

Investors Say 'Us Too' In Wake Of Sexual Misconduct Claims

By Rachel Graf

Law360 (February 1, 2019, 4:54 PM EST) -- Reports of sexual assaults by the former CEO of Wynn Resorts Ltd., inappropriate advances by the past head of CBS Corp. and sexist remarks overseen by the founder of Papa John's International Inc. all have one alleged victim in common: company shareholders.

During the past year, investors have filed lawsuits involving sexual misconduct allegations against the boards of major companies including Lululemon Athletica Inc., Nike Inc. and Google parent Alphabet Inc. These lawsuits typically allege companies inflated their share price by concealing the alleged misconduct or accuse companies' boards of shirking their oversight responsibilities.

Though critics say shareholder litigation is the wrong vehicle for these claims, others argue that securities fraud is securities fraud no matter the context.

"There's no exclusion for certain types of fraud and certain types of breaches that should be shuttled or swept under the rug," said Selendy & Gay PLLC partner Lena Konanova. "These plaintiffs are entitled to their day in court on their meritorious claims just like other plaintiffs."

Investor lawsuits involving allegations of sexual misconduct have been around for decades. A shareholder of ICN Pharmaceuticals Inc., which became Valeant Pharmaceuticals, claimed in 1998 its CEO Milan Panic and board members breached their fiduciary duties when Panic allegedly engaged in sexual harassment.

The lawsuit was dismissed, but many more have been filed in recent years as the #MeToo movement has gained momentum. The reckoning began in late 2017 with reports that producer Harvey Weinstein had sexually harassed many younger women. Other allegations against prominent public figures followed, and with them came shareholder lawsuits.

In 2017 shareholders brought allegations involving sexual misconduct against the boards of Signet, Fox and Liberty Tax, followed by allegations in 2018 against companies including CBS, Papa John's, the maker of LaCroix sparkling water and the boards of Wynn Resorts, Lululemon and Nike. Already in 2019, Alphabet has been hit with two shareholder derivative suits.

Just four of these types of lawsuits seem to have been filed between 1998 and 2016, according to Daniel Hemel and Dorothy Lund's paper "Sexual Harassment and Corporate Law," published in the Columbia Law Review last year.

One reason for the increase could be greater media coverage of the allegations. The bigger the spotlight on improper behavior, the greater likelihood the public reacts and a company's stock declines.

"Certainly increased media and public focus on behavior could lead to a greater impact on stock price," Konanov said. "And that could certainly increase the potential damages that shareholders are claiming result from breaches."

The #MeToo movement has also ushered in a greater understanding of the ways allegations of sexual misconduct can harm companies and their shareholders, said Lund, a lecturer at University of Chicago Law School.

Alphabet allegedly used company funds to pay a \$90 million severance package to an executive accused of harassment, 21st Century Fox's bid to acquire Sky PLC once seemed threatened by scandals at Fox News, and the Weinstein Co. filed for bankruptcy last year after the allegations against its co-founder surfaced.

More broadly, companies might have to contend with litigation expenses, reputational damage and difficulties hiring and retaining talent.

"A link between these allegations and horrible outcomes — not just for victims but for shareholders — became particularly clear," Lund said.

Rebecca Boon, senior counsel at Bernstein Litowitz Berger & Grossmann LLP, said the pace of these filings will only increase following a \$90 million settlement she helped investors secure in their derivative suit against Fox. The agreement included the creation of a first-of-its-kind watchdog to oversee Fox's board of directors, the Fox News Workplace Professionalism and Inclusion Council.

"[The settlement] is a good example of why corporate boards of directors and CEOs need to pay attention to these issues, because there will be real monetary and nonmonetary ramifications if they don't," Boon said.

The future of these claims will of course hinge on court rulings as well. So far, courts have given both plaintiffs and defendants reasons to be optimistic.

In November, U.S. District Judge Colleen McMahon in New York refused to dismiss investors' allegations that Signet Jewelers falsely stated it was committed to a harassment-free workplace, calling the litigation a "garden variety securities fraud suit." Judge McMahon rejected defendants' argument that a company code of conduct can't form the basis of a securities fraud claim, saying these types of representations "are actionable where they are directly at odds with the conduct alleged in the complaint."

The Ninth Circuit, however, declined two years ago to revive an investor lawsuit involving a supposed failure by Hewlett-Packard Co.'s former CEO Mark Hurd to disclose an inappropriate relationship with a contractor. The investors failed to point to any material misrepresentations, the appellate court said.

Plaintiffs attorneys argue their claims shouldn't be discounted just because they might seem unconventional. The standard for securities fraud litigation and shareholder derivative litigation is unchanged, and Judge McMahon's recent Signet opinion shows that these lawsuits meet that standard,

said Konanova.

Even if investor lawsuits can't eradicate sexual harassment by themselves, there's no harm in addressing the issue from multiple angles, Lund said.

Boon echoed this sentiment. "Shareholders have power, and when they can use that power to try to implement social change, it's really an amazing thing," she said.

But critics argue these types of lawsuits could actually make workplaces less safe for employees. Companies hoping to avoid a lawsuit about supposed misrepresentations in their policies and procedures could have an incentive to simply write vague policies, attorneys said.

A better way to change a company's culture is for shareholders to vote out ineffective board members, said Ronald Colombo, a professor at Hofstra University's Maurice A. Deane School of Law.

"If someone's being harassed and there's a #MeToo issue going on, we have other laws that deal with that," Colombo said.

--Editing by Brian Baresch and Alanna Weissman.