Organisational Culture and Conduct

The role and expectations of bystander employees: the missing piece of the puzzle?

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Setting the scene…

Scenario 1: An employee witnesses a colleague being bullied by her manager.

What, if anything, should the observing employee do at this moment? Should they intervene in some way to help the 'target'? Are we confident that our employees would know how (and how they would be expected) to respond; and be aware of the potential alternative intervention techniques?

Scenario 2: An employee observes a colleague jumping the barriers at the train station.

A 'victimless'[1] incident. Same questions. Same answers?

Scenario 3: An employee overhears a colleague (X) whispering to another colleague (Y) that he (X) has just inadvertently emailed some sensitive client-related information to an unintended external recipient. X asks Y to "keep this between us" and Y agrees to do so.

Here, a client's interests are at stake. How should the employee respond? Should she intervene?

Introduction

This article explores whether culture-oriented organisations may be missing an important trick by effectively overlooking the potential real-time interventional role of employees who observe a colleague's inappropriate behaviour – the so-called employee bystander. In the context of this article, 'employee bystander' means a member of staff who: (i) observes inappropriate (business or non-business-related) behaviour within the workplace – such as: sexual or racial harassment, bullying, intimidation or exclusion; or conduct which would improperly disadvantage a client; or secure some other form of untoward benefit, to the corresponding detriment of a client; or (ii) happens to witness integrity/reputation-related misconduct by a colleague outside of the office.

While much attention continues to be paid to the implementation and maintenance of effective whistleblowing and speak-up frameworks (which tend to focus predominantly on reporting post-event, coupled with safeguarding the 'reporter' from any adverse consequences), and to the importance of a creating a 'psychologically safe' environment in the workplace, there has to date been relatively little focus on the *real-time interventional role* of the employee bystander. For example, in a scenario in which an employee observes 'toxic' conduct directed at a colleague by a fellow employee, such as bullying, harassment or racism, should the witnessing employee have an obligation to intervene on behalf of the 'victim' (in addition to an expectation that they subsequently report the incident)?

Interestingly, there has been even less focus on the role of the employee bystander in misconduct situations involving a perpetrator colleague, when there is no human 'victim' (such as in scenario 2 above); or if a client's best interests are at risk of being compromised (scenario 3).

In our experience, many organisations' workplace culture frameworks (including, equal opportunities and anti-harassment policies) do not contemplate – whether sufficiently clearly and practically, or at all – active[2] bystander intervention in such invariably tricky situations, in which employees may find themselves, as witnesses.

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Contextual backdrop

A series of recent developments – most prominently, the #MeToo and Black Lives Matter (BLM) movements – have prompted a marked shift of focus onto the role and expectations of the employee bystander.

The UK financial services conduct regulator, the Financial Conduct Authority (FCA), has over recent years broadened its focus onto 'non-financial misconduct' (for example, sexual harassment or bullying – whether occurring inside or outside of the workplace) – given the perceived potential impact on an organisation's culture and on the 'fitness and propriety' of implicated senior level individuals:

"A culture where non-financial misconduct is tolerated is not one which encourages people to speak up and be heard, or to challenge decisions. Tolerance of this sort of misconduct would be a clear example of a driver of an unhealthy culture."[3]

In essence, any form of misconduct that calls into question a regulated or licensed individual's integrity or reputation is likely to be relevant, in this context. For example, the FCA has banned several individuals[4] who were found to have engaged in inappropriate (out-of-work) conduct, such as fraud or indecency[5].

While there is no regulatory equivalent in the US – there is no US analogue to the FCA's regulation of non-financial misconduct at financial institutions – in the current broader societal climate, inappropriate behaviour, including outside of the workplace, poses potentially significant and far-reaching reputational consequences for both those directly involved and those (individuals or institutions) who may be deemed complicit in such conduct for failure to prevent it or to speak out.

The employee bystander could therefore have an important role to play in 'calling out' any relevant non-financial (and, indeed, business-related) misconduct of colleagues – to ensure that such misconduct is brought to the attention of their firm, where appropriate, and robustly addressed.

