

'People v. Weinstein': New York Attorney General's Sharp Warning About Systemic Workplace Sexual Harassment

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If the widely-reported allegations flowing from the #MeToo and #TimesUp movements weren't enough of a wake-up call for New York corporations, the New York Attorney General has issued a sharp warning about systemic workplace sexual harassment that all organizations doing business in New York state, and their principals, directors, managers and employees, would be wise to heed. On Feb. 11, 2018, the Attorney General filed a lawsuit against The Weinstein Company (TWC), its parent holding company, and co-owners Harvey and Robert Weinstein, alleging workplace sexual harassment that spanned more than a decade. Under the broad scope of New York Executive Law §63(12), the Attorney General brought claims of "repeated and persistent illegality," of which corporate



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management and directors were allegedly aware, but failed to adequately investigate or stop. With that filing, the Attorney General made clear that organizations doing business in New York now have much more to fear than private actions alleging sexual harassment. The Attorney General sent a strong message that companies and individuals that allow or foster workplace sexual harassment, fail to take adequate steps to prevent it in the first place, or fail to investigate and address complaints that are

made, can incur severe consequences backed by the full investigative and enforcement power of the government. And, for organizations that wisely choose to be proactive in preventing workplace sexual harassment, the Attorney General's lawsuit provides a roadmap for implementing effective compliance programs and enhancing existing programs to ensure that their employees are not victimized by sexual harassment and that they and their principals, directors, managers and employees are

not on the receiving end of similar Attorney General actions.

Attorney General's Allegations

In its lawsuit, the Office of the Attorney General (OAG) paints a picture of a systemic, company-wide culture of sexual harassment, perpetrated against women by one executive, but allegedly enabled, facilitated, and hidden for years by an assembly of managers, executives, and employees. According to the complaint, OAG brought action against Harvey and Robert Weinstein (as co-owners, co-chairmen of the board, and co-chief executive officers), The Weinstein Company, and its parent holding company, "to remedy a years-long gender based hostile work environment, a pattern of *quid pro quo* sexual harassment, and routine misuse of corporate resources for unlawful ends." The complaint makes clear that OAG filed its lawsuit in response to "repeated, persistent and egregious violations of law, to vindicate the rights of TWC's employees, and to prevent future recurrence of such misconduct."

According to the complaint, OAG initiated its investigation after learning of published reports that Harvey Weinstein used his role as co-CEO, and his power in the entertainment industry, to sexually harass and abuse numerous women. OAG also alleged that TWC not only knew about Weinstein's misconduct and failed to take adequate steps to protect employees, but also took affirmative steps to shield the harassment and abuse through, among other means, the aggressive

use of non-disclosure agreements (NDAs), which prohibited settling complainants from disclosing their experiences and thereby concealed the underlying misconduct.

With regard to Weinstein personally, OAG alleged that he "repeatedly and persistently" sexually harassed female employees at TWC by creating a hostile work environment that "pervaded the workplace," and by demanding that women engage in sexual or demeaning conduct "as a *quid pro quo* for continued employment or career advancement." Among other more salacious allegations (see, e.g., the allegation that TWC employees had to procure and administer Weinstein's "erectile dysfunction shots"), OAG claimed that Weinstein regularly subjected female TWC employees and

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interns, and women seeking job opportunities, to unwelcome, unwanted, and inappropriate physical and sexual contact and touching, leering, and a "barrage of gender-based obscenities" and "gendered insults," and that his persistent actions created a "toxic environment for women" at TWC. OAG also alleged that Weinstein made *quid pro quo* offers or demands of sexual favors of female employees and interns in exchange for career advancement

at TWC, or to avoid adverse employment consequences.

With regard to TWC, OAG's complaint made clear that its allegations against the company were rooted in TWC's inaction and concealment of extensive evidence of persistent sexual harassment. OAG alleged that TWC bore corporate responsibility because of Weinstein's position at the company, because Weinstein used TWC's corporate resources and employees to facilitate his misconduct, and because TWC "was aware of and acquiesced in repeated and persistent unlawful conduct" by failing to adequately investigate or stop it. OAG alleged that Weinstein's regular use of gender-based obscenity and insults was made in front of TWC employees, "including the company's most senior executives"; that "multiple groups" of TWC employees were actually tasked with facilitating his sexual encounters with women; and that despite its awareness of the problem, the company failed to take any institutional action to investigate allegations or to protect employees or interns from future misconduct.

Further, OAG alleged that TWC's management and Board of Directors "were repeatedly presented with credible evidence" of Weinstein's sexual harassment of employees and interns, and were "fully aware" of Weinstein's creation of a hostile work environment and sexual harassment, but failed to "investigate and discover the nature and extent of the misconduct," restrict Weinstein's ability to hire or supervise employees, or terminate his employment altogether. Similarly, OAG alleged

that management “deliberately looked the other way,” or took actions that enabled Weinstein to retaliate against employees who complained about his misconduct. OAG alleged that rather than investigate and take prompt corrective action, TWC “used settlements that contained strict NDAs to keep law enforcement, the public, and even other TWC employees from discovering the extensive allegations of misconduct.” As a result, OAG alleged, TWC enabled Weinstein’s unlawful conduct to continue “far beyond the date when, through reasonable diligence, it should have been stopped.”

New York Executive Law §63(12) and the OAG Investigation

Under Executive Law §63(12), OAG is empowered to bring an action seeking injunctive relief, restitution, damages, disgorgement, civil penalties and costs, whenever any person (meaning individual or organization) has “engage[d] in repeated fraudulent or illegal acts or otherwise demonstrate[d] persistent fraud or illegality in the carrying on, conducting or transaction of business.”

