Memo: Ethena's Training's Compliance with State Law and its Impact on Employer Liability

The attached memorandum was prepared for Ethena by our outside legal counsel ("Law Firm"). It was based on materials we provided them and their review of the applicable law and regulations <u>at the time</u> of preparation of the memorandum.

This memorandum is not and should not be construed as an advertisement for Ethena or an endorsement by our Law Firm of Ethena or our products or services.

Additionally, the following paragraph is an update prepared by Ethena to "Recordkeeping", third column ("Ethena"), in Section II A. on pages 4-5 of the memorandum to reflect a change in our product:

'The company administrator can monitor in real time whether each individual employee is compliant using Ethena's administrator dashboard. The dashboard depicts whether or not employees are currently compliant. It also assigns additional "Action Required" and "Immediate Action Required" statuses to users. A user who is compliant today but has a status of "Action Required" is on their way to losing their compliance, and a user who has a status of "Immediate Action Required" is expected to be compliant at present but is not, necessitating corrective measures by the company. The dashboard also has "New Learner", "New State", and "New Manager" labels to indicate recent changes to an employee's situation that prompt changes to the employee's training requirements.'

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MEMORANDUM
July 24, 2020

To: Ethena, Inc.
From: Latham & Watkins LLP
File no: 065536-0001
Subject: Ethena's Training's Compliance with State Law and its Impact on Employer Liability

I. Introduction

Ethena, Inc. ("Ethena") provides sexual harassment training to companies through an online platform. The trainings are delivered regularly in small portions called "nudges". The content and style of these nudges is tailored to individual employees, roles within the company, industries, and states. Ethena would like to confirm that its services meet the legal needs of its customers in California, Illinois, and New York. Ultimately, this memorandum concludes that they do.

Implementing sexual harassment training programs is a generally a sound practice for employers, as such programs can create more effective working environments. Beyond this, there are three legal reasons for employers to implement sexual harassment training programs:

1) **Meeting state requirements.** An increasing number of states require companies to have such programs, and will assess fines or bring enforcement actions against delinquent companies[1];

2) **Reducing liability.** Workplace sexual harassment is prohibited under federal law, as well as in California, Illinois, New York, and New York City. Companies can be held vicariously liable for sexual harassment committed by their employees under Title

[1] For example, in Illinois, a failure to provide the required standard of training is a violation of the Illinois Human Rights Law, and can incur penalties from $500 for the first offense for an employer with fewer than four employees to up to $5,000 for the third offense for an employer with four or more employees. 775 Ill. Comp. Stat. Ann. 5/8-109.1.

VII of the Civil Rights Act of 1964 and similar state and local laws.[2] Having a sexual harassment training program can give a company an affirmative defense in suits involving sexual harassment committed by any of its employees, and it can decrease the likelihood of a federal or state agency targeting it in an enforcement action:

3) **Preventing sexual harassment incidents.** Effective sexual harassment training programs will assist in decreasing the overall incidence of sexual harassment issues in a workplace.

This memorandum will assess whether Ethena's sexual harassment training programs ("Ethena's training") accomplish these goals, based on a review of materials provided by Ethena describing the contents of their training, discussions with Ethena's corporate leadership, a survey of relevant law, and a study of applicable case law. First, we address whether Ethena's training meets the requirements for sexual harassment training imposed in California, Illinois, and New York. We then assess whether a company utilizing Ethena's training would be likely to face an enforcement action or could expect to be shielded from liability in the event that it is sued for sexual harassment committed by any of its employees.

Ultimately, this memorandum concludes that Ethena's training does meet the statutory requirements in California, Illinois, and New York for sexual harassment training. With respect to employer liability and enforcement actions, courts and enforcement agencies have typically emphasized whether an employer maintains a harassment training program at all and infrequently delve into the quality of such programs. However, there are several indications that a program's quality will be increasingly determinative moving forward.

First, courts give special weight to the guidance promulgated by the United States Equal Employment Opportunity Commission (the "EEOC"), the federal agency that administers and enforces civil rights laws against workplace discrimination, in cases involving workplace sexual harassment. Recent guidance promulgated by the EEOC has emphasized the importance of delivering training that goes beyond minimum requirements and is actually effective at preventing sexual harassment. Whether a given training program incorporates such best practices could enter into a court's analysis in the future.

Second, the EEOC and comparable state and local agencies have discretion in terms of which enforcement actions to bring and how zealously to pursue these. Additionally, settlements for offending companies frequently require them to undergo some level of sexual harassment training. A company that already trains it employees using training that incorporates the EEOC's best practices would presumably be less likely to be targeted by an enforcement action than a company that merely complies with the bare minimum requirements for training or has no training program at all.

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[2] Such claims are actively pursued at the federal level by the United States Equal Employment Opportunity Commission; at the state level by the California Department of Fair Employment and Housing, the Illinois Department of Human Rights, and the New York State Department of Human Rights; and at the local level in New York City by the New York City Commission on Human Rights.

Third, an effective sexual harassment training program would intuitively lead to fewer incidents of sexual harassment from which liability or enforcement actions could flow. If states follow New York's recent example in passing laws that make it increasingly difficult for companies to escape liability following incidents of sexual harassment, the fact that a company's sexual harassment training program meets the minimum legal requirements may become increasingly irrelevant in assessments of liability. Instead, the training programs could increasingly be judged on how well they actually work in practice.

Thus, a sexual harassment training program's adherence to the EEOC's best practices, and by logical extension its likelihood to be effective in practice, has bearing on a company's potential liability for sexual harassment. Ethena's training incorporates the EEOC's latest best practices for effective sexual harassment training in a way that other programs, such as the model sexual harassment training programs disseminated by California, Illinois, New York State, and New York City, do not.

All of these factors, considered in light of the fact that the aggregate value of the penalties assessed and money collected by the EEOC has increased markedly since the inception of the #MeToo movement, suggest the growing importance of having a high quality sexual harassment training program such as the one that Ethena provides.[3]

II. State Law Requirements

A. California

California law requires that businesses with five or more employees provide training on sexual harassment and abusive conduct to their California-based employees. *See* Cal. Gov. Code § 12950.1; Cal. Code Regs. tit. 2, § 11024.[4] The California Department of Fair Employment and Housing (the "DFEH") is responsible for enforcement.

The training requirement covers full-time, part-time, and temporary employees, in both supervisory and non-supervisory roles. *See* Cal. Code Regs. tit. 2, § 11024(a)(3). This does not include independent contractors, unpaid interns, and unpaid volunteers. It also excludes anyone employed for less than 30 calendar days and working fewer than 100 total hours. While the core training requirements remain consistent for these various categories of covered employees, there are some differences in how the training must be delivered. Supervisory employees must receive two hours of training every two years, while non-supervisory employees must only receive one hour of training every two years. Additionally, temporary and seasonal employees must be trained within 30 days of being hired rather than within six months for other employees.