Most financial institutions and many corporates operate whistleblowing and speak-up policies, procedures and protocols, that both encourage staff to raise 'reportable concerns'[6] and seek to safeguard staff from any detrimental consequences of doing so. Under these arrangements, employees are commonly encouraged to report any in-scope incidents of which they become aware, with a provision for the whistle-blower to remain anonymous, if desired. In tandem, firms will often advocate and aspire to provide a 'psychologically safe' working environment, in which employees should have no qualms or concerns in highlighting, challenging or escalating issues. *"Psychological safety is a characteristic of a healthy culture."[7]*

Additionally and more generally, many firms will have codes of ethics / conduct and conflicts of interest policies, under which employees are generally encouraged to 'do the right thing' – which will often essentially include, amongst other things, subordinating self-interest to the 'greater institutional (or client) good'.

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Bystander intervention

An introduction

In the wake of #MeToo and BLM, and as evidenced by the burgeoning volume of literature and studies published over recent months, there appears to be a growing appreciation that – alongside diversity and inclusion and the avoidance of unconscious bias – bystander intervention training and awareness can represent one of the most effective ways to help eradicate workplace misconduct:

"With leadership support, bystander intervention training could be a game changer in the workplace."[8]

Put another way, bystander apathy or inaction often serves to perpetuate issues, such as toxic cultures and misconduct within; and thereby potentially undermine other aspects of an organisation's culture strategy. Furthermore, research has shown that a failure to intervene can also have a serious negative effect on the mental health of the bystander, and on workplace morale and productivity.

Once used primarily on university campuses and in the military, bystander intervention training is now gaining momentum elsewhere – given its perceived value as an integral part of an effective anti-harassment / misconduct strategy; and a key 'empowerer' and engagement tool for the workforce.

"By empowering employees and managers with the skills they need to speak up against toxic behaviour and help prevent future incidents, organisations can take a powerful step toward building safer, more inclusive cultures – the kind of cultures people want to work in … As part of a holistic approach to improving workplace culture, bystander intervention training can be vital to increasing employee engagement and creating a harassment-free workplace that promotes diversity, inclusion and allyship."[10]

While the above citation specifically relates to harassment, bystander intervention can be regarded, by logical extension, as equally significant in the context of other forms of misconduct, such as exclusion, bullying and racism.

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Common intervention techniques

Bystander intervention techniques typically include:

- ▶ Directing and/or disrupting the situation
- ▶ Confronting
- ▶ Distracting
- ▶ Supporting the target
- ▶ Reporting the incident

A detailed explanation of these techniques is beyond the scope of this article. However, there is a growing body of readily-available literature, which elaborates upon each of these methods.
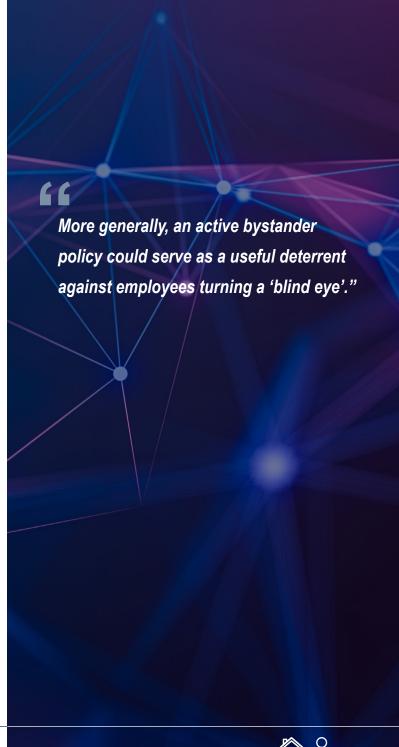
Clearly, no two situations will be the same; and different scenarios will warrant different courses (or variations on a theme). By their very nature, many scenarios will be awkward and/or daunting for the observer. Inevitably, responding to such a scenario will require a large degree of tact and measured judgment.

