

THOUGHT LEADER FORUM

WORKPLACE HARASSMENT

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On February 1, Puget Sound Business Journal Publisher Emory Thomas led a dynamic discussion on the subject of Workplace Harassment with three experienced regional leaders whose expertise is highly sought after for help by companies looking to improve in this important area. The participants were **Diana Shukis**, Attorney, Garvey Schubert Barer; **Aviva Kamm**, Attorney & Workplace Investigator – Stokes Lawrence and **Kellis M. Borek, JD**, Vice President, Labor & Legal Services and General Counsel, Archbright.

How is the #MeToo movement changing your practice or your clients' business practices?

BOREK: Companies are prioritizing the need for training and education. I've seen an uptick in management being more proactive and not waiting for a complaint. Because of what the headlines are communicating, people think "I'm going to step in front of this now and budget for that training for our leadership team." Investigations are up too. Employees are savvy. They know when to bring complaints forward. They have more courage to do that now.

KAMM: The #MeToo movement is bringing this issue higher up on many people's radar. For my practice, it's not a fundamental shift but it's now easier to convince clients to make training a priority. The current discussion is to err on the side of scheduling training, revising the employee handbook this year, bringing in outside expertise, etc.

You say investigations are up. Dramatically? Measurably so?

BOREK: We tend to go through peaks and valleys and I haven't seen any valleys. It's a steady stream. Most of them right now have to do with harassment. We are seeing fewer investigations for theft or other issues.

SHUKIS: I echo that. Organizations are much more aware and wanting to prioritize training and leadership's focus on this issue. Higher-level executives are listening more attentively to what their HR executives have been telling them for some time. I've seen an increase in requests for training for higher level executives.

What are the most important things organizations should do right now to be in the right place on this?

BOREK: Start with the leadership. That is the place you have to start to eradicate harassment and inappropriate behavior in any form in the workplace. The conduct may not be unlawful, but leadership has to know they are setting

the example. If management is not behaving appropriately, others are not going to see the need to change.

So, it starts with training?

BOREK: Yes, in addition to employee awareness training I recommend leadership teams sit down with a trusted advisor and have real in-depth conversations on what harassment looks like and what to do if someone comes to you with a complaint.

SHUKIS: It's important to get leadership the tools they need so they are part of the solution. Organizations need to look at their policies – not just their policies that are written on a page – deeper than that. How do they live those words when it comes to harassment?

How do you decide if you live those words?

SHUKIS: If you have an HR department it starts there. What issues have we had? What did we do, not do? Where did we not do well enough? How do we correct that? Sometimes you need to rip up what you currently have and start over.

KAMM: Typically, if you can't set the culture within leadership you can't do it anywhere else. You need to set a culture where leadership is attentive and responsive and human. The first thing you do when someone brings a complaint is to say, "I am sorry you feel that way and tell me more about it." You want to set a culture that doesn't tolerate inappropriate behavior but also recognizes people are going to make mistakes and when they do they can come and tell us about it and we will demonstrate that we care. A policy on paper is worse than nothing if you don't follow it.

Have the rules changed?

SHUKIS: I'm a lawyer so sometimes I think of rules as "what is the law," but the law is the minimum. It's the floor. Some rules have changed or may change. One thing that has changed is the new tax law. Now in settlement of sexual harassment complaints if the settlement includes a non-disclosure agreement (NDA) then that settlement and the attorney's fees associated with it will no longer be deductible as a business expense. That is one way the rules are changing.

BOREK: The expansion of the protected status definition in the realm of gender identity and gender expression is a changing rule, a changing norm. For some employees, there's a level of education that needs to be put in place so that employers can be not only

compliant, but also caring and human. That's an important piece in any diversity, inclusion and harassment training. It's not consistently defined across the US so it can be challenging when dealing with employers from different parts of the country and even within our state.

A report of conduct that might constitute workplace harassment comes in. What are the first steps an organization should take?

KAMM: Be human. React like you care because you do care. You should care as a business owner as well as care as a person. I think we all have been conditioned to react as if we are in a fender-bender and avoid getting out of the car to say, "I'm sorry." In a harassment situation, you need to bring compassion to the situation.

BOREK: "I regret you feel that way" is first thing out of your mouth. Or "thank you for bringing this forward." Ideally, the person came to you because you have a culture of trust and your policy says to come forward.

SHUKIS: Then I think you naturally get what you need which is information. What are the facts that will help inform what my next steps are? Without the bravery of someone coming forward you can't take the next steps as a business.

KAMM: You will be asking yourself, "what do I need to do right now? Is someone at risk? Do I need to put someone on leave because there might be continued harm? Does this require an investigation? And if it does, who is the right person to do it?" You need to have the right advisors on your team to help you right then. Do you have a lawyer you can go to?

SHUKIS: Sometimes there also can be a public-relations component depending on the nature of the allegations, the organization, who's implicated, etc. It doesn't happen every time, but that is part of the "do I have the right advisors" you need to review.

Let's talk about investigations. How do you triage and figure out what's needed? The gamut of an investigation can be quite broad. How do you decide what the scope needs to be?

