EMPLOYMENT LAW

Workplace Harassment: How Do We Stop It?

"When people face harassment, retaliation or discrimination at work, it affects more than just their jobs. It affects their mental and emotional wellbeing. They might be worried about the various impacts such as losing their jobs, losing hours, suffering a demotion or some other sort of financial harm."

Twila White speaks to us on workplace harassment and what employers should be doing to avoid such situations.

What do you believe should be done in order for organizations to gain the best out of their employees?

I think that communication is important. People need to feel comfortable asking questions and be in an environment which cultivates open communication. No one wants to feel like they are walking on egg shells when speaking to a supervisor or in an environment where growth is limited. Organizations should have management and leaders that are relatable, so people feel comfortable enough to approach them with questions and issues whenever they arise.

With sexual harassment being a big concern, how would you advise workplaces to handle such situations?

The first thing employers have to do is engage in training, which is key. The employer should have antidiscrimination and harassment policies and procedures, but most importantly abide by them. Policies should be followed and complied with. Some employees don't know what they can or cannot do. Or what is appropriate and inappropriate in the workplace. Therefore, I would recommend yearly training for employees, from the top down. Many people in management believe that they are untouchable and that they do not need to comply with the policies and procedures. These are people in management positions who in many instances place employers at the most risk, because the higher up you go, the greater the liability and legal exposure that the employer can be held accountable for. For example, if an officer, director or managing agent was engaged in the conduct, knew about it, ratified it and/or or adopted the conduct, the employer could be held liable for punitive damages. We know from reading about large verdicts that punitive damages can be many times more than any compensatory damages verdict that a jury decides for the plaintiff. That is why I say training has to be a top down approach; we lead by example.

In regards to clients that may approach you, how would you advise them to tackle such a situation, especially if they would want to continue working for the company; how do you ensure their safety?

I would not recommend a resignation to someone who has worked so hard to get a position that they enjoy or climbed the corporate ladder by investing years of their life only to be confronted by a difficult situation at work. Many people who work in hostile environments enjoy their jobs, but they don't enjoy the way that they are being treated. The environment can be distinguishably different from the work itself. The first course of action is to get legal advice and consultation so that the employee knows what their rights are before making any drastic decisions. While the employee may be in despair about their workplace situation, sometimes companies do the right thing and will seek to correct whatever it is that may be wrong. This would be an employer who has written policies and complies with them by taking immediate and prompt measures to correct the situation. The assumption should never be made that the employer will not do the right thing. Many times, if the employer is unaware of the misconduct, they cannot rectify the problem. On the other hand, if the employer is given the opportunity to remedy the situation, and they choose to do nothing and not stop the conduct,

problems increase. The employee may want to explore the possibility of retaining a lawyer and/or bringing a lawsuit for any harm caused or seek relief for damages caused by the employer's failure to rectify the situation.

Are there any regulations or legislations that you are hoping to see change in employment law?

I would like to see arbitration clauses eradicated in employment cases. Doing away with arbitration in this context would prohibit employers from requiring employees or applicants to waive their legal right to a trial by jury in order to work. Signing an arbitration agreement that waives your Seventh Amendment Constitutional Rights should not be a condition of employment. Employers devise contracts of adhesion, where they make employees sign an arbitration clause in order to get the job. Of course, most people are not going to disagree with their potential employer, because they want the job and if they refuse, they will never get work. In my opinion, these contracts are one-sided bargaining situations. When something bad happens in the workplace, after an employee has signed an arbitration agreement, most of the times the employee will end up in arbitration where there is a retired judge or lawyer, who is the ultimate decision maker. The employer is paying the arbitrator. The employer has the opportunity to have a repeat player dynamic where that employer has been before a particular arbitrator many times over, and has a familiarity with an arbitrator, whereas the plaintiff has no familiarity with that arbitrator or process. Lawyers call it the "repeat player effect". The California Supreme Court[1] has held that a neutral arbitration is essential to the integrity of the process. But the "repeat player effect", as noted by the California Supreme Court and California appellate courts, and discussed in various law journals, conveys distinct advantages to the employer including knowledge of the arbitrator's temperaments, procedural preferences, styles, and the arbitrator's cultivation of further business by taking a 'split the difference' approach to damages.[2]

Therefore, in some instances where employees should win arbitration, they end up losing, or where they have sought full justice, they only receive partial justice, with a lower verdict with an arbitrator than with a jury. Moreover, when a case is litigated by jury, it is in a public forum, a courthouse, where anyone can attend, listen and watch the proceeding, including the media. In arbitration, the proceedings are usually private and the public does not know when the arbitration is occurring or where, and oftentimes many documents are designated as confidential, also without becoming part of public court records. With the #MeToo movement and many women and men feeling empowered to speak up about sexual harassment because they feel they have a voice and are not alone, arbitration allows those proceedings to be kept confidential and private so that the rest of the world knows nothing about the developments in the legal proceedings. These proceedings should be in the open and public, and the right to trial by jury preserved. **LM**

[1]Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal.4th 83, 103

[2]Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L.Rev. 33, 60-63 (Schwartz).)

Isbell, Compulsory Arbitration of Employment Agreements: Beneficient Shield or Sword of Oppression? Armendariz v. Foundation Health Psychcare Services, Inc. (2001) 22 Whittier L. Rev. 1107, 1142-1144

Bingham, Employment Arbitration: The Repeat Player Effect (1997) 1 Employee Rts. & Employment Poly. J. 189.

Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal.App.4th 171, 178

Armendariz, supra, 24 Cal.4th at p. 115.

Firm Profile

The Law Office of Twila S. White stands ready to protect the rights and livelihood of workers across California. Attorney White is a prolific speaker on employment law and uses her extensive knowledge to passionately represent her clients' interests. Her care and concern for California's workers has resulted in being selected for inclusion in the Southern California Super Lawyers and Rising Stars list for multiple years.

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