

SEXUAL HARASSMENT— A PRIMETIME TV LAUGHING MATTER

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ABSTRACT

This article focuses on the treatment of sexual harassment by television networks in situation comedies. It contrasts the litigated cause of action under Title VII, with the comedic value of sexual harassment in television screenplays. While the former faces punishment in the form of termination and damages, the latter is rewarded with ratings and royalties. This article explores the Title VII restrictions placed on employers, and discusses the (im)plausibility of placing those same restrictions on television character employers. It finally examines why free speech trumps Title VII in the television arena, but not in the American workplace.

In recent years, the topic of sexual harassment has permeated our society through employment [1], journalism [2], politics [3], and even the entertainment industry [4-12]. Embedded in Title VII of the Civil Rights Act of 1964, sexual harassment is viewed as a form of discrimination [13]. The seriousness of this unlawful conduct is evidenced through a multitude of lawsuits, training sessions, and published guidelines for employers and employees alike [14]. The Equal Employment Opportunity Commission (EEOC) has established criteria for employers to follow [15, 16], and the Supreme Court has narrowly defined what constitutes sexual harassment [17], how that leads to a hostile work environment [18], and who can be held liable for such conduct [19, 20].

The seriousness of sexual harassment dissipates in the transition to the broadcast form. The responsibilities placed upon employers are absent when those employers are characters on the small screen. As a favorite situation comedy topic, sexual harassment metamorphosizes from unlawful conduct punishable by termination and damages, to a humorous satire rewarded by high ratings and

royalties. This article first addresses the plausibility of applying EEOC guidelines to television employers, and second, discusses why the First Amendment and free speech outrank Title VII on the small screen, but not in the office.

SEXUAL HARASSMENT: THE RELATIONSHIP BETWEEN TITLE VII, THE EEOC, THE SUPREME COURT, AND PRIMETIME SITUATION COMEDIES

Title VII and Its Treatment on Television

Title VII prohibits two forms of discrimination: disparate treatment or intentional discrimination, and disparate impact, or neutral practices with discriminatory effects [21]. Title VII makes it "an unlawful practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex [5, § 2000e-2(a)(1)]. An unlawful employment practice is established when the "complaining party demonstrates that race, color, religion, sex, or national origin was a motivating party factor for any employment practice . . ." [5, § 2000e-2(m)]. *Sexual harassment arises under claims of sex discrimination in Title VII.*

There are eight theories of Title VII sexual harassment liability [1, p. xi]. 1) *Quid pro quo* harassment which occurs when a superior uses apparent or actual authority over the terms of the employee's employment to extort sexual consideration from the employee [22]; 2) hostile work environment harassment which occurs when an individual has been required to endure a work environment that, while not necessarily causing any direct economic harm, or even a significant psychological or emotional harm, substantially affects a term or condition of employment [23]; 3) claims by third parties which arise when hostile behavior based on gender is challenged by complainants who, though not targets of the behavior, belong to that gender and are affected by the hostile environment [1, p. 57]; 4) harassment by supervisors where the employer is held liable for the actions of the supervisor under a theory of respondeat superior, apparent authority, or negligence [1, p. 63]; 5) harassment by coworkers which occurs when coworkers create the hostile work environment and the employer has notice, but fails to take corrective action [24, 25]; 6) harassment by non-employees where employers are held liable for failing to take corrective action when a nonemployee harasses an employee [16, § 1604.11(e); 26]; 7) constructive discharge which occurs when an employee's resignation was forced by intolerable, discriminatory working conditions [27]; and 8) retaliation which occurs when an employee suffers an adverse employment action that is motivated by the employee's protected opposition to discrimination, or in anticipation of such a protest [1, pp. 86-87].

