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Sexual-Harassment Liability in 1998: Good News or Bad News for Employers and Employees?

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Abstract

In June 1998 the U.S. Supreme Court issued three separate rulings regarding workplace sexual harassment. In an apparent victory for employers, the court ruled in one case that a victim must actually suffer a tangible loss (i.e., a demotion or unwelcome transfer) to establish a case for *quid pro quo* harassment. The court affirmed, moreover, that employers can absolve themselves of liability in hostile-environment cases by establishing a meaningful and effective policy against sexual harassment. Absent a meaningful policy, however, employers will be liable for a hostile environment created by supervisors. Thus, in another case, the court found an employer liable for workplace harassment because the employer pp. 14-21 failed to disseminate its existing policy and to follow its terms. Finally, in a same-sex harassment case, the court rejected the notion that egregious sexual harassment is per se unlawful, leaving open the possibility that a harasser who treats men and women equally, no matter how badly, could be found not guilty of unlawful behavior. Still, the court made it clear that an employer's best defense against supervisors' sexual-harassment behavior is an effective prevention policy. Consequently, employers should draft a policy that (1) defines sexual harassment; (2) states the company prohibits such conduct; (3) provides a clear procedure for submitting claims, including the names of individuals involved in the resolution process; (4) states that those who complain or cooperate with an investigation will not be retaliated against; and (5) is disseminated to all new employees when they join the company, reissued to all employees each year, and posted in a conspicuous location in the workplace.

Keywords

U.S. Supreme Court, workplace sexual harassment, same-sex harassment

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Comments

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Good News or Bad News for Employers and Employees?

by David Sherwyn and J. Bruce Tracey

Three recent Supreme Court decisions have both clarified and muddied the waters surrounding employment-related sexual-harassment cases. Employers have not, however, been as badly hurt as some analysts have warned.

In the first six months of 1998 the U.S. Supreme Court issued three landmark decisions that we believe will have a profound effect on the issue of workplace sexual harassment. While at first blush the decisions may not seem employer-friendly, in fact they can benefit those employers who understand the decisions' underpinnings.

In this paper we first examine two of those decisions, *Burlington Industries v. Ellerth*[1] and *Faragher v.*

[1] *Burlington Industries v. Ellerth*, 118 S.Ct. 2257 (1998).

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Boca Raton,[2] and show that these cases actually limit the liability of employers who establish a meaningful and effective policy against sexual harassment. Then we discuss *Oncale v. Sundowner Offshore Services,*[3] a same-sex harassment case, and posit that the court actually created a new, "equal-opportunity harasser" defense for employers that, while unfortunate, nevertheless establishes yet another hurdle that plaintiffs must overcome to prevail in court. We conclude our analysis by recommending an approach to handling sexual-harassment complaints that should help employers avoid liability. Taken together, these three cases demonstrate again the necessity for employers to establish and follow policies forbidding workplace sexual harassment.

Sexual-harassment Liability

No U.S. law expressly prohibits sexual harassment. The statute that forms the basis for workplace sexual-harassment claims is Title VII of the Civil Rights Act of 1964.[4] Briefly, Title VII prohibits employment discrimination based on race, color, religion, national origin, and sex. In *Meritor Savings Bank v. Vinson,* the U.S. Supreme Court held that discrimination based on sex includes that which today is defined as sexual harassment.[5] In *Meritor* the court delineated two types of harassment: *quid pro quo* and hostile environment. *Quid pro quo* harassment exists when employment conditions are contingent on sexual favors. A hostile environment exists when **(1)** an employer subjects an employee to sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; **(2)** the conduct is unwelcome; and **(3)** the conduct was sufficiently severe or pervasive[6] to alter the conditions of the victim's employment and create an abusive working environment.[7]

Liability. One of the key issues in sexual-harassment claims is establishing liability. The *Meritor* court held that "agency principles" would determine whether the company was liable for the actions of its supervisors. Because that term is so vague, however, lower courts that must adhere to *Meritor* have had trouble defining "agency principles." Prior to the U.S. Supreme Court's June 1998 decisions, every circuit court to address this issue held that employers were vicariously liable for the conduct of supervisors in *quid pro quo* cases.[8] Thus, a company was liable when a supervisor took tangible actions against an employee who refused to submit to the supervisor's sexual demands.

