KATZ, MARSHALL & BANKS, LLP

How Can We Challenge Sexual Harassment in the Federal Judiciary?

January 9, 2018

Last month, allegations of sexual harassment against Ninth Circuit Court of Appeals Judge Alex Kozinski showed that the federal judiciary is not immune from the type of insidious sexism that plagues every industry. The federal judiciary is largely immune, however, from the laws that protect victims of sexual harassment in other industries and the other branches of the federal government. The unique exemption of federal judges from the reach of anti-discrimination laws creates conditions that allow sexual harassment to continue unchecked.

Details of the Claims Against Judge Kozinksi

On December 8, 2017, the *Washington Post* reported that six of Judge Kozinski's former employees, law clerks and externs, claimed that he had subjected them to sexual comments or conduct. Former law clerk Heidi Bond, for example, claimed that Judge Kozinski manipulated her and showed her pornography in his chambers. Although her experience tormented her to the point that she eventually left the legal field, she did not tell anyone about the workplace harassment for nine years because she believed it would violate the duty of confidentiality that law clerks owe to their judges. In the ensuing weeks, a total of 15 women came forward with claims that Judge Kozinski had acted inappropriately toward them, the Ninth Circuit launched an inquiry into the allegations, and Judge Kozinski announced his retirement.

Effects of Harassment in the Legal Industry

Sexual harassment in the judiciary risks blocking talented women from rising and contributing to the legal system. In the wake of the allegations against Judge Kozinski, numerous commentators have discussed the effect that workplace harassment has had on the legal industry. For example, Amanda Taub explained in the *New York Times* that a clerkship with Judge Kozinski often led to a clerkship with a Supreme Court justice, as he was one of a handful of federal appellate court judges considered to be feeder judges for Supreme Court clerkships. Female law students lost career opportunities as they chose not to apply for clerkships in his chambers and professors steered them elsewhere. Meanwhile, the legal industry lost those women's contributions, and aspiring lawyers lost female role models. Similarly, Dahlia Lithwick, journalist and former clerk for a different Ninth Circuit judge, recounted Judge Kozinki's inappropriate conduct toward her and described his behavior as an "open secret." She explained how this open secret contributed to an already gendered pipeline to the Supreme Court. These discussions, and others, reveal the toll that sexual harassment has taken on the judiciary and the legal profession.

The Challenges for Female Victims in Law

While Judge Kozinski's resignation removes one obstacle to women finding equal opportunity in the legal profession, it also highlights the general absence of legal recourse to challenge the type of sexual misconduct he allegedly subjected his employees to. No one tried to challenge Judge Kozinski's behavior because discrimination laws do not apply to employees of the federal courts. Other workers typically bring sexual harassment claims under Title VII of the Civil Rights Act of 1964 ("Title VII"),

which prohibits, among other things, sex-based discrimination in employment. Title VII applies to businesses in the private sector with 15 or more employees, 42 U.S.C. § 2000e (b), and parts of the federal government, but not the judiciary. *See* 42 U.S.C. § 2000e-16; 5 U.S.C. §§ 2102–03. (A different statute, the Congressional Accountability Act applies to Congress.) Because Title VII does not apply to the federal judiciary, it does not provide a remedy for judicial employees who have been sexually harassed by federal judges.

The Fifth Amendment, which guarantees equal protection of the laws, may theoretically provide a civil remedy for sexual harassment by a federal judge. In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court held that there is an implied cause of action against federal government actors for violating the Fourth Amendment. In *Davis v. Passman*, 442 U.S. 228 (1979), the Supreme Court applied *Bivens* to Fifth Amendment claims. The Court held that because the Fifth Amendment's due process clause requires equal protection of the laws, there is "a federal constitutional right to be free from gender discrimination." *Id.* at 235. As a result, federal government employees can bring *Bivens* claims for gender discrimination where there is no statutory remedy for the violation.

However, not only is it extremely rare for such a cause of action to be asserted against a federal judge, *Bivens* claims have generally become increasingly disfavored and courts have repeatedly declined to expand their scope to new contexts. The Supreme Court recently rejected a *Bivens* claim brought by six undocumented men detained and allegedly subjected to harsh and abusive treatment by federal officials, holding that although prison abuse is a familiar area for *Bivens* claims, the context was different because the petitioners were allegedly mistreated in the "new context" of post-9/11 detention policies targeting Arab or Muslim men. *Ziglar v. Abbasi*, 582 U.S. ___, 137 S.Ct. 1843 (2017).

