Gender Bias, #MeToo, and Higher Ed
ACCT’s general counsel and his colleague, Catherine E. Walters, offer insights on why boards must address the #MeToo movement and gender bias issues.

By Ira M. Shepard and Catherine E. Walters

SEXUAL HARASSMENT AND SEXUAL violence on or related to campuses is not a new issue for higher education. Indeed, the #MeToo movement, which has morphed into an internet and cultural phenomenon since October 2017, was helped along in large part by students and others related to higher education. While empowering victims to speak out, the #MeToo movement has also forced us, as a society, to look directly into the abyss of sexual harassment, violence, and abuse that is so much a part of our culture. This includes a new, laser-like focus on sexual harassment and gender equity issues in the workplace, including the higher education workplace.

Higher education institutions serve both as workplaces and as learning, recreational, and often living spaces for students and others. Broad discussion supported by the #MeToo movement has helped to expose the extent to which sexual harassment and violence occurs on campuses. If embraced, the #MeToo movement will aid in the resolution of sex-based harassment and other complaints by shining light into previously dark places. At the same time, this spotlight on unacceptable cultural norms may result in a more gender-neutral atmosphere, both on campus and in the workplace. Of course, this will also bring some new challenges to administrators as they work through related issues. Recognizing these challenges, as discussed below, is the first step toward positive resolution of the underlying issues.

“The problem? The problem is that, for every rock I earn doing the same work as you, you earn two rocks.”
#MeToo also has brought attention to issues of equality and fairness beyond sexual harassment and assault. In the context of advancing gender equality, now is a prime time to look at gender pay bias, which affects higher education as much as it affects all employers, public and private. Pay bias issues are being examined by state and local legislatures with new zeal, and first-ever requirements, including bans on applicant salary histories are popping up in numerous states, counties, and cities. State and local legislatures are also experimenting with ways to make it easier to pursue class and/or collective gender pay bias legal actions so that the problem can be addressed by the courts. Advance, voluntary, and critical self-analysis by your institution, as discussed in this article, may be a way to correct the problem and head off legal challenges.

Both of these highly publicized and difficult issues — harassment and violence, and gender-based pay bias — are ones which community colleges and their governing boards cannot ignore. Our goal in writing this article is to provide knowledge of the latest developments so that board members can ask intelligent questions and raise these current issues with their administrations. This is the best way to improve proper handling, diminution, and, hopefully, eradication of both of these problems.

**Role of Title IX Mandate**

The Obama Administration’s edict that it is the college’s or university’s absolute obligation under Title IX to “resolve” all complaints of sexual harassment and violence on or related to campus brought this issue into the light. While the Title IX mandate was highly controversial, it resulted in most institutions making improvements in professionalizing their abilities to investigate and address this prevalent problem. While sexual harassment and violence continues (whether among students, between faculty and students, among staff, between students and staff, or any other permutation), observers uniformly conclude that mechanisms now are in place at virtually all institutions that can be used in an attempt to investigate and address these problems.

Although it has reconsidered past guidance on these issues, the Trump Administration has not actually altered the consensus best practice of most higher education institutions to continue their efforts to strengthen policies, educate constituencies, and investigate and resolve sexual harassment and violence complaints with a goal of coralling and reducing the prevalence and recurrence of these issues.

**Role of #MeToo**

Enter the Me Too movement (or #MeToo, with local alternatives in multiple languages), which became a viral phenomenon in October 2017. #MeToo is a social media hashtag (#) campaign that highlights the prevalence of sexual harassment and assault, violence, and abuse in our society, especially in the workplace. Catalyzed by allegations from several high-profile women that film producer Harvey Weinstein had assaulted or harassed them over the course of many years while numerous entertainment industry executives, aware of Weinstein’s criminal abuses, either enabled and covered them up or looked the other way, women and men alike began to share their own experiences of sexual harassment, assault, and abuse in the workplace via social media, tagging these stories with #MeToo. New stories were unveiled and discussed in the media for months, revealing the broad scope of sexually abusive behaviors in an equally broad range of workplaces in all sectors.

Journalist Ronan Farrow and The New Yorker, which published his bombshell report about Weinstein, carefully vetted information, including surveillance footage of Weinstein that supported alleged victims’ accusations before reporting the story. (Farrow and The New Yorker were awarded the Pulitzer Prize for public service in April 2018.) Even so, a great number of other cases have no such supporting evidence, leaving both victims and perpetrators vulnerable to injustice.

**Victims of Circumstantial Evidence**

One of the many Achilles heels impacting higher education sexual harassment and violence investigations is the absence-of-witness problem. The events being investigated usually occur when the accuser and the accused are alone, out of view of any third-party witnesses. The lack of witnesses, as well as the desire of potential witnesses not to be involved in such matters, often stymies investigators. As a result, outcomes are often inconclusive, resulting in the perception that the investigation was not fair, that the alleged victim has been victimized all over again, or that the institution is attempting to sweep the matter under the rug. In essence, the attempt to accord due process to both the accuser and the accused often results in
outcomes perceived by the accuser to be biased in favor of the accused. The #MeToo movement has served to normalize the reporting of sexual harassment and sexual violence, reducing the stigma often experienced by victims in the past. It is anticipated that this shift in public consciousness will increase reporting of these events when they transpire, rather than, as in many of the most public cases, years and even decades later. In this regard, the movement should be embraced by investigators as a source of potential leads and witnesses. Handled properly, with professionalism, investigators may be able to take advantage of expanded assertions and supporting affirmations to develop leads and identify witnesses who may not have been available to them before #MeToo.

