2018 GLOBAL TECHNOLOGY SUMMIT
AT THE INTERSECTION OF BUSINESS, LAW AND TECHNOLOGY

#METOO TO BROTOPIA: PRACTICAL TIPS FOR IN-HOUSE COUNSEL

DLA Piper Global Technology Summit

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THE SILENCE BREAKERS
THE VOICES THAT LAUNCHED A MOVEMENT

#MeToo

#TimesUp
HOW ARE COMPANIES HANDLING ACCUSATIONS AND CLAIMS IN THE #METOO ERA?
What’s changed: the double standard no longer acceptable
Cost-benefit analysis then

Title VII Liability

Maximum 7 figure liability
• “We cannot decide who is telling the truth”
• Counseling

$\text{made for the Company}$
Cost-benefit analysis now

Title VII Liability

$ made for the Company
Generally, there was no reporting to the board

- Nature of claims
- Severity of claims
- Number of claims
- What the company was doing about it
BEST PRACTICE reporting to the board
- Nature of claims
- Severity of claims
- Number of claims
- What the company was doing about it

Reporting obligations today

- Board
- CEO
- HR: Investigate/Resolve
- Legal: Assistance
- Operations

Complaint
Boards have a duty of oversight

- “[O]nly a sustained or systematic failure of the board to exercise oversight — such as an utter failure to attempt to assure a reasonable information and reporting system exists — will establish the lack of good faith that is a necessary condition to liability.” *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996)

- The Seventh Circuit found that the board of a healthcare company breached its duty of oversight through inferred awareness of problems, took no steps to prevent or remedy the problems, and the failure resulted in substantial corporate losses. *In re Abbott Labs. Derivative Shareholders Litig.*, 325 F.3d 795, 808 (7th Cir. 2003)
Section 16 Officers:

Ignoring a section 16 officer’s sexual harassment can run afoul of SOX, which requires publicly traded corporations adopt a Code of Ethics containing, among other things, “written standards that are reasonably designed to deter wrongdoing and to promote . . . compliance with applicable governmental laws, rules and regulations”
The SEC has further adopted rules requiring a company to make "immediate disclosure" on Form 8-K or via Internet of any change to, or waiver of, the company's code of ethics for senior officers.

- A "waiver" is the approval by the company of a "material departure" from a provision of the code of ethics
- An "implicit waiver" is the company's failure to take action within a reasonable period of time regarding a "material departure" from a provision of the code of ethics that "has been made known to an executive officer"
- Companies should be careful that they do not create the perception of a "double standard," which suggests that there is one set of ethical values that applies to senior management and a different one for rank and file employees
The perils of turning a blind eye

- In 2017, a shareholder derivative action was settled by Twenty-First Century Fox Inc. for $90 million.
  
  “The settlement requires $90 million to be paid back to the company by the third-party insurers of Fox News Chairman Rupert Murdoch, the estate of former CEO Roger Ailes and members of the Twenty-First Century Fox board, whom the shareholders say failed to recognize a culture of rampant sexual harassment”

- According to the complaint, “Fox News has a sustained and systematic history of sexual harassment by its executives and talent” and “[h]ad the Board exercised even minimal oversight, they would have been aware of this history, given the negative publicity around many of these lawsuits, and given the sheer number and in some cases substantial sizes of the settlements relative to the salaries of the plaintiffs”

Source: https://www.law360.com/securities/articles/987358/21st-century-fox-pens-90m-investor-deal-over-scandals
HOW SHOULD COMPANIES ADDRESS SEVERANCE WHEN ACCUSERS LEAVE THE JOB?
Suit alleged that the board breached its fiduciary duty by paying substantial severance to an employee that could have been terminated for cause

“Based on the facts alleged, it is clear to me that the Board had several options in deciding how to handle Ovitz’s alleged breach . . . . Finally, the Board might have granted Ovitz a Non-Fault Termination and paid him the severance benefits for which he had bargained under the terms of the Employment Agreement”

The Board made a business decision to grant Ovitz a Non-Fault Termination. Plaintiffs may disagree with the Board's judgment as to how this matter should have been handled. But where, as here, there is no reasonable doubt as to the disinterest of or absence of fraud by the Board, mere disagreement cannot serve as grounds for imposing liability based on alleged breaches of fiduciary duty and waste”
Indemnity: Companies may not indemnify directors and officers in shareholder derivative suits.

