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COMMENTARY

Legal factors shaping workplace harassment training

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I agree with Hayes et al. (2020) that applied psychologists are well equipped to help improve organizations' responses to workplace harassment. However, in doing so, it is important to examine the legal context within which such interventions are implemented.

Importance of understanding legal framework

The law serves as a societal level factor that shapes organizational goals, strategies, and policies. Furthermore, the law establishes a set of broad norms that will impact organizational norms. Laws and norms should thus inform organizational codes of conduct, which have been associated with variance in undesirable work behaviors (e.g., Kish-Gephart et al., 2010). As suggested by Ajzen's (1991) theory of planned behavior, norms play a meaningful role in influencing behavior. Not only does the law impact psychological applications to workplace harassment prevention, but understanding the legal context will also position psychologists to contribute to improvements in the law. With the proper legal orientation, applied psychologists can study the relevant psychological phenomenon and evaluate interventions to provide evidence-based advocacy for a better legal framework for workplace harassment.

Examination of relevant legal factors highlights further implications regarding many of the topics in the focal article by Hayes et al. (2020) and raises important supplemental research considerations. Hence, I explore three examples: the legal definitions of sexual harassment, the legal requirements for remedial action, and the impact of an employee failing to report. As a disclaimer, I do not intend this as legal advice or as comprehensive coverage of all the relevant legal factors for workplace harassment interventions.

Elements of unlawful sexual harassment

As Hayes et al. (2020) pointed out, applied psychologists should consider the relevant continuum of harm and should take a development-focused, rather than compliance-focused, approach in workplace harassment prevention efforts. However, their emphasis on addressing only *unlawful* harassment unnecessarily constrains the potential scope and impact of training. Indeed, training criteria that exclude less severe forms of harassment risk perpetuating a problematic compliance focus. Instead, training aimed at correcting or preventing harassment should include appropriate consideration of harassment that is not severe enough to be unlawful. Harassment does not need to rise to this level to lead to undesirable workplace outcomes. A more proactive approach to workplace harassment training will treat avoiding *unlawful* harassment as the bare minimum, or worst-case scenario, criteria. This idea aligns with the continuum of harm approach, in that harassment that is not necessarily illegal could fall at the lower end of the continuum.

In light of this, it is important to clarify what exactly constitutes unlawful harassment. There are two main approaches to establishing a sexual harassment claim: quid pro quo and hostile work environment. Quid pro quo sexual harassment requires that (a) the harassment resulted in a significant tangible employment action, (b) it was perpetrated by someone with authority to influence tangible conditions, and (c) it was because of the victim's sex (e.g., *Meritor Savings Bank, FSB v. Vinson*, 1986). Legally speaking, "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits" (*Burlington Industries, Inc. v. Ellerth*, 1998, p. 761). Thus, quid pro quo is generally aimed at preventing harassment by individuals in authority positions with power to affect such tangible employment actions.

Establishing sexual harassment based on a hostile work environment requires showing (a) the victim was subject to unwelcome derogatory or sexual conduct, (b) the conduct was because of the victim's sex, and (c) the conduct was severe or pervasive enough to create a hostile or abusive working environment (e.g., *Harris v. Forklift Systems, Inc.*, 1993). It is also informative that harassment based on a hostile work environment approach is not constrained to sexual harassment. In effect, this replaces the second element above with any protected class recognized by federal law, such as race, national origin, religion, color, disability, and age over 40.

In sum, the illegality and distinction of harassment largely depends on either (a) whether the harassment resulted in a tangible employment action or (b) whether the harassment was severe or pervasive. This ignores undesirable behavior that does not result in changes in employment conditions and that is less severe or sporadic. In addition, vague legal terms, such as "severe or pervasive," often evade scientific precision and predictability given the role of subjective judicial interpretation. As a result, training programs targeting *unlawful* harassment might suffer ambiguity in criterion conceptualization and measurement due to a dynamic or inconsistent standard. Conceptualizing harassment beyond the legal definition has implications for Hayes et al.'s (2020) Topic 3 discussion on training content. Broadening the scope of training content to address even "legal" harassment might help prevent problems before they escalate in severity, as predicted by the continuum of harm approach.

Another important point implicit in the legal conceptualization of sexual harassment is that Title VII merely provides a claim against the employer. It does not provide an action against the individual who engaged in the harassment. To reach the perpetrator, the victim can pursue criminal charges and/or civil tort claims, such as based on assault and battery. This raises further implications regarding the scope of training. Thus, scholars should examine the potential advantages of training programs that provide information on alternate avenues for recourse.

