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Employment Law
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How to address workplace misbehavior in the #MeToo age

Sexual harassment and other forms of sexual misconduct has been front and center in the media for months now. Reports of film mogul Harvey Weinstein's conduct, followed by reports of similar behavior from other famous and powerful men in entertainment, politics, sports and business, have sparked a new awareness and intolerance for conduct that crosses the line.

Meanwhile, the #MeToo movement has empowered victims to come forward and report misbehavior.

This has implications for employers. Sexual harassment has been considered a form of illegal discrimination for several decades and employers have long been expected to take allegations seriously. But now there's an even higher expectation that employers will actively address workplace sexual misconduct and proactively take steps to make it less likely to occur in the first place. Employers who fail to do so risk negative publicity, legal liability and the serious financial fallout that can follow.

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So what can employers do? Here are some ways to get started:

► *Foster and maintain an inclusive culture*

Though nothing can guarantee problems will never arise, employers that maintain a culture of mutual respect among workers are less likely to be vulnerable to sexual misconduct and other types of harassing or discriminatory conduct within their ranks. This means training your entire workforce. The best kind of training involves realistic situations that are relevant and specific to your work environment. Training also must be done frequently — once a year at the very least — and constantly modified to stay fresh, engaging and relevant to the realities of a changing workplace. This sends a message that an inclusive, tolerant culture is important to the company. A good employment lawyer can either provide

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Employers must document performance issues

A recent seven-figure jury verdict in Massachusetts shows that employers who encounter workers with performance issues must document those issues or leave themselves vulnerable to discrimination and wrongful-termination claims.

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The employee in question, auto mechanic James Bereford, was fired at age 61 after working at a garage that was part of a regional chain for more than 30 years.

According to the employer, Bereford lost his job because of attitude problems and poor performance. Specifically, the company claimed they fired him because he actively resisted new management's efforts to modernize garage operations. For example, he apparently refused to use vehicle maintenance software that the company installed to manage its repair services, insisting the old paper record-keeping system was more reliable. He also allegedly told the bosses, "I don't do computers" and said he had no intention of learning how to use them.

According to Bereford, however, he never said these things. He also claimed that the employer scheduled a meeting to "talk" with him about the situation, but really planned to fire him at the meeting, which it did, claiming it was for "poor performance" and "insubordination."

Bereford sued for age discrimination. On the surface, his case appeared thin since all but one of the six technicians at the garage was older than 40, including one in his 70s. Additionally, the manager who fired him was only 8 years younger than Bereford, who wasn't replaced.

Still, the lack of a paper trail of discipline and warnings and the timing of his termination appear to have done the employer in. Ultimately a jury found in Beresford's favor and awarded $1.7 million in damages, including a significant sum in punitive damages (designed to punish the employer and deter similar conduct in the future).

The lesson here is that employers must document employee issues as they arise and keep accurate, detailed files. They also need to be sure to train their managers on the issue of age discrimination. Finally, talking to an employment lawyer before terminating an employee can go a long way, and it's much better than needing a lawyer to defend you at trial.

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Employer faces claim by employee 'regarded as' disabled

The Americans with Disabilities Act (ADA) provides broad employment protections for people with disabilities. For example, under the ADA, employers cannot take a "negative employment action," e.g., demote, underpay, refuse to promote or refuse to hire a worker, based on his or her disability as long as the worker is capable of doing the job with "reasonable accommodations."

But did you know the ADA will also hold employers accountable if they discriminate against a worker who they "regard as" disabled, even if the worker doesn't actually have a disability?

This happened recently in Illinois. Ronald Shell applied for a job in a Burlington Northern Santa Fe Railway railyard. The job was a safety-sensitive position that involved working with heavy equipment.

BNSF gave Shell an offer pending a medical exam. The company then rescinded the offer because Shell, who was 5'10" and weighed 331 pounds, had a Body Mass Index of 47.5. BNSF's reasoning was apparently that the health and safety risks associated with that level of obesity, such as sleep apnea, diabetes or heart disease, made Snell medically unqualified for such a safety-sensitive position. The company was particularly concerned that he might suddenly develop one of the above-mentioned underlying conditions and become unexpectedly incapacitated while on duty. BNSF told Snell it would reconsider if he lost 10 percent of his body weight and kept it off for six months.

Shell sued the company in federal court, accusing BNSF of disability discrimination under the ADA.

A federal district court judge ruled that he couldn't bring a handicap bias claim because obesity is only considered a disability when it results from an underlying physical disorder, which wasn't the case here. But the judge also decided that Snell could sue for being "regarded as" disabled. That's because the company was arguably treating him as if he actually suffered from one of the underlying conditions it feared, as demonstrated by its refusal to hire him and then monitor him for such conditions. Since if Snell actually suffered from one of these conditions he could make out a straight handicap-bias claim under the ADA, being treated as though he had them supported a "regarded as" claim, the court decided.

