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Sexual Harassment in the Workplace: Legal Attempts to Resolve a Cultural Problem

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ABSTRACT

This paper is going to detail the legal definitions and imposed liability for sexual harassment in the workplace. A historic discussion of harassment and the courts attempts to ameliorate the prevalence of this pervasive societal problem will be analyzed. Social and psychological factors in the under and delayed reporting of workplace harassment will be explained. Finally, proposed solutions, both legal and cultural, will be examined and proposed.

Keywords

Sexual harassment, employer liability

1 INTRODUCTION

Not everyone is Harvey Weinstein – morally or financially. The #MeToo movement has renewed awareness for a workplace epidemic reminiscent of Anita Hill’s televised testimony before the Senate Judiciary Committee in October 1991. Sexual harassment in the workplace harms victims, families, human relations and all of society. The law must make every effort to eliminate sexual harassment.

If the law is to contribute to ameliorating this pervasive harm, the remedies the legal system should provide must include employment policy modification, training in order to induce behavior modification and an award of meaningful monetary damages. Monetary damages are only meaningful if liability is imposed on a responsible, financially capable entity. In many cases, the employer of the victim and usually the harasser, as well, are the responsible parties.

This paper will explore and detail employer liability for sexual harassment in the workplace under the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991 and subsequent administrative and court interpretations. The employer’s liability for harassment committed by the employee’s peers, supervisor, clients, vendors and officers will be distinguished under current law.

Part one will define sexual harassment in the workplace. The elements of “unwelcomeness,” based on sex and affecting a tangible or intangible condition of employment, will be discussed individually. How these required terms have been interpreted, both historically and from jurisdiction to jurisdiction, is vital to employers and employees seeking to implement policies and consequences to halt sexual harassment in the workplace.

Part two of this paper will look at employer liability for sexual harassment in the workplace. The different legal requirements for employer liability depending on who the alleged harasser is and what steps the employer took and when the employer took them to prevent or stop the harassment. As the opening of this paper flippantly thankfully, not everyone is Harvey Weinstein. Victims of sexual harassment may successfully establish a violation of the law and damages, but if the only person held accountable cannot pay the judgment, how can the law and the system even portend to make the victim whole?

Part three will examine the prevalence of workplace sexual harassment. EEOC complaints and various studies attempting to measure the pervasiveness of this problem will be examined. The gap between the significant number of reported instances, according to research surveys, and the number of reported complaints is problematic. Partially explainable by evidentiary difficulties, the #MeToo social media phenomenon may indicate a more serious cultural problem with combatting workplace harassment. The research of Princeton professors, Margaret E. Tankard and Elizabeth Levy Paluck, discussing the phenomenon and its rationale of society’s reinforcement for non-reporting instances of sexual harassment will be placed in context for legal ramifications.

Part four will examine various approaches to modify current law in light of an increased public awareness of the sexual harassment problem. New York State has initiated legislation proposing mandatory training, limitations on the use of

nondisclosure agreements and prohibitions in using public funds to compensate victims of sexual harassment by public officials. The efficacy and probable impact of such proposals will be interpreted, along with additional suggestions, for mitigating sexual harassment in the workplace and will be expanded upon.

2 SEXUAL HARASSMENT IN THE WORKPLACE DEFINED

What is actionable under the law and what is rude, unprofessional, uncivil or would incite a reasonable parent of three daughters to punch out a pig are usually two different standards. Both must be prevented. Both negatively impact our families, our workplaces and our society. This paper is about what is actionable under the law.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to terms conditions or privileges of employment, because of race color, religion, sex or national origin (42 U.S.C. § 2000). Sexual harassment, as well as harassment based on race, religion and national origin, has been held to constitute discrimination as proscribed by Title VII.

Sexual harassment in the workplace is unwelcome conduct based on sex that affects a tangible or intangible condition of employment. Not all conduct based on sex in the workplace is illegal. Conduct which does not rise to the standard prohibited under section 703 of Title VII of the Civil Rights Act of 1964 as amended and subsequent case law progeny (*Meritor Savings Bank v. Vinson*, 1986) is still important to prevent and may result in adverse employment actions based on employment contracts or employment at will status.

Unwelcome conduct is not the same as voluntary conduct. In *Vinson*, the US Supreme Court held the correct inquiry under the Title VII harassment claim "...is whether (the victim) by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary" (*id.*).

Evidence the victim contemporaneously protested and communicated her unwelcomeness is helpful but not required. The complainant's case is strengthened as to satisfying the "unwelcome" requirement if lack of welcome was expressed in a timely manner and the strength of the argument improves if the protest is made to the harasser directly, ideally in front of reliable neutral witnesses.

Variables which cloud the case include a prior sexual relationship with the defendant-harasser, the complainant's history of behaving in a sexually aggressive manner or using sexually-oriented language in the workplace (*Gan v. Kepro Circuit Systems*, 1982). A careful balancing of conduct and character generalizations when attempting to determine unwelcomeness is cautioned by the Court in *Vinson* (477 U.S. 57, 1986).