Any enforcement of an active bystander policy will require careful consideration as to whether it was equitable for the company, in all the circumstances, to treat an employee's failure to actively intervene when witnessing misconduct as a breach of duty or act of misconduct in itself. In practice, it may be that employers only see fit to "enforce" an active bystander policy in limited situations, such as, for example, when an employee's failure to act is so serious in the particular circumstances that it is.

Training and awareness

Where employees are expected to intervene in such situations, it is self-evidently crucial that they are properly trained and equipped with the requisite knowledge, awareness and skills – to ensure that the incident is handled appropriately (both in real-time and subsequently).

For instance, relatable interactive videos (or even situations played out in person by actors) can be powerful and enduring ways in which to raise awareness and provoke thought. In this way, the impact of a bystander's actions (or inaction) in various scenarios can be clearly seen (and felt) by the audience.

> *" More generally, an active bystander policy could serve as a useful deterrent against employees turning a 'blind eye'."*

Bystander intervention where there is no human target

The 'conventional' concept of bystander intervention envisages scenarios in which there is a human target or victim. However, not all misconduct has a human victim, as such – the barrier-jumping colleague, for instance.

Where the observed misconduct is nevertheless of a type that it would (or would likely) be of interest to the perpetrator's employer[11] – for example, if it involves or signals a lack of integrity or improperly disadvantages a client – what, if anything, is expected of the witnessing employee?

In our experience, such scenarios are rarely covered within internal policies or training modules, leaving observing employees with little or no practical guidance – either as to what is expected of them and how they might approach the situation in real-time. Furthermore, the observer employee may often be the only witness in such situations – perhaps triggering a natural inclination to 'turn a blind eye' because no one else is present or watching. It will be important for organisations to set expectations and give guidance as to the type of conduct that should be reported; with possible distinctions to be drawn between work-related conduct, unlawful conduct (including conduct outside of work), conduct that may be directly harmful to the employer, and conduct that may be offensive to the bystander, but is legally protected.

Take another simple illustrative example: In the staff canteen, an employee spots a colleague smuggling a sandwich into his bag without paying. How should the witnessing employee respond? How does the employer expect the witnessing employee to respond? Does the witnessing employee even know how they would be expected to respond?!

In our experience, 'workshopping' and highlighting scenarios of this nature can prove extremely effective at focusing minds, provoking thought and helping to convey corporate expectations. Despite much talk about 'doing the right thing,' **there is often little elaboration as to what that actually means in practice.** For instance, to what extent are employees expected or required to put themselves in potentially tricky personal situations, putting aside their own self-interest or natural inclinations (in wanting to avoid any awkward confrontation)? Is it the "right thing" by me or the 'right thing' by my firm and/or the 'victim'?

In 2020, the FCA introduced the notion of 'tone from within'[12], which *"requires individuals to be clear about how they might respond in a situation and why … and is a pre-cursor to wider corporate change".* It will be interesting to see if and how this concept will be embraced by industry and whether it could usefully be woven into any bystander intervention expectations and training.

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Self-assessment questions

Against this backdrop, employers might consider the following (gently provocative) questions:

1. Do we recognise and appreciate the potentially integral interventional role played by the employee bystander?

   a. If not, how are we nevertheless confident that we do not have a significant lacuna in our culture strategy?

2. Have we focused sufficiently (or at all) on real-time bystander intervention (or has our focus been exclusively / predominantly on the post-event reporting of issues)?

3. Do we effectively convey our expectations of our employees who happen to witness relevant misconduct (**both involving and not involving human 'victims'**) – not only in terms of post-event reporting, **but also** real-time intervention?

   a. Should we explicitly reference these expectations in relevant internal policies/codes?

   b. Would it be helpful to calibrate our expectations in terms of self-interest (and the temptation to turn a 'blind eye') versus the 'greater good'?

   c. Do relevant training materials specifically include tricky bystander-related scenarios (both with and without human 'victims')?

   d. Have we explored the pros and cons of introducing a duty to intervene or report[13] – rather, than having a 'mere' expectation?

