

Sex, harassment and the workplace

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ABSTRACT

Last year, high profile individuals, such as presidential candidate Herman Cain, former IMF chief Dominique Strauss-Kahn, and WikiLeaks founder Julian Assange, made major media coverage, because of alleged issues relating to SEX. Now that I have your attention, this paper targets sexual harassment, therefore we will not be dealing with Strauss-Kahn's alleged sexual abuse charge, nor Julian Assange's sexual assault charges. The focus is on sexual harassment, not to commit violations of Title VII of the Civil Rights Act of 1964 and its amendments, but to help educate employers, in order to prevent these costly legal actions and payment of damages, or if they cannot be prevented, then to reduce the exposure involving actions that might not have been preventable.

The Civil Rights Act and its amendments do not require a general civility code on employers, nor does it require a utopian work environment, but it does require that employees not be sexually harassed, with one exception. Dealing with the "based on sex" element requiring that the harassment that occurred because of the complainant's gender, and did not occur to members of the opposite sex. *Steiner v. Showboat Operating Co.*, and *Harris v. Forklift Systems Inc.* both deal with this issue. This issue is evident in *Harris*, when the president of Forklift Systems is found to have made comments to female employees, often in front of others, regarding their appearance and their intelligence; in one instance, he called an employee a "dumb ass woman," and in another situation, he suggest that a female employee and he "go to the Holiday Inn to negotiate your raise." The president also asked only female employees to retrieve coins from his front pants pocket, and threw objects on the ground in front of the women and asked them to pick them up. He made no such requests of male employees.

This paper also deals with quid pro quo tangible employment action issues and a hostile work environment, which includes constructive discharge. The theory of vicarious liability under agency-relation legal standard will indicate why and how employers can be liable for actions of their employees, in addition, the liability of employers for actions of customers for sexual harassment will be covered.

Keywords: Sexual Harassment, Ministerial Exception, International Defense

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INTRODUCTION

Last year, high profile individuals, such as presidential candidate Herman Cain, former IMF chief Dominique Strauss-Kahn, and WikiLeaks founder Julian Assange, made major media coverage, because of alleged issues relating to SEX. Now that I have your attention, this paper targets sexual harassment; therefore, we will not be dealing with Strauss-Kahn's alleged sexual abuse charge, nor Julian Assange's sexual assault charges. The focus is on sexual harassment, not to commit violations of Title VII of the Civil Rights Act of 1964 and its amendments, but to help educate employers, in order to prevent these costly legal actions and payment of damages, or if they cannot be prevented, then to reduce the exposure involving actions that might not have been preventable.

EXECUTIVE ORDER 10925

President John F. Kennedy in 1961 signed Executive Order 10925 requiring government contractors to take affirmative action to ensure that employees are treated during employment, without regard to their race, creed, color or national origin. On June 19, 1963, five months before his assassination President Kennedy submitted a bill to Congress, which was signed into law on July 2, 1964, and is known as Title VII of the Civil Rights Act of 1964. One of the more interesting elements is that neither the Executive Order nor the proposed Civil Rights bill included the word sex, and attention is not intended to be drawn to the allegations of extra marital activities of the former president, in regard to why he didn't include sex. The term "sex was added as a last-ditch effort by opponents of the statute to thwart the passage of the Act."¹ "Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."² "The bill quickly passed as amended and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on sex."³

The word sex in Title VII is where the EEOC in 1980 created the legal rationale to form the Sex Discrimination Guidelines in dealing with sexual harassment in the workplace. Title VII says nothing about sexual harassment, but the Supreme Court in *Griggs* indicated that EEOC guidelines should be shown great deference by the courts.⁴

The guidelines define sexual harassment as follows

"Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct 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 decisions affecting such individual, or (3) such conduct has the

¹ *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (1984).

² *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (1977).

³ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971).

purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁵

What happens if the harasser subjects both men and women to the same sexual harassment? This would be the equal opportunity harasser. Courts often conclude that because both men and women are victimized, the harassment does not disadvantage members of one sex relative to the other, therefore it is not discrimination based on sex. In *Lack v. Wal-Mart*, the court stated that the supervisor "was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike."⁶

The Civil Rights Act and its amendments do not require that employees be treated in ways that are thought of as being appropriate. Employers can be demanding, tactless, crude, mean, and irritating. This is an unfortunate fact of life, in which the law does not require a general civility code on employers, nor does it require a utopian work environment, but it does require that employees not be sexually harassed, with a few exceptions. Dealing with the "based on sex" element requires that the harassment that occurred be due to the complainant's gender, and did not occur to members of the opposite sex. The Supreme Court case, *Harris v. Forklift Systems Inc.*, dealt with this issue, when the president of Forklift Systems is found to have made comments to female employees, often in front of others, regarding their appearance and their intelligence; in one instance, he called an employee a "dumb ass woman," and in another situation, he suggest that a female employee and he "go to the Holiday Inn to negotiate your raise." The president also asked only female employees to retrieve coins from his front pants pocket, and only threw objects on the ground in front of the women and asked them to pick them up. He made no such requests of male employees.⁷ If both women and men had been demeaned and equally abused this would not have been a violation of the Civil Rights Act, even if a hostile work environment was created.⁸

Harassment must be discriminatory, not merely abusive or inappropriate to be protected under the Civil Rights Act. Bullying or abuse in the workplace that is not discriminatory under the Civil Rights Act, still might be actionable under civil claims and/or criminal charges for assault, battery, intentional infliction of emotional distress, and other actions.

There are two kinds of sexual harassment protected under the Civil Rights Act. They are quid pro quo and hostile work environment. Quid pro quo means "something for something" or "something given or received for something else." *Burlington Industries v. Ellerth*, the Supreme Court held employers vicariously liable under agency law principles for the harassment by a supervisor who has authority over the sexually harassed employee.⁹

Quid pro quo relates to tangible employment action regarding sexual harassment involving situations where a supervisor or individual with authority over the subordinate has taken significant adverse tangible employment action, such as discharge, demotion, or an undesirable reassignment against a subordinate employee for the employee's refusal

⁵ 29 C.F.R., Ch. XIV, Part 1604.11 (1980), 1629 C.F.R. Part §1604.11(a) (2008).

⁶ *Lack v. Wal-Mart*, 240 F.3d 255, 262 (2001).

⁷ *Harris v. Forklift System*, 510 U.S. 17 (1993).

⁸ *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (1994).

⁹ *Burlington Industries v. Ellerth*, 524 U.S. 742, 758 (1998).

to submit to the supervisor's or individual with authority's demand for sexual favors. There are no affirmative defenses available to the employer for tangible employment action cases.

Pease v. Alford Photo Industries, Inc. indicated that the following five elements must exist for the plaintiff to successfully prove quid pro quo harassment:

- (1.) "Plaintiff is a member of a protected class;
- (2.) Plaintiff was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors from a supervisor or individual with authority over the plaintiff;
- (3.) Harassment complained of was based on sex;
- (4.) Submission to the unwelcome advances was an express or implied condition for receiving some form of job benefits, or refusal to submit to sexual demands resulted in a tangible job detriment; and
- (5.) Employer knew or should have known of the harassment."¹⁰

The distinction between quid pro quo and a hostile work environment regarding sexual harassment is important for determining employer liability. Hostile work environment is broader than quid pro quo and does not require an adverse tangible employment action against the employee. The harassment can be caused by a supervisor, fellow employee, or a third party, such as a customer, vendor or stalker, if the employer knew or should have known of the harassing conduct and failed to take appropriate corrective action.

