you have to file a complaint to is the one who is harassing you, then courts recognize that.

And then finally, when you do file a complaint, you are protected from retaliation. And what is retaliation? The employer or supervisor getting back at you for filing a complaint. And how does that happen? Firing, demotion, transfer, bad hours – that type of thing. You are protected from retaliation when you file a complaint. And so, you should know all of those things before going into it. So, I just want to close all of this by telling you something that Lyndon Johnson said about the

Civil Rights Act. And he said, “We must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions – divisions which have lasted all too long.” And I think that’s a nice quote to end on. So, that’s the information I have for you. Do you have any questions for me?

Julie Dower
Thank you so much, Robin. Really appreciate it. Okay, so we do have a couple of questions, Robin. The first one is, are employers required to provide sexual harassment prevention training?

Robin Paggi
Well, it depends where you live. As I said, in California, a law was passed in 2008 that said employers with 50 or more employees have to provide the training to their supervisors – two hours every two years. And before leaving office, Governor Brown in 2016, I think, signed a law that said employers with five or more employees have to provide harassment prevention training to all of their employees. Supervisors still get the two hours. Employees get one hour every two years. But California usually leads the way in employment laws, and research that I conducted, I only saw that harassment – any kind of harassment prevention training – is required in only three other states. Unfortunately, I can’t name them at the moment, but you want to make sure that whatever state you’re in, you go to whatever state government handles harassment discrimination claims to find out what the requirements are. So, one of the things I do want to say is that, as I said at the very beginning, the Civil Rights Act applies to employers with 15 or more employees. However, states do have their own laws pertaining to harassment, discrimination, and the threshold of the employee count might be lower. So, again, in California, we have the Fair Employment and Housing Act and it applies to employers with five or more employees. Now, in California, it doesn’t matter if you only have one employee. If you have only one employee and you’re accused of sexual harassment, you can get sued for it. But that differs state by state. And so, listeners really need to find out what their particular state says about it.

Julie Dower
Very good. Okay, next question. What do employers need to do when an employee complains?

Robin Paggi
This is really important because if you do not respond correctly, it doesn’t matter whether harassment happened or not. Failure to respond can get you sued, and it is required to do an investigation after receiving a complaint. So, here’s a brief step by step. And by the way, a webinar that’s coming up I think next week is “How to Do an Investigation.” And so, I’ll just tell you a few things for now. First of all, employers and supervisors should take all complaints seriously. And so, when somebody comes up to you and says, “This happened to me,” don’t brush it off and say, “Oh, you know he was just joking,” or what have you. And this happened with a client of mine. I did harassment prevention training. And then the employer called me back to do one-on-one training with a supervisor who had just been in my training. And so, I said, “Why am I training him again already?” And he said, “Because an employee complained to him and he didn’t bring the complaint to me, which is exactly what we said to do in the training.” And when asked why he didn’t take the complaint to the manager, the supervisor’s response was, “Well, it was a stupid accusation. I know that this guy wasn’t staring at her.” Well, supervisors don’t get to make those decisions. And so, supervisors, anyone, take all complaints seriously.

And then, an investigation needs to start – both parties need to be informed about what’s going to happen next. So, the person making the complaint and the person that the complaint is against. And you want to have a trained investigator investigating because if you mess up the investigation, then that can cost you some money. I had a woman in training once and she told me that she had been out on pregnancy disability leave, and she came back and her employer put her

in charge of an investigation. And she was one of the people that the complainant was complaining about. So, the person who's doing the investigation was charged for wrongdoing. So, what do you think she found out in the investigation? That no wrongdoing had occurred. You need to have a lot of times an outside investigator who has been trained and know what they're doing because if cases go to court, that's a lot of times what the defendant's attorney attacks is how the investigation was conducted and the fact that a trained investigator was not doing it.

