

SEXUAL HARASSMENT LAWS: HAVE WE GONE TOO FAR?

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ABSTRACT

Our forefathers based our decisions to withdraw on a simple principle: "that all men are created equal." Sexual harassment laws are the latest wave in the efforts to protect our fundamental principle. The courts have rendered decisions outlawing the sexual harassment form of discrimination and allowing victims to sue for damages. Governmental agencies have promulgated guidelines for assessing employer liability. Still, the problem persists.

Recently, legislatures have begun to explore new ways of dealing with sexual harassment. These innovative approaches emphasize use of training and alternative dispute resolution. They focus on educating workers and students to respect each other and promote peaceful resolution of problematic issues. Sexual harassment laws will continue to develop until equality is achieved.

Our forefathers based our decision to withdraw from English rule on one simple principle: "that all men are created equal" [1]. This fundamental principle stands as a shining beacon guiding immigrants to our shores. Men and women of all shapes, sizes, colors, and creeds built our country. Each lent a piece, which formed a patchwork of the highest quality. Thus, the United States should constitute a conglomerate of the best of all these various cultures. We have developed our laws in accordance with that goal.

The United States Constitution, the first law ever passed in the United States, originally set up our new government: a government that gave all classes of people at least an indirect say in the passage of future laws [2]. Shortly after enacting the original Constitution, our forefathers amended the supreme law of the land to

include a Bill of Rights, protecting the individual rights of each person [3]. Over the years, more amendments were passed to further protect the fundamental principle on which our nation was based—equality. We abolished slavery [4]. We passed the equal protection clause of the Fourteenth Amendment [5]. We specifically gave Blacks and women the right to vote [6].

Eventually, we found the principle, so obvious to our forefathers, difficult to put into practice. So, we continue to pass more and more laws in an effort to protect the principle that gave birth to our nation. Sexual harassment laws are the latest wave in the efforts to protect our fundamental principle. Have they gone too far? On the contrary, they will continue to develop until equality in that area is finally obtained.

THE DEVELOPMENT OF SEXUAL HARASSMENT LAWS

During the 1960s, it became apparent that equality did not exist in America. Congress attempted to rectify this situation by passing the Civil Rights Act of 1964. Title VII of that act prohibits employers from discriminating on the basis of sex, race, religion, color, and national origin with respect to compensation, terms, conditions, or privileges of employment [7]. Where there is equality, there is no discrimination. Discrimination can take place in various forms, some of them subtle. Harassment of certain individuals because of their race, sex, religion, etc., constitutes a sometimes subtle form of discrimination.

Even with the passage of Title VII, sexual harassment continued unchecked until 1977 when the D.C. Circuit, in *Barnes v. Costle*, first recognized a cause of action for gender discrimination based on what has become known as quid pro quo sexual harassment [8]. Quid pro quo sexual harassment occurs when submission to unwelcome sexual advances is used as the basis of an employment decision [9]. In *Barnes*, the plaintiff had refused to submit to sexual advances by her male supervisor with the result that he eliminated her job [8, at 986]. The lower court found the supervisor's actions against the plaintiff did not constitute gender discrimination, but rather were "underpinned by the subtleties of an inharmonious personal relationship" [8, at 986].

However, the appellate court recognized that the plaintiff would never have been subjected to such demands unless she was female and, therefore, the supervisor's actions constituted sexual discrimination in violation of Title VII [8, at 990]. To justify its decision, the court relied heavily on *Griggs v. Duke Power Co.* [10] in which the United States Supreme Court stated that Title VII invalidates all "artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification[s]" [10, at 431]. So, with the decision in *Barnes*, the quid pro quo sexual harassment cause of action was developed to remedy what the court considered to be an invidious form of discrimination.

