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SEXUAL HARASSMENT LAW

'Meritor' at 20: ills persist

Debra S. Katz Avi Kumin/Special to The National Law Journal
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This month marks the 20th anniversary of the U.S. Supreme Court's landmark sexual harassment case, *Meritor Savings Bank v. Vinson*, in which the court held that Title VII of the Civil Rights Act of 1964's bar on discrimination "because of sex" prohibited an employer from subjecting an employee to a sexually hostile work environment. Sexual harassment law has come a long way during this period, although there is still room for improvement.

In *Meritor*, Mechelle Vinson came under the supervision of Sydney Taylor, a bank vice president, who repeatedly propositioned her for sex. Vinson reluctantly consented because she thought that she would lose her job if she didn't. Over the next few years, Taylor subjected Vinson to horrific sexual harassment-exposing himself to her at the workplace, fondling her in front of other employees and even raping her on several occasions. When Vinson's Title VII claim reached the Supreme Court, the bank-along with the U.S. Chamber of Commerce and other pro-business amici curiae-argued that Title VII's prohibition of sex discrimination did not encompass "sexual advances towards an individual female employee."

The Supreme Court disagreed. The court had little difficulty in deciding that sexual harassment in the workplace was "because of sex" and therefore illegal under Title VII. Justice William H. Rehnquist, in a unanimous opinion, wrote that Title VII was not limited to only "economic" or "tangible" discrimination, and that "the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."

It took another five years, though, for the term "sexual harassment" to fully enter the public lexicon. In 1991, President George H.W. Bush nominated Clarence Thomas to the Supreme Court. During the Senate confirmation hearings, the press reported that Thomas had been accused of sexual harassment by Anita Hill, a law school professor who had previously worked with him at the Department of Education and the Equal Employment Opportunity Commission (EEOC). While the Senate ultimately confirmed Thomas' appointment by the slimmest of margins, the public learned through the hearings what "sexual harassment" meant and that it was illegal. Following

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these hearings, the number of employees who filed such claims rose exponentially. (In 1999, the impeachment trial of President Bill Clinton again awakened the public to the intersection of sexual harassment and the law.)

In the 20 years since *Meritor*, sexual harassment law has evolved in several important ways. In 1993, the Supreme Court decided *Harris v. Forklift Systems*, emphasizing that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." In 1998, in *Oncale v. Sundowner Offshore Services*, the court held that "nothing in Title VII necessarily bars a claim of discrimination . . . merely because the plaintiff and the defendant . . . are of the same sex."

Later that year, the Supreme Court decided two more cases-*Burlington Industries v. Ellerth* and *Farragher v. City of Boca Raton*-which held that an employer is vicariously liable for sexual harassment by its employees, but gave an employer an affirmative defense if it could prove that it exercised reasonable care to prevent and promptly correct the behavior and that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities it provided. The court thereby created a large incentive for employers to adopt anti-harassment policies, reporting procedures and disciplinary measures aimed at preventing and swiftly responding to workplace sexual harassment.

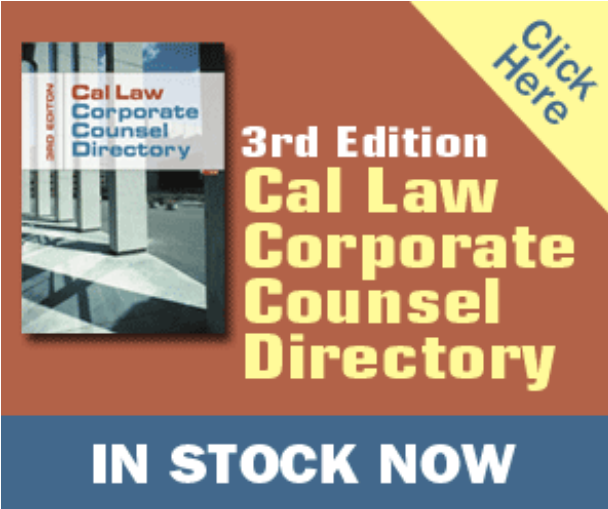
Today, employee awareness of the right to be free from sexual harassment has grown, and employers are likewise more aware of their duty to take affirmative steps to prevent workplace sexual harassment. Yet it continues to be a significant problem. Last year, nearly 13,000 employees filed charges with the EEOC, and thousands more filed similar complaints with state and local agencies.

When to report is problematic

Although the post-*Meritor* cases have clarified legal issues, real-world cases remain problematic. Out of well-founded fear that a harassing supervisor or co-worker may retaliate if she reports sexual harassment or the hope that the conduct will cease if she simply ignores it, an employee may endure months or years of harassment without remedy. Reinforcing this unfortunate reality is the fact that sexual harassment law emphasizes that the offending behavior must be "sufficiently severe or pervasive" to be actionable. If an employee attempts to quickly forestall sexual harassment by promptly reporting, she may be told-by a human resources department or a court-that it was not sufficiently severe or pervasive. On the other hand, if she waits too long to report, a court may find that the defendant is entitled to the *Farragher/Ellerth* affirmative defense.

The Supreme Court has repeatedly made clear that Title VII should not be transformed into a "general civility code," where every harassing action, no matter how minor, becomes an actionable claim. Yet we should be long past the days when an employee must endure the indignity of working in a sexually hostile work environment or being subjected to unwelcome demands for sex just to be able to earn a paycheck.

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