LATEST DEVELOPMENTS IN SEXUAL DISCRIMINATION
AND HARASSMENT

By

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I. SEXUAL HARASSMENT: AN OVERVIEW

A) The Difference Between Quid Pro Quo and Hostile Environment

Sexual harassment usually involves a plaintiff who is personally subjected, as opposed to a witness of, one or more of the following behaviors:

1. Unwelcome sexual advances;
2. Acts of gender-based animosity (hostile conduct based on the victim's gender); or
3. Sexually charged workplace behavior (conduct that is offensive on the basis of gender to persons whether or not they are the targets of the conduct).

Sexual harassment is unlawful sex discrimination under either of two legal theories: "quid pro quo" or "hostile environment." All forms of this behavior may constitute a hostile environment, but a claim of quid pro quo harassment necessarily involves unwelcome sexual advances. Sexual harassment claims usually are analyzed as disparate treatment cases.

The essence of a quid pro quo claim is that an individual has been forced to choose between suffering adverse employment actions and submitting to sexual demands. This "tit for tat" scenario is an obvious form of sex discrimination.

The essence of a hostile environment claim, by contrast, is that an individual has been required to endure a work environment that, while not necessarily causing any direct economic harm or even significant psychological or emotional harm, substantially affects a term or condition of employment.

The law of harassment prohibition has evolved over the last 30 years. Title VII prohibits sex discrimination in employment. Section 703(a)(1) of Title VII makes it "an unlawful employment 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." 42 U.S.C. § 2000e-2(a)(1). Yet not until the 1976 decision of Judge Charles Richey in Williams v. Saxbe, 413 F.Supp. 654, 657, 12 FEP 1093 (D.D.C. 1976) did a court first recognize sexual harassment as a form of sex discrimination. The following year, the D.C. Circuit in Barnes v. Costle, 561 F.2d 983, 15 FEP 345 (D.C. Cir. 1977) confirmed that quid pro quo harassment violates Title VII.

In 1986, the Supreme Court, in Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 FEP 1822 (1986) held that Title VII prohibits harassment in employment, even if the harassment does not cause a direct financial injury. Bank teller Mechelle Vinson admitted to having had sexual relations 40 to 50 times with her supervisor. She said she agreed to do so out of fear of losing her job. The bank, citing the absence of any complaint by Vinson, claimed ignorance of any improper conduct by her supervisor Taylor.
The Supreme Court rejected the defense's argument that liability was incompatible with the trial court's finding that Vinson's submission to Taylor's advances had been "voluntary." The Supreme Court held that voluntariness is not determinative; the correct question was whether Vinson, by her conduct, had indicated that the sexual advances were unwelcome. (Id. at 68). The Court acknowledged that the distinction between voluntariness and welcomeness required factfinders to make fine distinctions, often based on the credibility of witnesses.

Importantly, the Supreme Court also rejected the argument that the plaintiff had to suffer economic loss, an important factor in the Barnes analysis. Discrimination because of sex violates Title VII even if it affects only the psychological aspects of employment. (Id. at 64). As set forth, supra, the law's development has required "severe or pervasive" incidents and an interference with the terms of one's employment to be actionable.

B) The Burden Shifting Paradigm: Plaintiff's Case for Quid Pro Quo Harassment

In Henson v. City of Dundee, the Eleventh Circuit set forth the elements of a prima facie case of quid pro quo harassment:

1. membership in a protected group;
2. unwelcome sexual advances;
3. an adverse employment action;
4. the causal link between the rebuffed advance and the adverse employment action, which was a tangible term of employment;
5. the employer's responsibility, either through affirmative misconduct or ratification of the individual's illegal conduct.

The basic elements of a claim have been defined by the circuits in the following leading cases:


Eighth Circuit: Moylan v. Maries County, 792 F.2d 746, 749, 40 FEP 1788 (8th Cir. 1986).

Ninth Circuit: Nicols v. Frank, 42 F.3d 503, 511, 66 FEP 614 (9th Cir. 1994), adopting a test based on the EEOC's guidelines: unwelcome sexual advances constitute sexual harassment if submission to such conduct is made a term or condition of employment or if submission or rejection is used as a basis for employment decisions. See 29 C.F.R. §§ 1604.11(a)(1)-(2).

