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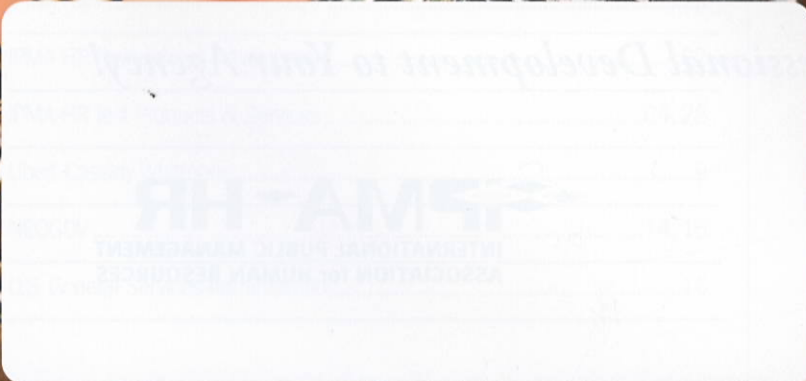
HR Legal Issues

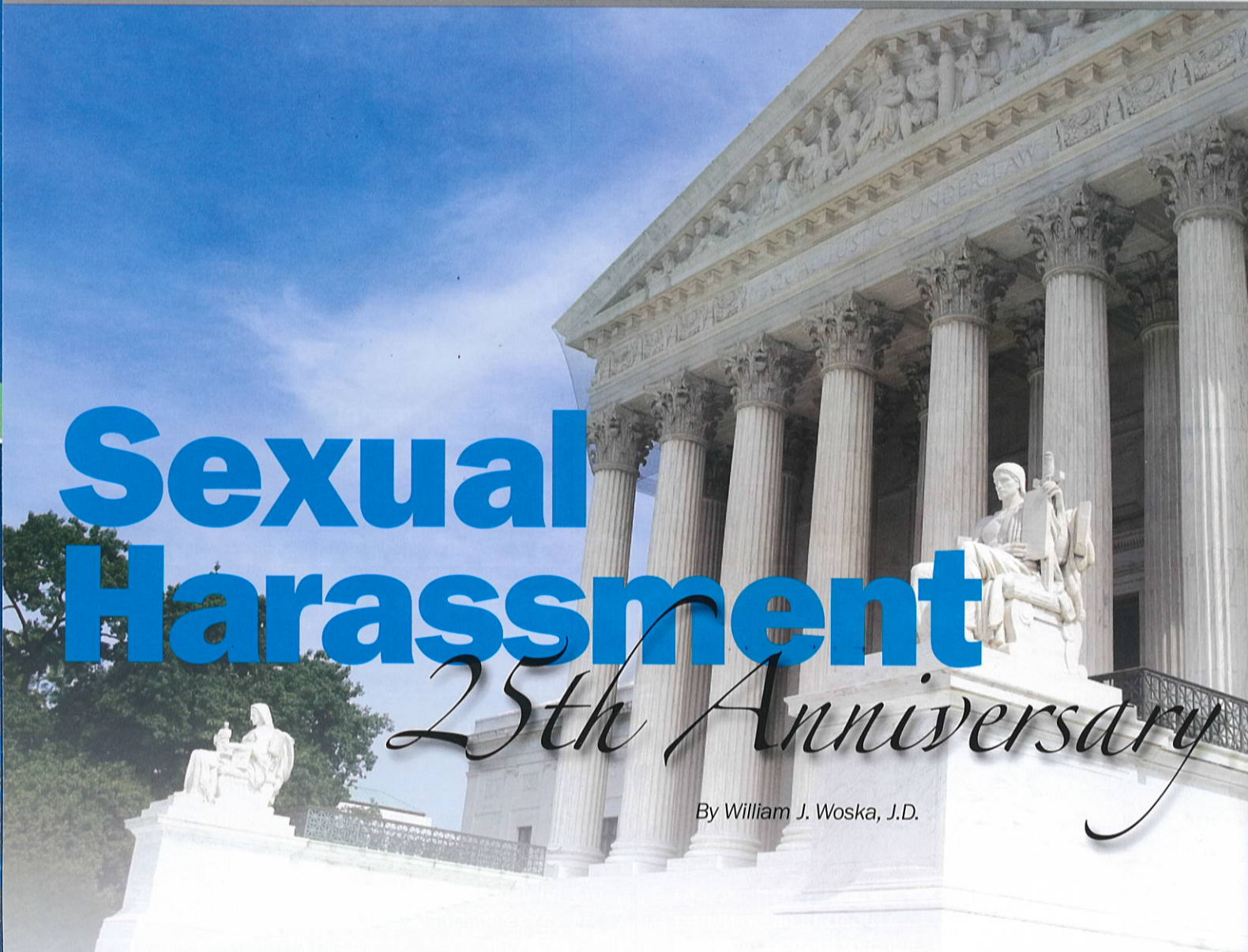
Title VII, Then and Now

Supreme Court Rules in Employment Case

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Sexual Harassment

25th Anniversary

By William J. Woska, J.D.

Title VII of the Civil Rights Act of 1964 (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.” The use of the term “sex” was not included in the Title VII legislation first proposed to Congress. It was not until the legislation was being debated on the House floor that “sex” was added “to prevent discrimination against another minority group—women.” Initially only intended to provide protection for women from discrimination, the prohibition of sex discrimination applies to both males and females.

The term “sexual harassment” did not originate until several years later. The term was being used by women’s groups in Massachusetts in the early 1970s. The term was further used in a report to the president and chancellor of the Massachusetts Institute of Technology in 1973 addressing various forms of gender issues.

In the years immediately following the passage of Title VII, sexual harassment claims were rarely brought under the statute, and when they were, courts dismissed, reasoning that Title VII was not appli-

cable. Finally, in the mid-1970s, courts began to accept sexual harassment as a form of gender discrimination under Title VII.

The Equal Employment Opportunity Commission (EEOC) is an independent federal law enforcement agency that enforces laws against workplace discrimination. In 1980 the EEOC issued the “Guidelines on Discrimination Because of Sex” declaring sexual harassment a violation of Section 703 of Title VII. The guidelines established criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defined the circumstances under which an employer may be held liable, and suggested affirmative steps an employer should take to prevent sexual harassment. Furthermore, the guidelines specifically stated for the first time that “harassment on the basis of sex is a violation of Title VII.”

