

SEXUAL HARASSMENT AND VIOLENCE IN THE WORKPLACE: The Role of Attorneys, Advocates, Counselors and Medical Professionals in Obtaining Court Awarded Damages for Victims

Presented by
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Rape is unquestionably among the most severe forms of sexual harassment. Being raped by a business associate, while on the job, irrevocably alters the conditions of the victim's work environment. It imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex.³

A weak command structure and a climate of fear among female personnel created the conditions that led to widespread instances of sexual assault of Air Force recruits by their instructors at Lackland Air Force Base in Texas, senior Air Force commanders said yesterday. New York Times, Jan 24, 2013, "Air Force Leaders Testify on Culture That Led to Sexual Assaults of Recruits"

With witnesses rare, sex-crime cases inevitably become "he said, she said" credibility contests, further stacking the deck against subordinate victims, since higher-ranking troops are considered inherently more credible. Rolling Stone, Feb 14, 2013: "The Rape of Petty Officer Blumer,"

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² The EEOC enforces Title VII of the Civil Rights Act of 1964 (race, color, sex, national origin and religion), the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act and portions of the Civil Rights Act of 1991. The agency has 51 field offices. A list of EEOC offices and contact names is listed at www.eoc.gov.

³ *Little v. Windermere Relocation, Inc.*, 265 F. 3d 903, 912 (9th Cir. 2001) (reversing summary judgment for defendant and holding that the defendant could potentially be liable for rape committed by third-party customer – the then Human Resources Director of Starbucks; Little was fired after she reported the rapes to her supervisors, her company's human resources coordinator and the company president)

Why, on the worst day of their life, don't they come forward? That's the heart of the problem. People don't feel comfortable coming forward, and they do not routinely report either sexual assault or sexual harassment, and that is one of the biggest problems we have. **Air Force General Mark Walsh**, testifying before House Armed Services Committee (*New York Times*, Jan 24, 2013, p. A15)

INTRODUCTION

Sexual harassment demeans its victims and destroys their lives. It is unlawful. Sexual harassment can include but is not limited to sexual assaults (e.g. rape), *quid pro quo* harassment (conditioning employment opportunities upon the grant of sexual favors), a hostile work environment that can also include sexual overtures, touching, grabbing, fondling, propositions for sex, pictures, pornography, etc. **Attorneys, advocates for victims of sexual assault, counselors, and medical professionals need to be informed about the various remedies available so that they can properly advise their clients and patients.** They may be the critical witnesses in ensuring that a victim is compensated.

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal government agency charged with investigating charges of discrimination and, if necessary, litigating these cases in court. It has recovered millions of dollars for victims of sexual harassment including sexual assaults. Many of these cases have involved **immigrant women and teenagers**. (For a partial list of EEOC cases involving sexual assault, see Appendix A.

I. OVERVIEW

Statistics: From FY2010 to 2013, EEOC received nearly 90,000 – 100,000 per fiscal year, **12% of those charges alleged sexual harassment. The “disparity in power” between employers or supervisors and employees (especially immigrant and low wage workers) has increased, thereby creating conditions for harassment and sexual assault to occur in the workplace.** However, over recent years, sexual harassment claims were in **25-30% of EEOC lawsuits** filed in federal courts.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq., prohibits discrimination on the basis of race, color, sex, national origin and religion in all terms and conditions of employment including hiring, firing, promotions, references, job conditions, etc. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government. Prior to the enactment of Title VII on July 1, 1965, discrimination in the private sector was perfectly legal under federal law. Thus, an employer could have very well sexually harassed an employee and fired her in retaliation for rejecting sexual advances without violating any federal law. Thus, Title VII provides a very important protection and remedy for workers.

What is Sexual Harassment?

Sexual harassment is a form of sex discrimination that violates [Title VII of the Civil Rights Act of 1964](#). Under the law, employers have **a duty to provide a safe work environment** and to take **prompt and corrective action** once it is on notice that harassment may have occurred. *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995)

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. The behavior must be **severe or pervasive enough to alter an employee's working conditions**. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.

The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.

The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.

Unlawful sexual harassment may occur without economic injury to or discharge of the victim.