Entering a workplace that has a history of anti-female or abusive has rarely been interpreted as indicating welcomeness on the part of the new female employee. A majority of courts and the Commission believe a woman does not assume the risk of harassment in these circumstances (*Barbetta v. Chemlawn Services Corp.*, 1987).

"Conduct based on sex" may mean either the conduct was of a sexual subject matter or the harasser's conduct was because of the victim's sex. If the victim is being harassed or the victim of a hostile work environment because of their gender or sexual orientation (*EEOC v. Scott Medical Health Center*, 2016) a Title VII violation has occurred (*Hicks v. Gates Rubber Co.*, 1987).

The unwelcome conduct based on sex must affect a term or condition of employment. If the term is a tangible such as the discrimination has direct economic consequences, such as termination, demotion or pay cuts, the common categorization is "Quid Pro Quo" sexual harassment (*Vance v. Ball State University*, 2013).

When the condition of employment affected is intangible, the "hostile environment" created must be severe or pervasive to a reasonable person (*Harris v. Forklift Systems, Inc.*, 1993). Individual evidence of psychological harm was not deemed necessary by the Court. The focus should be on whether an ordinary person would perceive and does perceive the environment to be hostile or abusive according to Justice O'Conner who wrote the majority opinion in *Harris*. No one factor alone determines whether a particular conduct violates Title VII. As the EEOC Guidelines emphasize, "the Commission will evaluate the totality of the circumstances."

3 PART TWO, EMPLOYER LIABILITY FOR SEXUAL HARASSMENT IN THE WORKPLACE

The employer is strictly liable for quid pro quo sexual harassment (*Burlington Industries, Inc., v. Ellerth*, 1998). Under theories of agency law if a tangible condition of employment was affected, the employer is vicariously liable if said action was conditioned upon unwelcome conduct based on sex.

An employer is liable for their employees creating a hostile work environment based on the following rules as outlined in *Ellerth* and *Faragher* (*Faragher v. Boca Raton*, 1998)

- 1) If a hostile work environment is created by a co-worker, vendor, client or other third party in the workplace, the employer is liable if they knew or reasonably should have known of the harassment and failed to stop it (Burlington Industries, Inc., v. Ellerth, 1998; Faragher v. Boca Raton, 1998).
- 2) If a hostile work environment is created by the supervisor of the victim, the employer is vicariously liable subject to the following affirmative defense. If the employer can prove reasonable care to prevent and correct the harassing behavior and the employee/victim failed to take advantage of any preventive or corrective opportunities that could have avoided or reduced the harm the employer may avoid liability (Faragher v. Boca Raton, 1998).

The definition of “supervisor” was a subject of dispute among the circuits until 2013. In Vance, the Court held that for purposes of Title VII vicariously liability for a hostile work environment, “supervisor” only if the person is empowered by the employer to take tangible employment actions against the victim (Vance v. Ball State University, 2013).

With the definition of “supervisor” settled by Vance, the most common issues of fact once the severe or pervasive according to a reasonable person hostile environment has been established is what actions must an employer take to successfully satisfy the affirmative defense established by the Court?

Reasonable care to prevent the harassment is the first prong. A viable grievance procedure effectively disseminated is part of the minimum action expected to establish compliance. A viable grievance procedure includes:

- 1) an unequivocal statement that harassment will not be tolerated,
- 2) a definition of prohibited harassment,
- 3) examples of what constitutes harassment,
- 4) a description of a reporting system that includes multiple modes of communication and multiple responsible people to report to,
- 5) a statement that reports of alleged harassment will be promptly acted upon and kept confidential as much as possible under the law,
- 6) a statement that retaliation against anyone who submits a report or acts as a witness will be protected from retaliation and
- 7) a warning that anyone who retaliates against a complainant or witness of a harassment report will be disciplined appropriately (Feldblum & Lipnic, 2016).

As noted in Faragher, the viable grievance procedure must be effectively communicated to the employees. Effective dissemination includes not just availability, but timely communication in a manner likely to be received by the intended employees (Faragher v. Boca Raton, 1998).

Courts have additionally looked at the proactive efforts the employer has undertaken to prevent workplace harassment. It has been suggested by some scholars and commentators that employers act more often than not to take actions to avoid liability rather than actually prevent the harassment (Bisom-Rapp, 2018).

