

**U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet**

***Protecting Federal Judiciary Employees from Sexual Harassment Discrimination and Other
Workplace Misconduct***

**February 13, 2020
Written Statement of Chai R. Feldblum**

I. Introduction

Chairman Johnson, Ranking Member Roby, and members of the Subcommittee:

Thank you for giving me the opportunity to testify at this hearing. My name is Chai Feldblum. I am a partner and a Director of Workplace Culture Consulting at the law firm of Morgan, Lewis & Bockius LLP. I served as a Commissioner of the Equal Employment Opportunity Commission (“EEOC”) from 2010 to January 2019. My testimony, and the answers I provide in response to your questions, reflect solely my views and not necessarily those of Morgan Lewis or its clients.

During my time as a Commissioner of the EEOC, I worked with my colleague, Commissioner Victoria Lipnic, to study how employers might prevent harassment before it happened – that is, before the EEOC showed up at their doors. Although Commissioner Lipnic and I come from different political parties, we are united in our commitment and passion to stop harassment in the workplace. Harassment prevention helps everyone – employers and employees. It is truly a bipartisan issue.

Approximately a year ago, Sharon Masling, my lead counsel at the EEOC, and I joined the law firm of Morgan, Lewis & Bockius LLP to help businesses and organizations create safe, respectful, diverse and inclusive (SRDI) workplaces. In such workplaces, harassment is less likely to occur in the first place, and if it does occur, it is more likely to be reported early and stopped. Such workplaces also have increased employee engagement and loyalty, better quality and productivity of work, increased innovation, and decreased conflict. Creating an SRDI culture is worth every dollar and hour put into it.

II. The Work of the Select Task Force on the Study of Harassment in the Workplace

Soon after Commissioner Lipnic and I joined the EEOC in 2010, we observed that harassment on all bases appeared pervasive in our workplaces, reflected in the thousands of charges brought to the EEOC and in the scores of cases brought by the EEOC in court. Our commitment and passion to stop harassment resulted in formation of a Select Task Force on the Study of Harassment in

the Workplace (“Select Task Force”) that we convened from 2015 to 2016, under the leadership of our then-Chair Jenny Yang.

We carefully created equal representation on the Select Task Force from three groups: management attorneys and business association representatives; plaintiff lawyers and employee association representatives; and academics from the disciplines of sociology, psychology and organizational behavior who had been studying harassment for years. Based on testimony heard by the Select Task Force, and as a result of many meetings and frank conversations among the participants, Commissioner Lipnic and I issued a comprehensive report in June 2016 (“2016 Co-Chairs’ Report”) with ideas on how to prevent and stop harassment. The report provides a comprehensive review of what we know about harassment in the workplace and provides a roadmap for change that employers can follow to prevent harassment and to respond to harassment when it does occur. The report focuses on stopping harassment on all bases under federal law, including race, national origin, ethnicity, religion, disability, age and sex (including sexual orientation and gender identity) – and including both harassment of a sexual nature as well as gender-based but non-sexual harassment.

The Select Task Force understood the importance of looking beyond solely stopping illegal harassment. Obviously, illegal harassment on any protected basis should not exist in the 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 the 2016 Co-Chairs’ Report are designed to stop unwelcome behavior based on any characteristic protected under federal or state laws, even if such conduct has not *yet* risen to a level that would violate the law. The report, and my testimony, refer to all such behavior as “harassment.”

While the 2016 Co-Chairs’ Report focused on harassment, we noted that some employees engage in abusive behavior towards others that is not based on a protected characteristic of the target. These individuals are equal opportunity harassers. The report, and my testimony, refer to such behavior as “bullying.” The research indicates that a workplace that tolerates bullying also is more likely to tolerate harassment. Finally, even low-level disrespectful behavior can create a workplace in which employees do not feel safe and in which their work performance suffers. Employers thus need to adopt strategies that will increase respectful behavior and decrease disrespectful behavior. In other words, employers must address the *continuum* of behavior in a workplace: from respectful behavior to disrespectful behavior to bullying to harassment.

