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"Because of … Sex": the Historical Development of Workplace Sexual Harassment Law in the USA

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Abstract The current article tracks the historical development of the law of workplace sexual harassment. It begins with a discussion of the implementation of the law that serves as the basis for most sexual harassment cases in the federal courts, Title VII of the Civil Rights Act of 1964. The article then discusses the developments that permitted sexual harassment to come within the purview of the antidiscrimination language of Title VII. Then, the major federal legal cases that have defined the contours of sexual harassment law are discussed. Finally, the current procedures to file sexual harassment claims in the Equal Employment Opportunity Commission, state agencies, and federal and state court are described.

Keywords Sexual harassment · Title VII · Quid pro quo · Hostile work environment

Sexual harassment is not a new phenomenon. Although the name and the legal processes involved in contemporary sexual harassment law are of relatively new vintage, the dynamic of sexual harassment in the workplace has always been an unfortunately common occurrence. Siegel (2004) wrote in a chapter titled, "A Short History of Sexual Harassment," that from chattel slavery, to domestic servants, to women in manufacturing in clerical position in the 1800s, there were many workplace contexts where men had coerced sexual relations from the women who worked for them. Often, the women themselves were blamed for being "promiscuous," and the likelihood of reporting a sexual assault was quite remote, given the potential damage to the woman's reputation, the risk for her prospects of a later marriage, and the low likelihood of legal sanctions for the criminal act. In the context of forcible rape, women needed to prove not only that the act was nonconsensual but also that she was overpowered by physical force despite her greatest physical efforts to resist. Short of this heroic effort to prevent the forcible rape, the law assumed that the woman wanted the sexual assault that occurred (Siegel 2004). Throughout the first two-thirds of the twentieth century, there was no legal process through which sexually harassed employees could seek legal redress, with tort law providing an inadequate vehicle to protect employees from sexual harassment. This article describes the development of the law of sexual harassment in the workplace as a form of sexual discrimination. First, the foundational federal law that undergirds sexual harassment cases, Title VII of the Civil Rights Act of 1964, is described. Next, the role of social activists, scholars, and the Equal Employment Opportunity Commission (EEOC) in defining sexual harassment as sex discrimination is discussed. Then, the development of the law of sexual harassment is traced through legal decisions of the U.S. Supreme Court and other federal courts. The contribution of state courts and state laws is then described, highlighting some important differences at the state level. Finally, the article discusses the current status of sexual harassment law in the USA. By nature of the breadth of this article, it necessarily cannot provide significant depth into these important areas of sexual harassment law. Fortunately, there exist a number of excellent books and articles that provide tremendous depth into the constituent topics addressed in this article.

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Title VII of the Civil Rights Act of 1964

The federal law that provides the foundation for sexual harassment law in the USA is the Civil Rights Act of 1964. In the early 1960s, the civil rights movement was taking shape and gathering steam. Discrimination against African-Americans was part of the fabric of daily life in many parts of the USA, and there were no federal laws that were focused on addressing this particular social evil. It was against this backdrop that in 1964 Congress was debating the Civil Rights Act, a broad and sweeping law designed to prevent discrimination against people of various minority classifications. Included in the version of the bill being debated were prohibitions on discrimination in employment settings based upon race, color, national origin, and religion. Against the concerted efforts of Southern Democrats, the bill appeared to be headed toward passage. Two days prior to the vote being called, an elderly Virginia Democrat, Howard W. Smith, proposed a one-word amendment to the bill; his amendment was to add the word "sex" to the list of categories for which discrimination would be prohibited. This amendment was not debated in committee nor subject to a hearing. Smith, a well-known racist, was strongly against passage of the bill. When he made his amendment, it was met with laughter and jocularity. Although the 12 female members of the House attempted to stifle the laughter, the day of debate ultimately was dubbed "Ladies Day in the House." There has been debate over the years about Smith's motive for inserting the amendment into the language of the bill. Many Northern legislators, who were strongly for passage of the bill to prevent racial discrimination, did not support Smith's amendment. Some theorize that Smith's amendment was an attempt to insert a "poison pill" into the law that would result in the bill not passing. There is some support for this theory in the EEOC's own literature (EEOC 2015). However, other commentators have pointed to Smith's long support for women's rights, dating back over 20 years (Dreiband and Swearingen 2015). The amendment had been suggested to Smith from the National Women's Party, which had long supported an Equal Rights Amendment. During the brief debate on the amendment on the House floor, Smith was concerned that the interests of women would be subordinated to the interests of minorities, and that without protection in the law, white women would suffer. The amendment passed by 35 votes. Although Smith ultimately voted against the entire bill, the legislation passed through Congress and was signed by President Lyndon Johnson on July 2, 1964. Included in the text of the law was a ban on discrimination in employment "because of ... sex." The relevant text read:

Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (Title VII of the Civil Rights Act of 1964).

