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Introduction

What is sexual harassment? University of Michigan law professor Catharine A. MacKinnon defined sexual harassment in her seminal work written in 1979, “Sexual Harassment of Working Women,”¹ as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.” MacKinnon observed that women, in exercising control over their lives, want to choose whether, when, where, and with whom to have sex. Sexual harassment undermines that control and denies women the opportunity to work without being subjected to sexual demands. “Women who protest sexual harassment at work are resisting economically enforced sexual exploitation.”²

Stanford University law professor Deborah L. Rhode’s conception of sexual harassment, similar to that of MacKinnon’s, describes it as a form of sexual abuse and a “strategy of dominance, exclusion, control, and retaliation—as a way to keep women in their place and out of men’s.”³ Cornell Law School professor Kathryn Abrams agrees, stating that sexual harassment “functions as a means of establishing male control and expressing or perpetuating masculine norms in the workplace.”⁴

Other legal scholars follow suit. Sexual harassment is a “type of incivility or disrespect,” “a sexually discriminatory wrong because of the gender norms it reflects and perpetuates,” “the institutionalization of women’s subordination through the preservation of male control of the workplace,” and a “tool used . . . by men as a method of undermining

women's competence in the workplace and thereby blocking women from certain jobs.”⁵

These views are grounded on the supposition that sexual harassment is primarily about “power, not sex.” Although this characterization may be accurate with regard to certain types of workplace conduct, it is inappropriately applied to others. From the legal practitioner’s perspective, sexually harassing conduct is more often seen as the product of sexual or erotic desire, conduct that is generally perceived as an expression of male sexuality, a sexuality run amok. Thus, although “the power, not sex” approach may provide an appropriate lens through which to view certain forms of workplace harassment, it should not divert our attention from what the law—developed over the past twenty-five years—defines as sexual harassment.⁶ In determining whether an alleged harasser’s conduct is unlawful, the focus of attention should be on the nature of his conduct and the circumstances in which it is translated into action affecting the working life of a female employee.

While accepting the premise that sexually harassing conduct more commonly reflects a sexual desire rather than a wish to dominate, we must be careful not to ignore the generally accepted principle that, irrespective of the harasser’s motivation, workplace sexual harassment always culminates in the diminution of a woman’s humanity and her status as a worker. Sexually harassing conduct reduces the workplace roles of women to objects of male sexual desire. We must also accept as accurate the legal scholars’ view that conduct, based on traditional masculine conceptions of legitimate sexual behavior, tends to fortify and bolster male control of the workplace. Thus we accept the formula enunciated by University of Arizona College of Law professor Katherine M. Franke that “sexual harassment is sex discrimination precisely because it replicates and perpetuates a sexual hierarchy in which men possess and maintain their power by virtue of their ability to define women in terms of their sexuality.”⁷

The chapters that follow center on sexual harassment as it is perceived in the courtroom. Sexual harassment is defined by law as unwelcome sexual conduct, sufficiently severe or pervasive to alter the terms and conditions of a woman’s employment. It is also defined as unwelcome sexual advances or requests for sexual favors and other conduct of a sexual nature, culminating in a hostile or offensive work environment. These legal definitions, however, present more questions than they provide answers.

What types of workplace conduct are correctly classified as sexually

harassing and what types are not? When is sexual conduct considered “unwelcome?” If a woman submits to requests for sexual favors, may she still establish that the conduct of the alleged harasser was unwelcome to her? When is harassing conduct perceived as severe or pervasive and when is it not? Under what circumstances will a worker’s terms and conditions of employment be considered as having been “altered?” When is an employer liable for acts of sexual harassment committed by co-workers of a female employee? When is an employer liable for the sexually harassing behavior of its supervisory or managerial personnel? May an employer be held liable for the sexually harassing conduct of its customers, clients, or other persons not directly under its control? What are the obligations of a woman to report acts of sexual harassment? Should the implementation of the laws barring sexual harassment be based on a “reasonable person” or a “reasonable woman” standard? If a woman proves she has been sexually harassed what monetary damages may she recover? Are there remedies other than monetary damages to which she may be entitled?

An adequate understanding of the law barring workplace sexual harassment cannot be attained unless these questions are first addressed. Thus one of my objectives in writing this book is to provide answers to these questions.

In the process of providing these answers, we also must consider borderline conduct that may or may not be considered sexually harassing. Although “a slap on the buttocks in the office setting has yet to replace the hand shake,”⁸ sexual mores exist in a state of continuous change. Conduct formerly held acceptable may no longer be so. Conversely, what was previously considered as sexually harassing may now be perceived as acceptable behavior.

Since sexual harassment encompasses only “unwelcome” conduct, the laws barring sexual harassment in the workplace should not be interpreted in a manner that would allow them to become factors negatively affecting ordinary male-female workplace social discourse. These laws were not enacted to provide a means of redressing the petty slights of the hypersensitive individual, or “to bring about a magical transformation of the social mores of American workers,”⁹ and as the Supreme Court has noted, they were not intended to produce a “general civility code for the American workplace.”¹⁰

On the other hand, we must be careful not to pass to the other extreme, viewing sexual harassment merely as a workplace nuisance, a view commonly advanced by some employers:

4 | Unwelcome and Unlawful

[Sexual harassment is] all “noise” cranked up to a loud pitch by a chorus of greedy, disgruntled employees looking for a way to stick it to their companies. . . . [Statistics] provided by the Equal Employment Opportunity Commission (EEOC) and by various studies and surveys are exaggerated, most of the claims are false, and the majority of the plaintiffs are . . . crazy. Some claims may be valid, but they are few and far between. . . . Because the financial awards being won by these cases are greater than ever, so are the number of frivolous complaints. . . . A tremendous amount of companies’ profits are spent to defend employers against such charges.¹¹

Rather, we should focus on a frame of reference adopted by more enlightened employers, those employers who view the existence of sexual harassment in their workplaces as aberrant and unprofessional conduct.