In hostile-environment cases, however, the issue of vicarious liability has not been settled. Instead, courts have typically analyzed whether supervisors were acting within the scope of employment.[9] While the general rule had been that sexual harassment is not within the scope of employment (i.e., that it is personal in nature and therefore unrelated to the supervisor's responsibilities),[10] employers could not rely on that distinction for protection. Even if the court held that sexual harassment is outside the employment context, an employer could still be held liable if it knew or should have known about the harassment.[11] Thus, employers would find themselves litigating over whether they knew about harassing behavior.

On the other hand, some courts held that a supervisor's harassing conduct is within the scope of employment because such conduct is due in part to the legitimate authority associated with the harasser's position.[12] Other courts found that certain supervisors held positions so high in the company hierarchy that their actions were imputed to the employer, regardless of whether the company endorsed the conduct or had a policy against it.[13]

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[2]*Faragher v. Boca Raton,* 118 S.Ct. 2275 (1998).

[3]*Oncale v. Sundowner Offshore Services, Inc.,* 118 S. Ct. 998 (1998).

[4]42 U.S.C. 2000(e). (For the layperson, an in-depth article on the development of sexual-harassment case law was published earlier this year. See: Jeffrey Toobin, "The Trouble with Sex—Why the Law of Sexual Harassment Has Never Worked," *New Yorker,* February 9, 1998, pp. 48–55.—*Ed.)*

[5]*Meritor Savings Bank v. Vinson,* 106 S. Ct. 2399 (1986) or 477 U.S. 57 (1986).

[6]The expression "severe and pervasive" is unclear and was not clarified by 1998's court decisions. In a concurrence to *Harris v. Forklift Systems, Inc.,* 114 S.Ct. 367 (1993) and U.S. Lexis 7155, Justice Scalia explained that the term "severe and pervasive" does not provide much guidance, but that neither he nor the court could think of anything better.

[7]*Meritor v. Vinson,* at 66267, and *Ellison v. Brady,* 924 F.2d 872, 875–876 (9th Cir., 1998).

[8]See, for example: *Ellerth,* at p. 4; *Davis v. Sioux City,* 115 F.3d 1365, 1367 (8th Cir. 1997); *Nichols v. Frank,* 42 F.3d 503, 513-514 (9th Cir. 1994); *Bouton v. BMW of North America, Inc.,* 29 F.3d 103, 106-107 (3rd Cir. 1994); *Sauers v. Salt Lake County,* 1 F.3d 1122, 1127 (10th Cir. 1993); *Kauffman v. Allied Signal, Inc.,* 970 F.2d 178, 185–186 (6th Cir.), cert. denied, 506 U.S. 1041, 121 L. Ed. 2d 701, 113 S. Ct. 831 (1992); and *Steele v. Offshore Shipbuilding, Inc.,* 867 F.2d 1311,1316 (11th Cir. 1989).

[9]*Faragher,* at 8.

[10]*Ellerth,* at 7.

[11]See: *Faragher,* at 5, citing *Katz v. Dole,* 709 F.2d 251, 256 (4th Cir. 1983), which upheld employer liability because the "employer's supervisory personnel manifested unmistakable acquiescence in or approval of the harassment"; *EEOC v. Hacienda Hotel,* 881 F.2d 1504, 1516 (9th Cir. 1989), which found the employer liable because its hotel manager did not respond to complaints about supervisors' harassment; and *Hall v. Gus Construction Co.,* 842 F.2d 1010, 1016 (8th Cir. 1988), which held the employer liable for harassment by co-workers because the supervisor knew of the harassment but did nothing.

[12]See: *Martin v. Cavalier Hotel Corp.,* 48 F.3d 1343, 1351-1352 (4th Cir. 1995), which held the employer vicariously liable in part based on finding that the supervisor's rape of an employee was not outside the scope of his employment because he used his position and power to facilitate the criminal act; and *Kauffman v. Allied Signal, Inc.,* 184, which held that a supervisor's harassment was within the scope of his employment.