Regardless of the theory of liability, American juries, as evidenced by the millions of dollars awarded in damages [28-32], take Title VII sexual harassment

claims very seriously. Verdicts such as these have prompted employers to take action to prevent sexual harassment in the workplace, to establish grievance procedures [16, § 1604.11(f); 33]; and to respond effectively once a complaint of sexual harassment has been made. These verdicts encourage employers to develop sexual harassment training sessions, complaint protocol, investigation procedures, and remedial actions. However, such employer precautions and procedures are discarded when sexual harassment is presented to the public through the medium of the situation comedy. The elements for each theory of Title VII sexual harassment liability can be found on primetime situation comedies, yet the seriousness of the behavior is answered by laugh tracks, and the damages are nonexistent.

For example, in some early episodes of the Fox Network television show *Ally McBeal*, lawyers at the law firm of Cage and Fish were faced with a sexual harassment lawsuit [4]. The receptionist Elaine threatened to sue the firm for sexual harassment under a hostile work environment theory of liability. Elaine rallied the support of the female support staff against the male lawyers of the firm for their actions toward a mail deliverywoman. Every time the woman delivered the mail around the firm, the men would stop working to stare at her and comment on her body. The creators of the show used special effects to satirize the harassment. The woman was cast in a ray of light that emphasized her shapely form, her movement slowed to the rhythm of the music, and the men's tongues dropped to the floor unanimously in a cartoon-like animation. Although a very serious cause of action, the sexual harassment was depicted in a comical manner, with little regard for the realities of the workplace, the victim, or the law. The women in the firm complained that the men's actions created a hostile work environment, and the would-be plaintiffs sought improved working conditions. Rather than subjecting the firm's attorneys to a Title VII scrutiny, the writers attributed Elaine's lawsuit to a jealous cry for attention, the suit was dropped, and all was forgiven.

If the attorneys in the Cage and Fish law firm were actually subjected to the elements of Title VII sexual harassment under a hostile work environment theory of liability, it is likely that television producers and home viewers would find less comedic value in their actions. Hostile work environment, as opined by the Supreme Court in *Harris v. Forklift Systems, Inc.* occurs "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' " [18, at 367].

It is likely the women in this fictional lawsuit could prove that the male attorneys' actions toward this woman reeked with "ridicule and insult" [34, at 65-67]. The men commented on the size of the woman's breasts and the shape of her body as they watched her bend over to retrieve mail from her cart. Because the scene took place in the hub of the law firm's reception area, the entire staff witnessed the men's actions. The would-be plaintiffs could likely prove their

actions were “sufficiently severe or pervasive to alter the conditions of [their] employment” [34, at 2405] because they observed the men’s actions toward this woman on a daily basis, and were forced to listen to their debasing comments. Subjecting the unwilling staff to their sexual comments, stares, and innuendoes likely induced a hostile work environment for employees of the Cage and Fish law firm.

To the viewer, the entire scene was depicted with an air of humor and frivolity. The firm’s partners did not discourage the behavior; rather, they were the primary harassers. The attorneys were not sanctioned or punished. Rather, the threat of their becoming defendants in a sexual harassment lawsuit induced the viewers’ sympathy. The line between reality and fantasy is often clouded when situation comedies tackle serious issues.

Although television is frequently an avenue of comic release, putting a comic spin on sexual harassment may send the wrong message to employers, employees, and victims of sexual harassment. What is funny in American family rooms on Monday night may not be so funny in corporate offices Tuesday morning. If television “employers” such as the partners at the Cage and Fish law firm were subjected to the same criteria as the employers in Title VII lawsuits, sexual harassment might be taken more seriously by the American public, and more specifically, its workforce.

The Equal Employment Opportunity Commission

In 1997 alone, the EEOC received 15,889 new charges of sexual harassment [35]. In response to the growing number of claims, the commission formulated guidelines on sexual harassment, and explained that:

[p]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned [16, § 1604.11(g)].

The EEOC prevention guidelines place great responsibility on employers to eradicate sexual harassment from the workplace. Conversely, the employers on primetime television are free from the EEOC guidelines, and situation comedies are free to parody the cause of action. In the quest for ratings, television producers transform sexual harassment from a real claim with real victims and real damages into a fantasy-based comedic release that makes a mockery of its harassers, its victims, Title VII, and the EEOC.