From a brief review of the text of the law, it clearly prohibits discrimination in employment settings on the basis of sex. However, nowhere in the text of the law does it state that sexual harassment is prohibited under the law. The EEOC was the federal agency created by Title VII and tasked with drafting regulations and enforcing the law. Ultimately, it would be the EEOC that would bring the prohibition against sexual harassment within the ambit of Title VII. That process, however, was anything but quick and straightforward.

The Conceptual Development of Sexual Harassment Under the Law: Activists and the EEOC

After passage of the Civil Rights Act of 1964, many within the EEOC considered sex discrimination to be worthy of derision, met with either boredom or hostility (Dreiband and Swearingen 2015). Those within EEOC leadership believed that the number of claims of sex discrimination would be negligible relative to the other categories under Title VII. They were wrong. In the first year that records were kept, there were 2053 charges of sex discrimination filed with the EEOC, accounting for 33.5 % of the total of all claims (EEOC 2015). The EEOC soon developed policy guidance to deal with the large number of sex discrimination claims it was receiving. It issued guidelines in 1965, which were expanded in 1966, 1968, and 1972. Despite the significant activity regarding claims of sex discrimination in the late 1960s, the EEOC lacked the authority to litigate cases involving employment discrimination until 1972. That year, Congress passed the Equal Employment Opportunity Act, which provided the EEOC with litigation authority to back up its administrative findings in cases of discrimination. Under the EEOC process, once the EEOC had the opportunity to investigate a claim, or alternatively did not have time to investigate a claim, it would issue a "Right-to-Sue" letter, which the complaining party needed to have be able to bring a case to court, demonstrating that administrative remedies had first been exhausted.

Throughout this time, sexual discrimination cases did not include what is now known as sexual harassment; rather, it

included cases only where men and women were treated differently in employments settings, such as in hiring, firing, and other terms or conditions of employment. There was not a legal process available to address harassment of a sexual nature in the workplace, because it was not considered "discrimination" on the basis of sex. There was a logical and conceptual barrier in the interpretation of Title VII's prohibition of discrimination "because of ... sex" to apply to situations in which employees were not treated differently because of their gender but rather were harassed at work by their supervisors. Although there had been infrequent successful actions for egregious sexual misconduct, for the most part, Title VII was not a viable process for litigating claims of sexual coercion in the workplace.

The 1970s was a period of powerful feminist activism and commentary. An attorney and social activist named Catherine MacKinnon not only represented women in court but also wrote about the mistreatment of women in the workplace. She and other feminist commentators addressed the topic of the unequal treatment of women in the workplace through the practice of sexual coercion by employers. In her 1979 book, *Sexual Harassment of Working Women*, a culmination of her academic work from throughout the 1970s, MacKinnon presented a conceptual framework arguing that the sexualized treatment of women by their male employers was a form of sex discrimination based on social inequality. MacKinnon also delineated the different forms of sexual harassment that we use today, i.e., "*quid pro quo*" and "hostile environment" harassment (MacKinnon 1979). Quid pro quo harassment was when a request for sexual favors was offered in exchange for a tangible job benefit (e.g., a promotion) or for the prevention of an adverse job consequence (e.g., a demotion). Hostile environment harassment involved the permeation of a work setting with degrading or sexualized content that had the purpose or effect of creating a hostile, intimidating, or offensive environment that affected the conditions of employment. The work by MacKinnon was seen by many as forming the conceptual framework for the application of Title VII's prohibition of sex discrimination to the problem of sexual harassment in the workplace. Soon thereafter, federal courts and the EEOC began to use MacKinnon's analysis and terminology for the investigation of workplace sexual harassment cases (Avery and Fisk 2010). In 1980, the EEOC published its *Guidelines on Discrimination Because of Sex* (1980), which provided guidance to courts in dealing with sexual harassment. Included therein were working definitions of the two types of sexual harassment. The guidelines stated:

Section 1604.11. Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to or rejection of such conduct by an individual is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Once the EEOC had adopted the conceptual framework of MacKinnon and other feminist commentators that sexual harassment by supervisors is a form of sex discrimination prohibited by Title VII, the EEOC began to prosecute these cases using its enforcement authority. Already the EEOC had reasoned in amicus briefs that sexual harassment could violate Title VII. For example, in *Tomkins v. Public Service Electric & Gas Company* (1977), the EEOC argued in an appellate brief that the district court was "simply wrong" and "plainly wrong" in denying the appellant's claim for sexual harassment. The argument stated, "It is a violation of Title VII for an employer or its agent to condition the employment opportunities of a female employee on her sexual cooperativeness" ("Amicus Curiae Brief of EEOC" 1977, p. 10). The analyses from the cases pursued and argued by the EEOC as well as the *Guidelines* were used by various courts when addressing egregious sexual misconduct by supervisors.

The Adoption of Sexual Harassment as Sex Discrimination in Federal Case Law

The federal courts were not fertile soil for arguments that sexual coercion by supervisors was a form of discrimination because of sex for more than a decade after Title VII became law. Although there were some cases in the 1970s where female plaintiffs who were harassed were successful under Title VII, that was the exception and not the rule. An example of a lower court case where the female plaintiff was unsuccessful was *Barnes v. Train* (1974). In the order granting summary judgment to the defendants, the federal district court ruled that Title VII of the Civil Rights Act of 1964, as amended by the Employment Opportunity Act of 1972, does not offer redress for the plaintiff's complaint that her job was abolished because she rebuffed her male supervisor's sexual advances.

In *Williams v. Saxbe* (1976), a federal district court ruled that quid pro quo sexual harassment could form that basis of a successful Title VII action. In the case, the district court reviewed findings of an administrative hearing officer who had found that there had been discrimination due to retaliatory treatment after the plaintiff had rebuffed the sexual advances of her supervisor. The court agreed with the hearing officer that there was ample evidence to support a conclusion of a

violation of Title VII. The court wrote, "[T]he conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other" (pp. 657–658).

Considered by many to be the first federal appellate court decision recognizing quid pro quo sexual harassment as a violation of Title VII, the appeal of *Barnes v. Train* (1974), appealed under the name *Barnes v. Costle* (1977), was considered a watershed moment in sexual harassment jurisprudence. Included in the reasoning of the case, the court wrote, "To say, then, that she was victimized in her employment simply because she declined the invitation [for a sexual affair in exchange for a promotion] is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel" (p. 990). The court continued, "It is clear the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way" (p. 990). As can be seen from a review of these passages, the District of Columbia Court of Appeals made the argument that the sexual harassment was related to the gender of the employee; this provided the nexus needed to argue that the sexual harassment was discrimination "because of … sex" that comes under the purview of Title VII. Please note that the decision in *Barnes v. Costle* predated the publication of Catherine MacKinnon's book in 1979. Following the publication of the book, and the adoption of its analysis by the EEOC, sexual harassment cases began to be more successful for plaintiffs.

In the case of *Bundy v. Jackson* (1981), the District of Columbia Court of Appeals addressed the issue of hostile work environment sexual harassment. In the case, the plaintiff was a female employee who had informed her supervisor that some co-workers had propositioned her at work. In response, the supervisor told her, "[A]ny man in his right mind would want to rape you," and then he propositioned her. The plaintiff also described repeated sexual advances and questions about her sexual behaviors and preferences. When she complained, she was ignored and criticized. Ultimately, her bid for promotion was blocked. At the time of the case, no court had yet recognized hostile environment sexual harassment, but the court agreed with the plaintiff and EEOC that the behaviors to which she was subjected were psychologically debilitating, and as a result, she experienced discrimination. The court utilized the EEOC Guidelines section 1604.11(a)(3) in upholding a Title VII action under a claim of hostile work environment. The court stated, "What remains is the novel question whether the sexual harassment of the sort Bundy suffered amounted by itself to sex discrimination with respect to the "*terms*, *conditions, or privileges of employment*." Though no court has as yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination" (pp. 943–944).

The first U.S. Supreme Court case to address sexual harassment under Title VII was *Meritor Savings Bank v. Vinson* (1986). The plaintiff in the case, Mechelle Vinson, had been an employee at the bank for 4 years. She had meritorious promotions during that time. While working there, her supervisor made repeated demands for sexual favors. She admitted to having had sex with him 40 to 50 times, that he fondled her in front of others, followed her into the ladies' room, exposed himself to her, and forcibly raped her on a number of occasions. She did not use the bank's complaint procedures to complain about his behaviors. She was terminated for excessive use of sick time. After the termination, she filed a complaint alleging sexual harassment. Following an 11-day bench trial, the District Court denied relief, stating that if there was a sexual relationship, it was voluntary and did not affect her employment, concluding she was not the victim of sexual harassment. The Court of Appeals reversed, reasoning that the District Court had not considered hostile work environment harassment in its decision, that it allowed improper testimony about her method of dress and personal fantasies, and that the bank should be strictly liable for sexual harassment by supervisory personnel.

