Sexual Discrimination Is a Perilous Response to #MeToo, Fisher Phillips Attorneys Advise

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If you asked most company executives in mid-2017 to list their top ongoing employment law challenges, it is unlikely that many would have placed "sexual harassment" high on their list. Some might have excluded this issue entirely, feeling confident in their approach to preventing sexual harassment in the workplace, including prompt investigations and training to prevent harassment.

Then, in October 2017, the #MeToo movement went viral and brought workplace sexual harassment to the forefront of our public dialogue. The effects of this social movement and its impact on the workplace are still reverberating.

In light of #MeToo, many employers have recognized that sexual harassment presents a complex and nuanced workplace issue sometimes requiring changes to organizational culture in combination with well-disseminated policies and enhanced training programs offered on a regular basis.

Others have made no substantive changes, relying on their existing approaches.

Meanwhile, a subset of male executives and managers have reacted in a defensive manner, seeking to prevent harassment claims by limiting or entirely eliminating interactions with female co-workers or subordinates.

As described below, this line of thinking is unfortunate and, if implemented, likely will lead to findings of unlawful gender discrimination.

The sexual harassment legal framework implemented in the 1980s and 1990s created an illusion of improvement.

#MeToo is a widespread social movement that promoted both national and international dialogue about, in part, sexual harassment in the workplace. For now, however, the underlying legal framework applicable to federal sexual discrimination claims has remained unchanged.

Although Title VII of the Civil Rights Act of 1964 has been in place for more than 50 years, the legal concept of sexual harassment is more recent. More important, "sexual harassment" as we know it was not addressed by amending Title VII, but rather through case law. Specifically, the U.S. Supreme

was not addressed by amending Title VII, but rather through case law. Specifically, the U.S. Supreme Court formally recognized unlawful discrimination in the 1986 opinion Meritor Savings Bank v. Vinson. In writing for the majority, Justice William Rehnquist stated, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."

The court also articulated the notion that a "hostile work environment" created by sexual harassment also constituted unlawful discrimination under Title VII. Specifically, for sexual harassment to be actionable, it must be sufficiently "severe or pervasive" to alter the conditions of the aggrieved person's employment and create an abusive working environment.

Prior to Vinson, lower courts had long recognized workplace sexual harassment as a concern, but the Supreme Court's opinion prompted employers to engage in serious efforts to prevent such misconduct — or face liability.

In 1998, the Supreme Court provided additional guidance in two cases, Faragher v. City of Boca Raton and Burlington Industries v. Ellerth. There, the court created the Faragher-Ellerth affirmative defense, under which an employer is not liable if it can establish that (1) it exercised reasonable care to prevent and promptly correct sexual harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher-Ellerth, therefore, prompted employers to maintain written nonharassment policies, provide anti-harassment training, promptly investigate complaints and take corrective measures. Policies, training and prompt investigations have since formed the bedrock of an employer's anti-harassment program and, after Faragher-Ellerth, the issue of workplace sexual harassment seemingly improved.

For example, between 1998 and 2016 the number of charges filed with the U.S. Equal Employment Opportunity Commission alleging sexual harassment declined. In analyzing this time frame, Bloomberg reported, "Every U.S. state saw the rate of sexual harassment per 100,000 in the workforce fall over the last 20 years …"

Employers generally pointed to the existence of policies, training and investigations as possible reasons for the decline in complaints. Further, the advent of new, modern technologies and general sense of overall improvement created the impression that commonplace sexual harassment had become a relic of the past.

#MeToo highlighted a disconnect between perception and reality.

Now, in light of #MeToo, it appears that while complaints of sexual harassment declined, the underlying misconduct remained a serious problem.

In the face of this information, some employers have questioned the overall effectiveness of the methods customarily relied upon to prevent workplace harassment.

Some evidence indicates that although most employers have implemented policies, training and investigation protocols, employees may not often avail themselves of reporting avenues. In January 2018, the Society for Human Resource Management, or SHRM, conducted a survey into workplace harassment. The survey found a significant degree of under-reporting. Specifically, while 11 percent of nonmanagement employees reported that they had experienced some form of sexual harassment in the past 12 months, 76 percent of these employees did not make a complaint. In other words, only one in three affected people reported possible sexual harassment.