If the partners in *Ally McBeal*’s fictional law firm, Cage and Fish [4], had followed the EEOC prevention guidelines, they might not have been threatened with the hostile work environment lawsuit. Had they expressed strong disapproval of

such offensive behavior, rather than being the chief instigators of it, primetime viewers might have gained insight into what constitutes sexual harassment and a hostile work environment, while learning that employers are responsible for its prevention. Instead, television viewers were shown a light, humorous office skit although an offense punishable by termination and damages had occurred.

In reality, once the EEOC has initiated a sexual harassment charge, "the employer should promptly appoint an investigator, conduct its own investigation, and preserve all documents. . . . [It] should likely engage counsel to assist in the proceedings . . ." [36]. Unfortunately, the formality of the EEOC proceedings is mocked by the farcical, short-lived predicaments of employers on situation comedies. The subject matter found in so many thirty-minute story lines could easily be the subject matter of long, arduous sexual harassment proceedings. The unfortunate distinction is that the former concludes with a laugh track and rolling credits, while the latter has the potential to destroy lives, careers, and reputations.

The Supreme Court and Employer Liability

In June of 1998, the United States Supreme Court held that under Title VII, an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee" [20, at 2270]. American employers are consistently held liable for hostile work environments when their employees sexually harass their subordinates. When the victims of such harassment are able to establish that the harassment culminated "in a tangible employment action, such as discharge, demotion, or undesirable reassignment" [36, pp. 206-207], their employers are not even afforded affirmative defenses.

The Supreme Court's treatment of sexual harassment and its application of agency-based liability to employers exemplify the gravity accorded the cause of action. The Sixth Circuit held employers may even be held liable for the harassing actions of coworkers, when the employer was aware of the offending conduct but failed to take reasonable steps to abate it [37]. When confronted with a claim of sexual harassment, employers face very serious allegations and potential damages. How can the very same conduct that is taken so seriously by the parties to a sexual harassment suit be a source of pure comedy and entertainment to viewers of primetime television situation comedies?

Television Situation Comedies and Sexual Harassment

Seemingly unchecked sexual harassment and sexual references reach employers and employees via the small screen every day. These references become topics of conversation in American workplaces, and such conversations can influence workers' behavior. Employees gather around water coolers and coffee machines to discuss scenes from their favorite television programs. It is unlikely the employees even contemplate that a discussion of what they viewed

on primetime network television might offend a coworker. A typical office conversation such as this cost Mr. Jarold Mackenzie his job in 1993 [38]. Mr. Mackenzie, an executive at the Miller Brewing Company, was terminated for "discussing a racy episode of the popular *Seinfeld* television show with a female subordinate" [38]. It is unlikely that Mr. Mackenzie will ever discuss sexual references from a situation comedy in an employment setting again.

In that particular *Seinfeld* episode, the main character/comedian is dating a woman whose name he does not know [39]. The only clue she gives him is that her name rhymes with a female body part. Jerry Seinfeld and his friends struggle through the possibilities: Celeste, Kest, Hest, Aretha, Bovary, Mulva, Gipple, Loleola, but the woman terminates their relationship before it dawns on Jerry that her name is Delores. This thirty-minute sitcom cost Mr. Mackenzie his job when he shared the details about the show with his secretary and photocopied a page from the dictionary with the word clitoris on it. Mr. Mackenzie's secretary claimed that the dictionary display was sexual harassment, and that she had been similarly victimized by her boss before. Although Mr. Mackenzie ultimately prevailed in a wrongful termination suit against the Miller Brewing Company [40], the fact remains that a "harmless" situation comedy provoked a serious complaint of sexual harassment.

It is not surprising that television viewers become desensitized to sexual harassment. Offensive behavior is showcased nearly every night on nearly every major network. In a remarkably comprehensive study on the subject, Thomas Skill and his colleagues at the University of Dayton determined that during a typical hour of television situation comedies in 1990, viewers were likely to see fifteen sexual behaviors and nine incidents of sexual harassment [41]. Skill's study documented the "range and extent of fictional portrayals of sexual harassment in network television situation comedies prior to the extensive media coverage on the issue resulting from the Clarence Thomas confirmation hearings [41, p. 15]. The study analyzed two months of situation comedies on the four major networks [42] in October and November of 1990. The study revealed that 124 of 307 sexual behaviors portrayed during the shows, which were chosen randomly, fit the legal definition of sexual harassment, "unwelcome behavior of a sexual nature" [41, p. 11].

