

# Shattering the Silence on Sexual Harassment in Our Legal Community

By Kathryn C. Liss

It is naïve to believe that sexual harassment – a term just 45 years old, but an action as old as time – will fully disappear. There will always be an issue when power dynamics are out of balance, regardless of gender identity, sexual orientation, race, or age. However, we cannot sit still when we have a moral and ethical obligation to protect the vulnerable and to champion the rights of others as legal professionals. Especially when confronting sexual harassment within our legal community, it is our duty as legal professionals as well as public citizens to do better. Most victims of sexual harassment continue to remain silent out of fear of retaliation, stigmatization, or hopelessness. Perpetrators mostly remain unchecked and free to continue harassing others while advancing within their careers. Despite concerted efforts, sexual harassment within the legal community continues day after day, week after week, year after year.

## Historical Framework

Sexual harassment remains a significant issue with a short legal history that starts with the Civil Rights Act of 1964 (CRA), signed into law by President Lyndon B. Johnson. Title VII of the CRA first laid the legal foundation for sexual harassment prevention, but did not go so far as to specifically include sexual harassment in the legislation itself. In an effort to enforce Title VII and end unlawful discrimination



in the workplace, the CRA created the Equal Employment Opportunity Commission (EEOC), which started its operations one year after Title VII became law.

Sexual harassment litigation did not occur until 1974 when the federal judiciary confronted the first Title VII case in *Barnes v. Train*. This case is commonly considered the first sexual harassment lawsuit in the United States, although the term “sexual harassment” was not yet coined when the case was decided. Ms. Barnes alleged she was terminated from her employment because she refused her supervisor’s sexual advances, which her supervisor claimed would enhance her employment status

(i.e., quid pro quo sexual harassment). The court found no discrimination existed upon the facts and dismissed the case. Ms. Barnes appealed and won her appeal in 1977.

In 1976, the U.S. District Court for the District of Columbia found that quid pro quo sexual harassment constitutes sex discrimination under the CRA in *Williams v. Saxbe*. Here, the court found that a male supervisor retaliated against Ms. Williams by firing her following her refusal of his sexual advances.

In 1980, the EEOC established criteria for sexual harassment in the workplace and declared it a violation of Section 703 of

## Survivors’ Statements:

The real-life stories that appear with this article are from courageous victims of sexual harassment. They represent just a small sampling of what has and is happening within our legal community. Some have been edited slightly, but all are the victims’ own words.

*When I was a 2L, I clerked at a firm. While doing computer research, a paralegal at the firm came behind me and grabbed my breasts. This happened out of nowhere – no previous flirtations by him or advances; it was random and terrible. I reported this to my supervising attorney (a partner at the firm), who then brought it to a named partner. Those two partners confronted the man who did this. I was then told later that because he admitted to doing this, rather than lying and denying, that was the end of it. I was a naïve law student and simply moved on. I never spoke to the person again after this happened. I know that I am not the last person who experienced something like this though, and I wish for this to not happen to others.*

– Anonymous

Title VII. Also in 1980, the Illinois Human Rights Act (IHRA) went into effect and created a cause of action for workplace discrimination, including sexual harassment.

In 1986, the U.S. Supreme Court heard the landmark case of *Meritor Savings Bank v. Vinson* in which the Court unanimously ruled that “severe or pervasive” sexual harassment of an employee by their supervisor results in a hostile work environment, which is a violation of Title VII of the CRA. Additionally, the Court indicated that the alleged sexual advances must be

Quid pro quo sexual harassment occurs when an employer explicitly or implicitly offers some job benefit in exchange for sexual favor(s). Hostile work environment harassment is discrimination based on sex or gender that interferes with an employee’s job performance or is unwelcome and creates an intimidating, hostile, or offensive work environment that is unwelcome, regardless of the harasser’s intent. Examples of a hostile work environment can include, but are not limited to, inappropriate jokes, sexually explicit images, and/or unwanted

be subject to sexual harassment pursuant to Title VII, as the conduct was reasonably perceived to be hostile or abusive.

