

WORKPLACE IMPLICATIONS OF THE #METOO MOVEMENT IN SEX HARASSMENT INVESTIGATIONS

34th Annual Labor & Employment Law Conference

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IN THE NEWS...

Charlie Rose Fired by CBS and PBS After Harassment Allegations

#MeToo Movement Is Person Of The Year,
'Time' Says



Harvey Weinstein Is My Monster Too

By SALMA HAYEK Dec. 12, 2017

The 'Today' show was a 'total boys' club' during Lauer's tenure

How Tough Is It to Change a Culture of Harassment? Ask Women at Ford

WHAT HAS THE #ME TOO MOVEMENT CHANGED?

- The law is the same, but...
 - More attention = more claims (estimate is #MeToo has been retweeted **2 million times** across 85 countries)
 - Empowerment, less fear/stigma (personal experiences are being shared)
 - Prevalence and magnitude of conduct has been exposed
 - More likely to report now – #MeToo Movement is correcting underreporting
 - More likely to involve media attention (non-disclosure and confidentiality agreements criticized)
 - People (juries) will have more information and stronger opinions

WHAT IS HARASSMENT?

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ILLEGAL HARASSMENT VS. INAPPROPRIATE CONDUCT

- “Harassment” refers to an illegal form of discrimination
- Employees often say they are being harassed. They are actually being subjected to inappropriate conduct or behavior which is not illegal but is unacceptable in the workplace.
- The term frequently used to describe this type of behavior and conduct is workplace bullying
 - Workplace bullying is repeated mistreatment of one or more employees using humiliation, intimidation and condemnation of one’s performance
 - Bullying behavior can exist at any level of an organization
 - Bullies can be superiors, subordinates, co-workers and colleagues

WHAT ARE THE DIFFERENT TYPES OF HARASSMENT?

Quid Pro Quo

Hostile Environment



QUID PRO QUO HARASSMENT

- This type of harassment typically occurs when a person with the power to influence an employment decision seeks a sexual favor in return for a positive outcome or to refrain from a negative outcome
- This for that
- Threats
 - Termination, transfer, no promotion, negative reviews, discipline, laid off
- Rewards
 - Hire, promotion, bonus, positive reviews



QUID PRO QUO HARASSMENT

- Employment decisions or expectations are based upon the employee's willingness to grant or deny sexual favors
- Employee's submission to or rejection of the requested conduct was a factor in the adverse employment action
- Must be unwelcome and offensive
 - Subjectively unwelcome to recipient
 - Objectively offensive to a "reasonable person"
- Employer held STRICTLY liable when managers or supervisors (those with power over the job terms and conditions of employment) engage in such conduct
 - Conduct outside of work may be relevant
 - Conduct towards other employees may also be relevant ("Me Too" evidence)

HOSTILE WORK ENVIRONMENT HARASSMENT

- Unwelcome conduct
- Based on a protected characteristic
- Enduring the unwelcome conduct becomes a condition of continued employment
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

SEVERE AND PERVASIVE

- How do I know if it's "bad enough" to be harassment?
 - Laws against "harassment" or creating a "hostile environment" are not meant to be a general civility code
 - Must be based on a protected category
- Conduct found not to be unlawful harassment
 - Simple teasing
 - Isolated or offhand comments
 - Isolated incidents that do not rise to a level of seriousness
- Other conduct, however, may violate your employer's policies

WHAT IS INAPPROPRIATE CONDUCT?

- Verbal Harassment
 - Comments – ethnic or racial slurs, derogatory or demeaning comments, jokes regarding stereotypes
 - Unwelcome sexual advances
 - Unwelcome requests for sexual favors
 - Jokes, nicknames, cartoons
 - Leering, whistling, offensive sounds (e.g. lip-smacking)
- Physical Harassment
 - Touching, pinching, grabbing, sexual assaults
- Visual/Written Harassment
 - Pictures/Photos
 - Symbols (e.g. Swastikas, Confederate Flag)
 - Technology – E-mail, Facebook, Twitter

A CASE STUDY

Vivienne had an acrimonious working relationship with Doug, a male supervisor in another department. Vivienne had to “occasionally” coordinate with personnel in his department but Doug did not exercise supervisory authority over her.

Doug was extremely vulgar and crude and customarily made obscene comments about women generally. On occasion, he directed obscenities to Vivienne. Vivienne and other female employees were annoyed by Doug’s vulgarity. Management was aware of Doug’s vulgarity but was not successful in curbing his offensive personality traits.

Vivienne and Doug, on the occasions when their duties exposed them to each other, were constantly in a confrontational posture.

In addition to Doug’s obscenities, other male employees from time to time displayed pictures of nude or scantily clad women in their offices and/or work areas. Vivienne and other female employees were exposed to the pictures.

Was Vivienne and the other women exposed to a sexually hostile working environment?

A CASE STUDY

Julie described the atmosphere in which she worked for four months as much like “a guys’ locker room” with unprofessional behavior by both males and females, and an environment that was hostile to women.