The survey further highlighted an apparent disconnect in the manner human resources professionals and nonmanagement employees perceive sexual harassment reporting. Fifty-seven percent of human resources professionals believed underreporting occurred to a "small extent," as opposed to 35 percent of nonmanagement employees who thought the same way.

As noted above, generally if an employee "unreasonably fails" to report potential harassment, an employer may not be liable under Faragher-Ellerth. #MeToo, however, raises new questions as to what a court or jury may consider "reasonable" behavior. For example, in July 2018, pointing to the "national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims," the U.S. Court of Appeals for the Third Circuit revived a plaintiff's sexual harassment claim by holding that a jury could find that legitimate reasons prevented the plaintiff from reporting harassment. Possible reasons included, but were not limited to, the perceived "futility of reporting."

The manner in which legislatures and courts address sexual harassment as a legal issue will continue to develop over years, but, in light of recent developments, employers should note that disseminating policies and providing occasional training in an ineffective manner may put into question the validity of their defense.

Relying on an existing approach, therefore, might not prove to be the best course of action. At the same time, as described below, managers' "disengagement" from any interaction with women in the workplace is a response to potential harassment that may move some from the fire into the frying pan.

An unlawful response: preventing discrimination against women by discriminating against women.

Many predicted that the #MeToo movement would result in sexual harassment complaints increasing. In October 2018, the EEOC provided information confirming this prediction. Charges alleging sexual harassment increased by more than 12 percent from the previous calendar year. Findings of "reasonable cause" increased by 23 percent. The EEOC's monetary recovery for sexual harassment complainants rose from $47.5 million in 2017 to approximately $70 million in 2018. Further, the EEOC reported that traffic on its sexual harassment webpage had doubled.

That same month, a SHRM survey, entitled Harassment-Free Workplace Series: The Executive View, further examined the #MeToo movement's effects. There, the SHRM found that about one-third of

further examined the #MeToo movement's effects. There, the SHRM found that about one-third of executives had changed or avoided behaviors to a "moderate, great or very great extent" that they believed could be perceived as sexual harassment.

When these executives were asked to further describe the behaviors they changed, 11 percent provided responses the SHRM described as "extreme reactions." Verbatim survey responses deemed "extreme reactions" included, in part, "don't talk to women;" "scared to say anything;" and avoid "any conversation one-on-one."

Executives also provided responses described as "policy change/new training" that included ending "senior-junior work teams of only two individuals;" disallowing after-office work of less than three employees absent managerial oversight; and modifying mentoring programs.

Another survey conducted in 2018 by LeanIn.Org and SurveyMonkey identified similar sentiments. Specifically, 30 percent of male managers reported being "uncomfortable working along with women," and 16 percent reported being "uncomfortable mentoring women." Further, "senior men" were reported as being "3.5 times more likely to hesitate to have a work dinner with a junior-level woman than with a junior-level man" and "5 times more likely to hesitate to travel for work with a junior-level woman."

Many of these reactions appear based on a purported "fear" by male executives over subjecting themselves to possible sexual harassment claims.

Much like ineffective anti-harassment programs, this line of thinking is both counterproductive and poor business strategy. Critically, implementing these views would demonstrate disparate treatment of female employees. Excluding women from mentoring arrangements, lunches, meetings, trips or other workplace opportunities is not an option.

The right balance will depend on your company's unique culture and environment.

Legal claims aside, seeking to prevent harassment by limiting interactions with women displays the same unmindful approach that, according to surveys and statistics, likely contributed to the #MeToo movement. Withholding or denying opportunities for women negatively impacts a company's culture and the trust women and others place in existing policies and reporting procedures.

These types of workplace cultures likely lead, in part, to the under-reporting identified by the SHRM. Indeed, in discussing its findings related to under-reporting, the SHRM noted that reasons provided by persons who did not report harassment included "fear of retaliation" and a "belief that little or no action would be taken."

There is no one-size-fits-all approach to this issue. Finding the right balance will depend on a company's existing values, culture and work environment. Employers should take a hard look at their existing policies, training programs and investigation protocols and undertake frank

assessments regarding their effectiveness. Further, reinforcing fairness, diversity and inclusion in the workplace may help to foster the trust needed for reporting avenues to function effectively.

Finally, avoiding harassment claims by walking headlong into a sex discrimination claim caused by male managers avoiding all contact with women is not a sound practice. The better approach is for male executives to learn how to engage with female subordinates in a constructive, professional and nonpredatory manner.

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