Notre Dame Law Review

Volume 68
Issue 5 *The Civil Rights Act of 1991: Theory and Practice*

Article 5

April 2014

Litigation of a Sexual Harassment Case after the Civil Rights Act of 1991

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I. INTRODUCTION

For almost thirty years, Title VII of the Civil Rights Act of 1964[1] has prohibited discrimination in employment because of a person's sex.[2] Sexual harassment, as a form of sex discrimination, was first recognized by a court in 1976.[3] In 1980, in order to reaffirm its long recognized position that sexual harassment is sex discrimination, the Equal Employment Opportunity Commission ("EEOC") amended its existing Guidelines on Discrimination Because of Sex[4] to add a section dealing expressly with sexual harassment. In 1986, the United States Supreme Court in *Meritor Savings Bank v. Vinson*[5] determined that Title VII prohibits sexual harassment in the employment context even where the harassment does not result in direct financial harm. Finally, the Civil Rights Act of 1991 (the "Act")[6] was passed, which is expected to alter the course and direction of the litigation of sexual harassment cases. Only time will reveal just how dramatic these changes will be.[7]

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1 Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified at 42 U.S.C. § 2000e). The prohibition against sex discrimination was added to Title VII at the last minute on the floor of the House of Representatives. 110 CONG. REC. 2577-84 (1964).

2 Section 703(a)(1) of Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1988).

3 Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

4 29 C.F.R. § 1604 (1992).

5 477 U.S. 57 (1986).

6 Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C. (Supp. III 1992).

7 Because many courts have determined that the recently passed Act is not to be given retroactive effect, see *infra* note 63, at present relatively few cases have actually been litigated under the 1991 Act.

II. SEXUAL HARASSMENT—THEORY AND LIABILITY

The EEOC Guidelines are not binding on courts but have persuasive weight because they are the official view of the EEOC, the agency charged with the administration of Title VII. In defining sexual harassment, section 1604.11(a) of the EEOC Guidelines states:

> 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 purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[8]

A. Types of Sexual Harassment

There are essentially two theories of sexual harassment: quid pro quo and hostile environment.[9] The essence of the quid pro quo theory is that an individual "relies upon his apparent or actual authority to extort sexual consideration from an employee."[10] Quid pro quo harassment occurs where "sexual consideration is demanded in exchange for job benefits."[11] In 1986, the Supreme Court in *Meritor Savings Bank v. Vinson*[12] determined that under certain conditions sexually harassing conduct can constitute a Title VII violation even where no tangible job detriment has resulted.[13]

According to the EEOC,[14] the line between quid pro quo and hostile environment harassment is not always clear. For exam-

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8 29 C.F.R. § 1604.11(a) (1992).

9 *Id.* Sections 1604.11(a)(1)-(2) describe quid pro quo harassment, and section 1604.11(a)(3) describes hostile environment harassment. Sex-based harassment may be construed as another type of harassment. Sex-based harassment may not necessarily involve sexual language or conduct. Rather, it is offensive language or conduct directed at a person *because* of his or her sex. The legal standards relating to traditional hostile environment harassment are applicable.

10 Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

11 Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir. 1990).

12 477 U.S. 57 (1986).

13 *Id.* at 65.

14 *See EEOC: Policy Guidance on Sexual Harassment*, 8 Lab. Rel. Rep. (BNA) No. 645, at 405:6681 (Mar. 19, 1990).

ple, an individual's tangible job conditions are affected when a sexually hostile work environment results in constructive discharge. Likewise, a supervisor who makes sexual advances toward a subordinate employee may impliedly communicate that a failure to comply will adversely affect the individual's job status.

The Supreme Court determined that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult.[15] The Court held that a plaintiff may establish a Title VII violation by showing that the harassment is sufficiently severe or pervasive to change the conditions of the victim's employment and create an abusive working environment.[16]

In *Meritor*, the Supreme Court stated that the gravamen of a sexual harassment claim is that the alleged sexual advances are "unwelcome."[17] Thus, that the sex-related conduct was voluntary, in that the complainant was not forced to participate, is not a defense to a Title VII sexual harassment suit. The correct inquiry is whether the victim by her[18] conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation therein was voluntary.[19]

The EEOC Guidelines state that the EEOC, in making a determination whether alleged conduct constitutes sexual harassment, "will look at the record as a whole and at the totality of the circumstances."[20] The legality of a particular action will be determined "from the facts, on a case by case basis."[21]

In *Scott v. Sears, Roebuck & Co.*,[22] a case decided shortly after *Meritor*, the Seventh Circuit defined conduct which did not constitute sexual harassment. In *Scott*, the issue was whether the alleged instances of harassment rose to a level of hostility offensive enough to be considered actionable under Title VII. Scott was trained to become an automobile mechanic at Sears. A male senior mechanic named Gadberry was assigned to give her on-the-

15 *Meritor*, 477 U.S. at 65.