Notice to the Employer: The victim should inform the harasser directly that the conduct is unwelcome and must stop. The victim should complain to her supervisor (unless he is the harasser) or any other superior, and use any employer complaint mechanism or grievance system available. Verbal or written notice is sufficient, and a third party can also put the employer on notice that there is a complaint or existence of harassment. These third parties can include a union, family member, co-workers, customers, etc. Again, notice to an employer of possible harassment requires an employer to promptly investigate and take necessary corrective action to stop and deter harassment. Corrective action may require discipline of the harasser and his supervisors up to and including termination.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, the context in which the alleged incidents occurred, how the employer was put on notice, and the response of the employer once it knew or should have known about the harassment. A determination on the allegations is made from the facts on a case-by-case basis.

Harassment by a Supervisor: An employer is generally liable for harassment by a **supervisor**. However, an employer can escape liability and/or reduce the damages if it can establish that 1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior AND, 2) the victim employee unreasonably failed to take advantage of any preventive or corrective opportunities provided or to otherwise avoid harm. *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). Notice to the employer of the harassment is critical.

If, however, the harassment by the supervisor results in a **"tangible employment action"**, e.g. termination, retaliation, suspension, failure to hire, demotion, reduction in hours, etc., the employer has no defense and will be found liable. (Note: Under some state anti-discrimination laws, e.g. California and Hawaii, an employer is *strictly liable* for harassment by a supervisor, i.e. there is no defense available to the employer. However, the employee's failure to report the harassment or otherwise take steps to avoid the harassment could reduce the monetary relief awarded to her.)

Harassment by a Co-Worker or Third Party: An employer is liable for **co-worker or third party** harassment if it knew or should have known that harassment occurred. *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995) Again, notice to the employer either directly or indirectly is a key factor.

II. PROVING HARASSMENT

Harassment is proven in a variety of ways. Even when there is no “third party, eye witness” of the assault, harassment can be proven.

Charging Party: The Charging Party (CP) can provide the most important testimony since she is a witness to the harassment. Her testimony including her description of the harassment (frequency, describes the physical contact or assault, verbal harassment, etc) and other discrimination, e.g. threats by harasser or managers, other forms of retaliation, etc. Other factors include her reaction to the harassment and/or to describing the harassment, e.g. was she crying? Emotionally upset? **The charging party’s credibility is the key element.** Employers will generally deny that the harassment occurred and thus, the credibility of the parties involved, the company’s response to the complaint of harassment, and the testimony of witnesses will be critical in determining whether harassment occurred.

Corroboration through Witnesses: Testimonies from other witnesses are also key to establishing CP’s credibility, the facts of the case, and past and present practices of an employer in response to sexual harassment. These witnesses may include co-workers, supervisors, counselors, parents, teachers, doctors, psychologists, actual eyewitnesses, etc. These witnesses might describe changes in the CP’s behavior, how she looked before and after the assault, whether other workers have been assaulted or otherwise harassed in the workplace, the response of the employer to prior reports of harassment, acts of retaliation against persons who complain about harassment or testify on behalf of victims, etc. (See discussion below on the role of advocates, counselors and medical professionals.)

The Employer’s Actions: Ultimately the key issue is whether the employer adequately protected the victim from harassment and/or assault and, if she was harassed or assaulted, whether the company took prompt and corrective action. The existence of a policy against harassment and retaliation and how the policy is disseminated (e.g. is it in a language that the workforce can understand?) to the workforce and how workers are trained about it will be at issue. The testimony and actions of company officials including human resources and company investigators will be critical factors. The past practices of the company in responding to complaints (including the discipline of harassers or lack thereof), its actions in responding to the instant complaint, and the qualifications of the company investigator to conduct the investigation, and the adequacy of the company investigation will be key.

The Harasser’s Actions: In sexual harassment cases, the accused harasser can either claim that the sexual harassment did not occur or that the harassment was “consensual”, i.e. that the charging party welcomed the sexual harassment. The accused harasser might portray the victim as the aggressor and harasser, or that she otherwise engaged in the same sexual behavior. The accused harasser may try to deny that harassment occurred by contending that he was nowhere near the alleged harassment, his co-workers support his version of the facts, etc. Like the charging party, the accused harasser’s credibility is a critical factor for the fact finder in determining “who is telling the truth”. Evidence of the prior sexual history of the victim with other individuals is irrelevant to an investigation and is inadmissible in a trial.⁴

⁴ Fed Rules of Evidence, Rule 412.

