

Five Lessons From Fox News On Sexual Harassment

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The recent accusations of sexual harassment against Roger Ailes at Fox News, and the response of a high-profile candidate for public office about how women should respond to sexual harassment have crystallized into an opportunity to learn from the mistakes of others. Since the mid-1980s, we've all read about sexual harassment and been trained on it. For the last 25 years, I've studied it, investigated it, seen it, taught about it, warned about it, developed policies to guard against it, and defended companies accused of it. Here are a few lessons from these recent events: ***A Quick Review*** If you've avoided (whether by choice or by luck) these last few news cycles, former Fox News anchor Gretchen Carlson accused former Fox News Chairman and CEO Roger Ailes of sexual harassment. After an outside investigation and multiple women providing more examples of his alleged slimy behavior, Ailes is now gone. It happened quickly. Then, in responding to questions about sexual harassment, a high-profile office-seeker went on record saying he hopes his daughter would quit if she were sexually harassed—and seek another career—which is, by all accounts, an impossibly unrealistic option for most women. Another family member, jumping on the grenade, made it worse when he tried to explain that what his dad *actually* meant was that a “strong” woman would not allow such sexual harassment to continue – implying (whether intentionally or not) either that strong women could control it, or would have the power to find other work. Enough already. Sexual harassment is personal; it's sensitive, and it's complicated. ***Five Quick Lessons***

- **Lesson 1: Sexual harassment comes in many forms.**

In 1986, *30 years ago*, the U.S. Supreme Court determined that sexual harassment is a form of sex discrimination. Today, the law recognizes harassment that includes female-on-male, male-on-male, female-on-female, but most often we see the male-on-female harassment. Still.

- **Lesson 2: Most women don't want to complain about it. Period.**

Since the 90s, the research has repeatedly shown that ***complaining*** is the *least* likely response from women who were harassed. The more likely responses include (1) avoiding the harasser; (2) downplaying the gravity of it; (3) ignoring it; and (4) taking it head-on. The EEOC's recently released [Select Task Force Report on the Study of Harassment in the Workplace](#) explains in more detail that most women who are victims of harassment don't ever

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complain about it. They just want to fly under the radar. There are a lot of reasons, but that's for a much longer article in a different format. In sum, usually, it takes courage to complain.

- **Lesson 3: Know when to bring in outsiders.**

Fox News did the right thing by bringing in an outside investigator—reportedly an outside law firm—to investigate the Carlson allegations. When the accused is in a position of power (like Ailes), such that other employees might be afraid to tell what they've actually experienced or seen, an internal investigator is usually not enough. An outside neutral has no attachment to the accused or accuser, and the results—whatever they are—in most cases, are more likely to be more thorough, more revealing, and more trusted. Importantly, with an outside law firm as an investigator, you also have more opportunities to protect communications, advice, and other developments under the attorney-client privilege. That process must be carefully handled.

- **Lesson 4: Confidentiality is critical.**

When employees report harassment, the law compels employers to investigate. We know investigations can be messy and trigger unexpected consequences. Practically, it makes sense to protect those who complain *and* those about whom complaints are made. Some sexual harassment (like the allegations against Ailes) is severe, while other accusations are more tame. In some cases, there really is no evidence of a hostile work environment and no evidence of harassment. Everyone needs to be protected. For those of you chiding me for the NLRB's sweeping decisions against blanket confidentiality rules, I know, I know. But, after being on the front lines of these investigations, confidentiality is critical to protecting everyone in an investigation, and to prevent retaliation. Notably, even the EEOC's Select Task Force acknowledges the need for the EEOC and NLRB to "jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations, and the permissible scope of policies regulating workplace social media usage."

- **Lesson 5: Update your policies.**

Good employers have good policies that encourage people to come forward. The EEOC's Select Task Force Report emphasized that a modern, updated policy will include the following elements: - Clear explanation of prohibited conduct, including examples - Promises to protect against retaliation - Complaint process that provides multiple, accessible avenues of complaint - Promises to protect the confidentiality of harassment complaints to the extent possible - Processes for a prompt, thorough, and impartial investigation - Promises to take immediate, proportionate corrective action when harassment has occurred - Promises to respond appropriately to behavior that might not be legally actionable "harassment," but that which—left unchecked—might lead to harassment The Select Task Force Report also lists a host of other recommendations, including updating training. Practically, even the best of policies may not have prevented the conduct that Ailes is accused of committing, but let's take this opportunity to try.