The reader’s viewpoint of sexual harassment issues will undoubtedly be colored by her or his gender, as women and men exhibit vast differences in their views of the propriety of sex in the workplace. In an early study, a group of men and women were asked how they would feel if asked by a member of the opposite sex to engage in sex. Their responses are given in table I.1.¹²

Table I.1

	Males (%)	Females (%)
Flattered	67.2	16.8
“It depends”	8.9	14.4
Insulted	15.0	62.8
Neither (it would not happen)	8.9	6.0

Traditional differences in male and female attitudes are reflected in the varying standards used by the courts in their rulings on sexual harassment issues.

From the legal perspective, sexual harassment is a form of sex discrimination. An issue of critical importance in a sex discrimination case is whether members of one sex are exposed to adverse terms and conditions of employment to which members of the other sex are not. A woman cannot establish that she was subjected to sexually harassing conduct without demonstrating that such conduct was discriminatory, that is, she was treated differently than her male co-workers. If a woman is subjected to acts of sexual harassment but so are her male co-workers, then it cannot be said she was discriminated against, and her sexual harassment claim will be dismissed. Thus a review of the issues typically arising in a sexual harassment claim must be conducted within the con-

text of the laws barring sex discrimination in the workplace. On the federal law level, that law is Title VII of the Civil Rights Act of 1964.

It has been argued, with some merit, that the courtroom is not the most appropriate forum to resolve sexual harassment issues. Highly charged emotional issues, such as those that nearly always arise in the litigation of a sexual harassment case, are difficult to resolve in an adversarial environment. Such issues generally are more effectively addressed in the work forum, where efforts to eliminate sexual harassment from the workplace are far more likely to be effective, especially in those instances where employers adopt and implement policies designed to prevent sexual harassment from occurring in their workplaces, and where they act aggressively to curtail harassing conduct when it does occur.

Employers, however, often are insufficiently motivated to expend the funds to accomplish those goals. But women are empowered to create that motivation. Sexual harassment charges levied against a supervisor and his employer, followed by a jury verdict and a huge damage award, together with subsequent widely promulgated adverse publicity, often prove sufficiently calamitous for an employer to force it to adopt a more enlightened view regarding the measures it is willing to initiate to assure a harassment-free work environment. In fact, an employer's fear of litigation may provide the requisite incentive for it to address sexual harassment issues, thus rendering it unnecessary for women to resort to litigation.

Women, far more often than men, are the objects of sexually harassing behavior. This is not to deny that on occasion women sexually harass men, that men harass other men, or that women harass other women. The sexual harassment of men by women and same-sex sexual harassment are discussed in chapters 15 and 16, respectively. Throughout other parts of the book, when analyzing legal issues I generally refer to the victim of harassment as "she" and to the harasser as "he." The use of these pronouns reflects the fact that more than 90 percent of sexual harassment cases involve the harassment of women by men. The reader should understand, however, that the use of these pronouns is a matter of convenience rather than of substance. In most cases, the gender identification could be reversed without affecting the underlying legal issues, since the legal principles barring the sexual harassment of men are the same as those barring the sexual harassment of women. Accordingly, prospective male sexual harassment complainants should find the book as useful as female complainants.

Although I am a lawyer, I have written the book primarily for ordinary

citizens—secondarily for other lawyers. It has been written for workers who have been sexually harassed, those workers who are contemplating litigation and considering whether to engage an attorney, and those already involved in litigation and who wish to assist their attorneys in the litigation process.

A complainant cannot gain an adequate understanding of the legal issues that commonly occur in sexual harassment cases unless she is able also to view those legal issues as they are perceived by her employer. A one-sided view of sexual harassment issues will lead only to misunderstanding, and thus all issues should be viewed from the perspective of the employer as well as that of the employee. A balanced view is a prerequisite for a complete understanding. Because both views are presented in the chapters that follow, human resources, managerial, and supervisory personnel should find the book useful in evaluating commonly occurring harassment issues. Although not written primarily for attorneys, those attorneys not fully aware of the scope and range of the legal issues normally arising in the courtroom in sexual harassment cases may find the work to be of value.

Every attempt has been made to eliminate technical language and legal jargon and to preclude the reader's immersion in legal intricacies and technical data having less than general application. In the discussion of those areas of the law where some technical knowledge is required, emphasis has been placed on the general applicability of the law, without regard to its exceptions. The broad picture takes precedence over special circumstances that may be relevant only in a limited number of instances.

Since Title VII of the Civil Rights Act of 1964 has largely preempted state-enacted antidiscrimination legislation, the focus of the book is on federal rather than state law. Most of the court cases reviewed in the book were decided pursuant to Title VII and were litigated in the federal courts. The emphasis on federal law should not be interpreted as an effort to undermine the significance of various state laws barring workplace sexual harassment. Although many of those laws are similar to federal law, an analysis of their differences falls outside the scope of this work. Victims of sexually harassing conduct and their attorneys should remain alert to the possible advantages of proceeding in state court and in reliance on state laws. They should also be mindful of harassment claims that may be alleged as tort claims, such as assault and battery and the intentional infliction of emotional distress, and they should also consider the possibility—if not desirability—of alleging in a single lawsuit violations of state, tort, and federal law.

