Sexual Harassment in Employment Law

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FOREWORD

It is a sobering revelation that every woman—*every* woman—who has spent substantial time in the work force in the last two decades can tell at least one story about being the object of sexual harassment. The phrase itself hovered at the periphery of most people's vocabulary until October 11, 1991, when Professor Anita Hill wrenched it into the vernacular during her seven hours of televised testimony before the Senate Judiciary Committee. It turns out to describe an experience that most women, but very few men, understand very well.

The stories of harassment are as varied as the women who tell them. There is the lawyer who put herself through college by waiting tables at a Hungarian restaurant, and soon discovered that the owner's son would take the opportunity to grope her as she passed through the kitchen with arms full of food. "You learned to wriggle past him without spilling the goulash," she explains. And the editor of a major newspaper who, as a junior reporter, had to repel numerous advances by one of her superiors. And the nurse who, early in her career, found herself locked in an examining room with a doctor who announced it was time for him to perform a different type of examination. And the teaching assistant who asked her psychology professor for some advice with a personal problem, only to have him turn around and demand some help with *his* personal problem. The list is endless.

The common thread to these stories, if there is one, is that they tend to involve women who are young—or at least young to their professions—and men in positions of authority who had no compunctions about using the leverage afforded them to demand or cajole sex. Sure, everyone knew or suspected that this type of thing happened occasionally, the way we know that people occasionally become the victims of crime or other misfortune. But who knew, who understood, that it was quite so pervasive? Apparently most women did, while most men did not. It was the best-kept secret of modern times.

Each woman handled these crises in her own way. Some quit. Others endured and learned to "wriggle without spilling the goulash." Some others appealed to a higher authority within the office. Still others submitted, often with a sense of violation and shame. Generally, however, the problem was viewed as a private one, to be handled by each woman alone; a personal challenge, not a matter for public policy.

The idea that harassment could be punished through the legal system is of relatively recent origin. The EEOC first issued guidelines on sexual harassment just eleven years ago, identifying it as a form of discrimination with broad

societal implications, rather than just a distasteful private foible. The first Supreme Court case recognizing sexual harassment came less than six years ago. Yet, as attested by the materials in these pages, the law has progressed swiftly in a very short time. Litigation has finally come to this somewhat seamy, but highly pervasive, corner of workplace misconduct. And, for the most part, it's a good thing.

But not entirely. Lawsuits are clumsy tools for shaping human behavior: they are expensive, eat up a lot of time and usually exacerbate whatever tensions already exist; they often have unforeseen consequences; they tend to enrich the lawyers far more often than they satisfy the parties. Before our litigious society throws itself headlong into this venture, it's worth considering why a fair measure of caution and common sense is particularly advisable.

I.

There is no good side to racism; there is no redeeming value to fraud or theft. By and large the things we define as wrongs in the law cleave neatly from the things that are lawful. Sexual harassment is somewhat unusual in that offensive, prohibited conduct is often not all that dissimilar from conduct that is acceptable, even desirable, in a different context or involving different individuals. There are, to be sure, certain actions that would be unacceptable under any circumstances: "Have sex with me or you're fired" is a fine example. But much sexual harassment comes to us steeped in the ambiguities, misunderstandings, tensions and frustrations of male-female relations. No other human interaction is as shrouded in mystery, as likely to result in hurt feelings, or so deeply engages our sense of self-esteem as the human mating ritual.

Outside the work environment, these tensions and ambiguities tend to make courtship exciting and, in any event, are not matters of public concern. But when men and women are brought together in the workplace, sexual tensions and ambiguities are aggregated with the already formidable tensions and frustrations of the job. The results can be explosive.

One response might be a bright-line rule: never mix business and sexual relationships. While this rule is easy to remember, it is impossible to enforce, as men and women are drawn to each other in the workplace, as elsewhere. Even were it enforceable, do we really want to live in a society where normal flirtations, courtships and marriages are routinely banned from the office and the factory? The function of the law must be to separate the normal from the perverse, the playful from the harmful, the bumbling from the evil. No easy tasks these.