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[3] *See infra* Table 1 at p. 18.

[4] "Employee" for the purposes of this five employee threshold includes full time, part time, and temporary workers, including unpaid interns, unpaid volunteers, and persons providing services pursuant to a contract. Cal. Code Regs. tit. 2, § 11024. However, while these categories are relevant for the size of the business, employers do not have to train independent contractors, unpaid interns, and unpaid volunteers.

Ethena’s training meets all of the requirements for sexual harassment training under California law. The following chart summarizes California’s requirements and Ethena’s training’s compliance with these requirements.

Structural and Format Requirements		
Requirement	California	Ethena
Amount of training	By January 1, 2021, supervisory employees must receive two hours of training, and non-supervisory employees must receive one hour of training. Employers must continue to provide two hours of training to supervisory employees and one hour of training to non-supervisory employees every two years. The training does not need to be conducted in one session and can be accumulated though numerous sessions, as long as the total time is met. While the regulations state that classroom and webinar sessions should be no less than 30 minutes in length, there is no such requirement for e-learning training, which can be bookmarked or paused at the user’s discretion.	Ethena delivers an aggregate of one hour per year for nonsupervisory employees and two hours per year for supervisory employees through monthly nudges. It fits the categorization of e-learning training and can thus be delivered in small portions, as long as the total time requirement is met.
New hires/promotions	New non-supervisory employees must be trained within six months of hiring, and new supervisory employees must be trained within six months of assuming the supervisory position. Effective January 1, 2021, for seasonal, temporary, or other employees that are hired to work for less than six months, an employer shall provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first.[5] They must receive the amount of training commensurate with their role as either a supervisory or non-supervisory employee. Employers must train agricultural migrant and seasonal workers consistent with non-supervisory employees.	Ethena accelerates the training for new hires and newly-promoted managers to cover all required topics within the six month window. Upon request, Ethena is able to expedite training for seasonal/temporary workers who must be trained within 30 days. In this case, all the training content needed to reach compliance is made immediately available to the seasonal/temporary employee.
Record keeping	In order to track compliance, the employer must keep records of the training for at least two years,	The company administrator can monitor in real time whether each

[5] For temporary employees employed by a temporary services employer, the temporary service rather than the client must provide the training. Cal. Gov. Code § 12950.1(f)

	including the names of the supervisory employees trained, the date of training, the sign in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials that comprise the training, and the name of the training provider. Cal. Code Regs. tit. 2, § 11024(b)(2) While there is some ambiguity with respect to what amount of access to digital third party training content the regulation requires, companies having (1) real-time access to the compliance status of all of their employees, and (2) the ability to be given access within a reasonable amount of time to the actual content on which each of their employees have been trained, should satisfy the requirements of this regulation.	individual employee is compliant using Ethena's administrator dashboard. The dashboard depicts whether employees are "on track" or "off track." A user who is compliant today but "off track" is on their way to losing their compliance, and a user who is "off track" and not compliant today will not be able to achieve compliance, necessitating corrective measures by the company. The dashboard also has a "falling behind" status that users get when they are on their way to being off track. Companies do not have immediate access to either the specific topics that each user has been trained on or the actual content delivered to each employee. However, Ethena does track this. In the event of an enforcement action, a company can request access to any pertinent training content by contacting Ethena at support@goethena.com. Ethena will respond promptly to such requests. Ethena keeps data tracking what users have been trained on indefinitely, or until the company requests that they be deleted. This level of record-keeping on employee compliance, and this degree of access to the content on which each employee has been trained, should constitute compliance with the regulation's record-keeping requirements.
Format	California allows classroom, webinar, and e-learning styles of training. E-learning training is "individualized, interactive, computer-based training created by a trainer and an instructional designer." Cal. Code Regs. tit. 2, § 11024(b)	Ethena meets the definition of e-learning training. The specific requirements for interactivity and trainer qualifications are discussed below.

Interactivity	In order to qualify as interactive, the training must include any of the following • questions that assess learning • skill-building activities that assess the supervisor's application and understanding of content learned • hypothetical scenarios about harassment incorporating discussion questions Cal. Code Regs. tit. 2, § 11024(a)(2)(E)	Ethena's training is sufficiently interactive. Each nudge concludes with a check-on-learning question that users must answer correctly in order to progress. This is the same method that California's model training utilizes.
Responsiveness to questions	E-learning platforms must provide access to a trainer who can answer questions within a reasonable time, but no more than two business days after the question is asked. The trainer shall maintain all written questions received, and all written responses or guidance provided, for a period of two years after the date of the response. Cal. Code Regs. tit. 2, § 11024(a)(2)(B).	Ethena allows companies to choose to either direct employees to a representative from Ethena or to provide their own point of contact for the purposes of questions related to the training. Ethena will respond to all questions sent directly to them within two business days, and keeps records of all questions asked.
Trainer qualifications	California requires that trainers giving the training meet certain qualifications. They must, through a combination of training, experience, knowledge, and expertise, have the ability to provide training about the topics described in the "content" section of this chart. Cal. Code Regs. tit. 2, § 11024(a)(10) They must also be either an attorney, human resources professional, or university professor with a minimum of two years of relevant experience practicing in this subject matter area. Cal. Code Regs. tit. 2, § 11024(a)(10)(A)	Ethena's content team includes attorneys, university instructors, and human resources professionals. The team's primary attorney is an employment lawyer with over forty years of experience, more than enough to meet California's requirement for experience. California does not license qualified trainers; they simply must meet the prescribed amounts of experience. Therefore, the content team's experience and subject matter expertise satisfy the requirement for qualified trainers.