Law Enforcement: The existence or lack thereof of a police report filed is not determinative of whether harassment occurred. Note: less than 10% of sexual assault crimes are reported. Compare: "beyond a reasonable doubt v. by a preponderance of the evidence, e.g. 51%" (See discussion below on Establishing Credibility)

Some Hurdles in Proving Harassment:

Charging Party (CP) may be afraid to tell parents or friends; must deal with stigma, shame, peer pressure, fear that friends or co-workers will tease or believe that she is having an affair with a co-worker or supervisor, etc.

CP needs the job to support family, pay for basic living expenses, and fears retaliation

CP is afraid that her parents and family will not believe her and/or will punish her

CP fears that husband or boyfriend will not believe her and will harm her or others

CP fears deportation and its consequences (poverty, persecution, etc. in homeland)

CP might not have known about her rights and did not object.

CP may have been so traumatized by the assault that she has difficulty remembering details, or copes with the trauma by burying any memories.

Other witnesses may be fearful about stepping forward because of potential retaliation including bodily harm, termination, suspension, etc.

CAVEAT: Just because the Charging Party didn't tell someone right away about the harassment doesn't mean she's lying!! There is no "normally expected" response for victims of severe harassment or assault.

III. RETALIATION

Title VII of the Civil Rights Act of 1964 also protects employees from retaliation. **Nearly every sexual harassment lawsuit filed by the EEOC includes a retaliation claim where the victim was terminated, demoted, suspended, and/or threatened with physical harm to her and/or her family, etc.** In Fiscal Years 2011 and 2012, of the approximately 100,000 charges received each year, RETALIATION constituted over 37% of the charge filings – the top category. (This was followed by race discrimination.)

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, testifying, participating in a discrimination proceeding, investigation or litigation, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in any related proceeding, e.g. investigation of the discrimination charge, testifying in court, testifying in depositions, etc.

Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in **protected activity or otherwise opposed discrimination**. See *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, --- U.S. --- (2009), 2009 WL 1604249 (Jan. 26, 2009)

A. Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

employment actions such as termination, refusal to hire, and denial of promotion, other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and

any other action such as an assault or unfounded civil or criminal charges that are *likely to deter reasonable people* from pursuing their rights. See, *Burlington Northern Santa Fe Railway Co. v. White*, 126 C. Ct. 2405 (2006); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

NOTE: If, during the course of an EEOC investigation, a charging party is being threatened with termination, further harassment, or other adverse actions that may consequently impede the investigation, EEOC can go to federal court immediately to obtain a temporary restraining order or preliminary injunction to stop the adverse action. 42 U.S.C. Sec. 2000e-5(f)(2). (See *EEOC v. Iowa AG, LLC and DeCoster Farms of Iowa*, discussed in "Partial List of Sexual Assault Cases Litigated by EEOC" below.)

NOTE: If, during the course of litigation or anticipated litigation by the EEOC, a charging party, class members or witnesses are being threatened with adverse actions, violence, other harm etc., the court can issue a temporary restraining order or preliminary injunction to stop the behavior. FRCP Rule 65. (See *EEOC v. Evans Fruit Co., Inc.*, 2010 WL 2594960, CV-10-3-33-ORS (E.D. WA)), Temporary Restraining Order issued June 24, 2010 barring alleged harasser from retaliating against charging parties, class members, known and potential witnesses, family members, taking any adverse actions, paying or offering to pay persons for favorable testimony, terminating, suspending, etc. current employees who assist in the prosecution of the case.

Adverse actions generally do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history. Adverse actions for retaliation, however, can also include *further harassment*. *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000).

Even if the prior protected activity alleged wrongdoing by a **different employer**, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against her for pursuing an EEO charge against a former employer. Similarly, it is unlawful for a former employer against whom a complaint was made to retaliate against the CP in other jobs by giving a negative reference, informing the prospective employer that the CP made a complaint of discrimination or harassment, or otherwise taking actions which serve to deter CP from pursuing her complaint.

B. Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his/her spouse or fiancé participated in employment discrimination litigation. *Thompson v. North American Stainless Co.*, ___ U.S. ___, 131 S. Ct. 863 (2011).

