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Considerations for Financial Services Employers as #MeToo Reaches Wall Street

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As has been reported by the New York Times, NBC, and other outlets, asset-management firm TCW is defending a lawsuit filed by a former fund manager, Sara Tirschwell, charging the firm with gender discrimination and retaliation, among other allegations. Ms. Tirschwell's lawsuit has received media attention not only because of the substantial damages that she demands (in excess of $30 million), but also—and perhaps, principally—because the suit has been characterized as Wall Street's first public brush with the #MeToo movement.

The basic contours of the dispute are familiar. TCW maintains that it terminated Ms. Tirschwell for performance reasons. According to TCW, Tirschwell committed multiple, serious compliance violations, and also was unable to generate the target level of investment in her distressed debt strategy fund. Ms. Tirschwell, for her part, claims that TCW's stated reasons for her termination were pretextual. She contends that her submission of a formal complaint of sexual harassment against her supervisor, whom she had dated for a time before joining TCW, was the true reason for her termination. In Ms. Tirschwell's view, TCW's termination of her employment only nine days after she submitted her complaint to HR was no coincidence.

Despite the familiar outlines of the dispute, Ms. Tirschwell's claims present a significant wrinkle—one that makes this case particularly worth following for employers in the financial services sector. Ms. Tirschwell alleges that her supervisor and former paramour leveraged his support of her fund into a renewal of their sexual relationship, and that he withdrew this support when Ms. Tirschwell ultimately refused to continue the relationship—ostensibly dooming the fund.

Hence, while the case highlights considerations for management that cut across industries, these issues receive a critical overlay in the Wall Street context of this dispute: how might management's decision-making be impacted where the alleged modality of harassment or retaliation implicates return on investment?

At base, the Tirschwell case serves as a reminder that employers must proceed cautiously when an employee otherwise identified for probable termination (or any other adverse action) for legitimate reasons, as was Ms. Tirschwell by TCW's account, complains internally—whether to HR, a supervisor, or otherwise—of harassment. Any post-grievance adverse action might later be cast as retaliatory—and might be *presumed* as such if it follows immediately on the heels of a grievance, as in Ms. Tirschwell's case. Before taking adverse action, employers should *always* consider whether an employee's issues have been documented and communicated sufficiently, and whether employees who engaged in comparable conduct faced similar consequences in keeping with firm policies. This sort of analysis, though, becomes *even more* critical with the complicating factor of a harassment grievance added to the mix. Further, even where there exists an unquestionable record of the employee's transgressions, if circumstances allow, an employer should ideally complete a thorough investigation of the employee's allegations before going forward with the adverse employment action.

Even if the firm has done everything right, though, an employee still may accuse the firm of retaliation. Now, the firm’s principal question is whether to settle quietly even if it believes there is no liability, or dig in and defend its actions in court. Much of the time, firms have chosen the first option, valuing discretion above all else. But that calculus already may be in the process of changing, at least in some cases, as states, such as New York and New Jersey, chip away at nondisclosure provisions in settlement agreements in response to the #MeToo movement. How might that calculus change further where, as with Ms. Tirschwell’s claims, the allegations would tend to engender pressure—and, potentially, additional suits—from the firm’s clients and/or stakeholders? Debunking allegations of financial malfeasance in the context of litigation with an employee would not necessarily *preclude*, as a matter of law, investors and stakeholders from levying similar allegations in a separate suit. Nevertheless, as a matter of optics, a firm might choose to contest allegations like Ms. Tirschwell’s vehemently, in a public forum, so as to assure its investors and stakeholders regarding its stewardship of their assets—and, in so doing, perhaps deter a pile-on of legal action.

We have also recently seen shareholder suits alleging a breach of fiduciary duty arising from the way that companies have *responded* to employee accusations of sexual harassment. The Tirschwell case, though, seems unique in that, according to Ms. Tirschwell, the alleged harassment/retaliation *itself* placed stakeholders in financial peril. Depending on the outcome of the dispute between Ms. Tirschwell and TCW, might would-be plaintiffs claiming harassment/retaliation be inclined to generate leverage by suggesting, like Ms. Tirschwell’s allegations, that the alleged misbehavior exposed investors and stakeholders? Though not every plaintiff could draw a line between alleged harassment and investor well-being as straight as the one Ms. Tirschwell seems to have drawn, one assumes that creative arguments could link the two together, in some way, in many cases.

The Tirschwell case should serve as a reminder to employers to be vigilant and proactive when it comes to harassment: create robust policies and procedures prohibiting harassment and for handling complaints, take all complaints seriously, and take prompt action when harassment policies are violated.