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Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond

By Hannah Hayes

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On November 1, 2018, a little more than a year after the hashtag #MeToo ushered in a loud and public conversation about sexual harassment in the workplace, 20,000 Google employees walked out of offices worldwide to protest the company's handling of sexual misconduct allegations. The protest was spurred by a *New York Times* article, which revealed that in 2014 Google quietly discharged a top executive accused of sexual harassment and gave him a \$90 million golden parachute. The article reported that Google also paid millions in exit packages to other male executives accused of sexual misconduct while keeping silent about their transgressions.

Up until that moment, Google held a reputation for being an employer of choice. Now it, too, had to answer to questions that companies around the world are grappling with: How adequate is the response to sexual harassment? Is everything being done to create a workplace culture where gender parity and respect are the norm?

In the legal profession, the conversation has advanced at a rapid pace. In July 2018, the *ABA Journal* surveyed 3,000 businesses and law firms

and found that 68 percent of the female respondents had experienced sexual harassment, but only 30 percent of them reported it. Further, 47 percent of the female respondents believe sexual harassment is tolerated in their organization, and 45 percent had no confidence that senior leadership is addressing the issue.

“Two years ago when I suggested to managing partners [at the firm where she worked at the time] there may be issues, they assured me it was not a problem [and] they were working on diversity,” says Hilarie Bass, the former ABA president who spearheaded a study on why women are leaving the legal profession. “Now there’s much more of a recognition that there *are* issues of which they aren’t aware as well as a commitment to figuring things out.”

Companies Take a Second Look

Businesses across the globe are scrambling to respond, and many are changing their focus and looking to proactively address potential issues. A survey conducted by Challenger, Gray and Christmas, Inc., a Chicago-based career consulting firm, found that 52 percent of the companies surveyed eight months after the start of the #MeToo movement said they were reviewing their sexual harassment policies. Of these, 58 percent said they updated them.

“What I’ve seen is that every employer has been impacted by the #MeToo movement in some way or another,” says Amy Bess, chair of the Labor and Employment Practice Area and a partner in the Washington, D.C., offices of Vedder Price. Her section oversees trainings in more than 55 offices worldwide as well as provides training for clients. “If nothing else, the awareness of the reality of sexual harassment has been heightened.”

According to Bess, more companies are looking seriously at their training programs to ensure they are relevant to the issues raised in recent times. For example, she says “bystander empowerment” is now included in most trainings.

Consider that former film producer Harvey Weinstein had dozens of charges lodged against him over the years, yet many women feared retaliation or were held back by the belief that their word held little weight against someone so powerful. Bess says trainings try to instill a sense of responsibility as well as empowerment.

Paula Brantner develops and conducts sexual harassment workshops for nonprofits and businesses. A former plaintiffs’ employment lawyer and nonprofit director, Brantner launched her company in 2016 after the Equal Employment Opportunity Commission (EEOC) issued new recommendations on workplace harassment. Brantner says she has absolutely seen an uptick in training requests since the #MeToo movement began, especially in smaller firms and startups where it wasn’t thought necessary.

One difference Brantner sees is that liability no longer guides company policy. In the past, many organizations were content to “check off the boxes” in terms of training, sending the message that if it didn’t meet the standards of legal liability, the company had little interest in pursuing it.

“You want to create a culture where certain things just aren’t done—not because it violates the law, but because it doesn’t reflect company values,” Brantner points out.

Companies already know the cost of keeping superstar offenders goes beyond the golden parachute, which is no longer acceptable. In 2015, the Harvard Business School codified these costs in a study on toxic

workplaces. “The reality is that the organization is ultimately going to suffer more both in terms of actual cost as well as intangibles by keeping that superstar harasser in place than it would if it got rid of him,” Bess observes.

Amy Oppenheimer is the founder and past president of the Board of the Association of Workplace Investigators, Inc. (AWI), and the former chair of the Executive Committee of the Labor and Employment Law Section of the State Bar of California. As a private practitioner in the San Francisco Bay area, she has six lawyers who investigate discrimination, harassment, bullying, whistleblowing, and what she calls “all kinds of situations that would come under misconduct, harassment, discrimination.”

“Some organizations are really driven by their belief system and their values, and other organizations are driven by liability,” Oppenheimer says. “I think that employers are recognizing that this does impact the bottom line regardless of what motivates them.”

Rooting Out the Problems

Giving employees many avenues and companies many tools for dealing with misconduct is another change in workplace policy. “It’s best practice to provide employees a lot of different avenues, such as offering a hotline, an opportunity to speak with HR or a manager,” Oppenheimer says.

She points out that a policy dictating a specific path may be futile if that path involves the problem person. “If you’re only providing employees one means of recourse,” Oppenheimer notes, “you’re inevitably deterring a big chunk of the workplace from ever coming forward. They have to be able to bypass the manager or HR if necessary.”

Companies are also looking to nip problems in the bud before they hit social media or the whisper network. “Using mediation and alternative dispute resolution, training about communication and respect, and bystander training—it’s about having a lot more tools instead of just this binary of investigate and not,” Oppenheimer says.

