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Contact: Josh Kalish (919) 724-9000
josh.kalish@thenoblelaw.com

Sexual Harassment

10 Things the Media May Not Be Adequately Covering

By Laura Noble, Attorney at Law

About the Author

Laura Noble is an Employment Attorney and Managing Partner of The Noble Law Firm, with offices in Raleigh, Chapel Hill and Charlotte, NC. She is a former Assistant District Attorney in Brooklyn and has defended victims of sexual harassment and rape in the workplace.



Laura Noble is available as to serve as legal expert on workplace sexual harassment issues to local and national media outlets.

OVERVIEW

I'm an employment attorney, and I represent people, mostly women¹, who were sexually harassed at work. While the current news stories capture our attention with salacious facts about famous people, I write this hoping to give attention to the other stories. The stories of women who will never be on TV and who are not receiving ample six-figure settlements. Here's what you may be missing about sexual harassment and assault at work.

1. Sexual Harassment Including Physical Assault, is Not Rare

I have represented women who have been verbally accosted, physically assaulted, temporarily imprisoned and raped at work. What did these women experience? Things like:

- Being forced to commit fellatio to prevent job termination;
- Being asked for sex at the job interview;

¹ I have represented men sexually harassed by other men or women. I have represented women sexually harassed by other women. However, by a landslide, my cases involve men in power sexually harassing female subordinates, so I am addressing the legal and practical effects of these scenarios in this article.

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- Being forcibly trapped in a small room by a harasser demanding sex before allowing release;
- Being sent pictures of male genitalia;
- Having breasts groped by a drunk boss,
- Having a co-worker bang a hotel door room for 30 minutes demanding sex;
- Being forced to listen to a boss's graphic accounts of fantasized sex acts.

I won't get into to the details of the rape cases, but they are as shocking and horrifying as you can imagine.

Outraged reactions to the recent spate of stories about high-profile men are frankly disappointing. If anyone were paying attention, they would know that women being sexually harassed and assaulted at work is not a rare occurrence. The #metoo campaign provides anecdotal support that sexual harassment at work is commonplace. Hard data is more difficult to come by. Researchers have concluded that sexual harassment and sexual assault at work is extremely underreported.² Given this, studies that conclude only 38-40% of women have experienced sexual harassment in the workplace should be viewed critically,³ however, even that number should make our hair light on fire. Instead, unless someone famous is involved, we speak little about it in public or at work.

Sadly, there are no recent, reliable statistics about sexual violence at work. However, the most recent data from the Bureau of Justice Statistics *estimated* there were more than 43,000 workplace rapes and sexual assaults a year.⁴ Worse still, there is a legal black hole that many rape victims fall into when they try to pursue remedies for rape at work. Many jurisdictions around the country limit recovery for rape at work to a workers' compensation claim for recovery of their rape "injuries."⁵ This means the victim cannot sue

² See, [Report of the Secretary-General of the United Nations, In-depth Study on all Forms of Violence Against Women 68 \(July 2006\)](#) at page 68.

³ Potter & Banyard, 2011 survey concluding that 38% of women in the workplace have experienced sexual harassment at work.

⁴ <http://www.npr.org/2016/02/23/467826376/underreporting-makes-sexual-violence-at-work-difficult-to-address>.

⁵ *Wood v. Safeway, Inc.*, 121 Nev. 724 (2005)(woman sexually assaulted at work could not bring lawsuit against the employer; workers' compensation was her only remedy); *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995)(Employee raped by a visitor to the shelter where she worked was barred from bring a lawsuit against her employer for negligence; workers' compensation was her exclusive remedy.) *See also*, Andrea Giampetro-Meyer, et al., *Raped at Work: Just Another Slip, Twist, and Fall Case*, 11 U.C.L.A. Women's L.J. 67, 98 (Winter 2000).

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the employer for negligence around the unsafe workplace conditions where the rape occurred nor recover for significant emotional distress damages. Even if a rape victim is allowed to sue the employer directly, often courts will dismiss the claim because the rapist was not acting “within the course and scope of employment.” In other words, the case may be dismissed if the company shows that the rapist was not carrying out company business, or otherwise acting on the employer's behalf when he raped the employee. Without the ability to hold companies responsible, sexual abuse victims are forced to seek compensation from the perpetrators themselves, most of whom do not have the resources or insurance to compensate the victims fairly for the injuries that they caused.

