Cuomo Harassment Scandal Holds Key Employer Lessons

By **Dove Burns and Stacey Pitcher** (August 12, 2021)

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The sexual harassment allegations levied against New York Gov. Andrew Cuomo, resulting in his resignation, have captured the attention of the nation in a way not seen since the inception of the #MeToo movement, which endeavors to hold responsible those accused of sexual misconduct, and led to the downfalls of Harvey Weinstein and Matt Lauer.

As has been reported widely, almost a dozen women have come forward accusing Cuomo of making inappropriate comments or touching their body.

Notably, Brittany Commisso alleges that while hugging, Cuomo put his hand up her shirt and touched her breast.

Cuomo denies her claim. He also denies other egregious allegations, and appears to argue that hugging, face-touching and kissing cannot constitute sexual harassment, as he has done that to everyone throughout his life, and he intends those gestures as mere greetings or acts of comfort.[1]

Nonetheless, a Quinnipiac University poll conducted on Aug. 4 and 5 found that 70% of New Yorkers thought he should resign and 55% thought criminal charges should be filed.

Regardless of what you think about accused harassers like Cuomo, these allegations should provide a cautionary tale. The standard for sexual harassment varies widely based on jurisdiction, and sometimes the bar is quite low.

The allegations differ greatly from those lodged against Weinstein or Lauer, which consisted of claims of rape and sexual assault that happened behind closed doors.

The movement is now shining a light on behaviors that take place in public, often in full view of party revelers, co-workers and even law enforcement.

Headlines are shifting from groups of women accusing a single individual of rape, million-dollar payouts and coercive confidentiality agreements, to focus on less lascivious behaviors that arguably ride the line as to what constitutes sexual harassment.

There is no hard and fast line where social customs end and sexual harassment begins.

Socialization and cultural mores only further complicate the sexual harassment landscape. The Cuomo predicament is rife with the tension between social custom and alleged coercive sexual misdeeds.

Employers, lawyers and pundits alike often discuss sexual harassment as if it is a static, monolithic standard.

Instead, sexual harassment comprises a spectrum of behaviors and the panoply of what is actionable differs based upon the applicable legal jurisdiction.

Since the U.S. Supreme Court first recognized the viability of harassment claims under Title VII of the Civil Rights Act[2] 35 years ago in its 1986 Meritor Savings Bank FSB v. Vinson decision, federal, state and local courts and legislatures have continued to refine the legal standards for what constitutes sexual harassment.

Many states, including New York, have passed painfully specific training requirements in an attempt to prevent sexual harassment and to ensure people know how to recognize it and have available avenues to report such conduct without fear of reprisal.[3]

Despite this push toward training, most people still seem to be unaware of what actually constitutes sexual harassment.

A hostile work environment is actionable under federal law when "the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment," according to the U.S. Court of Appeals for the Second Circuit in its 2004 Petrosino v. Bell Atlantic ruling, quoting a body of established precedent.[4]

To prevail, an employee only needs to show that conduct was severe or pervasive; not both.[5]

The standard applied to hostile work environment claims under the New York State Human Rights Law and New York City Human Rights Law is significantly lower.[6]

Under these state and local laws, liability is determined simply by the existence of differential treatment.[7]

Accordingly, there is a violation if the employee is "treated less well" at least in part because of one's gender, according to the Second Circuit's 2013 decision in Mihalik v. Credit Agricole Cheuvreux North America Inc.[8]

The NYSHRL was amended in 2019 to specify that conduct constitutes harassment

> when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories.[9]

A New York state appeals court reasoned in its 2009 ruling in Williams v. New York City Housing Authority that the federal "severe or pervasive" standard did not do enough to incentivize "employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status."[10]

Conversely, the court determined, a "differential treatment" standard "maximizes the law's deterrent effect."[11]

While the law does make clear that "petty slights or trivial inconveniences" are not sufficient to state a claim,[12] depending on the severity, "even a single comment [or action] may be actionable in the proper context," according to the Second Circuit in Mihalik.[13]

Cuomo's argument that it cannot be sexual harassment because he does it to everyone is akin to someone maintaining that they cannot be liable because they did not intend to harass anyone.

Unfortunately, this shows a fundamental misunderstanding of sexual harassment law. Courts have long "rejected the notion that a harasser's innocent intent will defeat liability."[14]

Instead, courts examine the conduct itself and the victim's subjective perception thereof.

Accordingly, one of the most important takeaways from the Cuomo allegations is that an individual can still be held liable, regardless of their intention.

After years in business and public service, can Cuomo credibly maintain that he did not know it was not okay to touch, hug or kiss co-workers and subordinates? Does it matter?

In the private business context, leadership usually monitors the hard costs of harassment in the workplace, whether it's sizable settlements, attorney fees or payouts for confidentiality agreements.

However, most organizations, regardless of the context, do not directly monetize other resulting critical losses, such as attrition, reputational harm and lost opportunity.

The fiscal and societal ramifications of harassment are only further obfuscated in the governmental context. There are no boards of directors, shareholders or human resources organizations to oversee, investigate and intercede.

