

## **The Role of Advocates, Counselors and Medical Professionals in Obtaining Remedies for Victims**

## **Faculty**

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## **Background**

- Represented over 5 dozen battered immigrant women in immigration proceedings pre-“self-petitioning” under VAWA
  - Drafted legal memorandum for Senate

## **Background**

- As EEOC Regional Attorney
  - File lawsuits alleging sexual harassment including violent acts, rapes, etc. against companies
  - Overwhelmingly immigrant victims

## **Violence is Violence**

- Sexual violence in the workplace is violence
  - Sexual violence is a form of sexual harassment
- Domestic violence
  - Target abusers
  - Criminal justice

## **Violence is Violence**

- Sexual harassment
  - Target is company for \$\$ and changes

### **Violence is Violence and Control is Control**

- Balance of power
- Domestic violence
  - Spouse v. spouse
  - Husband with \$\$, job, immigration status, language capacity, control over children
  - Remedy is conviction, safety

### **Violence is Violence and Control is Control**

- Sexual harassment
  - Worker v. company
  - Company controls conditions of work
  - Job is lifeline for victim and family
- Remedy is \$\$\$ and policy changes

### **Parties**

- Victim or harasser may be man or woman
- Victim and harasser may be of same sex
- Harasser can be supervisor, agent of employer, co-worker, third party
- Victim can be indirect target of hostile work environment

### **EEOC Procedures**

- Who can file a charge?
  - All workers employed in an entity in U.S. and its possessions with 15 or more employees
  - *No distinction based on immigration status*
- US citizens working abroad for US companies

### **EEOC Procedures**

- Third parties (unions, church, relative, organization, etc.)
- Commissioner's charge
- A charge must be filed with 180 days of the discriminatory act (or 300 days in jurisdictions that have a fair employment practices agency)

### **EEOC Procedures**

- In termination cases, clock starts when employee is *notified* of termination
- In harassment cases involving a continuing pattern of harassment, at least one act must occur within the last 180 days (or 300 days with a FEPA)

### **EEOC Investigation**

- EEOC, a federal agency, can obtain statements, interview witnesses, visit the facility, review documents
- Find out who else is a victim of harassment
- Employer has opportunity to present its side of the story (request for information)

### **EEOC Investigation**

- EEOC can subpoena employer's records, have access to officials and interviews
  - Employer must cooperate with EEOC

### **EEOC Investigation**

- EEOC can enforce subpoena in federal court
  - Granted 99% of the time
  - Existence of confidential investigation becomes a matter of public record

### **Resolving Charges**

- Dismissal
  - “Insufficient evidence”
  - Employee gets Notice of Right to Sue and has 90 days to file suit in Federal court
- Letter of Determination
  - Reasonable cause to believe that a violation has occurred

### **Resolving Charges**

- Conciliation
  - Negotiation between the company and the EEOC and the charging party
  - EEOC is a party
  - Confidential voluntary settlement

### **Litigation**

- If conciliation fails, then EEOC can sue
- EEOC v. X Company, on behalf of the charging party
- Settlement authority rests with the Regional Attorney
- EEOC can obtain relief for the charging party and the *class of similarly situated workers* even if they did not file charges

### **Litigation**

- **Intervention**
  - CP has a right to intervene in the lawsuit and also bring related state claims (unlimited damages)

### **Key Issues in Investigation**

- Did harassment occur?
- Did CP complain to a supervisor? HR?
- Did the employer fail to protect the employee from harassment? Why?
- Is harasser the top official? No where for CP to go?
- Did employer or its agents threaten CP if and/or after she complained?

### **Proving Harassment**

- **Charging Party**
  - Is she credible? (do not assume that CP is lying)
- Emotionally upset?
- Crying?
- Describes details? Physical touching, grabbing? Frequency?
- Verbal harassment? What was said?

### **Proving Harassment**

- Threats by harasser? Manager? Co-workers? Human Resources?
- Post-Traumatic Stress??
- Any physical injuries? What? Medical treatment?
- Need ongoing medical or psychological treatment??

### **Proving Harassment**

- Evidence buttresses credibility to establish liability and damages
- Corroboration through witnesses
  - Co-workers, supervisors, actual eyewitnesses?
  - Note: Most egregious harassment happens “behind closed doors”
- Counselors, doctors

### **Proving Harassment**

- Parents, spouse, other relatives, other harassed individuals? Did CP complain to anyone about the harassment?
- EEOC v. Footaction
  - Harasser twice threatened to break 17-year-old’s neck if she reported harassment

### Proving Harassment

- Mother
  - Learned of harassment after she found teen curled up in fetal position on the couch after the 2<sup>nd</sup> neck-snapping threat (after harasser put hand's on teen's neck)
  - Got teen to talk; reported to EEOC
  - Confirms some trauma

