

## #MeToo Is Missing An Investigative Process

By **Jen Rubin** (August 15, 2018, 1:15 PM EDT)

The #MeToo movement has galloped through both private industry and the public sector leaving many accused of wrongdoing, but with no clear process to confirm whether the accusations are true. The consequences of this collective rush to judgment by employees and employers alike — from social ostracism to loss of employment — can be severe.

And the facts would appear to bear this out, at least anecdotally. According to a recent study published by the crisis consulting firm Temin & Co, #MeToo has resulted in the ouster of over 400 executives and employees from their positions since its inception. It is unclear what, if any, internal process these employers followed before making these firing decisions. Instead, it would appear that, rather than accept the light the movement has shined on the failure of many workplaces to effectively address internal processes for investigating harassment and (if appropriate) meting out punishment for it, the pendulum for some employers has swung in a singular direction, sometimes in the absence of a searching or professional investigative process.

In fact, a little-discussed side effect of the #MeToo movement is its impact on individuals who are accused — but not found guilty through an investigative process — of sexual misconduct or other misbehavior in the workplace, yet are hastily (and frankly unceremoniously) fired from their positions. But a community judgment of guilt (especially one that public opinion renders) is neither morally nor legally equivalent to a fair investigative process.

While it may be expedient to succumb to what is perceived to be politically correct groupthink, the concept that individuals are innocent until proven guilty remains a distinct but important feature of our judicial system. It is not practical of course to suggest that employers construct a mini judicial system in their workplaces. And it is clearly within the employer's right to dictate the process both to investigate and punish the conduct, if merited.

It is hard to garner sympathy for those who belittle, harass and, in some cases, assault people who are unable, unwilling or incapable of defending themselves. Nevertheless, it is equally wrong to argue against the application of at least some process to the investigation and punishment of the conduct leading to these claims. The due process our court system commands both assumes and requires that an individual who is charged with a crime or civil misconduct may confront witnesses, gather evidence and submit his or her case to a neutral fact-finder for a fair trial. Again, a mini judicial system is unrealistic for



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most employers; but at a minimum, a trained professional should administer some process before abruptly ousting an individual accused of workplace misconduct. A simple accusation should not result in a suspect's hasty termination, which leaves the person officially branded as a community monster, unemployed and perhaps unemployable.

Left without a meaningful process to determine criminal or civil liability which only the courts offer, the alleged perpetrator must explain the circumstance of a termination. And what does the ousted employee say? That the accusation was unfounded? Sexual harassment both by its nature and legal definition is subjective. One person's sexual offense is another's poorly conceived joke. The abrupt termination of an accused sexual harasser may feed an employer's desire to "do" something to address the accuser's claims and enforce an employment policy but it is unclear whether this serves the salutary purpose of promoting a "zero-tolerance" policy for harassment or better yet professionalizing the workplace to thwart harassment from occurring in the first place. In fact, a commissioner at the U.S. Equal Employment Opportunity Commission recently cautioned against the implementation of "zero-tolerance" policies given that many employees who believe a process is unfair may decline to report misbehavior in the workplace.

So this leads us back to the slippery slope to which the court of public opinion leads. Absent a final judgment obtainable only through due process, we don't really know whether or not a perpetrator is justifiably branded as a sexual harasser, a pervert or just a stupid human who made a mistake. Instead we are left to surmise that wrongdoing must have occurred because why else would the employee be fired? Those calling for public registries of harassers, akin to a sex offender registry, largely miss the point — a predicate to the inclusion of a name on a sex offender registry is that a conviction has occurred (again, a nod to due process). Public shaming of accused harassers does not, therefore, seem to accomplish anything other than muddying a legitimate issue with an air of unfairness.

Instead of expedited retribution, the focus should be on prevention (professionalizing the workplace), the internal mechanism for evaluating reports (the investigative process) and appropriate punishment (redemption? training? termination?). Employers should intensify their efforts to create workplace policies that reward good behavior — a mantra of "yes" — rather than a compilation of policies that only focus on "no." Employers should create systemically safe reporting procedures and toothy anti-retaliation pledges so the upstanders will feel comfortable calling out bad behavior. Employers should embrace what #MeToo offers — shining a light on the problem — rather than fleeing (or worse covering up) the problem by summarily terminating individuals without any process at all, which may foil the ultimate purpose of creating safe and welcome workplaces.

Finally, and importantly from an internal process perspective, the right people (human resources professionals and internal counsel) should be trained to investigate these claims. If it is not possible to conduct a professional and even-handed investigation internally, employers should engage professionals to undertake a balanced and fair investigative fact-finding.

But branding individuals as wrongdoers and offenders without resort to a meaningful investigative process seems un-American at best; at its worst it only adds to the patina of secretiveness that chilled reporting — the very behavior and problem #MeToo has so brilliantly addressed. This movement has important social lessons to teach us regarding making our society (and workplaces) safe and productive. At the same time, and with any social upheaval, the movement would benefit from mindful and meaningful process.

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