The EEOC Guidelines defined sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such

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

Although courts are not required to follow the guidelines, they received significant recognition when the United States Supreme Court accepted its first sexual harassment case, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

25th Anniversary of *Meritor*

June 19, 1986, marked the United States Supreme Court's recognition of certain forms of sexual harassment as a violation of Title VII of the Civil Rights Act of 1964 when it handed down its decision in *Meritor*. The primary question before the court was whether a hostile working environment created by unwelcome sexual behavior is a form of employment discrimination prohibited under Title VII when no economic loss or quid pro quo harassment exists. In a unanimous decision, the Court found that Vinson's charges were sufficient to claim hostile environment sexual harassment which must be severe or pervasive to support a claim. Additionally, the Court established the standards for analyzing whether conduct was unlawful and employer liability. This case became the cornerstone for answering sexual harassment questions under Title VII. The Court also provided credence to the EEOC Guidelines and that hostile environment sexual harassment is a form of sexual harassment even when the victim suffers no economic losses.

The Court held that Title VII was "not limited to 'economic' or 'tangible' discrimination," finding that the intention of Congress was to "strike at the entire spectrum of disparate treatment of men and women in employment..." The Court pointed out that the EEOC Guidelines specified that sexual harassment leading to non-economic injury was a form of sex discrimination prohibited by Title VII. The Court further recognized that plaintiffs could establish a violation of Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment."

Meritor was the beginning of several decisions by the United States Supreme Court clarifying sexual harassment law under Title VII.

