

Debra Katz and Hannah Alejandro Author Article on Ailes Sexual Harassment Suit

By [Debra S. Katz](#) and [Hannah Alejandro](#)
August 22, 2016

Katz, Marshall and Banks partner [Debra Katz](#) and senior counsel [Hannah Alejandro](#) published an article in Law360 on August 19, 2016, entitled, "[Ailes Scandal Puts Sex Discrimination Issues In Plain View](#)." The article discussed the role of corporate culture in the explosive Gretchen Carlson harassment lawsuit against former Fox News executive Roger Ailes. In the complaint filed last month, Carlson alleged that Ailes subjected her to *quid pro quo* sexual harassment, demanding a sexual relationship in exchange for career protection and advancement, and ultimately terminated her in retaliation when she rejected his propositions. Since the lawsuit was filed, over two dozen women have come forward with similar allegations that Ailes engaged in blatant, persistent sexual harassment of female employees throughout his career. Ms. Katz and Ms. Alejandro observed that this case depicts more than just a single person's reprehensible behavior. Rather, it conveys an organizational culture of sexual harassment and discrimination at Fox News that protected a serial sexual harasser at the expense of women.

Employment agreements required by Fox News, and many other organizations, play a crucial role in shaping corporate culture on discrimination. Ms. Katz and Ms. Alejandro wrote, "By conditioning employment on binding, confidential arbitration of discrimination claims, Fox News and other employers signal to sexual harassers and victims alike that the company is primarily interested in its reputation, rather than accountability and equality." The growing number of harassment allegations against Ailes raises an important question: how many Fox executives knew about Ailes' sexually predatory behavior and turned a blind eye to it? Or worse, abetted it by paying women to keep quiet, allowing Ailes to continue his predatory behavior? The answer may determine the outcome of the lawsuit. Read the full article below.

Ailes Scandal Puts Sex Discrimination Issues In Plain View

When former Fox News host Gretchen Carlson filed her recent lawsuit against Roger Ailes, then chairman and CEO of Fox News, she turned a spotlight on the inner workings of one of the most powerful media companies in American history and on the sexually predatory conduct of its top executive. Carlson's allegations, if true, depict a workplace where she was routinely subjected to sexist, offensive and discriminatory treatment by Ailes and co-workers.

Carlson asserts that she was belittled and denigrated by her co-hosts both on air and off, and that when she reported this unlawful treatment to Ailes he responded with a crude sexual proposition, stating "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better ..." Carlson alleges that she rejected Ailes' sexual advance at that meeting and "nine months later, Ailes ended her career at Fox News." In Carlson's account, Ailes acted with blunt entitlement, making it clear that she was expected to have a sexual

relationship with him if she wanted to keep her job and firing her when she refused.

The behavior that Carlson's complaint describes — conduct that over two dozen women have reportedly also confirmed happened to them — is egregious. But equally disturbing as her description of a sexist and demeaning culture, established and exploited by Ailes through his authority as CEO, is the reality that he carried out this behavior in plain view.

Public accounts give credence to Carlson's allegations that the sexually hostile atmosphere at Fox News allowed Ailes and other men to target female employees with impunity. Regardless of whether Carlson's lawsuit will progress through trial, be dismissed and ordered into confidential arbitration, or be withdrawn before any final disposition under a settlement agreement, the scandal set off by her allegations graphically illustrates how employers can enable and protect harassers through years of egregious sexual harassment.

This case raises many disturbing questions, including foremost the following one: How many executives at Fox knew about Ailes' sexually predatory behavior and either turned a blind eye to it or abetted it, by paying women to go away and maintain their silence and allowing him to continue to victimize women? And, what tools did Fox — and indeed other employers — use to enable this unlawful behavior?

To start, there is the threshold question of where harassment claims may be heard, and who has the power to select the forum for resolution when an employee has been sexually harassed. In Carlson's case, Ailes promptly moved to enforce the mandatory arbitration clause in her employment contract with Fox News to require the claim to proceed in a confidential arbitration. Should Ailes' efforts to force Carlson into arbitration succeed, her complaint will be diverted into a process that provides for no public disclosure of findings of fact or conclusions of law.