16 *Id.* at 67.

17 *Id.* at 68.

18 Throughout this Article, for the sake of simplicity, the alleged harassee will be referred to as a female and the alleged harasser will be referred to as a male. Obviously, the genders should be reversed where appropriate.

19 *Meritor*, 477 U.S. at 68.

20 29 C.F.R. § 1604.11(b) (1992).

21 *Id.*

22 798 F.2d 210 (7th Cir. 1986).

job training. Scott contended that Gadberry created a hostile environment by repeatedly sexually harassing her. She claimed that Gadberry propositioned her, winked at her, and suggested he give her a rubdown. She claimed that when she asked for assistance, Gadberry would often reply, "what will I get for it?"[23] Scott also asserted that another mechanic slapped her on the buttocks and yet another mechanic told her he knew "she must moan and groan while having sex."[24]

On the other hand, Scott admitted that Gadberry never expressly asked her to have sex and never touched her. She thought that he was "basically nice" and considered him a friend. Gadberry's "propositioning" was nothing more than requests to take her to a restaurant for drinks after work. Although Gadberry responded "what will I get for it" when Scott asked for his advice, there was no evidence that he withheld information due to her failure to "give something" in return.[25] There was also no indication that the other mechanics repeated their alleged offensive conduct. Significantly, Scott conceded that she never complained about the above conduct to any supervisory personnel.

The Seventh Circuit agreed with the district court that the harassment as described by the plaintiff "was not so severe, debilitating or pervasive that it created an actionable hostile environment claim within the current interpretation of Title VII."[26] Simply put, Scott failed to show that the conduct about which she complained was so hostile that it affected the terms and conditions of her employment.[27]

B. Sexual Favoritism

Often third parties, that is, persons who are injured by gender-based conduct in the workplace that is either directed at someone else or at no one in particular, may have valid claims. In 1990, the EEOC addressed sexual favoritism in three situations: (1) favoritism based upon quid pro quo harassment; (2) isolated instances of favoritism toward a lover; and (3) environmental harassment caused by widespread favoritism.[28]

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23 *Id.* at 211.
24 *Id.* at 211-12.
25 *Id.* at 212.
26 *Id.* at 213-14.
27 *Id.* at 214.
28 *EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII*, 8 Lab. Rel. Rep. (BNA) No. 694, at 405:6817 (Jan. 12, 1990) [hereinafter *Sexual Favoritism*].

The classic third-party case concerning favoritism based upon quid pro quo harassment arises where a woman, under duress, accepts her supervisor's unwelcome sexual advances and thereby wins promotion to a position for which another employee was better qualified. Section 1604.11(g) of the EEOC Guidelines addresses this situation:

> Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[29]

The EEOC describes two theories in support of such a claim: (1) a disappointed female could claim that she was denied job benefits as an "implicit quid pro quo" that had become a general condition of employment; and (2) where an individual submits to unwelcome sexual advances and is rewarded, both female and male workers who are better qualified for the benefit in question may advance a derivative claim on the basis of the unlawful sex-based coercion of the favored employee.[30]

With regard to isolated instances of favoritism toward a lover, the EEOC takes the position that "Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships."[31]

According to the EEOC:

> If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors.[32]

Both men and women who find this conduct to be offensive can establish a violation if the conduct is severe enough to alter their employment conditions and create an abusive working environment.[33]

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29 29 C.F.R. § 1604.11(g) (1992).
30 *Sexual Favoritism*, *supra* note 28, at 405:6817-21.
31 *Id.* § A.
32 *Id.* § C.
33 *Id.*

C. *Employer Liability*

The EEOC Guidelines set forth the circumstances under which the EEOC has determined that an employer will be held liable for the acts of its employees. An employer is responsible for the acts of its agents and supervisory employees "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[34] An employer is liable for sexual harassing conduct between fellow employees in the workplace where the employer (or its agents or supervisory employees) "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[35] An employer may be held responsible even for the acts of non-employees with respect to sexual harassment of employees in the workplace where the employer (or its agents or supervisory employees) "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[36]

