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What Should Happen When Sexual Harassment Victims Don't File Prompt Complaints? A Court Weighs In

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What Should Happen When Sexual Harassment Victims Don't File Prompt Complaints?

A Court Weighs In

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Christine Hawk alleges that her supervisor subjected her to sexual harassment. She had attended an anti-harassment training seminar and was aware of the company's anti-harassment policy. However, she waited nine months before filing a formal complaint about her harassment with her employer. (She did, however, alert the company earlier than she was experiencing harassment, without providing any details.)

Why did Hawk wait? She says she feared she would lose her job if she complained. She was intimidated by her supervisor--the alleged harasser--and believed he controlled her future with the company.

Does Hawk's delay mean her case must be dismissed? A federal district court in Philadelphia said no in her case, *Hawk v. Americold Logistics*. In so ruling, it joined a number of other courts who have ruled similarly, forming a modest, if important, trend. It also raised other interesting and significant legal questions about how the Supreme Court's framework in cases of alleged hostile environment harassment should be applied.

Hawk's Allegations

Christine Hawk began work at Americold Logistics in June 1999, as a temporary employee, making pallets. By the end of that year, she was given a permanent position as a forklift driver. During the majority of her employment with the company, Hawk was directly supervised by Jack Bambary.

According to Hawk's deposition testimony, Bambary began a course of harassment that continued from her first month of work to her last. (Bambary denies this.) She says he made sexual comments to her, paged her daily, made unannounced visits to her home, recited his affections for her, called her into the office under false pretenses, questioned her about conversations she had with other men at work, sent her sexually suggestive e-mails, and told her he wanted to have sex with her in his chair. On one occasion, he grabbed her arm and pulled her toward him, insisting she kiss him; on another occasion, he shoved her up against a wall and demanded sex.

Early on, Hawk told another supervisor that she was being harassed by someone, but did not name him, for fear she would be fired - a risk she could not afford to take, given her financial status and obligations as a single parent. Nine months later, however, she filed a formal complaint with the company's human resources manager.

When the company investigated, it found Bambary had engaged in "unprofessional behavior." However, it did not conclude that he had sexually harassed Hawk. Nonetheless, it forbade him to have further contact with her, and disciplined him for his behavior.

Hawk was given the option of moving to a new facility, which she accepted. However, according to her testimony, Bambary tried to poison her new work environment - among other ways, by telling one prospective co-worker that she was a "slut" and a "liar." (Bambary denies this.) As a result, a week later, she sent the company a letter indicating she had been constructively discharged (that is, made to work in such hostile conditions she had no choice but to leave).

The company then terminated Bambary's employment, and made an offer for Hawk to return to work. She declined the offer.

Employer Liability for Sexual Harassment: The Supreme Court's Framework

The harassment alleged in *Hawk*, if proven, is "hostile environment" harassment. Such harassment includes unwelcome conduct of a sexual nature that is either so severe or so pervasive as to create an objectively hostile, abusive, or offensive working environment. The conduct contributing to or creating a hostile environment may be physical, verbal, written, visual, or, as Hawk alleges, a combination of several types.

Two Supreme Court cases - *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* - establish a framework for analyzing employer liability for sexual harassment by supervisors.

With respect to hostile environment harassment, the rule is that employers are automatically liable for such harassment, but the employer has the opportunity to prove a two-part affirmative defense.

The Two-Prong Affirmative Defense For Hostile Environment Harassment

The first prong of the defense requires the employer to show that it took reasonable care to prevent and correct harassment. The second prong requires it to show that the victim unreasonably failed to complain or otherwise avoid harm flowing from the harassment.

The second prong thus penalizes victims who fail to take advantage of corrective measures available to them. In applying this prong, courts often ask questions such as, If the victim failed to complain, was there any justification for her silence? If she waited to complain, for how long, and why?

Courts have found delays as short as seven days to be unreasonable, though the standard may be less strict for less severe harassment. Courts have not been sympathetic to claims that the victim was waiting to see if the behavior continued or to gather more evidence of harassment.

