Suits About Nothing: Does the Seinfeld Case Indicate That Businesses Need to Reconsider the Rights of Employees Accused of Sexual Harassment?

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Imagine that you are the in-house counsel for the Ostrich Corporation, a large national business whose headquarters is located in a major industrial city in the United States. The C.E.O. of Ostrich has called you into his office to discuss the possible termination of Harry Harried, an eighteen-year employee with the company who has reached the level of senior manager and who is earning a salary of $70,000 a year. One of his female assistants has accused Harried of committing a series of sexually harassing actions. After examination of the incidents, and despite Harried’s firm denials, the C.E.O. is convinced that the charges are true. Considering that Harried staunchly refuses to admit any wrongdoing and claims that he is being falsely maligned by the female assistant, the C.E.O. of Ostrich seeks your advice on whether there will be any possible repercussions if he terminates Harried’s employment.

Mr. Harried’s chances of succeeding in any action against the Ostrich Corporation will be quite slim.1 Whatever the justification for a plaintiff’s claim, suits brought by alleged harassers have generally faced a cool reception from the courts.2 Many actions are lost at the summary judgment phase of a trial, with judges placing a very high bar for plaintiffs to get over before a case will reach a jury. However, the relatively recent flood of litigation by alleged harassers3 has also resulted in some success for these

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2. See id. Except when the discipline was clearly improper, judges have supported employers in their efforts to curb sexual harassment in the workplace.

3. Since 1992, suits by alleged harassers have multiplied tremendously and have been brought under an increasing range of theories. See Hope A. Comsky, Beware of the Alleged Harasser—Lawsuits by Those Accused of Sexual Harassment, 12 LAB. LAW. 277 (1996).
types of claims. The most notable verdict came from the action Jerold Mackenzie brought against the Miller Brewing Company in the so-called "Seinfeld case." After being fired, in part for discussing a bawdy episode of the *Seinfeld* television program with a female coworker, Mackenzie sued Miller Brewing Company, Miller Vice President Robert Smith, and the female coworker who made the initial allegation and won a $26.6 million jury verdict in July 1997. While the result in this case is certainly an exception to the fate of most claims brought by alleged harassers, some attorneys argue that the jury was sending the message that the management of companies may be overreacting to charges of harassment and that alleged harassers have rights that should be protected as well.

The verdict also puts companies in the difficult position of being damned if they take swift action against a possible harasser and damned if they take little or no action. As one attorney noted after the judgment, employers will now worry "if they don’t act on harassment, they’ll be in Monday’s paper for an $18 million verdict. If they do act, they’ll be in Tuesday’s paper for a $26.6 million verdict." Some argue that companies should pause and reconsider their policies toward alleged harassers, on the grounds that fear of liability and political correctness have pushed businesses to approach those accused of violations with excessive harshness.

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5. See Julie M. Buchanan, "Seinfeld" Case Creates New Concern About Firing: Wrongful Termination Becomes Issue, Rather Than Inappropriate Conduct, MILWAUKEE J. SENTINEL, July 21, 1997, at 11. The *Seinfeld* case is unique for several reasons, discussed infra Part IV, but certainly for the way that damages were spread amongst the losing parties. The award included $24.5 million against Miller Brewing Company, $1.5 million against Patricia Best, the female coworker who complained, and $601,500 against Miller executive Robert Smith. See Ex-Miller Exec Wins $26-Million Verdict in "Seinfeld" Case, L.A. TIMES, July 16, 1997, at D1. The *Seinfeld* award is one of the largest jury awards in such cases; rarely do such awards survive on appeal. See id. On October 6, 1997, Circuit Judge Louise Tesmer dropped the $1.5 million punitive damages assessed against Best and reduced Smith’s damages to $100,000. See Dave Daly, Most of "Seinfeld" Award Stands, MILWAUKEE J. SENTINEL, October 7, 1997, at 1, available in 1997WL 12758265. The $24.5 million judgment against Miller itself, including more than $17 million in punitive damages, remains in place pending further appeal. See No Punitives in Seinfeld Suit, Judge Rules, THE DAILY REC., Oct. 8, 1997, at 17, available in 1997 WL 17886166.

6. See Jon Tevlin, "Seinfeld" Case is No Joke for Companies, Workers: Sex-harassment Suit Prompts Discussion, MINNEAPOLIS-ST. PAUL TRIB., July 17, 1997, at 1A, available in 1997 WL 7574372. Attorney Linda Holstein called the judgment “an overreaction” but noted that the verdict probably shows that ordinary people are becoming fed up with the extent of sexual harassment suits. See id.


Mackenzie v. Miller Brewing Company are examples of employment law spinning out of control because the first reaction of many individuals involved in a work-related dispute is to take some type of litigious action. 9

This comment will explore how courts have dealt with actions brought by those accused of sexual harassment, specifically by examining the impact large jury verdicts such as in the Seinfeld case, have and should have on a company's policy toward sexual harassment. Unsuccessful suits brought by those terminated for harassment will be examined first to show how many courts have implicitly mandated that employers implement strong policies against sexual harassment, and how some courts have approved the strict enforcement of these policies. Successful claims by harassers will be analyzed next, focusing specifically on the Seinfeld case. Finally, this comment will consider whether verdicts in favor of harassers really indicate that companies need to change the way they approach internal investigations of violative behavior.