The issues before the Supreme Court were (1) whether hostile work environment harassment is actionable under Title VII; (2) whether plaintiff's behaviors are relevant in determining whether sexual advances are unwelcome; and (3) whether employers should be strictly liable for sexual harassment by supervisory personnel. The U.S. Supreme Court held (1) hostile work environment sexual harassment is actionable under Title VII; (2) evidence of sexually provocative speech and dress and not per se inadmissible as irrelevant; and (3) the existence of a grievance procedure and policy against discrimination, coupled with an employee's failure to invoke that procedure, does not necessarily shield an employer from liability for sexual harassment. The Court reasoned that there need not be tangible economic loss for a violation of Title VII and stated that pursuant to EEOC Guidelines, hostile or offensive work environment harassment is contemplated under the statute. It exists when verbal or physical conduct of a sexual nature is present and "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (p. 65). The Court differentiated this type of harassment from the quid pro quo type of sexual harassment, noting that both are viable claims under Title VII. In addressing whether the sexual conduct of a supervisor must be against the will of the employee for there to be sexual harassment, the Court stated, "[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not

forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'" (p. 68). "The correct inquiry is whether respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary" (p. 68). In its decision, the Court was vague about the standards for employer liability when a supervisor sexually harasses an employee.

In *Meritor*, the Supreme Court had held that hostile work environment harassment was a viable cause of action as sexual harassment under Title VII. What was not clarified in the case was the standard to be used to determine whether a work setting is a hostile environment. In the absence of further clarification, most jurisdictions used the "reasonable person" standard, which is ubiquitous in civil law. The reasonable person standard is supposedly an "objective" standard, in which the trier of fact is asked whether a reasonable person in the shoes of the plaintiff would have perceived the environment to be hostile. This standard is also used in other civil cases, such as in tort law to determine whether a defendant in a negligence case engaged in behavior that departed from the standard of care. Notably, it is a nongendered standard, as the reasonable person can be a man or a woman. Whether this standard is a good fit in sexual harassment cases, where the majority of plaintiffs are women, was an issue that had not been settled in law.

Thus, in the development of sexual harassment case law, one of the next major issues was whether the reasonable person standard is appropriate when determining whether conduct in a hostile work environment case is severe or pervasive enough as to alter the terms and conditions of employment. In the case of *Ellison v. Brady* (1991), the Court of Appeals for the Ninth Circuit addressed this issue. The court reasoned that employees do not need to endure sexual harassment to the point that their psychological well-being is seriously affected, such that they suffer anxiety and debilitation. Title VII's protections operate long before the point where sexual harassment victims need psychiatric assistance. The court then stated that when evaluating the severity and pervasiveness of sexual harassment, the victim's perspective should be the focus, which often will involve an analysis of the different perspectives of men and women, noting that conduct that men find unobjectionable may be offensive to many women. The court continued, "[W]e hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment" (p. 879). This standard was binding in federal courts in the Ninth Circuit, but was not a new national standard.

The next U.S. Supreme Court case to address sexual harassment was *Harris v. Forklift Systems, Inc.* (1993). The Court stated that it took the case to resolve a conflict among the various appellate circuits whether conduct in a hostile work environment case must seriously affect the employee's psychological well-being or cause the plaintiff to suffer injury. The Court held, "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment and there is no Title VII violation" (pp. 21–22). The Court continued by stating that Title VII comes into play before harassing behavior causes a nervous breakdown. A harassing work setting that does not seriously compromise the plaintiff's psychological well-being can still detract from job performance or prevent the person from advancing in her career. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, … there is no need for it also to be psychologically injurious" (p. 22). The *Harris* case solidified the analysis in *Ellison v. Brady* that the hostile environment does not need to be so severe as to cause psychological injury. However, it differed in its approach to the issues of reasonableness, offering a two-part test. The harassing conduct must be not only *objectively* hostile and abusive, but also the conduct must be *subjectively* hostile and abusive. In other words, as a threshold matter, the conduct must be objectively hostile and abusive; whether the plaintiff is extremely sensitive to the conduct or is exceptionally immune from the conduct, the conduct must be objectively hostile and abusive. Then, information can be used to determine whether the plaintiff considered the conduct to be subjectively hostile and abusive. It is here where information about the plaintiff's behavior could permit the defense to argue that the plaintiff did not subjectively consider the conduct to be hostile or abusive.