Tenth Circuit: Hicks v. Gates Rubber Co., 833 F.2d 1406, 1412-14, 45 FEP 608 (10th Cir. 1987).

Eleventh Circuit: Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1564, 45 FEP 160 (11th Cir. 1987).

A prima facie case of quid pro quo harassment, like any disparate treatment claim, requires the complainant to prove that she suffered a tangible loss as to term, condition, or privilege of her employment.

In Karibian v. Columbia University, 14 F.3d 773, 63 FEP 1038 (2d Cir. 1994) cert. denied, 114 S.Ct. 2693 (1994) the court held that "[o]nce an employer conditions any terms of employment upon the employer's submitting to unwelcome sexual advances, a quid pro quo claim is made out, regardless of whether the employee (a) rejects the advances and suffers the consequences, or (b) submits to the advances and suffers the consequences, or (b) submits to the advances in order to avoid those consequences." See also, Highlander v. KFC Nat'l Mgmt. Co., 805 F.2d 644, 648, 42 FEP 654 (6th Cir. 1986) (implying that a quid pro quo case would be established even absent a job detriment, if submission to unwelcome advances was made an express or implied condition of employment).

C) The Employer's Burden: Demonstrating a Reasonable Response, Plaintiff's Mitigation, and a Legitimate Purpose to Its Actions

In two important 1998 decisions, the United States Supreme Court undertook a thorough examination of the agency principles governing an employer's vicarious liability for the sexual harassment of an employee carried out by his or her supervisor. In Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998), the court rejected, for such purposes, any distinction between "quid pro quo" and "hostile environment" harassment. That distinction is only significant, the court held, relative to the threshold question whether actionable conduct occurred. A tangible employment action resulting from a refusal to submit to sexual demands -- the "quid pro quo" paradigm -- is an explicit Title VII violation, the court explained, whereas in the absence of a tangible job detriment, there must be proof that the alleged "hostile environment" harassment was "severe or pervasive". The court rejected the rule developed by various courts of appeals according to which an employer is subject to vicarious liability for "quid pro quo" harassment, but is subject to liability limited to its own negligence in cases involving hostile environment claims. Instead, the court held, employer liability for both types of harassment is to be
determined in accordance with Title VII's goals and policies in light of "the general common law of agency", taking as a "useful beginning point" the Restatement (Second) of Agency.

In the concurrent case of Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998), the United States Supreme Court again addressed the issue of employers' liability for sexual harassment carried out by supervisory employees, and basically reiterated the analysis and repeated verbatim the central holding of Burlington Industries v. Ellerth. Both Burlington and Faragher determined that, in the absence of a tangible detrimental employment action resulting from a refusal to submit to sexual demands, the employer may assert two affirmative defenses:

1. the employer exercised reasonable care in preventing the supervisor’s harassing conduct; and

2. the employee failed to exercise reasonable care to mitigate her/his damages and harm.

In Faragher, the Supreme Court declined to remand the case to permit the defendant to attempt to establish the newly-defined affirmative defense of reasonable care, holding as a matter of law that the City could not be found to have exercised reasonable care to prevent the supervisors’ harassing conduct. In so holding, the court noted the following District Court findings: "...the City had entirely failed to disseminate its policy against sexual harassment ... and its officials made no attempt to keep track of the conduct of supervisors."

Since the Burlington/Faragher decisions, several circuit courts have employed the two-prong affirmative defense analysis. Instructive of the defenses’ analysis are the following:

Swinton v. Potomac Corp. 2001 Daily Journal, D.A.R. 11,381, -- F.3d. -- (9th Cir. 2001)

In a racial harassment case asserting violation of Section 1981 and the Washington State Anti-Discrimination statute, plaintiff did not avail himself of written internal complaint procedures or identify a supervisor as an involved party, despite being subjected to the daily occurrence of racial “joking” for approximately five months before quitting. Plaintiff was the only African American of 140 employees. The Ninth Circuit held the two prong Faragher affirmative defense was not available because here the harasser was a supervisor, but not plaintiff’s supervisor. The supervisor’s inaction after becoming aware of the joking was properly imputed to the employer because he was designated by the employer as a person responsible for acting on harassment complaints. Further, the Court found the employer failed to implement the anti-harassment policy in good faith.