
The Case of the Hidden Harassment

by Daniel Niven



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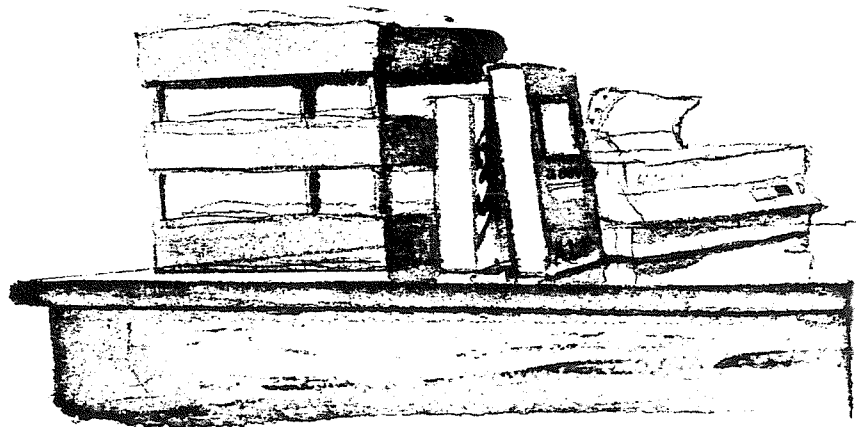


HBR Case Study

At the moment of decision, what would you do?

What happens when a manager's responsibilities clash with an employee's right to privacy?

The Case of the Hidden Harassment



by Daniel Niven

Jerry Tarkwell, a real estate lending manager at Filmore Trust, marched out of his office toward the associate's wing of the bank's eighteenth-floor offices. "I need the Thompson Properties file right away," Tarkwell said to the associates' secretary. "Do you know where I can find it?"

"It's probably on Jill's computer table. I was helping her enter the new figures this morning."

"Thanks." Tarkwell headed down the hallway and knocked on the door marked "Jill McNair, Associate." McNair didn't answer, so he opened the door and walked over to the computer table piled high with folders. As he shuffled through the files, Tarkwell glanced at what was written on the computer screen. It was an electronic mail message McNair had sent earlier.

Can you walk me out again tonight? He's in today and I'm sure he'll be waiting for me. He leaned up against me when I was at the coffee machine this morning and whispered some disgusting stuff about how great he is in bed. I don't want another episode like the one in the hallway Monday night. I should have left when you did, but I thought he'd already gone.

I'm sorry you have to put up with this. Get back to me. I'll be ready to go whenever you are.

"Oh, that's awful." Tarkwell felt sickened as he got up to leave. "God, I wonder who's doing this?" He grabbed the Thompson Properties

HBR cases are derived from the experiences of real people and real companies. As written, they are hypothetical, and the names used are fictitious.

file, returned to his own office, and called the company's equal employment officer.

"Tarkwell was in your office a little while ago looking for the Thompson file," shouted the secretary as Jill McNair walked briskly down the hall.

"Damn, I was supposed to hand that over to him an hour ago," McNair thought as she opened her door. The computer screen immediately caught her eye. "Oh no," she gasped, "I can't believe I left that on." The ring of her phone made her jump.

"Hi, Jill, it's Jerry. I'd like to talk to you right away. Can you come down to my office?"

"Sure," she said weakly and then hung up the phone. "I'll bet he read it," she thought. "What am I going to do now?"



McNair knocked on Tarkwell's door and went in. "Sit down, Jill. I have something rather disturbing to discuss with you," Tarkwell began. "I went into your office to pick up the Thompson file. I'm afraid I read what was on your computer screen."

Jill looked at him angrily. She clenched her fists in her lap.

"Let me tell you first how sorry I am that you've been...put in that kind of situation." Tarkwell shifted uncomfortably. He was having trouble finding words that wouldn't embarrass them both. "I need to know who's been doing this to you so we can put a stop to it. I called the equal employment officer, and she explained the steps to resolving a case of this sort. First you..."

McNair cut him off. "You had no right to read my personal e-mail, and

you had no right to call EEO before talking to me. This is my problem not yours, and I don't want this getting around. Do you have any idea what can happen to me and to my career if people find out about this?"

"I didn't tell them who'd be bringing the complaint," Tarkwell said. "You just have to write a letter, and they do an investigation."

