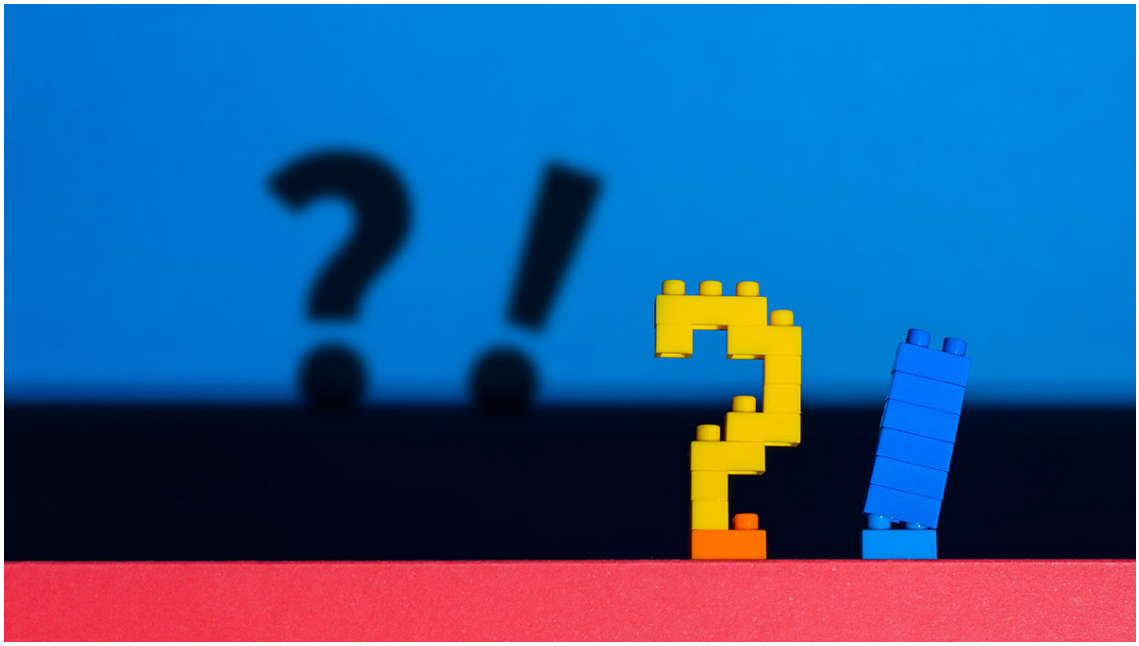
Harvard
Business
Review

Hiring

If You Fire Someone for Sexual Harassment, What Do You Say If You're Called for a Reference?

by Jessica A. Clarke

March 27, 2018



yangleephoto/Multi bits/Getty Images

Summary. Many victims of workplace sexual harassment tell the same frustrating story: Their harasser got fired, but then he landed a plum new job in the same industry. So does a former employer have any duty to disclose allegations of sexual misconduct to a reference... **more**

Many victims of workplace sexual harassment tell the same frustrating story: Their harasser got fired, but then he landed a plum new job in the same industry. In 2016 Reuters terminated a senior editor after his subordinate filed a sexual harassment complaint. Not long after, that editor was hired as an executive at Newsweek. In 2012 the Red Cross asked an official to resign after it investigated allegations that he had raped one of his subordinates and sexually harassed another. Nonetheless, that official received "very positive references" and went on to a top job at another nonprofit, Save the Children. After these stories hit the news in the wake of the #MeToo movement, both accused harassers lost their new jobs.

Cases like these raise sticky legal and moral questions. Does a former employer have any duty to disclose allegations of sexual misconduct to a reference checker? If not, how can serial harassers be stopped? What sort of due diligence must a prospective employer do to determine the truth of allegations of sexual harassment? Does an accused job applicant have any sort of "due process" rights in this situation?

There are no easy answers to these questions. While the law may not provide definitive guidance, a look at the legal landscape can help to further the conversation about how to stop sexual misconduct, harassment, and assault — while also ensuring fairness to the accused.

What Are the Duties of Former Employers?

A former employer does not have a general legal duty to disclose to the public that an employee was fired as a result of a sexual harassment investigation. Some state laws might even prohibit employers from indiscriminately disclosing the reasons an employee was terminated. But once an employer agrees to give a reference, it could be liable for offering misleading information. In a well-known California case, school officials offered "unreserved and unconditional praise" for a former administrator, even though they knew disciplinary action had been taken against that administrator for

molesting students. The court concluded that the recommenders could be liable for "misleading half-truths" when the administrator molested another student at his new job.