Language	There is no explicit language requirement for training created by third parties or employers themselves; presumably it must be capable of being understood to be deemed effective. As a reference point, training provided by DFEH must be available in English, Spanish, Simplified Chinese, Tagalog, Vietnamese, Korean, and any other language that is spoken by a “substantial number of non-English-speaking people,” as defined by California law. DFEH must also make versions of the online training courses with subtitles in each language and shall orally dub the online training courses into each language other than English.	Ethena is currently only available in English and, upon request, other languages. Ethena makes clear that for employers with employees who have different language and accessibility requirements, the employer is responsible for finding an appropriate substitute in order to train those specific employees, such as the California Model Training.
Content Requirements		
Federal and state statutory provisions	Must cover information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment. This must include: • The types of conduct that constitute sexual harassment • Individual and employer liability • Remedies available for victims • Supervisors' obligation to report harassment, discrimination, and retaliation of which they become aware • The limited confidentiality of the complaint process • Resources for victims of unlawful harassment, such as to whom they should report any alleged harassment • Appropriate remedial measures to correct harassing behavior, which includes an employer's obligation to conduct an effective workplace investigation of a harassment complaint • Training on what to do if the supervisor is personally accused of harassment.	Ethena’s training covers these topics. It includes the following content: • Federal and California law governing sexual harassment in the workplace • The different types of sexual harassment • What constitutes harassment and scenarios illustrating this • An overview of liability and examples • Reporting mechanisms • Options for victims of sexual harassment • Company responsibilities for addressing incidents • Supervisor responsibilities for addressing incidents • Company-specific policies

	• The essential elements of an anti-harassment policy and how to utilize it if a harassment complaint is filed • Strategies to prevent harassment in the workplace Cal. Code Regs. tit. 2, § 11024(c)(2)	• The importance of building an office culture that is inclusive • Research on effective methods for preventing harassment
Practical Examples	Must include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. These can include factual scenarios taken from case law, news and media accounts, hypotheticals based on workplace situations and other sources, which illustrate harassment, discrimination and retaliation using training modalities such as role plays, case studies and group discussions. Cal. Code Regs. tit. 2, § 11024(c)(2)(G)	Ethena's training includes definitions of and practical examples illustrating harassment, discrimination, and retaliation.
Gender identity, gender expression, and sexual orientation	Must cover harassment based on gender identity, gender expression, and sexual orientation, along with examples of these.	Ethena's training covers the following: • Inclusivity with respect to transgender, gender nonconforming, and gender non-binary teammates • Definitions and scenarios related to gender identity, gender expression, and sexual orientation • Questions/comments to avoid and why • Tips for being inclusive
Abusive conduct	Must include the prevention of abusive conduct as a component of the training.	Ethena's training covers the definition of abusive conduct, regulations addressing it, and scenarios illustrating it.

Bystander intervention	§ 12950.2 states that employers may also include bystander intervention training. However, they are not required to.	Ethena's training covers bystander intervention through the following topics: • Definition, research and scenarios to illustrate how to implement it • Conditions under which it is most effective • Managers' responsibility to intervene

B. Illinois

The Illinois Human Rights Act (the "IHRA") requires that all employees who work in Illinois receive annual sexual harassment training covering a prescribed core curriculum. § 2-109 of the Illinois Human Rights Act. Businesses of all size are covered. All employees, regardless of their status (i.e. full-time, part-time, or interns) must receive training. Independent contractors are not required to be trained, but the Illinois Department of Human Rights (the "IDHR") strongly advises that they do receive training if they either work on-site at the employer's workplace or interact with the employer's staff.[6] Restaurants and bars must also comply with additional requirements under § 2-110 of the IHRA. The IDHR has disseminated a model training program (the "Illinois model training") that meets the minimum requirements under § 2-109, however employers can also choose to deliver a program of their own choosing as long as it meet or exceeds the minimum requirements. *See* IHRA § 2-109(C).

Ethena's training meets the requirements for sexual harassment training under Illinois law. The following chart summarizes Ethena's compliance with specific provisions of Illinois law.

Structural and Format Requirements		
Requirement	Illinois	Ethena
Amount of training	Illinois has no set amount of training, as long as the core training curriculum is delivered. The Illinois model training can be delivered in approximately 30 – 60 minutes.	Ethena's training amounts to approximately one hour of training in the aggregate per year, covering all of the required training topics.

[6] FAQ FOR SEXUAL HARASSMENT PREVENTION TRAINING, Illinois Department of Human Rights, available at https://www2.illinois.gov/dhr/Training/Pages/FAQ%20for%20Sexual%20Harassment%20Prevention%20Training.aspx

New hires/promotions	New hires must be trained as soon as possible. If an employee was previously trained through a prior employer, it is the employer's responsibility to ensure that their previous training was compliant with the IHRA. In such cases, the IDHR recommends that employers simply give all new employees new training.	Ethena gets IL employees compliant within 90 days, and frontloads the most essential topics – such as how to report harassment – in the first month.
Frequency	Annually. All employees must be trained by the end of 2020, and thereafter once per calendar year.	Ethena covers all core training topics over the course of each year.
Record keeping	Employers must retain records, either electronically or on paper, to show that all employees completed the required training. These must be able to be produced for inspection by the IDHR upon request.	Real-time records are kept within Ethena's administrator dashboard and can be exported. These are stored indefinitely, or until the employer requests that they be deleted.
Format	Illinois has no set format, as long as the minimum training topics are covered as soon as possible after hiring and once a year thereafter. Nor is in-person training required. The Illinois model training can be delivered remotely via downloadable PowerPoint slides.[7] There is no indication that smaller portions of training delivered throughout the year would violate this.	Ethena's monthly nudges are an acceptable method for delivering sexual harassment training under Illinois law.
Language	Employers must provide the training in a way that is accessible to its workforce. If employees have disabilities or speak a language other than English, employers must train employees in a manner that is accessible to them.	Ethena is currently only available in English and, upon request, other languages. Ethena makes clear that for employers with employees who have different language and accessibility requirements, the employer is responsible for finding an appropriate substitute in order to train those specific employees, such as the Illinois Model Training.
	Content Requirements	
Explanation of sexual harassment	Must include an explanation of sexual harassment consistent with the IHRA. IHRA § 2-109(B)(1). The Model Training covers the IHRA definition, quid pro quo sexual harassment, hostile work environment sexual harassment, the unwelcome behavior standard, the treatment of situations off	Ethena's training covers all of these topics, including relevant Illinois law and the IHRA definition of sexual harassment.

[7] Available at https://www2.illinois.gov/dhr/Training/Documents/IDHR-SHPT-2020-04-APR-V11.pptx

	work property or with non-employees, gender identity, sexual orientation, and third parties.	
Examples	Must include examples of conduct that constitutes unlawful sexual harassment. IHRA § 2-109(B)(2). The Model Training provides a list of example behaviors to illustrate sexual harassment, and describes sexual harassment online.	Ethena's training provides industry-relevant examples and scenarios to illustrate a wide variety of behaviors that constitute unlawful sexual harassment. It also includes training on sexual harassment online.
Federal and state statutory provisions	Must include a summary of relevant federal and state statutory provisions concerning sexual harassment, including remedies available to victims of sexual harassment. IHRA § 2-109(B)(3). The Model Training covers what to do if you witness or experience sexual harassment and the different mechanisms for reporting - including the Illinois Sexual Harassment and Discrimination Helpline, the IDHR, the employer's internal reporting mechanism, and the EEOC.	Ethena's training covers the state and federal laws on sexual harassment, including remedies, the complaint process, and all required reporting mechanisms. It also allows employers to include their company-specific reporting mechanisms and contacts.
Supplemental training for restaurants and bars	Per IHRA § 2-110, training for restaurants and bars must also include (1) specific conduct, activities, or videos related to the restaurant or bar industry; (2) an explanation of manager liability and responsibility under the law; and (3) English and Spanish language options.	Ethena's training includes industry specific examples and scenarios. Ethena's training also covers manager liability and responsibility. Ethena makes clear that it the employer's responsibility to provide training in languages other than English. One solution in such cases could be to refer employers to the Illinois Model Training, which covers manager liability and responsibility under the law. This training is available in Spanish.[8]