In *Meritor*, the Supreme Court expressly held that employers are not always automatically liable for sexual harassment by their supervisory personnel, but rather courts must look to agency principles for guidance.[37] The Court acknowledged that such a rule "is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice."[38] The Court, however, pointed out that the Guidelines require an examination of the specific employment relationship and the individual's job functions "in determining whether an individual acts in either a supervisory or agency capacity."[39]

In *Brooms v. Regal Tube Co.*,[40] the Seventh Circuit acknowledged that in *Meritor* the Supreme Court determined that employers are no longer held strictly liable for sexual harassment by their supervisory employees.[41] *Brooms* is particularly significant because the court determined that a dual standard must be used when

34 29 C.F.R. § 1604.11(c) (1992).
35 *Id.* § 1604.11(d).
36 *Id.* § 1604.11(e).
37 *Meritor*, 477 U.S. at 72.
38 *Id.* at 71.
39 *Id.* (citing 29 C.F.R. § 1604.11(c) (1985)).
40 881 F.2d 412 (7th Cir. 1989).
41 *Id.* at 420.

evaluating a Title VII sexual harassment claim. A Title VII violation can be found only if the alleged misconduct "would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action."[42] In *King v. Board of Regents of University of Wisconsin System*[43] and *Daniels v. Essex Group, Inc.*,[44] the Seventh Circuit repeated that harassment must be judged from the view of a "reasonable person" and the particular plaintiff. Thus, in the Seventh Circuit, a combination of subjective and objective standards must be employed to determine the validity of a Title VII sexual harassment claim.[45]

Other circuits apply different tests. For example, the Third Circuit has utilized a five-part test which includes the application of objective and subjective factors.[46] The Eighth Circuit recently endorsed a "reasonable woman" standard.[47] Sixth Circuit cases have produced conflicting results.[48] The later view, as expressed by the Sixth Circuit in *Yates v. Avco Corp.*,[49] is that in a case involving a male supervisor's sexual harassment of a female subordinate, "it seems only reasonable that the person standing in the shoes of the employee should be 'the reasonable woman' since the plaintiff in this type of case is required to be a member of a protected class and is by definition female."[50]

Strong support for the "reasonable woman" standard can be found in the Ninth Circuit. In *Ellison v. Brady*,[51] the court stated that its adoption of the "reasonable woman" standard was based primarily on the court's perception "that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[52] Further, "a gender-conscious examination of sexual harassment enables women to

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42 *Id.* at 419.

43 898 F.2d 533, 537 (7th Cir. 1990).

44 937 F.2d 1264, 1271-72 (7th Cir. 1991).

45 *Brooms*, 881 F.2d at 419.

46 *See* Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990); Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990).

47 Burns v. McGregor Elec. Indus., Inc., 61 Daily Lab. Rep. (BNA) D-1 (8th Cir. 1993).

48 *Compare* Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), *with* Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987).

49 819 F.2d 630 (6th Cir. 1987).

50 *Id.* at 637. The court noted in dicta that, if the plaintiff were a male subordinate, the "reasonable man" standard should be applied. *Id.* at 637 n.2.

51 924 F.2d 872 (9th Cir. 1991).

52 *Id.* at 879.

participate in the workplace on an equal footing with men."[53] The Ninth Circuit noted that if the plaintiff were male, the proper perspective would be that of a reasonable man.[54]

III. THE CIVIL RIGHTS ACT OF 1991

A. Title VII Expanded

Previously, under Title VII a prevailing plaintiff was entitled to injunctive relief, including reinstatement, backpay, lost benefits, attorneys' fees, certain litigation costs, and interest.[55] Under the Civil Rights Act of 1991, a prevailing plaintiff in a claim for intentional discrimination under Title VII also may be entitled to: (1) compensatory damages, including those for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life; and (2) punitive damages if the plaintiff demonstrates that the employer engaged in discriminatory conduct with malice or with reckless indifference to the employee's federally protected rights.[56] For each complaining party, the amount of compensatory and punitive damages must not exceed:

—$50,000 for employers with more than 14 and fewer than 101 employees;[57]
—$100,000 for employers with more than 100 and fewer than 201 employees;
—$200,000 for employers with more than 200 and fewer than 501 employees; and
—$300,000 for employers with more than 500 employees.[58]

Significantly, the Act provides that a plaintiff who seeks compensatory or punitive damages may demand a jury trial.[59] A plaintiff may also be granted expert fees as part of an attorney's fee award.[60]

