

Shifting Presumptions of Credibility in Sexual Harassment Cases in the #MeToo Era

BY ANN-MARIE AHERN & JACK MORAN

Ask almost any Plaintiff’s employment lawyer what their favorite kind of case is and they will invariably say age discrimination. Why? Everyone gets old and an older employee who loses his or her job after years of faithful service is inherently sympathetic. The framework for the narrative is simple and relatable. Sexual harassment cases, by contrast, are almost always complicated. Not legally complicated, but factually complicated, most often turning on motive, intent, honesty, and credibility. And then add sex. See, it’s complicated.

Although the law is clear that anyone can be a victim of sexual harassment, male or female, and the perpetrator can be the same sex or the opposite sex, by far the most common occurrence involves a male harasser and a female victim. For purposes of this article, therefore, (and ease of pronoun use), we default to a male harasser and female victim, but all of the observations contained in this article are equally applicable to atypical harassment situations.

In order to prevail, a sexual harassment victim must show that she was subjected to unwelcome harassment (sexual advances, sexual language/ images, verbal or physical harassment of a sexual nature and requests for sexual favors are common examples), and

that the harassment was “sufficiently severe or pervasive” so as to unreasonably interfere with work performance or create an intimidating, hostile or offensive work environment.

In response to allegations of sexual harassment, employers typically rely on one of two defenses: (1) the complained of conduct never happened, or (2) the complained of conduct was not unwelcomed by the plaintiff. The first defense puts the victim’s credibility squarely on trial and the second puts her sexual proclivity at issue. It is not uncommon for the employer to try to build themes around the plaintiff’s conduct outside of work, her manner of dress, past relationships/partners, and appearance. If this sounds like hyperbole, I promise it’s not. I have had a client cross-examined about the height of the heels that she wears on weekends, pictures that she had from vacation of herself in a bikini, and the length of her skirt when she goes out to bars (and that was all in a case where the defense was that the plaintiff had entirely fabricated the allegations). When the defendant is claiming that the harassment was “welcomed” by the plaintiff, it has the potential to expose the plaintiff to far-reaching – and sometimes highly personal — lines of inquiry that are arguably “relevant” because of the inherent credibility issues in such cases. To be a plaintiff in a

sexual harassment case can be a punishing and independently injurious pursuit.

And, like so many of us, sexual-harassment victims are imperfect people. The savviest sexual harassers pick their victims with the victim’s vulnerability in mind. The typical sexual harassment case is rarely as simple as what we’ve heard about in the news over the last six months. The brazen executive who demands sex in exchange for a promotion or job benefit (*quid pro quo* sexual harassment) is thankfully an uncommon occurrence. But most sexual harassment cases do involve a demonstration of power and control over someone who is weaker. Weaker in position, someone who is without a voice to speak up, or someone who won’t be believed if they do. Of the sexual harassment victims that present to our office, almost every one has been previously victimized, usually sexually, in some other way in their lifetime. Many times, victims of sexual harassment have their own involved and complex issues around relationships and sex. They may have a troubled background, a criminal record, mental health conditions, or be poor performers. Each imperfection becomes a vulnerability for an attack on a plaintiff’s credibility.

So, historically when a victim of sexual harassment reports that conduct either internally or through formal legal action, most often there has been a huge credibility gap to overcome. Whether it’s with Human Resources, a judge or jury, these claims in my experience, evoke a presumption of skepticism toward the victim. It’s a significant hurdle to overcome especially when the harasser is well-heeled, respected and successful, as they often are.

While we are still assessing the impact of the #MeToo movement, the presumption of credibility appears to be changing. After the parade of allegations against high-profile business, entertainment, and political figures, the public now knows that this conduct actually happens, and people will not immediately dismiss such claims

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as an attempt to garner money or attention. We can see this already with the counterpart hashtag to #MeToo, #BelieveWomen. Harassers and their employers appear to be on much shakier footing should they choose to base their defense on impugning the victim's credibility. While this was once perhaps a reliable page of the playbook, it now could serve to anger a judge or juror and thereby exacerbate the consequences of the defendant's underlying conduct. By encouraging women to share their experiences, the public has now been inundated with countless accounts of sexual misconduct, from both famous and anonymous women. In turn, this increases the likelihood that a single, isolated story will be believed, because sexual harassment is better understood as something that could happen anywhere, at any time, to anyone, and by anyone.

The #MeToo movement has not been without its critics, of course. For example, the New York Times ran an op-ed decrying the prospect that #BelieveWomen would necessarily imply that we should not believe men, given that credibility serves as such a focal point of "he said, she said" sexual harassment claims. It was inevitable that concern for falsely-accused men would emerge, and it is certainly wise to tread carefully in dealing with absolutes. Such criticism of #MeToo, however, fails to fully address the long-standing, and often effective, history of denial as a primary reaction to credible allegations of harassment. That criticism also fails to acknowledge that one of the main reasons that #BelieveWomen has gained steam is that the current rash of high-profile allegations have almost all been substantiated.

To be sure, denials are still issued by some. And we still see (and will probably always see) the evasive, hedging, and essentially non-responsive replies issued by a harasser's lawyer or public relations representative. But what is noteworthy is that many of the famous subjects of recent harassment complaints have responded to the allegations by essentially admitting that they occurred, while perhaps meekly qualifying that the harasser "remembers it a little differently." We have then seen apologies, resignations, failed candidacies, and sales of entire companies to address the fallout.

Consistent with so many reports finding that harassment is under-reported, the #MeToo movement has provided a platform for the long-silenced to speak out. This may have served to not only bolster the public's willingness to believe women but also to dissuade employers from questioning the accuser's integrity. Those who practice in

this area must be aware of the seismic shift in public awareness around these issues, and that while credibility determinations may still be at the heart of every case, the plaintiff no longer starts at a credibility deficit.

How #MeToo affects Ohio law if at all, will also be interesting to watch. Under Title VII, an employee is allowed to pursue claims against the employer only – she cannot bring claims against the individual harasser. The state law counterpart to Title VII, Ohio Revised Code Chapter 4112, provides a more robust resource for harassment victims. Specifically, Ohio Revised Code § 4112.02 permits an employee to bring a claim directly against the individual that committed the harassment, a right that was recognized by the Ohio Supreme Court in 1999 in *Genaro v. Central Transport*, 84 Ohio St.3d 293. Since that time, individual supervisor liability has been the subject of many bills seeking to eliminate that claim. It will be interesting to see if the #MeToo movement finally quells those attacks on § 4112.02, because in this climate of hyper-awareness of the issue, the ability to hold individual harassers responsible seems to be an unassailable principle.



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