C. New York

New York mandates that all businesses conduct annual sexual harassment training for all of their employees that meets certain minimum requirements, per Labor Law § 201-g. The law

[8] Available at https://www2.illinois.gov/dhr/Training/Documents/IDHR-SHPT-SP-2020-04-APR-V5.2-Notes.pdf

requires that the New York Department of Labor (the "NY DOL") disseminate a model training program (the "New York Model Training"). If employers choose to deliver their own training, it must meet or exceed the standards of the New York Model Training.

For New York City employers with 15 or more employees, Local Law 96 of 2018 mandates minimum requirements for sexual harassment training in addition to the New York State requirements. *See* N.Y.C. Admin. § 8-107(30). New York City also has a model training program (the "NYC Model Training") that constitutes the minimum threshold for training, though employers are free to implement their own training programs that go beyond this.

Ethena's training meets the requirements for both New York State and New York City. The following chart summarizes Ethena's compliance with specific provisions of both laws.

Structural and Format Requirements			
Requirement	New York State	New York City	Ethena
Amount of training	No specified duration. The NY DOL states that no time requirement exists as long as the required curriculum is covered. The New York Model Training, the substance of which employers must equal or exceed, can be presented in approximately 30-60 minutes, depending on audience participation. Additionally, the NY DOL certifies that the NYC Model Training, which takes approximately 45 minutes to complete, satisfies New York State requirements.[9]	No specified duration. The NYC Model Training takes approximately 45 minutes to complete.	Ethena delivers training in monthly nudges that take approximately five minutes to complete, for a total of approximately 60 minutes of training per year.
New hires	New hires must be trained as soon as possible.	Training must be conducted within 90 days of hire for full or part time employees. N.Y.C. Admin. § 8-107(30)(b)	New hires can be added on Ethena on their first day of work, and the pace of training is initially accelerated to ensure that all required topics are covered within the first 90 days.

[9] COMBATTING SEXUAL HARASSMENT; FREQUENTLY ASKED QUESTIONS, New York Department of Labor, Available at https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers

Frequency	Annually. N.Y. Lab. Law § 201-g(2). The NY DOL states that this may be based on the calendar year, anniversary of each employee's start date, or any other date the employer chooses.	Annually. N.Y.C. Admin. § 8-107(30)(b)	Once an employee has complete their initial training requirement, Ethena will deliver nudges once a month. Ethena tracks a user's aggregate training, both in terms of the content engaged with and the total time spent training. The training covers all required topics over the course of a year.
Record keeping	No statutory requirements. However, the NY DOL encourages employers to keep training records in order to respond to future complaints and lawsuits.	Employers shall keep a record of all trainings, including a signed employee acknowledgement. Such acknowledgment may be electronic. These records must be kept for 3 years and are inspectable by the New York City Commission on Human Rights (the "NYC CHR") upon request.	Real-time records of users' interactions with and progress through the training are kept within Ethena's administrator dashboard and can be exported. These are kept indefinitely, or until the employer requests that they be deleted.
Interactivity	The raining must be interactive. N.Y. Lab. Law § 201-g(2)(a). The training may be presented to employees individually or in groups; in person, via phone or online; via webinar or recorded presentation. It should include as many of the following elements as possible: • Ask questions of employees as part of the program; • Accommodate questions asked by employees, with answers provided in a timely manner; • Require feedback from employees about the training and the materials presented. The model training includes three to five questions for the	The training must be interactive. Interactive training consists of participatory teaching whereby the trainee is engaged in a trainer-trainee interaction, use of audio-visuals, computer or online training program or other participatory forms of training. However, such "interactive training" is not required to be live or facilitated by an in-person instructor in order to satisfy the provisions of this subdivision. N.Y.C. Admin. § 8-107(30)(a). The NYC Model Training includes videos segments with multiple choice check-on-learning questions that the viewer must answer correctly.	Ethena's training is sufficiently interactive for both New York and New York City. Each training nudge concludes with a check-on-learning question that users must answer correctly in order to progress. Users can submit questions that will be answered within two business days. Ethena regularly asks for feedback with the "rate this nudge" feature.

	audience to respond to for each of the five example scenarios it offers. The NY DOL also notes that any one of the above examples would meet the minimum requirement for being interactive, but an individual watching a training video or reading a document only, with no feedback mechanism or interaction, would not be considered interactive.[10]		
Language	Employers must provide employees with their sexual harassment prevention policy and training information in English and in an employee's primary language if it is Spanish, Chinese, Korean, Polish, Russian, Haitian-Creole, Bengali, or Italian. See N.Y. Lab. Law § 201-g(2-a)(a), (b), (c) and NY DOL guidance.[11]	No specific requirements	Ethena is currently only available in English and, upon request, Spanish. Ethena makes clear that for employers with employees who have different language and accessibility requirements, the employer is responsible for finding an appropriate substitute in order to train those specific employees, such as the New York Model Training or the NYC Model Training.
Uniformity	The training should be modified to reflect the work of the organization by including, for example, industry specific scenarios. To every extent possible, this training should be given consistently (using the same delivery method) across each organization's workforce to ensure understanding at every level and at every location. Flexibility in delivery is acceptable if it is based on the same core curriculum.[12]	No specific requirement	An organization using Ethena would provide its employees with the same core material on the same platform, albeit with some variations in the style and delivery. This is uniform enough to be acceptable under New York law and the NY DOL's guidance. Additionally, Ethena's tailoring of scenarios and examples to specific industries aligns with NY DOL guidance.