The U.S. EEOC Select Task Force on the Study of Harassment in the Workplace reported in 2016 that sexual harassment training alone may not change employees’ attitudes about harassment. It further opined that some training might actually have the opposite effect. The task force reviewed 30 years of social science research and found current training programs designed to prevent workplace harassment had resulted in no meaningful improvement. “That was a jaw-dropping moment for us,” said EEOC Commissioner Victoria A. Lipnic in a Sunday Session at the Society for Human Resource Management 2016 Annual Conference & Exposition (Folz, 2018)

4 PART THREE, WHY IS WORKPLACE SEXUAL HARASSMENT STILL PREVALENT?

Surveys indicate that at least one quarter of all women have experienced sexual harassment in the workplace (Langer, 2011). The problem persists across many demographic delineations and professions although certain historically male dominated professions have greater reported incidences of sexual harassment. For example, in the construction industry where women comprise less than 3% of the workforce, a U.S. Department of Labor study found 88% of female construction workers report being sexually harassed (Goss Graves et al., 2014). Even in white collar jobs like medicine and science, surveyed incidences of workplace harassment remain significant. Almost one-third of medical academic faculty reported being subjected to harassment in their workplace (Jagsi et al., 2016). In another report, 64% of survey respondents reported experiencing sexual harassment in their scientific fieldwork setting (Clancy, Nelson, Rutherford, & Hinde, 2014).

According to The Restaurant Opportunities Centers United Forward Together, women working in industries with a higher than average proportion of lower paying jobs reported even more significant instances of sexual harassment. In a study of restaurant workers, two-thirds of female employees and more than half the male employees surveyed reported being sexually harassed by management. In the same study both females and males, 80% and 70% reported being harassed by co-workers and 80% of females and 55% of males reported being victimized by sexual harassment by customers (2014).

Despite these alarming reports, few victims of harassment formally file charges with authorities or even make a formal complaint to their employer. According to studies analyzed by the 2016 EEOC Task force, 87%-94% of victims of workplace harassment do not file a formal complaint (EEOC v. Scott Medical Health Center, 2016).

The EEOC Report reported that employees fail to file reports, “because they anticipate and fear...disbelief of their claim (Lonsway, Paynich, & Hall, 2013); inaction on their claim; receipt of blame for causing the offending action (Fitzgerald, Swan, & Fischer, 1995); social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation” (Barling, & Cooper, 2008). Evidence seems to support many of these concerns.

One study found 75% of employees who raised concerns about workplace harassment faced some sort of retaliatory actions in their workplace. So why #MeToo? Is awareness and willingness to challenge the status quo now experiencing a cultural shift? Maybe not.

In the June 2018 Stanford Law Review open forum on Sexual harassment, Dean Nicole Buonocore Porter, distinguished the victims of Harvey Weinstein and others coming forward to confront their harassers from current victims, “it’s important to be realistic about whether the #MeToo movement will lead to any real transformation in workplaces around the country. Many of the people who complained were not current employees of the companies who employed the men who harassed them. For instance, many of the women who accused Harvey Weinstein of harassment and assault were not his employees at the time of the harassment (Desta & Busis, 2018). Many were complaining about harassment that had occurred many years ago, long past the statute of limitations. In short, many of these stories were told for the cathartic effect of telling a story of pain and outrage.

But for women reporting harassment of a current supervisor or coworker, telling their story likely does not have the same cathartic effect. For some women, reporting harassment is fraught with risk (Lawton, 2007), and often brings very little reward. The reason for that is simple—retaliation” (Porter, 2018).

Researchers have posited that while retaliation unfortunately is a realistic response, the fear of retaliation often accomplishes the identical outcome. The likelihood of retaliation, humiliation, professional discrimination, social retribution and the like quite effectively discourages the potential reporting of workplace harassment (Cortina & Magley, 2003). Other studies reported victims who do report sexual harassment may experience organizational indifference, hostility, adverse job repercussions and psychological distress. One researcher testified to the EEOC Task Force, “It is actually unreasonable for employees to report harassment to their companies...reporting is a gamble that is not worth taking in terms of individual well-being” (Bergman, 2015).

In Norm Perception as a Vehicle for Social Change, Princeton Professors Margaret Tankard and Elizabeth Levy Paluck posit why sexual harassment is rarely reported. They explain people have an inclination to behave consistent with social norms. If victims of sexual harassment in the workplace complain or report the victimization and this behavior results in retaliation, humiliation, ostracization and blame, then future victims learn not to report the harassment. The social norm becomes not to report the harassment (Tankard & Paluck, 2016).

5 PART FOUR, WHAT CAN BE DONE

Mandatory sexual harassment policies, training and expanded employer liability have made only marginal progress at best in eliminating sexual harassment in the workplace. Some academics have advocated expanding anti-retaliation laws (Porter, 2018) and others have advocated making nondisclosure/non-disparagement agreements unenforceable (Berkowitz, 2018). Changes in the law while the focus of this paper; unfortunately, can only accomplish so much. Preventing sexual harassment as well as harassment of all protected classes in the workplace is a societal issue with the most meaningful target for resolution being the corporate culture itself.

The EEOC Select Task Force concluded, “workplace culture has the greatest impact on allowing harassment to flourish, or conversely. In preventing harassment” (Feldblum & Lipnic, 2016). A commitment to a diverse, inclusive, respectful workplace where harassment is not acceptable or tolerated. Leadership supported systems that hold everyone accountable is also critical to creating a workplace free and intolerant of harassment. Finally, leaders must model the desired behavior. Leadership begins at the top and leaders who live by the organizational values they profess create a foundation for maintaining that organizational culture.

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