I. A BRIEF DEFINITION OF SEXUAL HARASSMENT

Because of the large amount of publicity afforded to complaints by women like Anita Hill and Paula Jones and the proliferation of on-the-job sensitivity training, most Americans are familiar with the basic concept of sexual harassment in the workplace. It is, however, worthwhile to briefly examine the precise legal definition of sexual harassment before exploring the remedies available to one who has been accused of the act. 10

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

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national origin." The prohibition against sex discrimination was added to Title VII at the last minute by the House of Representatives, thus there is little legislative history to guide courts in interpreting this part of the Act. 12 Most states have followed Congress' lead in passing statutes forbidding discrimination in employment on the basis of sex. 13 Most jurisdictions now recognize liability for sexual harassment whenever an individual suffers unwelcome conduct because of the individual's gender when that conduct affects the individual's employment and when the individual's employer is responsible for perpetrating, failing to prevent, or failing to correct the conduct. 14

Two basic legal doctrines have been developed to explain how sexual harassment at work is equivalent to sexual discrimination in employment. 15 The first theory, "quid pro quo" harassment, "involves the conditioning of concrete employment benefits on sexual favors." 16 Thus, if an employer were accused of conditioning a subordinate's raise or continued employment on the subordinate's engaging in a sexual act with the employer, the charge would be for quid pro quo harassment. In Meritor Savings Bank, FSB v. Vinson, 17 the Supreme Court recognized a cause of action under Title VII for a "hostile work environment," 18 the second classification of sexual harassment. In that case, the Court found that the language of Title VII is "not limited to 'economic' or 'tangible'

13. See Kadue, supra note 10, at 471.
14. See id.
15. See id. at 474. The impetus behind these two theories was Professor Catherine MacKinnon's book entitled SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). The Equal Employment Opportunity Commission (EEOC) endorsed these theories in 1980 when it issued its guidelines on the sex discrimination ban of Title VII. See Kadue, supra note 10, at 474. The 1980 guidelines explain that:

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment 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 individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

16. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). This case is worth noting both as the first major Supreme Court decision on sexual harassment and as the case in which the Court endorsed both the quid pro quo and hostile environment theories of liability. See Kadue, supra note 10, at 476.
17. 477 U.S. at 73.
18. See id.
discrimination [and that the] phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."19 Title VII is violated then when a workplace is permeated with discriminatory intimidation, ridicule, and insult that is "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."20 While the majority of harassment suits are brought as hostile environment claims, an exact definition of what constitutes an "abusive environment" continues to elude courts and businesses alike.21

The 1991 Civil Rights Act22 added one more weapon to the arsenal of those suing for sexual harassment by increasing the money damages that workers receive if they can prove that discrimination occurred at the workplace.23 Before passage of the Act, most workers who could prove discrimination would be reimbursed only for their lost back pay with interest.24 Since 1991, however, victims of harassment can receive money for compensatory and punitive damages if they prove that there was malicious and illegal behavior resulting in stress and humiliation, or that a company did not take corrective action quickly enough.25

Employers face even more liability after the recent Supreme Court decisions of Burlington Industries, Inc. v. Ellerth26 and Faragher v. Boca Raton.27 While employers had previously been held vicariously liable under Title VII for the offending conduct of their employees of which they knew or should have known, the Court, in these decisions, held that employers would be liable for any harassment by an employee that caused a tangible job detriment even if the behavior caused no harm.28 Under these new guidelines, an employer will be vicariously liable:

19. Id. at 64.
20. Id. at 67.
21. For example, in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), the court said it is possible to "envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority workers." Id. at 238. However, in Harris v. Forklift Systems, Inc., the Supreme Court held that an abusive work environment need not seriously affect an employee's psychological well-being or lead the employee to suffer injury. The Court instead used a lower standard, requiring only that the employee be genuinely offended by the conduct. See 510 U.S. 17 (1993).
24. See id.
25. See id.
28. See Burlington, 118 S.Ct. at 2270; Faragher, 118 S.Ct. at 2293.
to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.\textsuperscript{29}

To take advantage of this affirmative defense, an employer must prove that he "(a) . . . exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."\textsuperscript{30} The Court also stresses that while "proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense."\textsuperscript{31}

Because of the ever-increasing burden on employers to ferret out and eliminate harassment in the workplace, it is no wonder that employers are creating stricter policies and sterner punishments to deal with employees accused of committing Title VII violations. This in turn leads to a more rigid workplace environment.

With this basic overview of harassment law in mind,\textsuperscript{32} we turn to the specific types of claims alleged harassers have unsuccessfully brought against employers who have fired them. These claims demonstrate how many courts have condoned and even encouraged the tough anti-harassment policies of businesses and employers.

II. TITLE VII ACTIONS BY ALLEGED HARASSERS

"The annual cost of sexual harassment for each Fortune 500 company

\textsuperscript{29} Burlington, 118 S.Ct. at 2270.
\textsuperscript{30} Id.
\textsuperscript{31} Id. Note that no affirmative defense is available when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. See id.
\textsuperscript{32} One should also note that a third offshoot of the two types of harassment charges discussed above involves claims by an "indirect victim." Several courts and the EEOC have also recognized liability where an individual suffers harm from conduct that is directed to other persons or that is not directed to anyone in particular. See Kadue, supra note 10, at 477. Four different types of conduct raise issues of liability in this context: (1) quid pro quo harassment that results in sexual favoritism to the detriment of persons who were not subjected to the harassment; (2) consensual sexual favoritism that results in job detriments to non-favored employees; (3) hostile conduct directed toward one employee that affects other employees; and (4) widespread consensual sexual conduct that is not directed at the complainant but is offensive to the complainant because of his or her sex. See id.
is $6.7 million."³³ In trying to fend off costly and embarrassing legal claims, many companies have set high standards for acceptable behavior, often higher than the law requires, ³⁴ and have vigorously enforced their sexual harassment policies. The majority of courts have sided with businesses that take an aggressive approach; many lawsuits brought by workers terminated for harassment charges are dismissed in the summary judgment phase. This court-imposed bar that a plaintiff accused of harassment must hurdle can be seen as a type of tacit approval of strict internal policies against harassment by employers. Despite the slim chances for success, alleged harassers continue to bring suits under a progressively vast and inventive range of legal theories.

