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3 Lessons Employers Can Learn From Bill O'Reilly's Ouster

By **Vin Gurrieri**

Law360, New York (April 20, 2017, 8:46 PM EDT) -- Bill O'Reilly's well-publicized departure from Fox News on Wednesday is a textbook example of why businesses should act quickly and decisively to address sexual harassment claims, even if they are against star employees, and should not expect confidential settlements to make the problem go away, attorneys say.

O'Reilly's exit, which was confirmed by Fox News' parent company 21st Century Fox, came weeks after The New York Times reported the network and O'Reilly himself have paid out at least \$13 million in settlements with five women who complained of sexual harassment and other inappropriate behavior by the anchor.

Since the report, dozens of advertisers reportedly cut ties with O'Reilly's program, "The O'Reilly Factor," and 21st Century Fox hired an outside law firm to look into at least one allegation against the longtime newscaster, much the way the company did before last summer's departure of chairman and CEO Roger Ailes, who was caught up in his own sexual harassment scandal.

Both O'Reilly and Ailes have continuously denied the allegations.

Jay Holland, chair of Joseph Greenwald & Laake PA's labor, employment and qui tam whistleblower practice, said the \$13 million in reported settlements for O'Reilly's accusers was "more than enough [for 21st Century Fox] to say enough is enough," but noted the company made the decision only after determining that the financial benefit of keeping O'Reilly no longer outweighed the cost.

While the events that played out at Fox involved specific facts and personalities that may not necessarily translate to every business, attorneys say Fox's handling of the situation offers clear examples of what not to do in addressing harassment claims.

Here, Law360 looks at three lessons employers can learn from the controversial pundit's exit from Fox.

Resist Urge To Treat Star Employees Differently

One of the elements of the saga involving O'Reilly and Ailes was the sheer volume of claims made against them. Dozens of women whose careers at Fox spanned decades came forward either publicly or through the company's internal complaint system to lodge claims that they had been harassed.

Workplace harassment can run the gamut of requests for sexual favors to inappropriate behavior like sexual banter, with the claims against O'Reilly seemingly falling under the latter category.

Joseph Santoro, co-leader of Gunster's labor and employment practice, said businesses "have an obligation to not tolerate" that sort of behavior, but that they often encounter difficulty when trying to address it if the person accused is in a position of power or has an outsized economic impact on the organization.

"If the allegations [against O'Reilly] are true, it is a textbook example of the problems associated with having someone within a company that is so important and powerful that the company has trouble addressing these types of issues," Santoro said. "Companies must enforce their rules regardless of who it is that's being accused."

When faced with disciplining a star employee, companies sometimes make the mistake of opting to tolerate the behavior in order to protect the financial side of their business, which Santoro says can be shortsighted.

"Those are the types of decisions that lead to punitive damages in a case because the company is making a choice that their economic interest is more important [than a harassment-free workplace]," Santoro said.

Michael Delikat, leader of Orrick Herrington & Sutcliffe LLP's global employment law practice, believes Fox "will be paying a lot in the future for claims that may not have merit" against O'Reilly, Ailes or others because it didn't properly address the women's claims when they first arose.

Drawing on his decades of experience as an employment lawyer, Delikat added that it is rare for an organization like Fox to keep a person who has been accused of harassment multiple times, and that the situation with Fox and O'Reilly is an outlier since most companies have either a zero-tolerance or one-strike policy in place.

"This will go down in the annals as a textbook case study in how not to handle internal investigations," Delikat said.

Speaking generally about best practices for employers dealing with repeat sexual harassment complaints about an employee, Michael Marra of Fisher Phillips LLP said companies need to make sure they give each individual complaint adequate attention and not rush to judgment just based on sheer volume.

"You want to make sure that complaints are getting [a] proper investigation by proper personnel that are free of bias," Marra said. "How [a company] handles [such complaints] will become part of the record to the extent that litigation pops up in those or future matters."

Corporate Culture Starts At The Top

One of the key elements in O'Reilly's situation that may have contributed to his behavior, attorneys say, was the example that was set by his longtime boss Ailes, whose own miscues may have given others at the company the green light to behave in kind.

"In Fox's case, I think it has something to do with who was running it until recently. It would have been pretty sanctimonious for Ailes to ... tell O'Reilly, 'You're out,' when everyone knew [Ailes] was chasing anything that moved in that organization," Delikat said.

Holland offered a similar assessment, saying the corporate culture at Fox was established by Ailes

and that other companies that watched the Fox saga play out should be mindful of the example their leaders set.

"What he was allowed to get away with trickled down to people like O'Reilly," Holland said. "If the leader can get away with [inappropriate behavior], then so can [others]. That's not the type of message a good employer wants to send."

For employers, a key to not tripping over the same landmines as Fox could be as simple as holding corporate leaders to account for their actions and making sure they set a clear example for the rest of the organization to follow.

Attorneys who spoke with Law360 suggested that employers, as many already do, put policies in place that send a clear message throughout an organization that workplace harassment won't be tolerated and that rules will be enforced.

One of Fox's shortcomings was that no such policy existed and that actions by the company leadership's may have actually encouraged harassing behavior to take place, leaving the company scrambling to now fix its error.

"Fox is [now] attempting to make a clear statement that no matter how high up you are or how profitable you are to the organization, workplace norms [that] harassment isn't [allowed] will be enforced," Delikat said.

Settlements May Not Be A Cure-All

The New York Times' report was not the first indication that O'Reilly had been accused of harassing women, with allegations popping up in various court documents, including a lawsuit filed last year by former TV personality Andrea Tantaros.

But the newspaper's account shed light on details surrounding earlier claims, which attorneys said may have made it progressively more expensive for Fox to settle, which it likely sought to do to avoid collateral damage to its business and reputation.

"Why does a company pay up in big numbers in confidential settlements? It's to keep [the allegations] out of the public eye," Delikat said, noting that the incentive to offer those hefty settlements dissipates as the claims become public.

If a sense exists that a person like O'Reilly has a history of harassment, Delikat said it enhances the value of future claims, where accusers could claim that the organization itself knew that a pattern or practice of harassment existed and failed to take adequate measures to address the problem.

"When you start getting to the second, third or fourth [settlement], even though they were confidential, the word is out where maybe it's not just a person trying to take advantage of a situation. It raises the issue that there might be some merit [to the allegations]," Delikat said.

A lesson for companies watching the Fox saga is to make sure that they act fast when a pattern becomes apparent with a particular employee.

By having allegations against any particular individual or the company as a whole pile up, Holland said it places the company "behind the eight ball" when it comes to future allegations and creates a perception that a company is incapable of conducting an trustworthy internal investigation.

"Over the years, Fox did nothing but pay out money. In successive cases, that puts Fox in a vulnerable and precarious position where each successive claim [the company] has to settle for higher amounts," Holland said, noting that the amounts Fox was reported to have paid for single claims "are extraordinarily rare."

From a legal perspective, Holland said it's always better for employers to address issues right away rather than waiting, saying that putting off taking action is itself a violation of the law.

"It makes the case for subsequent victims that makes it easier for them to pursue claims," Holland said.

--Editing by Philip Shea and Jill Coffey.

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