[10] COMBATTING SEXUAL HARASSMENT; FREQUENTLY ASKED QUESTIONS, New York Department of Labor, Available at https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers

[11] MINIMUM STANDARDS FOR SEXUAL HARASSMENT PREVENTION TRAINING, New York Department of Labor, available at https://www.ny.gov/sites/ny.gov/files/atoms/files/MinimumStandardsforSexualHarassmentPreventionTraining.pdf

[12] New York Model Training, page 2-3, October 2019, available at https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionModelTraining.pdf

Content Requirements			
Definition of sexual harassment	Must include an explanation of sexual harassment consistent with guidance issued by the NY DOL in consultation with the Division of Human Rights. N.Y. Lab. Law § 201-g (2)(a)(i); The New York Model Training includes the definition and covers the two types of sexual harassment, quid pro quo and hostile environment; who can be the victim and the perpetrator; where sexual harassment can occur; and sex stereotyping.	Must include an explanation of sexual harassment as a form of unlawful discrimination under local law. N.Y.C. Admin. § 8-107(30)(b)(1) The NYC Model Training states basic definitions, but is heavily reliant on examples and anecdotes to illustrate these.	Initial provide the definition of sexual harassment under New York Law and include descriptions of quid pro quo and hostile work environment harassment, as well as scenarios illustrating these.
Examples	Must include examples of conduct that would constitute unlawful sexual harassment. N.Y. Lab. Law § 201-g(2)(a)(ii). The Model Training includes six examples scenarios, each capable of being briefed in approximately 30 seconds and with between three and five questions for the training audience to answer afterwards.	Must include a description of what sexual harassment is, using examples. N.Y.C. Admin. § 8-107(30)(b)(3) The NYC Model Training includes several video examples with follow-up questions that the viewer must answer correctly to move on.	Ethena's training includes definitions of and practical examples illustrating harassment, discrimination, and retaliation. These examples are specific to the employee's role and industry.
Federal and state statutory provisions on remedies	Must include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment. N.Y. Lab. Law § 201-g(2)(a)(iii)	Must include a statement that sexual harassment is also a form of unlawful discrimination under state and federal law. N.Y.C. Admin. § 8-107(30)(b)(2)	Ethena's training covers the relevant law, including a description of how harassment is an unlawful form of discrimination under local, state, and federal law, as well as remedies available under these laws.
Redress and complaint adjudication	Must include information concerning employees' rights of redress and all available forums for adjudicating complaints. N.Y. Lab. Law § 201-g(2)(a)(iv); Should include the contact info of specific individuals in one's office responsible for complaints. The Model Training also includes sections on making a complaint, the investigation process, and instructions for filing complaints through the	Must include any internal complaint process available to employees through their employer to address sexual harassment claims. N.Y.C. Admin. § 8-107(30)(b)(4); Must also include the complaint process available through the NYC CHR, NY DHR, and the EEOC, including contact information. § 8-107(30)(b)(5)	Ethena's training describes the complaint processes available, provides employees with information to utilize these processes, and allows each specific employer to upload their company-specific policies. It includes processes available through all required local, state, and federal agencies.

	following channels: the NY DHR, the EEOC, and any local requirements.[13]		
Retaliation	No specific statutory requirement. However, the Model Training includes a section on retaliation.[14]	Training must cover the prohibition of retaliation and examples thereof. N.Y.C. Admin. § 8-107(30)(b)(6)	Ethena's training explains retaliation, describes how it unlawful, and provides examples to illustrate it.
Bystander Intervention	No specific statutory requirement. However, the Model Training includes a section on "What Should I do if I witness Sexual Harassment" that encourages bystander intervention.[15]	Must include information concerning bystander intervention, including but not limited to any resources that explain how to engage in bystander intervention. N.Y.C. Admin. § 8-107(30)(b)(7)	Ethena includes a specific onboarding nudge on bystander intervention, explaining the research backing it, and providing guidelines for intervening on behalf of a colleague.
Supervisors	Must include information addressing conduct by supervisors and any additional responsibilities for such supervisors. N.Y. Lab. Law § 201-g(2)(b)	Must cover the specific responsibilities of supervisory and managerial employees in the prevention of sexual harassment and retaliation, and measures that such employees may take to appropriately address sexual harassment complaints. N.Y.C. Admin. § 8-107(30)(b)(8)	Ethena's training covers the duties and responsibilities of supervisors in training sent to both employees and supervisors. Additionally, Ethena provides managers with training tailored to managers, including more detailed scenarios that apply to common situations managers encounter.

III. Ethena's Training's Impact on Employer Liability

Implementing a sexual harassment training program can reduce an employer's potential liability under Title VII of the Civil Rights Act of 1964 as well as comparable state and local laws.[16] Implementing a high quality program which incorporates many of the EEOC's best practices, as Ethena's training does, can protect employers more readily than a training program that only meets the statutory minimums, such as the model training programs disseminated by New York, Illinois, and California. This is true in three respects: (1) enforcement agencies such as the EEOC have discretion over enforcement and will presumably be less inclined to punish companies that are already doing their utmost to adhere to published guidelines; (2) implementing sexual harassment training programs can give employers in many jurisdictions an affirmative defense to claims of hostile work environment and help limit punitive damages, and

[13] See New York Model Training, page 3.

[14] See New York Model Training, page 11.

[15] See New York Model Training, page 13.

[16] Specifically the California Fair Employment and Housing Act, the Illinois Human Rights Act, the New York Human Rights Law, and the New York City Human Rights Law.

there are indications that a higher quality program could do so more effectively than programs that meet the bare minimum legal requirements moving forward;[17] and (3) a higher quality program will presumably make incidents of sexual harassment less likely and help companies better manage them if they occur, thereby reducing the number of incidents from which liability could spring.

The potential costs of being found liable are severe. For example, the California DFEH recently brought an action against Silicon Valley Growth Syndicate, a venture capital firm, after one of the firm's co-founders sexually harassed a female employee. The firm paid a settlement of $1.8 million in May 2020.[18]

The costs of such enforcement actions are also trending upward. Figure 1 illustrates how the aggregate value of penalties and settlements collected in enforcement actions filed by EEOC has increased markedly since the inception of the #MeToo movement. After having hovered near $40 million for the prior decade, the yearly aggregate value paid in enforcement actions approached twice that total in 2019. This has occurred without a significant increase in the number of claims filed and with a slight decrease in the rate of success for such claims.[19]

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[17] This is less relevant in jurisdictions with laws that establish more stringent standards for employers. Notably, New York State and New York City have both recently passed laws restricting the availability of the Faragher-Ellerth defense, an affirmative defense to liability to which having a sexual harassment training program is relevant. Greater discussion of this follows in section C.