[13]See: *Faragher,* at 6, citing *Burns v. McGregor Electronic Industries, Inc.,* 955 F.2d 559, 564 (8th Cir. 1992), which found the employer-company liable where harassment was perpetrated by its owner; and *Torres v. Pisano,* 116 F.3d 625, 634-635, and n. 11 (2nd Cir. 1997), which noted that a supervisor may hold a sufficiently high position "in the management hierarchy of the company for his actions to be imputed automatically to the employer."

An employer can avoid liability for a supervisor's sexual harassment by having an effective sexual-harassment-prevention policy.

Finally, to deflect liability, employers could argue in their defense that they had a policy against sexual harassment and the employee failed to observe it. This defense was almost always successful in those cases where the harasser was a coworker,[14] but it did not always absolve the company when the harasser was a supervisor.[15]

Liability is relatively clear in *quid pro quo* cases, when compared to hostile-environment cases. Thus, plaintiffs have been known to "spin" the facts to fit this theory. Employers, in the course of defending themselves in those cases, ended up contesting the *quid pro quo* classification and arguing that the plaintiff could proceed only under the hostile-environment theory, if at all. While having the dispute classified as a hostile-environment case did not ensure an automatic victory for employers, it did make it more difficult for plaintiffs to prevail. Gaining that advantage was not without its costs, however. To have a case reclassified, defense lawyers must conduct extensive discovery procedures and create lengthy briefs on the issue. The attorneys' fees, associated costs, and lost productivity from arguing over the classification of a case could exceed the total value of the case award.

1998 Supreme Court Rulings

Prior to June 26, 1998, when the Supreme Court announced its decisions in *Ellerth* and *Faragher,* the two cases seemed to present different issues. In *Ellerth* the plaintiff alleged that she was led to believe that receiving a promotion was contingent on having an affair with her supervisor. The plaintiff refused to have an affair, but was nevertheless promoted. The question before the court was whether such a scenario constituted *quid pro quo* or hostile-environment harassment. In *Faragher,* the plaintiff, a lifeguard employed by the city of Boca Raton, Florida, brought a hostile-environment case against the city. The question before the court was whether the city could be held liable even if it did not know that the plaintiff had been harassed.

In *Ellerth* the court set forth what could be described as three holdings. First, the court held that employers will always be liable for a supervisor's *quid pro quo* harassment. Second, the court held that to establish a case of *quid pro quo* harassment a plaintiff must prove that there was a tangible loss (e.g., plaintiff is discharged, demoted, not promoted, or reassigned unfavorably). In other words, a plaintiff could not, according to the court, establish a case of *quid pro quo* harassment if she did not actually suffer a loss, despite having been threatened with a tangible loss. This part of the decision is a victory for employers because it limits the circumstances under which they are automatically liable for *quid pro quo* harassment. Third, in what has been described as a break from the majority of circuits, the U.S. Supreme Court held that employers are liable for the conduct of supervisors in hostile-environment situations.

On the surface, this last holding is terrifying for employers. It appears that an employer who is opposed to any form of sexual harassment could be held liable for the actions of supervisors who deliberately disobey company policy. This is not, however, the court's holding, because the decision provided employers with an affirmative defense. The *Ellerth* holding stated that employers could avoid vicarious liability if **(1)** the employer exercised reasonable care

[14] *Blankenship v. Parke Care Centers,* 123 F.3d 868 (6th Cir. Ohio 1997), cert. denied 118 S. Ct. 1039 (1998).

[15] See: *Martin v. Cavalier Hotel Corp.; Kauffman v. Allied Signal, Inc.; Burns v. McGregor Electronic Industries, Inc.;* and *Torres v. Pisano.*

to prevent and promptly correct any sexually harassing behavior, and **(2)** the plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

In explaining those defenses against company liability, the court muddied the water by noting "proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law."[16] Unfortunately, the court did not explain how, in the absence of an effective sexual-harassment policy, an employer could satisfy this burden.