Commissioner Lipnic and I have been gratified to find that the 2016 Co-Chairs’ Report has been useful across a range of professions, occupations and industries. We were particularly pleased to meet with members of the Federal Judiciary Workplace Conduct Working Group (“Working Group”) to offer our insights on the comprehensive analysis and recommendations of the Working Group. As we noted to the Working Group at the time, two essential components of a successful effort to shape workplace culture are leadership from the top and a focus on the unique needs of a particular workplace. The establishment and efforts of the Working Group are excellent examples of those two components.

III. Creating a Safe, Respectful, Diverse and Inclusive (SRDI) Workplace

The best way to stop harassment is to prevent it from happening in the first place. And the best road to prevention is a safe, respectful, diverse and inclusive (SRDI) workplace.

An organization can create an SRDI workplace, but doing so requires intentional and strategic efforts. There are five key elements for creating such a workplace:

- Leadership
- Cultural Assessment
- Accountability
- Effective Policies and Procedures
- Training that Works

My description and understanding of these elements derive from the comprehensive work done by the Select Task Force; from the many conversations I have had with management and plaintiff attorneys, human resources leaders, and ethics and compliance officers; and finally, from real-life, on-the-ground experiences that Sharon Masling and I have had over the past year since joining Morgan Lewis and advising businesses and organizations on creating SRDI workplaces.

I am pleased to say that each of these five elements are covered, in varying degrees, in the Working Group's report issued on June 1, 2018. Moreover, the Status Report from the Working Group to the Judicial Conference of the United States, issued on September 17, 2019, describes steps that have been taken to date in each of these areas.

However, none of these elements is easy to achieve and maintain, and each includes layers of complexity. The challenge for the federal judiciary is to continue to refine its work in each of these areas, until it achieves the SRDI workplaces that it clearly desires and deserves.

A. Leadership

Strong and committed leadership is the first, and essential, element required to create an SRDI workplace. There are three components to this element:

1. Beliefs

Leaders must believe that an SRDI workplace is something they want and something that is important. If leaders hold that core belief and value, much else will flow naturally from that. Conversely, if leaders are not truly committed to an SRDI workplace, it will be difficult for many of the other elements to be adopted or to have their desired effect.

2. Articulation

Leaders must articulate their belief that an SRDI workplace is valuable and that everyone in the workplace is expected to act in a manner that creates such a workplace. Written and spoken words have power, particularly when they are plain and clear. Every organization should have a simple and clear policy setting forth its expectations for respectful behavior and descriptions of the disrespectful behavior, bullying, harassment, and retaliation that it will not tolerate. In addition, leaders should articulate these expectations verbally to everyone in the workplace on appropriate occasions.

3. Action

Leaders must act in a manner that makes their employees believe they are *authentic*. If the leaders' values and expectations remain simply words printed on paper or pronounced at meetings, they will not have the desired effect of shaping workplace culture.

B. Cultural Assessment

A significant proactive step that leaders can take to create an SRDI workplace is to assess the existing culture in their workplaces.

Almost every organization has a set of stated values, including (often) values regarding safety, respect, diversity and inclusion. The question is whether and how those values are cascaded down and reflected in reality in work settings within the organization.

The best way to assess the culture in a work setting is to ask employees how they experience their workplace. Many organizations (including the federal government) use broad employee engagement surveys that capture a portion of this information in quantitative data form. In addition, if the employee engagement survey permits respondents to answer an open-ended narrative question (such as, "what change would most improve your experience here?"), some qualitative information can be gleaned from those answers through a human review of the narrative answers. My colleague, Sharon Masling, and I recently completed a review of that kind that provided insights to the company on its perceived culture and allowed us to offer recommendations for improving the workplace going forward.