While the law and respect for decency require that we undertake the effort, it is worth considering some serious drawbacks in using litigation to resolve this conundrum. I list them, roughly, in what I see as ascending order of significance.

A. Just When You Thought it Was Safe to Go Back in the Water ...

While many frown on romance in the workplace, it is a fact of life. Indeed, I would suggest that it is an important and enduring reality and that, within

bounds of propriety and good taste, romance in the workplace should be accepted rather than forbidden.

There are important personal and business reasons for this. Propinquity leads to sexual interest, which may lead to romance and marriage, or just romance and fun. Rules that prohibit or discourage interpersonal relationships can cause frustration and resentment among employees, and may cost businesses the services of one or both partners when the inevitable secret relationships develop. From the perspective of unattached employees, the work environment provides the most suitable atmosphere to find a partner of compatible interests, age, temperament and education.

The fear of a sexual harassment charge—with the humiliating personal implication and the potentially devastating professional consequences—may well discourage many employees from taking the first hesitating step toward an office romance. This may make the workplace a less collegial and inviting place, as men and women socialize less with their co-workers and turn their energies toward meeting people elsewhere.

Chilling romance in the office may be a cost we are willing to bear as a society in order to eliminate sexual harassment. But it *is* a cost, and one we ought to recognize. For young men and women, busy with their careers but also on the lookout for a lasting relationship, the burden of having to exclude their co-workers from the pool may be more than trivial.

B. She Said, He Said

Some of what is included within the concept of sexual harassment, particularly of the hostile environment type, is done openly and publicly. Consider, for example, the Washington state judge who informed a prosecutor in open court of his desire to "jump [her] bones." But charges of sexual harassment, like those of rape, child molestation and spousal abuse, can raise some of the most difficult problems of proof in the law, because some of the most egregious conduct—the nurse and doctor locked in the examining room, the professor and student in his office, the boss and his assistant traveling on business in a distant city—occurs in private, with the participants doubling as the only witnesses. Our adversarial system is at its very weakest when the evidence consists entirely of the conflicting accounts of two interested parties. While recent experience makes this point too obvious for much elaboration, the policy implications are considerable.

A charge of sexual harassment, if sustained, can have devastating consequences for the accused. There is a natural reluctance, therefore, to sustain the charges where it's one person's word against another's. Sexual harassment victims are aware of this, which makes them think twice before airing their accusations. After all, bringing an unsustained charge of harassment doesn't earn the accuser a badge of honor, and may well result in ostracizing her or impairing her advancement. And it doesn't take many cases where the accuser suffers this fate to persuade other women to remain silent.

Dealing with sexual harassment through the mechanism of the adversary process may thus have the perverse effect of suppressing the disclosure and resolution of the most egregious types of misconduct. This problem may

explain why a recent Florida study found that 40 percent of female attorneys felt they had been sexually harassed at some time by a state-court judge, but only one of them had ever filed a complaint. While this problem may have no satisfactory solution, it does suggest that there are serious drawbacks in relying on litigation as the principal means of ridding the workplace of sexual harassment.

C. Congress Shall Make No Law ...

Much of what we define as sexual harassment consists of speech, and speech is normally protected against governmental interference by the First Amendment. Some speech, of course, is not protected—extortion, blackmail, obscenity—and some sexual harassment undoubtedly falls within these unprotected categories. Though there's not much law on the subject, it's safe to assume that much of quid pro quo sexual harassment—"have sex with me or you're fired"—lands on the unprotected side of the line.

But the line blurs rapidly as one moves away from the easy cases. Could Congress make a law prohibiting employees from asking each other out on dates? Could it prohibit a second or third request after a firm "no"? These are questions worth pondering, because sexual harassment law requires employers to punish employees who get too aggressive in expressing a personal interest in other employees, even when this expression is purely verbal. Title VII effectively forces the employer to become the censor for employee speech and conduct.