Regarding the employee's actions, the court was again less than exact when it stated: "While proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense."[17]

In *Faragher* the court helped define the defense by addressing the issue of policy dissemination. In this case the city of Boca Raton had a sexual-harassment policy but failed to disseminate that policy to all of its employees. Moreover, the harasser's supervisor knew of the harassment but failed to stop it. Because of the city's failure to disseminate the policy and the supervisor's complicity, the court held that the city did not exercise reasonable care to prevent and correct promptly any sexually harassing behavior. Accordingly, the city could not establish its defense.

[16]*Ellerth*, at 10.

[17]*Ibid.* The affirmative defense, however, is available when the supervisor's harassment culminates in a tangible employment action (i.e., a *quid pro quo* case).

No New Problems for Employers

Some analysts and so-called "harassment consultants" have responded to the court's 1998 rulings by stating that: **(1)** plaintiffs will now have an easier time prevailing in sexual-harassment cases, and **(2)** the holdings will be a bonanza for lawyers as the courts determine what constitutes an employer's reasonable care to avoid harassment. Both of these points may be true to an extent, because employers have lost the heretofore effective defense of "outside the scope of employment." In addition, employers who do not have a policy to eliminate sexual harassment but seek to argue that they nonetheless exercised reasonable care will be faced with significant legal fees in doing so. Since the court did not explain how to establish such proof of reasonable care in the absence of an effective company policy, those employers probably face an expensive, uphill battle.

Employers do not, however, have to expose themselves either to the risk of increased liability or astronomical legal-defense fees. In fact, employers who legitimately seek to end workplace sexual harassment should regard the court's holdings as an improvement over the prior state of the law.

Institute a policy! One considerable improvement is that the U.S. Supreme Court has made it clear that an employer can avoid liability for a supervisor's sexual harassment if the company has an effective sexual-harassment-prevention policy in place. While the court did not definitively define what constitutes an effective policy, its *Faragher* holding (and common sense) makes it fairly clear what is expected. The policy should:[18]

[18]See: "Employment Alert," July 1998 edition, published by the Chicago law firm of Altheimer and Gray. For information, call or e-mail David Ritten at 312-715-4661, «rittend@altheimer.com».

(1) define sexual harassment;
(2) state that the company prohibits such conduct;
(3) provide a clear procedure for submitting claims, including the names of individuals involved in the resolution process;[19]
(4) state that those who complain or cooperate with an investigation will not suffer retaliation; and
(5) be disseminated to all new employees when they join the company, reissued to all employees each year, and posted in a conspicuous location in the workplace.[20]

When enforced, such a policy will constitute a company's strongest defense because it will show the firm's reasonable care in preventing sexual harassment. Moreover, employees who refuse to lodge complaints would be failing to take advantage of a preventive measure established by the company. Alternatively, a company that has a policy yet fails to investigate complaints, does not stop harassment, or retaliates against complaining employees will not prevail because its policy would not fulfill the conditions required for reasonable care. An employee who sued under those latter conditions without first lodging a complaint would not be found to have acted unreasonably.

Shortcomings for Employers

As stated earlier, the court's current holding focuses on a company-

[19]A policy that requires employees to report incidents to their immediate supervisor will not be considered effective when the supervisor is the harasser. Large companies may consider alternative reporting strategies, such as establishing a sexual-harassment hotline. In any event, the policy should include a procedure that allows the alleged victim to bypass the harasser if the harasser normally has a role in the company's policy-enactment process.

[20]Some firms require that employees sign an acknowledgment that they have read and understand the company policy.

sponsored sexual-harassment policy and whether the employer and the employee complied with it. Since a plaintiff's lawyer probably will not risk scarce resources on litigating the effectiveness of such a policy, the court's holdings strengthen an employer's defense. Although the *Ellerth* and *Faragher* decisions greatly reduce the threat of liability for a company that can document its adherence to and enforcement of a sexual-harassment policy, the court's holdings still raise two potential problems for employers.

