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Harassment Investigations in the #MeToo Era

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I. INTRODUCTION

The #MeToo and the related Time's Up movements reveal that sexual harassment in the workplace is continuing across industries around the world, including the sports, entertainment, government, financial, and legal industries, even though federal, state, (and sometimes local) laws prohibit such conduct. This disconnect underscores the need for companies to continue to review their policies and procedures regarding harassment and the mechanisms in which to report any such conduct with the goal of eliminating harassing behavior before it becomes pervasive. Not only should such a commitment to eradicating sexual harassment in the workplace lead to decreased administrative filings, litigation, and the inherent risk of monetary damages that goes with it, it should also avoid the productivity and morale issues, including "brain drain" that occurs when experienced and solid employees choose to leave a company that has or is believed to have a toxic work environment.

The #MeToo movement was started in 2006 by social activist and community organizer, Tarana Burke, to raise awareness of and to provide support for women of color who are sexual assault survivors, particularly in disadvantaged communities. In the wake of the Harvey Weinstein allegations in 2017, the #MeToo movement spread around the world to raise awareness of the extent of sexual harassment in the workplace. The Time's Up movement was started on January 1, 2018, in response to the #MeToo movement in order to fund lower income women to pursue sexual harassment and sexual assault claims, as well as to advocate for stricter laws regarding companies that

allow or condone harassment in the workplace.

II. NO SUBSTANTIVE CHANGE IN THE LEGAL FRAMEWORK

In this context of the #MeToo movement, internal investigations are more important than ever. Due to the speed of social media, companies should ensure they appropriately investigate sexual harassment claims, and not engage in a "rush to judgment" in order to appear proactive. Businesses are recognizing this new reality; in fact, in 2017, continuing into 2018, there has been a surge in workplace harassment training. This is a new reality—even though the #MeToo movement has not yet caused any substantive changes in the laws protecting employees from harassment in the workplace. Instead, there has been a shift in public and corporate perception of these issues which has led many companies to review their own cultures, policies, and procedures.

For many companies, the biggest issue remains obtaining the continued support from senior management. If a company has a strong, written non-harassment policy, but the senior management is perceived as not supporting Human Resources on this issue, the employees will notice. The Human Resources Department should consider the most effective manner in which to encourage senior management to support regular review of the company's policies and procedures, as well as regular, in-person harassment and discrimination training for all employees, including supervisors, managers, and senior management. When the CEO or other senior managers attend and participate in such training along with other employees, the company sends a powerful message to its stakeholders. They can fully understand and

appreciate that the company's management stands behind its policies. Clearly, companies are continuing to respond to the #MeToo movement that has sent shock waves across industries and continents causing companies to reevaluate their own policies and procedures regarding sexual harassment, discrimination and retaliation.

III. HARASSMENT

Title VII of the Civil Rights Act of 1964 forbids an employer to refuse to hire, terminate, or otherwise discriminate against an individual based on race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a)(1); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). The Supreme Court, however, has broadened the scope of Title VII to include "sexual harassment so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher*, 524 U.S. at 786 (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

Title VII also prohibits harassment because of race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2(a)(1). Although it is not a settled issue in the Fifth Circuit, Title VII may also prohibit transgender discrimination. *See Wittmer v. Phillips 66 Co.*, No. H-17-2188, 2018 WL 1626366, *5 (S.D. Tex. April 4, 2018) ("assuming" that Title VII prohibits transgender discrimination).

A. Same-Sex Harassment

Same-sex harassment is likewise prohibited under Title VII. *EEOC v. Boh Bros. Const. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013). In evaluating a same-sex harassment allegation, the court first

determines whether the harassing conduct was "because of sex", and second, the court considers whether the conduct should be evaluated under the *quid pro quo* standard or the hostile work environment standard. *Id.* at 453.

In *Boh Bros.*, the plaintiff, an iron worker on a post-Hurricane Katrina construction site in Louisiana, was called numerous names by his crew superintendent for being too "feminine", who also exposed himself to the plaintiff on approximately ten occasions. *Id.* at 449-50. The Fifth Circuit, following the Supreme Court precedent of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), held that a plaintiff can as a matter of law rely on gender-stereotyping evidence to establish a same-sex harassment claim. *Id.* at 453. Accordingly, a plaintiff can satisfy Title VII's requirement that the harassing conduct occur "because-of-sex" with evidence of his/her perceived failure to conform with gender stereotypes. *Id.* at 455.

Recently, however, the Texas Supreme Court found that a gym teacher's same-sex harassment claim against a co-worker for "misery at work that no employee should endure" was not actionable under the TCHRA because it was not "motivated by her gender." *Alamo Heights I.S.D. v. Clark*, No. 16-0244, 2018 WL 1692367, *8, 16 (Tex. April 6, 2018). The Texas Supreme Court outlined three methods to prove that the harassing conduct was because of sex in a same-sex harassment case: (1) The harassing conduct was motivated by sexual conduct; (2) The harassing conduct was motivated by a general hostility to women (or men) in the workplace; or (3) Direct comparative evidence that the alleged harasser treated men and women differently. *Id.* at 9-14. The Texas Supreme Court analyzed the claim

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