The laws barring sexual harassment were intended to eradicate unwelcome sexual conduct from the workplace. These laws have achieved a great deal since the enactment of the Civil Rights Act of 1964, but sexual harassment has yet to be totally eliminated. It will be eliminated only if American working women regularly challenge such conduct. This book has been written to encourage working women to commit themselves to accepting that challenge.

CHAPTER ONE

Sexual Harassment in the Workplace

An Overview

Women have always been sexually harassed at work. A study conducted in the early 1980s reported that up to one-half of all women experienced some form of sexual harassment during the course of their working lives.¹ A later survey, focusing solely on female attorneys, reported that 51 percent of the women participating in the study affirmed they had been sexually harassed.² Women employed in governmental positions have been treated no differently. A 1981 study undertaken by the United States Merit Systems Protection Board disclosed that 42 percent of the female federal employees responding to its survey asserted they had been subjected to acts of sexual harassment at one time or another.³ Other studies have reported even greater numbers of working women who claim to have been sexually harassed, with one report concluding that incidents of workplace harassment occur in the lives of 90 percent of working women.⁴ But studies and surveys are not needed to prove the point. I venture to say nearly all of the women reading this book have on at least one occasion been subjected to the sexually harassing behavior of a co-worker or supervisor. Unquestionably, sexual harassment is a condition of employment daily encountered by millions of women. It is a problem that “is not only epidemic, it is pandemic, an everyday, everywhere occurrence.”⁵

University of Michigan law professor Catharine A. MacKinnon described the scope of sexually harassing conduct as it existed in 1979:

Victimization by the practice of sexual harassment, so far as is currently known, occurs across the lines of age, marital status, physical appearance, race, class, occupation, pay range, and any other factor that distinguishes women from each other. Frequency and type of incident may vary with specific vulnerabilities of the woman, or qualities of the job, employer, situation, or workplace.⁶

MacKinnon might very well have been describing current working conditions; the range of harassing conduct remains today as expansive as MacKinnon observed it nearly twenty-five years ago.

The number of women who formally report incidents of sexually harassing conduct has steadily increased. Between 1992 and 2001, the number of sexual harassment complaints filed by women with the Equal Employment Opportunity Commission skyrocketed, increasing by nearly 50 percent during that time.⁷ Moreover, a far greater proportion of sexually harassed women—for reasons later discussed—refrain from filing formal complaints. A survey of female workers who held managerial positions at fifteen hundred major companies revealed that 60 percent of them reported having experienced some sort of sexual harassment at work, but only 14 percent had informed their employers of these occurrences, and less than 1 percent had filed formal complaints or lawsuits.⁸

The injuries suffered by a woman subjected to acts of sexual harassment may be economic or psychological or, in many cases, both. If the harassment leads to her resignation, the victim loses her salary, insurance, pension, medical and other benefits. If, on the other hand, she reports the harassment but remains in her position, she may be branded a troublemaker, subjected to co-worker hostility, blocked from further advancement, or suffer a retaliatory discharge. In general, sexual harassment impedes a woman's prospects for economic equality, reduces her productivity, lowers her job performance, diminishes her work aspirations, and limits her economic independence.⁹

The psychological effects of sexual harassment may be devastating and extend beyond the workplace. Victims of harassment frequently suffer mental turmoil, depression, guilt, anxiety, and loss of self-esteem, both inside and outside the workplace, and thus experience a diminished satisfaction with life in general.¹⁰ In her book, MacKinnon, observing that victims of harassment often feel humiliated, degraded, ashamed, embarrassed, and cheapened, referred to comments reportedly made by harassed women in a survey conducted by the Working Women United

Institute. One woman's remarks were typical of those reported in the survey:

As I remember all the sexual abuse and negative work experiences I am left feeling sick and helpless and upset instead of angry. . . . Reinforced feelings of no control—sense of doom . . . I have difficulty dropping the emotion barrier I work behind when I come home from work. My husband turns into just another man. . . . Kept me in a constant state of emotional agitation and frustration; I drank a lot. . . . Soured the essential delight in the work. . . . Stomach ache, migraines, cried every night, no appetite.¹¹

But the most fundamental harm a victim of harassment suffers is a loss of personal dignity, a loss of self-esteem. Rosa Ehrenreich, a senior adviser to the U.S. Department of State, summed it up well when she described sexual harassment as “an insult to the dignity, autonomy, and personhood of each victim, [violating her] right to be treated with the respect and concern that is due her as a full and equally valuable human being.”¹²

Occurrences of sexual harassment in the workplace may reflect a condition of inequality existing between male and female workers. The harassment of female employees often conveys the message that women are primarily perceived, not as workplace colleagues and valuable assets, but merely as sexual objects. While creating barriers to job advancement, the persistent presence of sexually harassing conduct also signals to women that they are welcome to remain in the workplace only if they subvert their identities as women and adopt—or adapt to—male sexual stereotypes.¹³ A male worker’s sexually harassing behavior expresses the age-old belief that women should be sexually available to men, and it simultaneously reminds them they are neither viewed nor respected as workplace equals.¹⁴

Since acts of sexual harassment generally culminate in a hostile and offensive work environment, the harassed woman is compelled to labor under abusive and antagonistic conditions each day of her work life. Every aspect of her employment status is thus undermined. Women, therefore, perceive acts of sexual harassment as material threats to their economic livelihood.¹⁵

