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Trouble in the C Suite: Moving Beyond the Law

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TROUBLE IN THE C SUITE: MOVING BEYOND THE LAW

I. INTRODUCTION

The #metoo movement has pushed companies to think beyond the question of mere legal compliance and onto larger questions of right and wrong, societal tolerance, and market-based consequences. The live presentation accompanying this paper focuses on recent examples of companies and leaders who have underestimated this powerful (and hopefully lasting) cultural shift, while this paper provides an overview of the legal framework surrounding sexual harassment under Title VII of the Civil Rights Act of 1964, as well as a brief discussion of the circumstances under which the Texas Rules of Disciplinary Procedure may require a Texas lawyer to go over an executive's head in service to his or her client.

A. More Than Law, Not Less

It is extremely important ***not*** to confuse what is legally tolerable with what is socially tolerable. To be sure, the law is an important and necessary component in our societal evolution and provides a backstop and foundation for any societal movement against harassment. At the same time, it is important to recognize that the law is often slow and should never been seen as something that holds us back from aspiring to more than the minimum standards legislatures—and the politics that drive them—see fit to impose. In other words, the fact that the law may tolerate (at present) a certain form of behavior does ***not*** mean we as private actors should treat that same behavior as "normal" or "okay." There is a difference between that which is legal and that which is right.

B. Market Power

In 2017, the EEOC secured $39M in suits and $125.5M in pre-litigation resolution for harassment claims. By comparison, in just the first quarter of 2018, companies with high-profile leaders accused of harassment lost an estimated $4B in market value. http://time.com/5130340/kate-upton-guess-stock-price/. Obviously, some of this market value may return over time, but the immediate, short-term, and long-term consequences of the market's swift reaction to these controversies is not lost on investors or boards of directors, and it should not be lost on executives.

Indeed, many executives may react differently to a discussion that centers on some of the high-profile cases that lead to the downfall of once untouchable titans than one that retreads the familiar ground of the costs and perils of litigation. Talk of legal costs, disruptions, and potential verdicts pales in comparison to talk of plummeting stock prices, devastated morale, compromised recruiting, increased turnover, negative publicity, customer boycotts, and executive removals.

With this in mind, a practitioner meeting with a misbehaving executive, or an executive who does not seem to grasp the importance of taking all allegations of discrimination and harassment seriously, should consider sharing recent examples of the incredible market backlash some companies have faced for having failed to respond properly to such complaints.

II. HARASSMENT

A. *Meritor Savings Bank v. Vinson* (1986)

Title VII of the Civil Rights Act of 1964 does not actually make "harassment" illegal. In fact, the word "harassment" does not even appear in the statute. Rather, modern day harassment jurisprudence traces its origin to the 1986 U.S. Supreme Court decision in *Meritor Savings Bank v. Vinson*. In Vinson, the Supreme Court effectively adopted of the EEOC's 1980 Equal Employment Opportunity Commission's 1980 Guidelines on Discrimination Because of Sex (the "Guidelines"), which set forth two types of "sexual harassment": (1) harassment in which concrete employment benefits are conditioned on sexual favors, and (2) harassment that does not necessarily affect economic benefits but nevertheless creates a hostile or offensive working environment. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2403 (1986) (*citing* the Guidelines). Over time, these two types of sexual harassment have become more commonly known as "quid pro quo" (or this for that) harassment and "hostile environment" harassment.

In *Meritor*, Mechelle Vinson, was hired by Sidney Taylor, a Vice President, as a teller-trainee and then her way up to teller, head teller, and ultimately assistant branch manager. *Id*. at 2401-02. In September 1978, Vinson told Taylor she was taking an indefinite sick leave, and on November 1, 1978, Meritor fired her for excessive leave. *Id*. at 2402. After she was terminated, Vinson filed suit, claiming she had been a victim of constant sexual harassment by Taylor during her employment. At the bench trial that followed, Vinson testified Taylor was "fatherly" to her at first but took her out to dinner and suggested they have sex after she was promoted from teller-trainee to teller. Vinson testified she resisted at first but then agreed for fear of losing her job. According to Vinson, Taylor continued to make repeated sexual requests after their first sexual encounter, typically at work and both during and after business hours, ultimately resulting in the two of them having sex approximately 40 or 50 times over the next several years. Vinson further testified that Taylor fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and forcibly raped her on several occasions.[1] According to Vinson, Taylor stopped his sexual behavior when Vinson started dating a steady boyfriend. *Id*. at 2402-03. Vinson testified she never reported the harassment, because she was afraid of Taylor.

For his part, Taylor denied Vinson's allegations in their entirety, testifying he never had sex with her, never asked her for sex, never fondled her, never made suggestive remarks to her, and never asked her to have sex. *Id*. For its part, the bank denied having any knowledge of any of this.

The district court held Vinson could not proceed with her claim absent an economic injury. *Id*. at 2406. The district court further found that *if* there was a sexual relationship, it was a voluntary one that could not support a claim for relief. *Id*. at 2402-03. Finally, the district court found the bank had an express policy against discrimination, that neither Vinson nor any other employee had

[1] Notably, the district court allowed Vinson to present—in the absence of an objection from defense counsel—other female employees who testified that Taylor had likewise touched and fondled them, but the district court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief" and instead ruled she could only present such evidence in rebuttal to the defendants' cases, which she ultimately did not. *Id*. at 2402.

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