How hostile must the workplace become before the law is violated? In the Meritor U.S. Supreme Court case, the court held that for sexual harassment to be actionable, no tangible job detriment was necessary, but that the hostile work environment harassment must be unwelcome conduct and it must be sufficiently severe or pervasive to alter the conditions of employee's employment and create an abusive work environment.¹¹ Conduct that unreasonably interferes with an employee's work performance reaches an actionable hostile work environment more quickly than mere offensive utterances, as does physically threatening conduct.¹²

Whether the offensive activity has occurred in Louisiana, which is the 5th Federal District, or in Indiana, which is the 7th Federal District, the Courts have indicated that common sense and context must apply before courts and juries in determining whether the conduct is severely hostile and abusive.¹³

The employer can raise affirmative defenses, if there is no tangible loss from a hostile work environment involving sexual harassment. The defenses are as follows:

- (1.) "the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior at its workplace and
- (2.) the plaintiff employee unreasonably failed to take

¹⁰ Pease v. Alford Photo Industries, Inc., 667 F.Supp. 1188 (1987).

¹¹ Meritor v. Vinson, 477 U.S. 57 (1986).

¹² 510 U.S. 23 (1993).

¹³ Indest v. Freeman Decorating, Inc., 164 F.3d 258 (1999); Patt v. Family Health System, Inc., 280 F.3d 749 (2002).

advantage of corrective or preventive opportunities provided by the employer or to avoid harm otherwise.”¹⁴

The existence of an employer sexual harassment policy and notification procedures will aid the employer in proving an affirmative defense in hostile environment cases.

Another defense is that the employer has less than 15 employees. The numerosity requirement goes to the merits of the case, and the employer must raise this defense at the beginning of the case, or the employer is deemed to have waived this defense to liability.¹⁵

A third and creative defense for sexual harassment might be to use the ministerial exception rooted in the First Amendment. The “ministerial exception” allows religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers.¹⁶ The ministerial exception defense was used in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, which was a Supreme Court case decided January 11, 2012, involved a lawsuit under the American with Disability Act. The Court recognized that the ministerial exception, grounded in the First Amendment, precluded application of employment discrimination legislation to claims concerning the employment relationship involving the ministerial exception.¹⁷ The courts have interpreted the Free Exercise Clause, in the First Amendment, to protect religious liberty and to recognize the unique relationship between church and minister.¹⁸ “The choice of a minister is a unique distillation of a belief system. Regulating that choice comes perilously close to regulating belief,” a protection of the First Amendment.¹⁹ Although the Supreme Court had not recognized the ministerial exception until 2002, the Supreme Court recognized the “freedom to select the clergy, where no improper methods of choice are proven, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.”²⁰

The question is “who qualifies under the ministerial exception?” Courts have determined ministerial status under a primary duties test that considers whether the employee’s job responsibilities render him important to the spiritual and pastoral mission of the church.²¹

A variety of positions have been categorized as ministerial, from communications director²² to academic faculty²³.

¹⁴ *Faraghen v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Leopold v. Baccarat, Inc.*, 239 F.3d 243 (2001).

¹⁵ *Arbaugh v. Y&H Corp., d/b/a The Moonlight Café*, 126 S. Ct. 1235 (2006).

¹⁶ *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 (2006).

¹⁷ *Hosanna – Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694 (2012).

¹⁸ *McClure v. Salvation Army*, 460 F.2d 553 (1972).

¹⁹ *Van Osdol v. Vogt*, 908 P.2d 1122 (1996).

²⁰ *Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952).

²¹ *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (1985).

²² *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (2003).

²³ *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (1981).

In evaluating the responsibilities of the employee, the court must be cautious not to interfere with the autonomy of a church. If the government were to interfere with the employment decision of the church, the First Amendment rights under the Establishment Clause could also be in violation.