Another question courts often ask is: Did the employee comply with internal grievance procedures - by, for example, complaining to the correct person? And, did the victim cooperate with the investigation? If the answer to either question is "No," the employer is likely to prevail on the second prong of the affirmative defense.

Does Fear of Retaliation Excuse Failure to Use Internal Procedures?

What if the victim is too afraid of retaliation to avail herself of internal procedures? In the immediate wake of *Faragher* and *Ellerth,* courts were quick to reject claims that a "generalized fear of retaliation" was sufficient to excuse failure to complain, or delay in complaining.

Their logic may have been that since most victims suffer at least some fear of retaliation, anyone could claim that fear, and the whole requirement would be undermined.

Of course, that's strange logic - if most victims indeed are too fearful to employ internal procedures (and as I will discuss below, empirical evidence shows they are), does it really make sense to make them mandatory? But lower courts may have felt that accepting this logic was necessary for them to conscientiously enforce the Supreme Court's requirement that victims do avail themselves of these procedures.

But more recently, some courts - such as the one that decided *Hawk* - have begun to recognize that, at the summary judgment stage, victims should have the opportunity to prove that the fears they harbored had an objective or reasonable basis.

They have asked questions like these: Was there a specific threat of retaliation if the victim complained? Had the victim tried to complain previously, and found the employer unresponsive? If so, the victim might be found to have a good reason not to complain.

On this view, evidence that the victim had a good, specific reason not to employ the internal grievance procedure should get the victim to the jury on this issue. That makes sense: Juries are well-equipped to assess whether, in the full circumstances of a given workplace, it was reasonable or unreasonable not to complain. Indeed, assessing reasonableness is the very paradigm of what juries are meant to do.

Victims of Harassment Infrequently File Formal Complaints

Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment. Fear of retaliation - including retaliatory termination - and ostracism by co-workers are among the most common reasons victims give for not filing a formal complaint with their employers.

Filing a complaint with an employer is in fact the least likely response for a victim of harassment. According to a recent study of federal employees, forty-four percent of those who had experienced sexual harassment took no action at all, while only twelve percent reported the conduct to a supervisor or other official.

The low rate of reporting occurred despite the fact that every federal agency has an established sexual harassment policy, and seventy-eight percent of survey respondents reported knowing about the formal complaint channels available to them. That suggests the situation in other workplaces, where policies may not be as well-publicized, might be even worse.

Strikingly, this survey, when compared with prior ones, shows victims of harassment to be almost as unlikely to file formal complaints of harassment with their employers as they were fifteen years ago.

Thus, despite the growing public awareness about the problem of sexual harassment, and support for efforts to eradicate it, the fear of retaliation remains. Nor is it an unreasonable fear: After all, the retaliation might come at the hands of the harasser himself - when rules don't stop him from harassing, why would they stop him from retaliating?

Moreover, a woman who, like Hawk, is a single parent - indeed, any woman who is in a caretaker position where others depend on the income she brings in - may reasonably fear being fired would be devastating to those for whom she cares.

Victims Tend to Choose Informal, Non-Confrontational Methods of Coping

Rather than file formal complaints, victims tend to respond in a variety of other ways, most of which are informal and non-confrontational.

Participants in laboratory studies seem to believe that they would be able to handle harassing situations themselves. However, real-life victims tend to be less successful.

Real victims tend at first to ignore incidents of harassment, and subsequently to respond with mild recriminations such as "I'm not your type." They also tend to find ways to rationalize the harassment and convince themselves it won't recur, or is innocuous: "I wore a sexy outfit"; "It was a joke."

Many women choose costly consequences--such as quitting their jobs--to avoid dealing with harassment directly, as Hawk eventually did in this case. Or, they may instead try to effect changes in their work assignments, or seek a new job placement, in order to avoid contact with the harasser - even if those changes are professionally undesirable or damaging to their long-term career success. They may try to appease the harasser without direct confrontation. They may also reach out to friends or co-workers for support.