In 1980, the Equal Employment Opportunity Commission (EEOC), the governmental agency responsible for enforcing Title VII, issued guidelines declaring

sexual harassment a violation of Title VII [9, § 1604.11]. In addition to declaring quid pro quo sexual harassment illegal, the guidelines also prohibited hostile environment sexual harassment [9, § 1604.11(2)(3)]. Hostile environment sexual harassment occurs when unwelcome sexual conduct is so severe and pervasive that it alters the conditions of employment, or creates a hostile or offensive working environment [9, § 1604.11(2)(3)]. The EEOC allowed a cause of action for hostile environment sexual harassment even in cases where the plaintiff could show no tangible job detriment [9, § 1604.11(2)(3)].

This interpretation of the law received a test in the courts in *Henson v. City of Dundee* [11]. The *Henson* court recognized a hostile environment cause of action for sexual harassment, noting that *Rogers v. EEOC* [12] had applied the concept to race discrimination in 1971 [11, at 901].

In *Rogers*, the court held that a “working environment heavily charged with discrimination may constitute an unlawful practice” even if the discrimination is not directed at the plaintiff employee [12, at 238]. The court stated: “the phrase ‘terms, conditions, or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination” [12, at 238]. The *Henson* court acknowledged that sexual harassment in the workplace is widespread [11, at 902, n. 5; 13], and found, therefore, sex discrimination merits the same protections as racial discrimination [11, at 902]. As a result, the court in *Henson* applied the *Rogers* holding to sexual discrimination and thus established a cause of action for hostile environment sexual harassment [11, at 901].

The court in *Henson* found the plaintiff in a hostile environment sexual discrimination case does not need to plead tangible job detriment [11, at 901]. Rather, the *Henson* court decided the “terms, conditions or privileges of employment include the state of psychological well being at the workplace” [11, at 901]. Therefore, according to *Henson*, Title VII redresses psychological harm, and plaintiffs do not have to show tangible job detriment to recover [11, at 901].

Henson also acknowledged that a hostile environment cause of action for sexual harassment was recognized by the District of Columbia circuit in *Bundy v. Jackson* [14] and the 1980 EEOC Guidelines on Sexual Harassment [14]. The basic principle articulated by these legal authorities is that maintaining a sexually discriminatory work environment contravenes Title VII regardless of any tangible job detriment [14, at 934; 9].

This basic principle received confirmation by the United States Supreme Court in *Meritor Savings Bank v. Vinson* [15]. *Meritor* confirmed both the quid pro quo sexual harassment and hostile environment sexual harassment causes of action [15, at 65-6]. *Meritor* relied on *Rogers* and *Henson* to reach its conclusion that “Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult” [15, at 65]. Specifically, the court stated that Title VII strikes “at the entire spectrum of disparate treatment of men and women” [15, at 64]. The *Meritor* decision became a landmark case for

upholding equality because it affirmed the right of employees to sue for sexual harassment based on a hostile work environment. However, the Court gave no clear guidelines on the type of behavior that constitutes actionable sexual harassment. Instead, the Court merely found: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the [victim's] employment and create an abusive working environment" [15, at 67].

Meritor was the last word of the Supreme Court on the issue of sexual harassment for seven years, and the issue appeared to lay fairly dormant until an explosion occurred during the Clarence Thomas confirmation hearings. Women watching Anita Hill explain sexual harassment to a group of male legislators who referred to her as delusional were spurred to action to report the injustices that had occurred to them [16]. Companies also responded by implementing sexual harassment training programs in their organizations [17]. In the year after the Clarence Thomas hearings, sexual harassment claims filed with the EEOC soared at an alarming rate [16]. With these claims came more court cases. Issues previously unaddressed by the United States Supreme Court were raised in trial courts and appellate courts in many different circuits across the country [18]. Without clear precedent from the high court, these circuits often reached different conclusions with regard to the same issues [19].