[18] VENTURE CAPITAL PARTNERSHIP TO PAY $1.8 MILLION TO SETTLE DFEH SEXUAL HARASSMENT LAWSUIT, California Department of Fair Employment and Housing, May 2020, https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/05/DFEH_SVGS_PR.pdf

[19] The percentage of claims that reach a merit resolution - a charge favorable to the charging party consisting of either a settlement, withdrawal with benefits, successful conciliation, or unsuccessful conciliation - has decreased steadily from an average of approximately 25% at the beginning of the decade to an average of approximately 23% at the end of the decade. Settlements have become slightly less common over the past decade, while withdrawals with benefits have become slightly more common over the same period. However, in either case, the employer typically pays benefits to the aggrieved party. SEE CHARGES ALLEGING SEX-BASED HARASSMENT (CHARGES FILED WITH EEOC) FY 2010 - FY 2019, EEOC, available at https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019

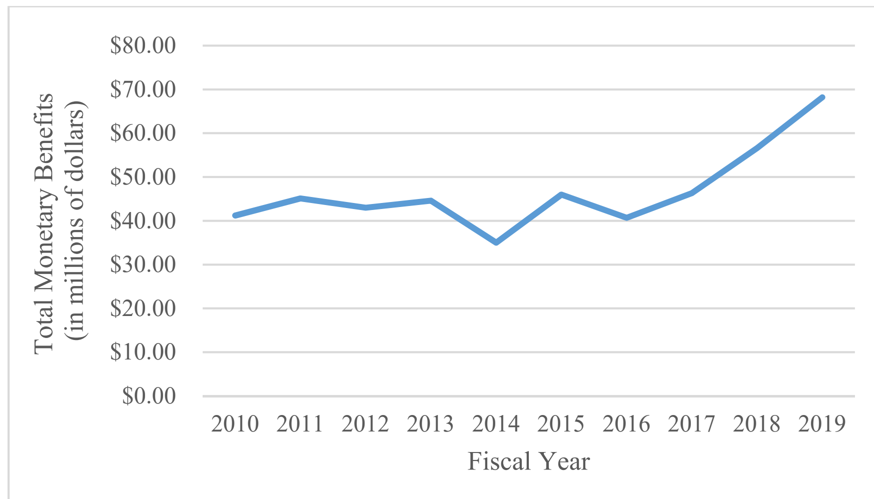

Figure 1. Aggregate Amount Paid in Sexual Harassment Enforcement Actions pursued by the EEOC from 2010-2019 (in millions of dollars)[20]

This section will first discuss why Ethena's training can be considered a high quality training program due to its adherence to the EEOC's best practices. It will then discuss why this matters with respect to the three categories introduced above.

A. Ethena's training incorporates many of the EEOC's best practices and is presumably high-quality

In 2016 the EEOC released a report outlining best practices for sexual harassment policies and training.[21] The Select Task Force on the Study of Harassment in the Workplace's report (the "Report") expressed frustration that, despite a robust infrastructure for sexual harassment regulation and the widespread practice of businesses educating their employees on sexual harassment, incidents of sexual harassment continued to occur with regularity. Based on extensive research, the report outlined a number of sexual harassment training best practices that go beyond the minimum standards typically required for such training. The EEOC subsequently

[20] These actions were pursued by the EEOC acting either alone or in conjunction with state and local agencies that have work sharing arrangements with the EEOC. The data underlying this chart was released by the EEOC and is available at https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019

[21] SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EEOC, 2016, available at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [hereinafter Select Task Force Co-Chairs' Report].

adopted the Report's recommendations in an official guidance document (the "Guidance Document") approved by the Chair of the EEOC in 2017.[22]

Determining whether a specific sexual harassment training program is effective in preventing sexual harassment is an elusive task without empirical data about its effectiveness. However, the EEOC's guidance represents the most authoritative current wisdom on how to build effective training. Thus, a training program that incorporates the EEOC's recommendations is presumably more effective than a program that fails to do so.

Ethena's training covers all of the content that the EEOC recommends covering in the Report and the Guidance Document. Additionally, it incorporates a number of the Guidance Document's best practices in a way that model trainings from California, Illinois, New York, and New York City generally do not:

1. EEOC recommendation: effective training should be repeated and reinforced regularly

The Reports states, "an organization's devotion of time and resources to any effort reflects the organization's commitment to that effort." The Report thus recommends that trainings not only be conducted once per year, but that they be frequently reinforced throughout the year. It further recommends that repeated trainings do not simply repeat the same material over and over again in what would be a "rote exercise," but that they rather deliver training that is "varied and dynamic in style, form, and content."

This is one of the principle ways in which Ethena's training diverges from most other sexual harassment trainings available. It is delivered every month in small, manageable portions. These cover new material each time, and they do so in a variety of styles. Employees who use Ethena are consistently reminded of their organization's commitment to preventing sexual harassment, educated on new aspects of sexual harassment, and engaged by varying content.

2. EEOC recommendation: effective training should be tailored to the specific workplace and workforce

The Report warns against the pitfalls of "canned, one-size-fits-all training." It instead recommends that "effective compliance trainings are those that are tailored to the specific realities of different workplaces," particularly by incorporating workplace-specific examples and scenarios.

This is another point of emphasis for Ethena's training. It is tailored to specific industries, and the examples it uses are specific to these industries. Thus, it manages to stay relevant and relatable to all of the employees who utilize it.

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[22] PROMISING PRACTICES FOR PREVENTING HARASSMENT, EEOC-NVTA-2017-2, EEOC, November 2017, available at https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment

3. EEOC recommendation: effective training should be designed to include active engagement by participants

The Reports stresses the importance of engaging employees by including examples and interactivity in the training. Ethena's training does just that. It includes examples drawn from the employee's particular industry to illustrate key concepts. It also includes questions that employees must answer at the conclusion of the trainings to progress.

4. EEOC recommendation: effective training should be tailored to the organization and audience

The Report recommends making the training relevant for the specific audience in order to keep it engaging and relevant. Ethena does this by allowing individuals to select the style of delivery that they would prefer. They can choose between either a witty style of delivery or a more direct style. Ethena also allows employers to upload company-specific information, such as that company's reporting procedures, company-specific language on the importance of inclusivity, a description of how innovative training aligns with company values, or a code of conduct, for example, to ensure that the training stays as relevant as possible for that particular audience. Ethena also tailors its training to roles within the company (e.g., Head of Product versus Managing Director) and industry-specific situations (e.g., an engineering sprint or a company offsite).

5. EEOC recommendation: effective training should include workplace civility training and bystander intervention training

The Report claims that the biggest factor in workplace sexual harassment is culture. In order to shape a harassment-free culture, the Report recommends going beyond delivering sexual harassment-specific content and training employees on workplace civility and bystander intervention. The Report claims that these areas "stood out for us as showing significant promise for preventing harassment in the workplace."

Ethena's training covers both workplace civility and harassment. It also includes additional topics that are not necessarily mandated but nonetheless with bearing on the goal of creating a harassment-free workplace, such as gender harassment.

6. EEOC recommendation: effective training should target management and supervisors

The Report stresses that managers and supervisors have an inordinately large role in shaping workplace culture. Their ability to signal an institutional commitment to preventing sexual harassment, their understanding of managing sexual harassment incidents if they do occur, and their individual commitment to not being part of the problem are significant factors in creating a harassment-free workplace.