Skill explained the serial nature of situation comedies facilitates audience identification with the characters and the familiarity enhances the likelihood of audience members performing a vicariously learned behavior [41, p. 2]. Applying Skill's analysis to a more recent situation comedy example, a viewer who identifies with the main character of the CBS situation comedy *Cybil*, may be encouraged to try to seduce a subordinate coworker because this behavior rewarded the star with a successful relationship [43]. Similarly, viewers of the NBC sitcom *Spin City* may identify with the characters on the show and determine that discussing public nudity, newlywed nuptials, and heterophobia in the staff office is acceptable behavior [11]. Because sexual harassment is draped

within the humor of these shows, viewers are understandably left with the impression that this type of behavior is appropriate and acceptable.

Dr. Skill's study determined that the sexual harassment presented on situation comedies in 1990 was "never prohibited through social sanctions of any type. . . . [T]here were not instances of a perpetrator being sanctioned or punishment [*sic*] for his or her actions" [41, p. 14]. This has not seemed to change in the last eight years. *Seinfeld's* Mr. Peterman was never sanctioned for calling his subordinate employee Elaine a "gentle soft breeze" or "a helpless young waif" [12]. Nor did the partners of the Cage and Fish law firm face a complaint procedure initiated by the EEOC [19]. In fact, the study indicated that more than two-thirds of the sexual harassment behaviors documented were "portrayed as a favorable and positive way to initiate relationships" [41, p. 16]. Skill's study suggests that viewers may imitate the television models and use these seemingly innocent sexual references to engage or attract people in the workplace. However, in reality, such references are often viewed as a form of sexual harassment.

The rules and regulations placed upon American employers are absent from television counterparts. On the small screen, sexual harassment goes unpunished. It is regarded as a humorous component of a story line that leaves no lasting impression on the people it touches. Skill's study opines that primetime situation comedies provide their viewers with models by which to learn anti-social behaviors [41, p. 17]. "By consistently portraying sexual harassment as humorous, primetime situation comedies do indeed distort, minimize and misrepresent the seriousness of sexual harassment" [41, p. 16].

Without victims and damages, the viewers are left with a clouded picture of the harsh realities of *quid pro quo* sexual harassment, hostile work environment, constructive discharge, and retaliation. Could the EEOC ever guide television employers the same way it guides American employers? Is the influence of situation comedies on workplace sexual harassment pervasive enough to require fictional employers to comply with Title VII? Or does the First Amendment and Free Speech preempt all regulation of primetime story lines relating to sexual harassment?

SEXUAL HARASSMENT: THE FIRST AMENDMENT AND FREE SPEECH IN SITUATION COMEDIES

An Overview of the First Amendment and Free Speech

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech." Although this language seems to prohibit all governmental regulation of speech, the Supreme Court "traditionally has balanced the right to free speech against other important interests that may infringe on this right" [44]. Generally, there are several "important interests" that allow the government to regulate speech. The government can regulate the time,

place, or manner of speech [45], so long as the regulation is content-neutral, fulfills a significant state interest, and provides alternative channels of communication [46]. Congress is also free to limit speech through the captive audience doctrine, which protects people in their home from hearing otherwise unavoidable speech [47]. The Supreme Court has also excepted fighting words from First Amendment protection [48].

Sexual Harassment and First Amendment Free Speech

Prohibiting only offensive or discriminatory speech is content regulation [44, p. 1004]. In *R.A.V. v. City of St. Paul*, the Supreme Court legitimized Title VII's apparent violation of the First Amendment by explaining that Title VII is designed to regulate conduct rather than speech [49]. The Court noted that governments may regulate sexually harassing workplace speech based on its inseparability from illegal discriminatory conduct: "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices. . . . Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy" [49, pp. 388-390].

