Let the Jury Decide:

Why Sexual Harassment Cases Belong in the Hands of the People

By Whitney L. Barr

Sexual harassment is one of the most enduring forms of discrimination in the workplace. Despite decades of legal recognition under Title VII of the Civil Rights Act of 1964, women—especially those in low-wage or marginalized positions—continue to endure unwanted touching, lewd comments, and degrading treatment on the job.

Under Title VII, as outlined by *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), victims of sexual harassment may recover for "hostile work environments." What constitutes a "hostile work environment" depends on the totality of the circumstances. The United States Supreme Court set forth factors to consider when determining whether the workplace is "hostile" in *Harris v. Forklift Systems*, 510 U.S. 17 (1993). This assessment includes "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Too often, courts deny plaintiffs the chance to have their stories heard by a jury. Judges have dismissed claims at the summary judgment stage, concluding that harassment was not "severe or pervasive" enough to warrant trial, even where the conduct involves repeated groping, explicit threats, or daily humiliation. Courts should ensure that sexual harassment cases always go to a jury because (1) Congress intended juries to be the arbiters, (2) harassment involves fact-intensive credibility questions, and (3) public policy and social science demand it. To strip survivors of a jury's judgment is to strip them of justice.

Right to a Jury Trial in Title VII Cases

In enacting the Civil Rights Act of 1991, Congress amended Title VII to provide recovery of compensatory and punitive damages in discrimination cases and to specifically guarantee the right to a jury trial. Before the 1991 amendments, plaintiffs could only obtain equitable remedies. The amendments recognize that ordinary citizens—not judges—are best suited to decide whether conduct qualifies as objectively severe or pervasive. Juries are uniquely equipped to apply the objective standard in harassment cases. The question of whether conduct is "severe or pervasive" enough to create a hostile work environment depends on how real people understand the boundaries of acceptable behavior. By design, a jury reflects a cross-section of the community and brings collective experience from offices, factories, schools, and service jobs. This diversity of perspective makes jurors far better positioned than a single judge to determine when conduct crosses the line from inappropriate workplace behavior to unlawful harassment.

The legislative debates from the 1991 amendments make clear that Congress wanted real people to decide what conduct is acceptable at work. In amending the Act, the House Committee on Education and Labor noted, "a jury of your peers can make a determination about whether you were too sensitive or whether you were properly offended and whether, in fact, you were damaged." By cutting plaintiffs off from their right to a jury, courts not only frustrate the very purpose of the 1991 Civil Rights Act amendments but also intrude on the Seventh Amendment's guarantee of trial by jury. This practice misapplies the law and, more importantly, deprives survivors of both their constitutional right and their opportunity to have their experiences validated by a jury of their peers.

Juries Are Best Positioned to Apply the Objective Standard

The jury's primary function is to decide the facts of a case. Juries serve as a democratic forum where workplace norms are tested. Drawing on collective wisdom from diverse backgrounds and experiences, jurors are well positioned to decide whether conduct is "severe or pervasive"—a task for which an Article III judge may lack perspective.

Standards of acceptable conduct are not static; they evolve with social and cultural change. Behavior once dismissed as "harmless" banter in the 1950s is now rightly recognized as demeaning and unlawful. The cultural shifts of the 1960s and 1970s—often described as the "sexual revolution"—demonstrate how changing attitudes toward gender and sexuality can transform community expectations and, in turn, reshape the law.

Courts have too often concluded that no sexual harassment occurred even when the alleged conduct would strike most reasonable people as sexual assault. For example, consider three Seventh Circuit cases:

- In *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993), the Seventh Circuit affirmed there was no harassment where a supervisor rubbed the plaintiff's upper thigh and kissed her without consent.

- In *Koelsch v. Beltone Elecs. Corp.*, 46 F.3d 705 (7th Cir. 1995), the Seventh Circuit affirmed the Northern District of Illinois' finding of no hostile work environment despite the company president rubbing his foot up the plaintiff's leg and grabbing her buttocks.
- In *Swyear v. Fare Foods Corp.*, 911 F.3d 874 (7th Cir. 2018), the Seventh Circuit affirmed the Southern District of Illinois' ruling against the plaintiff, even though a co-worker repeatedly touched her, followed her into her hotel room after a work event, and climbed into her bed uninvited.