The conflict in the circuits eventually brought a sexual harassment case again to the high court, this time to resolve the issue of whether a plaintiff must prove psychological injury in order to recover damages [20]. In the case, *Harris v. Forklift Systems, Inc.* [20], the Court held plaintiffs do not have to prove psychological injury to recover damages for sexual harassment [20, at 370]. To reach its conclusion, the Court reaffirmed its language in *Meritor* that the discrimination prohibited by Title VII "is not limited to 'economic' or tangible' discrimination" [20, at 370]. The language of Title VII "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment, which includes requiring people to work in a discriminatory hostile or abusive environment" [20, at 370; some quotation marks omitted].

Although the Court clarified some issues regarding sexual harassment, the *Harris* decision still left many unanswered questions. The Court stated that behavior constituting sexual harassment needs to be more than the mere utterance of an offensive comment or epithet but does not need to be so severe as to produce a psychological injury to the recipient [20]. Thus, we are left with no clear or "mathematically precise" test to determine whether behavior is or is not sexual harassment [20, at 371].

Instead, we must look to all the circumstances surrounding the case to determine whether a hostile environment actually existed from the plaintiff's perspective and whether a hostile environment existed from the perspective of a reasonable person [20, at 370-71]. The Court articulated several specific factors to take into account when making this determination [20, at 371]. These factors include the frequency of the discriminatory conduct, the severity of the conduct,

whether the conduct is physically threatening or humiliating as opposed to a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work performance [20, at 371]. The existence of psychological injury is also relevant to the inquiry, but no single factor is required to prove sexual harassment occurred [20, at 371]. This case-by-case approach to defining sexual harassment leaves employers and employees without clear guidelines by which to measure their conduct. Thus, rather than going too far, the *Harris* decision appears to have left many difficult issues open to debate [21]. The courts will continue to grapple with the issue of sexual harassment in an attempt to accurately apply "Title VII's broad rule of workplace equality" [20].

RECENT LEGISLATIVE ATTEMPTS TO ERADICATE SEXUAL HARASSMENT

While the courts try to fairly interpret the law, legislatures attempt to develop fair laws—laws that have the effect of stopping discrimination. Stopping discrimination may appear a daunting task. Since the birth of our nation we have had to rewrite our laws in a constant attempt to preserve equality among our citizens. Most of these laws have focused on punishing the discriminatory behavior [22]. Antidiscrimination laws allow individuals to sue for monetary damages as well as make-whole remedies [22]. It is not surprising then that the most recent attempt by the federal government to amend laws relating to sexual harassment, the Civil Rights Act of 1991, gave individuals suing for sex discrimination, including sexual harassment, the right to recover punitive damages [23]. However, Congress, in enacting the Civil Rights Act of 1991, took a bold step toward developing new methods for combatting discrimination. The Civil Rights Act of 1991 specifically encourages the use of alternative dispute resolution techniques for resolving issues of discrimination [23]. This bold departure from the traditional sue-for-money approach may present a whole new way to solve the problems of inequality in our society.

History shows that forcing discriminating individuals through the court system and ultimately hitting their pocketbook has not managed to change the basic attitudes that cause discrimination. Congress has opened the door for us to find alternative methods that may more readily accomplish our goal. It remains to be seen what we shall do with this opportunity.

The state legislatures have also amended or created laws relating to sexual harassment in an attempt to eradicate this form of inequality [24]. Most of these laws have also taken a different tack from the traditional sue-for-damages approach [24]. Instead, these laws create different types of educational requirements designed to change the attitudes of persons responsible for perpetuating sex discrimination [24].

California recently passed a law, AB 2264, which went into effect in January of 1993, requiring employers to pass out certain information regarding sexual

harassment to their employees [25]. Specifically, the law requires employers to distribute information about: 1) the illegality of sexual harassment; 2) the definition of sexual harassment under applicable state and federal law; 3) a description of sexual harassment, utilizing examples; 4) the internal complaint process of the employer available to the employee; 5) the legal remedies and complaint process available through the Department of Fair Employment and Housing and the Fair Employment and Housing Commission; 6) directions on how to contact the department and the commission; and 7) the protections against retaliation for filing a sexual harassment complaint provided by law [25, § 12950(b)(1)-(7)].