Burden of proof. The first problem is that the burden of proving that the company acted reasonably (and the plaintiff did not) rests on the employer, and not the employee. The employer must prove to a jury using a preponderance of evidence (e.g., testimony, documents, videos) that its policy was effective and the employee acted unreasonably. On the other hand, the plaintiff's lawyers do not need to prove anything. They simply have to shoot holes in the employer's arguments. This idea is exemplified in the criminal-law standard of innocent until proven guilty. However, after reviewing 1998's sexual-harassment cases, one could argue that the employer is guilty until it demonstrates innocence. Alternatively, if the burden were reversed, the plaintiff would have to prove that the company acted unreasonably and the employee was reasonable. It is much more difficult for employers to prove their assertions than to contest those of the plaintiff.

What's "unreasonable"? The other area where the court could have been more employer-friendly involves the plaintiff's obligation to use the employers' established policies unless doing so would be "unreasonable." The court's use of the word "unreasonable" is, we believe, unfortunate for employers. The word "unreasonable" is not as definitive a term as, for example, "futile." An employer with solid policies and procedures in place could proceed confidently because a jury could not find that using the company policy was "futile." The same employer may, however, have trouble proving to a jury that a plaintiff who suffered egregious harassment acted improperly by failing to follow procedures that seem "reasonable." We predict that the relevance of this difference will be seen as the lower courts clarify this standard.

Despite the difficult conditions presented to employers by the burden-of-proof issue and the court's failure to use something akin to the futility standard, the *Ellerth* and *Faragher* decisions do not create obstacles that employers should fear. Rather, employers should regard those court decisions as positive precedents that clarify the law and provide guidance for establishing a viable defense against harassment charges that arise when supervisors violate established company policy.

Oncale: Not a Victory for Employees

In *Oncale v. Sundowner Offshore Services,* the plaintiff was the smallest member of an all-male crew working on an offshore oil rig. The other members of the crew repeatedly taunted the plaintiff, and over time the taunts became more extreme. Finally, the plaintiff alleged he was attacked in the shower and a bar of soap was shoved into his anus. After complaints to the oil rig's managers did not eliminate the conduct, the plaintiff filed a lawsuit in federal court. The case was dismissed because the case was filed in the 5th Circuit—the only court of appeals to hold that same-sex sexual harassment is not prohibited by Title VII.[21] In upholding the district-court's dismissal, a panel of the 5th Circuit essentially begged the U.S. Supreme Court to overturn the decision that it was bound to follow.[22] The Supreme Court did just that. It rejected the notion that there was no cause of action for same-sex sexual harassment and held that the plaintiff could make such a case if the conduct was motivated by the sex of the plaintiff. The case was sent back to district court for adjudication consistent with the Supreme Court holding.

The court's holding elicited reactions that were similar to those that followed the *Ellerth* and *Faragher* cases. That is, media analysts declared a victory for employees at the expense of employers, while civil-rights advocates applauded the court's decision.[23]

We believe, however, that the analysts, commentators, and civil-rights advocates are wrong to see this as an untrammeled victory for employees. *Oncale* did not establish a new cause of action; *Oncale* created a more stringent burden-of-proof requirement that could reduce the probability that the employee will prevail in sex-harassment cases.

In fact, we think that the Supreme Court's definition of sexual harassment in *Oncale* will make it more difficult than ever for plaintiffs

[21] *Garcia v. Elf Atochem North America,* 28 F.3d 446, 451-452 (5th Cir. 1994).

[22] *Oncale v. Sundowner Offshore Services, Inc.,* 83 F.3d 118 (5th Cir. 1996).

[23] Media reaction to the *Oncale* case was clear from the headlines: "High Court Widens Workplace Claims in Harassment," *New York Times,* March 5, 1998; "Ruling Puts Workplace Behavior Under a Harsher Spotlight," *USA Today,* March 5, 1998; "Harassment, Not Gender; an Important Victory for Civil Rights," *Bergen Record Headline,* March 8, 1998; and "Justices Broaden Bias Law, Add Same-Sex Harassment," *Columbus Dispatch,* March 5, 1998. Civil-rights advocates found favor with the court's decision as well: Steven R. Shapiro, ACLU legal director, "This decision is a victory for all Americans, gay or straight, male or female," *Detroit News,* March 25, 1998; and Matt Coles, gay-rights litigant for the ACLU's gay-rights project, "[the court's message is] male or female, gay or straight, nobody should have to face sexual harassment when they go to work in the morning," *New York Times,* March 5, 1998.