2. All Industries and All Positions are Susceptible to Sexual Harassment & Assault

Sexual harassment transcends occupational and professional categories, age groups, educational backgrounds, racial and ethnic groups, and income levels. For example, one-third of female physicians have reported that they have been sexually harassed at work.⁶ My clients have ranged in race, national origin, sexual orientation, education, and age. I have had low wage clients in blue collar jobs, and extremely educated highly compensated women all in the unenviable group of “women harassed at work.”

I do recognize that specific groups of women are particularly vulnerable to sexual harassment. The European Commission has noted that “[d]ivorced and separated women, young women, new entrants to the labor market, women with irregular or precarious employment contracts, women in non-traditional jobs, women with disabilities, lesbians, widows, women working in informal sectors of the economy, migrant workers and women from racial minorities are disproportionately at risk.”⁷ Reading that list over, it makes me realize that actually few of us in the workplace are not “at risk.”

3. Sexual Harassment and Violence is a Form of Gender Discrimination

It has been *more than 50 years* since the U.S. passed the groundbreaking federal law prohibiting gender discrimination and sexual harassment at work.⁸ Yet, gender discrimination still rears its ugly head in obvious ways. Some examples:

⁶ [Committee on Pediatric Workforce. \(2006\). Prevention of sexual harassment in the workplace and educational settings: Policy statement. Pediatrics, 118, 1752-1756. doi:10.1542/peds.2006-1816](#)

⁷ [European Commission Recommendation of 27 November 1991](#) on the protection of the dignity of women and men at work, 1992.

⁸ Title VII of the Civil Rights Act of 1964. Perhaps enforcement has been less than ideal given that protection against gender discrimination was incorporated by accident into the law.

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- A male partner at a law firm tells a female associate that she can't try cases while pregnant because he claims she will get crazy with hormones;
- A woman is selected for a layoff because "she doesn't have a family to support" like her male counterparts;
- A man is hired for the same exact role as the woman employee, yet he is paid \$30,000 a year more in salary.⁹

What do fewer job opportunities, lower wages, and demeaning sexist attitudes have to do with sexual harassment? If it's not apparent, the World Health Organization sums it up nicely, "gender inequalities increase the risk of violence by men against women and inhibit the ability of those affected to seek protection."¹⁰

4. Why They "Give In" or Why They Don't "Just Leave." Part 1

There is always someone who responds to sexual harassment conversations with a line of questioning that goes something like this: "*Why do women put up with harassment or even, in some cases, acquiesce to unwelcome sex acts? Why not just say no? Or leave the job?*" I will break this down in parts because I really want people to understand what it is like to be a woman pursued and trapped by a sexual harasser.

Part 1: Predators are good at what they do.

- They understand when they are in a corporate culture that turns a blind eye and stays quiet when sexual harassment is reported. This is their green light to begin their search for women to harass or assault.
- Studies show that they tend to pick women who are economically or otherwise vulnerable. My unscientific analysis is that they also look for women who have a history of sex or child abuse.
- They are master manipulators and use a variety of tools to confuse, erode confidence, and bully women into acquiescing.

According to the legislative record, sex discrimination was not included in the original draft of the law, but was added at the last minute in an effort to prevent passage of the Act. 110 CONG. REC. 2577-84 (1964).

⁹ While there is some controversy around the causes of the wage disparity, we know that women still earn about 81% of what men earn and that women are disproportionately represented in low-wage jobs even though more women are earning college degrees than men.

¹⁰ http://www.who.int/violence_injury_prevention/violence/gender.pdf

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For example, listen to the tape recording of Harvey Weinstein who used these kinds of tactics on one woman. The following are excerpts from his attempts to get her into his hotel room:

Confuse: “I’m sorry...I won’t do it again... I swear on my children.”

Erode Confidence: “You’re embarrassing me... Don’t embarrass me in this hotel...Don’t have a fight with me in the hallway.”

Bully: “You must sit here and have a drink...You must come here now...Go to the bathroom. Listen to me.”