Ethena offers training specifically tailored to supervisory roles. This training includes material, scenarios, and examples that are supervisor-specific. It thus seeks to particularly

empower the workplace population with the greatest ability to create a harassment-free workplace.

Owing to its integration of best practices informed by the most sophisticated current wisdom on what makes sexual harassment training effective, Ethena's training can presumably be called effective, and it aligns with the quality of training that the EEOC desires that companies conduct.

B. Ethena's training's quality makes enforcement actions less probable

The EEOC and corresponding state and local agencies are responsible for enforcement of sexual harassment prevention laws. They have discretion as to when and against whom to bring enforcement actions. A company that implements a training program that tacks closely to the EEOC's recommendations would be a less likely target for an enforcement action than a company that fails to do so, everything else being held equal. Similarly, a company that implements a training program that surpasses the model training program disseminated by a given state or city in terms of material covered, effectiveness of delivery, and relevance of examples would be less likely to be targeted for enforcement by state or city enforcement agencies.

To underscore this, several recent enforcement actions settled by the EEOC included requirements for the offending companies to hire consultants to implement sexual harassment training programs.[23] The EEOC specified that these programs should meet certain basic thresholds in terms of content. Ethena's training content far surpasses the minimum requirements imposed in such cases.

Given that Ethena's training incorporates the EEOC's best practices and also surpasses the standards of the model training programs of California, Illinois, New York, and New York City, using Ethena's training may help to make enforcement actions less probable. The fact that the training requirements that the EEOC has imposed on delinquent companies far fall short of what Ethena's training already contains supports the notion that any enforcement action against a company already using Ethena's training would have little utility.

C. Ethena's training may reduce employers' potential liability

Reasonable care to prevent sexual harassment in the workplace can limit liability or reduce potential damages for employers. Employers can be held vicariously liable for hostile work environment sexual harassment. The standard depends on whether the harasser is the victim's supervisor. If so, the employer is strictly liable. Whether an individual is a supervisor turns on whether the individual is empowered to take tangible employment actions, such as firing, promoting, or reassigning, with respect to the victim. *Vance v. Ball State University*, 133

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[23] See, E.g., *EEOC v. G2 Corporation d/b/a Screen Tight*, Civil Action No. 3:18-cv-01524 (N.D. Texas, 2019); details of the settlement available at https://www.eeoc.gov/newsroom/g2-corporation-pay-55000-settle-eeoc-sex-harassment-suit

S. Ct. 2434 (2013). If the harasser is someone other than the victim's supervisor, then liability turns on whether the employer was negligent in failing to prevent harassment in the workplace.

Sexual harassment training plays two roles in the analysis of such claims: it can allow the employer to take advantage of the *Faragher-Ellerth* defense by demonstrating that the employer has taken reasonable care to prevent sexual harassment, and it can preclude the imposition of punitive damages by a court.

1. The Faragher-Ellerth defense

The Faragher-Ellerth defense is an affirmative defense to claims of a hostile work environment articulated by the Supreme Court in two cases in 1998. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

In order for an employer to avail itself of this defense, three conditions must be satisfied:

1) No tangible employment action can have been taken against the employee,

2) The employer must have taken reasonable care in preventing and promptly correcting the sexual harassment, and

3) The plaintiff employee must have unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

Sexual harassment training programs have been frequently cited as evidence that the employer met the "reasonable care" standard.[24] Providing any form of sexual harassment training at all has been typically found by courts to be indicator of the requisite reasonable care, and comment on the quality of such training is rare. Conversely, courts frequently cite the lack of a sexual harassment program in denials of defendants' motions for summary judgment.[25] The lack

[24] *See Crawford v. BNSF Ry. Co.*, 665 F.3d 978, 981 (8th Cir. 2012)(noting that the plaintiffs had been trained on how to report harassment, thus allowing the employer to escape liability via the Faragher-Ellerth defense); *Shaw v. AutoZone, Inc.,* 180 F.3d 806, 812 (7th Cir. 1999) (noting that in "addition to distributing a [sexual harassment prevention] policy to its employees, [Autozone] regularly conducted training sessions on sexual harassment," particularly for its managers); *Hetreed v. Allstate Insurance Co*., 1999 WL 311728, at *5 (N.D. Ill. 1999) (noting with approval that the employer had a detailed sexual harassment policy and provided managers with training); *DeWitt v. Lieberman*, 48 F. Supp. 2d 280, 287, 290 (S.D.N.Y. 1999) (noting that the defendant had "an anti-sexual harassment training program" and that it was "effective"); *EEOC v. Barton Protective Services*, 47 F. Supp. 2d 57, 60 (D.D.C. 1999) (noting that the employer provided "EEO training"); *Maddin v. GTE of Florida, Inc*., 33 F. Supp.2d 1027, 1032 (M.D. Fla. 1999) (citing favorably the fact that the employer "provided training about sexual harassment for its employees and supervisors"); *Fiscus v. Triumph Group Operations*, 24 F. Supp. 2d 1229, 1240 (D. Kan. 1998) (noting that the company "conducted anti-harassment workshops/training for its supervisors"); *Landrau Romero v. Caribbean Restaurants*, 14 F. Supp. 2d 185, 191-92 (D.P.R. 1998) (noting that the plaintiff received training in sexual harassment).

[25] *See E.g., Mortenson v. City of Oldsmar*, 54 F. Supp. 2d 1118, 1124 (M.D. Fla. 1999) (noting that main perpetrators did not attend sexual harassment training, one because he actively resisted attending and the other because he was out of town); *Powell v. Morris,* 37 F. Supp. 2d 1011, 1020 (S.D. Ohio 1999) (noting that the court has neither seen the employer's sexual harassment policy nor been provided with details on its training program);

of a sexual harassment training program is also not dispositive in every case; courts have deemed that employers took reasonable care even without such programs.[26]

In assessing sexual harassment training programs, courts have in the past stopped the analysis short of whether such programs were of a high enough quality. Rather, the relevant fact has typically been whether such a program existed at all. In *Leopold v. Baccarat, Inc.*, the court ruled in favor of a company with a demonstrably ineffective sexual harassment policy, stating, “the law is clear than any reasonable policy will do” for purposes of demonstrating reasonable care. *Leopold v. Baccarat, Inc.*, No. 95CV6475JSM, 2000 WL 174923, at *3 (S.D.N.Y. Feb. 14, 2000), aff'd sub nom. Leopold v. Baccarat, Inc, 239 F.3d 243 (2d Cir. 2001). While a policy is distinct from a training program, both play comparable roles in establishing reasonable care. Where courts have looked more closely at how Title VII training was administered, it was because there were conflicting accounts of whether such training actually occurred. *See, E.g., Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1210 (10th Cir. 2000) (in which the court refused to take at face value the employer’s claim that it’s sexual harassment training constituted a good faith effort to comply with Title VII, as some employees claimed that no such training had occurred).