Notable in the Supreme Court's decision in *Harris* is that the Court used "reasonable person" language and not the "reasonable woman" standard propounded in *Ellison* in the Ninth Circuit. Nonetheless, in subsequent EEOC enforcement guidelines, the EEOC interpreted the *Harris* language to mean a reasonable person in the position of the victim ("EEOC Notice" 1994).

The genesis of sexual harassment law revolved around the prototypic case of a male employer engaging in sexual harassment of a female subordinate, using the power differential inherent in their respective positions to engage in sexual coercion. This is an example of quid pro quo harassment. With the development of the law on hostile work environment harassment, co-workers could be the primary harassers, but liability only would be found if supervisory personnel did nothing to prevent or remedy the harassment once they knew or reasonably should have known about it. While certainly possible for the dynamics to occur, there were few cases being

brought of men being the victims of sexual harassment at the hands of women.

Another factual scenario that presented a conceptual hurdle was same-sex harassment. With Title VII's prohibition of discrimination because of "sex," it was unclear how the law would treat sexual harassment by male supervisors or co-workers on a male victim. Foote and Goodman-Delahunty (1999) noted that for much of the history of sexual harassment law, courts had assumed that same-sex harassment was not actionable. The U.S. Supreme Court addressed this issue in the case of *Oncale v. Sundowner Offshore Services, Inc.* (1998). The plaintiff in the case was Joseph Oncale, a young man hired to work on an oil-drilling platform in the Gulf of Mexico. Shortly after he boarded the oil platform, he was subjected to severe sexual threats and assaults by some of the eight-person crew. Two men in the crew attempted to rape him; he was held down while another man rubbed his penis on Oncale; and in the shower, a co-worker shoved a bar of soap into his anus. Oncale complained to his supervisor, but the supervisor himself had been the subject of repeated sexual intimidation and assaults, and he did nothing to stop the abuse. Oncale quit the job. At the Fifth Circuit Court of Appeals, the court held that Mr. Oncale could not state a cause of action under Title VII for sexual harassment against male co-workers. A unanimous U.S. Supreme Court reversed the ruling of the Fifth Circuit Court of Appeals. In an opinion authored by Justice Scalia, the court had no problem with the conceptual challenge presented by same-sex harassment ("Oncale" 1998). Analogizing the fact pattern in the case to that of national origin discrimination, the Court cited its own precedent from 21 years earlier ("Casteneda v. Partida" 1977) in stating, "Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group" (*Oncale* p. 78). Quoting *Harris v. Forklift Systems*, the court stated, "When 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, Title VII is violated" (p. 78). The Court concluded that from a review of its precedents, there is no rationale for a categorical rule barring same-sex harassment claims from the purview of Title VII. The Court continued, "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." Rather, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms of conditions of employment to which members of the other sex are not exposed" (p. 80).

Some commentators have concluded that a close reading of the decision in *Oncale* would permit sexually harassing conduct if the harasser targeted both men *and* women (Sherwyn 2015). It is argued that to show discrimination because of sex, the harasser must treat men and women differently. Thus, a bisexual harasser who targeted both men and women could arguably avoid liability because there was no differential treatment of men and women, and therefore would be no discrimination because of sex.

In the *Meritor* decision in 1986, the Supreme Court did not squarely address issues of employer liability for the harassing conduct of supervisors and co-workers of the victim. In a pair of companion cases decided the same day in 1998, *Faragher v. City of Boca Raton* (1998) and *Burlington Industries, Inc. v. Ellerth* (1998), the U.S. Supreme Court addressed the issue of employer liability in sexual harassment cases. In the *Faragher* case, the facts involved lifeguards in the City of Boca Raton. Beth Ann Faragher, who worked as a lifeguard during the summers between 1985 and 1990, complained that two of her immediate supervisors created a sexually hostile work environment by subjecting her and other female lifeguards to unwelcome touching, lewd remarks, and degrading language about women. Her supervisor also said he would never promote a woman to be a lieutenant and told her that if she did not date him, she would clean toilets for a year. Faragher sued the city for nominal damages, costs, and attorney's fees. The Court first reviewed the standards for finding of liability in sexual harassment cases, adding that Title VII is not intended to operate as a general civility code. Also, the Court stated that in quid pro quo cases where employment decisions are made, it is appropriate to impute knowledge and responsibility to the employer. In deciding against a finding of automatic liability for the harassing behavior of supervisors, the Court was concerned about finding liability for behaviors that the employer could do nothing about. Ultimately, the Court decided to permit an affirmative defense by the employer to show that the employer had exercised reasonable care to avoid harassment and to eliminate it when it might occur, while also showing that the complaining employee failed to act in a reasonable manner by not utilizing the employer's procedures to prevent the avoidable harm. The Court then announced the holding for both the *Faragher* case and the *Ellerth* case (below).