In 2015, the EEOC created a Select Task Force on the Study of Harassment in the Workplace. This Task Force spent 18 months examining the complex issues associated with all types of workplace harassment and issued a report finding the following about sexual harassment in the workplace: between 25%-85% of women (depending on the survey) have experienced it; it leads to increased employee

*Over 10 years ago, I was an associate at a small boutique firm in Cook County where I was often forced to go out with clients and ‘show them a good time.’ Normally I would order water and leave as soon as possible. One night, I was out with a judge and his attorney brother and had something slipped into my drink. I woke up the next morning unable to recall anything that happened shortly after I met with them. I was beyond sick and went to the hospital, where they found traces of a date-rape drug in my body. I reported the incident to the police, but they were unable to prove anything, as the men denied giving me this drug. Additionally, I did not receive any support from my then-boss. My female coworkers said I deserved it and laughed at me. I felt shamed, and still feel violated to this day.*

– Anonymous

unwelcome in a sexual harassment claim. The EEOC’s guidelines and definition of sexual harassment were affirmed, and the Court established levels of employer liability. The Court also determined that speech or conduct alone can create a “hostile environment.”

The Court in *Vinson* recognized the following two types of actionable sexual harassment claims under Title VII: (1) quid pro quo and (2) hostile work environment.

physical contact.

In 1993, the U.S. Supreme Court held in *Harris v. Forklift Systems, Inc.* that victims of sexual harassment need not prove that the harasser’s conduct “seriously affect [the employee’s] psychological well-being” or cause the victim to “suffe[r] injury” to show an abusive work environment. In *Harris*, Ms. Harris was frequently the target of unwanted sexual innuendos; therefore, in a unanimous decision, she was found to

turnover, which can be extremely costly; and it is linked to “psychological effects such as negative mood, disordered eating, self-blame, reduced self-esteem, emotional exhaustion, anger, disgust, envy, fear, lowered satisfaction with life in general, and abuse of prescription drugs and alcohol.”

In 2017, the #MeToo movement highlighted the ongoing problem of sexual harassment in the workplace. As a result, sexual harassment claims filed with the EEOC in FY 2018 rose to 7,609, a near 14% increase from FY 2017. In FY 2019, the number of claims dropped slightly to 7,514.

On January 1, 2020, Illinois amended its IHRA to expand protections against workplace sexual harassment as noted above. It also enacted the Workplace Transparency Act (WTA), part of which prohibits unilateral nondisclosure agreements (NDAs) related to unlawful employment practices in separation and settlement agreements. However, the WTA legally allows employers to bargain with employees (existing and new) for NDAs regarding unlawful employment practices if the NDA is mutual, in writing, demonstrates actual knowing or bargained-for consideration



(beyond the promise of employment), and includes certain written acknowledgments. That being said, no agreement can ever prohibit an employee from reporting unlawful employment practices to government agencies or participating in related proceedings.

As of February 2020, 47 states prohibit sex discrimination. Of those 47 states, only 12 address sexual harassment within workplace discrimination based on sex; 24 states (plus DC and Puerto Rico) ban of sexual harassment within the workplace. Eight states, including Illinois, go even further to require employers to provide sexual harassment training.

All employers in Illinois as defined by the IHRA were required to provide sexual harassment prevention training to all of their employees by December 31, 2020. Going forward, such training must continue on an annual basis. Section 2-109 of the IHRA provides minimum standards for sexual harassment prevention training and allows employers either to develop their own training or use a training provided by the Illinois Department of Human Rights.

### IHRA v. EEOC

Illinois is progressive in its sexual harassment laws compared to other states and the EEOC. On January 1, 2020, Illinois



vidual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Sexual harassment can also occur outside of an employment relationship if two parties also have a business or academic relationship.

The EEOC defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature" or

more calendar weeks within the calendar year of or preceding the alleged violation," the EEOC definition only applies to state and local governments and private employers with 15 or more employees. Additionally, the EEOC requires charges to be filed within 180 days of the harassment (federal employees have 45 days), whereas the IHRA allows charges to be filed within 300 days of the harassment.

### Have Things Really Changed?

A 2020 study entitled *Still Broken* by the Women Lawyers on Guard answers this

*In 2019, I was standing outside a courtroom door wearing a faux wrap dress. A male attorney in his late 60s stopped me to say hello and literally untied my front dress that was at my waist. I froze out of shock and horror. I cannot blame my silent reaction on the fact that I was young, nor could I nervously giggle it away because I had then been in business for myself for 9 years and was 41 years old. I should have reported him, but I did not. The brazen non-flippant way he did this to me and then laughed it off is disgusting and never, ever should happen to anyone. I would like to believe the next time, if ever, I would slap someone or have something smart to say in defense. What also blew me away is no one in the courtroom hallway said anything.*

– Lindsay Coleman

overhauled the IHRA to expand protections against workplace sexual harassment. The IHRA defines sexual harassment as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an indi-

vidual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Sexual harassment can also occur outside of an employment relationship if two parties also have a business or academic relationship.

