STEP FORWARD

SEXUAL HARASSMENT IN THE WORKPLACE

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The History of Sexual Harassment: How We Got to This Point

Not long ago I was conducting a sexual harassment workshop and we were waiting for everyone to come in and sit down so we could get started. A man in the front row turned to the woman sitting next to him and said loudly and, I thought at the time, jokingly, "What the hell are we doing here? I don't know what the stink's all about. Ten years ago you never heard anything about sexual harassment. Now there's something in the paper every damn day!"

He got no reaction, so he went on. "I wish I could get someone to sexually harass *me*. I've been trying for years to get someone to sexually harass me, and no one will do it." Then he burst out laughing.

The woman he was talking to looked upset and embarrassed, and apparently she didn't believe, know, or care whether or not he was joking. After his second statement, about wanting some-

one to harass him, she delivered her comeback, telling him in some detail exactly why she thought no one would ever bother to sexually harass him, emphasizing his lack of appeal and other not-so-endearing characteristics. That was the end of their discussion.

Actually, he was right—in the first part of his comments, at least: for the most part, ten years ago most of us hadn't heard much about sexual harassment, and now there is something in the paper almost every day. The truth is it's just a very, very old problem, getting a lot of new attention.

Many people who are facing the issue of sexual harassment for the first time today have little or no knowledge of how we got to this point. A bit of historical background can go a long way in helping us see the overall picture of sexual harassment and understand the intricacies of this complex and troubling problem.

Court records as far back as American colonial times show examples of what we today call sexual harassment. According to Charles Clark in the August 1991 *CQ Researcher*, it was in 1734 that a group of female servants published a notice in the *New York Weekly Journal* that said, "We think it reasonable we should not be beat by our mistresses' husbands, they being too strong and perhaps may do tender women mischief." Strikingly similar examples were reported in Canadian court records (Toronto, 1915) and in Genesis 39 (in which the harasser was female and the victim of harassment was male).

According to Clark, in the 1960s the basis for today's awareness of sexual harassment fell into place:

- Women began entering (and staying in) the work force in large numbers. In 1959 there were 22 million women in the work force, or approximately 33 percent; by 1991 there were 57 million working women, or 45.5 percent of the American work force.

- The 1964 Civil Rights Bill was passed, which broadened the employment-discrimination section, Title VII, to cover sex discrimination.
- The birth control pill, the women's movement, and the sexual revolution began changing society's views of men, women, work, and family.

THE 1970s

"The 1970s ushered in an era of dramatic efforts to curb workplace discrimination of all forms," says Clark. In 1972 Congress passed the Equal Employment Opportunity Act, giving the federal Equal Employment Opportunity Commission (EEOC) an [illegible] the president. This counsel was given the authority to bring cease-and-desist orders and to sue in federal court those employers guilty of workplace discrimination. Also in 1972, Congress passed the Education Act Amendments prohibiting sex discrimination at schools and universities that receive any federal funding.

But it was well into the 1970s, actually ten years after the enactment of the Civil Rights Act, when federal courts heard the first cases in which sexual harassment was the primary complaint. In these cases (*Miller* v. *Bank of America*, *Corne* v. *Bausch & Lomb, Inc.*, *Barnes* v. *Train*) the courts interpreted sexual harassment based on sex as a "personal matter" between the two individuals, and not as actions directed at or affecting groups of people. Thus, these cases were not successful in establishing sexual harassment as a form of sex discrimination.

In the very first case (*Corne* v. *Bausch & Lomb, Inc.*), two female employees resigned because of repeated verbal and physical advances by their supervisor. The district court refused to hold the company liable because the supervisor's conduct served no employer policy and didn't benefit the employer. The court

called the supervisor's conduct "a personal proclivity, peculiarity or mannerism."

But in 1976 a case (*Williams* v. *Saxbe*) finally did establish a cause of action for sexual harassment. The court ruled that the behavior in question had only to create an "artificial barrier to employment that was placed before one gender and not the other, even though both genders were similarly situated." Thus, conditions of employment that were applied differently to men and women, such as sexual harassment, were forbidden under Title VII as sex discrimination. This was a major and landmark decision in beginning to address sexual harassment in the workplace.