to prevail. In *Doe v. City of Belleville,* the 7th Circuit implied that severe or pervasive conduct of a sexual nature was *per se* unlawful.[24] The Supreme Court, however, rejected this analysis and held that same-sex sexual harassment was unlawful only if the conduct was "because of sex." Such a holding is a departure from how sexual-harassment cases were analyzed previously. To illustrate this point, it is necessary to examine the three types of sex-related harassment or discrimination that can give rise to causes of action: **(1)** sexual discrimination; **(2)** sexual harassment; and **(3)** gender harassment.

Sexual discrimination. Sexual discrimination, expressly forbidden by Title VII, occurs when an employee's terms and conditions of employment are negatively affected because of the employee's gender.[25] Accordingly, an employee who is discharged or not promoted because she is a woman has a claim for sexual discrimination.

Sexual harassment. We have already discussed sexual harassment in its two forms, *quid pro quo* and hostile environment.

Gender harassment. Gender harassment is similar to hostile-environment sexual harassment in that a violation occurs if the employer's conduct is severe and pervasive. There is, however, a difference between sexual harassment and gender harassment. The conduct that results in a gender-harassment claim is not sexual in nature. Instead, gender harassment exists when employers mistreat employees because of their gender. (For a more detailed explanation of that difference, see the box on this page.) Thus, while it is lawful for a company's supervisors to scream and yell at any or all of their employees (i.e., to be an "equal-opportunity boor"),[26] it is unlawful to scream and yell at just the women or just the men because of their gender.[27]

Motivation Is Key in Sexual-Discrimination and Gender-Harassment Cases

A supervisor's motivation is the key element in sexual-discrimination and gender-harassment claims. This is true because the conduct that gives rise to such claims is not *per se* unlawful. For example, any employee can bring a sexual-discrimination claim upon being terminated. To prevail, however, the employee must prove that she (or he) was discharged because she was a woman (or a man). Similarly, an employee can bring a gender-harassment claim if his supervisor regularly cursed at him and embarrassed him in front of clients. Such conduct, however, is only unlawful if the alleged conduct is motivated by the employee's gender. Subjecting an employee to harassment that is not of a sexual nature is actionable only if the employee can prove that harassment occurred because of the employee's gender. Thus, if the employee is a woman, she must prove that all women were treated this way, and that the men were not.

Conduct Is Key in Sexual-Harassment Cases

Unwelcome sexual conduct has always been considered *per se* unlawful,

Gender Harassment versus Sexual Harassment

The best way to distinguish between gender and sexual harassment may be with examples from relevant cases. In *Dias v. Sky Chefs, Inc.,* 919 F.2d 1370 (9th Cir. 1990), a woman complained that her male manager **(1)** made ongoing comments about her and other female employees' breasts, buttocks, and physical appearances, and **(2)** established dress standards so that he could examine female employees' legs. Because this conduct was sexual in nature, the plaintiff was able to maintain a cause of action for sexual harassment.

Alternatively, in *Cline v. G.E. Auto Lease, Inc.,* 55 FEP Cases 498 (N.D. Ill. 1991), the plaintiff's supervisor repeatedly verbally insulted the plaintiff, Phyllis Cline, but the insults were not of a sexual nature. The supervisor also hit Cline on the arm and on one occasion, in front of her co-workers, commanded Cline to "sit your ass down." Moreover, the supervisor also treated other women harshly. Because his comments were not sexual in nature, the court held that the plaintiff could not establish a cause of sexual harassment. It was possible, however, for the plaintiff to make out a case of gender harassment if she could prove that she was harassed because she was a woman.—*D.S. and J.B.T.*

[24]*Doe v. City of Belleville,* 119 F.3d 563 (7th Cir. 1997).

[25]The terms "sex" and "gender" are used interchangeably.

