SEXUAL HARASSMENT IN THE WORKPLACE

An Undergraduate Research Scholars Thesis

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News stations and social media have extensively covered the stories of Harvey Weinstein and Andrew Cuomo surrounding their sexual harassment allegations. Both Weinstein and Cuomo, one a corporate entity and another a government entity, are widely known across the nation for being accused of harassment. This paper focuses on each case to compare the charges against them and employer liability policy in a corporate versus a government setting. After reviewing both cases, the paper expands on New York's laws regarding sexual misconduct and how both men were tried under the same state's laws but had very different conclusions to their cases.

DEDICATION

I would like to thank my friends, family, instructors, and peers who have supported me throughout the research process.

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INTRODUCTION

Sexual harassment in the workplace is a pervasive issue that continues to exist in today's society despite the growing number of rules and regulations at the state and federal level. One of the main culprits in workplace sexual harassment cases are employers who value the reputation of their company over addressing such issues in the workplace (Tippett 2018). Another substantive issue is that institutional arrangements such as employment-at-will, where an employer can fire someone at any time, for any or no reason, and employer contracting practices protect the interests of the employers which pose a risk to employees (Arnow-Richman 2018). To address the above issues and issues of harassment in general the Equal Employment Opportunity Commission is tasked with the responsibility of conducting investigations into any concerns. Unfortunately, some of these concerns did not go through any type of investigation process and such issues came to light, giving rise to the MeToo movement. The MeToo movement brought awareness to the issue of sexual violence, opening the eyes of many who didn't understand the pervasiveness of this issue. Andrew Cuomo and Harvey Weinstein are two famous examples of perpetrators whose stories were brought to light with the rise of the MeToo movement. This thesis will focus on the cases of Cuomo and Weinstein and compare whether there were any differences in the cases of said employers in a private practice or public setting (corporate versus government setting).

The cultural shifts the MeToo movement brought about in centering the voices of women who faced sexual violence, combined with its attention on workplace sexual harassment has helped employees (predominantly women) to speak more openly about the sexual harassment they experience at the workplace. For instance, with the advent of allegations against Harvey

Weinstein in 2017 by over 80 women, the MeToo movement grew, and more women came forward with their assault cases. Several prominent figures such as Kevin Spacey, Bill Cosby, and Jeffrey Epstein had to step down from their powerful positions due to the workplace sexual harassment allegations. The most recent case of the New York Governor, Andrew Cuomo, is an important case in point. Cuomo was forced to resign on August 24, 2021, after numerous allegations of sexual harassment were brought against him. Women who accused Cuomo spoke up against incidents such as provocative remarks, groping of the breasts, and inappropriate touching. As women grew stronger with their voices, this posed a risk to companies since stories of harassment could have a reputational cost. Compared to litigation, having a low reputation as a result of harassment instances would be harder to manage (Hebert 2018). As a result, employers are subject to legal as well as publicity risks which have increased due to the increased awareness of sexual violence in the workplace during the MeToo era.

In addition to drawing attention to the pervasiveness of sexual violence at workplace, the MeToo movement was also instrumental in the development of employment policy revision at the state level: particularly with employment-at-will and employment contracting policies that protect the interests of employers. My thesis will explore the impact of #MeToo movement in shaping employment policies by examining two prominent cases. Through a comparative examination of Harvey Weinstein's and Andrew Cuomo's case I hope to shed light on different or overlapping ways in which corporate and state agencies response to allegations of sexual misconduct. More specifically, I will explore whether the different institutional space that these two men occupied had any bearing on the outcomes in these two cases.