Women generally react to sexually harassing conduct in one of four ways: “avoidance, defusion, negotiation, or confrontation.”¹⁶ In avoidance—the least assertive but the most common response—the victim of the harassment departs from the workplace, either by quitting, transferring to another position, or taking sick leave. In defusion, a somewhat

more assertive response, the victim endeavors to minimize the intensity of the harassment by pretending to go along with the harasser so as to defuse the situation. She hopes the harassment eventually will cease, but often, the harasser interprets this type of response as encouragement to further harassment or even considers it provocative.¹⁷ In negotiation, the victim asks the harasser to cease his offensive behavior, sometimes threatening to expose him to his supervisors. In confrontation, the most assertive and the least-utilized response, the victim of the harassment files a formal complaint with her employer and later may resort to seeking a legal remedy.¹⁸

All workplace conduct of a sexual nature is not necessarily of a harassing nature, since dating is common among co-workers, and many people find their marriage partners at work. Obviously, sexual attraction thrives in the workplace. But men and women in general differ concerning the appropriateness of sexual conduct in the workplace. Behavior considered offensive by women may be viewed as harmless by men. What is regarded by male workers as acceptable conduct may be considered unacceptable by female workers. In the 1980s study previously noted, 67 percent of the male participants in the study reported they would be flattered by a sexual advance made by a female co-worker, but only 17 percent of the women stated they would feel that way if made the object of a male's sexual advance.¹⁹ In certain respects, a determination that a co-worker's conduct is harassing is dependent on a gender perspective. Which perspective should prevail—male or female? This is one of the issues later to be addressed, but first we must undertake a review of the existing legal provisions enacted by Congress to eliminate sexual harassment from the workplace.

In 1963, President John F. Kennedy proposed broad-based civil rights legislation, barring discrimination in places of public accommodation and in connection with voting rights, school enrollment, and employment. Although the proposed legislation included prohibitions against discrimination in employment based on race, national origin, and religion, it lacked any provision barring discrimination based on sex.

Even with growing public support for the adoption of a Civil Rights Act, the proposed legislation was not without its opponents and detractors. Congressman Howard Smith of Virginia, a leading opponent of the president's proposals, offered an amendment adding sex to the prohibitions against employment discrimination. His intent was not to advance the interests of women, but rather to defeat the entire bill by complicating the debate and confusing some in Congress who, although fully sup-

portive of provisions insuring equality for African Americans, were less certain of the need to include protections for working women.

Smith showed contempt for his own amendment when he related having received a letter from one of his female constituents complaining about the “grave injustice” incurred as a consequence of the existence of more females than males in the country, which prevented every woman from having a husband of her own. This story was greeted with laughter on the floor of the House but also resulted in anger from the few women serving in the Congress at the time. Smith’s ploy backfired. Once the question of discrimination against women was placed on the House floor it was difficult for many representatives to ignore it, and ultimately Congress adopted Smith’s proposed amendment.²⁰ The inclusion of sex in the statute has had profound social implications.²¹ What was first considered a ruse and a joke ultimately culminated in legislation providing the broadest set of workplace protections ever granted American women.

After enactment of Title VII—that section of the Civil Rights Act of 1964 barring discrimination in the workplace based on a worker’s race, national origin, religion, or sex—the courts were pressed to decide whether sexual harassment was a form of sex discrimination barred by the statute.²² Nothing in the wording of the statute even suggested that sexual harassment was a form of sex discrimination, and due to the course pursued by Representative Smith in introducing his sex discrimination amendment, the issue had not been discussed in congressional hearings prior to the statute’s enactment. Without either a legislative history or a clearly expressed statutory provision to guide them, the courts were slow to respond to female worker complaints of workplace sexual harassment.

When some courts rejected the concept that sexual harassment constituted a form of sex discrimination barred by the statute, Catharine MacKinnon argued in her 1979 book that sexual harassment indeed was a form of sex discrimination. “Sexual harassment is seen to be one dynamic which reinforces and expresses women’s traditional and inferior role in the labor force.”²³

As a practice, sexual harassment singles out a gender-defined group, women, for special treatment in a way which adversely affects and burdens their status as employees. Sexual harassment limits women in a way men are not limited. It deprives them of opportunities that are available to male employees without sexual conditions. In so doing, it creates two employment standards: one for women that includes sexual requirements, one for men that does not.²⁴

Concluding that acts of sexual harassment are discriminatory, MacKinnon was among the first to contend publicly that sexual harassment in the workplace is a form of sex discrimination made unlawful by Title VII.²⁵

Courts continued to differ on the issue. In 1976, a New Jersey federal court judge ruled Title VII was not intended to prevent “a physical attack motivated by sexual desire on the part of a supervisor” merely because it “happened to occur in a corporate corridor rather than a back alley.”²⁶ In another early case, involving a complainant’s allegation that her supervisor had retaliated against her after she rejected his proposed “after hours affair,” a District of Columbia federal court held that the substance of the complainant’s allegations centered on her claim that she had been discriminated against, not because she was a woman, but because she had declined to engage in a sexual affair with her supervisor. According to the court, this was not sex discrimination: “This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff’s supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff’s sex.”²⁷

Less than a year later, an Arizona federal court ordered the dismissal of the claims of two women who alleged they had been verbally and physically harassed by their supervisor, and that his conduct had continued unabated until each was forced to resign. The court ruled that although Title VII clearly bars discrimination of women by their employers, nothing in the statute renders unlawful the sexual advances of their supervisors:

In the present case, [the supervisor’s] conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, [he] was satisfying a personal urge. Certainly no employer policy is here involved. . . . Nothing in the complaint alleges nor can it be construed that the conduct complained of was company directed policy which deprived women of employment opportunities.

