

U. S. House of Representatives
Committee on Natural Resources
Subcommittee on Oversight and Investigations

Sexual Harassment at the Department of the Interior
October 30, 2019

Written Testimony Submitted by Chai R. Feldblum

Thank you for giving me the opportunity to testify in this important oversight hearing. My name is Chai Feldblum. I am a partner at the law firm of Morgan, Lewis & Bockius LLP and the Director of Workplace Culture Consulting at the firm. My practice consists of advising clients how to create safe and respectful workplaces in which harassment of any kind is not tolerated and in which employees will perform to their fullest potential.

I am pleased to offer ideas and insights for your consideration as you engage in your important oversight of the Department of the Interior with regard to its efforts to stop and remedy sexual harassment. This testimony and any answers I may provide in response to questions reflect solely my views and not necessarily those of Morgan Lewis or its clients.

I served as a Commissioner of the Equal Employment Opportunity Commission from 2010 to 2019. During that time, I worked closely with Commissioner Victoria Lipnic to study how employers might prevent harassment before it happened. Although Commissioner Lipnic and I come from two different political parties, we were joined in our commitment to find ways to stop harassment. Prevention helps everyone – employers and employees.

Commissioner Lipnic and I convened a Select Task Force on the Study of Harassment in the Workplace from 2015 to 2016. The Select Task Force included management attorneys who counseled and defended employers with regard to harassment claims; plaintiff attorneys who brought claims of harassment on behalf of individual employees and classes of employees; representatives from both employee and employer associations, and academics who had been studying the phenomenon of harassment for decades.

The Select Task Force hosted a series of public and private meetings. The testimony received by the Select Task Force ran the gamut from data on the prevalence of harassment to promising practices on reporting and investigations to big picture ideas for changing workplace culture to minimize the risk of harassment.

In June 2016, Commissioner Lipnic and I, together with our dedicated staff, wrote and issued a comprehensive report drawing on the insights we had learned during our work with the Select Task Force. I am attaching a copy of this report, the Co-Chairs Report on the Study of Harassment in the Workplace, as part of my written testimony. In addition, all of the testimony that the Select Task Force received can be accessed here. [Add url.]

It is obviously of key importance to ensure that illegal harassment, including illegal sexual harassment, does not take place in any workplace. However, the best way to prevent illegal harassment is to have systems in place that stop low-level misconduct that might not yet rise to the level of illegal conduct. Hence, the recommendations in our Co-Chairs' report are designed to stop unwelcome behavior based on any characteristic protected under federal or state laws (such as race, sex, religion, national origin, disability, age, sexual orientation or gender identity), even if such conduct does not yet violate those laws. The report, and my testimony, refer to these behaviors as "harassment." In addition, some employees engage in bad behavior towards others, even though the behavior is not based on any protected characteristic. Those individuals are equal opportunity harassers. The report, and my testimony, refer to such behavior as "bullying." Finally, even low-level disrespectful and rude behavior can be a "gateway drug" to harassment or bullying. Hence, employers should have in place systems that stop all forms of these behaviors.

Together with Sharon Masling, my lead counsel at the EEOC, I recently joined the law firm of Morgan, Lewis & Bockius LLP to take the recommendations we had set forth in the Co-Chairs Report on the Study of Harassment in the Workplace about harassment prevention and advise businesses and organizations on how to stop harassment before it happens. Here are five key takeaways from the report, as supplemented by the work Sharon Masling and I have been doing as advisors to clients.

Leadership

The best way to stop harassment in the workplace is to have a culture of safety and respect in which harassment or bullying are understood to be unacceptable and are not tolerated.

Leaders, including leaders of a large government agency, have the ability to create such a workplace.

First, leaders must *believe* that harassment or bullying is unacceptable in any workplace that they lead. Everything flows from this first basic belief and value.

Second, leaders must *articulate* their values and expectations. Never underestimate the power of the written and spoken word. If leaders begin an all-staff meeting talking about their commitment to a workplace free of harassment and bullying, that will send a message.

Third, leaders must act in a manner that make their employees believe these leaders are *authentic*. The leaders' values and expectations cannot simply remain words printed on paper or delivered at meetings.

Accountability

The most important step leaders can take to establish their authenticity is to hold those who undermine the stated values and expectations *accountable* for those actions.

There are three groups of individuals that leaders must hold accountable.

First, individuals who have been found, after a fair and thorough investigation, to have engaged in harassment or bullying must be held accountable. It is particularly important that any corrective action is proportionate. While some forms of harassment, including sexual harassment, will be grounds for termination, not every act of harassment (particularly low-level harassment that is not yet illegal) will justify termination. In a fair and effective system, the corrective action is proportionate to the misconduct.

Second, supervisors who see or receive reports of misconduct must be held accountable for responding appropriately to such information. A supervisor who trivializes such behavior or sweeps complaints under the rug, and does not follow the procedures set up by the employer to address such misconduct, should receive corrective action. Conversely, supervisors that respond well should receive positive reinforcement. The best way to hold supervisors accountable is to include in a supervisor's performance evaluation an assessment of how the supervisor responded upon seeing or receiving reports of harassment or bullying.

Third, anyone who retaliates against an individual who reported harassment or bullying or who participated in an investigation of such misconduct, must be held accountable. If individuals are permitted to retaliate with impunity, few people will want to come forward with complaints and give the employer an opportunity to fix the problem.