We know how (sickly) effective he was at these tactics on women who seem intelligent, confident and resilient. But, predators are quite good at what they do, some of them having practiced these tactics for years, even decades.

5. Why They "Give In" or Why They Don't "Just Leave." Part 2

Part II: Women have few good choices, particularly when the harasser is a powerful superior.

Women are terrified of the consequences to their current and future opportunities if they say no to the advances of the powerful male supervisor.

- Women do not have often have the luxury of losing their salary, health care, and savings plan
- Because of the wage and leadership disparity with men, it will likely take a woman a longer time than a man to find a job with equivalent statute, pay and benefits to her current position.
- **Women still get fired for making sexual harassment claims.¹¹**

¹¹ A report by the Equal Employment Opportunity Commission noted that in Fiscal Year 2012 retaliation charges represented 37.8% of all charges filed (nearly 100,000) – the highest percentage of any claim for that year, and the highest number of retaliation charges ever received by the EEOC in any fiscal year. William R. Tamayo, [Retaliation in Harassment Cases and Threats to Deter Reporting](http://www.americanbar.org/content/dam/aba/events/labor_law/am/2013/06tamayo.authcheckdam.pdf) 12-17 (June 2013), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2013/06tamayo.authcheckdam.pdf.

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- Women often blame themselves, feel guilt and shame and then get caught in a cycle of continued abuse.

6. **What Really Happens When Women Report Sexual Harassment or Assault**

We have heard from some famous men accused of sexual harassment that the accusers are simply trying to “cash in” on their allegations or get their fifteen minutes of fame. For most women who report sexual harassment, neither of those results are very likely. In fact, I have never met a client who's super psyched to have been sexually harassed because now she can get her “big payout.” Literally never. Most of what I hear is “I just don't want another woman to have to experience what I went through.”

Here are the more common experiences of my clients before lawyers get involved:

- The company moves her out of the office or department away from the harasser because it's uncomfortable for him to see her every day. The move diminishes her career opportunities but not his.
- Potential male mentors shun her out of concern that they will be “misinterpreted” when alone with her.
- She has PTSD and must take a leave of absence from work further hurting her job security and career advancement.
- HR does a poor investigation and concludes that “there was no evidence that their sexual harassment policy was violated.” Now, she's viewed as a troublemaker and a liar.
- Her work goes under a microscope, and suddenly the company finds her attitude poor or her work deficient.
- She's fired.
- She can't get another job because she has no reference and can't tell the prospective employer the real reason why she was fired

The harasser? Well, if he's the company's top salesperson or the founder of the business or a Chief Operating Officer, chances are he's not going anywhere. Or, if he does, it will be with a generous six or seven-figure separation agreement in his back pocket.

There are ways to navigate this stressful and challenging path, but again, no woman wants to find herself having to take this journey.

7. **Companies Don't Always Walk the Talk**

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Almost all companies with more than fifteen employees understand that they need to have a written anti-harassment and anti-discrimination policy. And, most of them do write one. Then, they neatly tuck it away in a desk drawer and never look at it again.

We do not talk about sexual harassment and assault at the workplace well or with any meaningful frequency. We are still awkward giggly inappropriate teenagers about this, and it's time to grow up. Companies need to move past their uncomfortable feelings and engage in frequent communication and training about sexual harassment.

I provide Anti-Harassment and Anti-Discrimination training to companies on a regular basis. And, yes, people make jokes and roll their eyes at my lecture, but I trudge on. I talk about how a woman harassed at work may feel scared to go to the office or may re-experience trauma from childhood after an assault. I talk about the low morale everyone feels in a company when the investigators and lawyers start to pour in to examine someone's claims. I give concrete examples of words, images, and physical acts that are not appropriate for the workplace.

I hope that having a female lawyer stand in front of managers and employees for hours explaining in excruciating detail how and why this is not only wrong but in violation of the law makes a difference. But, I can only do so much without the help of the company. Predators know when the company truly means Zero Tolerance and when it's just lip service. The companies that buy in and wholeheartedly embrace the idea that the workplace should be free of all harassment and a safe place to work have the best chance of achieving that goal.