"Don't you understand?" she asked, seething. "It would be his word against mine, and he's senior to me." She wished she hadn't let that slip. "I'm the one who's going to get hurt. If this gets investigated by EEO, everyone in this building could be questioned. I'll probably get transferred, and then I won't have a chance at promotion. And who'd want to work with me? Every man in the company would be afraid I'd report

him if he so much as opened a door for me."

"Look," Tarkwell reasoned, "nobody here has to find out. I'm sure the EEO will do whatever you feel is best. You know you can't go on working under these conditions."

"I won't have my privacy invaded," McNair said flatly. "There's nothing you can do."

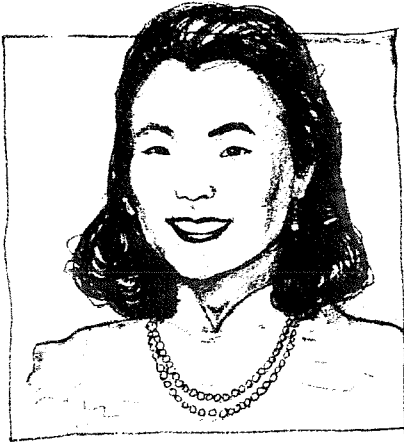
"But it's a federal law," Tarkwell demanded. "This company has to maintain a workplace free of sexual coercion, and as your manager, I have to report this. It's company policy."

"I've got too much at stake here," McNair answered, reaching for the door. "So just stay out of it, Jerry. I can take care of it myself."

Daniel Niven is a manuscript editor at HBR.

How can Tarkwell best resolve this issue?

Five experts on sexual harassment in the workplace examine his options.



Jill wonders who will want to work with her if she brings a complaint. The answer often is no one.

Jerry, although I know you will be talking to lawyers, people from human resources, and equal employment officers about Jill McNair's case, perhaps I can offer you another perspective—the perspective of someone who understands what Jill is going through. I too was a victim of sexual harassment.

In my case, however, the managers were not as enlightened as you are. They heard my harasser make comments like "let's go see a porno film" or "let me pet your sweater." They knew that intelligent women like me weren't getting assigned to exciting, high-visibility projects. They saw that women were leaving the department, one by one. And they did nothing. You, on the other hand, have recognized that what Jill is experiencing is sexual harassment. And, most important, you are treating this as a serious problem.

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Unlike the managers I encountered, you want to help. But you won't be helping Jill by forcing her to bring a complaint against the harasser. She is already a victim of someone else's unwanted actions. Don't compound her sense of victimization by pushing her into another situation she doesn't want to be in.

Perhaps the best way to help Jill is to show her how to take control. Show her that there *are* options. But first make damn sure that those options really do exist.

Find out what the sexual harassment policy in your office is. Does the message that sexual harassment is illegal and will not be tolerated come through loud and clear? Does that message come from top management? Are seminars held so that all employees understand what sexual harassment is and what to do if they encounter it? Is there a complaint system in place? If so, does it work? Do the employees trust it?

I suspect that the answer to these questions is no. If Filmore Trust did have an effective way of dealing with sexual harassment, Jill wouldn't feel as if she had to accept harassment as a necessary evil of her job. And man-

agers like you would know specific steps to take that wouldn't jeopardize the victim or the company.

If you really want to help Jill and Filmore Trust, you must convince the company to educate its employees and to establish a good system for handling sexual harassment complaints. Ultimately, you will be helping not only Jill but other potential victims as well. The chances are good that Jill is not the only person at Filmore Trust experiencing sexual harassment.

These are long-term solutions that will take time to implement; however, you and Jill also need immediate help. Two options for the short-term are:

- Call a meeting of your department and discuss sexual harassment. Tell your employees that Filmore Trust and you will not tolerate any behavior that is sexual in nature, unwelcome, or unreasonably disruptive.
- Find an expert on sexual harassment who doesn't have any ties to Filmore Trust and give his or her name to Jill. Obviously, Jill doesn't trust the way your company would handle a sexual harassment complaint. Perhaps she might have greater confidence in advice coming from someone on the outside.

In the meantime, let Jill know your concerns but don't dismiss hers. The unfortunate truth is that a sexual harassment victim who makes a formal complaint to management without the protection of an established, trusted complaint procedure risks losing his or her reputation, job, or even career.

