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Harassment Cases: High Profile or Not, a Volatile Thicket

[Harassment](#)

by Guest Columnist

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Perhaps one of the most powerful men in media, former Fox News Chair Roger Ailes, recently departed the network after a lawsuit was filed that included allegations he made sexual advances towards former FOX News host Gretchen Carlson, called her a "man hater," asked her to turn around so he could see her posterior, and made remarks about her clothes.

Ailes is not the first highly public figure to be on the receiving end of such allegations. Indeed, one of FOX News' most popular hosts, Bill O'Reilly, settled harassment allegations leveled by one of his producers in 2004, and his alleged behavior has come up in another suit filed recently against the network.

It's not just FOX News. The list of notables on the receiving end of harassment charges is staggering, and includes Dov Charney, the CEO and founder of popular clothing chain American Apparel; former New York Knicks coach and general manager Isaiah Thomas; former NFL quarterback Brett Favre; and even pop star Britney Spears.



The presidential campaign has also contributed, with GOP Republican nominee Donald Trump dogged by allegations of inappropriate language and touching, which in turn revived allegations of similar behavior by former president Bill Clinton, the husband of Democratic nominee Hillary Clinton.

Inclusion in this article by no means suggests that any of the allegations are true. However, the effect of such allegations is usually significant regardless of their truth or falsity.

The Law

These recent high-profile allegations of alleged on-the-job misconduct provide an opportunity to restate exactly where harassment law currently stands and how it is transforming.

The Equal Employment Opportunity Commission (EEOC) states, "Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive."

Basically, behavior rises to the level of harassment if the person on the receiving end of the behavior is:

- Being treated that way because they are a member of a particular group protected by the law.
- Suffering treatment that is offensive and unwelcome.
- Suffering treatment that negatively affects their job.

These three admittedly simplified standards are by no means cut-and-dried. Often times, the alleged harasser is indiscriminate. Courts have often stated that the law does not impose a "civility code" and if a person is abusive to many and all—I often call such people "pigs, but equal opportunity pigs"—then liability may not lie.

However, if the target is clearly selected because, say, they are female, then the inquiry moves to "how bad was it?" Obviously, reasonable people—and jurors—can differ, but the legalese "the conduct must be severe or pervasive enough that an objective, reasonable person would find the work environment hostile or abusive" is highly dependent on the terms "objective" and "reasonable."

For example, I know how "objective" my mother would be if she found out a boss was sending pornography via e-mail to his or her secretary. On the other hand, I know people who might shrug at the action.

Finally, when assessing the overall impact, or how the behavior affects an employee, there can be similar uncertainty as to whether the alleged harassment unreasonably interfered with an employee's work performance. The effect on people varies.

Ultimately, the bottom line is that harassment cases are a confusing, uncertain volatile thicket. As such, trying then can be a risky high wire act, which likely helps to explain why FOX paid Carlson \$20 million to settle her claims, stating, "We sincerely regret and apologize for the fact that Gretchen was not treated with the respect that she and all our colleagues deserve."

The Future

There are some recent developments that have in some sense changed the game with regard to harassment cases, high-profile or otherwise.

First, technology. If there is one thing we have learned this election season, it is the impact of the ability to record events in "real time." Whether it is tape of Trump's "locker room" banter or the e-mails of Secretary Clinton and her supporters, the lesson is clear: "he said, she said" can now be trumped by verbatim transcript.

An e-mail is likely forever and a touch of a button on an iPhone can capture inappropriate behavior surreptitiously and accurately. Indeed, Carlson was believed to have secret recordings of Ailes.

Second, protected status is becoming less and less critical. Take, for example, the antibullying movement. Legislation has been introduced in dozens of states that sets forth workplace standards similar to those above, but writes out the necessity that a claim be based on a protected status.

While no state has yet passed such an antibullying law, their existence and the emphasis on bullying in the public mind have likely made jurors less sympathetic to the "equal opportunity pig" defense, and may foretell a "civility code" for the American work place.

Third, there is still the antiquated emphasis on the "sex" of sexual harassment, as if the claim requires sexual advances or a focus on the salacious. But severe and abusive behavior need not be sexual.

The key component is that the severe and abusive behavior is occurring because of gender, not that it is imbued with racy or suggestive content. For example, some of Ms. Carlson's allegations were of a nonsexual nature, such as Ailes stating that Carlson needed to learn "to get along with the boys" and saw everything as "if it only rains on women."

Finally, while the EEOC focuses on "race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information" because those categories are protected by federal law, state law can be a great deal more expansive, protecting individuals from harassment because of their sexual orientation, their gender identity, and even their personal appearance.

Moreover, the EEOC has recently issued guidance on their own definition of "sex", stating "EEOC interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation."

Harassment law alters as society changes. It is difficult to predict those changes, but of one thing we can be assured: There will be more variations just as there will be more high-profile cases.



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