But a broad employee engagement survey, even one with narrative responses, can provide only part of the information an organization needs to truly understand its workplace culture. In order to determine what employees are actually experiencing, it is important to *talk* with them. The only way to do that is to use focus groups and individual interviews of randomly selected employees to probe deeper and ask follow-up questions. Such methods provide a granularity of qualitative data about employees' perceptions and concerns that provides a basis for smart and strategic change. Focus group discussions and interviews can also surface problems – and solutions - that are specific to a particular work location.

To the extent that an organization wishes to collect quantitative data as well, it is helpful to use a short and targeted survey focused specifically on issues of safety, respect, diversity and inclusion. Sending out such a survey communicates to the workforce that the leadership is focused on and concerned about these issues. The quantitative data can serve as a snapshot of employees' beliefs and experiences and can establish one measure against which positive change can be assessed. While such a survey is best used in conjunction with methods to collect qualitative data, it can be a useful first step in a cultural assessment.

A cultural assessment will be worthwhile only if an organization commits ahead of time to consider ways to address the concerns that may be surfaced by the assessment. Thus, whether an assessment results in concrete success in creating an SRDI workplace depends not on the assessment itself, but on any changes implemented by the company as a result of what it learns from the assessment.

C. Accountability

While leaders must believe an SRDI workplace is important and articulate that belief, what is most important is that leaders act in a manner that makes others believe they mean what they say. Expending time and resources on a cultural assessment sends an important message regarding the value leaders place on creating an SRDI workplace. But the most important action leaders can take is to hold *accountable* those who undermine the stated values and expectations of the workplace. 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 be proportionate to the misconduct. While some forms of harassment, including sexual harassment, will be grounds for removal from a position, not every act of harassment (particularly low-level harassment that is not yet illegal) will justify that type of corrective action.

Second, those who see or receive reports of misconduct must be held accountable for responding to such information appropriately. This includes everyone from judges to mid-level supervisors. There must be repercussions for a supervisor who trivializes such behavior or sweeps complaints under the rug and does not follow the procedures set up by the organization. The best way to hold supervisors accountable is to include in their performance evaluations an assessment of how the supervisor responded upon seeing or receiving reports of harassment or bullying. Obviously, there are unique considerations that arise when a judge does not follow the procedures set up by the system. But that does not mean that the judicial system cannot come up with some means of accountability for judges as well.

Conversely, supervisors who respond well when they see or receive reports of harassment or bullying should get positive reinforcement. There are many creative ways to do this, from recognition in performance evaluations to recognition in awards. Again, while performance

evaluations will not be relevant for judges, there may be other ways to provide positive recognition for judges who respond effectively and quickly to reports of harassment or bullying.

Third, anyone who retaliates against an individual who has reported harassment or bullying or who has participated in an investigation of such misconduct, must be held accountable. If individuals are permitted to retaliate with impunity, few people will come forward with complaints and the organization will not have the chance to address problems early.

D. Effective Policies and Procedures

An organization must make clear ahead of time what behaviors will not be acceptable, both in the workplace or that may affect the workplace. It also must have appropriate procedures for reporting and investigating such behavior and for taking corrective action if reports are substantiated. With such elements in place, an organization can hold supervisors accountable for not following the organization's procedures and can ensure consistent and appropriate corrective action.

With regard to policies, the 2016 Co-Chairs' Report describes the necessary elements of an effective policy and sets them forth in a user-friendly checklist in the Appendix. The most important element is that the policy be simple and clear. In our work over the past year with organizations and companies, we usually recommend that an organization or company have a combined Respectful Workplace, Anti-Harassment and Anti-Retaliation policy.

The policy should explain the mechanisms that can be used by those who experience or observe inappropriate behavior. Those mechanisms should make it easy, safe and effective to report.

A good reporting system will have multiple avenues through which individuals can report. It is best if employees have the option to report to their own superior, to another person with supervisory responsibility, and/or to an office the organization has established to receive reports.