History and Context of Sexual Harassment Laws

The Civil Rights Act of 1964 prohibits employment discrimination based on race, sex, color, religion, and national origin (EEOC.gov). This law serves as the foundation for sexual harassment law on which employer liability laws have been based on (Hebert 2018). Sexual harassment is unlawful under Title VII of the Civil Rights Act of 1964 only if the harassment is proven to have occurred due to one's sex. Otherwise, the harassment doesn't fall within the prohibitions of discrimination on the basis of sex and cannot be deemed unlawful. In 1998 following *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court states that simply the sexual nature of misconduct is not enough to fulfill the "because of sex" requirement. It can only be satisfied through some form of gender discrimination such as sexual hostility or sexual stereotypes, or through sexual desire (Hebert 2018). There has been a lot of contention surrounding the definition of sexual harassment, but numerous court cases contributed to its definition and allowed for more inclusivity in the law. This allows more room for women to argue in their favor about sexual misconduct. In 1986, the case of Meritor Savings Bank v. Vinson defined harassment as "sever or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff's employment" (Tippett 2018). However, this definition is too narrow and does not include harassment such as comments on a victim's body, suggestive pictures and messages, slurs, teasing, etc. Consequently, women were unable to file claims for less severe forms of harassment. Fortunately, the Supreme Court amended the definition of harassment that was found through the Meritor case later on. In 1993, the case of Harris v. Forklift found that harassment must be hostile or abusive to qualify as harassment. Tippett further explains that it is not necessary that it simply causes serious psychological harm to the person but is seen as offensive (Tippett 2018).

As the MeToo movement has progressed, employers have revised their privacy policies and drafted broader definitions of "cause", for which an employee may be terminated, in their executive employment agreements (Tippett 2018). Executive employment agreements are contracts under which the terms and conditions of an employee's term of employment are established; this includes provisions for which a possible earlier termination may occur. These revisions allow for more accountability and the ability to discipline those who have violated their employment agreement. Nevertheless, employers are only liable if the harassment by a supervisor or someone results in "tangible job action" such as a pay cut.

If there is no job consequence as such, the employer can avoid liability by establishing that they [1) did everything in their power to prevent or correct any sexually harassing behavior and 2) the employee failed to use any preventative or corrective opportunities given by the employer to avoid harm.] (1) "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (Hebert 2018). An issue arises where sexual harassment can occur without any job action and an employer will not be held liable. However, this issue is addressed through negligence: if the harassment occurs by a co-worker or client, the employer is only liable if they were negligent with the harassing behavior. This means that if the employer witnessed the harassment and made no effort to penalize the harasser or help the victim, they can still be held liable.

Employer liability grew to be an issue with the pervasiveness of workplace harassment. In 1998, the cases of *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton* found that employers are liable for harassment by their employees. In the employers' defense, they may

use something called the Faragher defense if the employer took the necessary measures to prevent or address harassment and the employee failed to take advantage of those opportunities. A potential issue that employers may bring up is that the victim failed to promptly report the harassment. But Hebert argues that courts would understand why women took time to come out with their stories and that line of defense for employers wouldn't be able to stand. Employers could also say that they took proper corrective action to ameliorate any instances of sexual harassment. Hebert argues that harassment usually occurs by a serial harasser using their power to coerce a woman into sexual acts and not simply isolated interactions (Hebert 2018). Thus, courts may view these instances as a failure on the employer's side to stop misconduct after the first instance.

These court cases have shaped the way that sexual harassment is addressed and have redefined the definition of harassment as well. The cases have changed the definition of sexual harassment from it being required to be "severe or pervasive" to something broader including instances of suggestive comments, teasing, low-scale touching, etc. I will use these cases to expand upon the definition of sexual harassment and how it affects employer liability through the use of privacy policies. Current research shows that despite the laws that have been instituted and privacy policies that have been revised for companies, sexual harassment is still a ubiquitous issue in workplace settings. Sexual harassment training is something that should be mandated by all states to increase awareness and understanding of what sexual harassment entails and how it should be dealt with. According to the American Bar Association (ABA), California, Connecticut, Delaware, Illinois, Maine, and New York have instituted mandatory sexual harassment training. However, while training may be a helpful supplement to raising awareness about the issue, it's more important for companies to focus on maintaining a respectable working

environment where harassment claims will cease to arise instead of simply requiring training. Maintaining a culture where there is a focus on how to submit harassment claims will not aid in any sort of prevention of the issue.

An issue that arises is whether employers conduct thorough investigations of sexual harassment claims. Employers may be quick to judge the situation and fail to investigate thoroughly or they may gloss over facts and try to turn the situation in their favor. However, Tippett argues that the investigations aren't the issue but when decisions are made to favor inaction. Employers usually conduct thorough investigations to protect themselves against any accusations but will employ defenses to avoid liability.