SHUKIS: It's based on the facts you have at that moment. What internal resources do you have? Do you have people who have the bandwidth, skills, experience? Or are there good reasons that an external investigation would be better?

BOREK: If the company has an internal HR department, first determine if they have the time and resources to get it done quickly and correctly. Delay is not an option in a lot of these cases.

KAMM: Look at who the players are and the power dynamic. If you have someone who's two layers down interviewing someone in the C-suite the dynamic is off. Or what if it's a small organization and the person in the HR function is the spouse, child or cousin of the founder and the founder is the accused? Or what if they're good friends? What

if the complainant and HR are good friends? You want to ensure fairness and independence in who's going to look at it, both actual independence and the appearance of it.

What's a common mistake in making a decision about how to handle it, besides delay and power dynamic?

SHUKIS: Sometimes investigations are too limited and that can be for different reasons. Sometimes I'm scrutinizing an investigation as part of a litigation and there are times when I can see glaring issues and I wish someone would have been on the team with the investigator to be sure we'd approached this the right way, the scope, docs, etc.

BOREK: The optics are really important. How is it going to look to the victim, the rest of the company, the witnesses, the public? We are seeing more companies using an outside investigator which can be very costly. This can drive decisions for companies to decide to do it internally who feel they cannot afford it.

KAMM: It can carry tremendous weight with an employee, that a company was willing to invest resources in an outside investigator. If the allegations are not upheld by the evidence, they may be more likely to feel that their concerns are validated. You see the value from the expense the minute the employee realizes they are being taken seriously.

What happens when these situations get to the criminal realm? If it involves sexual misconduct, minors, abuse? How does that change the arc of where things go and who's involved?

SHUKIS: I immediately call one of my partners who does criminal defense. It complicates things dramatically for a business.

KAMM: When there's a criminal allegation you're going to want to talk to internal marketing or PR, or outside PR. Gossip is insidious and fast-moving. It could impact your customer base, shareholders, board, etc.

What do leaders need to know that sometimes too often they just don't know these days?

KAMM: Keep your hands to yourself.

SHUKIS: Some surprisingly don't know that.

BOREK: If you're a leader, don't touch subordinates. It doesn't matter what you think or what you intended. It goes back to their perception of your conduct.

KAMM: At any level in an organization, informality often creeps into electronic communication like emails where people don't know how their tone is perceived. Last year I litigated a case about an emoji. Things can be interpreted differently when you're not there delivering a message in person. I include a conversation about IM, texting and emails when I do workplace trainings.

BOREK: A supervisor or a manager may say, "Yes, I hugged her but I asked first." In the eyes of the law, the subordinate

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AVIVA KAMM
Stokes Lawrence

has no power and couldn’t give a consensual answer. A lot of employees may not see it as a voluntary question. So for a manager to say they asked and they said it was ok, it’s still not ok. Just don’t do it. It’s too risky. That’s the blind spot.

KAMM: People with power are often not as aware of it as people who do not. When there’s a tremendous power imbalance at face value someone may think someone’s consent or participation is voluntary, but it does not feel that way to the person with less power.

Earlier the first thing you said is to be human. Now we’re saying to be human, but only to a point?

SHUKIS: Being human is about acknowledging that you are sorry they feel this way and thanking them for bringing it to your attention.

You are careful about your words.

SHUKIS: It is challenging for someone to raise these concerns. It’s very difficult for someone to do. Someone is bringing forward a concern and their experience of it at that moment is real and you have to respond to that without editorializing.

What are best things a company can do right now to prevent harassment from happening in the workplace?

SHUKIS: Leaders need to understand this is important and the policy and culture goals should be way above the floor, which is the law.

KAMM: Having an effective policy requires more than just giving it out at onboarding. You need to enforce the policy which means that when something comes to you, you respond, do whatever level of fact-finding you need to do, make prompt effective decisions, take actions. Then set outlook reminders at 2 weeks, 4 weeks, 8 weeks to check in with that complainant to be sure she’s not the victim of retaliation and is feeling okay.

BOREK: I have been an employment

law attorney for 30 years and boiler plate harassment policies are common. That can no longer be the case. At Archbright, we are really focused on refreshing policies. Make sure your policies cover employee conduct as well as third party conduct (customers, vendors, board members, anyone your employees interact with). Also, your managers should understand that inappropriate conduct that happens outside of work with co-workers should be reported as well. In your policies, address current examples, including social media examples. An effective complaint procedure should always provide employees with a clear process of who to report inappropriate conduct to, with a second individual, typically a high-level manager, identified as an alternate contact. Make sure you have a robust retaliation statement that protects the victim even if the complaint ends up having no merit and ensure that witnesses are protected from retaliation.

SHUKIS: The training should be interactive and engaging and deal with what’s happening now. Leaders need to understand it’s not just about their own behavior. If they observe something, if they overhear a joke – they have a responsibility to do something right then if they can. Example. An organization had a team meeting, fairly small. The one woman present was the most junior member of the team. The meeting happened around lunchtime. One of the male leaders says to the woman, “Hey, why didn’t you make sure we have lunch?” The great news is that the other leader said, “It’s not her job to get lunch!” So, the leader dealt with it at the moment, addressed it, made the

new employee feel comfortable – he also followed up later with the female employee. That so easily could have gone a different direction.