Under the Act, a defendant will be liable for declaratory and certain injunctive relief and a plaintiff's attorney's fees and costs if a plaintiff proves that race, color, religion, sex, or national origin

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53 *Id.*
54 *Id.* at 879 n.11.
55 42 U.S.C. § 2000e-5 (1988).
56 42 U.S.C. § 1981a (Supp. III 1992).
57 The employer must have the stated number of employees in each of 20 or more calendar weeks in the current or preceding year. These caps may be removed in the future.
58 42 U.S.C. § 1981a(b) (Supp. III 1992).
59 *Id.* § 1981a(c).
60 *Id.* § 1988(b).

was a "motivating factor" for any employment decision, even though other factors also motivated the employment decision, and where the defendant demonstrates that it would have taken the same action absent the impermissible motivation.[61] In those situations, however, a plaintiff is not allowed admission, reinstatement, hiring, promotion, backpay, or compensatory or punitive damages.[62]

The potential under the Act for the receipt of greater monetary rewards by plaintiffs and their attorneys undoubtedly will cause an increase in the number of discrimination charges and lawsuits filed against employers. In particular, the Act now provides a monetary remedy for sexual harassment victims not dependent on lost compensation. Previously, a sexually harassed employee could receive compensation only for economic losses under Title VII. Since loss of pay often does not accompany harassment, little or no monetary relief was provided for such claims. The possibility of greater financial rewards for plaintiffs and their counsel necessarily results in a substantial increase in employers' financial exposure and makes settlement more difficult.

Now that plaintiffs can recover for emotional distress, mental anguish, pain and suffering, and may also recoup expert witness fees, plaintiffs are expected increasingly to use experts at trial. This will require employers seriously to consider utilizing experts on their own behalf which will result in more expensive litigation. It also makes trials more complex and more difficult for employers to win.

B. Retroactivity of the Act

One of the most difficult issues resulting from the passage of the Act is its application to cases that were pending on, and conduct that occurred before, the date of its enactment. There is much uncertainty in the Act and in the law in the area of retroactivity. As this Article goes to press, seven circuit courts of appeals have decided the issue.[63] The Fifth, Sixth, Seventh, Eighth, Elev-

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61 *Id.* §§ 2000e-2(m), 2000e-5(g)(2)(B).

62 *Id.* § 2000e-5(g)(2)(B).

63 *See* Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993); Baynes v. AT&T Technologies, 976 F.2d 1370 (11th Cir. 1992); Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992); Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992), *cert. granted*, No. 92-757, 92-938, 1993 U.S. LEXIS 1760 (U.S. Feb. 22, 1993); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363

enth, and District of Columbia Circuits have determined that all or part of the Act does not apply retroactively; the Ninth Circuit, however, has held that the Act does apply retroactively. The Supreme Court has agreed to resolve this issue.[64]

The Act contains no express direction concerning its retroactivity. Thus, resolution of the retroactivity issue is a matter of statutory construction. Two presumptions have evolved from case law: (1) the presumption set out in *Bowen v. Georgetown University Hospital*,[65] that statutes are to be applied prospectively only, absent a contrary clear statutory mandate; and (2) the presumption set forth in *Bradley v. School Board of Richmond*,[66] that the law in effect at the time of the decision should be applied, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[67]

Recently, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*,[68] the Supreme Court, recognizing the inconsistency in these standards, found it unnecessary to resolve the conflict because Congress had clearly expressed the non-retroactive effect of the statute at issue.[69] Nonetheless, in his concurring opinion in *Kaiser*, Justice Scalia concluded that "absent specific indication to the contrary, the operation of nonpenal legislation is prospective only."[70]

As stated above, Supreme Court resolution of the retroactivity issue is forthcoming.

IV. LITIGATION OF A SEXUAL HARASSMENT CLAIM

A. *Agency Proceedings*

Before an individual can file a complaint under the Act in court, he or she must exhaust available administrative remedies. A person who feels he or she has been a victim of sexual harassment has various options. Requirements may vary from state to state. By

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(5th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992).

64 On February 22, 1993, the U.S. Supreme Court granted petitions for review in *Landgraf*, *supra* note 63, and Harvis v. Roadway Express, Inc., 973 F.2d 490 (6th Cir. 1992), *cert. granted*, No. 92-757, 92-938, 1993 U.S. LEXIS 1760 (U.S. Feb. 22, 1993).