In the recently decided Supreme Court case, *Hosanna Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, Cheryl Perich, an employee and teacher, brought a claim against Hosanna Tabor. After being diagnosed with narcolepsy, Perich began the 2004-2005 school year on disability. When she tried to return to work in January of 2005, the school reported that they had hired another teacher to fill her position. Refusing to resign from her position, Perich threatened legal action against the congregation. Shortly thereafter, Perich was terminated due to “insubordinate and disruptive behavior” along with damage done to her “working relationship.”

Perich, along with the EEOC, claimed that her termination was in violation of the Americans with Disabilities Act. Under the primary duties test, the Supreme Court ruled in favor of Hosanna Tabor Evangelical Lutheran Church and School stating that the court believes that “the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church’s decision to fire her.”²⁴

While the ministerial exception relates to employment discrimination pertaining to religious institutions, the 1991 Amendment to the Civil Rights Act of 1964 provides a defense for employers working in foreign countries. The language of the 1991 Amendment may provide protection for an employer regarding sexually harassment allegations involving its employees.

Under the 1991 Amendment:

“It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.”

The above section of the 1991 Amendment forces employers to comply with the laws of the country in which the workplace is located. When operating in progressive and westernized cultures, the clash between culture and legislation may be of little concern. However, as our globalized economy expands to include a multitude of nations and cultures, the statutory dynamic is changing.

If a company operating in the United States begins a venture in Saudi Arabia, the employer must abide by the laws of Saudi Arabia. If an American woman was to be assigned to a position at this workplace, she would be subject to Saudi law. While her male counterparts could obtain a license and drive, a female is unable to drive in Saudi

²⁴ See 17

Arabia²⁵. Under EEOC guidelines, this hypothetical company may have committed sexual discrimination under the Civil Rights Act of 1964. Since sexual harassment is based on sexual discrimination, there are all kinds of hypotheticals in which a female employee might be sexually harassed because of the clothes she wears or doesn't wear, the way she conducts herself, or any number of other western culture issues. The 1991 Amendment could provide a defense for the employer.

Continuing the hypothetical, Saudi Arabia adheres to a strict policy of sexual segregation. Under strict Islamic sharia law, women are not allowed to be in the dwelling or in a vehicle with an unrelated man. In one situation, a Saudi Arabian woman who was raped 14 times consecutively by 7 men was sentenced to 200 lashes and 6 months in jail, and the crime that the woman committed: entering the vehicle of an unrelated male²⁶. In a separate situation, a 75 year old woman was given 40 lashes and 4 months in prison for letting a young man deliver bread to her dwelling²⁷. Under the 1991 Amendment, the guidelines for sexual harassment must abide by the laws of the foreign nation. If a woman from employed by a United States global corporation were to be employed in Saudi Arabia, she would be forced to adhere to the confines of Saudi law. Although the law may constitute sexual harassment by our standards, no penalty may be levied against the employer under the Civil Rights Act.

Aside from the international impact, the 1991 Amendment to the Civil Rights Act of 1964 provided codified clarification to the burden of proof required to prove an unlawful employment practice. Under 42 USCS § 2000e-2:

“(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §§ 2000e et seq.], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”

Prior to the 1991 Amendment, it was at the court's discretion to decide whether or not an employment practice was altered through unlawful consideration of race, color, religion, sex, or national origin. While case law supports the principle that an unlawful consideration need not be the sole factor in altering an employment practice, the burden of proof was unclear. Under the 1991 Amendment, the so called “mixed-motive” standard emerged. The “mixed-motive” standard states that a discriminating consideration need not be sole factor to be unlawful; rather it must only be a motivating factor.²⁸

Further clarification of the burden of proof was provided in the unanimous decision of *Desert Palace, Inc. v. Costa*. In the opinion, Justice Thomas wrote that direct evidence is not required to prove that an unlawful employment practice was made.