That is not to say that the quality of a training program is completely irrelevant to the “reasonable care” standard. Rather, a given program’s quality simply has not typically been scrutinized by courts in the past. However, the standard of “reasonable care” is not carved in stone, and there is reason to believe that if the EEOC’s guidelines indicate that it expects more from companies in terms of sexual harassment training, than courts may well defer to the EEOC and evaluate “reasonable care” through the lens of the EEOC’s latest recommendations.

The availability of the Faragher-Ellerth defense in a particular jurisdiction can be limited by legislation. Notably, New York State and New York City have both done so. In 2019, New York’s Governor signed into law S. 6577/A. 8421, a bill amending the New York State Human Rights Law to render an employee’s failure to utilize a sexual harassment reporting mechanism maintained by their employer no longer determinative to a claim of sexual harassment. N.Y. Exec. Law § 296(1)(h). This amendment was intended to eliminate part of the Faragher-Ellerth defense.[27] Similarly, New York City courts have held that the standard for liability created by the New York City Human Rights Law precludes a “reasonable care” Faragher-Ellerth defense.

Miller v. D.F. Zee's, Inc., 31 F. Supp. 2d 792, 803, 808 (D. Or. 1998) (noting that neither diversity nor sexual harassment training was conducted); *Snapp-Foust v. National Construction, L.L.C.,* 1 F. Supp. 2d 773, 778-79 n. 9 (M.D. Tenn. 1997) ("Defendant has produced no evidence of any further dissemination of the [sexual harassment] policy or of any training of personnel regarding complaint procedures.");

[26] *Jones v. USA Petroleum Corp*., 20 F. Supp. 2d 1379, 1386 (S.D. Ga. 1998) (granting employer motion for summary judgment where harassment grievance procedure found legally sufficient despite a lack of training, as the choice of whether to invest in “sensitivity training” was a matter of employer preference rather than legal necessity); *Paton v. Dallas County Community College Dist.*, 1996 WL 722056, at *8 (N.D. Tex. 1996) (noting that "lack of seminars and 'sensitivity training' does not outweigh the fact" that the employer responded effectively to a harassment complaint).

[27] LABOR AND EMPLOYMENT—HARASSMENT, 2019 Sess. Law News of N.Y. Legis. Memo Ch. 160 (McKINNEY'S)

Zakrzewska v. The New Sch., 598 F. Supp. 2d 426, 433 (S.D.N.Y. 2009), certified question answered, judgment aff'd sub nom. *Zakrzewska v. New Sch.*, 620 F.3d 168 (2d Cir. 2010).

2. Punitive Damages

In *Kolstad v. American Dental Ass'n*, the Supreme Court created a safe harbor from punitive damages for Title VII violations in the case of employers who "adopt anti-discrimination policies and . . . educate their personnel on Title VII's prohibitions." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). The Court described how Title VII is intended to be prophylactic, encouraging employers to implement sound prevention practices, and that "Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII." *Id.* Good faith efforts to comply with Title VII's requirements invoke *Kolstad*'s limitation on punitive damages.

The presence of a training program typically constitutes such a good faith effort. Where this has been held to be insufficient, there has been something about the program indicating that it was not implemented in good faith. In one case involving racial discrimination under Title VII, the court deemed a training system insufficient when there were indications that the senior executives had a policy of racial discrimination, stating "a reasonable juror could infer that the system was implemented in an effort to mask such a corporate policy." *See Lowery v. Circuit City Stores*, Inc., 206 F.3d 431, 446 (4th Cir. 2000).

3. The relevance of the quality of a training program

Despite the relatively mechanical role that sexual harassment training programs have played in determinations of "reasonable care" for the Faragher-Ellerth defense and "good faith" for the Kolstad bar to punitive damages, the quality of such programs is still relevant. The standards of "reasonable care" and "good faith" are subjective. Courts will frequently defer to the EEOC's guidelines when applying Title VII. See, e.g., *Amie v. City of Jennings* (holding that the employer had not taken reasonable care under the *Faragher-Ellerth* definition, as EEOC guidelines recommended implementing sexual harassment training programs, and the employer had not done so). The Supreme Court has said that EEOC guidelines, while not being binding law, "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976)(applying the analysis of administrative guidance articulated in *Skidmore v. Swift & Co*., 323 U.S. 134, 140, (1944) to EEOC guidelines). Thus, even if there is no change in *Faragher-Ellerth* or *Kolstad* standards, decisions in this realm may still track changes in EEOC guidelines in order to determine the relevant standards to apply.

Recent trends indicate that such a change may be underway. The EEOC's 2016 Report and subsequent Guidance Document represent a burgeoning trend of emphasizing the effectiveness, rather than the mere presence, of sexual harassment training programs. Based on this, it is reasonable to assume that courts will follow the EEOC's lead and begin to look more closely at the effectiveness of training programs, with effectiveness judged in light of the practices that the EEOC deemed to be effective in the 2016 Report.

D. Higher quality training may impact the prevalence of sexual harassment issues in the first place

A sexual harassment training program's effectiveness in practice impacts an employer's exposure to liability for sexual harassment in a more fundamental way than the mechanism described above: it can prevent such incidents from occurring. Intuitively, a better-educated workforce could be expected to commit fewer incidents of sexual harassment and to handle these more effectively when they do occur. The best practices highlighted by the EEOC in its 2017 Guidance Document represent the current best understanding of what constitutes effective sexual harassment training. Adherence to such best practices thus remains the most practical and direct metric by which to evaluate the effectiveness of a program, besides empirical monitoring of actual results under a given program. As Ethena's training incorporates many of the EEOC's best practices from the Report and the Guidance Document, it is reasonable to expect a company using Ethena's training to produce fewer sexual harassment incidents, and to better manage those that do occur.

Furthermore, New York State and New York City's limitations on the availability of the Faragher-Ellerth defense under their respective human rights laws may be indicative of a budding trend. States and cities may grow increasingly unwilling to find that simply having any sexual harassment training program at all signifies that employers have done enough to prevent sexual harassment. Instead, the emphasis may shift to whether such programs are actually effective in practice. The EEOC's 2016 Report and 2016 Guidance Document lend support to the notion of increased emphasis on effective training. If these prove to be harbingers of a more widespread transformation, then effective training programs that actually do prevent sexual harassment will protect companies more readily than mere check-the-box programs that primarily focus on keeping a company compliant.

For all of the above reasons, a company using Ethena's training could reasonably expect to face fewer enforcement actions and to be less vulnerable to liability for sexual harassment than a company that uses a sexual harassment program that adheres less rigorously to the EEOC's recommended best practices.