Many companies hire outside investigators, particularly when the person accused of harassment is considered a heavy hitter or rainmaker. “They might not have appropriate expertise or have conflict issues if the alleged perpetrator has authority over HR,” says Elaine Herskowitz, the principal of EEO Training & Consulting. After 15 years of working at the EEOC, where she helped develop policy positions on sexual harassment, she started her own company to investigate allegations and provide training. Herskowitz also has seen an increase in business as many organizations are now recognizing that even if conduct isn’t bad enough to constitute lawful harassment, there has to be action before it progresses.

Overall, it seems companies are recognizing that climate and culture trump liability. Herskowitz is sometimes asked to provide workplace climate assessments even when there is no specific allegation, but an employer has reason to suspect there might be a problem.

The Legal Community Responds

Law firms are not immune to these challenges. According to a report by FTI Consulting and Mine the Gap, a women’s leadership organization, one in four women working in the legal industry said they experienced sexual harassment in the workplace.

Experts point out that several aspects of the legal profession make it susceptible to incidents of sexual harassment, which is often triggered by an imbalance of power. The power differential found in law firms

can lead to coercive behavior. While other professions have similar dynamics, the lack of women in law firm leadership impacts an organization's culture and climate.

"When you have at least some women in leadership, there's a very subtle but important cultural change that takes place, and it's that kind of change that really is the foundation for eliminating sexual harassment," says Stephanie A. Scharf, chair of the ABA Commission on Women in the Profession. She adds that with more women in leadership, "you have a culture that is more sensitive and more willing to speak out and insist that something be done."

In 2017, then ABA president Hilarie Bass launched an initiative to examine why women were leaving law practice in large numbers. Although women make up a majority of students enrolled in law school and 45 percent of associates, less than 20 percent are equity partners. Women of color make up 3 percent of leadership. Further, that number has only increased by 5 percent in 10 years, according to surveys conducted by the National Association of Women Lawyers in Chicago.

"I think a lot of people were disappointed with the lack of progress, but most women are not the least bit surprised at the data or the explanation as to why women are leaving," says Bass, who notes a full report is expected in early 2019. "From the beginning, we said anecdotes do not create change, but data will. Our hope is [to] come back to [the] House of Delegates with facts about why women leave the law and what we can do about it."

At the February 2018 ABA Midyear Meeting, the House of Delegates passed Resolution 302, which made recommendations for policies to eliminate sexual harassment in legal workplaces. Passed in August 2018 at the ABA Annual Meeting, Resolution 300 strengthened those

policies by recommending that mandatory arbitration of claims of sexual harassment should not be used if all parties are not in agreement.

“I think that for many years women and some men as well have recognized that sexual harassment exists even in legal workplaces,” Scharf points out. “I also believe that employers did not like the fact that sexual harassment and retaliation existed, and I think that is changing in part because more women are speaking out and not willing to wait any longer.”

Lawyers Lead the Way

In 2017, when the #MeToo phenomenon swept through Congress, Ally Coll Steele, a litigation associate in the Washington, D.C., offices of Boies Schiller Flexner, shared her story of being groped by a senator on the floor of the 2004 Democratic National Convention. Shortly after her story appeared in the *Washington Post*, Steele learned that her then-employer was involved in secretly investigating women on behalf of former film producer Harvey Weinstein in an effort to block publication of their allegations.

Because of her vocal presence on Capitol Hill, Steele took on what she terms “an unexpected leadership role” within the firm to push leadership into a number of changes. They formed a partnership with the National Women’s Law Center in Washington, D.C., for pro bono work and added more women and younger partners to the Executive Committee to create more ways for associates to be heard.

Nonetheless, Steele says she could not accept the explanation that “this is what lawyers do,” so she left the firm and founded the Purple Campaign with the aim of building a coalition of organizations focused

on implementing stronger corporate policies and establishing better laws around sexual harassment.

“There’s a huge opportunity for lawyers to be leading on this issue,” says Steele, noting that in-house lawyers, for example, often take the lead on developing policies and practices. “Law firms are often advising employers and clients on these issues, even for other law firms.”

Steele joined Thomson Reuters and Her Justice, a New York–based nonprofit that provides free legal services to women living in poverty, in a series of roundtable discussions on the role the legal profession plays in turning the tide on workplace harassment. Because lawyers are involved in shaping policy as well as responding to allegations, they have a unique opportunity to formulate solutions moving forward. Amy Barasch, executive director of Her Justice and co-sponsor of the workshops, says, “It’s about accountability. Lawyers have the ability to protect victims, but they’re also on the side of potential abusers—they’re doing policy for employers, they’re drafting nondisclosure agreements, they’re figuring out how to navigate situations in the workplace when someone makes an allegation.”

Barasch calls this a wake-up call to address gender imbalance and believes lawyers have a unique role to play. “It’s very integrated with best practice around diversity and inclusion,” she notes. “If you have a healthy, fully inclusive workplace with a healthy culture where employees felt respected or understood, you’re probably less likely to have a #MeToo situation arise.”

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