Without stock valuations, profit and loss charts, and growth targets, the wheels of government are not assessed from a fiscal perspective in the same ways as private business.

This can result in delayed recognition of poor behaviors and the negative impacts thereof.

Interestingly, however, when allegations do surface in the government arena, they play out on a public stage like no other.

While it is not uncommon for employers to retain outside counsel to perform an independent investigation, the resulting reports are typically kept highly confidential and are not announced press conferences.

Regardless of sector, employers need to move beyond their monolithic conceptions of sexual harassment and assess the workplace culture.

A broadened scope of the cultural assessment will result in a more accurate evaluation of a variety of actionable behaviors. Organizations that tolerate other poor behaviors are more susceptible to harassment and discrimination.

The report issued by the New York attorney general detailed the culture of coercion and trepidation that permeated the Cuomo administration.

Workplaces rife with fear and intimidation often lead to cynicism and bystanders who are unwilling to speak out or intervene.

Tolerance of such behaviors may result in a workforce that is checked out, tainted or heading for the exits. Attrition may only further exacerbate the problem, as it could reinforce the culture of cynicism and reduce the pool of potential whistleblowers.

There are a number of areas that employers must assess in order to evaluate vulnerability within the workplace.

Power Dynamics

Left unchecked, coercion based upon positional realities can lead to a greater likelihood of systemic sexual harassment.

Organizations must recognize inherent and naturally occurring power imbalances in order to make an objective assessment as to the working culture.

When an accused harasser is in a position of power, behaviors that might otherwise seem trivial can be viewed as coercive and oppressive, both by the alleged victim and a court.

If victims or bystanders had organizational power, it is likely the behavior would have been addressed at the time.

Individual power imbalances are only the first step in the inquiry, however. Oversight bodies with the ability to challenge executives must actually be empowered to investigate and take steps to intervene.

Sacred Cow

Star performers are often seen as beyond reproach, and thus are frequently afforded different rules and significant leeway.

If the individual contributor is permitted to trade on their professional achievements to victimize with impunity, the organization will eventually pay the price.

Internal review of actual hierarchies versus stated hierarchies is essential in order to ensure that a sacred cow is not usurping the stated structure set forth in the organizational chart.

Cultural Silence

Intolerance for transparency and systemic organizational siloing often result in an environment of fear and cynicism.

Internal forces, including onerous confidentiality policies, carefully crafted reporting structures or protective pods, may be enough to silence victims and bystanders.

External forces, including economic realities, familial responsibilities and socialized gender norms, have potential to reinforce the propensity for silencing whistleblowers and would-be victims.

Attrition

One way to detect a possible hostile environment is to look at the numbers.

Employers should examine which work groups, teams, locations, job titles, etc. are seeing the most attrition, and assess whether any common threads could be indicative of a systemic or cultural problem.

The statistics could suggest the presence of a sacred cow or other power dynamics that might merit further inquiry.

Conclusion

A lack of historical findings or liability does not necessarily indicate a healthy working environment. Employers must treat the condition and not the symptoms. Lack of litigation is not tantamount to a lack of vulnerability.

Societal tolerance for sexual behavior of any kind in the workplace is dwindling, and the applicable laws are ever-changing and often amorphous.

Regardless of where you think the line is and whether you think Cuomo's alleged behavior crossed it, the attorney general's scathing report, and Cuomo's resignation, demonstrate the far-reaching impacts of sexual harassment allegations, even before they reach a judge or jury.

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[1] See "Position Statement of Governor Andrew M. Cuomo Concerning the Sexual Harassment Allegations Made Against Him," pp. 2-3, 25, available at https://www.rochestercitynewspaper.com/media/pdf/8.3.21_position_statement_of_governor_cuomo.pdf.

[2] 42 U.S.C. § 2000e-2.

[3] See NYLL § 201-g; N.Y.C. Admin. Code § 8-107(30).

[4] Petrosino v. Bell Atlantic, 385 F.3d 210, 221 (2d Cir. 2004).

[5] Pucino v. Verizon Wireless Communications, Inc., 618 F.3d 112, 119 (2d Cir. 2010).

[6] See Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 113 (2d Cir. 2013); N.Y. Exec. Law § 296(1)(h).

[7] Williams v. New York City Housing Authority, 872 N.Y.S.2d 27, 38 (1st Dep't 2009).

[8] Mihalik, 715 F.3d at 110.

[9] N.Y. Exec. Law § 296(1)(h).

[10] Williams, 872 N.Y.S.2d at 38.

[11] Id.

[12] N.Y. Exec. Law § 296(1)(h).

[13] Mihalik, 715 F.3d at 111.

[14] Gabrielle M. v. Park Forest-Chicago Heights, 315 F.3d 817, 827 (7th Cir. 2003), citing Newton v. Dep't of Air Force, 85 F.3d 595, 599 (Fed. Cir. 1996); Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991); Vaughn v. Pool Offshore Co., 683 F.2d 922, 925 n.3 (5th Cir. 1982).