To the average person, these actions clearly amount to sexual misconduct, if not assault, and could readily be seen as creating a hostile work environment.

Judicial Gatekeeping and the Summary Judgment Problem

One of the greatest barriers to justice in sexual harassment litigation is judicial gatekeeping at the summary judgment stage. The summary judgment mechanism allows for a judge to resolve questions of law prior to trial. Summary judgment is proper under Federal Rule of Civil Procedure 56 if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

Legal issues are often categorized in two buckets: questions of law and questions of fact. Questions of law are for the judge to determine, while questions of fact are reserved for juries. In theory, summary judgment is proper only where "no reasonable jury" could find for the non-moving party. In practice, however, judges often use the device to weigh evidence and credibility, cutting off fact-intensive cases that Congress intended for juries to decide. This practice is particularly troubling in harassment cases, where the legal standard—whether the conduct was "severe or pervasive"—is inherently contextual and dependent on community norms. When judges cut harassment claims off at summary judgment, they risk freezing the law in outdated conceptions of what employees must endure.

Significant consequences result when a jury is prevented from deciding a case, particularly for plaintiffs bringing civil rights cases. One empirical study by Michael W. Pfautz in Columbia Law Review shows that 60% of "verified improper grants" occurred in civil rights cases, even though they comprised only 40% of the jury trials in the study.

This pattern reflects a deeper structural problem: Judges tend to underestimate the harms of harassment. While ordinary people often recognize conduct as harassing, courts frequently downplay or trivialize the effects of the same behavior. Judges, many of whom are insulated by life tenure and professional distance from most workplaces, are ill-suited to evaluate whether daily taunts, repeated comments, or unwanted physical contact create a hostile work environment. Juries, by contrast, bring the insights of lived experience across industries and communities, making them more capable of applying the "reasonable person" standard in this context.

Illinois State Policy

Illinois law demonstrates how state legislatures have moved beyond the narrow confines of federal precedent to recognize the seriousness of workplace harassment. The Illinois Human Rights Act prohibits offensive work environments for employers with significantly fewer employees than Title VII covers, providing a broader scope of protection. The Illinois legislature has also criminalized unwanted sexual contact and provided remedies under the Gender Violence Act. These enactments reflect a strong public policy judgment that even a single incident of harassment can be severe. That judgment is consistent with community standards and underscores why juries, not judges, should assess the impact of such conduct. Denying Illinois workers access to a jury would undercut the protections their legislature has explicitly sought to guarantee.

Broader Implications for Equality and Accountability

Overuse of summary judgment disproportionately strips civil rights plaintiffs of their Seventh Amendment right to a jury. While sexual harassment affects all genders and demographics, the consequences fall hardest on women in low-income and marginalized positions, who are already the least likely to have institutional power or workplace protections. Women in low-wage positions are often vulnerable and, as such, are generally deterred from filing complaints. Indeed, the EEOC Select Task Force on the Study of Sexual Harassment in the Workplace reported that only 8% of gender-harassing conduct and unwanted physical touching is ever formally reported.

This means the vast majority of incidents never even reach a Human Resources office, let alone a courtroom. For the small fraction of claims that do advance, jury trials are essential; they provide accountability, deter future misconduct, and give survivors the opportunity to have their experiences validated by a cross-section of the community.

Sexual harassment claims are fact-intensive and community-driven. Congress recognized this when it guaranteed jury trials under Title VII. The Pfautz study findings confirm that judges are often poor predictors of jury behavior. To deny jurors the opportunity to decide these cases is to deny survivors the justice promised by civil rights law. Sexual harassment cases should always go to a jury—not only because Congress required it, but because fairness, accountability, and workplace equality demand it. ■

Resources for victims of sexual harassment and assault:

- **Chicago Alliance Against Sexual Exploitation: https://www.caase.org**
- **National Sexual Assault Hotline: 1-800-656-HOPE**

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