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of the employment discrimination retaliation laws. For example, "whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination (race, color, sex, national origin, religion, age and disability under federal law) are not protected. However, there may be covered under anti-retaliation provisions of other federal or state laws.

C. Protected Activity

Protected activity includes:

Opposition to a practice believed to be unlawful discrimination . This would include informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in a discrimination investigation or lawsuit.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

IV. EEOC's CHARGE PROCESSING PROCEDURES

A. Who Can File A Charge?

A charge filed with the EEOC authorizes the EEOC to investigate alleged discrimination at a company or other covered entity. The federal laws apply to all employees of employers in the United States and its possessions and territories (e.g. U.S. Virgin Islands, Guam, Commonwealth of the Northern Mariana Islands, American Samoa, Commonwealth of Puerto Rico.) that have 15 or more employees (for at least 20 weeks in the calendar year or preceding calendar year of the charge filing).

Immigrant workers: The federal laws against discrimination make no distinction on the basis of immigration status for employees working in the U.S. or its territories. Consequently, **undocumented workers and other non-U.S. citizens are covered.**⁵ See *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991); see also, *Rivera, et al. v. NIBCO, Inc.* 364 F.3d 1057 (9th Cir. 2004). During its investigation, the EEOC will not ask the immigration status of any charging party since it is irrelevant to a finding of discrimination.⁶

In the course of litigation, the EEOC has sought and obtained court orders **barring a company's lawyer from inquiring into a charging party or any witness' immigration status.**⁷ Courts have concluded that allowing questioning about immigration status has a "chilling effect" on complainants and undercuts the civil rights laws. *Rivera, et al. v. NIBCO*, id.

⁵ Undocumented workers are also referred to as "illegal aliens", "unauthorized workers", "illegal immigrants", etc.

⁶ If there is any question about the immigration status of the charging party, she should be referred to competent immigration lawyers for consultation and advice.

⁷ See, e.g. See, e.g. *Cazorla v. Koch Foods of Mississippi* (consolidated with *EEOC v. Koch Foods of Mississippi*), ___ F.R.D. ___, 2012 WL 6161959 (S.D. Miss. Nov. 30 2012) (protective order barring disclosure of immigration information, personal identifying information, tax documents and income information, and employment history); *EEOC v. Fair Oaks Dairy Farms*, 2012 WL 3138108 (N.D. Ind., Aug. 1, 2012) (protective order issued barring defendant's request for plaintiff charging party's visa, passport, and birth certificate alleged to be used for a "background check"); *EEOC v. First Wireless*, 255 F.R.D. 404 (E.D.N.Y. 2004); *EEOC v. The Rest. Comp., dba Perkins Rest. & Bakery*, 448 F. Supp. 2d 1085, 1088 (D. Minn. 2006); *EEOC v. Bice of Chicago*, 229 F.R.D. 581 (N.D. Ill. 2005). *EEOC v. Willamette Tree*, 2010 U.S. Dist. LEXIS 97380 (July 8, 2010) (CV-09-690-PK) (D. Ore.) (protective order barred inquiry into immigration status, prior sexual history and reasons for not reporting rapes by supervisor to the police);

In *EEOC v. Willamette Tree Company* CV 09-690-PK (D. Ore.) which the EEOC alleged that one of the charging parties had been repeatedly raped by her supervisor and her siblings and brother-in-law had been fired and threatened with harm in retaliation, the employer sought through deposition to obtain information on the charging party's immigration status, whether her subsequent employers had sexual harassment policies, her sexual history and her reasons for not reporting the rapes to law enforcement. The court granted EEOC's Motion for a Protective Order and **barred the company lawyers from asking about asking about:**

1) immigration status and about subsequent employers' policies and her use of alternate names because it had a chilling effect on the claimants,

2) the claimant's prior sexual history (Federal Rule of Evidence Rule 412), and

3) her reasons for not reporting the rapes to the police.

The court especially noted that she had already testified in deposition that the supervisor threatened violence if she reported the rapes. *EEOC v. Willamette Tree Wholesale, Inc.*, 2010 U.S. Dix. LEXIS 9380 (D. Ore. July 8, 2010)

The court also barred the employer from issuing third party records subpoenas to the claimant's current employer.

U.S. citizens working for U.S. companies abroad are covered by federal laws. 42 U.S.C. 2000e (f). However, non-U.S. citizens working abroad for U.S. companies are not covered.