Of course, #MeToo is not without serious challenges for higher education. For example, a social media barrage against a specific professor or student alleging rumors of harassment or violence with no corresponding actual complaints can be both damaging and damning. A full blown “name and shame” approach can destroy reputations, careers, and relationships, regardless of whether a complaint is filed or an investigation is undertaken. Which begs the question: when — if at all — in such circumstances is the institution “deemed” to be on notice of a problem it is required to investigate, even if no formal or informal complaint has been lodged in accordance with its procedures? This challenge, among others, should be discussed by administrators and addressed, possibly even in the complaint procedures. No one-size-fits-all approach is available for this and other difficult issues. However, this should not stop trustees from asking presidents whether appropriate policies, unique to their own campus, are being developed to deal with these situations.

Commentators uniformly say that shining a light on a problem is the first step toward developing a solution. The #MeToo movement shines a blazing light on the prevalence of sexual harassment, violence, and abuse in a culture that has allowed such behaviors to go unchecked, with a goal of changing that culture, whether in a workplace or an educational institution. While there are challenges, trustees should nevertheless ask whether their presidents are exploring ways to address and potentially embrace the movement so that complaints can be quickly identified, addressed, and resolved. The legal maxim “Justice delayed is justice denied” highlights that the failure to identify, address, and resolve issues as they arise hurts the alleged victim, the alleged perpetrator, and more broadly, an institution’s culture and reputation.

**Gender Bias Pay Issues and Higher Education**

Unequal pay for “similar” work on the basis of sex is the centerpiece of increasing activity in state and local legislatures, even in the absence of federal activity in the sex discrimination area. Pay inequality is widespread throughout the United States, in both the public and private sectors. Although the pay gap appears to have narrowed in the last four decades, it persists and has remained stable. According to the Pew Research Center, women earned 82 percent of what men earned in 2017, based on an analysis of median hourly earnings of both full- and part-time workers in the United States. While commentators conclude that the pay gap is less glaring in higher education than in private industry, pay inequality is still a highly publicized area of concern that is subject to increasing regulation by state and local governments. Higher education will not be spared from the increase in collective and class-action litigation that alleges gender bias in pay for similar jobs.

The applicable federal law, the Equal Pay Act, mandates that the same salary be paid to all employees for doing the same job, regardless of gender. In other words, jobs of similar skills, education, duties, and responsibilities require equal pay, with some exceptions, irrespective of whether job titles are the same. Most states also have state equal pay laws; however, some states and localities are expanding the analysis to focus on the arguably broader issue of “pay equity,” which requires equal pay for jobs that are substantially similar, that is jobs where employees are engaged in substantially similar work based on a composite of skill, effort, and responsibility, performed under the same or similar working conditions, regardless of location. Expansive pay equity laws have recently been passed by California, Massachusetts, Maryland, and New York.

Another type of law aimed at achieving equal pay for women (and minorities) includes the salary history ban. Since 2017, at least six states, including California, Delaware, Massachusetts, New Jersey, New York, and Oregon, along with the Commonwealth of Puerto Rico, have passed statewide bans on the gathering of applicant salary history, which, they
conclude, perpetuates past gender- and race-based salary discrimination. Numerous municipalities, including some in states without a statewide ban, have added themselves to the list by, for example, banning the collection of salary history on employment applications. Additional states and municipalities have legislation under consideration, and it is anticipated that the list of states and municipalities adopting salary history bans will increase drastically throughout 2018 unless new federal legislation covering a broad array of jurisdictions is put in place. It should be noted that while some of these bans apply to all employers within a jurisdiction, others may be limited to specific sizes and types of employers, such as private employers with more than 20 employees within a municipality, city employers, or state government contractors, etc. Regardless, higher education employers are advised to stay abreast of legislation in the states and municipalities in which they engage in recruiting and hiring activities.

This recent burst of legislative activity is designed to give everyone in the workplace the opportunity to receive market-level wages rather than perpetuating historically unequal wages based on an applicant’s sex or race. The goal is to ensure that by removing historic barriers to pay equality, employees who perform the same or substantially similar work will receive comparable wages at market rates. And of course, legislators are quick to point out that these mandates should be law because they are consistent with human resources industry best practices.

This leads us to a potential HR best practice that could prove to be an antidote to these problems: if your college’s human resources staff is concerned that pay inequality may be an issue at your institution, then the best course of action is to conduct an assessment. Performing a voluntary human resources self-analysis or audit of your salary structure by job category and gender may be a good way to identify and resolve potential issues. At a minimum, doing so reflects good faith, and the audit can be used to defend against a class- or collective-action lawsuit that alleges such discrimination. Assuming that any pay disparities identified via the audit process are immediately corrected, such an audit would also serve as a strong defense against claims that potential gender pay inequities were willful. If the results reflect evidence of a problem, then a voluntary correction, including payment of back wages, should be considered.

The Board’s Role

Understanding that trustees do not create administrative procedures or actual policies but rather set direction in the best fiduciary interests of the institution is crucial. In this regard, the board should proactively ask its institution’s president whether the administration is addressing these issues and help the institution to follow through by providing ample investigatory, human, and monetary resources to facilitate the ideas suggested above. (For a detailed discussion on what boards need to know about the movement, see Trustee Talk on p. 30.) All told, trustee involvement should provide a helpful start in addressing and eradicating concerns with regard to sexual harassment, sexual violence and gender-based pay discrimination at your institution.

Note: This article is provided for informational purposes and is not intended to serve as legal advice. For formal legal advice about these and related matters, consult your college’s legal counsel.

Ira Michael Shepard is Of Counsel to the law firm of Saul Ewing Arnstein & Lehr LLP, in Washington, D.C., and ACCT’s general counsel. Catherine E. Walters is a partner in Saul Ewing Arnstein & Lehr LLP, resident in the firm’s Harrisburg, Pennsylvania, office.