

In-House-Counsel Seminar Insights: Ethics and Professional Responsibility in the #MeToo Era

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Ward and Smith employment law attorneys Ken Gray and Emily Massey gave corporate attorneys at the firm's 2018 In-House Counsel Seminar a refresher in the law and ethics surrounding employment discrimination and workplace harassment claims.

In an interactive and engaging session, the two attorneys covered some of the key principles of employment discrimination and harassment law and also flagged trends to which in-house lawyers need to be alert.

One issue is the parade of high-profile cases involving media celebrities and others accused of sexual harassment. Gray reeled off some of the names: Former Fox News CEO and Chairman Roger Ailes, Fox News host Bill O'Reilly, Hollywood powerhouse producer Harvey Weinstein, actor Kevin Spacey, NBC's Matt Lauer. "And there are others we can add to that list," Gray said.

"The key here, particularly with the #MeToo movement, is that we've always dealt with sexual harassment in the workplace, and we've always had claims and lawsuits that involved those claims," Gray said. "But most of that may have been peer-to-peer harassment or immediate-supervisor-to-subordinate harassment. We're starting to see more claims involving C-suite harassment."

Massey noted that a recently released U.S. Equal Employment Opportunity Commission (EEOC) report found that in 2018 harassment charges rose 13.6 percent.

The highly publicized harassment cases, as well as the social media activity around those claims, make it more likely, Gray and Massey said, that individuals will feel more comfortable pursuing harassment claims.

Harassment Over Gender Identity

One important area that employers should watch is harassment claims where an employee is targeted because of their gender identity or transgender status.

Now, Gray says, EEOC treats those harassment claims as sex discrimination cases, leaving employers vulnerable. The U.S. Department of Justice, however, has said claims based on gender identity are not covered by federal law.

Further clouding the legal landscape is the existence of dueling federal circuit court decisions on the matter. The result, Gray said, is that the Supreme Court could take up a case on the issue as early as 2019.

But, Gray warned, even if the Supreme Court rules that gender identity isn't covered under the law, the law itself could be changed if Congress and the White House shift to Democratic hands.

"We frankly think that will happen at some point in the future," Gray said. "It may not be within this decade, but most likely it will be within the next."

Employers, he said, might be well-served by planning now for that potential shift.

"If you're doing renovations, you may want to go ahead and consider, when you add bathrooms, to have gender-neutral bathrooms," Gray said.

When providing training on sexual harassment, Massey said, employers should consider scenarios other than typical man-harassing-woman situations.

"Train your employees, especially your managers, to help encourage an environment of mutual respect," she said. The best practice, she added, is to provide harassment training regularly – every year or every other year at a minimum.

C-suite Challenges

When accused harassers are managers — especially senior managers — in-house counsel may be faced with particularly difficult situations.

In those investigations, Massey said, attorneys must remember that their legal and ethical obligations are to the company — not a single manager or even shareholder.

"You have to say, 'I have to do what's in the best interest of the company,'" she said, and make it clear that as an in-house counsel you're not representing the person accused of harassment, the accuser or others who may be involved.

But that can get very difficult in some situations, Gray noted.

"You could be, at some point in your career, the only attorney in an organization in which the majority shareholder is the CEO and chairman of the board and that's the person who's doing the harassing," he said. "What do you do?"

What attorneys can't do is just go talk to the CEO.

"You must commence the internal investigation process just like you would get if this was the janitor," Gray said. However, with a high-ranking executive or shareholder, it also makes sense to go to the company's board of directors so they can help, perhaps by appointing an independent director to help oversee the process. Outside lawyers also can help.

"It is always a good idea, if you can, to bring in outside counsel," Gray said. "Frankly, that is the best practice. We can do that job in situations where it just isn't practical for the in-house counsel to do so."

Prevention is Powerful

Of course, the best prevention against harassment and discrimination claims are policies that follow the law, training to ensure managers and employees follow the policies, and — if something does happen — quick action.

“Come to us with problems so we can fix it,” Gray said. “If we get it early, we can deal with it.”

He recounted one case where a female employee reported inappropriate comments her supervisor was making to her.

“Management took the male supervisor ‘to the woodshed’ and said if you do anything like this again, you will be fired,” Gray said. “It worked out.”

But six months later, another problem arose. “The female employee has not been performing, Gray said. “It turns out she’s been using the Internet excessively for personal business.”

Because she had made a claim against her supervisor, however, she had protected status. So, Gray advised the in-house counsel to first check her Internet access records at work.

“We felt like she would say, ‘Well, other employees are using the Internet for personal business as well,’” Gray said. “We get the report back and it turns out she’s using 93 percent of the non-business internet within the entire organization. We said ‘OK, we can pull the trigger.’”

A few weeks after she was fired, she hired a lawyer who claimed the company had retaliated against her because of the sexual harassment claim she previously had made. But after her lawyer found out how the company had dealt with that claim and how much she was using the internet, the case was dropped.

Conclusion

Massey concluded by reinforcing the bottom-line for in-house counsel: have clear policies, train managers, and uphold ethical obligations.

This is one of a series of articles summarizing key takeaways from Ward and Smith's In-House Counsel Seminar. See additional articles:

- What In-House Counsel Need to Know About Blockchain
- How General Counsels can Successfully Collaborate with Outside Attorneys

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