
Harassing Sights

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A study of jurors' perceptions shows the gender gap is smaller than previously thought, especially concerning behavior likely to be litigated.

The consequences of sexual harassment suits are devastating to both sides. An understanding of juror perceptions of claims of sexual harassment is necessary before entering this arena.

The similarities in female and male jurors' perceptions of employer liability outweigh the differences. Research shows that the size of the "gender effect" that concerned the court when it established the "reasonable woman standard" (*Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)), was smaller than had been presumed, especially concerning the types of behaviors likely to be the subject of litigation.

Gender Differences

Gender differences in labeling behaviors as sexual harassment were smaller than differences resulting from the status of the perpetrator (behaviors by perpetrators of higher status than the victims were more likely to be labeled as sexual harassment than were behaviors by perpetrators of equal or lower status than the victims). Gender differences tend to be smaller in situations involving more explicit behaviors and when legal consequences could result from such labeling.

Women are generally more likely than men to focus

on the misconduct of the alleged perpetrator rather than conduct on the part of the victim, either in "eliciting" the harassment or in failing to discourage the harassment. Women tended to perceive a wider range of behaviors, including staring and sexual or sexist jokes, as constituting harassment. They also tended to perceive behaviors initiated by higher-status individuals toward lower-status individuals as inappropriate regardless of the targets gender; men were more likely to perceive such behaviors as motivated to close the psychological distance between the two parties. Women were more likely than men to believe that a harassed woman who complained was more at risk of retaliation and less likely to be taken seriously. Women and men agreed that a harassed woman was more at risk and less likely to be taken seriously if she complained about a supervisor than about a co-worker.

There are gender differences in how women and men perceive the same behaviors engaged in by a woman. Behaviors that female observers rated as definitely "not sexual" were rated by male observers as "neutral." Men are more likely than women to believe that harassing behavior should be handled by the targets on their own, not by organizational agents. In other words, men expected more initiative on the part of the victims to try to resolve the situation on an interpersonal basis before involving

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others. Men also tended to believe that the amount of sexual harassment reported in the workplace was exaggerated.

Perceptions of Employer Liability

Jurors who favor the plaintiff, especially jurors who award high damages, are likely to hold extreme anti-corporate attitudes, have had bad experiences with an employer or supervisor, or both. They have been the victims of some type of on-the-job discrimination or harassment, or they have witnessed discrimination or harassment. They tend to be unfamiliar with the work settings in which the plaintiffs' alleged sexual harassment occurred.

Jurors who favor the defense tend to have managerial backgrounds and have had positive interactions with their employers or supervisors. They tend to have had firsthand experience in the same work milieu as the plaintiffs and are thus in a better position to evaluate the context of their complaints in ways favorable to the corporate defendants.

The following examples illustrate some gender differences and similarities:

After a verdict for the plaintiff against a male employee and the employer, with compensatory and punitive damages, where the alleged sexual harassment stemmed from office pranks, the female jurors were incensed by the antics of the male co-worker described during the trial. They concluded that the antics did occur, including an incident where the defendant untied the drawstring of his pants and poked out the plaintiff's pen.

The lone male juror contacted was less offended by the male co-worker's alleged behavior. His impression of the plaintiff was more mixed than the sympathetic view expressed by the female jurors. He too concluded that she had been harassed, but he suspected she had exaggerated the severity of her claimed emotional distress. The male juror had not believed the employer was responsible for all of the plaintiff's current emotional condition and during deliberations had argued in favor of lower damages.

The interviewed jurors uniformly reported that the jury held the employer more responsible than the perpetrator for the sexual harassment. They had viewed the co-worker as a young troublemaker, ignorant of proper office behavior. They faulted his employer for failing to correct his clownish behavior earlier and thus letting matters get out of hand. The jurors were surprised and critical of the apparent lack of awareness by the supervisors of the proper procedures for handling complaints of sexual harassment

and an apparent absence of a training program about sexual harassment.

Characteristics of sexual harassment cases for which jury research has been conducted share certain factors:

- Males in supervisory positions over noticeably younger plaintiffs
- Juror unfamiliarity with the specific male-dominated work environments in which the case disputes occurred
- Perceived lack of awareness of or refusal to address earlier grievances voiced by plaintiffs on the part of management
- Perceived due process failures by human resources departments
- Perceived inadequate record of warnings before terminations or disciplinary actions.

Mock jurors acknowledged the plaintiffs' poor work records but concluded that the sins of the employers outweighed those of the plaintiffs.

Recommendations

A defense story should "convert" the dispute from a sexual harassment case to a case about chronic work shortcomings of the plaintiffs, employees who wanted special treatment and who refused to listen to their managers' loud and clear warnings.

To address male jurors' desire to see personal initiative by victims of sexual harassment to resolve the problem, more stress is urged on plaintiffs' failure to explore in-house options of redress before pursuing the extreme option of a lawsuit. To address female jurors' greater focus on perpetrators' conduct than on victims' conduct, more emphasis is urged on the basis for supervisors or managers' actions toward the plaintiffs and good standings among other employees (e.g., their records of fairness, willingness to stand up for workers, training skills, and lack of other complaints of sexual harassment against them rather than the plaintiff-implied status as "good ol' boys" in male social networks operating in the workplace). Finally, to reassure male and female jurors that the plaintiffs had received due process in terms of warnings and counseling before termination (or failure to promote), he defense is urged to provide more details about the plaintiffs' entire work and disciplinary history.

In many instances, jury research gave corporate clients more realistic perspectives concerning economic risk.

Employer Risk Factors

The following case characteristics are most likely to lead to juror perceptions of employer liability for sexual harassment:

- Social/sexual behavior is displayed by a higher-status individual toward a lower-status individual, especially when it involves a direct supervisory relationship between the two individuals (i.e., a power differential relationship exists between the plaintiff and the alleged perpetrator).
- The alleged targets are women in nontraditional occupations, especially where they come into work contact with large numbers of men. This work situation raises alarms in jurors' minds about the possible operation of an "old boys' network."
- There is a perceived lack of formal procedures in place for handling complaints of sexual harassment, investigating complaints, and providing satisfactory feedback to the complainant.
- There is a perceived lack of awareness by direct supervisory personnel about the proper procedures for handling a complaint of sexual harassment.
- There is perceived laxity on the part of the employer in permitting inappropriate workplace behaviors to escalate into a sexual harassment situation.