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SEXUAL HARASSMENT AND *CARR v. ALLISON GAS TURBINE*: INCREASING THE AMBIGUITY IN UNWELCOMENESS DETERMINATIONS

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ABSTRACT

The Seventh Circuit Federal Court of Appeals' decision in *Carr v. Allison Gas Turbine* addresses the element of "unwelcomeness" of the behavior in determining actionable sexual harassment. Apparently, the Seventh Circuit has decided that welcomed sexual harassment is an "oxymoron." This Circuit has chosen not to distinguish between acquiesce to the situation to be one of the "boys," and acceptance and participation in the questioned activities. Consequently, the complaining party can be excused for her behavior so long as she has expressed by word or deed that the questioned behavior is distasteful or offensive. As a result, the Court's logic in *Carr*, for all practical purposes, removes the requirement of "unwelcomeness" in establishing actionable sexual harassment.

Sexual harassment claims represent the most rapidly growing form of actionable discrimination under Title VII of the Civil Rights Act of 1964. From fiscal year (FY) 1990 to FY1994, sexual harassment complaints handled by the Equal Employment Opportunity Commission (EEOC) increased by more than 135 percent [1]. During this same period, total monetary awards to [female] victims increased almost three times from $7,727,508 in FY1990, to $21,490,020 in FY1994 [2]. And it should be noted that these figures include only complaints

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filed by victims handled by the EEOC; they do not include complaints deferred to state agencies for investigation and resolution.

As exposure to sexual harassment litigation grows, employers are increasingly turning to company sexual harassment policies to create harassment-free workplaces. In compliance with their duty to investigate all allegations of sexual harassment and take quick and appropriate action to preclude its recurrence [3], many employers have further developed policies and procedures for conducting internal investigations. The incentive for conducting an internal investigation is that it avoids the involvement of federal or state agencies and permits a more efficient resolution of the matter. Additionally, an effective message is conveyed to all employees that the organization is serious about eliminating harassment and will react swiftly to any such infractions of company policies.

However, for an organization to conduct thorough and proper investigations, it is first essential that the investigators fully understand which activities and behavior constitute actionable sexual harassment and which do not. This, of course, is equally important for state and federal investigators. Such assessments, however, may have been complicated by a recent federal circuit court of appeals decision, *Carr v. Allison Gas Turbine* [4], a ruling that, as will be seen, has affected the manner in which some federal courts may interpret whether the complaining party encouraged or "welcomed" the harassment. Therefore, the purpose of this article is to examine this Seventh Circuit decision, and ascertain its effect in establishing a Title VII violation. To enhance the reader's understanding of the issues involved, the legal proofs required in both *quid pro quo* and hostile environment forms of sexual harassment are reviewed. Additionally, a brief synopsis of the findings of facts of this case are provided. In our conclusions we address the specific ramifications this decision poses for the future of sexual harassment in the Seventh Circuit.

ACTIONABLE SEXUAL HARASSMENT

There can be little doubt that sexual harassment has become a growing concern for litigation-sensitive employers in both the private and public sectors. However, it must be noted that not all allegations of sexual harassment are meritorious. Approximately 30 percent of all the complaints handled by the EEOC in FY1994 failed to establish reasonable cause [2]. Not surprisingly, many employers have become increasingly concerned about defending themselves from frivolous allegations of sexual harassment. In mounting such defenses, it is important to note that actionable sexual harassment claims consist of either a *quid pro quo* allegation or a hostile environment allegation. Specific conditions that the complaining party must demonstrate in order to prevail exist in each form of allegation.

The *quid pro quo* form encompasses incidents in which the victim's acceptance or rejection of certain sexual behaviors in the workplace affects her eligibility for tangible job benefits [5]. The classic examples of *quid pro quo* sexual harassment

occur when a victim is threatened with termination or demotion if she refuses to have sexual intercourse with her supervisor [6]. From the employer's standpoint, this type of allegation is not as precarious as the hostile environment form since only supervisory personnel can be potential harassers—the harasser must be able to exercise control over a tangible job benefit. Under the other form, hostile environment, virtually anyone (i.e., coworkers, clients, vendors, etc.) can be a potential harasser, as will be seen later.