Directors and Officers Liability Insurance:

- May contain exclusions for willful violation of a statute or law;
- Settlement is at the mercy of the carrier.

Personal liability?

Brand damage from protracted litigation
HOW HAS THE CALIFORNIA LEGISLATURE RESPONDED TO THE #METOO MOVEMENT?
5 states propose laws banning either confidentiality or arbitration
New California law requires publicly held corporations with principal offices in California to include women on the board of directors

- “California becomes first state to require women on corporate boards” CBS News, October 1, 2018
- “Gov. Jerry Brown signs bill requiring California corporate boards to include women” Los Angeles Times, September 30, 2018
- “California state law mandates female board directors by 2019” Reuters, September 30, 2018
New California law on defamation and privilege

Assembly Bill No. 2770

CHAPTER 82

An act to amend Section 47 of the Civil Code, relating to privileged communications.

[Approved by Governor July 9, 2018. Filed with Secretary of State July 9, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2770, Irwin. Privileged communications: communications by former employer: sexual harassment.

Existing law provides that libel is a false and unprivileged written publication that injures the reputation and that slander is a false and unprivileged publication, orally uttered, that injures the reputation, as specified. Existing law makes certain publications and communications privileged and therefore protected from civil action, including certain communications concerning the job performance or qualifications of an applicant for employment that are made without malice by a current or former employer to a prospective employer. Existing law authorizes an employer to answer whether or not the employer would rehire an employee.

This bill would include among those privileged communications complaints of sexual harassment by an employee, without malice, to an employer based on credible evidence and communications between the employer and interested persons regarding a complaint of sexual harassment and would authorize an employer to answer, without malice, whether the employer would rehire an employee and whether or not a decision to not rehire is based on the employer’s determination that the former employee engaged in sexual harassment.

SENATE RULES COMMITTEE

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

CONSENT

Bill No: AB 2770
Author: Irwin (D)
Amended: 4/19/18 in Assembly
Vote: 21

SENATE JUDICIARY COMMITTEE: 7-0, 6/12/18
AYES: Jackson, Moorlach, Anderson, Hertzberg, Monning, Stern, Wieckowski

ASSEMBLY FLOOR: 72-0, 5/7/18 (Consent) - See last page for vote

SUBJECT: Privileged communications: communications by former employer: sexual harassment

SOURCE: California Chamber of Commerce

DIGEST: This bill codifies California defamation case law as it relates to allegations of workplace sexual harassment, making it explicit in statute that: (1) employees who report sexual harassment to their employer are not liable for any resulting injury to the alleged harasser’s reputation, so long as the communication is made based on credible evidence and without malice; (2) communications between employers and anyone with an interest in a sexual harassment complaint, such as victims and witnesses, are not liable for any resulting damage to the alleged harasser’s reputation, as long as the communication is made without malice; and (3) former employers are not liable for any resulting injury to a former employee’s reputation if, in response to inquiries from prospective employers, the former employers indicate that they would not rehire the former employee based on a determination that the former employee engaged in sexual harassment, so long as the statement is made without malice.
New California law limits releases and non-disparagement agreements

- **SB 1300** bars employers from requiring an employee (as a condition of employment, raise or bonus) to: (1) release FEHA claims/rights and (2) sign a non-disparagement agreement or other agreement denying the employee the right to disclose information about unlawful acts in the workplace.

