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SHOULD EMPLOYERS BE AUTOMATICALLY LIABLE WHEN SUPERVISORS COERCE SEXUAL FAVORS FROM SUBORDINATES?

The Second Circuit Says Yes, And It's Right

By JOANNA GROSSMAN
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Suppose a supervisor threatens to fire a subordinate employee unless she submits to his sexual advances--but never actually carries out the threat because she gives in. Should the employer be held automatically liable for the supervisor's sexual harassment?

In its recent opinion in *Jin v. Metropolitan Life Insurance Company*, the U.S. Court of Appeals for the Second Circuit addressed this very question. The decision is especially significant because the proper treatment of so-called "submission cases" has been up in the air since 1998 - when the Supreme Court revamped sexual harassment law with two important decisions.

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

The two key decisions are *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. With them, the Supreme Court established a framework for gauging employer liability for sexual harassment. Here are the rules it set:

What if no "tangible employment action" results from supervisory harassment? Employers are automatically liable unless they can prove a two-prong affirmative defense. First, they must show that they took reasonable care to prevent and correct harassment. Second, they must show that the victim unreasonably failed to take advantage of corrective opportunities made available to her by the employer.

If employers make both showings, they can escape either liability or damages - depending on the circumstances and jurisdiction.

The Trial in *Jin*: A Quid Pro Quo, But No Firing or Demotion

The *Jin* case recently decided by the Second Circuit was a case of a "quid pro quo" relationship without a "tangible employment action." The evidence showed that the victim was threatened with firing, initially submitted, and then, rather than being fired, ultimately left the company due to trauma from the harassment.

Min Jin was a successful life insurance sales agent for MetLife in New York City. Beginning in 1993, her supervisor was Gregory Morabito. According to the evidence presented at trial, Morabito engaged in a pattern of sexually harassing behavior from the beginning of their supervisory relationship.

Morabito, according to the evidence, made crude sexual remarks and touched Jin's breasts, butt, and legs in a sexual manner. He also required her to attend private Thursday night meetings in his locked office - during which he would threaten her with a baseball bat, kiss, lick, bite and fondle her, attempt to undress her, and physically force her to unzip his pants and fondle him.

Morabito repeatedly threatened to fire Jin if she did not give in to his sexual demands. For several months, Jin submitted, for fear of being fired. But eventually she refused, changing her schedule to avoid him.

In the end, Jin left the company, and tried to collect disability benefits due to the effects of the harassment. Ultimately, MetLife fired her because, the company said, she had stopped coming to work without having approval for disability leave.

Was the Jury Right to Find No Liability in Jin's Case?

The jury found that it had. It found that MetLife had taken adequate measures to prevent and correct the problem. In addition, it also found that Jin had unreasonably failed to take advantage of corrective opportunities. Accordingly, it entered a verdict of "no liability" on Jin's claim.

On appeal to the Second Circuit, Jin argued (as she had to the trial court) that the jury was wrong: As a matter of law, Morabito's harassment of her had resulted in a tangible employment action. Accordingly, she argued that MetLife was not entitled to make use of the affirmative defense - and should, instead, have been automatically liable regardless of whether it could satisfy the defense's two prongs.

Jin argued that one of the tangible adverse actions she had alleged and proved at trial was the requirement that she submit to weekly sexual activity as a condition of keeping her job - thus becoming prey to Morabito's sexual extortion. The Second Circuit ultimately agreed.

The Proper Treatment of Submission Cases: Why *Ellerth* Sheds Light

Did the Second Circuit do the right thing? The answer, I believe, is yes - but to see why, it is necessary to understand the law prior to and after the Supreme Court's crucial 1998 decisions in *Faragher* and *Ellerth*.

Before these two decisions, federal appellate courts had split on the proper treatment of submission cases. Most courts agreed that quid pro cases should result in automatic liability for the employer. And several circuits - including the Second Circuit, in its 1994 decision in *Karibian v. Columbia University* - had held that liability should be automatic even when the quid pro quo bargain is completed, and the victim submits to her supervisor's threats rather than refusing and being penalized by him. At least one circuit, however, had held to the contrary - creating a split.

