Anita Hill: 25 years later

Sexual harassment was recognized in 1986 as a form of sex discrimination, yet the battle still rages, even in as unlikely a place as UC Berkeley

By Alexis McKenna

This October marks the 25th anniversary of the Senate Judiciary Committee hearings regarding Anita Hill's allegations of sexual harassment against then-U.S. Supreme Court nominee Clarence Thomas. HBO's recent movie, *Confirmation*, stirred up striking memories for many of us. At the time, I was a college sophomore in a poli-sci-oriented college in Washington, D.C. Most of my all-female floormates in my dorm stopped watching soap operas in the common room to instead watch the real drama unfolding before us.

I don't think any one of us disbelieved Anita Hill. Even at that young age, without having started our careers, most of us understood what she was saying. But at the time, few, if any women would have had the courage that it took for Professor Hill to come forward and speak out. Her courage brought attention to a pervasive and demeaning experience that plagued women in the workplace, and started a much-needed national dialogue on the subject.

At the time of these hearings, in 1991, sexual harassment was hardly a new concept. American women had endured this mistreatment from the outset of our history; female slaves were subjected regularly to sexual coercion, as were free domestic workers. While women gained some rights and independence through the 20th century by entering the work force in more and more industries, sexual harassment only increased. If a woman didn't like being mistreated in this way, she was expected to simply quit – certainly, she was not to speak out about it.

Sexual harassment recognized by SCOTUS

In the flow of the women's liberation movement in the 1960s and 1970s, and the anti-rape and anti-battering movements of the 1970s, women started to share their stories and bring to light that sexual harassment was yet another form of sex discrimination. The phrase "sexual harassment" was coined by activist women at Cornell University, who formed a group speaking out against this conduct. Yet, the struggle against sexual harassment was just beginning, and faced much pushback.

In 1986, in *Meritor Savings v. Vinson* (1986) 477 U.S. 57, the Supreme Court finally recognized that sexual harassment violated the Civil Rights Act of 1964 as a form of sex discrimination. The Court set the standard, still applied today, for hostile work environment sexual harassment, namely that the conduct must be unwelcomed; severe or pervasive; create a hostile or abusive working environment, and be based on the plaintiff's gender. (*Ibid.*)

And then came Anita Hill

Yet, five years later, Anita Hill's description of sexual harassment seemed hardly troubling to many in the Senate, who confirmed Thomas by a 52 to 48 vote. In fact, Hill herself was vilified during the process. However, Hill's decision to speak out transformed the way in which Americans looked at the issue of sexual harassment. Her impact was dramatic and in some instances almost immediate. Following her testimony, the Civil Rights Act of 1991, providing for the right to jury trials and a wider range of damages in discrimination and harassment suits, which had previously been vetoed by George Bush, was passed. EEOC (ironically the agency where Hill worked for Thomas) and state agency charges for sexual harassment increased from 6,883 in fiscal year 1991 to 15,618 in fiscal year 1998. See *EEOC Enforcement Guidance*. In 1993, the Supreme Court looked at the issue of sexual harassment again, and in a unanimous decision written by Justice O'Connor, held that a victim of sexual harassment need not show "concrete psychological harm;" it was enough that she reasonably perceived the conduct as hostile or abusive. (*Harris v. Forklift Systems* (1993) 510 U.S. 17.)

Further, the stark image of an all-male Senate Judiciary Committee cross-examining Hill about sexual harassment is also credited, in part, to the election in 1992 of four women to the Senate (a pathetically notable high); the number of women in the House grew from 28 to 47.

In 1998, the Supreme Court set the precedent allowing for same-sex harassment suits in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75.

Where are we now?

Yet, where are we now? Shockingly, it was not until 2014 that the California legislature finally clarified that "sexual desire" need not be an element to a claim of sexual harassment. This clarification needed to be made because, even more shockingly, a 2011 appellate decision stated that sexual desire *did* need to be proven, at least in a same-sex harassment case. (*Kelley v. the Conco Companies*, (2011) 196 Cal.App.4th 191.)

Those of us who practice sexual harassment law know that it still occurs with

alarming frequency. Many of our clients are subjected to the same sexist scrutiny that Anita Hill received by the men in the Senate Judiciary Committee; most women know this and as a result are still often reluctant to come forward. In an institution as supposedly liberal and politically correct as UC Berkeley, at least 19 of its employees have been found to have violated its sexual harassment policy since 2011. (See https://assets.documentcloud.org/documents/2801483/UC-Berkeley-Sexual-Harassment-Investigation.pdf.)

Revelations that the university protected many of these harassers, especially men in high-ranking positions, have led to public outcry. And while the number of women in both the House and Senate has continued to rise, women are still only 19.4 percent of Congress.

Still a far way to go

In looking back 25 years to the silence that surrounded sexual harassment prior to the Hill-Thomas controversy, we have come remarkably far. In watching *Confirmation*, and being reminded of the comments made by Senate Judiciary Committee members at the time, such as Arlen Specter, I think it's fair to say such comments would be severely politically damaging now. While UC Berkeley's responses to sexual harassment complaints are alarming, the overall public reaction to these responses is encouraging, to say the least. And, unlike with Anita Hill, there seems little if any public debate about the truth of these accusations and the credibility of those making the charges. As another example, Bill Cosby's recent accusers were originally met with skepticism and even vitriol, but now they are being praised for coming forward and Cosby is finally facing consequences.

Certainly, we have very far to go still, but the movement is still forward. This anniversary has reopened the dialogue on a topic that in many ways was starting to become simply mundane. I don't think I can look forward to a day when sexual harassment in the workplace no longer exists, but I can at least hope that there will be a day when it is so minimal, and the harassers themselves are so vilified, that I am put out of a job.

McKenna

Alexis McKenna is a partner at Winer, McKenna & Burritt, LLP, *where she specializes in harassment, discrimination, wrongful termination and other employment claims on behalf of plaintiffs. Alexis is currently the President-Elect for the Alameda/Contra Costa Trial Lawyers Association, is on the Board of Governors of CAOC, and is also a member of the San Francisco Trial Lawyers Association and American Association for Justice. A former editor of The Verdict for ACCTLA, Alexis has also published several articles in the area of employment litigation and has been a lecturer for CAOC and California Employment Lawyers Association.*