8. Consequences Should be Swift and Severe. Usually, They're Not.

First, it typically takes more time than it should for companies to complete their factual inquiry and investigations. It takes more time than it should for the EEOC to engage in a meaningful investigation. Lawsuits maddeningly creep along at an interminable pace.

When a company finally gets to the point of agreeing to a settlement over sexual harassment or assault claims, they typically agree to make a payment of monetary damages to the woman harmed by the harasser's conduct. Many women also seek nonmonetary remedies like an apology, termination of the harasser, revision of the anti-harassment policy or meaningful anti-harassment training. This may be surprising but, in my experience, it is exceedingly rare for a company to agree to any of these terms. Not even an apology? Nope. More training so this doesn't happen again? Nah. In fact, it is standard for a settlement agreement to state emphatically that the payment of money to the woman harmed in no way should be construed as the company admitting "any liability

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whatsoever" for the acts. You can imagine how good this feels to a woman who was hoping to effect change by her brave act of coming forward with her complaint.

9. Confidentiality Agreements Are Not Helping Stem the Harassment

Perhaps some folks were indeed surprised when they learned about the claims by multiple women against Roger Ailes, Bill O'Reilly, Bill Cosby, and Harvey Weinstein. Why do I think this? Because I am confident that the women who settled their claims against these men had to sign away their rights to talk about the harassment or assault in exchange for the settlement. I am equally confident that those agreements contained harsh consequences if the woman harassed later spilled the beans about her harasser (such as having to pay back the entire settlement and the company's attorneys' fees). Given what we know about the difficulty of staying in the job or finding a comparable job and maintaining a reputation in the field after the complaint, it seems like a reasonable choice for women to accept the monetary benefits in exchange for a gag order. What if companies didn't insist on silence and the harasser was identified and tagged in the industry the same way that women who complain are? We might see fewer harassers attempt harassment again. As it stands now, we know the pattern: he harasses or assaults, she leaves, (maybe money is paid and a confidentiality order is signed), he stays at work to harass or assault again.

10. Mandatory Employment Arbitration Agreement are Unfair to Sexual Assault Victims

Americans have a right to a trial by a jury. However, fewer Americans can exercise that right because they sign it away when they go to work for corporate America. Many people don't even realize what they've signed until something terrible happens at work, and they need an attorney. Then they discover that the "onboarding" paperwork that Human Resources sent them included a "binding arbitration" clause for any employment claims. That means, instead of having your case filed publically and your evidence heard in open court by a jury of your peers, your case is filed privately, and your claims are decided by a private arbitrator(s). The arbitrator's decision is final meaning that you have no right to an appeal. Arbitration further stacks the deck in favor of employers because: i) it can be much more expensive than court; ii) arbitration can limit the amount of evidence that you can get from the company that will support your claims; and iii) the arbitrator(s) have to be agreed to by the employer, and they are usually ones that have incentive to be hired frequently by large law firms defending companies.

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Conclusion

Like most women, I have experienced sexual harassment at work. One summer during law school I worked in a bank. Many days while I sat at my computer the much older VP of the Bank would come to my desk, rub my shoulders and ask me to “relax.” My “#metoo” moments did not end there. I was sexually harassed by a law school professor and later while working as an Assistant District Attorney in New York. It never crossed my mind to tell anyone about these incidents. I thought the cost of working as a woman was that occasionally you had to fend off the advances of a sexual harasser. It never occurred to me to be angry that my male lawyer colleagues did not have to spend their precious energy dealing with this crap.

Supervisors (and co-workers), mostly men, need to learn that the sexual harassment and assault is against the law. Companies need to do a better job teaching this fact to their employees and taking swift and certain action against those who violate the law. Employees who were sexually harassed or assaulted at work should not have to be bound by a gag order when they seek the justice they are entitled to. Finally, American workers should not be limited to a private binding arbitration to seek redress for sexual harassment and assault at work.

If you're not convinced, do this. Go to your next professional conference - and I mean in any industry- film, car sales, pharmaceuticals, legal, medical, academic, etc.- and ask the attendees in the room to raise their hands if they've ever experienced sexual harassment at work. If they're honest, scores of women's hands will go up in your group. Scores and scores.