In the *Ellerth* case, the plaintiff was Kimberly Ellerth, a salesperson for Burlington Industries. She asserted that she experienced constant harassment from her supervisor, Ted Slowik. Slowik was a mid-level manager but not Ellerth's direct supervisor. He suggested that she had to submit to his sexual advances or face retaliation, and he engaged in a number of instances of overt requests for sexual favors, none of which she did. He also frequently discussed her in a sexualized way, suggesting that she enhance her sex appeal for her job. The U.S. Supreme Court began its discussion by deemphasizing the significance of the categorizations of quid pro quo and hostile work environment claims. The Court stated, "When we assume discrimination can be proved, however, the factors we discuss below, and not the categories of quid pro quo and hostile work environment, will be controlling on the issue of vicarious liability. That is the question we must resolve" (*Ellerth*, p. 754).

The Court stated that when there is a tangible employment action taken by the supervisor, the injury could not have been inflicted absent the authority in the agency relationship, and it is an act of the employer. The Court then announced the holding for both the *Ellerth* case and the *Faragher* case,

> 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. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment (*Ellerth*, p. 765; *Faragher*, pp. 807–808).

This two-pronged affirmative defense only is available in cases where the employer did not take a tangible employment action (i.e., it is available most often in cases of hostile work environment harassment or where there are unfulfilled promises or threats in a quid pro quo case). In most circumstances, but not all, the defense will require the employer to show that it has a viable sexual harassment policy with appropriate complaint procedures. Also, the employer will most often have to show that the employee unreasonably failed to use the employer's complaint procedure. An immediate side-effect of the decisions in *Faragher* and *Ellerth* was the spawning of a cottage industry of sexual harassment "consultants" offering their services to businesses to draft sexual harassment complaint policies, so that businesses would be able to avail themselves of this affirmative defense in later sexual harassment cases.

The U.S. Supreme Court addressed the issue of "constructive discharge" in a sexual harassment case in *Pennsylvania State Police v. Suders* (2004). When determining that there has been a tangible employment action in response to sexual harassment, usually, the issue is demotion or firing. In *Suders*, the employee argued that the harassment was so severe that there was no choice but to quit the job. In addressing the appropriate standard to use, the Supreme Court concluded that in most circumstances, an employee's decision to quit the job will not be a "tangible employment action" under *Faragher* and *Ellerth*. The Court held that a plaintiff only can show a constructive discharge in a hostile work environment case with both evidence of an actionable hostile work environment claim and a further showing that "the abusive working environment became so abusive that her resignation qualified as a fitting response" (pp. 133–134). When this does happen, however, the affirmative defense available in *Faragher* and *Ellerth* will not be available to the employer.

In 2013, the US Supreme Court redefined what a "supervisor" is for purposes of Title VII liability. In the case of *Vance v. Ball State University* (2013), the Court held "that an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim" (p. 2439). This was a significant narrowing of the definition of supervisor advocated by the EEOC in its Enforcement Guidance (EEOC 1999). In holding that under Title VII that for vicarious liability a supervisor must be empowered to take tangible employment actions against the victim (e.g., hiring, firing, failing to promote, and significant reassignment), the Supreme Court removed from consideration as a supervisor all those in the chain of command above an employee who have control over the daily work of a harassment victim but who does not have the authority to actually fire the person. The ostensible reason for doing so was to provide clarity about who is a supervisor for imputing vicarious liability on the employer and who is simply a co-worker, for which the employer must be shown as negligent in not stopping the harassing conduct. In other words, the employer knew or should have known of the offensive conduct and failed to take reasonable, prompt, and effective actions to stop the conduct. In co-worker harassment cases, the *Faragher*/*Ellerth* affirmative defense is not available to the employer, because it is not a vicarious liability case. Rather, the argument is that the employer was negligent in training, retaining, or supervising harassing employees, or was negligent in responding to complaints of harassment.

