

How Sexual Harassment Stays Hidden

By **Debra S. Katz and Hannah Alejandro, Katz Marshall & Banks LLP**

Law360, New York (October 30, 2016, 6:46 PM EDT) -- This election year will go down in history as a milestone in the progress toward gender equality, and not just because Hillary Clinton has broken the male monopoly on national politics in her run for president. During the campaign season, another movement has also arisen with extraordinary momentum — the movement of women from all walks of life who have been speaking up and speaking out about sexual harassment and assault.

Revelations have come flooding into mainstream and social media as women find their voices to describe abusive encounters they have long held in silence, the most shocking of which involve high-profile, powerful men. The latest in a growing litany of harassment allegations emerged just last week, when Moira Smith, now general counsel of Enstar Natural Gas, went public with her account of being groped by U.S. Supreme Court Justice Clarence Thomas when she was a Truman Foundation scholar in 1999.

Smith recounted that Justice Thomas groped her at a dinner party when she was 23 years old, and described the shock that paralyzed her from confronting him or telling her boss. In a statement issued on Thursday, Oct. 27, 2016, Smith stated that while she had felt powerless at the time of the groping, "17 years later, it is clear that sexual harassment, misconduct and assault continue to be pervasive, having an impact on all women." She added, "I choose to speak out now in the hope that this will change."

In an interview with Marcia Coyle of the National Law Journal, which broke this story, Smith further explained "We now know that many men in power take advantage of vulnerable women. That willingness by men in power to take advantage of vulnerable women relies on an unspoken pact that the women will not speak up about it ... Why? Because they are vulnerable. Because they are star-struck. Because they don't want to be whiners. Because they worry about their career if they do speak out. But silence no longer feels defensible; it feels complicit." In speaking out now, Smith firmly rejected the notion that such violations are just a part of life that women must endure.

With her allegations, Smith joined a growing number of women who have come forward about past sexual harassment by national figures. In July of this year, former Fox News host Gretchen Carlson set off a firestorm when she filed a lawsuit alleging that network co-founder and CEO Roger Ailes demoted and ultimately fired her in retaliation for her refusal to have a sexual relationship with him.

Following Carlson's bombshell allegations, more than 20 women came forward with their accounts of Ailes' sexual harassment and exploitation over the past four decades. Following public outrage and internal power plays, Ailes was ousted from the network just 15 days after Carlson's suit was filed, and was sent off with a \$40 million severance package. Six weeks later, 21st Century Fox paid Carlson a \$20 million settlement, as well as unspecified settlements to other Ailes victims, and made an exceptionally unusual public apology for Carlson's treatment.

Despite the clear evidence that Ailes engaged in a routine pattern of egregious sexual misconduct against women, he walked out of the Fox News C-suite straight into an expanded role as adviser to Republican presidential candidate Donald Trump.

Trump has since faced his own sexual misconduct scandal, following the dissemination of video in early October that recorded his boasts in 2005 about kissing and groping women without their consent: "Just kiss. I don't even wait. And when you're a star they let you do it ... Grab them by

the pussy. You can do anything.” Like Ailes, his adviser, Trump was promptly faced with statements by multiple women confirming that his remarks were not empty “braggadocio” or “locker room” talk as he claimed; Trump had in fact ogled, kissed and groped women in professional and social encounters on numerous occasions, emboldened to “do anything” to them because of his status.

For both Ailes and Trump, it took decades for the breadth of their sexual misconduct to become clear, in part because the women targeted for humiliation and abuse faced significant obstacles to coming forward. For example, Carlson’s complaint was immediately met by a motion to compel arbitration on the grounds that her employment contract required her to submit all discrimination claims to a mandatory, confidential arbitration process. Carlson’s counsel wisely brought Carlson’s action against Ailes under state law in his personal capacity, and was able to argue that the arbitration clause did not apply because it was limited to claims against her employer.

For the multitude of harassment victims who cannot take this path, however, mandatory arbitration clauses shield misconduct from public view and the public record. In so doing, these clauses can indirectly enable sexual harassment by disguising the true extent of a hostile work environment, the true pervasive nature of a sex harasser’s repeated conduct against multiple victims, and the true posture of the employer about its tolerance of this form of invidious sex discrimination.

Sexual harassment victims often feel isolated, and are encouraged to come forward only when they realize that their experience was not unique and that they will be believed. Mandatory confidential arbitration of sex discrimination claims robs employees and the public of vital information about the workplace, and drastically reduces employer accountability.

Another major obstacle to reporting sexual harassment is the fear of retaliation. This fear is particularly keen when harassers are wealthy or influential. Powerful individuals like Ailes and Trump have enablers, fixers and apologists protecting them from above and below, and their power becomes a self-perpetuating truism that makes objections to their unlawful conduct not only futile but professional suicide. Before Carlson’s complaint, many of Ailes’ victims had been silent because he held such tremendous power over their professional lives and was willing to use it vindictively.

Trump’s response to his accusers has also been overtly retaliatory. He has ridiculed their appearance, suggested that they deserved assault because of their sexual history, and announced that he will sue them after the election. While his highly publicized threats against these women and actions have been extreme, sexual harassers of all kinds are able to isolate and smear women who speak out in part because tropes about victims being opportunistic or deceitful still have tremendous resonance. The sexism perpetuated by harassers creates its own cover; women are demeaned, then discounted and disbelieved.

The behavior of Roger Ailes and Donald Trump demonstrates the many challenges to creating real equality in the workplace, and shows us what still remains to be done. Sex discrimination laws play a vital role in protecting women from unwelcome sexual conduct, including assault, in employment and providing remedies when harassment does occur. But their power is significantly eroded when employers are permitted to conceal the nature of the workplace through mandatory confidential arbitration and when they fail to establish effective zero-tolerance policies for retaliation against victims who do come forward. For meaningful gender equality, the law can and must protect all victims by creating an atmosphere where sexual harassment is never worth it.

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