Session 405 | #MeToo and Beyond: How Organizations Can Move From What’s Legal to What’s Right

Lawyers are uniquely poised to tackle workplace sexual harassment and discrimination and should take a leading role in that battle to become a strong proponent of women colleagues and vulnerable populations. This panel will discuss what are lawyers doing—and what they could be doing—in the context of the #MeToo movement to protect their organizations and, at the same time, do the right thing. We will discuss best practices and recent developments, including: (1) how lawyers need to adapt to high profile legal, operational, and reputational challenges; (2) procedures for documenting sexual harassment, and (3) the rapidly changing use of arbitration and non-disclosure agreements. We will also tackle helping organizations move from reaction to prevention, including: (1) creating a corporate culture that encourages disclosure and candid discussion; (2) the tension between zealous client advocacy and victims’ rights; and (3) how organizations can move towards integrity, accountability, and transparency. Finally, we will discuss how corporate social responsibility and diversity and inclusion efforts, particularly by and among the Asian American legal community, can be harnessed to amplify positive change.

MODERATOR:

Bonnie Lau, Morrison & Foerster LLP

SPEAKERS:

Jack Chen, Microsoft
Sharyn Tejani, National Women’s Law Center
Eric de los Santos, TrueBlue
Bettina Yip, Petco
Drew Harris, Texas Attorney General’s Office
ELIMINATION OF BIAS CREDIT:

The #MeToo panel focuses in part on how to eliminate barriers to retention, promotion, and full participation of women and AAPI lawyers in the public and private sector of the legal profession. The panel educates lawyers about best practices for training, accountability and transparency relating to sexual harassment and #MeToo issues, and discusses how to promote advancement of women leaders, diversity and inclusion in the workplace.
#MeToo and Beyond: How Organizations Can Move From What’s Legal to What’s Right

Session 405

Saturday, Nov. 9
9:15–10:30 AM
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Trends Following #MeToo
The EEOC Select Task Force
Prevalence of Sexual Harassment in the Workplace

- In FY 2018, the EEOC received 7,609 sexual harassment charges, a 13.6% increase over the previous year.

- TIME'S UP Legal Defense Fund started in January 2018. We help people find lawyers, help fund cases, and help with media assistance. Since we started, we have responded to almost 4000 requests for lawyers, committed to funding over 140 cases, and have committed over 9 million dollars to this effort.
  - We have seen requests for help come from every industry and every state.
  - Common themes: retaliation and the emotional harm sexual harassment causes.
  - Asian Americans are about 4% of the people who reach out to us.

- Data on EEOC sexual harassment charges filed by Asian women – in all industries, lower than their presence in the industry.
Data on Women’s Sexual Harassment Charges
View from the Government

- Perspective from Texas AG’s Office:
  - Overseeing employment litigation at dozens of state agencies and state universities
  - Not yet see a noticeable uptick of sexual harassment lawsuits
  - Seeing many Title IX student-on-student sexual harassment matters (and even trials)
  - Due process issues and mandatory reporting
Dec 06 2017

Graham, Gillibrand Announce Bipartisan Legislation To Help Prevent Sexual Harassment In The Workplace

WASHINGTON -- U.S. Senators Lindsey Graham (R-South Carolina) and Kirsten Gillibrand (D-New York) today introduced bipartisan legislation to prevent sexual harassment in the workplace. The Ending Forced Arbitration of Sexual Harassment Act of 2017 would void forced arbitration agreements that prevent sexual harassment survivors from getting the justice they deserve.

Graham and Gillibrand were joined by Gretchen Carlson, who previously worked at Fox News Channel and left the network after enduring years of sexual harassment. The perpetrators used forced arbitration to institutionalize protections for sexual harassers and prevent survivors from discussing their cases and taking them to trial.