### Proving Harassment

- Cops
  - Was police report filed? (non-conclusive)
  - Note: Less than 10% of sexual assault crimes are reported
- Compare
  - “Beyond a reasonable doubt” v. “by a preponderance of the evidence, i.e. 51%”

### Proving Harassment

- EEOC v. Harris Farms
- Cop
  - “Victim is lying”
  - Jury
    - “We believe her and here's \$1 million”

### Hurdles in Proving Harassment

- Charging Party
  - May be afraid to tell parents, spouse, relatives, friends, co-workers
- Stigma, shame, peer pressure, fear that co-workers will tease
- Need the job to support family, other retaliation

### Hurdles in Proving Harassment

- Afraid that spouse or boyfriend may not believe her and may harm her or others
- Immigration status; fear of deportation
- It takes a lot of courage to come forward

### Hurdles in Proving Harassment

- Just because she doesn't tell someone right away doesn't mean she's lying
  - Threats of retaliation or retaliation may chill her out

### **Hurdles: Retaliation by Company**

- Over 25% of charges are accompanied by a retaliation charge
- Unlawful, separate violation

### **Hurdles: Retaliation by Company**

- Issue
  - Does the adverse action, e.g. termination, demotion, threats to harm or other activity discourage a reasonable employee to file a claim?

### **Retaliation Is Unlawful**

#### **Protected Activity**

1. Employee opposed what she reasonably believed to be unlawful discrimination
  - E.g. complaining, threatening to file a charge, refusing to obey discriminatory order, refusing to have sex

### **Retaliation Is Unlawful**

2. Participating in proceedings related to employment discrimination complaint; investigations, trials, interviews, etc.

### **Remedies**

- Injunctive relief
  - Back pay, hiring, promotion, reinstatement, front pay, reasonable accommodation
- Injunctive relief
  - Training for supervisors, no rehiring of discriminating officials, etc.
- Attorneys fees, court costs, etc.

### **Remedies**

- Punitive damages
  - Punishing the employer for malice or reckless disregard
  - Didn't investigate
  - Botched investigation
  - Threatened witnesses
  - Fuller v. City of Oakland

### **Remedies**

- Medical testimony could help to illustrate the malice or reckless disregard
- May be the key remedy in retaliation cases
- Compensatory damages
  - Pain and suffering, emotional distress

### **Remedies**

- Key evidence
  - Charging party, family members, co-workers, counselors, social service providers, women’s shelter, rape crisis center, doctors, etc.
- Treating physician’s notes and records, unless “garden variety”

### **Remedies**

- Some areas to probe
  - How did CP react after the assault? Cry? Break down? Withdrawn?
  - How does she react when she describes the assault/harassment?
  - Physical injuries? Ongoing? What?
  - Treatment received? Ongoing?

### **Compensatory Damages**

- Areas to probe on impact of harassment and/or retaliation
  - Changes in her relationship with others? Spouse? Boyfriend? Children? Siblings? Friends?
  - Diminished sexual relations?
  - Inability to hold conversations with anyone?

### **Compensatory Damages**

- Less social? Can’t fulfill family obligations?
- Can’t take care of self??

### **Medical Exams in Compensatory Damage Cases**

- FRCP Rule 35
  - Company can ask court to order a physical and mental exam of the CP when CP puts her physical or mental condition in support of position, she intends to offer expert testimony in support of claim for emotional distress, and there is good cause

### **Medical Exams in Compensatory Damage Cases**

- Emotional distress is unusually severe, requires an expert to explain

### **Medical Exams**

- Examiner
  - Certified or licensed professional, normally a physician or psychologist
- Also includes dentists or occupational therapists who are not physicians or clinical psychologists but who may be well-qualified to give valuable testimony about physical or mental condition

### **Medical Exams**

- Other Stressors
  - Exam may reveal other stressors that affect claim for compensatory damages
    - Domestic violence, divorce, significant financial pressures, other family trauma
- Victim's doctor v. company's doctor
  - Who to believe???

### **Competencies of Medical Staff**

- Language
  - Victims describe harm better in first language
  - Health professional must be linguistically competent or have a qualified interpreter
  - Interpreter must be sensitive

### **Competencies of Medical Staff**

- Might not literally translate
- Difficult to describe assault in graphic terms

### **Cultural Competencies**

- Immigrants
  - Victims have factors of vulnerability
    - Non-white, immigrant, non-english speaking, retaliation, needs the job, few alternatives
- Immigrant workers less likely to complain in some industries



### **Cultural Competencies**

- Service, agriculture, rural, same employer of husband
- Teenagers
  - "It's not a big deal," "they can handle it"
- Fear that that parents, husbands or boyfriends may punish them and/or may confront harasser violently

### **Cultural Competencies**

- Peer pressure not to complain, jobs are few
- No support network at all

### **Information**

EEOC Website  
[www.eeoc.gov](http://www.eeoc.gov)

Youth At Work  
[www.youth.eeoc.gov](http://www.youth.eeoc.gov)

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