

It May Be A New World For Sexual Harassment, But Many Old Rules Still Apply

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In the weeks since allegations began to surface regarding the sexually predatory behavior of movie mogul Harvey Weinstein, sexual harassment allegations (sometimes admitted and sometimes disputed) against powerful, prominent men have been a daily feature of the headlines, involving Oscar-winning actors, sitting and would-be senators, talk show hosts, and numerous other high profile figures. Allegations against the both the current President of the United States and one of his predecessors, while not new, have been the subject of renewed focus.

On social media, the “#MeToo” campaign has featured numerous women coming forward with their experiences as victims of sexual harassment. While the effect of these developments is still evolving, clearly there have been changes in how sexual harassment is perceived and understood, particularly when the alleged perpetrator is not only powerful, but famous. That being said, ***for an employer assessing potential liability, has the legal landscape for sexual harassment and related claims really changed all that much?***

The impacts of this explosion of high profile episodes is potentially far reaching, even for employers far outside the political, entertainment, and media arenas where so many of the recent cases have emerged. Public awareness of sexual harassment issues in general is certainly more pronounced. In many (but not all) situations, the public has treated the allegations as credible, even when raised years or decades after the fact. Not surprisingly, there have also been downsides to the recent uproar, including regrettable attempts to blame or attack victims who have come forward. In one bizarre episode in connection with an ongoing political campaign, a woman apparently attempted to plant false allegations of harassment in the Washington Post, precisely so that they could be shown as false, thus undermining the credibility of the Post and, by implication, of other women whose accusations had earlier been reported there.

But for employers, whether they are high profile media outlets or corner drug stores, sexual harassment involves legal duties and the risk of liability if those duties are not

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met. Those duties haven't really changed. The law governing sexual harassment has been developed in state and federal courts for several decades. While the law continues to evolve in certain areas, the basic legal framework and key procedural requirements are well-established. When an employer is actually sued for sexual harassment, those rules, including mundane boring procedural requirements, can be the key to winning or losing the case. Two recent decisions illustrate the fact that the old rules still apply:

In *Tudor v. SE. Okla. State Univ.*, in the United States District Court for the Western District of Oklahoma, the plaintiff's allegations implicated some cutting edge issues, but the case was decided using fundamental precepts of employment discrimination law. The plaintiff, a college professor, contended that Southeastern Oklahoma State denied her tenure application and then fired her because of her transgender status (she was transitioning from male to female). She also claimed that the University maintained a hostile environment, and that she was retaliated against for raising concerns in the first place.

The University moved for summary judgment, but the court denied the motion. First, regarding a hostile environment claim, the issue was whether the plaintiff alleged a sufficient number of incidents, with sufficient severity, to establish "a work environment permeated with intimidation and ridicule." In other words, was the environment bad enough to support a legal claim? The plaintiff relied not only on sporadic insults and comments, but also on the fact that every day over the course of a four-year period she had restrictions on which restroom she could use, how she could dress, and what make-up she could wear. She also noted that administrators persisted in using a male pronoun to refer to her even after she considered herself to be female. The court found that that was sufficiently pervasive to survive summary judgment and preserve her hostile environment claims for trial. The court also rejected a defense based on plaintiff's alleged failure to take advantage of preventive and corrective opportunities at the University. The plaintiff successfully countered this argument by noting that at the time, the University did not have policies prohibiting discrimination on the basis of transgender status. Therefore, there was no effective internal redress available to her.

The court also denied summary judgment on the plaintiff's claim that the tenure denial and subsequent termination were discriminatory. The court had decided in a previous ruling that transgender status *is* protected under Title VII. In evaluating the evidence of discrimination, the court applied the familiar three-part framework: (1) plaintiff must demonstrate a prima facie case; (2) the employer must provide evidence of a legitimate non-discriminatory reason for the employment action; and (3) plaintiff must provide evidence that the asserted legitimate reason is actually a pretext for discrimination. The primary dispute concerned evidence of pretext, which the plaintiff satisfied by showing substantial procedural irregularities in the tenure decision, including a refusal to state reasons for the denial of tenure and use of a backdated letter to elaborate on rationales for the tenure denial.

Finally, with respect to the retaliation claim, the court found sufficient facts to show protected conduct followed by an adverse employment action. The application of Title VII

and other gender discrimination laws to transgender status is a new and disputed legal issue, but the framework used to analyze such claims is well-established, and the court applied it to determine that the case would go forward.

In another recent case, *Durand v. District of Columbia Government*, decided by the United States Court of Appeals for the District of Columbia Circuit, the employer prevailed, also by relying on the validity of long-established legal requirements for such claims. The plaintiff contended that he was being retaliated against for prior participation in a large sexual harassment lawsuit that had been decided some years earlier. In dismissing the retaliation and retaliatory harassment claims, the Court of Appeals relied on plaintiff's procedural failures, including failure to file a proper administrative charge of discrimination with the EEOC and failure to proceed in a timely fashion. The case also failed in part because it was based on employer actions that were not materially adverse to plaintiff's employment status. Finally, plaintiff failed to show severe or pervasive harassment, which would be necessary to support a retaliatory harassment claim.

Both of these recent decisions confirm that while public perception and understanding of sexual harassment may be experiencing a true revolution, in litigation both the employer and the employee must comply with largely well-established legal doctrines to determine who actually wins the case.