Ironically, the same statute that has allowed harassed employees to seek justice against harassment has also been used by alleged harassers in claims against former employers. For example, several men fired for harassment have brought actions against their former employers by charging under Title VII that the false accusations against them created a hostile work environment or were based on discrimination. Most courts have not recognized these types of claims.³⁵ In Balazs v. Liebenthal,³⁶ the plaintiff, a supervisor for AT&T for twenty-two years, claimed he had been demoted as a result of a charge of sexual harassment.³⁷ The charge centered on a skit at a company picnic where the plaintiff presented a "silver rocket award" (allegedly resembling the male anatomy) to a female employee for quick typing and clerical skills.³⁸ Several women managers were offended, claimed they were victims of sexual harassment, and demanded that the plaintiff be punished.³⁹ The court dismissed the plaintiff’s claim, brought after the demotion, because the claim did not allege that he had been treated differently because he was a male, a necessity under Title VII.⁴⁰ The court said that an “allegation that . . . [the plaintiff] was falsely accused of conduct which, if true, might have given

³⁶. 32 F.3d 151, 153 (4th Cir. 1994).
³⁷. See id. at 153.
³⁸. See id.
³⁹. See id.
⁴⁰. See id. at 155. The plaintiff needed to prove that he was discriminated against based on his sex because section 703 of Title VII, 42 U.S.C. § 2000e-2, makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2.
rise to a claim of employment discrimination based on sex by someone else in no way states a cause of action that plaintiff himself was a victim of discrimination based on his sex." Thus, absent proof that the company disciplined its employees differently according to gender, the court refused to recognize the plaintiff's claim.

However, even proving that a company treated a male and female coworker differently may not be enough to ensure that a plaintiff will get past the summary judgment phase of a trial. In *Pierce v. Commonwealth Life Insurance Co.*, the plaintiff was demoted after a series of allegedly harassing acts including giving a female coworker a card which said "Sex is a misdemeanor. De more I miss, de meanor I get." The plaintiff responded that the female worker to whom he had given the card had often engaged in behavior more off-color and flagrant than his own. However, the court upheld the dismissal of his claim under Kentucky state law because the court found that the two employees were not similarly situated. The crucial distinction in the court's mind was that the plaintiff was a supervisor and the female employee was not. The court agreed with the lower court's contention that, unlike the female coworker, the plaintiff "was a member of management, had authority over three offices and several subordinates, and had a responsibility to maintain a respectful, respectable, and decorous office." The court further added:

>[F]or two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment in a Title VII case, the plaintiff must prove that all of the relevant aspects of his employment situation are 'nearly identical' to those of the [female] employees who he alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.

The benchmark created by the Sixth Circuit is typical of the fairly rigid tests alleged harassers must pass before their suits can survive summary judgment.

Some courts have set similarly difficult tests when workers fired for

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41. *Balazs*, 32 F.3d at 155.
42. 40 F.3d 796 (6th Cir. 1994).
43. *Id.* at 799.
44. *See id.* The plaintiff claimed that the female coworker had engaged in flirtatious behavior, sent and shared sexually explicit jokes and cartoons with other workers, and had even brought a pornographic videotape into the office. *See id.*
45. *See id.* at 802 (describing why the two employees were not similarly situated).
46. *See id.*
47. *Id.* at 802.
48. *Id.* (alteration in original) (quoting Ruth v. Children's Med. Ctr., 940 F.2d 662 (6th Cir. 1991)).
sexual harassment have tried to bring Title VII actions based on race, rather than gender. In *Johnson v. J.C. Penney Co.*, the plaintiff had been terminated for allegedly offensive conduct such as unzipping and zipping his pants, placing his hand on his crotch, asking a female subordinate to spend the night with him the next time her husband was out of town, and placing his arm around the female coworker's waist. The plaintiff denied the charges and claimed his offensive conduct was merely a pretext and that he was truly dismissed because of racial bias. The only proof the plaintiff offered for the pretext claim, however, was a single comment that a superior had made to him. The court granted summary judgment to the defendants on the Title VII claims because the plaintiff had produced no evidence sufficient to create a genuine issue of material fact as to the pretext issue. The court stated that "a single remark, which on its face is not even racist, cannot provide sufficient evidence to create a genuine issue of material fact." Similarly, in *Baker v. McDonald's Corp.*, an African-American plaintiff filed suit against his former employer alleging that he had been discharged on the basis of his race in violation of Title VII. As in *Johnson*, the court granted summary judgment for the employer because the plaintiff did not satisfy the burden of demonstrating a prima facie case of discrimination. Even if the plaintiff had met his burden, the court still would have granted summary judgment because the employer gave a legitimate, non-discriminatory basis for the discharge. The court said that an "employer who shows that there were reasonable grounds to believe that the discharged employee had made unwelcome sexual overtures to female employees rebuts any prima facie case presented by the plaintiff." This statement by the court shows the latitude the judiciary has allowed employers on the issue of harassment, even at the expense of the equally sensitive issue of racial discrimination.

Arguing that a termination for harassment was merely pretext for age discrimination can also prove difficult for the alleged harasser bringing a
Claim under Title VII. In Agugliaro v. Brooks Brothers, Inc., 60 the plaintiff was fired by the employer after thirty-three years of service because of a charge that the plaintiff sexually harassed a subordinate female worker. 61 The plaintiff stated that the allegations were merely a pretext and that his termination was really based on his age. 62 The court found, however, that the plaintiff had no grounds to sue the clothing store because Brooks Brothers had a good faith belief that the plaintiff had engaged in harassment when it decided to fire him. 63 In his opinion, Judge Chin wrote:

[N]o reasonable jury could conclude that defendants' articulated reason for discharging... [the plaintiff]—that he sexually harassed a subordinate employee—was pretextual. Indeed, on the present record, it is clear that plaintiff did engage in inappropriate sexual conduct with a subordinate employee on the premises during business hours. Moreover, even assuming for purposes of this motion that... [plaintiff] did not engage in inappropriate sexual behavior, defendants fired him because they believed in good faith that he had, and... [plaintiff] has presented no evidence to show otherwise. 64

Bad faith could be proven if the plaintiff could show, for example, that the company knew the allegations against him to be false, but terminated his employment anyway. 65 This defense of good faith for employers has been upheld by various other courts and can present a considerable obstacle for any fired employee accused of harassment. 66