The system must also ensure that individuals who report misconduct are protected from retaliation. Individuals are often told that if they experience retaliation, they should report that. That is a foundational requirement. But the onus should not solely be on the individual. Ideally, an organization should put in place mechanisms that will proactively monitor, to the extent possible, what happens after someone reports a case of misconduct or participates in an investigation of such misconduct.

Finally, the organization must ensure that investigations into reports of misconduct are timely, effective and trusted. This requires allocating the necessary resources to hire a sufficient number of well-trained investigators and to create a system in which employees feel there will be an objective investigation. It is as simple (and difficult) as that.

E. Training That Works

Training is an essential component of creating an SRDI workplace.

Anti-harassment training has been the training of choice for decades and it continues to be the type of training organizations have deployed in the #MeToo era. All individuals in a workplace should receive such training. The 2016 Co-Chairs' Report lays out the elements of effective anti-harassment training and sets them forth in a user-friendly checklist in the Appendix.

But an organization committed to an SRDI workplace must provide more than anti-harassment training. It should provide training that addresses the *continuum* of behavior in a workplace, from respectful behavior (which should predominate in a workplace), to disrespectful behavior, bullying and harassment (all of which should be absent in a workplace). This form of training establishes the underpinning of an SRDI workplace and situates harassment as one form of behavior among many that is not tolerated in the workplace.

We call this "Respectful Workplaces training," although it can go by many different names. Regardless of the name, effective training of this kind achieves two goals. First, it teaches everyone in a workplace *why* simple forms of respectful behavior are so important in creating a situation in which employees feel safe and can be productive, and how even low-level disrespectful behaviors are harmful in the workplace. It also teaches employees what behaviors are considered bullying or harassment and walks employees through the organization's Respectful Workplace, Anti-Harassment and Anti-Retaliation policy.

Second, effective training gives participants the skills they need to be active contributors to an SRDI workplace. Different types of training can teach different skills. In the training we offer, we teach participants how to give feedback when they experience unwelcome behavior of any kind, and how to receive such feedback. Neither of these skills comes naturally to us as human beings. And yet, often the best way to stop low-level bad behavior is to have the skills to engage in a direct conversation with a co-worker or someone else in the workplace. The training provides tips for giving and receiving feedback and participants are then given the opportunity to practice those tips in hypothetical scenarios that are realistic for their particular workplace.

We also teach individuals how to be active bystanders in helping to stop disrespectful behavior, bullying or harassment. Most people do not like seeing someone else being subjected to disrespectful behavior, bullying or harassment. Sometimes they feel it is not their responsibility to intervene. But often they would like to intervene, but do not know how to do so effectively and safely. The training offers realistic options that individuals can use, taking into account the specific power dynamics of their particular workplace.

We offer a different skills-building component for supervisors. This training teaches supervisors how to respond effectively to complaints about disrespectful behavior, bullying or harassment. How a supervisor responds, in those first moments when a complaint is made, largely determines how effective the rest of the process will be in addressing and resolving the complaint. Again, the training provides tips for how to respond to a complaint, and participants then practice those tips in scenarios that are realistic for their workplace.

The training also teaches supervisors how to coach employees who are engaging in problematic behavior. Many supervisors have achieved their positions because they are good at a particular substantive skill, not because they are natural managers. An organization committed to an SRDI workplace needs to invest time and resources into training front-line supervisors on how to coach employees who are acting in ways that undermine such a workplace.

IV. Conclusion

Stopping harassment depends on having a workplace culture that simply does not tolerate harassment. The best way to create such a workplace is to create an SRDI workplace generally. That will stop low-level behavior before it becomes worse, create a safe environment for individuals to report any form of misconduct early (including harassment), and hopefully, provide concrete skills to everyone in the workplace that will enable them to be active participants in creating an SRDI workplace.

I hope the ideas I have presented in this testimony will assist the Subcommittee on Courts, Intellectual Property and the Internet in its oversight responsibilities, and the federal judiciary, in their ongoing efforts to ensure that everyone in the judicial system is able to work in an SRDI workplace. In such workplaces, everyone benefits and everyone thrives.