2018 Management & Professional Liability Conference
June 20-22, 2018
Boston, MA

Sexual Harassment Front and Center: Harvey, Spacey and Louis C.K. Exposed!

I. The #MeToo/#TimesUp Movement

Harry Weinstein and Hollywood

The #MeToo/#TimesUp movement was sparked by the release of two investigative news articles. On October 5, 2017, the New York Times published an article titled "Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades." A few days later, the first New Yorker story by Ronan Farrow appeared: "From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories." In these articles, courageous women came forward to tell how they had been sexually assaulted by the powerful movie Producer, Harry Weinstein, and how Weinstein had used Non-Disclosure Agreements to prevent them from sharing their stories.

If the articles were the spark, then social media was the gasoline that made the movement spread. On October 15, actress Alyssa Milano took to Twitter to encourage the use of the phrase "Me Too" as part of an awareness campaign: "If all the women who have been sexually harassed or assaulted wrote 'Me too' as a status, we might give people a sense of the magnitude of the problem." Scores of people responded, telling their own personal stories of harassment. By Twitter's count, more than 500,000 "#MeToo" tweets were published by the following afternoon. Additionally, during the first 24 hours, the hashtag was used by more than 4.7 million people in 12 million posts on Facebook.

As the movement spread, more members of Hollywood's elite were exposed. These included: Matt Lauer, Kevin Spacey, Louis CK, Dustin Hoffman, James Toback, and Charlie Rose. Many of these individuals, Kevin Spacey and Matt Lauer for example, have had their careers seemingly destroyed as a result of the #MeToo allegations made against them.

Expansion in Other Industries

The #MeToo/#TimesUp movement has spread into other industries such as politics, technology, athletics, and education. Allegations and photographic evidence led to Senator Al Franken's resignation. News of Silicon Valley investors grouping female employees to company/industry drug and sex parties where female employees feel obligated to attend have been wide spread. Athletes have come forward to allege that their coaches and trainers have sexually assaulted them, and that their schools did nothing to protect them. Even the judiciary hasn't been immune.

Ninth Circuit Judge Alex Kozinski retired from the bench in December after at least 15 women accused him of inappropriate behavior. This behavior ranged from showing them pornography to inappropriate touching. His victims ranged from law clerks that worked for him to a U.S. Court of Federal Claims judge.

II. How We Got Here

Not Just an Abuse of Power Issue

It has long been believed that sexual harassment was primarily an abuse of power problem. It was believed that men were more often found to be sexual harassers because they traditionally held the positions of authority/power in organizations. As women have advanced into leadership roles, however, the volume of sexual harassment claims against women has not dramatically increased. Thus, what makes a person a harasser may be significantly more complicated than once believed.

The Psychology of Why Women Haven't Historically Reported Harassment

According to one study, as many as 1 in 3 women between the ages of 18 and 34 have suffered sexual harassment at work. According to the Equal Employment Opportunity Commission (EEOC), roughly 70% of those who experience sexual harassment at work fail to report it. Studies further reveal that women who are victims fear they will face disbelief, inaction, blame or societal and professional retaliation. This fear may be founded, as one 2003 study found that 75% of employees who spoke out against workplace mistreatment faced some form of retaliation.

Inadequate Harassment Training

While three states- California, Connecticut, and Maine- require some employers to provide harassment trainings, studies show that about three-quarters of all companies provide some type of training. It is easy to understand why, providing this training can

provide companies with potential defenses to harassment claims. In 2016, however, the EEOC concluded that "much" of the training sold to companies did not prevent harassment. It cited the 162,872 harassment allegations it received between fiscal 2010 and 2015 to support this conclusion. In short, many studies believe that the trainings used by employers have been inadequate because they were designed to provide legal defenses, not actually train employees/managers how to prevent, identify, and report harassment.

III. Responses to the Movement

Tax Cuts and Jobs Act

The recently passed Tax Cuts and Jobs Act prohibits employers from taking a tax deduction for settlements "related to" sexual harassment or sexual abuse if the settlement is subject to a non-disclosure agreement. The implications of this provision remain uncertain because it is unclear whether it applies to settlement of sex discrimination claims, whether companies can apportion some settlement payments to sex harassment claims and other payments to other claims and then take a partial deduction, and whether it applies to severance agreements. Until the IRS issues guidance, employers must carefully consider whether and how to incorporate confidentiality clauses in their settlement agreements.