And yet employers may have reasons not to disclose negative information. An employer might decide that the evidence of sexual misconduct is ambiguous and that the best course of action is to convince the accused employee to resign. In exchange for a voluntary resignation, the employer might agree to keep the allegations confidential. Victims may also want confidentiality.

Even if there is no confidentiality agreement, employers may keep silent to avoid defamation suits brought by accused employees. This is despite the fact that employers usually win defamation and other such cases so long as they act in good faith and tell the truth. Many states even have laws that give employers immunity from suit for job references. In one case, a court held an employer was not liable for giving a bad reference, even though the employer had accidentally provided false information. But it is a hassle to be sued, even if you win. So lawyers may advise employers it is best not to give bad references.

As a result, many employers have adopted the "name, rank, and serial number" approach to job references — they refuse to share any information about former employees other than confirming dates of employment and titles. Or they may refuse to say anything at all. While this may be the smartest legal strategy, it is morally questionable in cases in which an employee is likely to go on to commit sexual harassment, misconduct, or assault again.

What Are the Duties of Prospective Employers?

Prospective employers have incentives to avoid hiring individuals who might commit sexual misconduct. State law may create liability for negligent hiring if, for example, the employer failed to use reasonable care to discover that a job applicant presented an "undue risk" of sexual assault. Successful negligent hiring cases typically

involve sexual abuse of children, rather than sexual harassment of adults. Nonetheless, employers have legal incentives to avoid hiring sexual harassers as well.

A prospective employer might think that its liability for sexual harassment will be limited because it has policies in place, like trainings and a complaint procedure. It is true that sexual harassment law protects employers that act reasonably to prevent and correct harassment. But this protection does not apply if the harasser took some sort of official action against the victim, such as a demotion, or if the harasser is one of the company's highest officials. "Superstar" employees create particular harassment risks because they may believe they have so much clout that they can take advantage of other people with impunity.

To be sure, it is difficult for victims to win harassment cases or to hold their employers liable when they are sexually assaulted by coworkers. But even if the law is in their favor, employers have moral and business reasons to avoid hiring anyone with a history of sexual harassment. Perhaps as a result of #MeToo, the public has demonstrated a zero-tolerance attitude for sexual harassment. When victims come forward, it can cause a disruptive scandal and harm a business's reputation. In addition to these costs, an organization may have to launch an expensive internal investigation to figure out what went wrong.

Despite these incentives to learn the truth, it may be impossible for a prospective employer to determine whether a job applicant did in fact commit sexual misconduct at his last workplace. In the case involving the Reuters editor, the new employer, Newsweek, is reported to have conducted "three weeks of due diligence" but could not "uncover anything more than rumors." Prospective employers could try requesting that job applicants sign a release form, waiving any potential legal claims against the former employer. But it is unclear whether this would provide enough incentive for a former employer to be candid.

What About Due Process for the Accused?

All of this may leave prospective employers in the position of having to make decisions based on hearsay and speculation. To blacklist a job applicant based only on rumors of sexual misconduct may be unfair, but it is not necessarily illegal. While the term "due process" often comes up in #MeToo discussions, the Constitution's due process clause doesn't apply to private-sector employers. In the United States, most employment relationships are "at will," which means employers can hire or fire employees for any reason — good or bad — not prohibited by law. Yes, private-sector employees terminated as a result of shoddy sexual harassment investigations may be able to sue their employers under labor, contract, or tort law, depending on the circumstances. But job applicants are unlikely to have a legal basis for demanding any sort of fair process.

Federal and state laws do prohibit hiring discrimination on the basis of sex, however, and we may start to see cases in which men accused of sexual harassment allege they were unfairly stereotyped and disbelieved because they are men. The law also prohibits discrimination based on race, and accused harassers may argue they were treated more harshly because they are members of racial minority groups. Thus far, however, race and sex discrimination claims by people accused of workplace harassment have not had much success.

Alternatively, the term "due process" may be shorthand for general concerns about fairness to the accused and the principle that any response be proportionate to the harms. Not every instance of sexual misconduct, harassment, or assault is equally severe, and a zero-tolerance attitude could have perverse effects. Sometimes victims do not want to see their harassers become pariahs; they may just want the harassment to stop or the harasser to offer a meaningful apology. If victims believe the results of a harassment complaint will be draconian — shutting the harasser out of all future job opportunities — they may not come forward at all. Or they may not come forward until the misconduct becomes so severe that there is no other choice.

This puts prospective employers in a difficult situation. Perfect fairness is impossible in a world of imperfect information. Like the rest of us, employers must do their best to evaluate the evidence they can gather, respond proportionately, and make a decision that best balances fairness to the accused against the imperative that the workplace be safe and inclusive.

JC

Jessica A. Clarke is an Associate Professor of Law at the University of Minnesota Law School.