Addressing workplace misbehavior in the #MeToo age

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such training or direct you to good training resources.

► *Provide multiple channels for workers to report inappropriate behavior*

One of the biggest obstacles to combating workplace misconduct is workers' reluctance to report it, either because they fear retaliation or they are uncomfortable with the designated manager to whom they're supposed to report. One way to combat this is by having multiple individuals designated as appropriate people for reporting incidents of harassment. This increases the odds that the employee will feel safe reporting misbehavior.

► *Evaluate your workplace for risk factors*

Certain workplace dynamics can increase the risk of sexual misconduct as well as racial, ethnic or other forms of harassment and discrimination. For example, cultural and language differences in the workplace can potentially create tension, as can gender and age imbalances. "Work hard, play hard" workplaces that hold a lot of alcohol-fueled events also create obvious risk factors.

A diverse workplace in terms of age, race, gender, sexual orientation and socioeconomic background, or a lively, fun workplace that offers social outlets, obviously isn't a bad thing. Diverse companies and companies where workers have a chance to bond are stronger companies, and of course it's illegal to make employment decisions that seek to maintain a racially, ethnically or sexually homogeneous workplace. But it's also important to be mindful of the tensions that can arise in any workplace setting.

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► *Investigate quickly and thoroughly with the help of an attorney*

Employers get in trouble when they don't follow up on complaints. This means it's critical to investigate promptly and comprehensively any situation that comes to your attention. Doing so will minimize the risk of an unacceptable situation continuing to fester without your knowledge. It will also minimize the risk of that you will act too soon to discipline or fire the alleged perpetrator without having all the facts, which can also subject you to legal consequences. It goes without saying that anyone involved in conducting an investigation must be thoroughly trained and the investigation must be confidential. Enlisting an employment attorney to assist you is a great place to start.

Single incident can support hostile work environment claim

Sexual harassment claims tend to take one of two forms: "quid pro quo" harassment, where a supervisor offers favorable treatment in exchange for a sexual relationship, or "hostile work environment" harassment, where a supervisor or co-worker engages in offensive or intimidating conduct that makes the workplace intolerable. For hostile environment claims, courts look for conduct that is "pervasive." But a recent federal court case from New York shows that in some instances, one or two incidents can be enough to land an employer in hot water.

In that case, a male corrections officer home recovering from knee surgery was using the bathroom when his male supervisor called to check on him. When he returned the supervisor's call, he claimed the supervisor asked him if he'd been masturbating. He also claimed that two years later, while he was sitting in a booking room, the supervisor started rubbing his shoulders and told him in very crude language what he would do to him sexually if the supervisor was a woman.

The officer brought a same-sex hostile work environment claim under §1983, a federal statute that allows people to sue public entities, including public employers, for constitutional violations.

The supervisor argued that his alleged conduct didn't amount to a constitutional violation because it wasn't sufficiently pervasive and wasn't motivated by the officer's sex.

But the judge said the supervisor's words in the booking room were sexually explicit and aggressive enough that, when paired with his unwanted touching, they could be seen as threatening and creating an objectively hostile work environment. Additionally, the supervisor's conduct went beyond casual obscenity and thus could be taken as being motivated by sexual desire. Now the officer can bring his case to a jury.

Employers can reduce the risk of such claims through effective workplace training. An employment attorney can help — contact one near you.

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High burden for employers justifying pay disparities

Under the federal Equal Pay Act (EPA), employers are required to pay men and women equally for work that requires "substantially equal" skill, effort and responsibility under similar working conditions. Employers who violate the EPA by paying women less than equally qualified men for the same work risk serious consequences, including enforcement actions by the Equal Employment Opportunity Commission and lawsuits by employees who claim they've been discriminated against.

Employers can defend themselves against EPA claims by claiming they had "gender-neutral" reasons for a pay disparity. But a recent ruling by a federal appeals court shows that employers have to meet a high standard for this to work.

In that case, three state employees in Maryland sued their employer under the EPA, complaining they were being paid less than male co-workers with the same qualifications.

The state agency tried to defend itself by claiming the disparity was because it was using a state salary schedule and because of the experience and qualifications of the workers. A lower court judge agreed with the employer and threw out the suit.

But the federal appeals court reversed. According to the court, the salary schedule excuse didn't hold water because the agency could have been guilty of gender bias in how it assigned salary steps in the first place.

Further, the court didn't buy the experience/qualifications argument because nothing in the record showed definitively that these factors actually explained the pay differences.

The key point here is that it's not enough to show that a legitimate non-gender-based reason *could* explain a pay differential. The employer must show that it actually *did*.

This could be a tough burden to meet, so you need to be very conscious of how pay differentials could be perceived by certain workers and make sure that any differences are actually justified by experience and qualifications. It also helps to consult with an employment lawyer in setting salaries to make sure you're not unwittingly leaving yourself vulnerable to an equal pay claim.