Foul language was prevalent by her male co-workers, who openly and loudly referred to female customers, truck drivers, co-workers and others in derogatory terms.

Male and female co-workers viewed sexually explicit pictures on their computers and male coworkers left pornographic magazines lying open on their desks.

One male employee brought in nude pictures of his girlfriend and shared those pictures with his male co-workers, who occasionally brought in, and shared, pictures of their own with him. Male co-workers also traded sexual jokes and engaged in graphic discussions about their sexual fantasies and preferences in the female employee’s presence on a daily basis.

Was Julie exposed to a sexually hostile environment?

WHAT IS “ME TOO” EVIDENCE?

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“ME TOO” EVIDENCE

- Allows an employee/plaintiff in a lawsuit to present testimony of other employees to demonstrate that an employer (or individual) discriminated against similarly situated individuals
- Distinguish reports from employees who experienced harassment or other discrimination personally, versus reports from employees who witnessed the conduct or heard about the conduct

THE SUPREME COURT HAS SPOKEN (2008)

- The United States Supreme Court held that “Me Too” evidence offered in discrimination cases is neither per se admissible nor per se inadmissible
- Declined to create a bright-line rule for this evidentiary doctrine
 - Whether evidence of discrimination by other supervisors is relevant requires a fact-based inquiry that “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case”
 - *Sprint/United Management Co. v. Mendelsohn* (2008)
 - In ADEA case following a companywide RIF, former employee attempted to introduce testimony by five former employees outside her department who alleged they also experienced age discrimination

WHY “ME TOO” EVIDENCE MATTERS

- Evidence of other acts of harassment against women is admissible as evidence of the harasser’s intent to discriminate based on sex. *Hurley v. Atlantic City Police Dept*, 174 F.3d 95, 109 (3rd Cir. 1999), *cert denied*, 120 S.Ct. 786 (2000).
 - Other women’s experiences concerning sexual harassment was relevant because it allowed the jury to gain insight into the motives, attitudes, and intentions of the defendants
- Evidence of similar actions by the same actors is relevant to show a defendant’s state of mind rather than a plaintiff’s experiences in the workplace. *Robinson v. Runyon*, 149 F.3d 507, 512 (6th Cir. 1998); *Miller v. Regents of the Univ. of Colorado*, No. 98-1012 (10th Cir. 1999).

“ME TOO” EVIDENCE IS NOT LIMITED TO HARASSMENT

- As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer’s discriminatory intent. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990).
 - Allowing similar act evidence in a Title VII case. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986); *Phillips v. Smalley Maintenance Services, Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983).
 - Allowing similar act evidence in an ADEA case. *Stumph v. Thomas & Skinner, Inc.* 770 F.2d 93, 97 (7th Cir. 1985); *Harpring v. Continental Oil Co.*, 628 F.2d 406, 409 (5th Cir. 1980), cert. denied 454 U.S. 819 (1981)).
 - Allowing similar act evidence in a retaliatory discharge case for exercising First Amendment rights. *Morris v. Washington Metropolitan Area Transit*, 702 F.2d 1037, 1045-46 (D.C. Cir. 1983).

WHAT HAS HAPPENED POST *SPRINT*?

- Admissibility of “Me Too” evidence includes consideration of the following factors:
 - Temporal and geographic proximity between the plaintiff and other employees
 - Whether the plaintiff and other employees were treated in the same manner
 - Whether the same actors/decision-makers were involved
 - Whether the plaintiff and other employees were similarly situated

WHAT HAS HAPPENED POST *SPRINT*? (CONT.)

- Temporal and geographic proximity
 - More than three years is likely to be too remote – “Me Too” events are close in time to reported event more likely to be viewed as relevant
- Plaintiff and others treated in a similar manner
 - How similar is nature of “Me Too” evidence to report being investigated? (claim of discrimination versus retaliation)
- Same actors/decision makers
 - More likely to be relevant
- Plaintiff and others similarly situated
 - Do others have the same job title, same job, and report to the same supervisor? (if so, likely to be relevant)

WHAT TO DO WHEN YOU SEE A “#ME TOO” POST ON SOCIAL MEDIA

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WHAT IF A “#ME TOO” POST IS GENERATED?

- Take all complaints seriously
- Do not prejudge or speculate in any way
- Do not ignore information that surfaces through “#MeToo” outlets or otherwise on social media outlets
- Management may be on notice depending upon details provided
- Take action and follow established policy



WHAT IF A “#METOO” POST IS GENERATED? (CONT.)

 **Alyssa Milano**  @Alyssa_Milano 15 Oct
If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet. pic.twitter.com/k2oeCiUf9n

 **Lea Thompson**  @LeaKThompson [Follow](#)

me too
7:43 PM - Oct 15, 2017
10 replies 17 retweets 126 likes

 **Allie Beth Stuckey**  @conservmillen [Follow](#)

Hi @Georgetown -- someone on your MSFS board just told me he hopes I get sexually harassed or assaulted. Is this the kind of standard your university holds for your advisors?