Third Parties: Charges can also be filed by a third party on behalf of an aggrieved individual. Third parties might include a friend, relative, co-worker, union, church member, etc.

Commissioner's Charge: Additionally, an EEOC Commissioner (one of five commissioners) can initiate an investigation on his/her own based on information that is obtained by the Commissioner's office.

Directed Charge: Under the Age Discrimination in Employment Act, an EEOC District Director can initiate a "director's charge" to launch an investigation into a company.

B. Timeliness

A charge must be filed within **180 days** of the discriminatory act. In harassment cases involving a pattern of harassment, at least one act must occur within the last 180 days. *National R.R. Passenger Corp. v. Morgan* 536 U.S. 101 (2002) Note: In states that have similar anti-discrimination statutes and that have a work-sharing agreement with the EEOC, the charge must be filed within **300 days** of the discriminatory act. 42 U.S.C. Sec. 2000e-5(e). In discharge cases, **the date of NOTICE of termination** (not the last day of work necessarily) starts the clock. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). A charging party cannot proceed to court unless it has "exhausted its administrative remedies" without first filing with the EEOC or a state or local agency authorized to take charges.

Equitable Tolling; Allowing for Late Claims:

The courts have allowed certain claimants to file late claims with the EEOC. In *EEOC v. Willamette Tree Wholesale, Inc.*, discussed above, the Court also denied the defendant's Motion for Partial Summary (which argued that the late filing (62 days past the 300 day deadline) warranted dismissal of the claim) and granted "equitable tolling" on the grounds that ***the company could not benefit from the trauma caused by the multiple rapes and threats to the claimant and her siblings.*** *EEOC v. Willamette Tree Wholesale, Inc.*, 2011 WL 886402 (D. Ore. March 2011), citing *Stoll v. Runyon*, 165 F.3d 1238 (9th Cir. 1999) ("An applicable limitations period may be equitably tolled 'when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time", *Stoll*, at 1242.)

IMPORTANT: A LAWSUIT UNDER TITLE VII, THE AMERICANS WITH DISABILITIES ACT (ADA) AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) CANNOT BE FILED UNLESS A CHARGE IS TIMELY FILED WITH THE EEOC OR CORRESPONDING STATE AGENCY.⁸

C. What Happens after a Charge of Employment Discrimination is Filed with EEOC?

Ten days after a charge is filed with the EEOC, the employer is notified that the charge has been filed and is given an opportunity to respond to the charge. There are a number of ways a charge may be handled:

Investigation

A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong at the outset, the charge may be assigned for follow up investigation to determine whether it is likely that a violation has occurred.

EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues.

In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred and other related sites.

Are there other victims?: The EEOC can also seek information on other potential victims of discrimination or harassment, including names, lists of employees, other witnesses, etc. EEOC can also obtain relief for these "class members" even if they do not file a charge.

⁸ This means a state or local fair employment practices agency that has a "work sharing" agreement with the EEOC. **In the state of Washington, however, there is no need for a plaintiff to file a charge ("exhaust administrative remedies") before filing a discrimination lawsuit in state court.**

When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate. The employer is required by law to cooperate with the EEOC's requests for information. A failure to provide the information can result in the EEOC issuing an administrative subpoena for the information. If the company does not comply with the subpoena, the EEOC can file a complaint in federal court to enforce the subpoena. **The existence of a federal investigation then becomes public.**

[Note: The charge may be selected for EEOC's *mediation* program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation.]

D. Resolving Charges

Dismissal: A charge may be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. If the evidence obtained during an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party **90 days (from the date of receipt of the Notice of Right to Sue)** in which to file a lawsuit on his or her own behalf in **federal court**. Different laws may apply to the comparable state claims. (See discussion below on an individual filing a lawsuit.) **If however, the company acted in such a way that the victim could not file her lawsuit on time, equitable tolling might be granted.** See discussion above on *EEOC v. Willamette Tree Wholesale*. The EEOC relied on *Stoll v. Runyon*, 165 F.3d 1238, 1242 99th Cir. 1999) in arguing that equitable tolling was warranted. In *Stoll*, a postal worker who had been raped and threatened by her supervisors was so traumatized that she could not work with her lawyer to file her lawsuit on time. The Ninth Circuit Court of Appeals reversed the lower court's dismissal of the case, and held that an employer could not benefit from having traumatized a victim so badly that she could not assert her civil rights on time. It granted equitable tolling.