Legal commentators have suggested that Title VII regulations may fit into the existing First Amendment exception for the captive audience because "the inability of employees to avoid objectionable speech in the workplace is analogous to their inability to avoid such speech at home, rendering them a captive audience [44, p. 1007]. However, this theory has also received strong criticism. Because workplace "captivity is extremely common, [there] is no justification for a speech restriction" [50, p. 7]. Volokh believed Title VII harassment law suppresses free speech simply because the government believes it is harmful and offensive [50, p. 1].

Professor Volokh found fault with sexual harassment regulations because they suppress political statements, religious proselytizing, art, and humor—"material that's at the core of the First Amendment's protections" [50, p. 1]. He concluded that harassment law is unconstitutional, and that there are no exceptions to the First Amendment's protections that justify such a broad speech restriction [50, p. 1].

There is tremendous tension between sexual harassment regulations and First Amendment free speech protections. However, as evidenced by the first part of this article, there is also tremendous support for the objectives of Title VII: employers are encouraged to establish complaint procedures [14]; the EEOC affords victims a means of addressing their claims and provides employers with guidance [15, 16, 33]; the courts establish theories of liability for sexual harassment causes of action [17-19; 24-27]; and juries award damages [28-32]. With such support, it is unlikely harassment laws will be preempted by First

Amendment concerns. However, support for Title VII and sexual harassment regulations and sympathy for its victims decrease when the harassment takes place on television situation comedies.

Sexual Harassment, the First Amendment, and Television Regulation

The Supreme Court has identified several categories of speech outside of the protections of the First Amendment, which include obscenity, incitement to illegal action, and indecent speech [51]. The Court determined that Congress may, in exercise of its power to regulate broadcast communication, seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate the broadcasting stations [52].

The Court also explained that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them” [53]. Perhaps this is also the justification for not applying Title VII regulations to television employers. Do the differences between American workplaces and situation comedies justify differences in the Title VII standards applied to them?

The answer to this question is apparently “yes.” Recall Mr. Mackenzie, the executive at the Miller Brewing Company who was terminated for photocopying a page from the dictionary with the word “clitoris” on it [38-40]. Although Mr. Mackenzie never actually said the word to his secretary, the Miller Brewing Company determined that this act constituted sexual harassment under Title VII. Similarly, Jerry Seinfeld never actually said the word either, and this story line was deemed perfectly suitable for network broadcast television. The story line was protected by the free speech clause of the First Amendment.

CONCLUSION

It is likely sexual harassment will continue to invade our society through the television medium, probably in the form of story lines for situation comedies. The laugh tracks will continue to highlight the humor of the sexual references, innuendoes, and harassment. Viewers will continue to revel in the frivolity of television’s workplace antics, where victims are unharmed, harassers go unpunished, and employers do not face damages. Television will likely continue to mock the realities of workplace sexual harassment.

Although television situation comedies seem to make light of this very serious form of discrimination, it is important to remember that it is not the broadcaster’s responsibility to provide its viewer with television shows that abide by Title VII or guidelines set by the EEOC. Network situation comedies are protected by the First Amendment’s free speech clause. The First Amendment prohibits Congress

from making laws that abridge freedom of speech, and the exceptions to this rule do not allow Congress to tackle the content of television programs that are not obsolete or indecent [51].

The First Amendment prohibits regulation of this type of speech when it is presented on television. In the broadcast medium, sexual harassment is humorous. However, when the same speech is uttered in the workplace, Title VII defeats the First Amendment's free speech clause, and the speech is punishable.

It is an interesting exercise to impose Title VII regulations on fictional employers such as the partners at the law firm of Cage and Fish [4]. However, the ratings show that Americans tune into situation comedies that ridicule sexual harassment. Perhaps because the television programs allow viewers a means of escaping the realities they face in the workplace, or perhaps because viewers find the cause of action laughable. Whatever the reason, it is unlikely television sexual harassment will ever be regulated. Title VII responsibilities will remain with the employer. The employer will also have to face the consequences when the behaviors that are the focus of situation comedies seep into the workplace, lose their humor, and cause harm.

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