After the investigation, need to come to some kind of conclusion. And the conclusion is not whether somebody violated the law or not. The conclusion is whether somebody violated company policy. So, that's one of the reasons when you think that you've been harassed, that you look at the company policy and the investigator is determining whether the policy was violated. You're not trying to figure out if somebody broke the law or not. That's for a court to figure out if it goes to that case. And after you've come to the conclusion as far as whether the person violated the policy or not, then you want to communicate the results to both parties. And this is really key because I have had people in training come up to me afterwards and say, "You know, I complained of harassment and nothing ever happened." And I said, "Did the harassment stop?" And they said, "Yes." And I said, "Well, then they took care of it," but they never told me what happened. And so, that is part of my training. When I tell supervisors, be sure to get back to people and tell them, "We have handled the situation." Now, you can't tell them how you disciplined the person. If you think that harassment did happen, you can't say, "We wrote him up" or "We fired him" or whatever. But you get back to them and you say, "We handled it and if anything else happens, let us know." And of course, you're going to tell the person who is accused of harassment what happens next and it might end up being disciplinary action.

After all of that, you want to check back in with the complainant and make sure that they feel comfortable and that nothing else has happened – no retaliation has happened, not only by the person who was accused, but by any coworkers or any third parties or anyone else. So, those steps are really important. If you take all of those steps, then even if harassment did not happen but you fired the person because she thought it happened, if you take those steps, then chances are you will not get in trouble if it is deemed that the harassment did not happen because you followed a good faith, thorough investigation.

Julie Dower
Great information. Okay, our next question. If an employee did harass another employee, what kind of disciplinary action should the employer take?

Robin Paggi
There are four primary things that employers should look at. First of all, is how egregious was the contact? How bad was it? Did somebody say something? Did somebody touch somebody? If they touched somebody, where did they touch them? How often did they touch them? So, just how bad was the behavior? And then they want to look at the harasser's employment record. Is this somebody who frequently gets in trouble about doing inappropriate things? Or is this somebody who's worked here for 20 years and has a stellar record? You can take that into consideration. You also want to be as consistent as possible in your disciplinary action. And so, you look at if this happened before, how did we handle it? All things being equal, you want to handle it the same way. If you discipline people inconsistently, that can lead to a discrimination claim – "You fired me for doing the same thing that that person only got written up for." So, that's very important. And for those listeners who have progressive discipline policies, especially if you're a union organization, you need to follow them. And progressive usually is first. Sure, you get a verbal, then you get a written, then you get a second written. Whatever it is, you need to follow your policies. So, make sure that if you are not sure where your policies are, you are looking at them in the handbook. And if they're not in the handbook, then what is our regular protocol or in any stand-alone policies as well? That's a really important part. Supervisors get in trouble and employers get in trouble for not following their own policies.

Julie Dower

Great. Okay, here's a good question. Where does foul language or frequent obscenities fit into harassment?

Robin Paggi

That is a good question. Well, it depends upon what the foul language is. And one of the things is I talked to a representative of the Department of Fair Employment and Housing, our state agency, and asked that very question. And his response was that foul language does not meet the definition of harassment unless it involves any of the protected classes. So, that would be a racial slur or a religious joke or a sexual term. So, when we're talking foul language, if you're talking about the F word, then that is a sexual term. And so, therefore, it could be construed as sexual harassment. Other types of foul language, while not appropriate in the workplace, is not necessarily a violation of the Civil Rights Act. So, again, look at what your state says and look at what your company says, because companies can have policies that says, "There will be no foul language." You can have those policies if you want to. It is not a violation of people's First Amendment right to say whatever they want to because that's not what the First Amendment says. The First Amendment doesn't say we get to say whatever we want to. It says that government will make no laws restricting our freedom of speech. It says nothing about employers restricting our speech. So, if employers don't want people to curse, make a policy against it.

Julie Dower

That's great. Okay, well, I think that's everything we have time for today. We did have a couple more questions, but we can always answer those after the session. Thank you, everybody, for joining us today. Again, a copy of this will be emailed to all of our attendees or you can access any previous webinars, including this one, in a couple of days when they're up on our website, which you can access at vensure.com. Thanks, everybody, and have a great day.