The MeToo movement has grown to help many women come out with their stories and hold companies accountable. Especially with the risk of bad publicity, many employers have begun to revise their policies and include provisions addressing workplace harassment. For instance, following the new Texas laws (S.B. 45 and H.B. 21), policies have been revised to address changes under federal law. Federal law states that employers can only be liable for harassment if they have at least 15 employees, but the new Texas law expands liability by stating employers with at least one employee may also be liable (S.B. 45). Consequently, workplace policies have been reviewed to make sure they follow the new guidelines. Thus, laws need to be instituted at the federal level to hold employers accountable so that all employees are protected regardless of the company's prestige. To what extent are employers liable for harassment that occurs in the workplace? Is there a difference in sexual harassment policies for a government workplace versus a corporate workplace? What do the cases of Andrew Cuomo and Harvey Weinstein have in common or are different?

The objective of this paper is to understand the extent to which employers are made liable for sexual harassment in the workplace, specifically regarding the cases of Andrew Cuomo and Harvey Weinstein and see if they are subject to the same investigation process and penalties as each other. Cuomo and Weinstein's cases help me tease out the difference between corporate and government employer liability policies.

For my thesis, I will focus on policies used in the Andrew Cuomo and Harvey Weinstein management. This will show whether employment policies have a broader definition to allow for greater accountability or a narrow definition to protect employers from liability issues. I will also be able to compare how employment policies differ between corporate and government management.

1. ANDREW CUOMO

Andrew Cuomo was a governor of New York from 2011 to 2021. He was charged with a criminal complaint of groping which was later dropped due to a lack of evidence. There were numerous allegations of sexual harassment by multiple women. An investigation report by the New York Attorney General into the allegations showed that 11 women raised concerns against Cuomo. However, the charges were dropped and he was asked to resign from office instead.

1.1 Executive Chamber Policy

The "Employee Handbook" of New York requires the Governor's Office of Employee Relations (GOER) to investigate all complaints of sexual harassment in state agencies, including the Executive Chamber which Cuomo's assistants are a part of. Consequently, with any reported allegations, GOER is required to investigate the allegations.

Members of the Executive Chamber and the governor are required to take annual sexual harassment prevention training. It can be done online, by reviewing a pdf, or in person. These options show that the training does not have to be taken seriously because simply looking over a pdf doesn't force the person to truly ingrain the knowledge. Furthermore, in practice, many members barely recalled what the contents were of the sexual harassment training (Clark et. al, 2021). One witness said she wouldn't have felt empowered to report an allegation because she didn't know of any reporting mechanism within the chamber. Numerous staff members did not know how to deal with a complaint. There is an undercurrent of concern with how such statements go to show the lack of gravity sexual harassment training has in a governmental workplace.

The issue with potential complaints that were raised was that they weren't always reported to GOER which means they were unable to be investigated. The Executive Chamber didn't refer many allegations to GOER which contributed to the lack of knowledge that harassment was taking place. Any potential misconduct was investigated internally and not reported to GOER further contributing to the harassment's ambiguity. When an institution is not taking the correct action to investigate potential misconduct, that means something is wrong with either the policy employees work by or by the employees themselves or even both. It is quite interesting because the policy that the Executive Chamber follows explicitly states that: Sexual harassment doesn't need to be severe or pervasive (EEOC.gov). Anyone with a complaint should complain to GOER or the person receiving a complaint must submit it to GOER even if requested not to report it. As a result, GOER must initiate an investigation. However, these rules were not followed and most employees swept issues under the rug. Furthermore, the lack of awareness and enforcement of the sexual harassment policies and procedures, like the process for reporting potential harassment, exacerbated difficulties of employees having their allegations heard and addressed and their rights protected.