After *Faragher* and *Ellerth,* the split continued - with the few courts to address the question dividing on the issue of whether the employer in a submission case should be able to try to prove the two-pronged affirmative defense, or should be held automatically liable. The Second Circuit, as noted, just adopted the latter view.

Ellerth itself was a case in which adverse action was allegedly threatened but not taken. But the Court did not squarely address the "submission" issue in its decision. Indeed, it granted review of an entirely different question: What is the proper rule of liability when a victim is threatened, but neither submits nor suffers any consequences?

Nevertheless, the Court's opinion in that case is nonetheless relevant to the question at issue in *Jin.* That is because *Ellerth* defines a "tangible employment action" to include (but not to be limited to) any "significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

Is being forced to submit to sexual activity as a condition of keeping one's job - as the evidence showed Jin had been - a "significant change in employment status"?

The Supreme Court's non-exhaustive list in *Ellerth* certainly leaves open that possibility. It also makes clear that economic harm is not required, leaving open the possibility that Jin's non-economic harm could suffice.

And logic counsels that Morabito's conduct did indeed change Jin's employment status. Through his sexual demands and accompanying threats, Morabito in effect placed an additional condition on her employment: to keep her job, she not only had to sell life insurance and fulfill any other legitimate duties imposed on her by MetLife, she also had to allow herself to be fondled by her supervisor. For other employees, simply selling life insurance was all that was asked.

If anyone doubts it is a significant change in employment status, he or she should consider being offered two jobs: one that came with Jin's predicament, one without. Most of us would accept a far lower salary to avoid the sexual extortion Jin endured.

EEOC's guidelines on employer liability - which were revised in the wake of *Faragher* and *Ellerth* - suggest the same conclusion. These guidelines state that employers should be strictly liable when an employee submits to her supervisor's demands and consequently obtains a tangible job benefit. The benefit obtained by Jin was retention of her employment, since failing to submit would have caused her to forfeit it.

Why Strict Liability For Employers Is Crucial In "Submission" Cases

This rule is correct from the point of view of statutory purpose, as well as that of Court precedent. Applying a rule of strict liability to submission cases is the only result that will serve the goals of Title VII - the central federal anti-discrimination statute - which are preventing harassment and compensating victims. Having to sleep with a supervisor to keep your job is just the kind of "arbitrary barrier to sexual equality" that Title VII is designed to break down.

As the Second Circuit recognized, requiring a subordinate employee to submit to sexual activity as a condition of keeping her job is one of the "most pernicious and oppressive forms of sexual harassment that can occur in the workplace." It should be treated as such. Employers who countenance such behavior by hiring, retaining, and failing to monitor supervisors who impose such conditions should not be rewarded with the affirmative defense; rather, they should be held responsible through automatic liability.

Any other approach would be truly ironic, as it would mandate a more lenient rule of liability in instances of successful, than of unsuccessful, harassment. The harasser who was unable to extort sexual conduct would trigger strict liability for his employer. Yet the harasser who was able to achieve his goal would perhaps trigger only a finding of "no liability" - as occurred in *Jin*.

A Second Irony: Losses For the Victims With Fewest Resources To Fall Back On

Another irony would also result - in which emotionally stronger victims, with more options who assert themselves would be vindicated in court, whereas emotionally weaker victims, with fewer options, who feel compelled to submit would not be. The wealthy career woman may get a verdict in her favor; yet the close-to-the-poverty-line single mother, with a job she cannot leave because her children depend on her, will not.

Those who do submit do so because they do not have the power, economic security, or personal strength to refuse the supervisor's demands. Their counterparts with greater resources may suffer serious harms: a lost job, lost income, lost opportunities, a draining court battle to get justice. But the women with fewer resources will suffer far more serious harms - being effectively required to accept molestation, sexual assault, or even rape as part of their work life. As Catharine MacKinnon argued in Feminism Unmodified, "[W]omen who are forced to submit to sex must be understood as harmed not less, but as much or more, than those who are able to make their refusals effective."

The Second Circuit thus reached the correct outcome in this case, a victory for sexual harassment plaintiffs everywhere. Let us hope that other courts to consider the same issue will adhere to *Ellerth*'s precedent and continue to recognize a workplace bargain demanding sexual submission for what it is: A tangible, adverse employment action.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination, among other subjects.

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