Retaliation as a Violation of Title VII in Sexual Harassment Cases

Retaliation claims arise in a harassment context when an employee suffers an adverse action by an employer when the

employee has opposed discriminatory harassment or has participated in governmental proceedings to enforce antidiscrimination laws (Avery and Fisk 2010). Section 704(a) of Title VII states that it is an unlawful employment practice to discriminate against employees or applicants for opposing any practice that is a violation of the law under Title VII or has engaged in proceedings to enforce Title VII.

In *Burlington Northern & Santa Fe Railway Co. v. White* (2006), the U.S. Supreme Court addressed the standards that must be used when courts are faced with claims of retaliation when an employee exercises her rights under Title VII. The Court concluded that the anti-retaliation provision in Title VII is not confined to employment or workplace actions. The provisions cover employer actions that would be materially adverse to a reasonable employee or applicant for a job. They must be harmful to the point that they could dissuade a reasonable worker from making or supporting a charge of discrimination. Notably, the retaliation action can be successful even if the underlying discriminatory behavior would not rise to the level of a successful harassment claim; the standard is tied to the retaliatory act, not the underlying conduct that forms the basis of the Title VII claim.

Procedures for Filing Claims Alleging Sexual Harassment

It is a requirement that claimants exhaust all administrative remedies before they can pursue their sexual harassment cases in court. The EEOC is the administrative agency that was created to enforce Title VII and other federal antidiscrimination laws. What exhausting administrative remedies means is that first the claimant must file a claim with the EEOC (and/or with their local or state fair employment practice agency).

There are time deadlines to filing a claim with the EEOC (Title VII, Section 706). The time requirement for filing a charge with the EEOC is either 180 or 300 days after the alleged unlawful action occurred. The deadline is 180 days if the state where the action occurred does not have a state or local agency that can provide relief under the law. The time limit is 300 days if the state where the action occurred has a state or local agency that is authorized by state law to provide the employee relief from employment discrimination or to otherwise begin criminal proceedings against those practices. In those states, a potential plaintiff must wait 60 days after proceedings begin in the state or local agency before filing a charge with the EEOC.

After the EEOC then investigates the charge, it will either dismiss the charge or attempt informal methods of conference, conciliation, and persuasion to eliminate the unlawful practice. Upon dismissal of the charge or the failure to enter into a conciliation agreement within 180 days of filing the charge, the EEOC will notify the aggrieved employee, who then has another 90 days to file the case in civil court. However, in most workplace harassment cases, the EEOC or relevant state agency conducts investigations in only a small fraction of the cases that are filed with the agency (Avery and Fisk 2010). Therefore, in most cases, the EEOC issues a "Right-to-Sue" letter to the employee, who then has 90 days from receipt of the letter to file a complaint alleging a Title VII violation in court.

One of the issues that has been litigated has been when an unlawful employment practice has occurred, as there are firm deadlines for filing the charge with the EEOC. With discrete events such as firings, demotions, and pay cuts, the 180-day clock begins to run from the day the discriminatory action took place. Recall the deadline is extended to 300 calendar days if the state or local agency enforces a law that prohibits employment discrimination on the same basis. If more than one discrete discriminatory event took place, and the claim is not one of hostile work environment, the 180/300-day deadline applies to each separate act. In 2002, the U.S. Supreme Court addressed the issue of when an event occurred in *National Railroad Passengers Corp. v. Morgan* (2002). In the case, the Court distinguished between different types of employment discrimination claims (e.g., discrete acts, retaliation, and hostile work environment). Although discrete acts of discrimination are clear for purposes of the timing deadlines, hostile work environment cases are different. In those cases, which can be comprised of numerous small acts that collectively lead to a hostile work environment, the Court recognized that the basis for the claim is not a single act, but many that occur "over a series of days or perhaps years," which "collectively constitute one 'unlawful employment practice'" (p. 117). The Court concluded, "Provided that an act contributing to the claim occurs within the charging period, the entire time period of the hostile environment may be considered by a court for the proposes of determining liability" (p. 117). Thus, harassing conduct that occurred outside of the deadline for filing if it was a discrete act can nonetheless be considered if it was part of a hostile environment claim and the last act of harassment fell within the relevant deadline.

