

THE WEINSTEIN EFFECT

RISK PROFESSIONALS MUST GO BEYOND SETTLEMENTS AND NON-DISCLOSURE AGREEMENTS

BY DOVE BURNS

As autumn 2017 came to an end, we witnessed the epic fall of Hollywood elites as the Weinstein dominoes continued to topple. The fervor of the #MeToo movement indicated that the fallout extended well past the Hollywood hype and hipster elite. From the workers at Ford to media interns, it became clear that sexual misconduct in the workplace extended from the lunchrooms to the boardrooms of many organizations across the country.

The cost to an organization of sexual harassment in the work environment is almost never fully measured. Companies don't directly monetize losses such as attrition, reputational damage, and lost opportunity. This amorphous price tag is actually much more detrimental to an organization as a whole than the attorneys' fees, settlement stunners, and litigation exposure. It's crucial to look beneath the Band-Aids and salacious allegations to assess why organizations become vulnerable to systemic harassment or even repeated violations so we can enact meaningful change.

PERMISSIVE CULTURE

Nothing has changed legally, judicially,





or hierarchically, so it's clear that a cultural groundswell is what caused the dominoes to begin falling. The permissive culture that allowed the plague of perpetual sexual impropriety and coerciveness in the workplace was immune to every antidote except for real cultural intolerance.

The most common trait shared between organizations rampant with sexual harassment or abuse is cultural entrenchment. The Weinstein organization and Ford paid millions of dollars over decades to settle litigation or buy confidentiality (sometimes both). Yet the money paid out was not accompanied by a change in organizational norms.

For instance, Ford paid \$22 million to settle lawsuits based upon sexual harassment and abuse in the 1990s. Despite the steep price tag and media attention the settlement garnered, it was not enough to usher in cultural change in the workplace. The Equal Employment Opportunity Commission reached a \$10 million settlement with Ford in August 2017 for sexual and racial harassment in two Chicago plants.

As the number of Weinstein's accusers approaches 100, authorities across the globe are investigating the financial juggling, smuggling, and befuddling tactics that were used to finance the cloak of confidentiality that allowed the behavior to fester over decades. Despite the millions of dollars paid out, risks taken, and sheer volume of accusers, nothing changed until the bad acts and coerced confidentiality hit the wall of cultural intolerance for such behavior.

Tolerance of poor behavior in the workplace increases the likelihood that sexual harassment will occur. Usually, systemic harassment and discrimination are born out of an environment where other poor behaviors are accepted. Assessing the workplace for foul language, racial jokes, lack of corporate controls, and inconsistent or non-existent application of policies can be illuminating. An environment of

chaos or excess contributes to cynicism amongst the workforce. Cynical bystanders are largely unwilling to intervene or even report inappropriate acts. Employees left to tolerate poor workplace behavior or a toxic work environment either leave or become tainted, checked out, disengaged, or dispirited. Attrition only reinforces the permissive culture, as it reduces the pool of likely whistleblowers.

SACRED COWS

Assessment for organizational vulnerability must include inquiries into whether there are star performers considered beyond reproach. Many companies that have entrenched sexual harassment have institutionalized different rules and policies for top performers who trade on their brands and professional achievements to victimize others in the workplace with impunity. While sexual impropriety may not be widely apparent, permission for organizational superstars to flout rules and policies is perceptible.

Beyond treatment of individual sacred cows, organizationally stated hierarchies often differ from true hierarchy. The Penn State sexual molestation tragedy exemplifies the dangers of how unstated organizational dynamics can further enable the sacred-cow scenario.

The stated hierarchy at Penn State had lauded football head coach Joe Paterno reporting to the athletic director, who in turn reported to the university president. Over the course of decades, the athletic director and president abdicated their duties as leaders of the university. Although they had actual knowledge of impropriety and were charged with oversight of Paterno and the football program, they were overly deferential to Paterno based upon his actual power and likely daunted by his reputation and influence in the community and beyond. The published hierarchy differed widely from the true hierarchy, which caused an institutional failure that resulted in decades of abuse and criminal convictions up and down

the chain of command. Both the school president and athletic director were convicted based upon the abdication of their power.

When a company's true organizational power is not reflected in its stated organizational chart, abusive conduct is enabled. Allowing sacred cows to operate without mitigation and in contradiction to stated organizational reporting structures leaves the chain of command vulnerable and incapable of combating impropriety.