This brief survey of Title VII cases demonstrates the stringent tests courts force an alleged harasser to pass before allowing his claim to reach the jury. Plaintiffs' lack of success reinforces the tendency of employers to enact stiff penalties against workers accused of harassment. 67

61. See id. at 744-45.
62. See id. at 743.
63. See id.
64. Id.
65. See id. at 747.
67. It should be noted that Title VII actions by harassers have also been brought under charges of religious discrimination. See Levitt v. University of Texas, 847 F.2d 221 (5th Cir. 1988); Evans v. Bally's Health & Tennis Club, Inc., 64 F.E.P. Cas. (BNA) 33 (D. Md. 1994).
III. OTHER UNSUCCESSFUL CLAIMS BROUGHT BY ALLEGED HARASSERS

A. Emotional Distress

Moving away from Title VII claims, alleged harassers have found equal difficulty suing under the umbrella of an emotional distress claim, stating that the charges of sexual harassment and the subsequent termination have caused the accused intense emotional injury. To prove intentional infliction of emotional distress, most states require that the conduct of the employer, in handling the investigation of the harassment charge, be extreme and outrageous. Thus, in *Pierce v. Commonwealth Life Insurance Co.*,\(^68\) the court found that the defendant employer had not violated the stringent Kentucky standard of conduct. Its actions were not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."\(^69\)

The court in *Johnson v. J.C. Penney, Co.*\(^70\) came to this same conclusion when it granted summary judgment for defendant.\(^71\) The court went so far as to say that even though "an employer’s conduct may rise to the level of illegality, except in the most unusual cases, it is not normally enough to constitute the 'extreme and outrageous' conduct necessary for this cause of action."\(^72\) Thus, as with Title VII claims by alleged harassers, courts tend to set very high standards for plaintiffs to bring a successful action for emotional distress.

B. Worker’s Compensation

The high bar can also effect plaintiffs who bring worker’s compensation claims. In this scenario, the worker has usually been demoted for harassment and then asserts that he missed work due to emotional injuries brought on by the harassment accusations raised against him. In *Maritone v. State of Rhode Island/Registry of Motor Vehicles*,\(^73\) the plaintiff tried to collect for emotional injuries allegedly caused by other employees’ treatment of him after he had been disciplined for sexual

\(^{68}\) 40 F.3d 796 (6th Cir. 1994).

\(^{69}\) *Id.* at 805. The court went on to say that for an emotional distress claim to be successful, the case should be "one in which the recitation of facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim ‘Outrageous!’" *Id.*


\(^{71}\) See *id.*; see also supra text accompanying notes 49-54.

\(^{72}\) *Id.* at 141 (citing Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991)).

\(^{73}\) 611 A.2d 384 (R.I. 1992).
The court held that the plaintiff could not collect worker's compensation benefits because he could not establish that the alleged injury was caused by his job. In examining the causation issue, the court looked at the source of plaintiff's harassing acts and found that they were not motivated by factors that sprang from the plaintiff's job, but rather were motivated by his own sexual cravings and by his desire to take advantage of the female coworker. To succeed with such a claim, the plaintiff would have to prove demonstrably that his psychological distress was not caused by his own actions, but by the actions of his employer or other employees. However, if the court finds that the employer acted correctly in investigating the charge of harassment, the plaintiff could, in all likelihood, not collect his worker's compensation payments.

C. Negligent Investigation

Courts have also set tough standards for plaintiffs to meet in actions brought under the rubric of negligent investigation. In Lambert v. Morehouse, the court granted summary judgment for the defendants, holding that Washington state courts should not recognize a cause of action for negligent investigation of alleged harassment. The court said that, as a policy matter, tort liability for negligent investigation is inappropriate in the employment relationship because "to the extent an employee has an employment contract requiring specific reasons for dismissal, ... the employer must conduct an adequate investigation or be liable for breach of that contract." The court reasoned that the negligence claim simply reasserts, in a tort context, the charge that the plaintiff's firing breached contractual promises arising from the employer's disciplinary policies. The court noted that it added nothing to show that the employer breached a standard of care because the employer would be liable even without this type of breach. If the plaintiff is an employee-at-will, the court stated, the negligence claim conflicts with the employer's right to discharge the employee for any cause without incurring liability.

74. See id.  
75. See id.  
76. See id.  
79. Id. at 1119.  
80. See id.  
81. See id.  
82. See id.
D. Due Process Claims by Alleged Harassers

Government employees discharged for harassment have also faced a high bar in getting past summary judgment when suing the government for violations of substantive and procedural due process rights. Often, these cases will focus on whether the plaintiff can establish a deprivation of a definite liberty or property interest. In Rudow v. City of New York,83 the plaintiff, found guilty of sexual harassment by the City Commission on Human Rights, stated that the employer’s failure to disclose the harassed employee’s falsified receipt of medical care deprived him of his constitutional right to liberty without due process of law. The plaintiff argued that he had a protected interest as an individual innocent of sexual harassment.84 The court found, however, that the plaintiff’s liberty interest as someone innocent of the charges was not constitutionally protected.85 Further, the court stated that the statute describing the parameters of the City’s authority to prosecute sexual harassment complaints did not, without a separately articulable substantive right, create an interest in liberty protected by the Constitution.86

Similarly, in Grassinger v. Welty,87 the court found a university’s failure to follow its own sexual harassment guidelines in investigating accusations against a professor did not violate procedural due process. The court stated that the school’s failure to follow its own regulations did not give the victim of the alleged behavior a protected liberty or property interest.88 The court noted that there is neither a liberty nor a property interest in procedures themselves, and that state administrative policies, such as the university’s, generally do not confer entitlements under state law.89 The court added that because this particular policy did not confer any property or liberty interests, even if the university had violated its own regulations, at most there would have been a violation of state procedural law, which is beyond the jurisdiction of the federal court.90