For the complaining party to establish an actionable case of *quid pro quo* harassment, the following four conditions must be met:

1. The employee making the complaint must belong to a protected class under Title VII. Since sexual harassment is a form of sex discrimination, complaining parties need only to demonstrate that they are either male or female. Obviously, this point is rarely in contention.

2. The conduct or behavior to which the employee was subjected was *unwelcome*. Standards for unwelcomeness are the focus of this article and, therefore, are discussed in greater depth further in the text.

3. But for the individual's sex, she would not have been subjected to the alleged harassment. The complaining party satisfies this condition by demonstrating that had she been a member of the other sex, she would not have been subjected to the unwelcomed sexual behavior. In essence, the claim is that members of the opposite sex were not subjected to the same treatment. This proof is absolutely necessary to make the connection between the harassment and Title VII.

4. Finally, in *quid pro quo*, the alleged victim must show that acceptance or rejection of the unwelcomed sexual behavior would affect a tangible job benefit.

Under the other form of sexual harassment, hostile environment, the first three conditions are exactly the same; only the fourth condition is different. The alleged harassment must be sufficiently severe or pervasive enough to alter the terms or conditions of employment and create an abusive work environment [7]. The problem this creates for employers is that virtually anyone is a potential harasser who may participate in creating an abusive work environment: supervisors [8], coworkers [9], vendors [10], and passers-by [11].

Given this existing vague and complex legal environment for sexual harassment claims, the United States Court of Appeals for the Seventh Circuit has further complicated matters by apparently reducing the burden of proof for *unwelcomeness*.

UNWELCOMENESS

As previously stated, establishing the *unwelcomeness* of the behavior in question is normally considered a vital element in the determination of actionable sexual harassment. "In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not *solicit or incite it*, and in

the sense that the employee regarded the conduct as *undesirable or offensive*" [emphasis added by authors] [6, at 897, 903]. To further amplify this point, it must be noted that the Supreme Court, in *Meritor Savings Bank v. Vinson* [12], concluded: "The gravamen of any sexual harassment claim is that the alleged sexual advances were *unwelcomed*" [emphasis added by authors] [12, at 68].

Federal courts have not developed a consensus as to when participation in potentially harassing situations precludes the "victim" from later claiming the behavior was unwelcomed. In fact, several jurisdictions have held there are instances in which acquiescence to harassing behavior does not necessarily establish *welcomeness*. Mere voluntary participation by the complaining party in the alleged harassment is not generally considered adequate to remove the claim. For example, in *Meritor*, the Supreme Court held that the correct inquiry for establishing *unwelcomeness* is not whether the victim's actual participation sexual intercourse was voluntary, but whether the victim by her conduct indicated the alleged sexual advances were unwelcome [12, at 68]. In other words, mere participation [13] in the questioned behavior does not, of and by itself, constitute welcomeness. The touchstone is, rather, did the complaining party indicate by word or deed that the behavior was distasteful or offensive? If *she* did, then the unwelcomeness is established. Conversely, if *her* actions and words indicate that *she* was not offended by the behavior in question, then it is likely to be considered *welcome*.

In *Swentek v. USAir, Inc.*, the complaining party, much like the one in Carr [4], had a history of being a foul-mouthed individual who frequently talked about sex and engaged in sexual pranks at work [14]. Similarly, the question arose as to whether this type of conduct automatically created an invitation for sexually harassing behavior. The United States Court of Appeals for the Fourth Circuit concluded it did not. In this instance, the alleged harasser was unaware of the complaining party's prior behavior with other coworkers. The complaining party also *informed* the harasser that his behavior was unwelcome. The court ruled that the complaining party's prior behavior did *not* constitute an acceptance of the questioned behavior and that she, by word, clearly conveyed to the harasser that she regarded the behavior offensive. Following this line of reasoning, the court considered the questioned behavior to be actionable sexual harassment [14, at 557].