Letter of Determination: If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.

Conciliation: Conciliation is an opportunity for the employer, employee and the EEOC to seek a confidential solution.⁹ This may include various remedies including back pay, reinstatement, monetary damages, injunctive relief (training, discipline, etc.) and other remedies.

V. LITIGATION BY EEOC

If EEOC is unable to successfully conciliate the case, the agency will decide whether to file a lawsuit in federal court. Lawsuits by the EEOC are brought by the Office of General Counsel (OGC). The Regional Attorney is the OGC's representative in the

⁹ Until the EEOC files an action in federal court, the existence of the charge and any information gathered during the investigation remains confidential and cannot be disclosed by the EEOC under federal law.

field and can authorize lawsuits.¹⁰ The lawsuit is essentially between the United States government (EEOC) on behalf of the charging party and the employer. In the lawsuit, the EEOC can obtain relief for the charging party and the class of similarly situated workers even if they did not file individual charges. *General Telephone Company v. EEOC*, 446 U.S. 318 (1980). All money recovered by the EEOC goes to the victims.

Intervention: If the EEOC files suit, the charging party can intervene in the lawsuit and sue on the federal claims as well as any other related state or federal claims. This can play an important role in the case since federal employment anti-discrimination laws have caps on damages up to \$300,000. Some state law claims have no caps on damages or may have different caps from federal law. Attorneys seeking to represent charging parties who will intervene into the EEOC's lawsuit, should contact the respective EEOC Regional Attorney as soon as possible. Note that the Charging Party cannot intervene in an Age Discrimination in Employment Act suit filed by the EEOC.

Notice of Right to Sue: If EEOC decides not to file a lawsuit, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf.

VI. PRIVATE LAWSUIT BY THE CHARGING PARTY

A charging party may file a lawsuit within 90 days in federal court after receiving a notice of a "right to sue" from EEOC, as stated above.¹¹ There may be different deadlines for claims brought under state law and to be filed in state court. See *EEOC v. Farmer Bros.*, 31 F.3d 891 (9th Cir. 1994). Under [Title VII](#) of the Civil Rights Act of 1964 and the Americans with Disabilities Act a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice. Under the Age Discrimination in Employment Act, a suit may be filed at any time 60 days after filing a charge with EEOC, but not later than 90 days after EEOC gives notice that it has completed action on the charge. Under the Equal Pay Act, a lawsuit must be filed within two years (three years for willful violations) of the discriminatory act, which in most cases is payment of a discriminatory lower wage. The EEOC can intervene into a private lawsuit if it is in the public interest to do so.

The EEOC's earlier determination that the evidence did not establish a violation of law does not prevent a CP from filing a private lawsuit. These lawsuits are trials *de novo*, i.e. the CP has the opportunity and the burden to show that a violation occurred notwithstanding the EEOC's findings. Similarly, a court is not bound by the EEOC's determination that discrimination occurred. The CP must still prove discrimination and the defendant employer can present its own witnesses to establish that no violation occurred.

¹⁰ The charging party's attorney or advocate should communicate with the Regional Attorney and provide any necessary information that may help determine whether a lawsuit should be filed.

¹¹ The EEOC can also intervene in individual suits if there is a public interest that can be served by joining the lawsuit.

VII. REMEDIES AVAILABLE TO VICTIMS OF HARASSMENT OR RETALIATION

The "relief" or remedies available for employment discrimination may include:

Back pay (money covering the period from termination until resolution),

Front pay (money for pay that would have been earned if charging party was reinstated but reinstatement is not a good option under the circumstances),

Compensatory Damages: Under Title VII and the Americans with Disabilities Act, compensatory damages can be awarded to compensate a victim for actual monetary losses, for future monetary losses, and for mental anguish, pain and suffering, etc.

Punitive Damages: Punitive damages also may be available to punish an employer if it acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments under federal employment discrimination laws.

