The Real World

Author : Brooke D. Coleman

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Diane P. Wood, *Sexual Harassment Litigation with a Dose of Reality*, 2019 **U. Chi. Legal F.** 395.

I love being a JOTWELL contributor, but I am going to be real with you. Writing a Jot in the midst of a pandemic is fraught. I sit at my computer, often paralyzed, while questions run through my mind, such as: How do I write about the latest and greatest law review article as if everything around us is normal? How do I conjure the energy to focus on great scholarship when in the back of my mind I am just, well, worried?

I do not have many answers right now. But I do know one thing for sure: This community that we have built—scholars who have a deep interest in justice and how it works within our civil court system—is an amazing one. I have watched with awe as you have taught your classes, written your work, and kept things going with amazing grace. I am grateful for all of you and I am honored to be a part of your world.

So, in this Jot, I am going to do something a little different. One idea behind JOTWELL was to be something of a time saver. Each Jot draws attention to a great piece of legal scholarship. Given the reality of our current time constraints, I want to focus your attention on a new University of Chicago Legal Forum, Law in the Era of #MeToo. The online forum includes several great pieces. One notable inclusion is Judge Diane P. Wood's Sexual Harassment Litigation with a Dose of Reality.

Judge Wood is a beloved jurist and renowned civil-procedure expert. This makes her real-world take on the state of sexual harassment litigation a great read. Judge Wood reminds us that Title VII of the Civil Rights Act has been on the books for more than fifty-five years. As the *#MeToo movement* starkly revealed, however, Title VII and similar laws meant to prohibit sex discrimination in the workplace and beyond have not done the job. This is true even when there is Supreme Court precedent that should be working. Cases such as *Meritor Savings Bank v. Vinson* (recognizing harassment in the absence of a quid pro quo) or *Oncale v. Sundowner Offshores Services, Inc.* (recognizing sexually harassment by a person of the same sex) have been in place for decades. But Judge Wood shows that in the real world, "even blatant cases of sexual harassment frequently fail" in our federal district and appellate courts.

To unpack why, Judge Wood surveys a set of Seventh Circuit sexual harassment cases. The cases are startling. First, lest anyone think that corporations and individuals are routinely slapped with sexual harassment lawsuits over "innocuous or misunderstood" behavior, these cases prove the opposite. The stories are harrowing. One female employee endured repeated sexual advances by her supervisor, including an episode where he followed her while she was on a walk and grabbed her. Another female worker was told by her supervisor that he could see down her blouse during her interview. That supervisor also repeatedly said things such as, "You know you want me, don't you?" And still another male supervisor grabbed a female employee's breasts and buttocks and, on another occasion, simulated a sexual act on her while holding a zucchini between his legs. In all of these cases and most others Judge Wood details, the female employees did not prevail.

Judge Wood explains that while her data are not comprehensive, these cases provide a unique window into how sexual harassment cases are handled in the real world. Sexual harassment cases are under-

reported, and even when a court case is filed, it often settles. Thus, the cases in her survey represent the small number that proceed to summary judgment or trial. In many of these cases, the parties appealed on an agreed factual record. This provides interesting insight. The agreement on the facts reveals what is actually occurring in the workplace. And the trial and appellate courts' responses, as detailed in their opinions, provide a better sense of why these cases are unsuccessful.

What Judge Wood observes overall is that substantive and procedural blockades, combined with judicial skepticism of sexual harassment claims, render even the most dreadful of sexual-harassment cases dead on arrival. Despite the shocking nature of the harassing behavior, judges determined that the actions were not severe enough to affect a person's employment experience. In other cases, the employee lost because she did not sufficiently apprise her employer of the abuse. In still other cases, the court could not connect the actions against the employee to her sex. Finally, sometimes employees chose the wrong legal theory—harassment instead of retaliation, for example—that proved fatal to their claims.

After examining why these cases fail, Judge Wood offers potential reforms. First, she calls for better reporting mechanisms. Employees often fail to report for fear they will not be believed or might lose their jobs. While retaliation laws help, they do not do enough; the law and our cultural response to complaints of workplace harassment must improve. Second, Judge Wood argues for reconsidering the structure of sexual harassment law, such as the problematic distinction between supervisory harassment and harassment by co-workers or customers. If a company has a well-written harassment policy, as most do, it is nearly impossible to get relief from the employer when co-workers or customers violate the law. Written policies will not eradicate sexual harassment, yet this fairly easy step will often immunize employers. These substantive rules misunderstand how sexual harassment functions in real life, and Judge Wood calls for their reconsideration.

Judge Wood lives in the real world of these cases. She sees them in the courtroom and she has witnessed how they have played out over the years. Her pragmatic assessment and prescriptions are all the more appealing. As we wrestle with our new reality on so many fronts, it is refreshing to read Judge Wood's take on an area of the law where we certainly can do better.

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