Courts might also give plaintiffs accused of harassment little leeway in recognizing types of due process they are entitled to before termination. In Jackson v. St. Joseph State Hospital,91 the plaintiff argued that he had suffered a due process violation when he received a letter from his

83. 822 F.2d 324 (2d Cir. 1987).
84. See id. at 325.
85. See id. at 329.
86. See id. at 330.
88. See id. The court did say that a teacher who had gained tenure had a property interest in his job and could only be released after notice and a hearing. See id.
89. See id. at 869.
90. See id.
91. 840 F.2d 1387 (8th Cir. 1988).
employer indicating that the decision to fire him had already been made. He was given a chance to convince his superior to change his mind, but claimed that this opportunity should have preceded the decision to terminate him.92 The court held, however, that there was no due process violation because due process "does not require predecision hearings. It only requires an opportunity to be heard prior to the termination of benefits."93 Since the plaintiff had eleven days to respond before his salary payments ceased, the court found that there was no violation.94

Even when the charges against an employee are proven to be false, the employee may have a hard time bringing a due process claim. In Workman v. Jordan,95 a captain in the sheriff's department was fired for making inappropriate comments in the workplace.96 At a grievance hearing, the hearing officer found that while the plaintiff's comments were sexist and vulgar, they did not rise to the level of sexual harassment.97 The captain was reinstated and granted full back pay, nevertheless, a letter of reprimand, a letter of termination, and a poor evaluation were placed in the plaintiff's personnel file.98 The plaintiff asserted that he was deprived of both property and liberty without due process of law in violation of the Constitution; the court dismissed both claims.99 While admitting that the plaintiff did have a property interest in continued public employment, the court found that this interest was not infringed because the employer's procedures worked when the plaintiff was reinstated and awarded all necessary back pay.100 The court also found no deprivation of a liberty interest in the alleged damage to the plaintiff's reputation because the stigmatizing documents placed in the personnel file were not false.101 The court noted that the documents in the file merely repeat the evidence found to be accurate by the investigation but which the hearing officer did not find to be sufficient to justify immediate termination.102 The court concluded that the captain was unable to prove that false stigmatizing statements had become entangled with his interest in employment.103

92. See id. at 1391.
93. Id. at 1390.
94. See id.
95. 32 F.3d 475 (10th Cir. 1994).
96. See id. at 477 (describing how the plaintiff was accused of calling women "bimbo," "sweetie", and "bitch", and using other inappropriate language).
97. See id.
98. See id.
99. See id. at 478.
100. See id. at 479.
101. See id. at 481.
102. See id.
103. See id.
E. Defamation

Courts have also placed high hurdles in front of alleged harassers bringing defamation actions against their former employers. There is a well-recognized conditional or qualified privilege for an employer to communicate information about its employees and to give its employees information regarding the company, as long as the disclosure is not motivated by malice.\(^\text{104}\) Thus, in Manning v. Cigna Corp.,\(^\text{105}\) the plaintiff, terminated for fondling several female workers, brought an action for defamation against his employer after the defendant employer disclosed to other workers the nature of the plaintiff's harassing acts. The court, finding that Cigna had a right to tell employees that the plaintiff had been fired for harassment, granted summary judgment for defendants.\(^\text{106}\) The court stated that the workers had a real interest in knowing why a fellow employee was discharged, that the disclosure reiterated the company's sexual harassment policy, and that "common interest" communications such as these are protected.\(^\text{107}\)

Similarly, the court in Duffy v. Leading Edge Products, Inc.,\(^\text{108}\) held for the defendant company,\(^\text{109}\) but in this case the issue centered on proving malice. The plaintiff in Duffy was terminated for accosting a fellow employee in her hotel room during a trade show.\(^\text{110}\) The plaintiff sued for defamation, but the court found that because the investigator actually believed the allegations to be true no actual malice could be proven.\(^\text{111}\) For the defamation claim to remain, the court found that the plaintiff would have to show that the investigator "had a high degree of awareness that the underlying facts as reported to her were probably false."\(^\text{112}\)

Duffy also presented a unique twist on the qualified privilege afforded


\(^{106}\) See id. at 899.

\(^{107}\) See id. Similarly, in Moss v. Mutual of Omaha Ins. Co., No. Civ. A. 89-138, 1990 WL 485666, at *5 (D. Vt. Apr. 9, 1990), the court found that the employer had a conditioned privilege to publish information to certain employees that a worker had been fired for sexual harassment. Even though the employer did not give the defendant an opportunity to argue his version of the events, the court did not find that the employer acted with malice. See id.

\(^{108}\) 44 F.3d 308 (5th Cir. 1995)

\(^{109}\) See id. at 311.

\(^{110}\) See id. at 310-11.

\(^{111}\) See id. at 313.

\(^{112}\) Id. at 314. The court did note that where a story is clearly falsified, a profession of good faith by the investigator probably would not hold up. See id. (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). However, in this case, the court found no evidence of fabrication. See id.
to employers. In this case, the plaintiff was not suing over a publication by the company of his termination but over a compelled self-publication defamation.\textsuperscript{113} The plaintiff argued that the defendant company should be accountable for damages because "it was reasonably foreseeable that he would as a practical matter be required to tell prospective employers of the allegedly defamatory reason for his termination."\textsuperscript{114} The lack of malice on the part of the employer, however, defeated the claim here.\textsuperscript{115} Plaintiffs attempting to bring a successful defamation action in a situation such as Duffy face the challenge of proving either malice or a lack of qualified privilege on the part of the employer.