65 488 U.S. 204, 208 (1988).

66 416 U.S. 696 (1974).

67 *Id.* at 711; *see also* Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 281-82 (1969).

68 494 U.S. 827 (1990).

69 *Id.* at 836.

70 *Id.* at 838 (footnotes omitted).

way of example, the options available in Illinois will be discussed here.

1. State Administrative Process

Illinois is considered a "deferral" state, that is, a state in which the complainant must file with the state agency. In most deferral states, such as Illinois, the state-EEOC work-sharing agreement results in simultaneous filing with both agencies.

In Illinois, a charge must be filed with the Illinois Department of Human Rights ("Department") within 180 days after the occurrence of an alleged violation.[71] If the alleged civil rights violation is continuing, the occurrence date may be any date subsequent to the commencement of the alleged violation up to and including the date on which it stopped.[72] Where the Department conducts the investigation, the Department's staff generally gathers information from both parties and convenes a formal fact-finding conference.[73]

Within the period which begins with the 301st day after the filing of a charge and ends with the 330th day after the filing of a charge, the aggrieved party may file a complaint with the Illinois Human Rights Commission ("Commission"), "if the Department has not sooner filed a complaint or ordered that no complaint be issued."[74] Thus, under those circumstances, the aggrieved individual may file a complaint directly with the Commission during this thirty-day window period.

If the complainant does not file within the thirty-day window period, the Department will continue its investigation and the Director of the Department, or a duly authorized designee, ("Director") will ultimately issue a determination. If the Director concludes that there is not substantial evidence of a civil rights violation or that the Department lacks jurisdiction, the charge will be dismissed. The Department serves the parties written notice of the dismissal and a copy of the investigative report. The notice states

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71 ILL. ANN. STAT. ch. 68, para. 7A-102(A)(1) (Smith-Hurd 1992) (under the new Illinois codification, this section can be found at 775 ILCS 5/7A-102(A)(1)).

72 IDHR R. PRACT. & P. § 2520.310 (Rules of the Illinois Department of Human Rights).

73 *Id.* §§ 2520.430-.440.

74 ILL. ANN. STAT. ch. 68, para. 7A-102(g)(2) (Smith-Hurd 1992) (under the new Illinois codification, this section can be found at 775 ILCS 5/7A-102(g)(2)). A period longer than thirty days may be agreed upon by the parties. *Id.*

the grounds for dismissal and advises the complainant that a request for review may be filed within thirty days of receipt of the notice. On the other hand, if the Director concludes that there is substantial evidence of a civil rights violation, the Department so notifies the parties and advises them that conciliation efforts will take place.[75]

If conciliation fails to result in a settlement or dismissal of a charge, the Department issues and files a complaint with the Commission.[76] After discovery and hearing, an Administrative Law Judge prepares a written recommended order and decision. Regardless of whether exceptions to the recommended order and decision are filed, a three-member panel of the Commission reviews each recommended order and decision, together with the record of proceedings, prior to issuing the Commission's final order and decision.[77] Within thirty days after service of the Commission's Order and Decision, a party may petition for rehearing before the entire Commission.[78] After resolution of the rehearing issue, a party may obtain judicial review in the Illinois Appellate Court.[79]

2. The EEOC Administrative Process

The EEOC follows a somewhat similar procedure. In a state having a state or local law prohibiting sexual harassment, a complainant actually has 300 days after the purported sexual harassment occurred to file a charge with the EEOC.[80] The EEOC's investigation is similar to that of the Illinois Department. After the completion of its investigation, the EEOC will either make a finding that there is reasonable cause to believe that the charge is true or a finding that no such cause exists. If a reasonable cause determination is made and conciliation efforts are unsuccessful, the EEOC will ultimately issue a Notice of Right To Sue to the complainant. The individual has ninety days from receipt of the Notice to file a complaint in court.[81] Significantly, even if the

75 IDHR R. PRACT. & P. § 2520.460.

76 *Id.* § 2520.480.

77 IHRC R. PRACT. & P. § 5300.910 (Rules of the Illinois Human Rights Commission).

78 *Id.* § 5300.1150.

79 ILL. ANN. STAT. ch. 68, para. 8-111(A)(1) (Smith-Hurd 1989) (under the new Illinois codification, this section can be found at 775 ILCS 5/8-111(A)(1)).

80 42 U.S.C. § 2000e-5(e)(1) (Supp. III 1992).

