

Md. attorneys see culture shift on sexual harassment allegations

Employers need to be especially aware during holiday season, lawyers say

By: Anamika Roy Daily Record Legal Affairs Writer December 15, 2017

Since movie producer Harvey Weinstein's decades of sexual misconduct was brought to light, countless men and women have come forward in a variety of industries to expose similar workplace behavior. For local employment attorneys, these scandals have sparked conversations with clients about workplace harassment policies and making sure complaints are handled responsibly.

"These are not new concepts," said Renee Lane-Kunz, chief operating officer at Shapiro Sher Guinot & Sandler P.A. in Baltimore. "This culture now, this environment in which we are all operating has changed significantly. For the first time in a long time, employers are seriously listening to and investigating claims of harassment."

"A number of my clients," added Julie C. Janofsky, another Baltimore practitioner, "go through annual reviews of company policies and we're going to be looking at this to make sure they have their bases covered."

Janofsky, of Fedder & Janofsky LLC, has been handling sexual harassment issues since the Supreme Court first recognized it as a claim more than 30 years ago.

"This is an issue that cuts across industries, all workplaces and all sizes of businesses large and small," she said.

Lane-Kunz knows that firsthand, as she spent more than a decade in the hospitality industry before embarking on a legal career. Because of her background in corporate America and now as an employment attorney, dealing with harassment issues has always "played a part in my world," she said.

"It's important for employers to not only have policies in place, but the communication of those policies to their employees is tantamount," Lane-Kunz said.

In her role as COO, Lane-Kunz said the increased attention toward sexual harassment in the workplace hasn't necessarily heightened her "consciousness" on the issue but she did review the firm's handbook with her human resources manager ensure the language was appropriate.

"Most employers have some anti-discrimination policies in place. Now is the time for them to review those policies and make sure the policies say what they mean and are being followed and enforced," Lane-Kunz said.

'Dog bite rule'

As sexual harassment allegations stay in the headlines, Brian Markovitz, an employment attorney with Joseph Greenwald & Laake P.A. in Greenbelt, said he has been getting more cases. "People are more comfortable" coming forward in a world where high profile-people such as Sen. Kirsten Gillibrand, D-N.Y. and actress Gwyneth Paltrow are openly talking about being sexually harassed, he said.

"None of this should be new or shocking to anybody. It's just that people have had enough," said Markovitz.



Renee Lane-Kunz (The Daily Record / Maximilian Franz)



Julie Janofsky (The Daily Record/Rich Dennison)

When an employee brings a complaint in writing or multiple people come forward with a complaint against the same person, Markovitz advises employers to fire the person against whom the complaints are made.

Markovitz calls it the “dog bite rule,” where a dog gets one free bite before being considered a dangerous animal.

“If you know someone who’s a sexual harasser, there’s usually something wrong with this employer. They will act again and you will be responsible for that as you would be as a dog owner,” Markovitz said.

Complaints should be made in writing, Markovitz said, to ensure there is evidence of the harassment being reported to human resources or an immediate supervisor. An employee should follow up an oral complaint with an email, he added.

Janofsky warns employers against promising absolute confidentiality to an employee making a harassment claim, as the complaint has to be shared with the alleged harasser, witnesses and decision makers. The complaint may also be used in subsequent legal proceedings.

“It’s not accurate and that should not be part of an effective harassment procedure,” Janofsky said.

Holiday time

Employers can also be held liable for sexual harassment even if the employee never complained but faced an “adverse employment action” such as a demotion, for resisting a superior’s sexual advances. The company can also be on the hook for sexual harassment by vendors, customers and other outside people who interact with employees if the company knew or should have known about the misconduct and did not take corrective steps, Janofsky said.

“This stuff gets tricky when the company makes it tricky,” Markovitz said, referring to when companies are reluctant to fire an employee despite harassment accusations. “When you start to dance with the devil, you have a problem.”

During this time of year, with holiday festivities in the workplace, companies should be especially cognizant of behavior that could be considered harassment. Markovitz tells clients to talk to take preventative steps including cutting off an open bar or simply ending a holiday party earlier than normal.

“Be very clear about your lines,” Markovitz said.