  - **Exception.** The above provisions do not apply to negotiated settlement agreements resolving a claim in court, before an administrative agency, alternative dispute resolution forum, or through an employer’s internal complaint process.
WITH HEIGHTENED MEDIA SCRUTINY, ARE EMPLOYERS NOW COMPELLED TO DEFEND THEMSELVES IN THE COURT OF PUBLIC OPINION?
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
2. Effectively Admit the Claims/ Take Swift Action
3. Say Nothing
The legal dangers of responding to allegations

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2. Effectively Admit the Claims / Take Swift Action
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Defames Accuser
Courts have noted the “complex” and “dizzying” nature of defamation law, as illustrated by two courts reaching opposite conclusions regarding the same statement:

The new, never-before-heard claims from women who have come forward in the past two weeks with unsubstantiated, fantastical stories about things they say occurred 30, 40, or even 50 years ago have escalated far past the point of absurdity. . . . Over and over again, we have refuted these new unsubstantiated stories with documentary evidence, only to have a new uncorroborated story crop up out of the woodwork.

D. Mass. Ruling: **Defamatory.**


3d Cir. Ruling: **NOT defamatory.**

Opinion that implies that plaintiff is a liar, but “adequately discloses” the factual basis for the opinion, allowing the reader to draw his/her own conclusions. *Hill v. Cosby*, 665 F. App’x 169 (3d Cir. 2016)
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
   - Defames Accuser

2. Effectively Admit the Claims/ Take Swift Action
   - Defames Accused

3. Say Nothing

“We take this very seriously”

“We will no longer do business with the accused”

“We fired him”
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
2. Effectively Admit the Claims / Take Swift Action
3. Say Nothing

Defames Accused

An opinion statement may give rise to defamation liability if a reasonable reader could conclude that the speaker’s opinion implies the existence of an undisclosed false fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990).
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
2. Effectively Admit the Claims / Take Swift Action
3. Viewed as an Admission

“Silence in response to the statement of another is an adoptive admission under Fed. R. Evid. 801(d)(2)(B) if the district court makes a determination that, under the circumstances, an innocent defendant would normally respond to the statement.” United States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991)

Silence does not protect your brand
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
Defames Accuser

2. Effectively Admit the Claims/ Take Swift Action
Defames Accused

3. Say Nothing
Viewed as an Admission

A statement that simply acknowledges or even expresses concern about the allegations would not constitute or imply an actionable statement of fact, nor would it be construed as an admission of any such allegation.

“My client takes claims of misconduct seriously, and is concerned about the allegations raised by the accuser.”
The legal dangers of responding to allegations

1. Vigorously Dispute the Claims
   - Defames Accuser

2. Effectively Admit the Claims/ Take Swift Action
   - Viewed as an Admission

3. Say Nothing
   - Defames Accused

A more forceful statement regarding a client’s determination to defend himself or herself also does not state or imply any facts regarding the accuser or his or her veracity

“At the appropriate time and place, my client intends to vigorously defend against allegations of misconduct and any related legal action”
Limitations of the litigation privilege

- Pre-litigation statements
  - A pre-litigation statement is only privileged when it relates to litigation that is “contemplated in good faith and under serious consideration.” *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1251 (2007)

- Statements to the press
  - “Litigants and attorneys who wish to litigate their cases in the press do so at their own risk—that is to say, protected by the First Amendment . . . and all principles which protect speech and expression generally, but without the mantle of absolute immunity.” *Rothman v. Jackson*, 49 Cal. App. 4th 1134, 1140 (1996)
HOW HAVE #METOO AND BROTOPIA CHANGED THE TECH INDUSTRY?
“Sexism is not a new story in Silicon Valley, or any other industry for that matter. What is new is that women are being believed when they speak out - and men are being held accountable for their actions. The past year has seen the toppling of powerful players in the Valley like Uber CEO Travis Kalanick and venture capitalists Justin Caldbeck and Chris Sacca, for sexual harassment.”

A study by Leain.org has found that since #MeToo, male managers are more hesitant to interact with female subordinates. According to Sheryl Sandberg, this can set back women
“Silicon Valley’s MeToo moment is changing the venture capital industry – but many wonder if it will last,” *Business Insider*, March 24, 2018

- VCs are more aware of gender discrimination issues, are trying to be more inclusive, and the #MeToo movement has made an impact

- Will this movement will result in lasting change?
QUESTIONS?