81 *Id.* § 2000e-5(f)(1).

EEOC determines that there is not reasonable cause to believe that the charge is true, the aggrieved individual is still entitled to receive a Notice of Right To Sue and file a complaint in court.

Even before the completion of the EEOC investigation, an aggrieved individual has the right to receive a Notice of Right To Sue. If certain requirements are met, an individual may request a Notice of Right To Sue once 180 days have expired since the filing of the EEOC charge. The aggrieved person may file a civil action in court within ninety days after receipt of the Notice.[82]

With the passage of the Act, more complainants may well choose the federal court as their litigation forum. Although the limited discovery available under the state procedure *may* result in the state administrative and court process being less costly for the parties, complainants usually can initiate judicial proceedings much more quickly by utilizing the EEOC process. They can then request and obtain a Notice of Right To Sue after the expiration of 180 days, and then immediately file a civil action in court. Because the Act provides for, *inter alia*, the granting of compensatory and punitive damages and a jury trial in an intentional discrimination case, aggrieved parties are more likely to forego the state process, quickly file in federal court, and try to obtain a large monetary award from a jury.

B. Court Proceedings

While this Article does not purport to be an all-encompassing discussion of how to litigate a sexual harassment case, it presents some general observations and principles regarding the litigation of such cases once they get to court. As noted, the Act has generally been held to be prospective.[83] Accordingly, as this Article goes to press, there is a relative scarcity of cases which have been decided under the Act.

As shown, under the Act a successful plaintiff claiming intentional discrimination is entitled to compensatory and punitive damages and a jury trial. It is no secret that jury trials are difficult for employers to win. However, employer victories are not impossible.

The defendant or defendants are served with the sexual harassment complaint soon after it is filed in federal court. To sim-

82 *Id.*

83 *See supra* note 63.

plify this discussion, a case against only one defendant will be discussed here. Often, however, sexual harassment plaintiffs sue not only the employer, but also others such as the alleged individual harasser. That event gives rise to various issues. The court must initially decide whether the complainant may sue the individual in his personal capacity or only in his corporate capacity.[84] Also, the joint defense of an employer and an individual defendant presents issues such as potential conflicts of interest, attorney-client privilege, and work product confidentiality. While these matters will not be discussed in detail here, they are significant and must be considered by defense counsel before undertaking joint representation of the employer and the individual.

Upon receipt of the complaint, the defendant's counsel should closely analyze it to see if it may be resolved with a motion to dismiss. Since a plaintiff is now entitled to a jury trial with its attendant costs and risks, a good faith dispositive or even limiting motion to dismiss assumes added significance. A motion to dismiss can be based on any one or more of numerous theories.[85] For example, if the plaintiff has not filed a timely EEOC charge or a timely complaint in court, a motion may seek dismissal because the statutory limitations period has expired. If a defendant supports its motion to dismiss with documents which are not excluded by the court, "the motion shall be treated as one for summary judgment."[86]

If the motion to dismiss is denied in whole or in part, and possibly even while it is pending, the discovery process may begin.[87] Initially, a plaintiff usually depends on written discovery, for example, interrogatories and document production requests, in order to obtain the facts of the case and to learn the employer's defenses. It is generally to the defendant's advantage to keep all discovery, especially written discovery, to a minimum. The defendant knows most of the facts. The defendant's principal need is to learn the plaintiff's perception of the facts and damages and the identity of alleged witnesses through the plaintiff's deposition. A document request seeking all documents relevant to the plaintiff's

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84 *See* Weiss v. Coca-Cola Bottling Co. of Chicago, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991) (determining that a claim against an individual in his personal capacity is not actionable under Title VII).

85 *See* FED. R. CIV. P. 12.

86 *Id.* at 12(b)(6).

87 The defendant, of course, must answer any part of the complaint which was not dismissed.

liability and damage claims should accompany the notice of the plaintiff's deposition.

Before the plaintiff's deposition, a defendant should request a copy of the EEOC's investigation file under the Freedom of Information Act; obtain records of any physicians and therapists consulted by the plaintiff; and conduct a thorough investigation. The investigation should include interviews of the alleged harasser and all employees who might have observed the plaintiff, the alleged harasser, or the harassment itself. Interviews should also be conducted of any employees to whom the plaintiff spoke or complained about the alleged harassment.