Things get even fuzzier when one considers some of the hostile environment cases where male employees use locker-room jargon and decorate their work spaces with pictures of scantily clad women. It is widely assumed that Congress may not outlaw such decorations unless they amount to obscenity, that it couldn't pass a law prohibiting off-color language in private discourse. Under sexual harassment law as it has developed to this point, however, an employer may be held liable for failing to curb such workplace indiscretions. The tension between the right of female employees to work in an environment free of gender-based abuse, and the right of male employees to engage in speech and conduct normally deemed constitutionally protected, has not yet attracted much judicial attention, but it soon may. At least one constitutional scholar, Professor Kingsley R. Browne of Wayne State University Law School, has suggested that much of hostile environment sexual harassment law is constitutionally suspect.

D. Whose Rights Are These, Anyway?

A complaint of sexual harassment in the work environment brings into conflict the rights and interests of two or more employees. On one side is the accuser, who is entitled to work in an environment cleansed of coercion and insults; on the other is the accused supervisor or co-worker, who has an interest in retaining his job and clearing his name. In the nature of things, it may be very difficult to reconcile these interests in a single proceeding, and the em-

ployer may be left holding the bag when one disputant or the other is dissatisfied with the outcome.

Ellison v. Brady, best known for announcing the "reasonable woman" standard for sexual harassment cases, provides a helpful illustration. Ellison worked in the San Mateo office of the Internal Revenue Service. A co-worker named Gray sent her a series of harassing letters. Ellison complained to management, which arranged for Gray to be transferred to another office. Gray brought a grievance through his union and the case was resolved by letting him return to the San Mateo office after six months. Ellison refused to work in the same office as Gray, and rejected a transfer to another office on the grounds that she, as the victim of the harassment, should not have to bear the burden. Having resolved Gray's rights in the context of *his* grievance, the employer was now stuck with a claim for damages by Ellison, who took the position that Gray had gotten off too easy, and that she was entitled not to work in close proximity to him.

As sexual harassment claims become more common, employers may frequently find themselves caught between the pit of a Title VII suit for failing to purge a hostile environment, and the pendulum of a wrongful discharge suit for disciplining an employee wrongly accused of harassment. Given the intractable problems of proof discussed earlier, how can employers protect themselves from attack by one side or the other? And even if the facts are not in dispute—let's say the accused employee admits having done or said something unacceptable—what is the proper remedy? It's a judgment call the employer must make with some regard to the entire office, not merely the parochial interests of the particular individuals involved. One concern might be to send a message to other employees that such conduct will not be tolerated. This counsels in favor of overly severe punishment, but does that then expose the employer to a claim of vindictiveness by the punished employee? Or what if the transgression is minor and the transgressor is essential to the employer's operations? Is the employer required to risk business without him or damages in a Title VII suit?

Of course, employers have always had to resolve disputes among members of the work force, but sexual harassment claims stand on somewhat different footing. First, they require the employer to police all manner of non-job-related interaction at or near the work site and, quite possibly, off the work site. A dinner date between co-workers that ends in hurt feelings or worse may well foster a sexual harassment claim. Second, sexual harassment claims are unique in that one employee can base her (or his) claim on the employer's failure to punish another employee quickly or severely enough, as happened in *Ellison.* Quite obviously, employers will have to be far more vigilant in setting and enforcing standards for employee conduct, on *and* off the job.

All of this runs against the grain of contemporary notions as to the proper relationship between employer and employees. Enlightened employers have generally shied away from the Orwellian notion of policing employee behavior outside the work environment; enlightened office policy generally grants errant employees a chance to mend their ways before they are sent packing. When it comes to accusations of sexual harassment, however, employers may deem it

prudent to take the harshest measures first, lest they be accused of insensitivity to harassment in the workplace.