I know. When I brought my complaint to senior management, one of my greatest fears was retaliation. I wrote a letter, just like the one you are suggesting Jill write. In response, management thanked me for bringing sexual harassment to its attention and told me not to worry. I was promised it would be "business as usual" around the department.

But it wasn't. Instead of starting an investigation of my harasser, management started an investigation of me. It stole positive performance reviews out of my employee file and then told me my work was unsatisfactory because there weren't any

good reviews on record. Colleagues who had once been sympathetic now didn't want to get involved. Others just stopped talking to me. Conversation would halt when I entered a room. So I sympathize with Jill when she wonders who will want to work with her if she brings a complaint. The answer often is no one.

And don't think that "nobody here has to find out." Long after I left my

company, I heard that people were gossiping about the financial settlement I had received—and this in spite of a gag order.

Like other victims of sexual harassment, Jill hopes that the problem will eventually go away. Unfortunately, sexual harassment doesn't stop on its own. It simply goes somewhere else, finds someone else—unless people like you step in.



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A mandatory investigation policy discourages reporting; Filmore Trust should offer some options.

People who feel harassed need options and choices—especially if they lack conclusive proof of the harassment. This case appears to present two unacceptable choices for manager Jerry Tarkwell and no desirable options for Jill McNair. Moreover, Filmore Trust's policy will not work in the company's interests either. No party's interests are served well here.

Let's start with the company. Filmore Trust needs an environment where sexual harassment is absent or at least rare. This will occur where employees can and do speak up and get incipient harassment stopped on the spot, where managers offer options so people who feel harassed have some control over what happens, and where reporting harass-

ment and asking for help will not damage someone's career.

My research and experience indicate that while a mandatory investigation policy may appear to be helpful to harassed people, it actually discourages reports of harassment. Mandatory investigation especially threatens careers when the only evidence is "he said/she said" (though more evidence might be found in the Filmore Trust case). This is because responsible managers hate to take action in such a case, so no one gets punished, and the alleged offender does not feel truly acquitted.

What about McNair's interests? They are the same interests I listed for Filmore Trust. In addition, McNair values her privacy and fears reprisal. Tarkwell's interests are probably similar.

How can Filmore Trust meet the interests of all parties? The company should offer four sets of options for dealing with harassment:

1. *Counseling for Direct Negotiation.* Filmore Trust should offer off-the-record counseling so that employees can learn to negotiate the problem effectively. With the help of an employee assistance program or an ombudsman, for example, McNair

might choose to learn how to confront the harasser directly and/or write that person a private letter. Drafting a clear, factual letter will help McNair think through her evidence, compose her mind and feelings, and help her select and pursue an option for action. Sending or hand delivering (and keeping a copy of) a letter is statistically likely to end the harassment, at no cost to privacy. It also provides more evidence, if harassment continues or the offender retaliates, that the alleged sexual approach actually happened and was unwelcome.

2. *Informal, Third-Party Intervention.* McNair should be able to seek informal assistance from a human resources manager or other appropriate person. The third party would intervene as a shuttle diplomat or mediator. Informal intervention usually does not include adverse administrative action. The third party could deliver a warning and write a memo to his or her own file.

3. *Formal Investigation and Action.* McNair should be able to request fact-finding and judgment. If she knows she has choices, she will be more likely to make a formal complaint, but this option should not be pursued against her wishes.

4. *Generic Approach.* McNair should be able to ask Tarkwell or another appropriate manager—off the record and without providing the name of the alleged offender—for a harassment prevention effort. This choice could trigger an apparently routine training program in the relevant department. Or McNair could ask that the department head send a departmental letter that includes examples of sexual harassment and a strong statement of company policy. If McNair has the option to ask for such action without anyone's name being used, then the harassment can be stopped at no cost to anyone's privacy or rights. In my experience, the generic approach will stop the alleged harassment about four-fifths of the time, and it helps to affirm company policy. It also fosters an atmosphere where people can feel comfortable taking a direct approach if they are harassed and where they will feel less afraid to ask for an investigation.

There should be no adverse administrative action against an alleged offender without a fair—probably formal—process. If any of the informal options are chosen by McNair, then

Tarkwell must follow up immediately, several months, and one year later to be sure that the alleged harassment has ceased and that there has been no retaliation.



For women,
Japanese companies
are hotbeds of
harassment.