In a sexual harassment case, the plaintiff's deposition is an extremely important part of the defense strategy. In addition to learning the plaintiff's perception of the facts and damages and the identity of purported witnesses, the defendant can use the deposition: (1) to get to know the plaintiff as a person and to determine whether the plaintiff will appear to be credible to a judge and jury; (2) to prepare for trial; (3) to discover any alleged facts which might be inconsistent with the defenses intended to be raised by the employer; (4) as a basis for a summary judgment motion; (5) to educate the plaintiff and plaintiff's counsel to weaknesses in the plaintiff's case; (6) to apprise the plaintiff and plaintiff's counsel of litigation's many unpleasant aspects, for example, major commitment of time, emotion, and resources; and (7) as a means to attack the plaintiff's credibility both during the deposition itself and later during briefing on motions and at trial.

Prior to the passage of the Act, emotional distress generally was an issue in only those cases where it was one of the plaintiff's independent claims or where it somehow impacted other issues. Now, because the Act allows for compensatory damages and plaintiffs can be expected to seek such relief in virtually every case, inquiry at the plaintiff's deposition will concern all related matters, for example, symptoms, psychological and medical treatment, medication, therapists' and physicians' records, family and personal relationships, traumatic experiences, job-related stress, and other possible sources of harassment, tension, or stress.

Once the plaintiff puts his or her mental or physical condition in controversy, the court, upon a showing of good cause, may

order the plaintiff to submit to a physical examination by a physician or a mental examination by a psychologist or physician.[88]

Traditionally, sexual harassment plaintiffs have used expert testimony in some cases. Mental health experts, including psychiatrists, psychologists, or therapists, can help show the existence of the plaintiff's emotional distress and its nexus with the alleged sexual harassment.[89] The potential recovery of compensatory damages under the Act will cause, if not necessitate, the plaintiff's use of expert testimony in virtually every case where such relief is sought. To the extent permitted under applicable rules, the defendant should request the plaintiff to identify any experts early in the litigation process. If the plaintiff delays producing this information, the employer should aggressively pursue obtaining it as quickly as possible by appropriate means.

Once the plaintiff's experts are identified, again to the extent permitted under applicable rules, the defendant should obtain, through discovery, each expert's report and any underlying documents. This report should disclose the expert's theory and methodology and, in fact, the express and implied bases for the expert's conclusions. The defendant should also obtain all other written materials which relate in any way to the expert's relationship with the plaintiff.

Only after the defendant is confident that it possesses all the expert's reports and all written material generated by the expert-plaintiff relationship to which the defendant is entitled, and after it is clear that a trial is probable, should the expert's deposition be taken by the defendant. Again, applicable rules will govern. The deposition should be taken as close to trial as feasible so that the defendant can learn the most recent information regarding the plaintiff's condition.

On the other hand, the plaintiff will also want to conduct discovery regarding any experts retained by the defendant. While the defendant should conduct a preliminary search for potential experts early in the litigation, in many cases, if at all possible, the defendant should postpone actually hiring an expert until after the deposition of the plaintiff's expert. Admittedly, this means that a good deal of last minute preparation for trial may take place. Nonetheless, any final decision regarding whether the defendant

88 FED. R. CIV. P. 35.

89 *See, e.g.*, Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524, 1528 (11th Cir. 1983).

should hire an expert at all, and, if so, the identity of the defendant's expert, generally is more appropriately made after the defendant has completed its discovery of the plaintiff's experts. It is at this point that the defendant will have a clear understanding of the scope and contents of the analysis of the plaintiff's experts. Only then can the defendant make a reasoned decision as to whether an expert is needed for the defendant's case.

A defendant usually has a need to take few, if any, depositions other than those of the plaintiff and any experts. However, if the alleged sexual harasser has left the company and moved beyond the subpoena power of the court, the employer may want to take his or her deposition in order to preserve such testimony in the event the individual—assumedly a necessary part of the defendant's defense—will not be available at trial.

On the other hand, a plaintiff normally will take several depositions. A plaintiff has the same interest as a defendant in taking the depositions of any needed witnesses who are beyond the subpoena power of the court. In addition, the plaintiff will undoubtedly want to take the depositions of any relevant company decisionmakers and possibly some of the plaintiff's supervisors, managers, and co-workers.

Once discovery, or a least non-expert discovery, is closed, if the facts so warrant and settlement is not feasible at that juncture in the proceedings, the defendant should file a summary judgment motion. Because the alternative is a costly and risky jury trial, the defendant should try to dispose of all, or at least part, of the case summarily.

