UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

26th Annual Labor and Employment Law Conference

May 9-10, 2019
Austin, Texas

Corroborating Evidence: He-said, She-said… [and X, Y, and Z said]

Jim Sanford

Author Contact Information:
Jim Sanford
GILLESPIE SANFORD LLP
Dallas, Texas

jim@gillespiesanford.com
214.800.5113

Gillespie Sanford LLP
Attorneys at Law

Jim Sanford
jim@gillespiesanford.com

A founding partner of Gillespie Sanford LLP, Jim counsels and advocates for clients in the area of labor and employment law. Before founding Gillespie Sanford LLP with Joe Gillespie in 2013, Jim spent the first eight years of his career with the stalwart Dallas labor and employment firm of Gillespie, Rozen & Watsky, P.C. His practice focuses on minimum wage and overtime claims under the Fair Labor Standards Act (FLSA), discrimination claims under state and federal civil rights laws (e.g., Title VII, ADEA, ADA), sexual harassment complaints and workplace investigations, whistleblower and retaliation claims for people who speak up about unlawful working conditions, and claims arising out of employment contracts. He also represents union clients on labor and labor arbitration matters. Jim has fought and prevailed for clients in state and federal court, on appeal, and before federal and state agencies, for the past 13 years. He is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

Jim is a graduate of The University of Texas School of Law (J.D., with honors) where he was a staff member on the Texas International Law Journal, a summer Democracy Fellow at the Congress in Lima, Peru, an intern with the Prosecutor's Office at the International Criminal Tribunal for Rwanda in Arusha, Tanzania, and a participant in the Capital Punishment and Immigration Law Clinics. He is also a graduate of Emory University (B.A. in Economics and History) in Atlanta, Georgia.

Jim is licensed to practice law in Texas and is admitted in federal courts in the Northern, Eastern, and Western Districts of Texas. He is also admitted to the Bars of the Fifth Circuit and Ninth Circuit Courts of Appeal. He is a member of the National Employment Lawyers Association (NELA) (and its DFW-NELA affiliate) and the Texas Employment Lawyers Association (TELA).

Jim and his wife, Emily, are the proud parents of two active, fun-loving kids and one loyal mutt.

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I. Introduction

In March 1998, surveying the evidence in Paula Jones's lawsuit against then-President Bill Clinton, *Time* magazine offered that, "[i]n cases of alleged sexual harassment … Americans have grown accustomed to weighing the word of one defendant against that of one plaintiff, the steadfast denial against the angry accusation: he said, she said."[1] However accustomed—to say nothing of effective—Americans were in resolving he-said, she-said circumstances in 1998 is debatable. Even then, the phrase "he said, she said" more often meant something like "testimony in direct conflict, with an implication that truth is therefore undiscoverable."[2] It could be a sort of rhetorical dodge to downplay scandal or avoid digging into harassment allegations.

How much better are we equipped today to decide between "the steadfast denial" and the "angry accusation" of sexual misconduct and harassment? Twenty-plus years on, and again the answer is debatable. #MeToo and other social and cultural developments have not only raised the profile of these issues but corresponded with an increased number of sexual-harassment complaints filed[3] and perhaps even impacted the manner of corporate response to these complaints.[4] The EEOC reports that charges alleging sexual harassment increased by 13.6 percent in FY2018 over FY2017, that those charges resulted in 23.6 percent more cause findings (nearly 1,200 such findings), and that it recovered almost 50 percent more for sexual-harassment victims through enforcement actions in that year ($70m in FY2018 versus $47.5m in FY2017).[5] Meanwhile, a thread in this public debate reflects a widely-held concern for false reporting and the due process rights of the accused.[6]

But even as the case-law and legal standards have developed, and even as #MeToo has elevated the discussion of workplace and other sexual harassment, various forms of the he-said, she-said dodge remain widely deployed. In a more recent highly public sexual-misconduct allegation, the sworn testimony of multiple women was dismissed by many, once again, as a decades-old he-said, she-said accusation—with the implication that the truth is beyond reach at this point. As one commentator put it, "[u]ncorroborated plus uncorroborated plus largely uncorroborated is not the

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[1] Eric Pooley, *Kiss But Don't Tell*, TIME (Mar. 23, 1998).