Reporting Misconduct in the Judiciary

Although there are few legal avenues for challenging harassment by federal judges in court, victims of such sexual harassment may report their claims internally within the judiciary. However, there is no centralized system for reporting sexual harassment and, as a result, judicial employees may not know how to make a complaint. The Law Clerk Handbook currently states that law clerks are encouraged to bring claims of misconduct, including sexual harassment, "to the attention of an appropriate judge or other official." Law Clerk Handbook § 2.2.A.2. Although the Federal Judicial Center added this instruction last month to clarify the scope of law clerks' confidentiality requirements, the instruction does not explain the procedure for reporting misconduct.

Further, by statute, anyone can bring an ethical claim against a federal judge for misconduct by filing a written complaint with the clerk of the court of appeals for the circuit. 28 U.S.C. § 351 *et seq*. The chief judge of that circuit must review the complaint, and in doing so may seek a response from the accused judge. After reviewing the complaint, the chief judge must decide either to dismiss the complaint or to convene a judicial council to investigate the complaint. Congress did not design this procedure specifically for allegations of sexual harassment and it is unclear whether the Federal Judicial Center or the various bodies responsible for regulating judicial conduct contemplate judicial employees using it to report sexual harassment. However, this is the procedure the Ninth Circuit followed in response to the public allegations about Judge Kozinski, which triggered his resignation. This procedure is the only clearly articulated method of reporting judicial misconduct that applies to all circuits, and it is not an effective procedure for handling harassment complaints. One of its defects is that it does not provide a way to address the harassment—for example by moving the employee to a different position—without alerting the judge and risking the employee's career and reputation. Meanwhile, there is no statutory cause of action to compensate the employee for either the damage to her career or the suffering the hostile workplace caused.

Relief for Judicial Employees

Even if a judicial employee successfully pursues an internal complaint, the possible outcomes are limited and provide no relief to the employee. Federal judges are appointed for life and can be removed only by Congress. Thus, if the judicial council conducts an ethics investigation and finds that the judge engaged in sexual harassment, the most it can do absent an act of Congress is redistribute the judge's cases. In 2015, the Judicial Council of the Fifth Circuit Court of Appeals formally reprimanded Judge Walter Smith, a judge in the Western District of Texas, for sexually harassing a law clerk in his chambers in 1998. The Judicial Council did not recommend impeachment. Instead it ordered Judge Smith to undergo sensitivity training and temporarily removed him from new cases, redistributing them to other judges in the district. Judge Smith, like Judge Kozinski, eventually retired amid public pressure. Retired federal judges receive their full salaries (calculated as the amount they received for their last year with a full caseload) for the rest of their lives. 28 U.S.C. §371(a).

Changes to the Harassment Reporting within the Courts

In the month following Judge Kozinski's employees' first reports of harassment, members of the judiciary have taken some initial steps at self-examination. On December 18, 2017, the Federal Judicial Center revised its Law Clerk Handbook to clarify that law clerks' ethical responsibilities do not prevent them from internally reporting sexual harassment. Two days later, on December 20, hundreds of current and former law clerks and professors sent a letter to Chief Justice John Roberts; Judge Anthony Scirica, Chair of the Committee on Judicial Conduct and Disability; Judge Jeremy Fogel, Director of the Federal Judicial Center; and James Duff, Director of the Administrative Office of the U.S. Courts, calling on the federal judiciary to, among other things, develop a centralized system for reporting sexual harassment. That same day, Chief Justice Roberts asked the Administrative Office to establish a working group to review the existing safeguards to protect employees from sexual harassment and other misconduct in the judiciary. Chief Justice Roberts also emphasized the judiciary's commitment to the issue in his 2017 Year-End Report on the Federal Judiciary.

These attempts at self-reflection are the first steps in curbing sex-based discrimination in the courts, but they should not be the last steps. The Administrative Office working group has scheduled to report on existing safeguards in the judiciary by May 1, 2018. Its methods and efficacy likely cannot be evaluated until then. The reforms proposed by law clerks and professors in their December 20 letter aim to solve many of the real obstacles for accountability for judicial sexual harassment, namely those related to confidentiality and centralized reporting. The judiciary should implement all of these recommendations. However, even if the judiciary implements these reforms, there will still be a lack of effective remedies unless congress develops a statutory civil cause of action to redress judicial sexual harassment. To create meaningful change, the judiciary needs both legal and cultural reform and members of the legal community should keep up the pressure for that reform.