Insurance Companies

In light of the #MeToo and #TimesUp movements, insurance companies are reevaluating their EPLI underwriting procedures. Additionally, some carriers are examining when they can deny coverage for sexual harassment/assault claims under the intentional act clause of their policies. One example is the recent declaratory judgment lawsuit filed by Chubb against Harvey Weinstein.

Proposed Federal Legislation

In addition to the Tax Cuts and Jobs Act discussed above, Congress has taken a number steps in response to the #MeToo and #TimesUp movements. First, Congress members are now required to take sexual harassment training. Additionally, members of Congress are now prohibited from having a sexual relationship with their staff. Most interesting, however, is the proposed legislation that would amend the Federal Arbitration Act to bar mandatory arbitration of sexual harassment claims. This legislation is supported by the National Association of Attorneys General.

State Legislation

States are also taking action in response to the #MeToo and #TimesUp movements. Many states are considering laws that would limit the use of confidentiality agreements with employees regarding sexual assault and harassment claims. Some states are also considering laws that would prohibit mandatory arbitration of sexual harassment claims. Washington State, for example, recently passed three laws that: (1) prohibit confidentiality/non-disclosure agreements relating to sexual harassment or sexual assault; (2) prohibit confidential arbitration provisions in employment contracts; and (3) require the Washington Human Rights Commission to draft best practices and model policies regarding workplace harassment.

Courts

State and Federal Courts are also beginning to refer to the #MeToo and #TimesUp movements in their written opinions. Though the references have currently only been in dicta, it is likely just a matter of time before these movements play a factor in a Court's opinion.

IV. Where We Go from Here

Increased Claims

It is widely believed that the #MeToo and #TimesUp movements will result in an increase of sexual assault and sexual harassment claims. The EEOC, however, has reported that they have yet to notice any increase in claims.

Impact on Faragher-Ellerth Defense

If the #MeToo and #TimesUp movements have taught employers anything, it should be that they should encourage their employees to report concerns and/or instances of sexual harassment as soon as possible. This principle was recognized in 1998 by the U.S. Supreme in two landmark decisions -- *Burlington Indus. Inc. v. Ellerth and Faragher v. City of Boca Raton*. Under *Faragher-Ellerth*, the employer in a hostile work environment sexual harassment case may generally assert as an affirmative defense to vicarious liability, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise," provided that the employer has not taken an adverse tangible employment action against the plaintiff employee. (Keep in mind that the *Faragher-Ellerth* framework only applies to supervisor harassment claims).

It is possible that the #MeToo and #TimesUp movements will lead Courts to reexamine this defense. Most likely, Courts will reexamine what it means to exercise reasonable care to prevent and promptly correct sexually harassing behavior. All employers should reexamine their anti-harassment policies to make sure they are clearly written and distributed to all employees. Furthermore, the policies should provide a number of ways for employees to report sexual harassment, and all employees should be encouraged to report sexual harassment that they experience/observe.

Equal Pay Implications

Various studies report that harassment may lead to the departure of women from the workplace. Women may even leave for lower-paying jobs if there is a perceived lower risk of harassment in the new position. Thus, sexual harassment can affect compensation in a way that hurts pay equity.

Pay equity issues should be especially top of mind for employers operating in California, Delaware, Massachusetts, New York City, Oregon, Philadelphia and Puerto Rico; all these jurisdictions have recently passed pay equity related laws. As these laws continue to gain momentum, employers should consider proactively addressing this issue to better position themselves for any future compliance requirements and reduce one risk factor associated with pay discrimination claims under the federal Equal Pay Act and similar state and local laws.

Updated Training

As noted above, many of the trainings offered by employers have been ineffective at preventing sexual harassment. Employers need to assess the quality of their sexual harassment training and update it as necessary. To effectively combat sexual harassment, training should be tailored to an employer's specific workplace and audience. Live and interactive trainings are generally more effective than recorded trainings. Regardless all trainings should use realistic examples of what is, and is not, harassment, encourage reporting and explain the reporting process, and make sure managers know how to spot potential issues and respond to complaints.