On the other side, there are several cases in which the courts in other circuits have concluded the behavior was welcomed by the complaining parties, based on their conduct. In *Sauers v. Salt Lake County*, the atmosphere of the complaining party's office was such that a claim of hostile environment could have been made. Nevertheless, the complaining party, in her own testimony, indicated she viewed this environment as merely "disgusting and degrading," not as sexually harassing. Consequently, the court concluded, based on the complaining party's own behavior and interpretation of the environment, that a sexual harassment claim was not appropriate [15].

In *Ebert v. Lamar Truck Plaza*, the court found that because the employees and supervisor, both male and female alike (including some of the complaining parties), routinely engaged in the use of foul-mouthed language, this environment was not considered to be hostile [16]. Similarly in *Reed v. Shepard*, the complaining party was deemed to be enthusiastically receptive to sexually suggestive jokes and activities. Her response to such behavior was concluded to be indicative of acceptance and thus failed to establish the unwelcomeness proof for sexual harassment [17].

It must be further noted that what an individual does away from the worksite does *not* waive her right to a harassment-free work environment. In *Katz v. Dole* the court held: "A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment" [18]. Apparently, Katz and a male coworker used nicknames for each other that had potentially sexual connotations. However, the use of these nicknames was consensual, and unknown to other coworkers. Therefore, their use does not justify unwelcome and unsolicited sexual harassment [18, at 254, n2].

In *Burns v. McGregor Electronic Industries, Inc.*, a woman who had previously posed nude for a national magazine was subjected to unsolicited comments, innuendo, and behavior. The Eighth Circuit found that regardless of how reprehensible one might find the plaintiff's personal life, it did not provide lawful acquiescence to unwanted sexual advances in the workplace. Off-duty conduct must be divorced from on-duty conduct because the goal of Title VII is to rid *the workplace* of unwanted sexual harassment [19]. This was particularly true since the complaining party had demonstrated the conduct was undesirable by filing a complaint.

THE FINDINGS OF FACT

It was into the aforementioned legal environment that Carr brought her sexual harassment litigation. Carr began her employment at General Motor's gas turbine division as a tinsmith apprentice in August 1984. She was the first woman in the tinsmith shop, much to the displeasure of her male coworkers. As a manifestation of this displeasure, Carr alleged her coworkers initiated a campaign of persecution that lasted throughout her employment. For example, her coworkers made derogatory sexual comments to her on a daily basis, used vulgar nicknames to refer to her, and played various practical jokes on her that were of a sexual nature. These included painting her tool box pink and cutting out the seat of her overalls without her knowledge. Additionally, her coworkers adorned her tool box and work area with sexually explicit signs, pictures, and graffiti, hid her tools and toolbox, hung nude pin-ups around the shop, and would strip to their underwear in front of her while changing into their work clothes. They also urinated from the roof in her presence. One coworker was even alleged to have exposed himself to her on more than one occasion [19, at 1009-1010].

Initially, Carr ignored the harassment, but from 1985 until the termination of her employment in 1989, she complained about this harassment repeatedly to her immediate supervisor. Even though some of the harassment occurred in front of him, the supervisor concluded he did not know whether the harassment would be considered offensive by a woman because he was not a woman [19, at 1010].

The district court found the vulgarities exceeded what is normally referred to as "shop talk" and workplace humor. However, the district court concluded the harassment was welcomed, and thus not actionable under Title VII. Carr had not merely been the recipient of crude behavior—she had dished it out as well [19, at 1010].

Witnesses testified Carr had frequently used vulgar language and engaged in equally questionable behavior. One female coworker described Carr as vulgar and unladylike. In fact, Carr had a reputation for telling dirty jokes, and on one occasion, she even placed her hand on a male coworker's thigh [19, at 1010-1011]. The district judge concluded her behavior constituted an acceptance of the environment and thus failed to satisfy the second proof of actionable sexual harassment, "unwelcomeness." According to the lower court, Carr, by her actions and responses, had "invited" or encouraged this behavior [19, at 1010].

