Competing Interests and Best Practices in the Wake of #Metoo

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Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 **Yale L.J. Forum** 85 (2018).

One of my favorite pieces published in labor and employment law this year is Rachel Arnow-Richman's *Of Power and Process: Handling Harassers in an At-Will World*, which is a not-to-be-missed call for an overhaul of the contracting practices deployed by employers, one designed to shift the calculus that employers use to police sexual harassers of various corporate ranks. This piece examines a rarely thought-about angle of the #Metoo movement and the changes that it has precipitated and is yet to still effect. Professor Arnow-Richman, a scholar in employment law and in contract law, exposes this angle thoughtfully and sets forth a laudable proposal.

Professor Arnow-Richman's starting point is, appropriately, as she puts it, the "extreme power imbalance in the workplace" that engenders "a world in which high-level decision-makers wield unrestricted control over employees," while the entity can turn a blind eye to the way in which this unfettered discretion may be abused. (P. 90.) Lower-level employees are not accorded such latitude, and they are typically expeditiously disciplined or otherwise dealt with in the face of their inappropriate behavior. The #MeToo Movement, Professor Arnow-Richman correctly points out, was the force that kicked up a lot of the dust that enabled us to see just how uneven this landscape has been. Specifically, she argues that as society begins to grapple with balancing aggressive policing of workplace harassment with ensuring that accused harassers are accorded fair treatment (rather than summary and automatic dismissal), it needs to address inequities among workers at different ranks in the workplace. Moreover, she notes, misconceived corporate responses have companies punishing sexualized actions, rather than policing sex-based harassment that is not sexual in nature. Having astutely pointed out that "employers are inclined to tolerate sexual harassment and other misconduct by top-level employees but aggressively police 'inappropriate' behavior by the rank-and-file" (P. 85), Professor Arnow-Richman then sets out to address this problem.

This piece is both important and timely. After decades upon decades of sexual harassment, abuse, and assault being covered up and shrouded in silence, the #Metoo movement is finally starting to bring light to these events—and real consequences to their perpetrators. However, with these actions has come an accompanying backlash, as accused men bemoan what they perceive as knee-jerk justice and a lack of process in their swift ousters. Celebrating the unearthing and remedying of abuse that has been kept underground for so long, while simultaneously navigating the legal landscape as complicated by the backlash is a contemporary issue of great proportion.

Recently, much attention has been paid by scholars and other legal observers to the disparity between the way in which high and low-level accusers are treated by their employers and by the law. The acknowledgment that high level and highly-valued accusers operate with a certain amount of privilege, whereas low-level employee accusers are more vulnerable to being disbelieved or retaliated against is not surprising. However, Professor Arnow-Richman examines the status of the accused with an eye toward *their* vulnerabilities, rather than just toward whatever privilege they enjoy. Professor Arnow-Richman astutely notes that low-level employees alleged to be sexual harassers or abusers, "share with their accusers a vulnerability to indiscriminate adverse action by those above them in the workplace hierarchy." She posits that "[t]he very dynamics that make workers susceptible to sexual harassment in the first place put them at risk of excessive disciplinary action in the face of sexual harassment allegations," and cautions that "in the #MeToo-inspired race to root out inappropriate sexualized behavior, workers with less power, engaged in less pernicious behavior, are likely to be swept up in the rush to judgment." (Pp. 91-92.)

By getting into the details of the multitude of contractual benefits and protections enjoyed by these “top-level’ employees, professor Arnow-Richman is able to examine precisely how and by how much they fare better than lower-level employees when they are accused of sexual harassment. Job security and for-cause provisions are true game-changers, since employers do not want to incur liability as they respond to allegations of harassment or abuse. Lower-level employees, on the other hand, generally lack written contracts at all and can be summarily discharged at will. As Professor Arnow-Richman puts it, “In other words, if employers wish to cleanly remove high-level employees based on sexual harassment, they better be right about what happened.” (P. 93.)

The piece’s illustrative examples are rich and informative. It discusses, for example, the fact that Harvey Weinstein’s contract was crafted not merely to require that he be convicted of a crime or fraud in order for the “cause” standard to be met, but the fact that his prospective wrongdoings were explicitly contemplated by his contract’s language, which “not only created a safe harbor for Weinstein’s sexual misconduct, it anticipated and condoned an ongoing pattern of misbehavior, as long as Weinstein was willing to pay for the privilege.” (P. 95.) Given these extraordinary contractual protections, the reader gets a really clear idea of just what employers and accusers are up against in the face of alleged abuse by him and others like him at the highest levels of employment.

In stark contrast, the piece notes, the so-called “powerless harasser” affords his employer “every incentive to hedge against the risk of sexual harassment liability,” by getting rid of him, and this engenders gross disparities in the way in which these individuals are treated versus their higher-level counterparts. (Pp. 95-96.) This is true whether or not the allegation is ultimately proven to be true, because “[t]erminating an accused harasser is a surefire way of satisfying this element of the defense [to sexual harassment under Title VII],”and “[i]n cases of uncertainty, as when the employer is unable to verify whether harassing conduct occurred, it is safer for employers to err on the side of punishing the accused.” (P. 96.)

Of particular value in this piece is Professor Arnow-Richman’s informing her analysis and observations with her own experience reviewing labor arbitration awards. In her view, a legal backdrop against which employees at private workplaces have no actual Due Process rights and are owed nothing beyond what a contract might say encourages the enforcement of a “broad, antisexual norm against vulnerable workers” by employers. (P. 97.) Her analysis of labor awards bolsters her contention that employers are prone to “engage in overzealous disciplinary action in response to behavior that relates to or invokes sex or sexuality.” (p. 98.) So what *is* the law to do with the disparity in discipline and consequences that inures to the benefit of the top-level worker over the rank-and-file worker?

The piece concludes that increased job security and a greater ability to influence workplace terms and conditions would help redress this disparity. It calls for consideration of how this might be accomplished short of an overhaul of at-will employment, noting that “[t]he time is ripe for proposals.” (P. 100.) Professor Arnow-Richman answers her call with some thoughtful and provocative proposals of her own, all of which are worthy of consideration. Among them are employers: 1) continuing to create accountability for harassers at all levels of employment; 2) developing counter incentives to sexual harassment; 3) evaluating “wrongdoing with an informed understanding of what sexual harassment is and why it is harmful;” and 4) deliberately refraining from dealing with offensive statements in the same manner in which they deal with physical behavior that is repetitive or unwelcome.

Professor Arnow-Richman’s expertise in the fields of contracts, labor law, and employment discrimination well situate her to think through the problems created by the #Metoo movement and its subsequent backlash. This piece is thought-provoking, well-illustrated, and something that I found to be an excellent read this year.

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