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993)

The Court next addressed questions regarding sexual harassment in 1993. The question before the Court in *Harris* was whether sexual harassment must seriously affect an employee's psychological well being in order to create an "offensive work environment" that violates Title VII.

The Court's opinion made two important contributions to the law surrounding sexual harassment. First and foremost, the plaintiff did not have to prove psychological harm to establish a Title VII violation. Also, it was not necessary for the plaintiff to show that her job performance had suffered as a result of the harassment. Instead, courts considering the issue were to consider a myriad of conditions

including the frequency of discrimination, the severity of such conduct, and whether it was physically threatening or humiliating.

Landgraf v. USI Film Products et al, 511 U.S. 244 (1994)

Landgraf had been sexually harassed by a coworker while working for USI Film Products and voluntarily terminated her employment. The District Court found that the harassment was not so severe to justify her decision to resign. Because her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. Landgraf appealed the District Court's decision.

While her appeal was pending, the Civil Rights Act of 1991 became law and included provisions that created a right to recover compensatory and punitive damages for intentional discrimination in violation of Title VII, and authorize any party to demand a jury trial if such damages are claimed. The Fifth Circuit Court of Appeals affirmed the District Court's decision and rejected Landgraf's argument that her case should be remanded for a jury trial regarding damages.

The question before the Court was whether the provisions of the 1991 Civil Right Act were applicable. The Court held that provisions of the Civil Rights Act of 1991 regarding jury trials and damages do not apply to cases that arose before the 1991 Act took effect.

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)

Oncale was the first case addressing same sex sexual harassment before the Court. The question before the Court was whether "same sex sexual harassment claims were actionable under Title VII"?

Joseph Oncale was a male oil rig worker who claimed that he was repeatedly subjected to sexual harassment by his male coworkers. He complained to supervisory personnel but no remedial action was taken. The District Court granted summary judgment to the defendants relying on a 1994 Fifth Circuit decision that harassment by a male supervisor of a male subordinate does not state a Title VII claim. On appeal, the Fifth Circuit affirmed.

The United States Supreme Court, in a unanimous decision, held that Title VII, banning on-the-job sexual harassment, applies when the harasser and victim are the same sex. The Court drew on its previous holding in *Meritor* to emphasize that Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)

The *Ellerth* and *Faragher* cases were filed and argued separately before the Court. Both cases involved Title VII and were handed

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Harassment CONTINUED FROM PAGE 7

down by the Court on June 26, 1998, each by a vote of 7 to 2. The effect of the two decisions was to make some lawsuits against employers easier to win while rewarding companies with effective anti-harassment policies by limiting their legal exposure.

The issue before the Court in the *Ellerth* case was whether an employer should be liable for a supervisor's sexual harassment of an employee if the employee did not acquiesce to her supervisor's threats and suffered no adverse employment actions. The case is significant with respect to establishing an employer's liability for sexual harassment by a supervisor. Imposing liability on employers would shift the risk and burdens associated with sexual harassment from the employee to the employer. Shifting the burden would encourage employers to establish and disseminate policies and procedures against sexual harassment, and to develop and implement training programs accordingly.

The Court held that an employee who refuses the unwelcome and threatening sexual advances of a supervisor, but suffers no adverse, tangible job consequences, can recover against the employer without showing that the employer is negligent or otherwise at fault for the supervisor's actions. However, unfulfilled threats must meet the "severe or pervasive" test for sexual harassment.

The issue before the Court in *Faragher* was whether an employer can be held liable under Title VII for the acts of an employee whose sexual harassment of subordinates has created a hostile work environment amounting to employment discrimination. The Court held that an employer is vicariously liable under Title VII for an actionable hostile environment caused by a supervisor. Additionally, such liability is subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of the plaintiff victim.

The *Ellerth* and *Faragher* decisions provided employers with a two-pronged affirmative defense in sexual harassment cases. If the employer can prove both that it took reasonable care to prevent and correct promptly any sexually harassing behavior through disseminated policies, procedures, and training programs, and that the employee unreasonably failed to take advantage of any corrective opportunities provided by the employer or to otherwise avoid harm, the employer would be successful in defending its actions. However, the affirmative defense would not be available when harassment has culminated in a tangible employment action such as a demotion or termination.