E. The Gilded Cage

Perhaps the most worrisome aspect of using litigation as the primary tool for eliminating sexual harassment is that it could stunt the progress of women in their long struggle to gain workplace equality. This could happen as a result of precautions—often subtle and surreptitious—that male employees might take so as to avoid spurious charges of sexual harassment. Of course, we want male employees to adjust their inappropriate behavior, and we want employers to exercise authority in purging the work environment of sexually hostile practices. But the incentives may be too great, causing male workers to run for shelter by minimizing their contact with potential female protégés. The right balance may be difficult to achieve if litigation is used as the principal lever.

The concept of workplace equality has been premised on just that—equality—whether on the basis of sex, race, or any other immutable characteristic. We all look forward to the day when employment decisions will be made only on the basis of merit, and when employees of both genders work together without regard to their biological differences. In subtle ways, sexual harassment law tends to deepen those differences, driving a wedge between the sexes in the workplace. Although anecdotal evidence is always somewhat suspect, many women have reported a distancing from male colleagues after the Thomas-Hill hearings. "My God," many male employees must have thought, "if allegations like that were raised against me, how on earth would I defend myself?" Considering the devastating consequences of a sexual harassment charge both professionally and personally, it's hard to fault men for being cautious.

"So much the better," one might say. "*Let* them be careful—it will just discourage sexual byplay and other questionable conduct that doesn't belong in the office anyway." One must keep in mind, however, that men are still in an overwhelmingly dominant position in terms of supervisory authority. This means that men tend to make a far larger share of the hiring and promotion decisions. What effect will concerns about spurious sexual harassment charges have on those decisions?

Take simple items like deciding which junior associate to take on an important business trip or which employee to keep in the office for an after-hours project. Competence may well suggest the female as the better choice; caution may lead the manager to select the male. It is impossible to tell whether and to what extent the fear of sexual harassment charges will color supervisory decisions, but as sexual harassment litigation becomes more common, male managers may end up presupposing that every time they appoint a woman to a position that brings her into close personal contact, they hand her a loaded gun with which she can blow away their careers.

To dismiss such concerns as baseless, to suggest that the failure to promote can itself be subject to a Title VII claim, is myopic. Managers have a lot of discretion in hiring, evaluating, and promoting; proving sex discrimination in such decisions is very hard and, given the choice, most managers would rather

defend against a claim for discriminatory hiring than one for sexual harassment: The former is an inconvenience, the latter a sudden end to a career.

Short of adverse hiring and promotion decisions, the fear of sexual harassment suits may well isolate women in the workplace. No one wants to be accused of creating a hostile work environment or get shipped off to a branch office because another employee lodges a complaint of sexual harassment. Male employees may find it prudent to avoid lunches with colleagues of the opposite sex, and after-work socializing may well exclude female co-workers. The personal networks that are so important in building a career may exclude women, as men fear getting too chummy with female co-workers and subordinates. To the extent sexual harassment litigation raises the level of suspicion between men and women in the workplace, it may ultimately hamper efforts at gender integration.

II.

It is far easier, of course, to find fault than solutions. And litigation surely does have a place in helping rid the American workplace of the type of demeaning experiences far too many women have had to endure. I am reminded of the experience of a friend of mine who had been general counsel to a medium-sized manufacturer in the apparel business. As is prevalent in that industry, the company's field managers regularly handled the merchandise, generally as it was worn by female models; complaints came in on a fairly consistent basis. Mindful of her employer's potential liability, my friend drafted a sexual harassment policy that contained the usual advice and warnings: sexual harassment is unlawful; the company condemns it; if you feel you have been sexually harassed, you have certain remedies; and so on. The general counsel dutifully presented the policy to one of the company's top managers, who approved it for distribution. She had hundreds of copies made, which were then posted on bulletin boards and stuffed into employees' pay envelopes.