1.2 New York State Human Rights Law

Since Cuomo resided in New York, he not only had to follow the Executive Chamber policy but the state of New York's laws as well. The New York State Human Rights Law (NYSHRL) forbids workplace harassment – something that is essentially universal across all of the US. Despite the fact that these laws are in place, Cuomo was not prosecuted because his actions were seen as less egregious. There were five criminal cases against him coming from different counties, however, every close shut down their investigation due to the lack of evidence (nytimes.com). Nevertheless, this doesn't mean that Cuomo was innocent. The issue stemmed

from having to fulfill the burden of providing enough evidence to charge Cuomo and there wasn't enough. The investigation report concluded from its testimonies of various female employees and even people not employed under him, that Cuomo was guilty of sexual harassment. He forcibly violated women by touching them without their consent and made suggestive comments. The law states that "direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment" (*Redd v. New York Div. of Parole*). Furthermore, Cuomo's suggestive comments created a hostile work environment which satisfies one of the sexual harassment contingencies under federal law (Clark et. al, 2021).

The fault of the harassment falls on the GOER for failing to investigate complaints thoroughly or even at all. Employer policy states that any complaint of harassment must go through the GOER even if the victim does not want to go through the process (Clark et. al, 2021). For example, in the case of Charlotte Bennett, her superiors arranged for a transfer instead of reporting the harassment to the GOER because Bennett was scared of facing retaliation. Unfortunately, this was the case with many women who worked under Cuomo and a multitude of harassment instances went unnoticed and failed to be investigated (Clark et. al, 2021). These failed investigations also contributed to Cuomo's acquittal, purporting the fact that Cuomo may have been innocent.

2. HARVEY WEINSTEIN

Harvey Weinstein was a well-known film producer who co-founded the company, Miramax, with his brother. Throughout Weinstein's career in his company, he took advantage of many women who worked under him. As a CEO of his company, Weinstein held the utmost power which allowed him to do as he pleased. Thus, so many instances of harassment were kept under wraps. Following the accusations from Rose McGowan, Rosanna Arquette and four other women, he was convicted of two charges in 2020: rape in the third degree and a criminal sexual act in the first degree. Currently, Weinstein is awaiting trial in Los Angeles and facing four counts of rape, four counts of forcible oral copulation, one count of sexual penetration by use of force, plus one count of sexual battery by restraint and sexual battery by five women.

2.1 Personal Stories

Rose McGowan was one of the first women to come out and tell her story about the harassment that she faced with Weinstein during her career. She accused him of raping her by performing oral sex in a hotel at the Sundance Fil Festival in 1997 when she was 23 years old (Kantor and Twohey, 2019). Annabella Sciorra accused Weinstein of forcing himself into her apartment and raping her in 1992. Ashley Judd sued Weinstein for damaging her career in retaliation for her rejecting his sexual advances. Weinstein had asked her to go to his hotel room for a supposed "business meeting" but answered the door in a bathrobe, asked for a massage, and asked her to watch him shower. These few personal stories about encounters with Harvey Weinstein show the nature of how he acted with those who worked for him. Weinstein would take advantage of his position and power and use them to exploit his female employees – especially those trying to climb up the social ladder.

2.2 Policy and Non-Disclosure Agreements

According to my research, there hasn't been much information regarding Miramax's sexual harassment policy. However, contrary a government entity, employees did not have to go through sexual assault training or have a specific group of people like the GOER to complain to. Instead, the few women who tried to speak up about their experiences were compelled sign non-disclosure agreements (NDA) and couldn't tell the public or push the issue further. For instance, Rose McGowan had complained to her managers about her rape, but nothing was done, and lawyers encouraged her to file for a damages claim. She was given a $100,000 settlement and forced to sign an NDA where she could barely breathe a word about this to anyone. Furthermore, McGowan didn't have a copy of the NDA as part of the agreement which meant her story was prone to credibility issues. Unfortunately, numerous lawyers suggested that women only file for damages instead of pursuing a criminal suit because of two reasons: (1) It would be very difficult to prove the stories of sexual harassment and (2) Since there's a higher chance of losing a criminal trial, lawyers will push for a settlement to keep up their win rate. (Kantor and Twohey, 2019). These two factors combined contributed to the dearth of legal complaints by women who worked under Weinstein.