\textbf{F. Wrongful Termination and Breach of Contract}

The final claim to be considered in a survey of unsuccessful litigation brought by alleged harassers is wrongful termination. For a plaintiff to bring a successful action of this sort which will survive summary judgment, the plaintiff must prove that he or she had an employment contract for a term of years. In most states the employment-at-will doctrine is in effect, meaning that most terminated workers who try to sue under this claim face the burden of demonstrating that an employment contract did exist.\textsuperscript{116}

Thus, in Ekokotu \textit{v. Pizza Hut, Inc.},\textsuperscript{117} where the plaintiff had been discharged for using derogatory language toward female employees, the court disposed of the claim on summary judgment because there was no proof of a contract between the plaintiff and his employer.\textsuperscript{118} The court did the same in Simpson \textit{v. Pizza Hut, Inc.},\textsuperscript{119} a case involving a plaintiff discharged under similar circumstances, stating that "any business \ldots is freely permitted to 'shoot itself in the foot', so to speak when it decides to terminate seemingly competent and ideal employees like plaintiff \ldots who are employed at will."\textsuperscript{120} The court added that, so long as the employer investigated the complaint, firing for sexual harassment does not create an exception to the employment-at-will doctrine.\textsuperscript{121}

\begin{thebibliography}{99}
\item 113. \textit{See id.} at 311.
\item 114. \textit{See id.}
\item 115. \textit{See id.} at 310.
\item 116. The employment at will doctrine provides that "absent express agreement to the contrary, either employer or employee may terminate their relationship at any time, for any reason. Such an employment relationship is one which has no specific duration, and \ldots may be terminated at will by either the employer or the employee, for or without cause." \textit{BLACK'S LAW DICTIONARY} 525 (6th ed. 1990).
\item 118. \textit{See id.} at 904-06.
\item 120. \textit{Id.} at *3.
\item 121. \textit{See id.} at *7.
\end{thebibliography}
In *Johnson v. J.C. Penney Co.*, the plaintiff tried to avoid his employment-at-will status by stating that the company manual changed his working status. The court noted, however, that Texas case law established that if an employment manual has a disclaimer which states that the manual does not constitute a contract, that disclaimer will negate any implication that the personnel procedures will restrict the at-will relationship.\(^{123}\) Because the defendant’s manual had such a disclaimer, the court dismissed the plaintiff’s claim.\(^{124}\)

In *Lawson v. Boeing Co.*,\(^{125}\) the plaintiff tried to make a similar escape from the employment-at-will doctrine by claiming that he had an oral assurance from his employer that he would retain his job as long as he performed at an adequate level.\(^{126}\) The court rejected the idea that this oral promise amounted to a definite contract and dismissed the claim.\(^{127}\)

Examining these varied unsuccessful claims brought by alleged harassers, one finds that many courts tend to support employers who terminate employees for sexual harassment by placing high bars for plaintiffs to surmount at the summary judgment stage. These high standards operate regardless of the type of claim brought by the alleged harasser. These barriers help create, in turn, a judicial impetus for employers to create and to strictly enforce demanding internal policies against harassment to aid in limiting their liability. Employers find themselves in a difficult bind, though, when alleged harassers are successful in their actions. These successful claims remind employers that they face potential liability not only from the alleged harassed employee, but also from the alleged harasser.

IV. SUCCESSFUL CLAIMS BROUGHT BY ALLEGED HARASSERS

Although alleged harassers have been largely unsuccessful in their cases against employers,\(^{128}\) courts have been willing to recognize claims by harassers when the employer’s actions are especially egregious. In *Valdez v. Church’s Fried Chicken, Inc.*,\(^{129}\) the court found that the plaintiff, an alleged harasser, had been discriminated against on the basis of race. This finding was in part because of the poor investigation of the sexual

\(^{122}\) 876 F. Supp. 135, 140 (N.D. Tex. 1995); see also supra text accompanying notes 70-72.

\(^{123}\) See *Johnson*, 876 F. Supp. at 140.

\(^{124}\) See id.


\(^{126}\) See id. at 547.

\(^{127}\) See id. at 548.

\(^{128}\) See *Conte*, supra note 1, at 35.

harassment allegations conducted by the company. The court was troubled by (1) the short length of the investigation (two days), (2) the fact that no outside lawyer was hired for guidance, (3) the employer's failure to take a statement from the plaintiff accused of harassment, and (4) the employer's failure to ask the plaintiff to take a polygraph test when it had asked others accused of harassment to do in prior cases.

Similarly, in Starishevsky v. Hofstra University, the Supreme Court of Suffolk County, New York found a due process violation in a sexual harassment case where a university panel fired an administrator who allegedly kissed a student. The court found that the administrator/plaintiff did not receive a fair hearing when he was not informed prior to the disciplinary hearing that, (1) the judging panel was instructed to look beyond the single allegation of sexual harassment, (2) the panel was to make a recommendation as to the plaintiff's future employment, and (3) the employment recommendation need not be based solely upon whether a finding of sexual harassment was made. The court further noted that this lack of essential fairness and good faith in the hearing process culminated in the panel's finding that the plaintiff was not guilty of sexual harassment, but that he should nonetheless be terminated from the university because of behavior which was unethical, unprofessional, and inappropriate. The court ultimately ordered the reinstatement of the administrator.

While courts have generally recognized an employer's qualified privilege for publication, they have not extended this privilege to employees. In Garraghty v. Williams, the Virginia Supreme Court held that an employee's sexual harassment allegations did not qualify for a special privilege. In this case, a female employee sent memos to the plaintiff, accusing him of sexual harassment. After others had seen the memos, the plaintiff denied the charges against him and filed a defamation suit. The court permitted the defamation claim go to the jury, which found that the plaintiff had been defamed. After appeals, the plaintiff ultimately was awarded $277,597 in compensatory and punitive