Risk Factors

The EEOC report included information on twelve risk factors that can lead to harassment. The presence of one or more of these risk factors does not mean that harassment will be happening in the workplace. They are simply factors that leaders who are interested in being proactive in stopping harassment would do well to study. For example, if a government agency knows that one or more risk factors exist in the varied workplaces that make up the agency, the leaders of that agency can analyze those risk factors and take preventive measures in response.

Here are four risk factors that might be relevant to the Department of the Interior:

- *Homogenous workplaces.* In workplaces where women, people of color, religious minorities or people with disabilities are not well-represented, the risk of harassment increases. The best long-term response to this risk factor is to increase the diversity of the workplace. In the short-term, it is particularly important that individuals in such workplaces understand that harassment will not be tolerated and that people who report misconduct will be protected from retaliation.
- *Decentralized and isolated workplaces.* A government agency may have the best policy and procedures at its headquarters. But in decentralized and isolated workplaces, individual managers or supervisors often have much greater control over the culture of

that workplace. Having mechanisms to assess how supervisors have dealt with complaints of harassment in those workplaces, and holding such supervisors accountable through performance evaluations, are essential in dealing with this risk factor.

- *Mundane tasks/boredom.* When employees are engaged in repetitive or mundane tasks, they may engage in inappropriate behavior – including inappropriate jokes and various forms of sexual harassment – as a way to pass the time. If such behavior has been the norm in the workplace for a length of time, it may be particularly hard to change that culture. However, if proportionate corrective action is taken, a change in behavior will usually follow.

Reporting and Investigations

An agency cannot take corrective actions against those who engage in harassment, or hold supervisors accountable in performance evaluations for not responding appropriately to reports or observations of harassment, if they don't know about those incidents of harassment. Agencies must therefore have mechanisms that make it easy and safe for those who experience harassment, or those who observe harassment, to report those incidents.

An effective reporting system has multiple avenues through which employees can report. It is best if employees can report to their own supervisor, to another supervisor, or to the agency's human resources office. The EEOC recommends that government agencies designate an individual as a Harassment Prevention Coordinator who can deal with complaints of harassment.

Agencies must also ensure that individuals who report harassment are protected from retaliation. Obviously, individuals should be told that if they experience retaliation, they should report that as well. But there is no reason for the onus to be solely on the individual. An agency can put in place mechanisms to oversee what happens after a report of harassment is made – particularly in a decentralized or isolated workplace.

Training

Training to stop harassment is an essential component of a comprehensive effort to create a safe and respectful workplace. But that training will be most effective if it is integrated into an overall campaign to stop harassment that includes the components described above.

The EEOC Co-Chairs report lays out the variables that are important for a foundational anti-harassment training. Those variables are set forth in a user-friendly checklist that can be used by any government agency, including the Department of Interior.

But agencies can go beyond that basic anti-harassment training. The EEOC Co-Chairs report recommended that employers provide respectful workplaces training that is not focused on

unwelcome behavior based on legally protected characteristics (such as sex or race), but rather is focused on giving employees the skills to affirmatively create a safe and respectful workplace for everyone. Several years ago, the EEOC developed and has been providing a Respectful Workplaces training to government agencies and private employers.

Sharon Masling and I have developed similar training at Morgan Lewis that we now offer to our clients. The training teaches employees how to give feedback when they experience unwelcome behavior and how to receive such feedback. If misconduct can be stopped early through such feedback, that is the best outcome. The training also educates employees have to be active bystanders in helping to stop harassment. For supervisors, the training provides skills in responding to complaints of harassment in a constructive manner and in coaching employees who are engaging in problematic behavior.

Cultural Assessments

A significant proactive step that leaders can take to create a safe and respectful workplace is to assess the existing culture in their workplaces.

The EEOC's Co-Chairs' report recommended that businesses and organizations perform climate surveys to assess the state of their workplace culture. Over the past year, we have refined that recommendation in various ways.

First, employers often deploy general employee engagement surveys that ask questions about a range of workplace issues. The federal government's Federal Employee Viewpoint Survey (FEVS) is an example of such a survey. OPM could modify the FEVS to include questions about feeling safe, respected and valued in the workplace, as well as questions regarding harassment and bullying. Even before OPM undertakes such a change, agencies are permitted to ask OPM for two questions specific to the agency. The Department of Interior could ask to include specific questions as to whether employees would know what to do if they experienced harassment, including sexual harassment, and if they would feel comfortable reporting harassment that they have experienced or observed.

There are also more sophisticated assessments that can be done in a targeted fashion. For example, we have developed at Morgan Lewis a short twenty-question survey focused on safety and respect. The survey can also include an open-ended question seeking narrative input. We offer that survey to clients who wish to do a short, targeted assessment. The best assessment, however, also includes focus groups and/or interviews of randomly selected employees. Then qualitative data collected from these efforts offer even greater insights into the culture of the organization.

Conclusion

Stopping harassment depends on having a workplace culture that simply does not tolerate harassment. Everyone from the top to the bottom of an organization can play a role in creating

a workplace in which not only harassment, but also bullying and even rude behavior, is not countenanced. In such a workplace, everyone benefits and everyone thrives.

But ultimately, leadership is key to achieving a safe and respectful workplace in which harassment is simply not tolerated. I hope the ideas I have presented in this testimony will assist the Committee in its oversight of the Department of Interior's efforts to stop harassment throughout its diverse locations.