What to Do About Well-Grounded Fears?

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Blair Druhan Bullock, *Uncovering Harassment Retaliation*, __ **Ala. L. Rev.** __ (forthcoming, 2020), available at SSRN.

Articles sometimes do an important service by exposing what seems obvious, but only in retrospect. Blair Druhan Bullock's *Uncovering Harassment Retaliation,* forthcoming in the Alabama Law Review, does a great job of surfacing an issue that had previously received little attention in the law journals.

It's not news that women have been, at least before #MeToo and probably still, reluctant to report harassment. Neither is it news that one reason is their fears of retaliation for invoking the employer remedial processes that have been put in place in the wake of the Faragher/Ellerth structure for employer liability. And it will come as no surprise that the courts have been remarkably unreceptive to claims of victims of sex harassment that delaying a report until the situation became unbearable was reasonable because of fears of retaliation. What is needed, and what Professor Bullock provides in *Uncovering Harassment Retaliation,* is an empirical basis for believing such fears are well grounded and not (as one might think from reading court opinions) paranoiac.

Although it is challenging to get more than anecdotal data on an issue as complicated as the extent of retaliation against those who report harassment, the author offers two main bases for concluding that such retaliation is common, especially when the alleged harasser is a supervisor (although it seems likely that respondents to a survey that she analyzes were using a more common-sense definition of "supervisor" than the Supreme Court's stringent definition). The article notes the Catch-22 created by the intersection of the requirement of § 704(a) (a reasonable belief in the illegality of the conduct reported) and the requirement of early reporting of harassment (perhaps before it is sufficiently severe or pervasive to be reasonably viewed as illegal), but it has bigger empirical fish to fry.

Looking to a dataset the author created of 1990-2013 filings with the EEOC obtained by an FOIA request, the article reports that "[U]pwards of 70% of harassment claims filed with the EEOC include a retaliation charge, and . . . harassment charges are more than 90% more likely to include a retaliation charge than any other type of discrimination claim." (P. 1.) The latter finding is striking. While a skeptic might dismiss any employee charges as self-serving evidence of the reality they supposedly reflect, it's hard to see any reason harassment should manifest more false positives than other charges of discrimination.

While recognizing that liability standards in theory should discourage retaliation against reporting victims, the article then analyzes a 2016 Merit Systems Protection Board harassment survey of federal employees to conclude that such deterrence too often fails. While this Jot is not the place to summarize all of Professor Bullock's findings, she makes a persuasive case that reporting harassment by supervisors "greatly increases the likelihood that a victim experiences an adverse employment action as a result of the harassment." (P. 1.) She writes, for example, that "female sexual harassment victims who reported the harassment were 11.4 percentage points more likely to experience an adverse employment action compared to those that did not report the harassment," (P. 33) and those "who are harassed by their supervisor are 22.7 percentage points more likely to experience an adverse action."

(P. 34.)

The takeaways from these and similar findings are twofold. First, “courts must move away from treating the failure to report as an end all be all to the *Faragher/Ellerth* affirmative defense or even to negligence liability for coworker harassment—especially under the current regime where not all victims who report are protected under retaliation law.” (P. 39.) Rather, she urges courts to “consider the reasonability of failing to report.” (P. 39.) There are, in fact, a handful of cases taking this something like this approach, and Professor Bullock’s article offers a strong basis for more to follow.

Second, and more sweepingly, the author questions the current incentive structure for employer response to harassment. She argues that separating a supervisor harasser from the victim is typically the optimal solution for the employer facing a complaint, and the one transferred is too often the victim. The article has a nuanced assessment of the cross-cutting operational, legal, reputational, and cost incentives involved in such decisions, but Professor Bullock’s empirical work suggests that all too often the employer calculus nets out by moving the victim. The thumb on the scale in such cases is the operational efficiencies of keeping a supervisor in place.

There is much to chew on here, and both the empirical work and the author’s theoretical explanations leave room for debate. But there is no doubt that Professor Bullock has raised an important reality that needs careful consideration in a #MeToo world. *Uncovering Harassment Retaliation* suggests modifications that could rejigger the incentives created by Title VII’s current liability structure, but, recognizing the difficulty of achieving meaningful change in this arena, it urges state legislatures to address the issue. There is already significant legislative reform dealing with sexual harassment in that arena, particularly with respect to nondisclosure agreements, but Professor Bullock urges legislation that would “remove the reporting requirement for supervisor harassment, broadly define supervisor, codify a mixed-motive standard for retaliation, or expand retaliation protections to cover all forms of opposition” (Pp. 43-44), noting some limited successes to date. More are needed.

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