Jerry Tarkwell does not have to choose between respecting Jill McNair's privacy and putting a stop to sexual harassment. His accidental knowledge of McNair's harassment has given him, whether he likes it or not, the responsibility to do both.

It would be irresponsible to follow blindly "company policy" if to do so would undermine its original intent (presumably to help employees deal with harassment). Doing nothing, however, is also not an option. Sexual harassment involves the entire company, not just two people. Tarkwell therefore cannot let the issue go now that he knows something is going on.

As long as McNair refuses to report her case, Tarkwell will, by definition, be threatening her privacy in any attempts to talk to her about it. But McNair has already crossed the line between private and company life by using company equipment (e-mail) to tell her colleague about her sexual harassment. While Tarkwell must urge McNair to report her case, he

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must refrain from reporting it to the company's EEO until she assents.

Regardless of whether or not McNair ultimately reports her case, Tarkwell must make this his opportunity to attack the problem of sexual harassment and to raise company consciousness about it. Anything less would be shirking his responsibility of creating a safe working environment for his staff.

In Japan, on the other hand, a Jerry Tarkwell would have no cause to even mention his knowledge of Jill McNair's case to her, and the ethical problem presented by this situation would not have surfaced. Few Japanese companies have any sexual harassment policy in place.

Indeed, consciousness of sexual harassment here is so undeveloped that the very issue of the protection of privacy has yet to surface. For women, Japanese companies are still hotbeds of harassment.

The first sexual harassment suit filed in Japan was in 1989. The woman, who was being harassed by her immediate supervisor, complained to his boss, only to find that his boss condoned his actions and blamed her for inviting them. In other words, the men stuck together.

HBR wishes to thank Ann Saphir and Miyuki Mineshige, editors at *Look Japan* magazine in Tokyo, Japan, for their efforts in securing and translating the commentary from Mikiko Taga.

Within such a context, a woman must go beyond those immediately involved in order to be heard. But once she does, the rest of the company eventually finds out, she is further harassed, and, generally, she ends up quitting.

If she does file suit, she will most likely do so more out of a desire for revenge than of a feeling that her rights have been violated. Japan has such a long history of male dominance that there is no collective belief that a woman should be the equal working partner of a man.

I endured two years of sexual harassment—though at the time I did not know the term—while I was employed at a large manufacturing company. The older female employees taught the younger women that it was a mark of "female maturity" to respond to harassment by smiling and ignoring it.

During my stay in the United States (1983 to 1988), I was shocked to learn that there was a name for such hateful behavior. In 1989, when I published my book *Single Mind*, I was able to introduce the term sexual harassment to Japan.

In the three years since, the term *seku hara* has gained currency as the media has legitimized its usage. (In fact, *seku hara* is a trivialization of the term sexual harassment, further proof of the widespread insensitivity to this issue.) There have been three sexual harassment suits filed in Japan that I have followed; two have been won, and the other is still pending. Though this sounds promising, and though anti-*seku hara* campaigns would seem to indicate substantial change, the situation is, in fact, far from progressive. In effect, the message is "Watch out, guys. We know women are emotional, so we will have to step lightly for our own protection."

Ultimately, sexual harassment is less an issue of company policy than one of personal responsibility in a management position. Tarkwell has shown that he takes the company's policy seriously; now he should follow through on his commitment by ensuring that McNair's situation is justly resolved and by raising office consciousness about harassment.



Jill McNair should not be pressured into becoming an unwilling martyr.

Jerry Tarkwell should respect Jill McNair's request for privacy. She is not obliged by law to press charges of harassment and should not be required to do so against her own better judgment. McNair is probably realistic about the potential damage to her career. She has no doubt seen the lack of sympathy and support available to a woman who complains about harassment. She should not be pressured into becoming an unwilling martyr.

If Tarkwell is concerned about McNair's complaining later that she was not protected by the company, he could ask her to provide a memo stating that she had considered her options and rejected the company's offer of assistance. If she declines to provide such a memo, Tarkwell should write his own memo to that effect and place it in McNair's personnel file. It would likely protect the company in the future.

Tarkwell, having alerted the EEO of his knowledge that a company employee was imposing on other workers, is in the difficult position of any good citizen who learns of a malfasant in his community. If the victim refuses to press charges, the bystander cannot do so. Having encouraged the victim to do what he

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thinks is correct, he must accept her decision.