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From the Baltimore Business Journal:

<https://www.bizjournals.com/baltimore/news/2017/11/30/what-employers-need-to-know-now-about-sexual.html>

What employers need to know now about sexual harassment

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With new sexual harassment cases unrolling daily — from NBC's Matt Lauer to U.S. Sen. Al Franken — it may be hard for employers to understand their responsibilities regarding sex in the workplace. But there is more urgency than ever. Here is a start:

1. Because welcomeness is often an issue in sexual harassment cases, employers cannot afford to foster or tolerate an unprofessional workplace culture in which sexual behavior is common. Such an atmosphere may contribute to miscommunications among coworkers about the welcomeness of sex.
2. Just because an employee may choose to endure a coworker's sexual conduct does not make the conduct welcome. Employees may endure many indignities over a long time, and may mask their true feelings, simply to keep the job.
3. Employers may have a defense to liability for some acts of sexual harassment by low- and mid- level employees, if the company has instituted a comprehensive written anti-harassment policy with an effective internal complaint procedure, and the complaining employee fails to follow the complaint procedure.
4. An effective harassment complaint procedure should give employees at least two choices for directing complaints, and should not require the employees to direct complaints to the harasser. Complaining employees should not be promised absolute confidentiality. The complaint will have to be presented, at a minimum, to the alleged harasser, any witnesses and company decision-makers, and it may also be the subject of legal proceedings.
5. Even if an employee never formally complains, the employer is still legally responsible for sexual harassment that results in an adverse employment action (such as a termination or demotion because the employee resisted a sexual advance). Also, the employer is almost always liable for sexual harassment by high level managers and owners, regardless of whether there is a formal complaint lodged.
6. Employers may be held responsible for sexual harassment by vendors, customers and others with whom their employees come into contact, if management knew or should have known about the misconduct, and failed either to prevent it, or take corrective action.
7. Employers are barred by law from retaliating against employees who complain about sexual harassment, as well as those who assist others in pursuing complaints. Retaliation is a separate legal



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Julie Janofsky is an employment lawyer and principal at Fedder and Janofsky LLC.

problem for employers. An employer still may be liable for retaliation, even if it is ultimately found to be not liable for the underlying claim of sexual harassment.

8. Employers need to seek legal help quickly to ensure that they don't make missteps after a sexual harassment complaint is lodged, and to help ensure good documentation and clear communications to all of the affected employees.

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From the Baltimore Business Journal:

<https://www.bizjournals.com/baltimore/news/2017/12/14/7-sexual-harassment-basics-for-any-employee.html>

7 sexual harassment basics for any employee

🔑 SUBSCRIBER CONTENT: Dec 14, 2017, 9:00am EST

Sexual harassment cases continue to flood the news. It may be hard for employees who believe they were victims of sexual harassment to know what to do.

Here is a start:

The law does not mandate civility in the workplace. Not all rude or offensive behavior is sexual harassment. There must be severe or pervasive unwelcome conduct, based on sex. Because sexual harassment is so common, employees need to be prepared in advance with something to say if they are sexually harassed, such as: "I can't believe you just did that — please don't do it again" or "Your behavior is offensive, and makes me uncomfortable — please stop."

Verbal conduct such as propositioning, joking and teasing may amount to sexual harassment if it is severe enough to affect the employee's terms and conditions of employment. However, a physical assault is much stronger evidence. An employee who is physically assaulted will have the best case if criminal charges are pursued immediately.

Sexual harassment claims based on the misbehavior of high-level managers or owners are stronger cases than those based on the misbehavior of low-level employees.

If the employer has a formal harassment complaint reporting procedure, harassed employees should seek legal help to make sure that they follow it to the letter. Putting the company on formal notice is especially important when the harasser is not a high-level manager, and when the harassment does not result in an adverse employment action (such as termination or demotion). Employees who do not use the employer's complaint reporting procedure may hand the employer an effective defense.

Employees cannot make secret audio recordings in Maryland to document their cases. However, employees should carefully preserve emails, text messages, phone messages and other evidence of the harassment.

Employers are barred by law from retaliating against employees who complain about sexual harassment.



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Julie Janofsky, an employment lawyer and principal at Fedder and Janofsky LLC.

Employees who are the victims of sexual harassment may have less than a year to bring some of their claims, so they should seek legal advice quickly.