Whether courts in cases brought under the Act will be more reluctant or more inclined to grant summary judgment to employers remains to be seen. Because plaintiffs have a right to a jury trial and because the law in general is currently more favorable to plaintiffs, courts might be more reluctant to grant dispositive motions. On the other hand, the expense in time and resources of jury trials and the likelihood of more frivolous lawsuits precipitated by the plaintiff's hope of obtaining a windfall from a sympathetic jury may cause judges to examine closely summary judgment motions. Courts could then readily dispose of those cases in which a trial would be a waste of the resources of the court, the litigants, and the jury.

If the defendant's summary judgment motion fails, two options remain: settlement or jury trial. Both parties should seriously

explore settlement possibilities at this time. Obviously, if a settlement is not reached, the case must go to the jury.

Clearly, at a trial most jurors will identify with the plaintiff; thus, the employer should take only strong cases to the jury. A strong case is one in which there is essentially no evidence of discrimination or harassment and one in which the employer acted fairly and reasonably. Although, from a legal perspective, the fairness and reasonableness of an employer's conduct frequently should play a minor, if any, role, jurors normally place a significant amount of weight on whether the employer did what was "fair."

For example, where a plaintiff rests her sexual harassment claim on a quid pro quo theory claiming that she was not promoted because she refused her supervisor's sexual advances, the jurors will undoubtedly use a "fairness" standard in analyzing the employer's probable defense that she was not qualified for the promotion. Similarly, in assessing a hostile environment claim, the jurors will undoubtedly seek to determine whether the employer treated the plaintiff "fairly" given all of the circumstances.

Because many sexual harassment cases which survive summary judgment are simply credibility conflicts between the plaintiff and the alleged harasser, the ultimate question for the jury is to decide who is to be believed—who presents the more credible story. Giving that question to a group of basically unknown individuals whose sympathies are undoubtedly with the employee is very risky for the employer. At trial, obviously each party will attempt to impeach the other party's witnesses and render their stories incredible.

While each party has various matters to consider at trial, a few issues are very important. For example, pursuant to the EEOC Guidelines, an employer should have a policy to prevent sexual harassment:

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.[90]

90 29 C.F.R. § 1604.11(f) (1992).

An employer's sexual harassment policy plays a significant role in the defense of any sexual harassment case. A showing by the employer that it has a written sexual harassment policy, a complaint procedure for sexual harassment victims, training and education programs regarding sexual harassment concerns, a policy of thoroughly investigating every complaint, and a practice of taking prompt corrective action might appear to the jury to be inconsistent with a finding that the employer engaged in sexual harassment. Similarly, if the plaintiff failed to utilize the complaint procedure, a finding that no sexual harassment actually occurred might result.

The complainant's conduct also may be relevant. In *Meritor*, the Supreme Court determined that the complainant's dress and speech might be relevant to the issue of "unwelcomeness."[91] If a plaintiff who engages in sexually explicit conduct complains of others' vulgar comments and conduct, the sexual advances that follow may not be viewed as "unwelcome."

As mentioned above, the plaintiff will undoubtedly present expert testimony at trial. Plaintiffs are expected increasingly to utilize the services of mental health experts, sociological experts, and employment professionals. From the employer's perspective, the plaintiff's use of sociological experts and employment professionals has no real value and serves only to prejudice the jury against the employer. A sociological expert may testify as to the existence of a hostile environment.[92] Employment professionals, such as human resource specialists, may provide expert testimony on appropriate sexual harassment policies. Neither sociological experts nor employment professionals appear to have the experience or education which provides the specialized knowledge necessary to qualify them as experts. If possible, defendants should preclude such expert testimony at trial.

V. CONCLUSION

Sexual harassment litigation is expected to increase as a result of the passage of the Civil Rights Act of 1991. Cases will be brought by plaintiffs who have been sexually harassed and by plaintiffs who have not been sexually harassed. Nonetheless, sexual

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91 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

92 *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

harassment cases brought under the Act will be more costly and more difficult for employers to win. Employers' financial exposure will increase dramatically. Settlement will be more difficult because of the greater amount of potential monetary recovery by plaintiffs. The implementation and execution of a strong and effective sexual harassment policy are necessities for the employer. Obviously, from both the employer's and the employee's viewpoint, sexual harassment should be eliminated. Further, from the employer's perspective, it is far easier and less costly to prevent sexual harassment than to litigate it. Unfortunately, however, even the prevention of sexual harassment is not likely to eliminate its litigation.