These early sexual harassment cases involved claims that the plaintiffs had been deprived of tangible job benefits for their failure to succumb to sexual advances (*Tomkins* v. *Public Service Gas & Electric*). The women had to show that there was a clear relationship between the objectionable conduct (the harassment) and the negative employment consequences (being fired or demoted, given distasteful job assignments or poor performance reviews). If they could not show these tangible, negative consequences, then the harassing behavior was seen as isolated sexual misconduct, not a Title VII violation (*Hill* v. *BASF Wyandotte Corp.*, *Neely* v. *American Fidelity Assurance Co.*, *Davis* v. *Bristol Laboratories*).

In 1977 the first charge of sexual harassment of students was brought under Title IX of the 1972 Education Act Amendments. A female undergraduate at Yale University said that her professor [illegible] accept his sexual proposition and that when she refused she got a C. In her suit (*Alexander* v. *Yale University*) she demanded that the lower grade be removed from her record; she was joined in this demand by four other students and a faculty member.

The district court maintained that sexual harassment may constitute sex discrimination under Title IX, stating, "It is perfectly

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reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment."

Her suit was dismissed in 1980 because she had graduated from Yale and in the meantime the university had established a sexual harassment grievance procedure for dealing with complaints. However, the importance of this case is that it served to define sexual harassment in the educational system and bring attention to teacher-student types of harassment.

In addition to the rush of legal activity taking place in the seventies, a number of major studies and surveys were published. Lin Farley's book, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (1978), defined the problem and told story after story of women who experienced harassment at work. Catharine A. MacKinnon wrote *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) and argued the legal remedies. Even anthropologist Margaret Mead contributed, with an article, titled "A Proposal: We Need Taboos on Sex at Work," that is still quoted today.

THE 1980s

What seemed to be a quiet start for the 1980s was truly a noisy beginning. In November 1980, during the final days of the Carter Administration, EEOC's Guidelines on Discrimination Because of Sex were formalized by chairman Eleanor Holmes Norton. The Guidelines had been published earlier in the spring of that year and subject to public discussion and debate. In the fall they became official.

It was in the early eighties that the first district court decision

allowed for a suit over an "atmosphere of discrimination" (*Brown* v. *City of Guthrie*). While the woman could not show loss of tangible job benefits, she did establish that the harassment created a hostile, offensive, and unbearable work environment. The *Brown* court was the first to cite the EEOC Guidelines on Discrimination Because of Sex, quoting Section A, that sexual harassment is a violation of Title VII when "such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."

Shortly after *Brown*, in *Bundy* v. *Jackson* (1981), the circuit court ruled on the basis of the atmosphere of discrimination, and cited the Guidelines to support its opinion. The court interpreted "terms and conditions of employment" protected by Title VII to mean more than tangible compensation and benefits.

Other courts, however, did not follow the pattern of *Brown* and *Bundy*. In *Hill*, the district court had held that no action under Title VII for sexual harassment was available where the plaintiff did not show that her success and advancement depended on her agreeing to her supervisor's demands. The court observed that Title VII should not be interpreted as reaching into sexual relationships that arise during the course of employment but do not have a "substantial effect" on that employment.

Then, in 1982 and 1983, two federal circuit courts of appeal adopted their own classification scheme for sexual harassment cases, identifying two basic varieties of sexual harassment: (1) "Harassment in which a supervisor demands sexual consideration in exchange for job benefits ('quid pro quo')" and (2) "harassment that creates an offensive environment ('condition of work' or 'hostile environment' harassment)" (*Henson* v. *City of Dundee* and *Katz* v. *Dole*).

Quid pro quo ("this for that") harassment, as defined by the

courts, encompasses all situations in which submission to sexually harassing conduct is made a term or condition of employment or in which submission to or rejection of sexually harassing conduct is used as the basis for employment decisions affecting the individual who is the target of such conduct.

In the typical quid pro quo harassment case, an employee (or prospective employee) is approached by an individual with the power to affect the employee's employment future and asked for sexual consideration in return for a job benefit or in order to avoid losing a job benefit.

The *Henson* court stated four elements that a plaintiff must prove to establish a case of quid pro quo sexual harassment:

- He or she belongs to a protected group, i.e., is a male or female.
- He or she was subjected to unwelcome sexual harassment.
- The harassment complained of was based on sex.
- The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.