KAMM: None of us feel an ounce of forgiveness for sexual assault and the extremes we are seeing right now in headlines. What’s difficult is for everybody else to feel comfortable owning any kind of misstep and realizing harassment happens at many levels on the continuum, not only those most extreme examples.

What are factors to bear in mind when considering setting a claim?

KAMM: When we’re advising our clients, we are also educating them on what a jury pool will hear and what they’ll be thinking. Right now, the jury pool is getting educated on this every day. They’re more likely to see it as something relatable. So that’s influencing the settlement discussions I’m seeing.

BOREK: Also the PR issue. You don’t want to be the next headline. Sometimes a settlement discussion is taking place and you’re headed that way and then a piece of publicity rightly or wrongly might drive the desire to settle sooner.

SHUKIS: The non-disclosure element that is a factor of the new tax law. Historically it was automatic that you wanted an NDA and now it’s not always the case.

BOREK: I think we will see more legislative action outside of the new tax law addressing confidentiality in harassment issues.

SHUKIS: Also legislatively mandated training for cities and states.

BOREK: The #MeToo movement has highlighted a need to look at a company’s dating policy or lack thereof. Certainly fertile ground for claims of harassment when you think you have consensual dating in the workplace and you don’t.

SHUKIS: That can lead to a lot of challenges. My personal view is it’s going to happen so therefore my advice is to deal with it and deal with it in a way that looks at it in that reality so you can lessen the impact to your workplace and potential legal liability. I view it not unlike workplace harassment issues.

KAMM: #Timesupnow has a website which I’ve found to be a good resource where an employee can go for information about things like what is harassment and what isn’t harassment. Stuff happens whenever you put a bunch of people in a place together. We want people to interact in the workplace and learn the boundaries of what’s okay and what isn’t. You must take the realistic view. For every workplace dating scenario that doesn’t pan out there are couples who meet at work and date for years – or have a date or two and decide that isn’t the way to go. We don’t want people walking around not talking to anyone.

You have 30 seconds to give a CEO an opportunity to lower their risk and heighten their awareness of their workforce. What do you tell them?

KAMM: Culture, policies and enforcement.

BOREK: Walk the talk. Here’s your wake-up call. Pay more attention to this than you used to.

SHUKIS: Don’t miss this opportunity to improve because it’s so much better to take care of it now than being forced to when you have a major problem in your business.

THOUGHT LEADERS



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Kellis Borek is the Vice President of Labor & Employment Services and General Counsel for Archbright. She oversees Archbright’s team of attorneys and HR Advice professionals who provide advice and counsel regarding all aspects of Local, State and Federal employment and labor law to employers in Washington, Idaho and Oregon. On behalf of employers, she bargains labor contracts, responds to NLRB matters and provides advice and counsel concerning wage and hour, leave laws, discrimination, labor laws, labor contract administration and regulatory compliance. Kellis earned her B.A. from Washington State University and her J.D. from Seattle University.



DIANA SHUKIS
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Diana partners with employers to assist them in the wide-range of personnel issues that arise for virtually every business, for example, workplace harassment and discrimination, compliance with wage and hour and paid sick time laws, and managing leaves of absence and accommodations. Diana’s clients turn to her for advice and proactive assistance as well as representation in litigation and administrative proceedings, which Diana approaches with an astute business-minded and practical approach. In her strategic advice practice, Diana drafts and implements policies and procedures, provides critical advice during volatile situations, and offers tailored management and employment training. Diana also conducts workplace investigations.



AVIVA KAMM
Attorney & Workplace Investigator, Stokes Lawrence



Aviva Kamm represents employees and employers facing issues involving discrimination, wrongful termination, wage/hour issues and noncompete and nonsolicitation provisions. She also advises employers on a broad range of day-to-day and strategic human resources issues, including worker classification, FMLA administration, disability accommodation, discipline and I-9 (employment eligibility) compliance. She investigates discrimination and harassment complaints, conducts employee trainings, and drafts handbooks and policies. Her work with individuals includes negotiating executive employment contracts and severance agreements. Aviva graduated from the University of Washington School of Law, and clerked for Judge Anne Ellington of the Washington State Court of Appeals.



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Learn about our workplace harassment awareness training for employees and managers at Archbright.com.



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DON'T BE THE NEXT HEADLINE

Workplace misconduct is no longer just an employment issue. With the heightened focus on misconduct in the workplace, it is – more than ever – critical to be prepared for the slew of issues that may arise from a claim. Individuals and organizations dealing with allegations of harassment or worse may be exposed to potentially damaging consequences that affect everything from reputations to bottom lines.

GSB has assembled a full-service team of advisors that understands the highly sensitive nature of these matters and is experienced in helping organizations avoid and navigate allegations of misconduct.

Our holistic approach to helping clients mitigate risk involves providing comprehensive trainings, delivering strategic advice with all potential risks in mind, directing and conducting investigations, managing public relations efforts, and handling litigation.

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