Upon the enactment of AB 2264, employers feared the law would encourage employees to bring illegitimate lawsuits against their companies, thus substantially raising corporate legal costs. However, a year after the enactment of AB 2264 employers report they have seen no detrimental effect on their organizations [26]. The California Department of Fair Employment and Housing, the state agency responsible for enforcing California's antidiscrimination laws, likewise reports no appreciable rise in sexual harassment claims due to the passage of the new law [27].

In response to the new law, California employers have published antiharassment policies, performed training sessions on the behaviors that constitute sexual harassment, and established more effective internal complaint procedures in an effort to protect their organizations from liability. These measures also appear to be protecting employees, as the number of sexual harassment complaints filed levels off.

California is not alone in passing laws designed to end sexual harassment. Indiana has developed a legislatively mandated task force to educate the public as well as public and private employers on ways to reduce sexual harassment [28]. The task force must also develop and present training sessions on sexual harassment prevention [28, § 22-9-4-2(4)]. Connecticut requires employers with fifty or more workers to provide supervisors with minimum sexual harassment training [29]. Maine also requires employers with fifteen or more employees to conduct training sessions for all new employees on the subject of sexual harassment [30]. In addition, Maine employers must post information regarding sexual harassment in the workplace and give all employees written information regarding the illegality of sexual harassment [30, § 807(1),(3)]. Although these laws may appear costly to employers, the money spent on sexual harassment training of managers would seem insignificant when compared with the legal costs involved in handling one sexual harassment complaint within the organization [31].

In addition to educating workers, some states have passed laws requiring sexual harassment education in schools and allowing the expulsion of students for sexual harassment [32]. Many people feel these laws have gone too far and prevent children from enjoying the ability to be young and express themselves. Yet, those formative years provide the key time for individuals to learn interpersonal skills and appropriate behavior. Since sexual harassment will disappear if individuals

exercise simple respect for others, where better for our future leaders to learn that respect than in school? If we focus on the purpose of Title VII, which is to promote equality in the workplace, and remember that to stop harassment we must change individual behaviors and attitudes, teaching children to refrain from sexual harassment in schools makes sense.

CONCLUSION

Since equality has not yet been achieved, we will continue to revise our laws to accomplish this goal. However, instead of taking the traditional approach of allowing victims to sue in court for monetary damages, our legislatures are exploring different methods of resolving this age-old problem. New laws focus on educational requirements designed to permanently change attitudes and behaviors. New civil rights legislation encourages individuals to seek alternatives to courtroom litigation for resolving their disputes. Rather than going too far, sexual harassment laws appear to be taking a fresh approach to the age-old problem of discrimination and inequality. Although these laws still leave questions open to debate, they appear to guide us in the right direction. If we follow the appointed path, we may come into the next century having left the age-old problem behind.

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ENDNOTES

1. Declaration of Independence, para. 2 (U.S. 1776).
2. See U.S. Const. art. I, sec. 2, cl. 1, art. II, sec. 1, cl. 2 (giving citizens the right to vote for members of the House of Representatives and for electors).
3. U.S. Const. amend. I-X.
4. U.S. Const. amend. XIII.
5. U.S. Const. amend. XIV, sec. 1.
6. U.S. Const. amend. XV, sec. 1 (race or color); amend. XIX, sec. 1 (sex).
7. 42 U.S.C. sec. 2000e-2(a)(1). Members of Congress added sex as a category protected from discrimination in an attempt to block passage of Title VII. See *Barnes v. Costle*, 561 F. 2d 983 (D.C. Cir. 1977); 110 Cong. Rec. 2577 (1964) (remarks of Representative Smith); [7, at 2581-2582, remarks of Representative Green]. However, the

