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PERSPECTIVE

The #MeToo movement and confidential settlements

By Patricia K. Gillette

America has awakened to the nightmare that is sexual harassment. All across the country, we hear stories of women who have been subjected to conduct in their workplaces that violates the law as well as our sense of decency. Although the nature of these claims is not new, the volume of those being reported is. Women have been empowered and energized to speak up and speak out; to identify powerful people who they claim have harassed them verbally, physically, and psychologically, and to seek redress through the legal system for the harm they claim to have suffered.

There is no question that sexual harassment — or any type of harassment based on personal characteristics — has no place in our work environment. The U.S. Supreme Court made that clear in its 1986 landmark decision of *Vinson v. Meritor Savings* where it recognized that sexual harassment is a form of gender discrimination that is prohibited by Title VII. Since then, state and federal legislatures as well as the courts have further defined harassment and addressed employers' liability to employees who can prove they suffered from such conduct in their workplaces. As a result, most employers have adopted policies that prohibit such behavior and many states, including California, have required training

of employees on what types of conduct is inappropriate and the obligations of employers to respond to such conduct.

But what happens when these policies and preventive measures don't work; when a woman claims she has been subjected to harassment by a supervisor or co-worker; when an employee claims that the company has turned a blind eye or retaliated against her for raising issues of harassment? For many, the answer has been to bring formal claims — through government agencies or civil litigation — against the company. Historically, most of those claims are resolved through arbitration or mediation.

With the advent of the #MeToo movement, however, some people are questioning the ways in which these allegations are addressed. Should claims of harassment be excepted from arbitration clauses? Should confidentiality be allowed as part of the settlement process? Does confidential resolution of these claims perpetuate the problem and allow the alleged harassers to avoid responsibility or continue their behavior?

As an experienced employment litigator and now as a mediator, I have seen a number of women who claim to have experienced harassment in their workplace. Each one of these individuals is different. Some are angry, some are broken. Some want revenge, some want peace. Some feel

ashamed, some feel empowered. These women have different needs, different expectations, and different levels of tolerance for reliving the conduct that they claim offended them.

And that is where the tension lies with the concept of eliminating any type of confidentiality in connection with these kinds of claims. The advocates for eliminating confidential settlements and/or arbitration proceedings legitimately recognize the importance of "outing" the alleged bad behavior, arguing that this reduces the chances that the harasser can repeat his/her inappropriate behavior by keeping the conduct under wraps. They point to people like Bill O'Reilly and Matt Lauer, who allegedly continued their alleged harassment for years, without penalty, protected by the confidentiality clauses of the settlements paid for by their companies.

But the counter argument to eliminating confidentiality of harassment settlements, focuses on the idea that not all plaintiffs want to have their friends and colleagues know about the conduct they claim to have been subjected to. And for those who do not want a spotlight shone on them for whatever reason, confidential mediation and/or arbitration provide a way for them to have their claims addressed without public disclosure of the facts. Indeed some advocates argue, that if that alternative were eliminated, we

would be throwing the baby out with the bathwater — as women would choose to remain silent rather than air the offensive conduct they claim to have suffered in a public forum.

So what is the solution? That is not for me to say. As a mediator, I see both sides of this issue and understand the motivations and concerns of the advocates for each position. I would like to see the defense and plaintiff bars put some creative thought into how we can recognize and honor the interests of alleged victims and companies in a way that encourages reporting and resolution of these types of claims. Because when all is said and done, the one thing I am sure of, is this: All of the parties involved are better off if they can resolve harassment claims without protracted litigation.

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