Other women simply endure harassment, using various psychological strategies to do so. They may pretend it is not happening, treat it as some other kind of conflict that isn't as threatening, blame themselves, or detach from the workplace generally.

A Better Legal Standard: Look to Employer Efforts to Induce Victims to Complain

Current courts tend to force victims into a Hobson's choice: They must either complain, and risk retaliation, or lose their cause of action for harassment.

Even sympathetic courts may require a specific, not just a generalized, fear of retaliation for victims to get to a jury with their claims. That's not realistic: This generalized fear is the very reason most victims don't complain. It's "generalized" because it is typical; such fear is present is most workplaces.

Thus, courts should shift their inquiry to ask whether the employer, taking account of the fact that most workplaces induce this kind of fear, has done anything to ensure that its workplace is the exception. Put another way, courts should focus on whether the employer has created an environment that is affirmatively conducive to complaints.

What Kind of Environment Makes Victims Feel Able to Complain Without Fear?

Although the research in this area is spotty, there has been some effort by academics to study the factors that make victims likely to complain about harassment.

Victims are more likely to report severe or physical harassment than other forms. In addition, individual factors like gender, race, class, and personal assertiveness clearly play a role. But so does the working environment,

including past treatment of complainants and gender balance in the workplace. And that suggests that employers can indeed do something to make victims feel more comfortable about availing themselves of internal grievance procedures.

One study showed that women who have less "organizational power" - for instance, those who work in male-dominated areas or those with low-skill or low-status jobs - tended to respond more passively than other women. The law firm associate, for instance, might be more likely to complain than the law firm secretary.

In addition, women characterized as having low self-esteem or "low life satisfaction" responded less assertively than others. Thus, the confident, happy associate or secretary may be more likely to complain than her insecure, anxious counterpart.

Studies also show that women respond more assertively when employers take proactive efforts to prevent harassment--including policies, procedures, and training programs--and disseminate information about the issue. These efforts send the message that the employer does not condone harassment, and that victims who file complaints will be protected.

These studies suggest that employers could improve the environment for victim reporting in a number of ways. They include maintaining better gender balance in the workforce; refusing to tolerate highly sexualized work environments; and educating employees about policies and procedures in a way that reinforces the point that victims are entitled to a harassment-free workplace.

In sum, studies show that victims do often have good reasons for failing to file internal complaints, and that employers often cultivate an environment that is inhospitable to complaints. The law should account for what social science research tells us about sexual harassment.

Why the Philadelphia Court is on the Right Track

In Hawk's case, the judge's approach made sense, especially in the context of this social science research. The judge found that Hawk's explanation for delay - fear of job loss - was plausible. Indeed, the fact that her initial complaint refused to name names, he noted, was consistent with such fears. (The judge also found that Hawk provided sufficient details in her complaint and at least one witness who could corroborate the most serious of her allegations - so that she did put her employer on sufficient notice of her claims.)

Hawk now will get the opportunity to go to trial and try to convince a jury that, among other things, she had a good excuse for waiting so long to complain. Given the realities of victim reporting, the law should, at the very least, give her that opportunity.

A Better Approach: Take Unreasonable Failure to File Into Account For Damages

An even better approach would be to disregard victim behavior altogether on the question of employer liability. That is, a victim should be able to sue even if she never complained, to account for the reality that many, many victims are reasonably fearful of complaining and yet still have suffered an actionable harm. However, in assessing damages against an employer, the court could take unreasonable delay in filing - or failure to file - into account.

Thus, if an employer can show that its atmosphere was comfortable for victims, and that it would have intervened had it known of the complaint, then maybe it should not have to pay damages resulting from unreasonable failure to file or delay in filing. But victims who reasonably fail to file, or delay in filing, should not be punished for simply sharing a common fear.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination, among other subjects. Her other columns on sex discrimination, including sexual harassment, may be found in the archive of her columns on this site. The studies Grossman refers to are discussed in greater detail and cited in her forthcoming article, "The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law," 26 Harvard Women's Law Journal (Spring 2003).