

Corporate governance

Boards must be held accountable for sexual harassment scandals

Toxic corporate culture drags down morale and can be a bombshell waiting to explode

JULIE GOLDSMITH REISER

When banks harm customers and preventable wildfires rage, corporate boards are remade and top executives are fired. Since 2016, when US regulators revealed that Wells Fargo had opened millions of unauthorised accounts, nine of 14 members of the bank's board of directors have stepped down, and the chief executive has changed twice. Pacific Gas & Electric, blamed for sparking wildfires in California, has brought in a new CEO and 10 new directors, or 77 per cent of its board.

One might expect companies reeling from sexual harassment scandals, brought to light by the #MeToo movement, to hold their corporate directors similarly accountable.

As a lawyer who represents investors in lawsuits against corporate boards, I can tell you that the reality is very different when it comes to cases that involved allegations of pervasive sexual harassment, such as the ongoing litigation against Alphabet. Directors of companies embroiled in #MeToo-related crises have largely avoided accountability.

Take, for example, what used to be known as 21st Century Fox. In the first year following reports of rampant sexual harassment by news chief Roger Ailes and anchor Bill O'Reilly, not a single member of the company's board of directors stepped down. Even today, Fox has just one woman on its board.

There has also been no turnover on the board of directors at National Beverage Corp, even though billionaire CEO Nick Caporella has faced lawsuits alleging sexual misconduct (which he denies). Likewise, the Martin Agency's creative director, Joe Alexander, left his firm suddenly in 2017 after multiple allegations of improper behaviour (which he denies). Although its parent company, Interpublic Group Cos Inc, installed female leadership at the Martin Agency, IPG's board remained the same.

Boards may feel comfortable giving themselves a pass because the top court in Delaware, where most US companies are incorporated, ruled in the 2000 case of *White v Panic* that an all-male corporate board's decision to settle eight sexual harassment lawsuits with company funds, and to take no disciplinary action against the CEO, were "routine business decisions in the interest of the corporation".

Companies have successfully invoked this ruling for years. As far as I know, the recent ruling that the board of directors of Wynn Resorts may face liability for failing to adequately investigate or act on allegations of sexual harassment by company founder Steve Wynn, is the sole recent exception. (Full disclosure: I represent shareholders who recently settled with Wynn Resorts. He denies misconduct.)

The Delaware courts are more willing to hold boards of directors

to account when public health and safety are jeopardised. Recently, judges there allowed a lawsuit to go ahead that alleges Clovis Oncology's board "ignored" red flags about safety in clinical trials. They also revived a lawsuit against ice-cream maker Blue Bell's corporate board over a listeria scandal.

It is time to force boards to respond to sexual harassment scandals that trigger public safety concerns within their own workforce. *White v Panic* should be overturned, so it cannot be used to shield boards that enable sexual predators.

This is not just the right thing to do. It makes financial sense. A toxic corporate culture drags down workforce morale and can be a bombshell waiting to explode. A company hit by scandal suffers damage to both its reputation and stock price, and may struggle with a leadership transition.

Boards should stop hiding behind an outdated legal decision to dodge responsibility for preventing sexual harassment and discrimination. Enabling harassers is a breach of directors' fiduciary duties. Shareholders ought to insist on the removal of those who are complicit.

The writer is a partner at Cohen Milstein Sellers & Toll