There are, however, caps on compensatory and punitive damages, ranging from \$50,000 to \$300,000, per charging party or class member, depending on the size of the employer. 42 U.S.C. 1981a (b).¹²

Other costs and fees: The court could order the defendant to pay the plaintiff's attorney fees (if the plaintiff wins), witness fees and court costs. (Caveat: the plaintiff could be ordered to pay for the defendant's attorneys fees and costs if the court finds that the lawsuit was "frivolous".

Injunctive Relief: The court could also order that the employee be hired, reinstated, promoted, or otherwise made whole, e.g., in the condition s/he would have been but for the discrimination. An employer may be required to post notices in applicable languages to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case. This may include training for all staff, tying managers' or supervisors' performance reviews to compliance with federal anti-discrimination laws, or termination and/or not rehiring any harassing individual. The Consent Decree or other court orders could also specifically bar retaliation against the charging party. If the employer retaliates, the employer could be found in contempt of court and be subject to fines as well as additional damages.

¹² The caps on damages are as follows: Respondents (employers) with 15-100 employees (\$50,000); respondents with 101-200 employees (\$100,000); respondents with 201-500 employees (200,000), and respondents with more than 500 employees (\$300,000). The caps on damages do not apply to back pay or front pay. Note: these caps are not applicable to discrimination claims brought under 42 U.S.C. Sec. 1981 generally covering race/national origin claims. They are also not applicable to claims of discrimination under state law.

I. THE ROLE OF THE ADVOCATE, COUNSELOR OR MEDICAL PROFESSIONAL

A. Establishing Credibility: The medical doctor, counselor or other professional who treats the charging party plays a critical role. He/she may be the first person who hears about the acts that occurred, how they occurred, who did it, and what suffering the CP may have undergone. All this information may help to buttress CP's credibility – a crucial factor in "he said, she said" disputes or where sexual assault occurs behind closed doors, which is more likely.

Corroboration of assault: Physical injuries, mental state, etc. may help to confirm that the CP has undergone some traumatic experience; but "stoic" behavior, apparent indifference, and a limited description of the events, do not necessarily confirm that the assault did not occur.

Law Enforcement: Don't assume that law enforcement was called in when the assault was reported to the company or ever. Similarly, don't assume that the police know how to assess credibility *in civil cases* involving a private company. Police do not enforce and generally are not trained in federal employment discrimination law. More often than not, women do not report sexual assault crimes to law enforcement, and companies do not always report assault in the workplace when the company could face liability for the acts committed by an supervisor, a co-worker or even a third party. In criminal proceedings, the standard for finding guilt is "beyond a reasonable doubt" whereas the standard for finding an employer liable of harassment is "by a preponderance of the evidence, e.g. 51%".

Some Tips/Questions at the Initial Interview:

- 1) Ask first about the most recent assault; parties; location; what occurred
- 2) How did charging party respond to the assault? Fight it off? Fearful? Protest?
- 3) Did the harasser threaten the CP with retaliation? Bodily harm? Harm to others?
- 4) Did she complain internally to the company? To a supervisor? What happened? Treatment offered?
- 5) **Did the company or supervisor retaliate?** What was the retaliation? Demotion? Termination? Reduced Hours? Threatened Termination? Did the company try to discourage her from pursuing her complaint?
- 6) Were there prior incidences of harassment? When? How often? Who was involved?
- 7) Why didn't she complain sooner to the company? Were other victims deterred from complaining? Supporting Facts? Witnesses?

B. Compensatory Damages: Compensatory damages are damages awarded for pain and suffering and emotional distress. In cases where there is no significant back pay involved (i.e. failure to hire, demotion, termination), compensatory damages may be the most critical remedy for the CP. Generally, the treating physician's notes and records will be involved in establishing pain and suffering, but might not be necessary when seeking "garden variety" damages. Family members and friends could also testify to explain changes in the CP's behavior after the assault.

Some Areas to Probe:

- 1) How did CP react after the assault? Cry? Break down? Withdrawn?
- 2) What changes have there been in her relations with others? Spouse? Boyfriends? Children? Siblings? Diminished sexual relations? Inability to hold conversations with anyone? Less social? Not able to fulfill family obligations?
- 3) How does she feel when she sees the harasser?
- 4) How did she react after she was retaliated against?
- 5) Does she have any physical injuries? What? Marks? Bruises? Cuts? Were these reported to anyone? Who? What was her response when she was injured?