Organizations need to assess whether top performers are really crucial. Are the star performers truly providing something that is irreplaceable in the marketplace? Oftentimes, organizations that revolve around sacred cows do not assess the cost resulting from such systemic reverence—actual loss of business; costs of getting caught; and the attrition rate of other top performers, up and comers, or talented beginners. While litigation exposure is tangible, the very real—albeit nebulous—risk to an organization is the loss resulting from alienating talented workers, potential customers, and brand destruction.

POWER DYNAMICS

In addition to cultural and organizational obstacles, unrecognized power dynamics contribute to a culture of apathy in the face of sexual harassment and abuse.

Workplace sexual improprieties require acknowledgment of inherent power imbalances. If complaining employees or bystanders had organizational power or authority, then they likely would have addressed the abuse in the moment. The fact that the occurrence in question went unaddressed in the moment illuminates an actual or perceived power imbalance.

Coercion based upon positional realities contributes to an environment ripe for sexual harassment. Star performers are often paired with younger, less-experienced subordinates. The resulting power imbalance leaves both employees vulnerable. The scandal

regarding Matt Lauer and his reign as NBC's leading news anchor exemplifies how power imbalances can complicate workplace relationships. Because of the significant positional inequity between Lauer and his sexual partners, there are questions as to whether the sexual acts were performed with actual consent versus coerced acceptance. The typical executive/secretary, director/intern scenarios complicate investigations for organizations because power imbalances can tip the scales of consent. Organizations that do not recognize or account for such realities are vulnerable.

Individual power dynamics are only the beginning of the inquiry, though, because organizational power imbalances are almost inherent to multilayered companies. If the human resources department is viewed as a loss leader with only as much authority as the cost of the paper that the organizational chart is written on, then how can it possibly be empowered to investigate and address issues without interference or limitations? Beyond investigating, it's important to consider whether human resources has the actual ability to enact the necessary changes needed to redress the issues uncovered by the investigation.

Similarly, an assessment is necessary as to whether low- and mid-level management are empowered to raise concerns that include sexual impropriety. Lack of open dialogue, tolerance, or ability to question things in the workplace extends the likelihood that management will not be empowered to raise concerns regarding harassment. As a result, the employees who would be most apt to see signs of impropriety don't feel they are actually empowered to do anything about it.

CULTURE OF SILENCE OR FEAR

Fear is inherent in raising issues in the workplace. Over time, society has begun to view whistleblowers in a different, more positive light, but is that the case within most organizations? The information and cyber age has changed

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the reality of privacy and created a culture of transparency—at least eventually. All of these developments are breaking down the perpetuation of silence in the workplace.

Organizations that are built around silos—limited information sharing, wage secrecy, and unstated hierarchies—are reckoning with the spotlight shone by technological development, legislatively mandated workplace tolerance, and the millennial cultural shift. The silent victims and bystanders are being bolstered by the advancements in law and society, which is resulting in more culpability for improper sexual behavior in the workplace.

The National Labor Relations Board (NLRB) is charged with regulating union and non-union workplaces and has been actively targeting employers that restrict employees' ability to commiserate regarding working conditions. The tendency of employers to limit discussion of working conditions is the same philosophy that drives them to silence accusers of sexual impropriety in the workplace. The NLRB's crusade to eliminate employer policies that stop workers from organizing to address workplace injustice will undoubtedly help eliminate the culture of workplace silence.

Beyond internal policies and behavior that dissuade reporting, there are external forces that work to contribute to a culture of fear. For instance, during an economic downturn, employees are apprehensive to rock the boat at work for fear of

losing their jobs and being unable to find new ones. Conversely, economic growth and fiscal strength has throughout history given rise to cultural groundswell and resistance.

ADDRESS THE CONDITIONS, NOT THE SYMPTOMS

Whether an organization is healthy or ill is a separate inquiry from whether it is going to face litigation or exposure. The difference is often due to external forces, strength of the economy, the job market, or the individual circumstances of the victim in question.

Just because the working environment does not rise to the level of dysfunction that is recognizable under the law does not mean that the organization itself is healthy. The legally cognizable standard for sexual harassment is significantly higher than the threshold at which the performance of the business, or individuals within the business, starts to suffer.

Behavior and dynamics are not shifting, but the reactions to it are. Risk professionals should not be fooled into thinking their organizations aren't vulnerable because they have not been met with litigation. The ironic paradox is that the more toxic the work environment, the less likely there will be complaints, but the greater your exposure is to devastation once the dysfunction is unveiled. Absence of evidence is not evidence of absence. ■

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