Legal requirements of remedial actions

Interestingly, the law provides requirements for responding to workplace harassment. Because applied psychologists are likely, or should be, involved with designing harassment training, it is important to understand these requirements. The U.S. Equal Employment Opportunity Commission's (1990) policy guidance provides a convenient summary of some of these expectations. Employers have a legal duty to remedy known hostile or offensive work environments. Specifically, the employer should promptly investigate and then do what is reasonably needed to stop the harassment, to restore the victim back to preharassment conditions, and prevent repeated harassment. Empirical evidence on which training approaches are most effective could inform what the legal system views as "reasonable" remedial action. This also raises implications regarding alignment with organizational goals and obtaining buy in of decision makers (see Hayes et al.'s [2020] research questions #2 and #5, in part). For instance, the employer's legal duty to remedy harassment provides a compelling incentive for the organization to invest in *effective* training and other applied psychological solutions. It could be challenging, however, to emphasize that

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Table 1. Key legal implications for workplace harassment training

Legal factor	Implications for training
Definition of unlawful sexual harassment	Training programs should have broader scopes to also target conduct that is less severe than required to be deemed unlawful and to examine alternate avenues of recourse against the actual perpetrator.
Organizations' legal duty to remedy known harassment	Practitioners and researchers should consider how to best align training goals with the organization's duty to remedy harassment in a way that does not reinforce compliance focus.
Faragher-Ellerth defense	Practitioners and researchers should examine complexities of victim reporting behavior and potential conflicts of interests with employers to inform training programs that facilitate effective harassment reporting.

this legal requirement justifies training while also avoiding a compliance focus. Nonetheless, applied psychologists should learn to successfully navigate and leverage the organization's remedial duty.

Employee's failure to report: The *Faragher-Ellerth* defense

There are also important legal considerations for how the victim responds to harassment. Specifically, failing to report sexual harassment could impede a victim's opportunity for subsequent legal recourse. Two seminal cases in the sexual harassment context include *Faragher v. City of Boca Raton* (1998) and *Burlington Industries, Inc. v. Ellerth* (1998). Together, they established a two-pronged affirmative defense to vicarious liability of an employer for harassment perpetrated by a supervisor. The defense is only available when the alleged harassment does *not* involve a tangible employment action. The first prong requires the employer to take, and demonstrate that it took, reasonable actions to prevent and correct harassment. The First Circuit Court of Appeals proposed that the first prong will likely be met when the employer had an antidiscrimination policy that incorporated a reasonable complaint process and was available to employees (*Marrero v. Goya of Puerto Rico, Inc.*, 2002).

The second prong requires showing that the victim unreasonably failed to use any corrective or preventative opportunities given by the employer. The second prong has frequently been implicated when the victim failed to report (e.g., *Monteagudo v. Asociacion de Empleados*, 2009). Indeed, the Supreme Court contemplated that a victim's failure to use a reasonable complaint process would satisfy the employer's burden for the second prong of the defense (*Burlington Industries, Inc. v. Ellerth*, 1998). Thus, except in rare circumstances, a victim's failure to report harassment is likely fatal to her or his claim. This emphasizes the importance of ensuring that employees understand how to use the appropriate complaint procedures and the need for research to better understand the factors that influence a harassment victim's willingness to report the harassment. There is reason to suspect that victims are not likely to report (e.g., Brooks & Perot, 1991).

There is also reason to ensure that increased reporting is disentangled from potential negative outcomes associated with reporting (see Bergman et al., 2002). Furthermore, because the *Faragher-Ellerth* defense allows the employer to escape liability when the victim fails to report, it positions the employer's interests in avoiding liability against the victim's interests in protection from harassment. Hence, considering this paradox is particularly salient to Hayes et al.'s (2020) Research Question #3, which highlights the need to meet organizational and victim needs simultaneously. If not properly addressed, this tension could predict reduced support and receptivity of training programs designed to increase reporting behavior.

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Conclusion

Examination of the relevant legal factors reveals several key implications for applied psychologists to keep in mind as they develop, implement, and evaluate workplace harassment training programs (see Table 1). Therefore, applied psychologists seeking to contribute to harassment prevention should familiarize themselves with relevant legal factors and possibly associate with organizational attorneys, as suggested by Hayes et al. (2020). Along these lines, the appropriate legal fluency also relates back to Hayes et al.'s Topic 7 discussion on graduate curriculum and professional development for industrial and organizational (I-O) psychology programs. Incorporating more coverage of workplace harassment training in I-O graduate programs should also include adequate exposure to the relevant legal background.

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