Lessons from *EEOC v. Footaction, USA*: In a case involving the harassment of an 18-year-old sales associate, the assistant manager had threatened to the charging party's neck on two occasions, and on the second threat, actually had his hands around her neck. Earlier complaints of harassment to the store manager (who had been dating the harasser's mother) were unheeded. The teen did not report the harassment to her mother. ***The mother first learned of the harassment when she found the teen curled up in a fetal position on the couch after the second "break your neck" threat.*** She convinced the teen to file a charge with the EEOC, and her testimony about how the harassment impacted her daughter had greatly affected the daughter's recovery for compensatory damages.

Rule 35 Medical Examination

Under Rule 35 of the Federal Rules of Civil Procedure, the defendant company can ask the judge to order a physical and mental examination of the charging party when 1) her physical or mental condition is at issue (party puts her physical or medical condition in support of her position, the party intends to offer expert testimony in support of the claim for emotional distress, and there is good cause. A party's emotional distress is at issue when it is unusually severe, requires an expert to explain or is described in medical terms. *Ricks v. Abbott Labs*, 198 FRD 647 (D.Md. 2001). Less serious emotional distress, such as brief, anxiety, anger, and frustration that people experience when bad things happen is not sufficiently "in controversy".¹³

The Examiner: The examination must be conducted by a certified or licensed professional, normally a physical or a psychologist.¹⁴ Other examiners may "include a licensed clinical psychologist and other certified or licensed professionals such as dentists or occupational therapists, who are not physicians or clinical psychologists, but who may be well-qualified to give valuable testimony about the physical or mental condition that is the subject of dispute."¹⁵

Other Stressors: In the Rule 35 examination, other stressors in the victim's life may come out, e.g. domestic violence, divorce, other pressures, etc. that undercut or muddy her claim for compensatory damages. The defendant will

¹³ O'Connor's Federal Rules (2006).

¹⁴ Id.

¹⁵ Federal Civil Judicial Procedures and Rules (2006 Revised Ed.)

argue that the “pain and suffering” the victim is experiencing was not caused by the assault alone but by other stressors, and therefore the amount of monetary damages should be minimal.

Essentially, the case and amount for compensatory damages may turn on “dueling doctors” ‘ respective evaluations of the charging party’s physical and mental condition.

C. Cultural and Linguistic Competencies: Cultural and linguistic competencies are critical particularly in working with immigrant women or young workers. **Treating professionals should be aware of the following factors and exercise great patience in dealing with victims.**

Language: Studies show that victims are better able to describe embarrassing acts and emotional harm if they speak in their *first language*. Thus, it is critical for the treating professional to be linguistically competent or have a qualified interpreter. The interpreter must also understand and be sensitive to the fact that the victim will describe acts which may be embarrassing to her.

Factors of vulnerability: Awareness of the factors of vulnerability is critical. These factors may include minority and/or immigrant status, limited or non-English speaking ability, retaliation, the CP desperately needing the job, economic condition of CP, lack of employment alternatives, harsh historical working conditions and employment practices in an industry, etc. These factors commonly exist in higher levels in industries where employees are less likely to complain, e.g. service, agriculture, businesses in rural communities, small companies, etc.

Teenagers: Young workers pose an exceptional challenge in sexual assault cases as they might first believe that “it was not a big deal”, “they can handle it” on one hand, or be extremely reluctant to talk about it because they fear that their parents or boyfriend may punish them. Peer pressure “not to complain” is strong, particular in areas where jobs are few. Their relative youth, first time experience in work, and general unawareness of their rights or knowledge of what is permissible or prohibited behavior, may make it difficult to get the complete story in the initial interviews.

This is by no means an exhaustive list of the cultural and linguistic competencies that may be brought to bear in sexual harassment and assault cases and advocates, counselors and medical professionals should be aware of other factors.

CONCLUSION

Sexual harassment and assault in the workplace is a continuing problem, but laws exist to protect victims. This outline is intended to be a basic document to inform advocates, counselors and medical professionals about their roles in helping victims of sexual harassment and assault in the workplace obtain money and other remedies. If you want training or materials and/or have questions, feel free to contact the EEOC.

WWW.EEOC.GOV: Lists all EEOC offices, District Directors and Regional Attorneys, guidelines on discrimination claims, EEOC programs, etc.