Section 63(12) is a purposefully broad statute, allowing OAG to investigate and take action against a wide range of businesses engaging in “repeated” or “persistent” illegality. Pursuant to §63(12), OAG “is authorized to take proof and make a determination of the relevant facts,” and to issue subpoenas in accordance with the CPLR. OAG made use of its extensive authority under the law to investigate and ultimately bring charges here. According to the complaint,

as part of its investigation OAG issued a subpoena to TWC and third parties for documents and testimony, and received “correspondence, business records, financial records, and thousands of pages of documents”; OAG also interviewed current and former employees, executives and Board members of TWC.

This is not the first time that OAG has employed §63(12) to investigate and charge organizations and individuals that have “engage[d] in repeated fraudulent or illegal acts or otherwise demonstrate[d] persistent fraud or illegality in the carrying on, conducting or transaction of business.” Over the past decade, OAG has employed §63(12) against, among others: landlords who permit properties to be persistently used for criminal activities, as part of OAG’s “Nowhere to Hide” program; an individual and management company who invested client funds with Bernard Madoff, for a pattern of fraudulent concealment and misrepresentation; real estate developers who raided a reserve fund meant to ensure the health and safety of tenants, for persistent fraud and illegality in the conduct of their business; a nationwide talent agency, for repeatedly misleading consumers through deceptive advertising; auto dealerships, for persistent fraudulent, deceptive and illegal business practices in the sale and financing of automobiles that left some consumers with ruined credit reports; and a major hospitality company for failing to provide consumers with timely notice that thousands of credit card numbers were exposed

in security breaches, and failing to maintain reasonable data security, for deceptive acts and practices in conducting business.

The Weinstein lawsuit, however, represents a shift in focus for OAG under §63(12). The alleged misconduct—persistent illegality through workplace sexual harassment—fits squarely under the statute, but had not historically been a subject for OAG action under §63(12), until now. Rather than relying on laws prohibiting fraud as the predicates, OAG in this case looked to provisions of New York State Human Rights Law, New York City Human Rights Law, New York Civil Rights Law, and relevant provisions of the New York Penal Law to support its allegations. Ultimately, OAG asserted that Harvey and Robert Weinstein and TWC had “engaged in multiple, repeated and persistent” violations of §63(12), arising out of a decade-long pattern of systemic sexual harassment, by violating each of these underlying laws.

The Lessons of ‘People v. Weinstein’

OAG’s detailed allegations in this case provide both a warning and a roadmap for organizations to take significant steps to prevent workplace sexual harassment in the first instance, and to address all allegations and evidence of such harassment promptly, effectively and thoroughly. Organizations would be wise to act responsibly and proactively by implementing effective compliance programs, enhancing existing compliance programs, and taking

preemptive steps to reform compliance procedures that may fall short.

The lessons and warnings of the *People v. Weinstein* case are myriad, but some stand out:

Having policies in place is simply not enough; those policies must have teeth and be visibly and regularly enforced by well-trained managers to demonstrate a company's compliance in word and in practice. As alleged in the complaint, although TWC had a corporate policy prohibiting sexual harassment and discrimination, that policy was "flouted in practice." Employees, including supervisors, who should have had reporting responsibilities, were alleged to have received no training or guidance about the company's sexual harassment and discrimination policies, including how to report or handle a complaint.

An organization must have a Human Resources team entrusted and empowered to act on confidential complaints. That Human Resources team must also be able to act on complaints independently from the managers and executives who may be the subject of those complaints. OAG alleged that complaints directed to TWC Human Resources were often not treated confidentially, nor investigated. OAG alleged that the TWC Human Resources Director, who had the authority to investigate complaints, simply passed complaints along to the company's COO without any further involvement in the investigation or resolution process. Further, OAG alleged that notwithstanding the authority

to do so, "on not a single occasion" did the Human Resources Director start a formal investigation or implement any adverse employment consequences in response to a complaint about Weinstein's behavior.

Organizations must have managers and Board Members who are ready, willing, and empowered to take action against individual bad actors, no matter what corporate title or power that person may hold. OAG's

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complaint alleged that members of TWC management had knowledge of Weinstein's misconduct toward women—from personal observations and from complaints that were filed—but failed to take action against Weinstein "due to his power within the company and his perceived importance to the company's financial results." OAG alleged that TWC's Board likewise failed to adequately investigate, or prevent, Weinstein's repeated misconduct. This was allegedly due in part to Harvey and Robert Weinstein's influence over the Board, and in part to the Board's concerns that Weinstein's removal, or exposure of his misconduct, would risk financial harm to the company. OAG stated that the Board's failure to investigate Weinstein's misconduct,

and the actions taken to shield Weinstein from any consequences for his misconduct, "enabled [him] to continue victimizing employees of TWC." Notably, while mere inaction is on its own problematic, the TWC Board and management is alleged to have gone much farther than mere inaction, actively taking steps to shield Weinstein's conduct by entering into NDAs with settling complainants.

In the end, any fears that TWC managers and Board members may have had about the damage that could result if they took action against Weinstein were dwarfed not only by the reported extensive harm suffered by the victims of his sexual harassment, but also by the financial and reputational damage to the company. The message of *People v. Weinstein* to organizations and their principals, directors, managers and employees is clear: You must act responsibly, proactively, and decisively to prevent and address workplace sexual harassment, or you may face strong enforcement action and punishment by the state of New York.