[26]In *Kranz v. Port Authority,* 55 FEP Cases 1315 (S.D.N.Y. 1991), an employee alleged harassment against a supervisor who swore at the employee, made negative racial remarks, and opened the employee's locked desk. The court found the harassment was not unlawful because the supervisor treated all of his employees in a similar manner.

[27]See: *Cline v. G.E. Auto Lease.* Not all courts recognize gender harassment, however. In *Isaacson v. Keck, Mahin, & Cate,* 61 FEP Cases 1145 (N.D. Ill. 1993), the court held that a woman could not make out a "harassment" charge if she failed to allege any conduct of a sexual nature. To us, this ruling is inconsistent with the fact that employees can successfully allege harassment based on other personal and individual characteristics such as race, religion, national origin, age, or disability.

Unwelcome conduct of a sexual nature that is severe or pervasive should be *per se* unlawful, regardless of the gender of the harasser and the harassed.

provided such conduct is severe and pervasive. For example, an employee can establish a claim of sexual harassment by proving that a supervisor **(1)** sought to begin or rekindle a relationship by stating or implying that such a relationship was a condition of employment; or **(2)** repeatedly made unwelcome sexual advances, requested sexual favors, or engaged in other verbal or physical conduct of a sexual nature. In such cases the supervisor's motivation is irrelevant. Engaging in such conduct, regardless of the motivation, violates the law.

The *Oncale* Departure

The *Oncale* case seems to represent a discontinuity in sexual-harassment law. In *Oncale* the court held that to prove same-sex sexual harassment the plaintiff "must always prove that the conduct is not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."[28] Thus, similar to gender discrimination, the court held that to prove same-sex sexual harassment the plaintiff needs to show both conduct and motivation. To justify this departure from past approaches to sexual-harassment cases, the court explained that in male-female sexual-harassment cases one may assume that gender is the motivation and therefore it is not always necessary to prove that the conduct is because of sex. In same-sex cases, however (according to the court), this assumption can not be made if the alleged harassers are heterosexual. Accordingly, to prove their case, plaintiffs need to prove that gender motivated the harassers.

Proving motivation is a difficult burden to satisfy, as demonstrated by the *Oncale* case. The conduct in *Oncale* was clearly egregious, but was it because of sex? This element may be impossible for the plaintiff to prove. There were no women on the oil rig and Oncale was the only person harassed. How, then, can Oncale prove that his co-workers were motivated by gender when no other man was harassed, and when there were no women to be harassed? If the trial-court jury follows the law as interpreted by the court, Oncale should lose.

A new defense. By way of providing guidance for determining motivation, the court instructed fact finders to look at how harassers treat members of both sexes in a mixed-sex workplace. The implication of this instruction is clear. A plaintiff could not make a case of same-sex harassment if members of the opposite sex were treated in the same manner. Thus, a male employee whose male supervisor taunts the employee about sex and then grabs the employee's buttocks and rubs his chest likely will not have a case of sexual harassment if the supervisor also grabs a female subordinate's buttocks and rubs her chest. If the man in this example does not have a case of sexual harassment because the conduct is not motivated by gender, then it stands to reason that the female in this example does not have a case, either. Thus, the *Oncale* court created a new defense to charges of sexual harassment, what we call the "equal opportunity sexual harasser." Such a defense could turn what had traditionally been actionable conduct into lawful behavior.

For example, posters of naked women in mixed-sex workplaces have in the past exposed employers to claims of harassment by women employees. Now, the employer may be able to insulate itself by putting up such pictures of men, too. Additionally, explicit discussions of sex that used to be taboo may no longer be unlawful as long as both men and women are parties to the conversation. Finally, supervisors who wish to grope members of the opposite sex now may shield themselves and the employer from subsequent liability by groping all employees. Whether such a defense would hold up in court remains to be seen.