Although Carr had engaged in a variety of questionable activities, the question was one of whether or not she had adequately demonstrated that she found the behavior of her coworkers to be unacceptable [4, at 1011]. Her response was that she had complained about this harassment repeatedly to her supervisor, and this should have demonstrated that she objected to her coworkers' actions [4, at 1010]. Consequently, the Seventh Circuit of Appeals concluded that *welcomed* sexual harassment is an oxymoron [4, at 1008], and, therefore, reversed the decision of the lower courts [4, at 1013]. It appears the Seventh Court, in its ruling, had chosen not to distinguish between feeling compelled to acquiesce to the situation in order to be one of the "boys," and acceptance and participation in the behaviors for personal enjoyment. In other words, even the most active participation in ribald antics does not automatically provide an employer with a defense that the questioned behavior was "welcomed." The complaining party can be excused for her behavior so long as she has expressed by word or deed that the behavior is distasteful or offensive. This, of course, creates a particular dilemma for employers and their representatives. If a female employee is seen openly engaged in bawdy humor or pranks in the workplace, it can *not* be assumed she is a willing participant. Unfortunately, it would appear this decision could encourage employers to adopt speech codes in the workplace as a means of precluding such circumstances from occurring.

CONCLUSION

In light of these apparently contradictory cases, the question becomes "what actions by the plaintiffs indicate a welcomeness to sexual harassment?" The *Carr*

decision specifically addressed the aspect of welcomed sexual harassment. The Seventh Circuit's conclusion was that if the complaining party clearly indicates by word or deed that the harassment is welcomed is it no longer harassment [4, at 1008-1009]. Taking this argument to its inevitable destination, merely filing a sexual harassment could be interpreted as being sufficient to demonstrate that the conduct is unwelcomed. Using this analytic framework, unwelcomeness becomes little more than a "given." Therefore, the court's logic in *Carr* reduces the elements necessary to establish a hostile environment claim to "whether the plaintiff was, because of her sex subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to affect adversely the conditions under which she worked" [4, at 1009]. Should this doctrine become the national standard, the complaining party may be excused for her behavior as long as she has stated that she finds similar behavior in others distasteful.

Furthermore, even proof that a complaining party actively instigated coarse sexual language or antics in the workplace may not be sufficient to insulate employers. In the Seventh Circuit it may very well be that only the third and fourth elements (proofs) are relevant to establishing actionable sexual harassment claims under both *quid pro quo* and hostile environment analysis. If this is indeed the case, employers may want to adjust their policies governing internal sexual harassment investigations accordingly.

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ENDNOTES

1. Equal Employment Opportunity Commission, Sexual Harassment Statistics EEOC & FEPA Combined: FY1989-FY1994 (1994).
2. Equal Employment Opportunity Commission, Statistics on the Resolution of Sexual Harassment Charges Filed by Females (1994).
3. 21 C.F.R. § 1604.11.
4. *Carr v. Allison Turbine*, 32 F.3d 1007 (7th Cir. 1994).

5. Because over 90 percent of all sexual harassment complaints are filed by women, the authors use the feminine pronoun when discussing the victims of sexual harassment.
6. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).
7. *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) citing *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982), and *Dornhecker v. Malibu Grand Prix Corp.* 828 F.2d 307, 309 n2 (5th Cir. 1987).
8. *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547 (S.D. Fla. 1988).
9. *Zabkowicz v. West Bend Company*, 789 F.2d 540 (7th Cir. 1986).
10. *People v. Hamilton*, 42 FEP Cases 1069 (N.Y. App. Div. 1986).
11. *EEOC v. Sage Realty Company*, 507 F. Supp. 599 (S.D. N.Y. 1981).
12. *Meritor Savings Bank v. Vinson*, 477 U.S. 57.
13. *Shrout v. Black Clawson*, 46 FEP Cases 1339, 13344 (S.D. Ohio 1988).
14. *Swentek v. USAir, Inc.*, 830 F.2d 552, 556 (4th Cir. 1987).
15. *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993).
16. *Ebert v. Lamar Truck Plaza*, 878 F.2d 338 (10th Cir. 1989).
17. *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991).
18. *Katz v. Dole*, 709 F.2d 251, 254, n2 (1983).
19. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 963 (8th cir. 1993).

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