2.3 A Comparison

Following a trial into the allegations presented against Weinstein, he was convicted of two charges and sentenced to 23 years in prison. On the other hand, Andrew Cuomo was not prosecuted and simply resigned from office. As can be seen from the cases of Weinstein and Cuomo, one of the main differences between the two is that employees working in the government sector were required to take a sexual harassment training course. This difference shows how sexual harassment is seen as an important issue that needs to be contended with

through a government entity versus a corporate entity. Governmental organizations have mandatory sexual harassment training to increase awareness of what could constitute sexual harassment and what the process is if an instance of sexual misconduct were to occur. Unfortunately, corporate workplaces are private practices that are not required to institute sexual harassment training for their employees. There is no federal or state law requiring companies to institute training as part of their employer guidelines. Consequently, this could lead to a lack of awareness of what can constitute harassment. Furthermore, it can enshroud knowledge about what to do when sexual harassment has occurred. This may have contributed to the lack of investigations into any complaints under Weinstein's company.

Another difference between the two cases is that employees of Miramax signed NDAs with Weinstein. Andrew Cuomo never signed an NDA with any employees. This is possible because of the protections that corporations offer to top executives. As a top executive member, you are in charge of the board and overseeing all events and occurrences in the company. With so much power, you are essentially able to do as you please without facing repercussions because it is easy to cover up any instances that may cause bad publicity to give a bad image to employers in the company. By working in the government, a lot of your actions are overseen by others in the government as well. Cuomo could have technically signed an NDA with any employee of his, however, such an action would have become visible to the public eye. Moreover, Cuomo's less egregious actions may have led him to think that there is no need to hide anything because nothing serious had occurred. Looking at cases of Weinstein, he had to sign NDAs because he forcibly touched and raped women. With actions of such a grievous nature, it was more necessary to take precautions to make sure stories of harassment wouldn't get out. Another reason why it is easier for corporate employers to sign NDAs is because of the

monetary aspect of things. Corporate employers have financial security that comes from the profits of their company; however, government employees don't have that luxury. If a government worker wanted to sign an NDA, they would have to pay the settlement out of pocket whereas a corporate worker would be able to take some money out of the company's profits if it was deemed a worthy enough cause. It would be seen as a worthful investment because the risk of bad publicity or having a bad image attached to the company name would cause the company to sink. Consequently, NDAs may have an advantage with being able to keep the lid on stories that people don't want to get out. One caveat is that even though NDAs usually require both parties to keep quiet about any information, discussions, or knowledge regarding an event, there is always a possibility that the agreement may be broken by one of the parties who wishes to speak out. There is only so much a company can do to shield themselves from the public eye. A breach of agreement may deter someone from breaking an NDA, however, if the benefits outweigh the risks, they may still decide to go public with their information. If knowledge about an NDA and its content comes out, it can also be seen as a sign of guilt. A question may be raised: If nothing occurred, then what was the need of an NDA?

3. EMPLOYER LIABILITY

3.1 Federal Law

The United States recognizes two forms of sexual harassment: (1) quid pro quo sexual harassment where an employee is required to tolerate sexual harassment in exchange for employment, a raise or job benefit, or promotion, and (2) a hostile work environment where sexual harassment in the workplace results in an offensive work environment or unreasonably interferes with an employee's work performance (EEOC.org). These two definitions encompass all possible scenarios of sexual misconduct.

3.2 Non-disclosure Agreements

A non-disclosure agreement (NDA) is contract between two parties where one party agrees to not discuss certain information with unauthorized parties and keep it confidential. In cases of sexual harassment, NDAs disallow women from discussing anything related to a settlement – even the fact there was an NDA signed. NDAs are a very popular tactic by sexual predators to keep victims quiet and hide any instances of harassment. Harassers like Weinstein would also make their employees sign confidentiality agreements so there would be no chance of an instance of sexual misconduct getting out. Consequently, perpetrators would be able to "get away with it" and hold onto their power. As a result, numerous bills have been introduced into Congress in an attempt to decrease the effect of arbitration consequences.