130. See id. at 627-28.
131. See id. at 628-29.
133. See id. at 796.
134. See id. at 800.
135. See id.
136. See id. at 801.
137. See PERRITT, supra note 104.
139. See id. at 216.
140. See id. at 212.
141. See id. at 213.
142. See id. at 227.
Some recent jury decisions in favor of alleged harassers prompt serious debates about whether a company was vigorously pursuing a policy against sexual harassment or was acting unlawfully toward one of its employees. One such case is *Mackenzie v. Miller Brewing Co.*, the so-called *Seinfeld* case. In March 1993, the Milwaukee-based Miller Brewing Company fired Jerold Mackenzie, a manager with nineteen years of service, after coworker Patricia Best complained to her supervisor that Mackenzie had made her feel terribly uncomfortable. Best was troubled by Mackenzie having described to her the story of the previous night’s episode of *Seinfeld*, in which comedian Jerry Seinfeld forgets his girlfriend’s name, only remembering that it rhymes with a part of the female anatomy. At the end of the episode, Seinfeld remembers that his girlfriend’s name is Dolores, rhyming with “clitoris.” Mackenzie, in describing the episode to Best, did not want to say the word “clitoris” out loud. Instead, he showed her a photocopied definition of the word from a dictionary. Best complained about Mackenzie’s actions. Mackenzie was then called into a meeting to discuss the incident with Miller’s in-house and outside counsel who had already discussed the incident in a meeting with Miller’s then-CEO, Warren Dunn. Eventually the company decided to terminate Mackenzie, who then sued the company, one of his supervisors, and the complaining coworker in state court in Milwaukee in 1994. In July 1997, Mackenzie won a $26.6 million jury verdict, consisting of about $6.6 million in lost future earnings and $20 million in punitive damages although some of the damages have already been lowered on appeal.

Some pundits called the verdict a stinging rejection of the overzealousness and political correctness that has crept into the enforcement of sexual harassment policies in some companies. Close examination of the case reveals that this conclusion is inaccurate. First, the company based its decision to terminate Mackenzie on more than the one incident. A month before his discussion of the episode with Best, Mackenzie had left her a bizarre voice mail message saying that he had

143. See id. at 212.
146. See id.
147. See id.
148. See id.
149. See id.
150. See id.
151. See id.
152. See Tanick, *supra* note 8, at A19 (arguing that the “Seinfeld” verdict should remind companies to respect the rights of alleged harassment perpetrators).
been out drinking, was "going night-night," that he thought she was a "special" employee, and that he wanted to get off the phone before he got too mushy. In addition, Miller claimed that this incident was just the latest in a series where Mackenzie had demonstrated poor managerial skills, including a 1989 incident that led a different female worker to file a sexual harassment charge against Miller. The company eventually settled that claim for $16,000 in 1990.

Second, Mackenzie's cause of action only remotely touched on the reference to the television program. In fact, Mackenzie's lawyer seemed to be arguing a claim of wrongful discharge even though Mackenzie's claim under that theory had actually been dismissed before the trial when the court deemed Mackenzie to be an employee-at-will. Mackenzie's suit also was not a defamation claim, as the company does not provide any negative information about former employees. Instead, Mackenzie brought his action based on three different tort theories.

The first tort, misrepresentation, stemmed from a 1987 restructuring of the company in which the company downgraded 700 jobs, including Mackenzie's, and grandfathered the salaries and benefits of the incumbent employees filling those positions. Mackenzie claimed that his then supervisor, Robert Smith, did not explain to Mackenzie that his position had been downgraded, and that Mackenzie did not learn of the downgrade until August 1992. Mackenzie did not quit when he learned of his downgrade, but waited until 1994 to sue Miller and Smith claiming that they had deprived him of the right to make an informed choice in 1987 about whether to look for another job. The jury believed this theory and told Miller to pay Mackenzie $6.5 million in compensatory damages and $18 million in punitive damages and had Smith pay $1,500 in compensatory and $500,000 in punitive damages (a figure that was later lowered by the appellate court to $100,000).

Mackenzie's next claim was equally obtuse; he argued that Smith had tortiously interfered with his prospective contract when Smith advised the company not to promote Mackenzie in 1992. Mackenzie made this argument even though Smith had nothing to do with the final decision to promote, and even though Smith's feelings about Mackenzie were not

154. See id.
155. See id.
156. See Buchanan, supra note 5.
157. See Parloff, supra note 145, at 5.
158. See Buchanan, supra note 5.
159. See Parloff, supra note 145, at 5.
160. See id.
161. See id.
162. See id.
proven to be motivated by any sort of discriminatory bias. The jury, however, accepted this claim as well, and ordered Smith to pay an additional $100,000 for the injury.

Mackenzie's final claim did concern the discussion of the television episode. Mackenzie argued that Best had also tortiously interfered with his contract because she was not genuinely offended by his reference to the Seinfeld episode and had simply used the incident as a pretext to have Mackenzie fired. The jury found this argument persuasive as well and ordered Best to pay $1.5 million in punitive damages that were eventually revoked on appeal. The result of the Seinfeld verdict seems to speak more to the ability of Mackenzie's attorney to blur a number of claims to convince the jury that Miller had unfairly terminated Mackenzie, even though he had no cause of action for wrongful termination, than to the jury's statement that Miller was excessive in its treatment of alleged sexual harassment violators. As one writer noted, the lesson of the case might be that "if an employee complains to a supervisor about a colleague's conduct, and the supervisor and the company's attorney agree with the complaining employee and therefore take lawful action to punish the offensive conduct, the complaining employee may incur $1.5 million in liability."

V. POLICY ANALYSIS: SHOULD VERDICTS LIKE THE SEINFELD DECISION PROMPT COMPANIES TO RECONSIDER THEIR HARASSMENT POLICIES?

The Seinfeld verdict has been viewed as a statement against a company's knee-jerk reaction to anything that arguably constitutes sexual harassment. Thus, the jury's large damage award could have been intended to counter the company's overreaction to sexual harassment charges, and the harm unfounded allegations can do to an individual's reputation. When juries, such as the Seinfeld jury, grant large awards to those accused of sexual harassment, they may be attempting to readjust the lines of social policy, lines that may have been pushed too far in the opposite direction by judicial rulings and statutes passed by the legislative bodies. Some think the Seinfeld verdict shows that the jurors were angry