In light of the possibility that she might be forced into arbitration, Carlson appears to have made a savvy decision to file suit against Ailes (rather than Fox which clearly would have required arbitration) and allow this issue to play out in open court. Had Carlson and her counsel not made this strategic decision, the public would forever have been deprived of this jarring view of Fox News' treatment of women, other women would not have come forward, and Ailes would still be lording over women at Fox News from his large C-suite office.

Now, even if Carlson's claim is eventually removed, her publicly filed complaint has already shaped the narrative of her experience in a way that Ailes can never fully mitigate and has empowered other women to come forward. This of course would have been impossible had she initiated arbitration herself.

More broadly, Ailes' attempt to enforce arbitration highlights the significant harm that such agreements pose to workplace equality. By conditioning employment on binding, confidential arbitration of discrimination claims, Fox News and other employers signal to sexual harassers and victims alike that the company is primarily interested in its reputation, rather than accountability and equality. Mandatory arbitration agreements silence victims and often immunize harassers by shrouding misconduct in secrecy and allowing them to remain in positions of authority. Mandatory arbitration for discrimination claims does not serve the public interest or the interest that all employees have in a workplace free from discrimination.

The importance of publicly filed litigation is also illustrated by the fact that Carlson's lawsuit has been a catalyst for dozens of women to come forward with their own accounts of sexual harassment while working for Ailes. Just days after Carlson's complaint was filed it was apparent that her legal action

was no isolated salvo against a tremendously powerful man; it was, in fact, the tip of the spear for numerous women who have also suffered harassment from Ailes over many decades. The additional allegations that continue to mount — made by women of varying ages and backgrounds, many of whom describe eerily similar conduct — do more than simply bolster the credibility of Carlson's account. They also reveal the sordid mechanics of serial sexual harassment, which requires the complicity of dozens of people who effectively enable, excuse and disguise unlawful conduct.

The growing body of reports about Ailes' behavior suggests that he created a sexually hostile environment for female employees and engaged in a pattern of quid pro quo sexual harassment throughout his career in television. This behavior was not only egregious and persistent, it seems to also have been well-known. Multiple women have asserted that he demanded they perform sexual acts not just with him but with his associates, for example, and there are reports that top-level Fox News executives were involved in at least one multimillion-dollar sexual harassment settlement with a female employee whose allegations spanned decades.

Carlson's allegations against Ailes fit a mold that is now familiar from a spate of recent exposés of powerful institutions, or involving powerful individuals. (Here, we are referring not only to other sexual harassment cases, like, for instance, the American Apparel case involving CEO Dov Charney, but also to the Bill Cosby, Penn State and Catholic priest sex abuse cases.) Time and again we see that harassment and sexual abuse is often a mode of interacting with vulnerable targets, rather than particularized conduct focused on a single person. The behavior tends to escalate over time as the harasser tests the boundaries of both victims and superiors, determining just how far he can go and continue to escape any meaningful consequences for his actions. Ailes obviously saw himself as bullet proof.

A CEO who engages in routine egregious sexual harassment, who objectifies women and marshals the resources of an immense corporate machine to pursue personal vendettas against critics, sets the tone for a workplace rife with discrimination and retaliation. It is not surprising, then, that Fox News' response to the allegations against Ailes has been tepid thus far. After Carlson filed suit, the company did announce that it would undertake a full investigation into Ailes' behavior, but this announcement came at the same time that Ailes was permitted to mobilize successful women at Fox, like Greta Van Susteren, to publicly vouch for him and to cast doubt on Carlson's credibility.

Van Susteren stated publicly that Carlson's allegations did not ring true, and insisted that it was not credible that such behavior could have remained a secret. Maria Bartiromo praised Ailes' "loyalty" to his employees, and Kimberly Guilfoyle stated just days after Carlson's lawsuit was filed that she had spoken to more than 30 women at Fox News and "nobody believed this." It is highly unlikely that victims of harassment or witnesses to Ailes' misconduct would have felt comfortable coming forward to corroborate Carlson's allegations or to provide relevant information while he continued to wield power over high-profile colleagues. Fox should not have tolerated this type of intimidating conduct.

Legal observers, like ourselves, queried whether Ailes would be able to survive Carlson's allegations, or whether a well-oiled public relations machine controlled by Ailes would succeed in discrediting Carlson and taking her down. When explosive allegations of sexual harassment were made about Bill O'Reilly by his former producer Andrea Mackris (allegedly backed by tape recordings of O'Reilly making numerous phone calls to enact his sexual fetish of phone sex), O'Reilly counter-sued her for extortion and smeared her in public filings before finally settling the lawsuit for a sum generally thought to be in the millions of dollars and entering into a confidential settlement agreement.

