Train Smarter

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Elizabeth Chika Tippett, *Harassment Trainings: A Content Analysis*, __ **Berkeley J. Emp. & Lab. L.** __ (forthcoming 2018), available at SSRN.

Every couple of years, some automated program at the University nags me about renewing my sexual harassment training. Since the computer provides no way for me to claim an exemption for my work on the topic over the years, I usually procrastinate a few weeks and then give in, log on, and spend the 20 or so minutes needed to run through the process and get my certificate of compliance. (Why I need a certificate when the program presumably keeps track of my efforts is another question). Each time, I finish thinking how incredibly stupid the training is—and not just because I—like pretty much everyone reading this on Jotwell—know more than the average person about the topic.

But "stupid" is probably counterbalanced by cheap and efficient—if "cheap" means compared to live efforts and "efficient" means a low cost way of checking the "reasonable care to prevent" box for avoiding liability for sexual harassment. And I don't deny it works since I can't recall a case where a court found colorable employer training efforts to be *per se* insufficient to "prevent" misconduct.

Nevertheless, I ask myself each time—can this possibly be what the Supreme Court had in mind?

The difference between me and Tippett is that I've never gone further to figure out whether my university is using "best practices" or even "ok practices" in training its employees on this important topic. Liz did, and in an impressive way. *Harassment Trainings: A Content Analysis* builds on the line of literature started by Susan Bisom-Rapp's groundbreaking *Fixing Watches with Sledgehammers*, and *Ounce of Prevention* articles.[1] It both updates the earlier research and provides a remarkable on-the-ground view of the cottage industry of antiharassment training, with a focus on the nearly two decades since the Supreme Court's employer liability structure in theory changed the way employers did business.

From reading *A Content Analysis*, it turns out that my experience with sexual harassment training isn't so unusual after all. And maybe the limitations of employer training have something to do with the reality that #MeToo has exposed: The Court's elaborate social engineering effort to shift the incentives of both employers and employees in order to rid the workplace of harassment has largely been a failure.

Liz's article has a number of unexpected findings. Examining the harassment training from 1980 to 2016, she shows that much of the content actually traces back long before Faragher/Ellerth. But, surprisingly, considering how so much else has changed in both law and learning theory, the training long ago coalesced into a "genre" consisting of an authoritative figure summarizing legal rules and giving examples of prohibited conduct. Further, she reports that "current trainings include large quantities of tangential legal information and overemphasize sexual conduct at the expense of other forms of harassment. They also tend to suggest that relatively trivial slights could give rise to harassment-related liability." That certainly matches my experiences.

More interestingly, she also reports that earlier training had "two competing narratives"—abuse of power taking a toll on victims and liability risks that could affect company performance. But the "power-

based narrative faded over time," and current training tends to focus on the "business case" for preventing harassment—it's a violation of company policy. That, she argues, tends to deemphasize that harassment is a form of discrimination, with the consequent dilution of the moral case against such conduct. For example, current training tends to ignore stereotyping discrimination or gender-based harassment. Liz argues that there is reason to believe that a focus on the wrongfulness of the conduct might also be more effective in deterring it than an "it's against the rules" approach. Further, Tippett suggests that framing the law as prohibiting a "wide swath of behavior" may "inadvertently signal" that avoiding interactions with women or other potential victims is the best way to avoid problems, which has obvious negative implications for the cause of workplace equality.

The author concludes by sketching some "new and different approaches" that might be taken to training, including training more tailored to reported individual differences in attitudes, beliefs, or self-reported behavior. And resonating with my experiences was her recommendation of "more authentic content," which strikes me as more engaging and therefore more likely to leave a lasting impression. One example was, rather than just identifying problematic conduct, having a session that requires managers to respond to how they would deal with a particular scenario. That not only gets the point across about the conduct in question but also engages the trainee in the complicated dynamics of changing objectionable behavior in the workplace.

This project can't have been easy—to gather her data of 74 examples from 61 providers, Liz had to contact 175 professional trainers and law firms and scour libraries for historical materials. To my mind, that makes the project more important. After all, the point of legal rules is to affect conduct on the ground and it's impossible to assess the success or failure of any particular regime unless one can determine how conduct changes.

There's a lot more to the article than I have described, but I hope I've explained why I like the piece a lot.

However, there's an obvious downside to studies such as this: while it is very effective in revealing the shortcomings of current training efforts, it also suggests that mediocre training is the current standard of care for employers, which might make it more difficult to reform such training. Another item to put on the #MeToo agenda.

1. Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 **U. Ark. Little Rock L. Rev.** 125 (2001); Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 **Berkeley J. Emp. & Lab. L.** 1 (2001). Professor Bisom-Rapp is currently revising her earlier work in Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, to be published in 71 **Stanford L. Rev. Online** 62 (2018).

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