Condition of work or *hostile environment* sexual harassment, as defined by the courts, is roughly equivalent to the third category of sexual harassment listed in the EEOC Guidelines: unwelcome and demeaning sexually related behavior that creates an intimidating, hostile, and offensive work environment. In the *Henson* case, the circuit court reversed the lower court's holding that the plaintiff must show some tangible job detriment in addition to the hostile work environment created by sexual harassment. The court said that although not every instance or condition of work environment harassment gives rise to a Title VII claim, a plaintiff who can prove a number of elements can estab-

lish a claim. These elements are similar to those for quid pro quo harassment also outlined by *Henson*:

- The employee belongs to a protected group under Title VII, i.e., is a man or a woman.
- The employee was subjected to unwelcome sexual harassment.
- The harassment complained of was based on sex.
- The harassment complained of affected a term, condition, or privilege of employment.
- The employer knew or should have known of the harassment in question and failed to take prompt remedial action.

The U.S. Supreme Court Decision on Sexual Harassment

On June 19, 1986, the U.S. Supreme Court ruled that sexual harassment on the job is illegal discrimination even if the victim suffers no economic loss. The Court held that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination" and the law's phrase "terms, conditions or privileges" of employment indicates congressional intent to "strike at the entire spectrum of disparate treatment of men and women," including harassment that creates a hostile work environment.

The Court quoted the *Henson* court, saying, "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."

The Court reiterated that not all workplace behavior that may be defined as harassment can be said to affect terms or conditions

of employment. For sexual harassment to be actionable it must be sufficiently severe or pervasive to "alter the conditions of the victim's employment and create an abusive working environment."

The Court's key holdings were:

- Sexual harassment is a form of sex discrimination illegal under Title VII of the 1964 Civil Rights Act.
- Sexual harassment is illegal even if the victim suffered only a hostile work environment and not the loss of economic or tangible job benefits.
- Employers are not automatically liable for sexual harassment by their supervisors.
- Lack of knowledge of the harassment does not automatically relieve the employer of liability for supervisors' harassment.
- The complainant's consent to the behavior does not relieve the employer of liability. The question is not the "voluntariness" of the complainant's participation, but whether her conduct indicated that the behavior was unwelcome.
- The complainant's behavior, such as provocative speech and dress, may be considered in determining whether the complainant found particular sexual advances unwelcome.

Since then, other courts have continued to define and refine the definition of what constitutes sexual harassment. The courts' answers to this question have, for the most part, become somewhat predictable and followed a pattern parallel to that of racial harassment.

While some people believed (or hoped) that the courts would narrow the scope of what they consider discriminatory sexual harassment, this has not been the case. Actually, the opposite has occurred: initial rulings limited the scope of what was defined as harassment, and subsequent rulings broadened the definition.

THE 1990s

In the 1990s the problem of sexual harassment has continued to get widespread attention. On March 19, 1990, the EEOC issued updated Guidelines on sexual harassment, reflecting decisions made by the agency itself as well as by various courts since the first Guidelines were issued in 1980.

A number of studies and surveys have also been conducted and their results published. In September 1990, the Pentagon released the largest military survey ever on sexual harassment, showing that of 20,000 military respondents worldwide, 64 percent of the women and 17 percent of the men said that they had been sexually harassed. In a separate study (1991), the Navy revealed that of the 6,700 they surveyed, 75 percent of the women and 50 percent of the men responding said that sexual harassment occurs within their commands.

In the business world, estimates continue to run from 15 to 40 percent of women and 14 to 15 percent of men who experience sexual harassment. On campuses, the estimates range from 40 to 70 percent of female students experiencing harassment, with most harassment coming from other students.

The number of complaints filed with the EEOC has shown a general upward trend over the years (1981, 3,456; 1982, 4,233; 1983, 4,385; 1984, 4,380; 1985, 4,953; 1986, 4,431; 1987, 5,336; 1988, 5,215; 1989, 5,204; 1990, 5,557). However, these numbers don't reveal much about the problem, because many harassment victims sue privately and don't go through the EEOC at all.

Pinups and Sexual Harassment: Robinson *v.* Jacksonville Shipyards

Already in the nineties, two landmark court decisions have been delivered. In the first (*Robinson* v. *Jacksonville Shipyards*, Janu-