Sexual Harassment – What Does the Future Hold?

Sexual harassment is a legal term created for the purpose of ending harassment and discrimination against women in the workplace. Although the term is constantly being redefined and extended in



“Sexual harassment may occur at all levels within an organization...”

legislation and court decisions, the basic definition comes from the EEOC Guidelines.

Courts have given deference to the guidelines on sexual harassment interpreting Title VII's ban on sex discrimination, and sanctioning those guidelines so long as they are reasonable. The guidelines establish criteria for determining "unwelcome sexual contact," whether verbal or physical, that constitutes sexual harassment and defined the circumstances under which an employer is liable for such conduct. The guidelines further explain how "prevention" is the best means of eliminating sexual harassment and suggests affirmative steps an employer should take to prevent the occurrence of unlawful sexual harassment.

Sexual harassment may occur at all levels within an organization in relationships categorized as male-to-female, male-to-male, female-to-male, and female-to-female. Harassment often occurs because the harasser is in a position of leadership or authority that provides the necessary power to facilitate the harassing behavior. This type of harassment is considered quid pro quo harassment. Heather

Hemming who authored *Women in A Man's World: Sexual Harassment*, defined the power approach to sexual harassment as "a product of power differences between men and women in society and the workplace."

Since the workplace is dominated by men in positions of authority, combined sexual harassment charges filed with the EEOC and state Fair Employment Practice Agencies (FEPAs) confirm that a large percentage of the complaints are predominately female against male. During the 2010 fiscal year, 83.6 percent of sexual harassment complaints filed were by women. However, the number of complaints filed by men has increased by more than 41 percent since 1997.

Women in Positions of Authority

Education is a major factor in preparing women for managerial positions in the workplace. Women now earn the majority of diplomas in fields men used to dominate, from biology to business. Women account for about half the enrollment in professional programs such as law, medicine and optometry. During the 2005–2006 year women received 58 percent of baccalaureate degrees and 60 percent of master's degrees from major universities and colleges. During the last decade the number of women in Congress has increased by 21 percent, from 62–75 in the House of Representatives, and from 14–17 in the United States Senate. Additionally, for the first time the Speaker of the House of Representatives was a woman. Also for the first time, The United States Supreme Court has three women justices.

Without question, women are obtaining a more influential role in business, education, law, and politics in the United States. It is unknown as to whether there is a relationship between women in positions of authority and the sexual harassment of subordinates will follow what has been the historical trend of men in positions of authority. However, it is interesting to note that in 2010 the first sexual harassment case filed by a man against a woman was decided by a federal circuit court of appeals. The Ninth Circuit Court of Appeals decision *EEOC v. Prospect Airport Services, Inc.* (No. 07-17221, September 3, 2010), found that a male employee was subjected to verbal or physical conduct of a sexual nature by a female coworker that was unwelcome and was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment. The Court of Appeals emphasized that the law requires employers to treat complaints of sexual harassment made by men with the same seriousness they apply to complaints by women.

This case emphasizes the importance of treating complaints of sexual harassment by men seriously. The case also highlights the need to thoroughly train supervisors regarding their responsibilities when they receive complaints of sexual harassment from either

gender. Only time will tell if the number of sexual harassment complaints of men against women will significantly increase. However, there is little if any controversy that the number of women in positions of authority will be substantially greater in the future.

William J. Woska, J.D., has been an adjunct faculty member at several colleges and universities, including the University of California, Berkeley, Saint Mary's College, Moraga and San Diego State University. He is presently on the faculty at Golden Gate University. Woska has more than 30 years of experience representing employers in employment and labor law matters. His articles have been published in a number of publications including Public Personnel Management, Police Chief, Labor Law Journal, Public Administration Review, Lincoln Law Review, Public Personnel Review, and HR News. He is a member of the Employment Law Section of The State Bar of California. —X



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