The EEOC's definition is more limited than the IHRA's and therefore does not cover every employer-employee relationship. Unlike the IHRA, which now applies to employers "employing one or more employees within Illinois during 20 or

question in the negative. This study examined sexual harassment and misconduct in the legal profession nationally over a 30-year period. A survey on this topic was issued by 35 state and local bar associations as well as 24 national organizations. It yielded the following six key findings:

1. **The extent and breadth of misconduct/harassment is insidious and alarming.** Sexual harassment remains part

of the legal professional's culture (89% of the culture 30 years ago v. 73% of the culture today). More than 37% of the harassment reportedly occurred within group meetings around other individuals. Harassment by partners and supervising attorneys has not abated over the last thirty years and harassment by clients and opposing counsel continues to be an issue within the legal profession. Regarding false claims, 82% of men admitted to being concerned about women making false claims of harassment and assault. However, only 2% of men and 1% of women admitting to perpetrating sexual harassment or assault said they were ever accused of those abuses. Additionally, false reports

of sexual assault or rape are statistically likely to be between .002%-.008%, far from the perceived amount of fear.

2. **Reporting systems intended to discourage and capture harassing incidents are mostly not working.** The reasons noted for not reporting remain identical to the reasons reported 30 years ago. They include fear or retaliation/job loss, the person to whom the report should be made is the harasser, safety concerns, and doubt of whether the report would be believed and would make a difference. Eighty-six percent of the respondents did not report the harassing incident. Of the 14% of the respondents who did report the harassing incident, 40% indicated that the

person who heard their complaint acted in a non-supportive or harmful manner.

3. **Most harassers face few or no adverse consequences.** Of the 14% of individuals who reported a harassing incident, the harasser either faced no consequences (50%) or the individual reporting the harassment was not informed of any consequences (20%). The most common consequence of reporting was that only written or verbal warnings were given to the harasser.

4. **The "price" that women in particular pay and the cost to organizations and the profession are considerable.** The reported long-term effects of sexual harassment include anxiety about career or workplace (66%), negative impacts

*One of the partners told me that because I was going before a male judge, I needed to make sure I pulled my shirt down a little more so he could see [my cleavage], so maybe it would help me win my argument.*

– Anonymous

*One of the older male partners at my old firm used to say, 'come sit on grandpa's lap.' The other partners would say, 'oh, he's harmless.'*

– Anonymous

*When I was a second-year associate, a child representative (male) was appointed on one of my cases. This representative called me at the office and called/texted my cell phone to make sexual advances to me as well as 'talk dirty' to me. The most intimidating he ever got was when we were in a courtroom and he asked me to come into the jury room/side room, closed the door, pushed me up against a wall and said, 'You know I can do anything I want to you and no one would ever know.' I laughed it off and just got out of the room. He would do that often. Anytime I saw him in the courthouse, he tried to get me into a jury room/side room with him. He is a big-time, well-known child rep/GAL. He still makes comments to this day to me every time he sees me. Like how I am so beautiful now 'even after having 3 kids.'*

– Anonymous

*When I was a younger attorney, my friend and I went to a happy hour and met some male partners from other firms. Two of these partners walked us back to my apartment and insisted on coming upstairs. We didn't mind and thought it was harmless. Both male partners tried to get us to interact with them sexually and we both refused. One partner stripped down naked and laid on my couch. The other one did not and just tried to kiss me. My friend and I both laughed at the naked man and told them both they had to leave. Because we did not welcome their advances (we later found out that both were married; we were single) the one partner went around and told all the partners at my firm that I gave him oral sex. I spent months trying to clean up my reputation because everyone around our community was talking about it.*

– Anonymous

*When I was a new attorney, 26 years old, I worked at a non-profit agency representing low income domestic violence victims in contested order of protection, divorce, and custody cases. One day, in the hallway of the Daley Center, my client and I were talking to her husband and his attorney about her buying out his equity in the marital residence. The discussion got a bit heated and the other attorney said something rude to me. My client muttered, 'you're an ass,' but as I tried to shush her, the other attorney, a much older man, looked straight at her and said, "I am an ass. And I'm going to come to your house and stick it in your ass and break it off. And then I'm going to put a bullet in your brain." I was stunned. But somehow, we continued to discuss the house a bit. An older, female attorney, who I knew professionally, had heard what had happened and she came up to me and asked if I was OK. She suggested I tell the judge what happened. When we stepped back up on the case, I told the judge that the attorney had threatened to rape and kill my client. The older, male judge said, 'Mr. [X] is a respected attorney. I'm sure he didn't say anything like that.'*

– Rachel Moore

in their career with economic effects (33%), loss of productivity (36%), and fear of retaliation (40%). Only 18% of respondents reported no impact resulting from the harassing conduct.