3.2.1 Tax Cuts and Jobs Act of 2017

Congress added a new section, 13307, in the Tax Cuts and Jobs Act of 2017 where "no deduction is allowed for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorneys'

fees related to such a settlement or payment." (dglaw.com). The goal with this provision was to push employers away from adding arbitration clauses to any settlement contracts. Legal settlements are usually tax deductible so businesses would rather avoid adding an NDA to a settlement because they could claim the deductible instead. However, the provision doesn't clearly define what sexual harassment is and what a nondisclosure agreement can include. Furthermore, if the victim is paying for an attorney and the legal fees are not tax deductible, they may be reluctant to enter an NDA (Ence 2019).

3.2.2 Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act of 2021

This bill invalidates arbitration agreements that preclude a party from filing a lawsuit in court involving sexual assault or sexual harassment, at the election of the party alleging such content (Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act, 2021). This means that people can still bring their case to court even if they signed an agreement waiving their rights to taking legal action. The bill has the potential to overcome the main obstacle of NDAs: inability to speak out. Following this act, people would still have the choice to go to court with their stories instead of leaving it to a private arbitration which is what would take place previously if an NDA was breached. This would also dissuade employers from pursuing an NDA in the first place.

CONCLUSION

Sexual harassment is a consistent problem that occurs in the workplace. While it has decreased, there is still a strong yet hidden prevalence in work settings. One of the main issues that arises from such situations are when cases are brought up and complained to the higher-ups. Unfortunately, many of the times these complaints will be hidden and go unnoticed allowing perpetrators to get away with it. Most of the time harassment cases end in settlement cases where the public will never see or breathe a word of it. Women sign an NDA forcing a life of silence surround their stories. Consequently, harassers are barely punished and are allowed to go free.

Looking at the case of Andrew Cuomo, one can see how despite the investigation report concluding that the allegations against him were sufficient to say that he had sexually harassed women, he was still acquitted. Unfortunately, his actions were not as egregious as Weinstein which contributed to his acquittal. The criminal cases against him did not have enough evidence under New York law to say that his behavior garnered a criminal prosecution. The New York District Attorney (DA), Letitia James, found credible evidence to say that the harassment occurred but the DA is only allowed to prosecute in their jurisdiction and Cuomo did not fall in her jurisdiction. Furthermore, New York state law says that forcible touching is a crime only if the touching occurred with sexual or other intimate parts of the body (criminaldefense.1800nynylaw.com). Thus, touching someone's cheek is insufficient grounds for sexual harassment. Since the burden falls on the prosecutor to prove beyond a reasonable doubt that harassment occurred and there wasn't enough evidence to do so, Cuomo was acquitted.

In regard to Harvey Weinstein, allegations from a great number of women and knowledge about NDAs that had been signed regarding instances of harassment, contributed to

his prosecution. As a top executive of his own company, he was able to avoid the public eye and cover up and instances of misconduct. He abused his power and took advantage of his employees by promising them promotions and great opportunities or threatening them with pay cuts in exchange for sexual favors.

The main similarity with both cases come from Cuomo and Weinstein being subject to New York state law. However, the way in which their cases proceeded show the differences between working in the government versus working in a private practice. The main differences between the two cases were in regard to mandatory sexual harassment training and the signing of NDAs. In the government, everyone was required to go through sexual harassment training which would help increase awareness of the issue and how it may be dealt with if it were to occur in the workplace. In a corporate setting, it is not required which may lead to confusion and a lack of knowledge when it comes to giving a complaint about workplace harassment. NDAs may be signed by anyone, however, those in the corporate field have more protections especially as a top executive who is able to oversee all events in the company. Thus, NDAs may be more beneficial towards those working in a private practice like Weinstein.

These differences raise the question: Why are all companies not required to include sexual harassment training in their policy guidelines? Why are top executives not checked by other executives on the board? What can be done to ensure that those working in the government and those working in a private practice don't have an advantage over the other? The knowledge about how to file a complaint should be well-known by all employees. Furthermore, policy guidelines should be strict in saying that if any occurrence of harassment occurs, it must be investigated even if the victim is averse to an investigation. This will ensure that cover-ups

would be a lot more difficult, and perpetrators would be more wary and less likely to commit such acts.

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