It was at that point that the company's president first became aware of the policy. He was outraged—perhaps fearful it would foment litigation—and he ordered the notices torn off bulletin boards, removed from pay envelopes and retrieved from employees who had already received them. Quite obviously, the company in question could use a swift kick in the pants by way of a sexual harassment suit; few things rivet the mind to a problem like the threat of substantial liability.

But litigation ought not be the only avenue of approach, or even the most significant one. Whatever one may think about litigation as a means of resolving other disputes, it has too many negatives as the primary means of dealing with sexual harassment. If we are to achieve a workplace free from discrimination of any kind, including sexual harassment, it must be through the moral suasion employers exercise over their employees and, indeed, employees exercise over employers. It must be made absolutely clear that there is nothing at all cool about harassing or demeaning other employees on account of their sex.

Companies must adopt stringent policies against sexual harassment. A forcefully worded policy condemning harassment, written in simple terms and

aggressively backed by the company's top managers, is probably the most important ingredient in assuring a workplace where men and women can work together without discomfort or coercion. One large company managed to enhance enforcement efforts simply by rephrasing its policy in more easily understood language and putting up large posters condemning harassment.

Employee training is another obvious and essential component of a comprehensive sexual harassment policy. Men and women tend to see sexually related speech differently, which explains why much of what most women find sexually suggestive and demeaning many men consider playful and harmless. One recent study, for example, found that 67 percent of men would feel flattered if propositioned, while 63 percent of women would be offended. From their own perspective, each may feel justified, yet the result may be hurt feelings, distrust, apprehension and more hurt feelings. Many companies have been successful in using focus groups to avoid misunderstandings in the workplace, helping to educate men and women as to how they see the same events differently. Counseling, too, can be beneficial in educating men about how women perceive their actions, and vice versa.

Sexual harassment is the kind of problem supervisors hate to deal with, first because interpersonal problems are always a headache, and second because the issue is so sensitive. Training mid-level managers to deal with sexual harassment claims in a constructive, positive way is a challenge companies will have to accept if they are to avoid the quagmire of litigation. Front-line managers are in the best position to sense the atmosphere in the workplace, and to make gentle corrections before minor disagreements turn into major grievances and lawsuits. Common sense may not be enough and giving managers professional training on how to detect and deal with harassment is time and money well invested.

A fast, effective and confidential grievance procedure for dealing with harassment problems is yet another essential component of any company's office policy. One large company runs a 24-hour hotline that gives employees advice and accepts complaints (sometimes anonymously) on sexual harassment. Unions can be very helpful in this process as well, as they have traditionally helped to mediate workplace grievances through the dispute resolution mechanisms of collective bargaining agreements. Union representatives, however, are likely to need the same training in dealing with sexual harassment claims as mid-level managers, especially because they tend to be the elected representatives of male-dominated constituencies. Indeed, the overwhelming majority of union-filed grievances relating to sexual harassment have involved challenges to discipline imposed on alleged sexual harassers rather than vindication of the rights of the alleged victim. This apparent bias must be overcome if unions are to fulfill their pivotal role in resolving workplace claims of sexual harassment.

Finally, there must be a measure of restraint among employees. Men, on the one hand, must be aware of the boundaries of propriety and learn to stay well within them. Women must be vigilant of their rights, but must also have some forgiveness for human foibles: misplaced humor, misunderstanding, or just plain stupidity. Transgressions should be noted, and an apology or correc-

tion obtained. But it is important for everyone to try to mend the working relationship, not rush into a lawsuit.

Harassment tends to be less prevalent in stable workplaces where employees feel loyalty to the company and each other; only by education and awareness can the legal burden of sexual harassment law be turned into the economic benefit of developing a more productive, cohesive and comfortable workplace. The point is to learn to work together, not to turn offices into armed camps where men and women circle each other with mistrust and apprehension. This takes enlightened leadership, not crafty finagling. In other words, this is a problem far too important and delicate to be handed over to the lawyers.

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