²⁵ <http://www.reuters.com/article/2011/05/24/saudi-driving-idUSLDE74N0ET20110524>

While there is no law expressly prohibiting women from driving, an individual must obtain a license to operate a vehicle. The licenses to operate vehicles are not available to women

²⁶ <http://news.bbc.co.uk/2/hi/7098480.stm>

²⁷ <http://www.telegraph.co.uk/news/worldnews/middleeast/saudi-arabia/6813312/Saudi-Arabia-to-flog-75-year-old-for-breaching-sex-segregation-rules.html>

²⁸ 42 USCS § 2000e-2

Rather, the burden of proof under a mixed motive case simply requires a preponderance of the evidence.²⁹ Therefore, a plaintiff can prove his or her case simply by convincing a jury that his or her sex was a factor in an employment action.

CONCLUSION

In 2011, the U.S. Equal Employment Opportunity Commission's record of Civil Rights charges against employers under sex was 28,534, as can be seen below.³⁰ The data also includes all Civil Rights charges from 1997 through 2011, along with the percentage of charges under each category. As you can see, 28.5% of charges filed through the Equal Employment Opportunity Commission were filed under the category of sex. As the number of claims under the EEOC continues to rise, the possibility of facing a sexual harassment case is growing. Through application of the principles presented in this paper, a company can minimize or eliminate its exposure to a costly legal suit that follows allegations of sexual harassment.

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APPENDIX

Table 1 – Charge Statistics (<http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm>)



**U.S. Equal Employment
Opportunity Commission**

**Charge Statistics
FY 1997 Through FY 2011**

The number for total charges reflects the number of individual charge filings. Because individuals often file charges claiming multiple types of discrimination, the number of total charges for any given fiscal year will be less than the total of the ten types of discrimination listed.

The dates are compiled by the Office of Research, Information and Planning from data reported via the quarterly reconciled Data Summary Reports and compiled from EEOC's Charge Data System and, from FY 2004 forward, EEOC's Integrated Mission System.

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792	95,402	93,277	99,922	99,947
Race	29,199	28,820	28,819	28,945	28,912	29,910	28,526	27,696	26,740	27,238	30,510	33,937	33,579	35,890	35,395
	36.2%	36.2%	37.3%	36.2%	35.8%	35.4%	35.1%	34.9%	35.5%	35.9%	37.0%	35.6%	36.0%	35.9%	35.4%
Sex	24,728	24,454	23,097	25,194	25,140	25,536	24,362	24,249	23,094	23,247	24,826	28,372	28,028	29,029	28,534
	30.7%	30.7%	30.9%	31.5%	31.1%	30.2%	30.0%	30.5%	30.6%	30.7%	30.1%	29.7%	30.0%	29.1%	28.5%
National Origin	6,712	6,778	7,108	7,792	8,025	9,046	8,450	8,361	8,035	8,327	9,396	10,601	11,134	11,304	11,833
	8.3%	8.5%	9.2%	9.8%	9.9%	10.7%	10.4%	10.5%	10.7%	11.0%	11.4%	11.1%	11.9%	11.3%	11.8%
Religion	1,709	1,786	1,811	1,939	2,127	2,572	2,532	2,466	2,340	2,541	2,880	3,273	3,386	3,790	4,151
	2.1%	2.2%	2.3%	2.4%	2.6%	3.0%	3.1%	3.1%	3.1%	3.4%	3.5%	3.4%	3.6%	3.8%	4.2%
Color	762	965	1,303	1,290	1,135	1,381	1,550	930	1,069	1,241	1,735	2,698	2,943	2,750	2,832
	0.9%	1.2%	1.7%	1.6%	1.4%	1.6%	1.9%	1.2%	1.4%	1.6%	2.1%	2.8%	3.2%	2.8%	2.8%
Retaliation - Title VII only	16,394	17,246	17,883	19,753	20,407	20,814	20,615	20,240	19,429	19,560	23,371	28,698	28,948	30,948	31,429
	20.3%	21.7%	23.1%	24.7%	25.2%	24.6%	25.4%	25.5%	25.8%	25.8%	28.3%	30.1%	31.0%	31.0%	31.4%