[2] William Safire, *On Language; He-Said, She-Said*, N.Y. TIMES (Apr. 12, 1998).

[3] *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment* (available at: https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm)(last visited: Apr. 8, 2019).

[4] Sindhu Sundar, *How #MeToo Is Changing Internal Investigations*, LAW 360 (Jan. 28, 2018); *but see Workplace Sexual Harassment: Are Employers Actually Responding?*, American Psychological Association Center for Organizational Excellence (May 2018)(reporting that only 32 percent of working Americans say that their employer has taken new steps to prevent and address sexual harassment in the workplace since the recent increased media and public attention)(available at: http://www.apaexcellence.org/assets/general/2018-sexual-harassment-survey-results.pdf?_ga=2.143841205.1433128329.1550187009-1283341832.1550187009

)(last visited: Apr. 9, 2019).

[5] *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment* (available at: https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm)(last visited: Apr. 8, 2019).

[6] Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, Pew Research Center (Apr. 4, 2018)(available at: https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/

)(last visited: Apr. 9, 2019).

accumulation of questions, much less of evidence. It is the duplication of hearsay."[7] But this is a credibility assessment—apparently strongly in the accused's favor—masquerading as legal analysis. Just how many "duplicat[ed]" accusations would this commentator need before allowing that the original accusation had some corroboration?

There was a time not too long ago when many commentators—in legal contexts and otherwise—argued that public policy should require rape and sexual assault claims to proceed only where there is some sort of corroboration. This was the era when a respected jurist argued for additional burdens in rape cases because "ladies lie"—in other words, that false reporting justified this unusual additional evidentiary requirement.[8] The sentiment was not new. Even when recognizing that the common law did not require corroboration, an English judge in the late 17th Century cautioned that, "it must be remembered that [rape] is an accusation easily to be made and hard to be proved[,] and harder to be defended by the party accused, tho never so innocent."[9] Some states, most notably New York, passed laws requiring corroboration for sexual misconduct claims.[10] This set rape, sexual assault, and other sexual misconduct apart in American law in disallowing the plaintiff's stand-alone testimony to establish liability. (Treason, perjury, and some conspiracy claims involving co-conspirator admissions were other notable exceptions.) Some of the history for this atypical requirement is discussed below.

Fortunately or unfortunately, depending on your perspective, the requirement for independent or additional corroboration did not carry over into employment discrimination claims when Congress enacted Title VII and other civil-rights legislation, or when the courts began outlining the standards for hostile-work environment claims after *Meritor Savings Bank v. Vinson*.[11] Today, employment discrimination and retaliation—like all but a handful of federal causes—require no corroboration or heightened evidentiary showing.[12] In most jurisdictions, including federal courts, the testimony of a single witness is sufficient to support a verdict.[13] There is no legal barrier to hostile-work environment claims based solely on the victim's testimony, or any other discrimination or retaliation claim even when the plaintiff's testimony stands alone against a host of opposing witnesses. The jury in these civil cases is free to believe the lone plaintiff—and to disbelieve the opposing witnesses—so long as it is rational to do so based on the evidence.

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[7] Bret Stephens, *For Once, I'm Grateful for Trump*, N.Y. TIMES (Oct. 4, 2018).

[8] The jurist in question, New York Magistrate Morris Ploscowe, in 1972 comments about amendments to that state's rape laws, is said to have observed "that the victim's word was sufficient for a prosecutor to make out a prima facie case, enough to take to a jury, on assault, robbery, fraud and other crimes, but it was not enough for the crime of rape, because… 'ladies lie.'" William M. Freeman, *Ex-Magistrate Ploscowe Dies; Criminal-Law Expert Was 71*, N.Y. TIMES (Sep. 22, 1975).

[9] Lord Chief Justice Hale, 1680 Pleas of the Crown I, 633, 635 (quoted in JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, §2061 at 455 (James H. Chadbourn ed., 1978)).

[10] *Id.* § 2061 at 457-64 and n. 2; Irving Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, FORDHAM L. REV. at 263 (vol. 40, issue 2 1971).

[11] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

[12] *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003)(concluding that, "[i]f Congress intended the term 'demonstrates' to require that the 'burdens of production and persuasion' be met by direct evidence or some other heightened showing, it could have made that intent clear ….").

[13] *See infra.* at 7-9.

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