From the perspective of this court, an act of sexual harassment merely reflected a need to satisfy a “personal urge,” and thus it did not violate the legal rights of the victim.

The court also expressed its concern that if it were to declare sexual harassment actionable under Title VII “every time any employee made amorous or sexually oriented advances toward another,” it could culminate in a federal lawsuit. In such circumstances, the court opined, the

only sure way an employer could avoid such charges would be to hire only workers who were “asexual.”²⁸ Another judge remarked that if sexual harassment was covered by Title VII, the federal court system “would need 4000 federal trial judges instead of 400.”²⁹ If the rationale underlying these decisions had prevailed, no working woman would have ever successfully advanced a sexual harassment claim against her employer under Title VII. Fortunately, not all courts were as myopic.

One year later, a District of Columbia federal appellate court reversed course, ruling that a woman subjected to acts of sexual harassment is indeed discriminated against, not merely as a consequence of her refusal to engage in a sexual act demanded by a supervisor, but simply because she is a woman:

But for her womanhood . . . her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman. . . . Put another way, she became the target of her supervisor’s sexual desires because she was a woman and was asked to bow to his demands as the price for holding her job.³⁰

The court concluded, therefore, that an act of sexual harassment, because it is discriminatory, violates Title VII precepts.

Soon after, another federal appellate court ruled that if a supervisor, with the knowledge of his employer, makes sexual demands of a subordinate female employee and conditions her employment status on a favorable response to those demands, then he as well as his employer may be held liable for violations of Title VII.³¹

Following these cases, the Equal Employment Opportunity Commission issued guidelines formulated on the assumption that sexually harassing conduct indeed constituted a violation of Title VII. There the matter stood until 1986 when Mechelle Vinson’s sexual harassment case alleged against Meritor Savings Bank reached the Supreme Court, presenting the court with its first opportunity to consider issues involving allegations of sexual harassment in the workplace.

Vinson had worked for the bank for four years, first as a teller and later as a head teller and assistant branch manager. Throughout the term of her employment, she had worked under the supervision of Sidney Taylor. When Vinson was fired, purportedly for taking excessive sick leave, she sued Taylor and the bank, claiming that during her four years of employment, Taylor had continuously harassed her sexually.

Vinson alleged that shortly after beginning to work at the bank, Taylor suggested they engage in sexual relations. At first she declined, but when he persisted, she eventually agreed, but only because she feared she would lose her position if she did not accede to his request. Thereafter, Taylor made repeated demands on her for sex, both during and after business hours, and as a result they had intercourse on numerous occasions. Vinson also claimed Taylor fondled her in the presence of other employees, followed her into the women's restroom, exposed himself to her, and raped her. Because she feared Taylor and was concerned for her job, Vinson neither reported Taylor's harassment to any of his supervisors nor took advantage of the bank's grievance procedures.

Vinson's case required the Supreme Court to decide three basic issues:

- Is sexual harassment a form of sex discrimination barred by Title VII?
- Is an employer liable to a female worker for an offensive or hostile working environment, an environment created by acts of sexual misconduct committed by her supervisor?
- Is Title VII violated in circumstances where a sexual relationship between an employee and her supervisor is "voluntary"?

The court's responses to these questions proved to be of paramount importance in the development of Title VII's role in resolving issues relating to the presence of sexual harassing conduct in the workplace.

In affirming a lower court ruling that a woman may establish a Title VII violation by proving that her supervisor sexually harassed her, the court quoted from an earlier appellate court opinion:

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.³²

In these circumstances, women and men are not treated on equal terms. Thus sexual harassment generates inequality. Accordingly, acts of sexual harassment violate Title VII's ban of workplace discriminatory conduct.

The Supreme Court then proceeded to set the standard the courts were to use in determining whether sexual conduct reaches the level of sexual harassment. Sexual conduct violates the precepts of Title VII only if it is sufficiently "severe or pervasive" to alter the terms and conditions of the

harassed woman's employment, thus creating for her a hostile and abusive work environment. Without question, Taylor's conduct, as alleged, was sufficiently severe *and* pervasive to alter the terms and conditions of Vinson's employment, thus creating an abusive and hostile work environment in which Vinson was compelled to work. Vinson's allegations of Taylor's harassing conduct, if proved, would be sufficient to establish a claim of sexual harassment under Title VII.

With respect to the issue of the bank's responsibility and liability for Taylor's conduct, the bank had advanced the position that it could not be held legally liable for Taylor's behavior because its executive personnel were unaware he had engaged in harassing conduct, since Vinson had not reported his conduct to his supervisors nor had it otherwise come to their attention. Vinson's attorneys, on the other hand, maintained that since the bank had placed Taylor in a supervisory role over Vinson, it was liable for Taylor's misconduct, even if his superiors had not been apprised of the harassment. They argued that when Vinson received direction from Taylor, she in effect received direction from the bank. Thus, when Taylor exercised his supervisory functions, he acted as the representative or agent of the bank, and since the bank is legally liable for the actions of its representatives and agents, it was liable for Taylor's acts of sexual harassment.

The Supreme Court basically agreed with the position asserted by Vinson's attorneys. Since an employer delegates to its supervisors the power and authority to direct and control its employees, supervisors generally act as their employer's agents whenever they exercise that power and authority. Employers are thus generally held liable for their supervisors' misuse of the power and authority delegated to them. In some circumstances, however, such as in instances when a supervisor exceeds the scope of his authority or acts without authority, his acts may not be considered as those of his employer. Each case, therefore, must be judged on its own facts. The court must determine whether—in light of the facts existent in that particular case—the harassing supervisor actually acted as the employer's agent, thus rendering it liable for his harassment.