The law is unclear. The sudden appearance of what appears to be an equal-opportunity-harasser defense does not mean that sexual harassment is no longer an issue. While such a defense is consistent with the *Oncale* decision, no judicial authority directly supports it, and relying on such an approach doesn't make good business sense. First, because the lower courts will establish the validity of the defense as they grapple

[28] *Doe and Doe v. City of Belleville*, 1997 U.S. 17940, citing *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3rd Cir. 1990).

with *Oncale,* employers who invoke it will likely have to litigate the theory through several different levels of the court system. The cost of such litigation would, in most cases, exceed the potential liability of the original claim. Second, the equal-opportunity harasser, like the equal-opportunity boor, damages employee relations and will likely result in low productivity and high turnover. Thus, companies' problematic supervisors should be eliminated as a matter of course, and not protected or otherwise tolerated. In conclusion, we think that *Oncale* is simply bad law. It seems that the court was so concerned with not extending the civil-rights law that it created a standard that makes no sense. We're confident that, sooner or later, it will be corrected.

The Best Policies Reflect What the Law Should Be

It's clear to us that unwelcome conduct of a sexual nature that is severe or pervasive should be *per se* unlawful, regardless of the gender of the harasser and the harassed. Such a standard would discourage putative equal-opportunity harassers and ensure that people like Oncale win their cases. A clear standard would also provide employers with an easy method for determining whether a complaint was unlawful. The employer would simply ask the employee to describe in detail the type of conduct that occurred. If the severe or pervasive conduct is sexual in nature, the employer would know that the allegations, if true, constitute unlawful harassment—period.

If the allegations consist of nonsexual conduct, the employer would need to explore why that conduct occurred. Does the supervisor treat all members of one sex the same way? How are members of the opposite sex treated? If the supervisor yells at one employee, but treats the other employees of the same gender with fairness and respect, then there probably is no unlawful harassment. If, however, the supervisor makes comments about the employee's body or sex life, the conduct is probably unlawful—if it is deemed severe.

Following a standard of *per se* unlawfulness eliminates the equal-opportunity-harasser defense and other gray areas in the current law, thus making it easier for employers to police their own ranks.

Naysayers. Some people would argue that making severe or pervasive sexual conduct *per se* unlawful invites problems. One school of thought is that such a distinction would turn Title VII into a general civility code. We believe that such is not the case. As the *Oncale* court explained, the law "forbids only behavior so objectively offensive to alter the conditions of the victim's employment that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[29]

Common sense and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[30] We believe that the court is correct—juries can see the difference between conduct that is offensive and that which is boorish.

A second, unrelated argument is that courts and juries cannot distinguish between sexual and nonsexual conduct. *Oncale* notwithstanding, this is also not the case. In *Johnson v. Hondo, Inc.,*[31] a male plaintiff alleged that he was sexually harassed by his male co-worker. As evidence of the harassment, the employee alleged that the co-worker repeatedly said to the employee, "suck my dick." In dismissing the case the 7th Circuit held that the conduct was not sexual, that the employees hated each other, and that the words were used as an insult, not as a come on or a threat of rape.

What's Wrong with *Per Se?*

If unwelcome severe or pervasive sexual conduct should be *per se* unlawful, why did the U.S. Supreme Court refuse to adopt such a standard? We think that the answer lies in the theory behind sexual harassment, which is based not on statute but on a logical extension of Title VII. That leap of logic is grounded on Title VII's ban on discrimination "because of sex." Thus, sexual harassment is unlawful only if it is viewed as discrimination because of sex. To make sexual conduct *per se* unlawful based on Title VII is a leap that the Supreme Court refused to take. That refusal, however, results in an unclear and maybe unworkable law (as exemplified by *Oncale*).

We contend that the court should have either taken the leap or reversed *Meritor* and held that Title VII, in fact, doesn't have anything to do with issues of sexual harassment. Reversing *Meritor* (an unlikely event) would probably force the U.S. Congress to pass an explicit law on the topic. We believe such an outcome would be more desirable than the one that employers and employees alike face today. Until then, however, employers can limit liability by **(1)** establishing a sexual- and gender-harassment policy; **(2)** enforcing the policy; and **(3)** treating unwelcome supervisor–employee sexual conduct as *per se* unlawful. **CQ**

[29] *Oncale,* at 1003

[30] *Ibid.*

[31] *Johnson v. Hondo, Inc.,* 125 F.3d 408 (7th Cir. 1997).