 **Jeff Bernstein**  @jeffbenyc

J to @conservmillen
ing you a #metoo morr
e then you won't be so
itive

6:20 PM
7:29 PM - 13 Jan 2018
2,442 Retweets 3,836 Likes

 **Jeff Bernstein**  @jeffbenyc [Follows you](#)
Call it as I see it. Passionate about inno
finance, foreign policy, and political the
Board Georgetown University MSFS
San Francisco, CA
989 Following 529 Followers

 **Kate Upton**  @KateUpton [Follow](#)

It's disappointing that such an iconic women's brand @GUESS is still empowering Paul Marciano as their creative director #metoo 

1/31/18, 5:09 PM
45.4k likes 1,014 comments
He shouldn't be allowed to use his power in the industry to sexually and emotionally harass women #metoo
20 HOURS AGO

WHAT NEXT?

- Record or reproduce the post (and any other relevant social media posts)
 - Does the post include identifying information or can the individual's identity be inferred?
 - What is the content of the message – generalized grousing about work, complaints of inappropriate conduct, or harassment?
 - Current status of individuals (current or former employee)
 - Current employees are bound by written policies – former employees are not
 - Does your company's policy require cooperation? Any consequence for non-cooperation?

WHAT NEXT? (CONT.)

- Objective is to obtain sufficient information upon which to make decisions (or take action) and collect reliable information to support decisions (or action)
 - Accessibility to other information that advances objective to obtain sufficient information (even if identity of individual is not known or cannot be inferred)
 - Is any identifying information provided about alleged harasser, department, timeframe, context?
 - Prior complaints against alleged harasser, within department, timeframe or context (there may have been other issues or a similar or identical kind reported)

WHAT NEXT? (CONT.)

- Contact employee who posted “#MeToo” message
- Be straightforward about why employee is being contacted, review policy prohibiting harassment with employee and ask if he/she has any concerns or conduct to report
 - Emphasize commitment to a safe workplace free of harassment and other discrimination
 - Emphasize that retaliation is prohibited
 - Clarify meaning of post (if ambiguous)
 - Document contact/meeting
 - The specific nature of what is being reported dictates what action is next (which may include an investigation if a formal complaint is made)

WHAT NEXT? (CONT.)

- Investigate if at all possible with the information available
 - Document refusal to participate (may be all that can be done if employee who posted does not want to participate)
 - Document investigation, including all interviews
 - Document outcome/conclusions
 - Document any remedial action (including any training or retraining)

OTHER FORMS OF NOTICE

- Reports of “Me Too” harassment (or other forms of discrimination) may surface in several ways
 - Through an investigation when interviewing witnesses
 - When an investigation is being conducted, even if not identified as a witness (employees know despite attempt at confidentiality)
 - Exit interviews
 - Former employees may contact human resources/company
- Generally, all reports should be investigated!

HOW “ME TOO” EVIDENCE IMPACTS DECISION

- If there are conflicting versions of events, credibility must be assessed. Factors to consider when assessing credibility are:
 - Previous or other accusations against the alleged harasser
 - Information learned through the investigation or otherwise reported, including first hand accounts of “Me Too” experiences
 - “Me too” reports may render the account more likely than not to have occurred

HOW “ME TOO” EVIDENCE IMPACTS DECISION (CONT.)

- Several outcomes to any investigation
 - Incidents occurred as reported
 - Incidents are distorted or taken out of context
 - Some or all of the incidents did not occur
 - A determination cannot be made because the evidence is inconclusive

WHAT LEVEL OF PROOF IS REQUIRED?

- Hard, concrete palpable proof is not required
 - Typically he said/she said even after investigation and fact that others did not observe or are unable to corroborate the conduct does not mean it did not occur
- “Me Too” evidence may impact credibility determination
- “Me Too” evidence may permit a determination that reported incident more likely than not occurred
- “Honest belief rule” (modified as adopted by Sixth Circuit)
 - An employer need only establish reasonable reliance of the particularized facts that were before it when the decision was made, even if decision is later shown to be mistaken, foolish, trivial or baseless

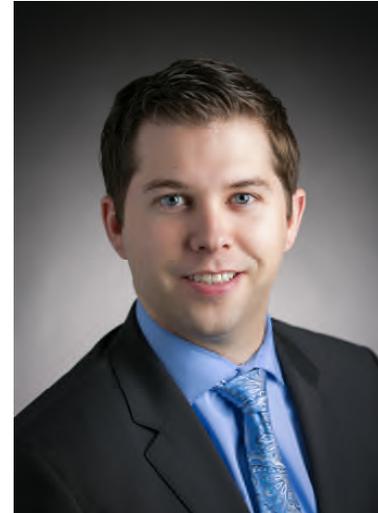
QUESTIONS?



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THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

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