With regard to the issue of Vinson's "voluntariness" in consenting to a sexual relationship with Taylor, the court pointed out that the correct inquiry was not whether Vinson's participation in sexual intercourse with Taylor was voluntary, but rather whether the sexual relationship was "unwelcome" to her. The fact Vinson was not forced to participate against her will in a sexual relationship with Taylor did not undermine her sexual harassment claim. However, Vinson had to prove her partici-

pation was “unwelcome” to her. This is an element of proof that must be borne by any complainant in a sexual harassment suit—an element of proof that may be sustained only with persuasive evidence that even though she acceded to her supervisor’s advances, his harassing conduct was nevertheless unwelcome. Since that issue had not been considered by the lower court, the Supreme Court remanded Vinson’s case for further proceedings. Before those proceedings were conducted, however, Vinson and the bank agreed to a settlement of the case.³³

Subsequent to the *Vinson* ruling, sexual harassment cases have appeared on court dockets with increasing frequency. These cases generally involve one of two categories of conduct, each held to be sexually harassing. The first is based on the abusive treatment of a female employee, treatment that would not have occurred but for the fact that she is a woman, and it usually entails demands for sexual favors either in return for employment benefits or under threat of some adverse employment action. This type of sexual harassment is referred to as “quid pro quo” harassment. Under guidelines adopted by the EEOC, quid pro quo sexual harassment exists when “submission to [sexual] conduct is made either explicitly or implicitly a term or condition of an individual’s employment [or when] submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”³⁴

The second category of sexual harassment evolves from the nature or quality of a woman’s working environment. When an employer encourages or tolerates a work environment replete with sexual commentary, sexual touching, or other forms of harassing conduct—conduct that is sufficiently severe or pervasive to alter the terms and conditions of a woman’s employment—the employer may be held liable for “hostile work environment” harassment.

A sexually hostile environment is one that is both objectively and subjectively hostile. It is objectively hostile if any reasonable person would find it hostile, and it is subjectively hostile if the victim of the harassment also perceives it to be so. Whether a work environment is sufficiently hostile or abusive to support a sexual harassment claim is determined by viewing all the circumstances, including:

- the frequency of the acts of sexual harassment;
- the severity of the offensive conduct;
- whether the offensive conduct was physically threatening or merely verbal;

- whether the victim was humiliated by reason of the conduct;
- whether the harasser was a co-worker or a supervisor;
- whether other workers joined in the harassment;
- whether the harassment was directed at more than one individual;
- whether the harassment unreasonably interfered with the victim's work performance, thus altering the terms and conditions of her employment.

A survey of sexual harassment cases filed in the federal courts during the ten-year period following the *Vinson* case revealed that 70 percent of those cases were hostile environment claims and another 23 percent presented a combination of hostile environment and quid pro quo claims.³⁵ Hostile environment claims, therefore, predominate.

As previously noted, Title VII does not prohibit all sex-related conduct; the mere presence of some sexuality in the workplace does not render a work environment "hostile." Some forms of sexual behavior are harmless or wholly innocent. Moreover, the differences in the ways men and women routinely interact with members of the opposite sex rarely rise to the level of sexual harassment. Flirtation, teasing, off-hand comments, isolated incidents, and vulgar language that is trivial, even if annoying, are generally insufficiently serious to support a hostile environment charge.³⁶

We now turn to a review of the various forms of sexual harassment as they commonly appear in the workplace.

CHAPTER TWO

Various Forms of Sexual Harassment

Sexually harassing conduct generally appears in the workplace in one of two forms or in a combination of both. In “quid pro quo” sexual harassment, the promise of employment benefits or the removal of threatened adverse employment actions are conditioned upon a woman’s affirmative response to the sexual demands of one higher in company hierarchy. Submission to sexual demands is made a condition of her employment. In “hostile work environment” sexual harassment, a woman is subjected to sexually harassing conduct sufficiently severe or pervasive to alter the conditions of her employment, requiring her to perform her job functions in hostile and offensive conditions. When quid pro quo conditions of employment culminate in hostile and offensive working conditions, a woman suffers both forms of harassment.

Sexual harassment may be physical or verbal in nature, and at times both physical and verbal. In most instances, a supervisor or co-worker targets one individual, but on occasion, a group of women, or even an employer’s entire female staff, may be subjected to the harassing behavior of a number of male employees or even of an entire staff of male workers.

Sexually harassing conduct adversely affects the working lives of women employed in blue-collar and white-collar positions as well as women working in management and professional positions. Women in all industries, businesses, and professions experience its corruptive cast. The cases that follow illustrate the depravity and degradation of this common workplace scourge.