**5. People at every level – including women in powerful positions – are being harassed.** Associates, staff attorneys, interns, summer associates, and staff are the majority of individuals being sexually harassed. However, in the

last five years, 16% of the respondents were partners or supervising attorneys, and 4% were judges. Professors, CEOs, and Managing Directors also reported sexual harassment.

**6. Age, race/ethnicity, and gender identity are perceived as compounding dimensions.** Thirty-seven percent of respondents believed that their age was a compounding dimension to their harassment; 15% believed their race/

ethnicity was a factor, and 19% believed their sexual orientation or gender identity was a factor. ■



*Kathryn C. Liss is the executive director of DePaul University College of Law's Schiller DuCanto & Fleck Family Law Center and Advisor.*

### Tips & Resources

If you are experiencing sexual harassment in an employment relationship, business relationship, or academic relationship, you should be proactive and never belittle what happened to you. Instead, encourage yourself to do the following to help build your sexual harassment case for yourself and to help save future victims:

- Document every incident;
- In the workplace, keep your performance records;
- Report the incident by filing a formal complaint with your firm, agency, company, or school;
- If there are witnesses, ask them to also report the incident by filing a formal complaint with your firm, agency, company, or school;
- Refer to your firm, agency, company, or school handbook to see how complaints are handled, and follow that procedure;
- In government offices, contact your agency's assigned Ethics Officer, EEO Counselor, the Office of the Executive Inspector General (<https://www.illinois.gov/oeig>; email: [OEIG.ReportSH@illinois.gov](mailto:OEIG.ReportSH@illinois.gov)), and the Office of the Legislative Inspector General (<http://ilga.gov/commission/lig/default.asp>; email: [JulieP@ilga.gov](mailto:JulieP@ilga.gov)) to make a formal report and initiate the investigation;
- In the workplace, report and file a charge with the Illinois Department of Human Rights (<https://www.illinois.gov/dhr>; email: [IDHR.ReportSH@illinois.gov](mailto:IDHR.ReportSH@illinois.gov)) within 300 days of the incident to accelerate an investigation by your employer if an investigation is delayed;
- In the workplace, report and file a charge with the EEOC if your employer has 15 or more employees to accelerate an investigation by your employer if an investigation is delayed; and/or
- Contact a lawyer specializing in this practice area.

Victims of sexual harassment by an attorney or judge are encouraged to file a complaint with the Attorney Registration and Disciplinary Commission or the Judicial Inquiry Board to report such incidents.

Additionally, the State of Illinois has a confidential sexual harassment and discrimination helpline (877/236-7703) staffed by the Chicago Lighthouse Call Center. This hotline can provide reporting options for victims of sexual harassment or discrimination, transfer the caller to an agency, or assist the caller in filing an anonymous report. The helpline will also help callers find legal and counseling options.

### Call to Action

Progress has been and continues to be made, but we need to keep pushing forward and do better. Below are some ways we can do just that:

1. **Call Out Sexual Harassers:** Identify and call out sexual harassment immediately when you see it. Let's use our collective voices to call out any misconduct and stand up for victims in the moment.
2. **Say 'No' to NDAs:** Do not agree to bargained-for consideration NDAs concerning unlawful employment practices (i.e., sexual misconduct). These NDAs are impediments to victims and thwart efforts to report incidents and end harassment.
3. **Push for Zero-Tolerance Policies:** Encourage your workplace to talk about sexual harassment and have an explicit zero-tolerance policy banning sexual harassment. This will help create or strengthen a workplace culture of civility and respect.
4. **Get Educated:** Support efforts to have sufficient sexual harassment prevention training in your workplace. Taking this one step further, the Illinois Supreme Court Rules' continuing legal education requirements should be amended to mandate annual professional responsibility training in sexual harassment and discrimination.