He's still one of Fox's top talents — and indeed, he quickly went on the air to proclaim that he stood by Ailes "100 percent" after Carlson filed suit. O'Reilly publicly impugned Carlson's honesty and

motives, asserting that “in this country, every famous, powerful or wealthy person is a target.” Under these circumstances, the message to Fox employees about the integrity of an internal investigation was mixed at best.

Even Ailes’ departure from Fox News has sent mixed signals about its commitment to complying with anti-discrimination law and treating female employees with equal respect. When Ailes stepped down as CEO just days after Carlson filed her lawsuit, he reportedly received the \$40 million dollars remaining on his employment contract. If Ailes is not a poster-child for an executive who should be fired for cause — and thus denied his golden parachute — who is? In addition to this exceedingly lucrative exit, Fox News’ parent company, [21st Century Fox](#), recently named two male executives to take over Ailes’ duties, both of whom have a reputation for being Ailes loyalists. These are not decisions that indicate a genuine desire to examine corporate culture and make transformative changes. They are decisions that send quite the opposite message to current Fox News employees, male and female alike — the status quo remains in place.

While Carlson’s legal action and the fallout at Fox News will both continue to develop over the coming months, this scandal has already served to bring much needed attention to the urgent need for robust anti-discrimination laws and zero tolerance corporate sexual harassment policies. Prior to the media coverage of this story, many Americans would probably have found it implausible that the CEO of a major corporation would engage in the kind of explicit, shocking quid pro quo sexual harassment and sexism that we associate with the pre-Civil Rights era.

Yet a growing body of evidence suggests that this was exactly what took place at Fox News through at least 2015. Reports indicate that throughout the 2000s, Ailes subjected multiple female Fox News employees to sexual propositions, inappropriate comments about their appearance, and pressure to engage in sex in exchange for career advancement. When these women resisted or complained, most faced retaliation of some kind, including termination. These events, if true, did not occur in some far-off time, nor were they perpetrated against people who lacked significant resources.

They allegedly took place at the very top of one of the most visible, powerful media institutions in the world, involving people who are highly educated and sophisticated. Yet most of Ailes’ targets, like the dozens of women who were victimized by Bill Cosby, were terrified to come forward and tried to move on with their careers and put the events behind them. Now that a tipping point has been reached, they are speaking out and exposing the pattern of abusive and exploitative conduct that has characterized Ailes’ leadership for decades.

The Ailes scandal demonstrates how institutional practices can embolden and perpetuate harassment, even against victims of relative privilege and sophistication. Serial sexual harassers are only able to prey upon generations of subordinates when employers either ignore or ratify their behavior. The picture that is emerging at Fox News is one of a workplace that harbored an open secret — women were second-class employees, and no one in the organization would take their complaints seriously or rein Ailes in.

It is clear, then, that some 50 years after the recognition that equal opportunity in employment is a crucial component of civil rights and equality for all Americans and more than 30 years after the [U.S. Supreme Court](#) held in [Meritor Savings Bank v. Vinson](#) that sexual harassment is unlawful sex discrimination, substantial work remains to be done to secure this right. Vigilant enforcement of anti-discrimination laws, through both administrative and private action, continues to play an important role in this process. With Carlson’s lawsuit, much needed scrutiny has finally come to a company that benefited from the contributions of its female employees while apparently denying them their legal entitlement to an environment free from gender bias and sexual harassment.

Fox and Ailes will certainly have to write large checks to Carlson. These will, undoubtedly, be a fraction of the one Fox wrote Ailes. And unfortunately, most victims of Ailes' sexual harassment are well outside of the statute of limitations and will never receive any form of redress. That is neither fair nor balanced.

—By Debra S. Katz and Hannah Alejandro, [Katz Marshall & Banks LLP](#)

Debra Katz is a founding partner and Hannah Alejandro is senior counsel at Katz Marshall & Banks in Washington, D.C. Both specialize in sexual harassment and whistleblower matters.

Original article can be found [here](#) with subscription. Reprinted with permission from Law360. All rights reserved. Further duplication without permission is prohibited.