4. Do we provide effective (and regularly refreshed) employee training (at all levels) on bystander intervention techniques?

   a. If not, how do we realistically expect our employees to react appropriately?

5. Is Senior Management 'on message' and reinforcing the importance of the role of employee bystanders?

   a. Is this demonstrably reflected – for instance, in management communiques or at town hall meetings?

   b. Are successful interventions celebrated (albeit it on an anonymised basis)?

6. Are our anti-retaliation controls sufficiently robust – so as to positively facilitate and encourage bystander intervention?

   a. Do our employees have confidence in these controls? How do we know?

   b. Are we taking anti-retaliation monitoring sufficiently seriously? Are we utilising all available techniques? How do we know?

7. Is our HR function appropriately trained to advise on whether any disciplinary action against a passive bystander is warranted?

8. How can we best measure and monitor the effectiveness of our bystander intervention efforts?

   a. How do we integrate this information this into our broader culture programme and related governance and oversight?

> " *These self-assessment questions are intended to serve as a practical and thought-provoking starting point for culture-oriented organisations – to help ensure that they are not missing an important 'trick' in the achievement of their cultural aspirations.*"

Concluding remarks

There is growing recognition that active bystander intervention has a significant role to play in the development and maintenance of a strong and healthy corporate culture.

Much of the organisational focus, to date, has been on the post-event reporting of an incident – for example, through whistle-blowing or speak-up arrangements – rather than on the earlier phases of real-time intervention. In consequence, firms' culture frameworks / programmes may lack a key foundational element, which could, in turn, serve to seriously undermine other efforts to instil a strong and healthy corporate culture.

Many (indeed, probably, most) organisations may not be training and equipping their personnel with the necessary skills to navigate such difficult situations in practice and in real-time – in a manner that optimises the chances of properly addressing any underlying issue(s) (and thereby minimising the risk of recurrence).

Based on our work and interactions in this field, it is clear that there is often a mismatch between what employee bystanders are inclined to do[14] and what their employer expects them to do, when they have observed colleague misconduct (whether or not that happens to involve a human 'victim'). This mismatch suggests that there is room for improvement – both in employers' calibration and articulation of their expectations of staff; and in the training of personnel so that employees are properly equipped to know how best to react in the circumstances.

The above self-assessment questions are intended to serve as a practical and thought-provoking starting point for culture-oriented organisations – to help ensure that they are not missing an important 'trick' in the achievement of their cultural aspirations.

Latham & Watkins recently launched the 2nd edition of *'Culture: A Practical Framework for Sustainable Change'* – intended as a decidedly practical resource from which organisations can draw when formulating their own approach to culture change. If you would like to obtain a copy, please contact natasha.kraus@lw.com.

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Endnotes

1   In the sense that there is no human 'target' or 'victim'.

2   Beyond post-event reporting.

3   FCA's third report on its 5 Conduct Questions programme, May 2019.

4   From working in the financial services sector.

5   For example: Jonathan Burrows (fraud) 2014; Mark Horsey (indecency) 2020; and Frank Cochran (indecency) 2020.

6   Or some similar or equivalent 'trigger'.

7   FCA, 2020.

8   Chai R. Feldblum, Co-Chair of the Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace.

9   For example, 'When is a bystander not a bystander? A typology of the roles of bystanders in workplace bullying', Edith Cowan University, Research Online, ECU Publications 2012, Paull, Omari and Standen.

10   Andrew Rawson, Co-Founder, Traliant, 2020.

11   Whether, for example, on account of regulatory concerns or expectations and/or reputational risk consideration.

12   2020 report on the 5 Conduct Questions ('Messages from the engine room').

13   A path which some firms are now following.

14   Perhaps borne out of a sense of self-interest and a desire to avoid a potentially awkward conversation; or a diffusion of responsibility (where the observer assumes that other witnesses will take some action).

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