163. See id.
164. See Parloff, supra note 145, at 5.
165. Mackenzie claimed that because Best used sexually charged language around the office, she could not have been sincerely upset by his comments. See id.
166. See id.
167. Id. at 5.
168. See Spivak, supra note 7, at 1.
169. See id.
170. Jonathan Rauch, the author of "Kindly Inquisitions: The New Attacks on Free Thought," said the Seinfeld verdict could be "the beginning of a useful backlash" against limits of on-the-job speech. See Tevlin, supra note 6, at 1A. Also, it should be noted that
at the way harassment law has been used to harass workers who want to talk about something other than the latest production figures, and that they did not want a work environment in which a worker must watch every word spoken.\textsuperscript{171}

Those who argue that these verdicts were intended to send a message cite several factors that have caused companies to overreact to claims of sexual harassment. The first is fear of liability. One writer observes:

\begin{quote}
[A] company’s legal duty to take prompt corrective action against sexual harassment seems to call for sanctions to be levied on those alleged to have committed such harassment in the workplace, regardless of actual culpability. The presumption of guilt runs rampant. Imposing discipline ostensibly carries out management’s legal duty while preventing the business from exposure to liability for a subsequent occurrence.\textsuperscript{172}
\end{quote}

The tendency of many courts to dismiss claims brought by alleged harassers\textsuperscript{173} regardless of the theory under which the plaintiff brings his claim, serves to bolster this attitude by employers, as they could see it to have an implicit judicial sanction.

A second reason cited for a company’s overzealousness in pursuing harassment charges is political correctness. When companies do not terminate harassers, “mild sanctions often trigger outcries that reflect poorly on a company. It is often easier to sweep claimed perpetrators away rather than risk the antagonism and adverse publicity that can be generated by failure to take strong measures against alleged wrongdoers.”\textsuperscript{174}

These arguments fail, however, for a number of reasons. First, it is hard to glean a cohesive message from any jury verdict. On the surface, the Seinfeld trial may seem to be about what constitutes a hostile work environment, but the jury verdict really seems to owe more to Mackenzie’s lawyer’s adept skill at blending different claims to bring an otherwise impossible wrongful termination suit. The Seinfeld verdict should actually be viewed not as a harbinger, but as an aberration, or what one writer said should be promoted as “the Twilight Zone case.”\textsuperscript{175}

Second, the same strong policy reasons that originally supported sexual harassment policies in companies carry the same force today.

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\textsuperscript{171} See Joanne Jacobs, Crossroads: Where’s the Middle Ground in Cases Like Miller-Seinfeld?, MILWAUKEE J. SENTINEL, July 27, 1997, at 3, available in 1997 WL 12740240 (arguing that the jurors were probably feeling more oppressed by workplace censorship than by workplace boorishness).

\textsuperscript{172} Tanick, supra note 8, at A19.

\textsuperscript{173} See discussion infra Parts II-III.

\textsuperscript{174} Tanick, supra note 8, at A19.

\textsuperscript{175} See Parloff, supra note 145, at 5.
Reviewing statistics concerning harassment of women indicates that anywhere from 42% to 90% of women experience sexual harassment at some point in their lives. Only 1% to 7% of all women who report sexual harassment in surveys actually file formal complaints, usually because they fear retaliation or loss of privacy. About 25% of harassed women use leave time to avoid the situation, and of those who report sexual harassment, about half just try to ignore it while 5% quit their jobs.\(^{176}\) Thus, the problem of sexual harassment remains a serious one, and companies need to continue to address violations, motivated not by political correctness, but by recognition of a legal obligation to stop harassment of which management is aware, even if no one has complained.

If courts have appeared to favor companies by often not allowing suits by alleged harassers to survive summary judgment, it may be because the federal mandate embodied in Title VII was given to businesses with little or no suggestion of how to implement it. Thus, "having saddled employers with the responsibility to transform gender norms—making them 'instruments of social policy,' in the words of employment law specialist Steven Berlin—is it fair to turn around and punish them for executing that responsibility in good faith?"\(^{177}\) California recently joined Nevada, New Mexico, Oregon, and Washington in answering "no" to this question, when the California Supreme Court ruled that jurors in wrongful termination trials need not decide whether the accusations are true, but only whether the employer in good faith believed after a reasonable investigation that the misconduct occurred.\(^{178}\) Justice Janice R. Brown warned that effective decision making in the workplace would be "thwarted" if an employer was "required to have in hand a signed confession or an eyewitness account,"\(^{179}\) before it could act.

Even given this posture by some courts, fears that alleged harassers could be denied essential procedural protections are unfounded when the case law is closely examined. While many courts have set the bar high for claims of alleged harassers to survive summary judgment, cases like \textit{Starishevsky v. Hofstra University}\(^{180}\) and \textit{Valdez v. Church's Fried Chicken}\(^{181}\) indicate that courts will allow claims to go forward when


\(^{179}\) Id.

\(^{180}\) 612 N.Y.S.2d. 794 (N.Y. Sup. Ct. 1994); \textit{see also supra} note 132 and accompanying text.

\(^{181}\) 683 F. Supp. 596, 627-28 (W.D. Tex. 1988); \textit{see also supra} note 129 and accompanying text.
alleged harassers have been denied essential procedural rights. As the court observed in Starishevsky, the "process of eliminating sexual harassment must go forward with recognition of the rights of all involved and without the creation of new wrongs. The process must be propelled by a sense of fairness and not motivated by any other less appropriate notions." In the face of the general befuddlement which afflicts legislators and business leaders alike in trying to define the parameters of harassing actions, the current policy of many companies to vigorously rid their businesses of sexual harassment violators should remain in place. The concept of sexual harassment is still relatively new to American society and culture, and until complete acceptance of sexual harassment as a crime has become the norm in the business community, the harm that could come from turning a blind eye to harassment claims by potential victims outweighs the concern for excessive discipline toward alleged harassers. With the recognition and the definition of harassment in such a volatile, indefinite state, the process described above by the court in Starishevsky is best served by American businesses continuing to take a vigilant, active role in the struggle to eliminate sexual harassment violations.

182. 612 N.Y.S.2d. at 794.