Today, an estimated 60 million Americans are subject to forced arbitration clauses in their employment contracts. The bipartisan legislation would void forced arbitration agreements that require arbitration of sexual harassment and discrimination claims and allow survivors of sexual harassment or discrimination to seek justice, discuss their cases publicly, and eliminate institutional protection for harassers.
Trend in Use of Arbitration Agreements

Uber, Lyft scrap mandatory arbitration for sexual assault claims

Laharee Chatterjee

(Reuters) - Ride-hailing companies Uber Technologies Inc [UBER.N] and Lyft Inc scrapped mandatory arbitration to settle sexual harassment or assault claims, giving victims several options to pursue their claims including public lawsuits.

Google ends mandatory arbitration in sexual harassment cases

CEO touts new policies, allows colleagues to accompany one another during HR complaints.

Cyrus Farivar - 11/8/2018, 9:45 AM
Microsoft Moves to End Secrecy in Sexual Harassment Claims

The wave of sexual harassment claims has spurred Microsoft to change its workplace policy and support a proposed federal law banning agreements that silence harassment victims.

Stuart Isett for The New York Times
Nondisclosure Agreements

States Take Action Against Nondisclosure Agreements

By Kathy Gurchiek
August 28, 2018
In the States:

Since #MeToo went viral, 15 states have passed new laws protecting workers from sexual harassment and there have been over 200 bills introduced.

- 13 states limited or prohibited the use of NDAs (AZ, CA, IL, LA, MD, NJ, NV, NY, OR, TN, VA, VT, WA)
- 5 states expanded workplace sexual harassment protections to include workers such as independent contractors, interns, or graduate students (DE, IL, MD, NY, VT)
- 4 states and NYC extended the statute of limitations for filing a charge (CT, MD, NY, OR)
- 10 states and NYC enacted new prevention measures such as mandatory training and policy requirements (CA, CT, DE, IL, LA, MD, NY, OR, VT, WA)
Legislative Updates

BeHeard Act:

- Covers all workers (not just those in workplaces with over 15 workers) including interns, fellows, volunteers and trainees
- Extends time limits for filing a charge (currently 180 or 300 days (depends on the state) and 45 days for federal workers – would be changed to 4 years
- Providing guidance as to what qualifies as harassment
- Reversing protections for harassment by lower-level supervisors
- Increasing the damage caps
Legislative Updates

California:

SB 1300 (effective January 1, 2019)

- Lowers burden and standard of proof for plaintiffs to prevail on claims of sexual harassment as well as other forms of harassment under California law
- Explicitly provides that “Harassment cases are rarely appropriate for disposition on summary judgment”
- Effectively eliminates ability for defendants to recover attorneys’ fees and costs
- Prohibits employers from requiring employees to sign releases of CA FEHA claims or nondisparagement agreements in exchange for bonus, raise, employment or continued employment

SB 820 (effective January 1, 2019)

- Prohibits NDAs of factual information in cases involving allegations of sexual assault, harassment or discrimination for claims filed in a civil or administrative action
California:

Stop Harassment and Reporting Extension (SHARE) Act (effective January 1, 2020)

- Extends statute of limitations for harassment and discrimination claims under California law from one year to three years
- For comparison, for Title VII claims, an employee needs to file a charge with the EEOC within 180 days or within 300 days in a FEPA jurisdiction

AB 51 (effective January 1, 2020)

- Effectively prohibits employers from requiring employees to sign mandatory arbitration agreements for employment-related claims as a condition of employment
- Does not apply to postdispute settlement agreements or negotiated severance agreements
Effect of #MeToo on the courts

• Comparing summary judgment rulings in sexual harassment cases on whether conduct was sufficiently “severe or pervasive”

• Determined by “reasonable man” standard → changing?

• 5th Circuit - then

  o Hockman v. Westward Commc'ns, 407 F.3d 317 (5th Cir. 2004)

  • “[Supervisor] once made a remark to Hockman about another employee's body, (2) he once slapped her on the behind with a newspaper, (3) he “grabbed or brushed” against Hockman's breasts and behind, (4) he once held her cheeks and tried to kiss her, (5) he asked Hockman to come to the office early so that they could be alone, and (6) he once stood in the door of the bathroom while she was washing her hands.” → Dismissed
Effect of #MeToo on the courts