Quid Pro Quo Sexual Harassment

At the time that Paulette Barnes obtained an administrative assistant position with the Environmental Protection Agency, working under the supervision of the director of the agency's equal employment opportunity division, the division director promised to elevate her to a higher position within ninety days. Barnes later claimed that immediately after starting her new job, the director initiated a series of requests for sexual favors, repeatedly soliciting her to join him for social activities after office hours, repeatedly making remarks of a sexual nature, while suggesting that if she cooperated with him in a sexual affair her employment status would be enhanced. Barnes resisted all these overtures, informing the director their relationship would have to remain on a "professional" level. When the director ultimately concluded that Barnes truly meant what she said, he began to denigrate her employment status by stripping her of her job duties, and eventually he ordered the elimination of her position. Instead of receiving the promised promotion, Barnes was fired. This is a classic example of quid pro quo sexual harassment. Barnes's job was conditioned on her submission to the sexual demands of one having the power and authority to establish the terms of her employment.¹

Carmelita Wilkes also was subjected to quid pro quo sexual harassment. After she submitted an application for an executive secretary position with Unichema North America, its personnel manager, Lance Chambers, offered her a lower-paying secretary/receptionist position. Wilkes agreed to accept that position. A few days before she was scheduled to begin work, Chambers telephoned Wilkes to advise her he was about to visit her at home to provide her with copies of the company's benefits package and various forms necessary to be completed prior to her first day of work. On his arrival at Wilkes's home, Chambers told her the benefits package and employment forms were located in his apartment and suggested she accompany him there so he could give her copies. On their arrival at Chambers's apartment, Wilkes discovered that the benefits package and forms were located in the briefcase Chambers had been carrying when he arrived at her home. When Wilkes asked why he had asked her to his apartment under a false pretense, Chambers responded that he wanted to be her mentor "and that if [she] opened up to him he was sure [she] would advance at [Unichema]."

During her brief career at Unichema, Wilkes split her day, working as a receptionist in the morning and as Chambers's secretary in the afternoon. Wilkes was not long on the job before Chambers made some sex-

ual remarks she found offensive. He later made other suggestive comments, bragging of his ability, if given the opportunity, to sexually satisfy any woman in bed. On one occasion Chambers asked her why she would “settle for second best when [she] could have the best with [him].” When Wilkes failed to respond to Chambers’s sexual remarks, he reduced her secretarial duties and later terminated her. Wilkes had a job as long as she played along with Chambers, and when she ignored or rejected his advances, she lost her job.

In order to succeed in proving a quid pro quo claim, the claimant must establish that the harasser’s sexual conduct was linked to an employment decision affecting her employment status. Wilkes easily demonstrated a direct connection between her rejection of Chambers’s sexual proposals and his decision to fire her. If each of Chambers’s remarks had been considered separately, they might not have been deemed sufficiently offensive to support a quid pro quo sexual harassment claim. However, when Chambers’s conduct was considered in combination—that is, when the totality of the circumstances surrounding his conduct, both before and after Wilkes began working for him, were taken into account—then it became clear Chambers terminated Wilkes once he realized she had no plans to accommodate his interest in a sexual relationship. Wilkes was subjected to quid pro quo sexual harassment.²

A quid pro quo sexual harassment claim is not dependent on proving that the harassment culminated in a termination of employment as in the *Barnes* and *Wilkes* cases. Consequences of lesser significance, such as a failure to promote, a denial of a choice job assignment, a refusal to provide training opportunities, or any other job action that substantially decreases a worker’s potential or causes a material deterioration in her working conditions, may be sufficient to support a quid pro quo claim.³

Hostile Work Environment Sexual Harassment

Cynthia Stoll, a single mother of three boys, worked for six years at the Sacramento post office as a letter-sorting machine operator before literally fleeing the workplace to escape multiple acts of sexual harassment committed by a network of supervisors and co-workers. They repeatedly asked her to perform oral sex, commented on her body, shot rubber bands at her backside, bumped up against her from behind, pressed their erect penises into her buttocks while she was sorting mail, followed her into the women’s bathroom, asked her to go on vacation

with them, fondled her body, subjected her to continuous sexual commentary, and generally stalked her throughout the facility.

Stoll was described as “fairly shy” and was easily intimidated by her supervisor, who seemed to take sadistic pleasure in screaming at and tormenting her. Another supervisor intervened on her behalf and then demanded sexual services from her. Stoll rejected these advances and tried to avoid him, but he then raped her. Stoll had to resign to escape her tormentors.

After resigning, Stoll suffered severe depression and on four occasions attempted suicide. A psychiatrist testified Stoll was scarred for life, would never again be able to work, and probably would continue to try to kill herself. At that point in Stoll’s treatment, the psychiatrist was solely focused on keeping her alive.⁴

The harassment Stoll confronted was severe, pervasive, and totally corrupting, culminating in a highly offensive and hostile working environment. A judge who heard her case characterized her working conditions as those no woman should ever have to endure. Although most women survive a hostile work environment suffering less severely than Stoll, hostile working conditions are frequently the cause of acute psychological pain and suffering. Hostile work environment sexual harassment may be as devastating for a woman as acts of quid pro quo sexual harassment.

On occasion, an entire staff of female workers may be subjected to hostile and offensive working conditions. Women working at the Eveleth Taconite Company in Minnesota filed a class action lawsuit against the company, alleging it allowed, and in some instances promoted, a work environment that was sexually hostile and abusive to all women. They submitted evidence demonstrating a pattern of sexual hostility that had long existed throughout the company. Company officials permitted sexually explicit graffiti, pictures, and posters to be placed on office walls, lunchroom areas, and tool rooms. Similar materials were exhibited in elevators and women’s restrooms, posted in company-locked bulletin boards, and distributed in interoffice mail. In addition, women often suffered incidents of unwanted kissing, touching, pinching, and grabbing. Everyday workplace language reflected a male-oriented and an anti-female work environment. Offensive sexist comments, such as “women should remain home with their children” and “women deprive men of their jobs,” were commonly heard in the conversations of male workers.