- attempt failed, and the bill passed with the protections against sex discrimination intact [7].
8. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (recognizing a cause of action for sexual harassment).
 9. 29 C.F.R. sec. 1604.11(a)(2).
 10. 401 U.S. 424 (1971).
 11. 682 F.2d 897 (11th Cir. 1982).
 12. 454 F.2d 234 (5th Cir. 1971), cert. denied 406 U.S. 957 (1972).
 13. See *Sex Discrimination in the Workplace*, 1981, Hearings Before the Senate Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 336, 342 (1981) (statement of J. Clay Smith, Jr., acting Chairman of the E.E.O.C.); 106 L.R.R. News & Background Inf. 333-35 (April 27, 1981). See also U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Is it a Problem?* (1981); 45 Fed. Reg. 25, 024 (April 11, 1980) (Commentary accompanying E.E.O.C. interim guidelines on sexual harassment).
 14. 641 F.2d 934, 943-46 (D.C. Cir. 1981).
 15. 477 U.S. 57 (1986).
 16. See Larry Reynolds, *As Expected, Job Discrimination Claims Up Sharply*, *HR Focus*, Oct. 1992, at 1 (stating that sexual harassment charges filed with the EEOC jumped sixty percent during the first six months following the Hill-Thomas hearings).
 17. Cathy Trost, Checkoff, *Wall Street J.*, Oct. 13, 1992, at A1 (stating that eighty-one percent of Fortune 500 companies now provide sexual harassment training to employees, up thirty-five percent from before the Clarence Thomas hearings).
 18. *E.g.*, *Rabidu v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); *Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989); *Downes v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985), and *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991). *E.g.*, *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp 1486 (M.D. Fla. 1991); *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991).
 19. Compare *Rabidu v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (requiring serious effect on psychological well-being); *Vance v. Southern Bell Telephone & Telegraph Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (same); and *Downes v. FAA*, 775 F.2d 288, 292 (Fed. Cir. 1985) (same), with *Ellison v. Brady*, 924 F.2d 872, 877-878 (9th Cir. 1991) (rejecting such requirement).
 20. See *e.g.*, *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).
 21. See R. Gaull Silberman, *After Harris, More Questions on Harassment*, *Wall Street J.*, November 17, 1993, at A22 (listing several questions left unanswered by the *Harris* case).
 22. *E.g.*, 42 U.S.C. sec. 1981 (1976); 29 U.S.C. sec. 623(a)(1) (1982); 29 U.S.C.S. sec. 706.
 23. 42 U.S.C. sec. 1981, added by sec. 102, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).
 24. *E.g.*, Cal. Govt. Code sec. 12950 (West 1993) (requires distribution of information regarding the illegality of sexual harassment); Tenn. Code. Ann. sec.s 3-13-101(a)(10), 4-3-1703(a)(4) (requiring each state department to conduct training workshops in order to prevent sexual harassment from occurring); Me. Rev. Stat. Ann. Tit. 26, sec.

- 807(1)-(3) (1993) (requiring employers to post information regarding sexual harassment and requiring employers to conduct training for all new employees on the subject of sexual harassment); Ill. Stat. Ann. sec. 512-105(5)(c) (West 1993) (requiring each state agency to establish and maintain a sexual harassment program which includes creating and posting a policy as well as training the workforce).
25. Cal. Govt. Code sec. 12950 (West 1993).
 26. Telephone survey of 30 San Francisco Bay area employers (Oct. 29, 1993).
 27. Telephone interview with California Department of Fair Employment and Housing Representative (Oct. 29, 1993).
 28. Ind. Code sec. 22-9-4-2(1) (1993).
 29. Conn. Gen. Stat. Ann. sec. 46a-54(15)(b) (West 1993).
 30. Me. Rev. Stat. Ann. tit. 26, sec. 807(3) (1993).
 31. See Ronni Sandroff, Sexual Harassment in the *Fortune 500, Working Woman*, December 1988, at 69-73.
 32. *E.g.*, Minn. Stat. Ann. sec. 127.46 (West 1993); Conn. Gen. Stat. Ann. sec. 10a-55c (West 1993); Cal. Educ. Code sections 212.6, 48900.2 (West 1993); Mass. Gen. Laws. Ann. Ch. 151C, sec. 1 (West 1993).

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