Obviously, a conscientious person such as Tarkwell could suggest that the company's harassment policy, with assurances of confidentiality, be circulated and posted again.

Whether McNair can be disciplined for refusing to cooperate in an investigation is a more difficult question. While reporting harassment is protected by law and retaliation against a person who does so violates federal law, failing to report is *not* protected by any clear statutory language. It might be argued that discipline for failing to report is a form of discrimination in itself. A woman who is required to report sexual harassment is being deprived of equal terms and conditions of employment, in that, unlike the men who are not subjected to the harassment, she is burdened with an obligation to come forward and place herself at risk.

Unfortunately, in many jurisdictions, a woman in McNair's position is at risk of discipline or termination for failing to disclose information requested by the company. In New York, for example, an employer who fired McNair for remaining silent could do so with impunity.

A subsidiary question arises concerning Tarkwell's conduct. If Tarkwell had not looked at McNair's computer screen, he would not have known about the problem. While it may be understandable that Tarkwell went into her office while she was not there to look for documents that he needed at once, his reading of her electronic mail message was inappropriate and an invasion of her privacy. McNair, unfortunately, has no right

to the privacy of her personal e-mail, unless the company has some rules protecting the privacy rights of its employees.

Jill McNair is in the unenviable position of a woman trying to make

a career for herself, who is likely to get battered for not publicly fighting back against the sexual harassment she is suffering and who risks ostracism and abuse from her colleagues if she does complain.



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Only the EEO can determine if the potential harm to employees outweighs the complainant's concern for privacy.

Like many companies, Digital doesn't deny that sexual harassment exists in the workplace. Digital encourages managers and employees to take advantage of sexual harassment training, which examines the issue and develops solutions to harassment in any given work situation.

At Digital, 90% of all sexual harassment claims involve individuals who are not aware that their behaviors are offensive or unwelcome. And 90% of these claims are settled by an apology and a promise by the harasser to correct permanently his or her behavior. The remaining 10% might be settled with some disciplinary action.

A great deal of consideration should be given to validating any claim of sexual harassment, even before a full-fledged investigation takes place. This allows for the possibility that an employee might be filing a claim to offset poor performance or getting revenge for a personal relationship "gone sour." Evidence must be secured to avoid a "his word against mine" situation.

In the case of Jerry Tarkwell and Jill McNair, Tarkwell did exactly what I would recommend by first contacting Filmore Trust's EEO for instructions. Even though McNair demands that no further steps be taken, Tarkwell should continue to consult with the company EEO so a decision can be made about how to react to McNair's requests for anonymity. Only there can it be determined if the potential harm to the victim or other employees outweighs the complainant's concern for privacy. Tarkwell is responsible for acting on any issues that affect his employees, so McNair's situation cannot be ignored. At Digital, Tarkwell would be held accountable for his employees' behavior.

Tarkwell must pursue the issue, first to find out if the complaint is merited and then to ensure that no other incidents of harassment occur. Tarkwell can suggest that McNair seek the advice of another manager if she feels uncomfortable talking about it with him, and he must convince her that a company policy exists that will protect her. Every company's sexual harassment policy must contain a "no retaliation" stipulation promising that the complainant will not incur any kind of reprisal as a result of a claim.

Programs and policies assuring employees of their right to bring forth, without reprisal, issues that they feel are affecting them negatively are paramount to any positive or reasonable resolution in issues of sexual harassment. Many cases are resolved with simple, positive intervention—when the offended employee is convinced that the company will stand behind its policies, standards, and values. Helping employees understand not only their right to utilize the internal open-door process but also federal EEOC guidelines on sexual harassment and their right to use these avenues to find a resolution is very important. The prevention of sexual harassment in the workplace is the employer's responsibility.

To implement this policy successfully, Digital managers and supervisors are encouraged to know their environment and subordinates—as well as raise their level of awareness through sexual harassment training courses. The training involves role playing of actual sexual harassment situations and lively follow-up discussion in which attendees share their thoughts and ideas about the implications of sexual harassment. Digital's EEO also offers "Train the Trainer" seminars for human resource professionals to learn more about the issue and prepare them to train others. Digital's goal is to bring resolution to a sexual harassment claim and ensure the investigative process satisfies both the employee and management.