Sexually oriented offensives grew so pervasive at Eveleth Taconite that they became “standard operating procedure.” First-line supervisors were

well aware of the harassing behavior of nonsupervisory personnel, and some of the supervisors even participated in the harassment. The company was male-dominated in terms of power, position, and atmosphere. Male-focused attention on sex and references to women as sexual objects created a sexualized work environment, and the presence of graffiti and other sexual materials, together with the general sex-oriented conduct of male workers, reinforced stereotypical attitudes toward the women working for the company. The court ruled the company had maintained a sexually hostile work environment.

It should be obvious that the callous pattern and practice of sexual harassment engaged in by Eveleth Mines inevitably destroyed the self-esteem of the working women exposed to it. The emotional harm, brought about by this record of human indecency, sought to destroy the human psyche as well as the human spirit of each plaintiff. The humiliation and degradation suffered by these women is irreparable. Although money damage cannot make these women whole or even begin to repair the injury done, it can serve to set a precedent that in the environment of the working place such hostility will not be tolerated.⁵

Quid Pro Quo and Hostile Work Environment Sexual Harassment in Combination

Quid pro quo sexual harassment underlay Mechelle Vinson's claims against Meritor Savings Bank (described in chapter 1). Vinson alleged she first consented to a sexual relationship with her supervisor out of fear of losing her position, and later complied with his repeated demands for sex only to save her job. She understood that if she rejected his advances, her continued employment with the bank would be placed in jeopardy. When the receipt of employment benefits or the elimination of threatened adverse employment actions are conditioned on a victim's submission to the sexual demands of her supervisor, victims such as Vinson may assert a powerful quid pro quo claim against her employer.

The circumstances Vinson confronted also afforded her the opportunity to allege a hostile environment sexual harassment claim against the bank. In fact, in its ruling, the Supreme Court emphasized that aspect of the case, noting that although her supervisor's harassment had not resulted in any economic loss for her, it unreasonably interfered with her work performance and created an offensive working environment. The court gave its approval to previously adopted EEOC guidelines that Title

VII “affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult,” and that the victim of such misconduct may sue her employer for having failed to provide her with a work environment free of hostility and offensiveness. Vinson’s allegations that her supervisor made repeated demands for sex, fondled her in the presence of other employees, followed her into the restroom, exposed himself to her, and even raped her were fundamental to her quid pro quo claim, but they also served as a basis for a claim that her working environment was overtly hostile and highly offensive. Claims of both forms of sexual harassment were thus available to Vinson.⁶

Terri Nichols worked in an equally offensive and hostile working environment. Nichols, deaf, mute, and incapable of communicating with co-workers except through writing and sign language, worked as a night-shift mail sorter at the Salem, Oregon, postal facility. The night-shift supervisor, Ron Francisco, was the highest-ranking manager at the facility during that shift and was the only supervisor able to communicate with Nichols in sign language. Shortly after Nichols commenced work, Francisco asked her to photocopy some documents for him. He followed her into the photocopy room, started kissing her, and indicated he wanted her to perform oral sex for him. Initially she refused, but when he persisted, she complied because she was afraid she would lose her position if she continued to resist him. Her testimony later given during the trial of her sexual harassment case vividly describes how a harassed worker typically perceives a sexually hostile work environment:

I remember that when this first happened I was just in shock. I was nervous. I was upset. I wasn’t happy doing it, and I was hoping it would never happen again. And I just kept that all to myself. But then there was repeats and repeats and repeats, and I was more upset and I didn’t want it. I didn’t want to do it again and again for him, and I didn’t know how to say, “Stop, just stop.”

Although this routine occurred repeatedly over a period of six months, Nichols did not report Francisco for fear post office officials would not believe her and Francisco would then retaliate against her. Nor did she tell her husband:

I tried to kill myself because I just didn’t know how to tell my husband. . . . I was afraid he would take the children and divorce me. And so I was just stuck. I was stuck between the two and there was no one I could talk to. I was afraid other people wouldn’t believe me. . . . [If I reported] the super-

visor I would lose my job. My husband and I had just recently bought a house and that house depended on my earnings, and I didn't want to lose everything. And that job was so important to the support of my family, so I was just stuck with the two.

Ultimately, Nichols grew depressed, anxious, and irritable and had difficulty eating and sleeping:

I was losing weight. I wasn't able to eat regularly. I didn't have enough sleep. I got real emotional at home. I was angry. I remember as time progressed, I was getting crazier. I hated that sex. I didn't want sex even with my husband.

Her fears about the reaction of her husband were realized when he sued for divorce. At the time, Nichols asked Francisco for a leave of absence to deal with her family problems. He granted her request but only after she again agreed to perform oral sex for him.

In the end, Nichols reported Francisco to the postal authorities and filed suit. Subsequently, she was diagnosed as suffering from a post-traumatic stress disorder and was granted federal disability benefits. By the time her sexual harassment case reached trial, the Postal Service had transferred her to another facility. She was then living with her two young children, her marriage having ended in divorce.

Francisco, as a supervisor and the highest-ranking managerial employee working on the night-shift, possessed the power to dictate the conditions of Nichols's employment, and he made submission to his sexual demands the predominant condition of that employment. The quid pro quo nature of his harassment of Nichols was epitomized in his demand for oral sex as the price for granting her request for a leave of absence. But Francisco's conduct also created a wholly offensive and hostile work environment, an environment sufficiently severe and pervasive to alter the conditions of Nichols's employment. The acts of harassment to which Nichols was subjected clearly supported a quid pro quo as well as a hostile environment claim.⁷

Physical Harassment

Lynn Fall worked in the South Bend branch of the Indiana University serving as a liaison between the university and the local community.