• 5th Circuit - now
  - *Morris v. Baton Rouge Constable's Office*, 761 F. App'x 433 (5th Cir. 2019) (supervisor’s romantic advances and sexually suggestive comments not sufficiently “severe or pervasive”) → Dismissed
  - *Ivey v. Brennan*, 770 F. App'x 661 (5th Cir. 2019) (supervisor repeatedly joking about plaintiff sleeping with her direct supervisor) → Dismissed

• But – multiple district court cases found otherwise

• But - *Minarsky v. Susquehanna Cty.*, 895 F.3d 303 (3d Cir. 2018) (Plaintiff’s fear of retaliation for reporting → denied employer’s *Faragher-Ellerth* defense)
Intersectional Discrimination

• 9th Circuit - Asian American woman is the subject of a seminal case about intersectional discrimination
  
  ○ Lam v. Univ. of Hawaii, 40 F.3d 1551, 1561 (9th Cir. 1994)
    
    • [T]he court seemed to view racism and sexism as separate and distinct elements amenable to almost mathematical treatment, so that evaluating discrimination against an Asian woman became a simple matter of performing two separate tasks: looking for racism “alone” and looking for sexism “alone,” with Asian men and white women as the corresponding model victims.
  
  • At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components. . . . Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences.
Best Practices Following #MeToo
Sexual Harassment Training Doesn’t Work. But Some Things Do.

Traditional methods can backfire, but ideas like teaching bystanders to intervene and promoting more women have proved effective.

Instructor: Training
Placeholder for Microsoft
2 min video on training
Training on Policies
Not Enough

- Training should be interactive, engaging, and scenario-based
- Still need aspects of “typical” anti-harassment training
- Training needs to be updated to meet increased obligations at the federal and state level (e.g., New York, California)
- One size does not fit all – customize content to the audience
- Training should occur at onboarding and be constant
- Start at the top, including the Board
- Train and re-train, particularly managers
Focus & Train on a Positive Culture

- Culture is key
- Invest in cultural initiatives that address the root causes of workplace harassment
- Cultural changes need to be seen at all levels – workplace leaders are key
- Develop positive behavior training (e.g., respect, mentoring, speaking up, bystander intervention)
- Focus on inclusion and diversity
- Foster a culture of accountability
- Create an internal communication plan that consistently shows commitment to improving culture
Texas House of Representatives’ Proactive Steps

- Concern about reporting through HR on politically powerful individuals
- In 2019 session passed House Rule 15 (Appropriate Workplace Conduct), with procedures for reporting harassment to General Investigation Committee
- Also provision for encouraging informal resolution
- Considering ombudsman approach
What’s next?

• More litigation when the job market tightens
• Title IX (student-on-student harassment) issues showing up in Title VII (employee harassment) cases
  • Due process and mandatory reporting
• Bigger picture – sexual harassment case law applies to racial harassment claims
#MeToo
Challenges for AAPI Women

- Model minority myth
- Glass & bamboo ceiling / intersectional stereotypes
- Fear of further marginalization
- Cultural barriers & stigma
- Power dynamics
- Access & awareness issues
- Lack of representation
Challenges for AAPI Women in the Low-Wage Workforce

- Socially isolated work, e.g., domestic workers
- Working conditions, nature of compensation, e.g., tips
- Language barriers
- Immigration status
- Retaliation
- Lack of knowledge of employment protections
Best Practices

- Update policies and procedures, and ensure processes and consequences are clear
- Make sure the complaint process is clear and consider multiple avenues, including anonymous reporting
- Ensure strong protections against retaliation
- Investigate promptly, properly, impartially, and thoroughly. Keep all involved parties informed appropriately throughout
- Be prepared to address any social media and/or reputational risks
- Always ask what the complainant wants
- Adapt best practices for your industry and workplace
Building blocks for enduring change

- Leadership accountability
- Respect and inclusion in workplace culture
- Increased protection and support for those communicating sexual harassment complaints
- Changes in the nature of settlement and separation terms (payouts, confidentiality)
- Clearer policies defining process and consequences for harassing behavior
- Grow representation of women and minorities in leadership
- Transparency