

What role do judges play in employment harassment cases?

November 28 2017, by Phil Ciciora

Suja Thomas is the Peer and Sarah Pedersen Professor of Law at Illinois and co-author of the book "Unequal: How America's Courts Undermine Discrimination Law." Thomas spoke with News Bureau business and law editor Phil Ciciora about why judges tend to dismiss employment harassment cases.

Your book argues that federal judges play a role in allowing sexual and racial harassment to persist in the workplace. How is that?

Judges can dismiss sexual or racial harassment [cases](#) for seemingly no good reason through a procedure called summary judgment, which allows a [judge](#) to unilaterally decide what a "reasonable [jury](#)" might decide. After a plaintiff files an [employment discrimination](#) case and information has been exchanged between the parties in the case, if a judge thinks that a reasonable jury could not find for the plaintiff, then they can dismiss the case on summary judgment. Consequently, a jury never hears the case.

The average person might think that there are a lot of frivolous discrimination lawsuits out there, so judges dismissing some of the cases isn't a problem. Well, my co-author and I argue that it's wrong for a number of reasons.

One, an individual should not decide what a reasonable jury might find. Different people can come to different conclusions about what a reasonable jury could decide in any given case. This is precisely

why the Founding Fathers vested juries with decision-making powers, because they thought an individual judge could not fairly decide these types of cases.

Two, the judges who employ summary judgment aren't really representative of the community in the way that a jury is. Being picked for the federal bench is a very privileged position. They're the elite of the elite, and overrepresentative of the white male population.

Three, there are no deliberations at the trial-[court](#) level. Summary judgment is just a paper record – relevant documents and a written account of what happened from the parties involved. There are no witnesses testifying as to what happened, so you can't judge anyone's credibility on the witness stand. Among other reasons, this is why we argue that if these cases had gone to a jury trial, it's possible that the outcome would be quite different from the opinion of one judge on summary judgment.

What is it about employment discrimination cases that makes them more prone to summary judgment?

Employment discrimination cases are typically very factually intense. So you would think you would have fewer instances of summary judgment than you would in, say, contract law cases.

But what you find is that employment cases and other civil rights cases have the highest rates of grants of summary judgment. When an employer makes a motion for summary judgment in an employment discrimination suit, more than 70 percent of those motions are granted in full or in part. Judges are using a variety of doctrines or inferences that are established by other courts or their

own courts to dismiss cases before trial. For example, courts will assess the facts and say the conduct is not sufficiently severe or pervasive to alter the terms or conditions of the worker's employment, such that it creates a hostile or abusive work environment. But the law enacted by Congress requires only that a person is treated differently because of their sex.

The bottom line is that a jury should decide that question. A judge shouldn't decide. A jury is supposed to listen to the witnesses and assess their credibility and then decide what they think happened.

Otherwise the judge is essentially encroaching upon the jury's turf, which tilts the playing field in favor of employers, even when the factual evidence screams [discrimination](#).

Is this something that employers know and use to their advantage?

It's possible that some employers know from experience that, if the company went to court, they're likely to be able to get the case dismissed by the judge without having to be dragged through the mud of a jury trial. But at the end of the day, most companies don't want to go to court for anything.

We also have circumstances like the Harvey Weinstein situation, in which there are power dynamics of a certain person in a high position who gets away with bad behavior. Or there's maybe a culture of bad behavior in a company and nobody is really looking to change it. So there are a number of different reasons as to why harassment continues to occur and people don't shut it down. And the courts certainly don't help by continuing to do what they're doing. By not having these alleged cases of harassment aired

publicly through trials, employers can ignore the issues without consequences.

What's the best outcome to this disparity?

If there were more done in the courts, then you would see companies change. If more of these cases went to jury trial where there's public exposure and money to be paid, corporations would take note. But by allowing summary [judgment](#), courts are explicitly favoring employers over employees.

The book "Unequal: How America's Courts Undermine Discrimination Law" is available [online](#).

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