State-Based Protections Against Sexual Harassment in the Workplace

Until now, the focus in this article has been exclusively upon federal law and protections to address sexual harassment in the workplace. However, a myopic focus on federal law presents only half the picture, as each state also provides its citizens with protections against sexual harassment in the workplace, and those protections may be more extensive than federal protections. These state-based agencies, collectively termed "Fair Employment Practices Agencies" (FEPAs), enforce laws similar to those enforced by the EEOC, but they may provide protections to those not covered explicitly under federal law (e.g., discrimination based upon marital status, with/without children, and sexual orientation). As with the

EEOC, employees must first make their complaints with the state-based FEPA, who investigate the claims prior to permitting a private lawsuit. These FEPAs also may have different filing deadlines, standards for determining scope of protections, and available relief. In her book *Sexual Harassment in the Workplace*, Mary Boland (2005) notes a number of reasons that a potential plaintiff may want to pursue a state claim rather than a federal claim. Boland states that these reasons potentially include: (1) a longer time period with which to file a claim; (2) coverage of smaller employers beyond the scope of Title VII; (3) the chance to charge a supervisor personally; and (4) more advantageous remedies, which could include no cap on damage awards. It also is important to note that state-based FEPAs are often determining state law regarding sexual harassment. Title VII is a part of a federal statute, and how the Supreme Court interprets federal statutes is binding on courts that are applying those statutes. However, individual states are free to apply greater protections in their own state laws related to harassment.

In many circumstances, state FEPAs have a work-sharing agreement with the EEOC that facilitates dual-filing of charges. Thus, if an employee files with the EEOC and the charge is also covered by state or local law, the EEOC will dual-file the charge with the relevant state FEPA; similarly, if the employee files with the state FEPA and the allegations include actions covered by law enforced by the EEOC, the state FEPA dual-files the charge with the EEOC.

In addition, for those state FEPAs that have contracts with the EEOC, a party who filed a charge can request the EEOC to review the determination made by the state FEPA. If the request for review is received within 15 days of receipt of the FEPA's determination, the EEOC will review that decision. Included in the request should be the reason the party is requesting the review (usually involving incomplete investigation or new information).

Alternatives to Filing a Claim Under Title VII

The focus of this article has been the development of the law of sexual harassment under Title VII of the Civil Rights Act of 1964. However, employees are not limited to Title VII if the facts surrounding the workplace harassment permit filing a claim under a different legal theory or cause of actions. As noted above, every state has antidiscrimination laws that protect its citizens from sexual harassment and discrimination. A plaintiff may elect to pursue an action under those state law antidiscrimination statutes, perhaps in addition to the Title VII claims, in state court. Also, if the facts permit it, plaintiffs can file a "Section 1983" claim under 42 U.S.C. section 1983, which prevents a person acting under color of state law from violating the constitutional or other federal statutory rights of the employee.

Common law and state law tort actions can be brought against an employer for conduct that meets the prima facie case elements of the various tort actions. Prior to the federal law under Title VII, which permits pain and suffering and punitive damages, common law tort actions were the primary vehicle used by plaintiffs to assert a violation against them by an employer. Foote and Goodman-Delahunty (2005) noted that some of the more popular tort claims for employment-related actions include negligent and intentional infliction of emotional distress, invasion of privacy, assault, battery, defamation, false imprisonment, wrongful discharge, negligent hiring, negligent supervision, and negligent retention. Also, when filing a lawsuit under Title VII (after the EEOC has investigated and issued a Right-to-Sue letter), the attorney may include various other tort claims for which the conduct complained of is consistent with the elements of the torts.

Conclusion

This article discussed the historical development of sexual harassment law in the USA under Title VII of the Civil Rights Act of 1964. Suffice it to say that this review is, by necessity, cursory, given the expansive body of law that has been produced in the federal court system. This review highlighted many of the key developments, including the passage of Title VII, the challenges in applying Title VII to the problems of sexual harassment during the early years of the law, and the key U.S. Supreme Court cases that have set the boundaries for sexual harassment jurisprudence in the USA under Title VII. Unfortunately, sexual harassment in the workplace remains all-to-common, and Title VII will likely continue to be the primary vehicle to vindicate the rights of those who have been sexually harassed for years to come. The law of sexual harassment has come a long way since the insertion of the word "sex" into the bill as an amendment to the Civil Rights Act of 1964 during the final days of debate on the floor of the U.S. House of Representatives. Few would have dared think that the robust body of law we have today to protect workers from sexual harassment would have grown out of an antidiscrimination law that, among other classifications, prohibits discrimination "because of … sex."

Compliance with Ethical Standards

Conflict of Interest The author declares that he has no conflict of interest.

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