University of Baltimore Law Forum

Volume 17
Number 1 *Fall, 1986*

Article 3

1986

Recent Developments: Meritor Savings Bank v. Vinson: Sexual Harassment Found to Be a Form of Sex Discrimination under 1964 Civil Rights Act

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Recent Developments

Meritor Savings Bank v. Vinson: SEXUAL HARASSMENT FOUND TO BE A FORM OF SEX DISCRIMINATION UNDER 1964 CIVIL RIGHTS ACT

In *Meritor Savings Bank v. Vinson,* 106 S.Ct. 2399 (1986), the United States Supreme Court held that a claim of "hostile environment" sexual harassment is a form of sex discrimination actionable under Title VII of the Civil Rights Act of 1964. The Court stated that even though employers are not always automatically liable for sexual harassment by their supervisors, the employer may be held liable under Title VII, even without notice of the harassment.

Michelle Vinson had been an employee of Meritor Savings Bank from 1974 to 1978. Sydney Taylor, a vice-president and branch manager of the bank, hired her and supervised her throughout her years of employment. She advanced, based on merit alone, from teller-trainee to assistant branch manager. In September 1978 Vinson took an indefinite sick leave until November 1, 1978, when she was discharged for excessive use of that leave.

After her discharge, Vinson brought this action against her former employer, asserting that Taylor had constantly subjected her to sexual harassment during her employment at the bank, thereby violating Title VII. She claimed that although she had voluntarily engaged in sexual relations with Taylor, she did so because of fear of losing her job. Taylor and the bank each denied the charges. Furthermore, the bank said that if the actions complained of had occurred, they had not been done with its approval.

The United States District Court for the District of Columbia found that a sexual harassment claim did not exist unless there was an economic effect on the employee, a tangible economic loss. Justice Rehnquist delivered the Court's opinion and rejected that reasoning, as had the Court of Appeals for the District of Columbia. Rehnquist noted that violation of Title VII may be based on one of two types of sexual harassment. Either the harassment may have an economic effect in that it involves the "conditioning of concrete employment benefits on sexual favors," or it may have the effect of creating a "hostile or offensive working environment," although not affecting economic benefits. *Id.* at 2403.

Sexual harassment allegations, in this case, were sufficient to state a claim for "hostile environment" sexual harassment, according to the Court. Specifically, Vinson's allegations that Taylor made repeated demands for sexual favors, followed her into the ladies' room when she went there alone, exposed himself to her, forcibly raped her, and fondled her in front of others were actions severe enough to create an abusive work environment and a cause of action for "hostile environment" sexual harassment.

In addressing the sexual harassment claim, the Court relied on two significant cases, one regarding discriminatory work environment, *Rogers v. EEOC,* 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972), and the other applying discrimination in the work environment to discrimination based on sex, *Henson v. Dundee,* 682 F.2d 897 (11th Cir. 1982).

Courts first recognized discriminatory work environment as a cause of action in *Rogers.* In that case, involving a Hispanic plaintiff alleging discrimination, the court explained that under Title VII an employee's protections extended beyond the economic aspect of employment. Following *Rogers,* courts have applied this principle to harassment based on race, religion, and national origin. *Meritor Savings Bank v. Vinson,* 106 S.Ct. at 2405. In the case before it, the Supreme Court reasoned that similarly a "hostile environment based on discriminatory sexual harassment should . . . be likewise prohibited" (emphasis in original). *Id.*

In *Henson,* the Court of Appeals for the Eleventh Circuit recognized that "[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Id.* at 2046.

Yet both the *Rogers* and *Henson* cases recognized that not all workplace conduct which is classified as "harassment" affects the aspects of employment required within the meaning of Title VII. For sexual harassment to be actionable, the Court relied on the *Henson* explanation that it must be "sufficiently severe or pervasive so that the conditions of employment are altered and an abusive working environment is created." *Id.* In this case, however, the court concluded that the allegations were sufficient to create a claim for "hostile environment" sexual harassment.

The Supreme Court also rejected the District Court's theory that because the sex-related conduct was "voluntary," *i.e.,* complainant was not forced to participate against her will, it was not sexual harassment. Justice Rehnquist said that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether the actual participation in sexual intercourse was voluntary." *Id.* This is so because the sex-related conduct could be "voluntary" in that the party was not forced to participate against her will. Therefore, the critical point is that the sexual advances were "unwelcome." *Id.*

In a final point regarding the "hostile environment" claim, the Court held that evidence of the claimant's sexually provocative speech or dress is not inadmissible per se. In fact, in this case it would be relevant because the existence of sexual harassment must be determined in view of the totality of the circumstances and in light of the record as a whole. Therefore, the nature of the sexual advances and the context within which they occurred would be relevant.

When addressing the issue of employer liability, the Court declined to issue a definitive ruling regarding the matter. The Court applied agency principles and considered Congressional intent when it held that employers are not always automatically liable for sexual harassment by their employees. Nor does absence of notice to an employer of the supervisor's sexual harassment protect the employer from liability. In this case, however, the Court found the bank liable. First, the existence of a bank policy against discrimination was not suf-

ficient to protect the bank because the policy did not address sexual harassment. The policy therefore failed to notify employees of the employer's interest in avoiding that form of discrimination. Second, the mere existence of a grievance procedure within the bank was insufficient to protect the bank against liability because the procedure required an employee to complain to her supervisor first. In this case, the employee would have had to complain to the alleged perpetrator, which she understandably failed to do. The Court left the door open regarding the rulings on employer's liability in the future. It even suggested that if the employer's "procedures were better calculated to encourage victims of harassment to come forward" the employer may be able to avoid liability. *Id.* at 2409.

Justice Marshall delivered the concurring opinion, joined by Justices Brennan, Blackmun, and Stevens. They agreed that workplace sexual harassment is illegal and violates Title VII. As regards employer liability, however, the justices concluded that "sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes, regardless of whether the employee gave 'notice' of the offense." *Id.* at 2411.

Based on the Court's holding there may be problems in the future concerning proof of whether conduct was "unwelcome" or "voluntary." Also, the issue of employer liability in sexual harassment cases has been left open, although the Court has indicated that future cases should apply agency principles.

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Bethel School District No. 403 v. Fraser: FIRST AMENDMENT DOES NOT PREVENT SCHOOL DISTRICT FROM DISCIPLINING STUDENT FOR GIVING OFFENSIVELY LEWD AND INDECENT SPEECH

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Supreme Court of the United States acknowledged that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Recently, however, the Court held that a school district acted entirely within its permissible authority in imposing sanctions upon a high school student in response to the student's offensively lewd and indecent speech given at a school assembly. The Court held that such speech was not protected by the first amendment. *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159 (1986).

Matthew Fraser was a high school student in Bethel, Washington. At a school assembly attended by about 600 students, many of whom were 14 years of age, Fraser delivered a speech in support of a candidate for student government office. The speech referred to the candidate in terms of explicit sexual metaphors, employing such phrases as "he's firm in his pants . . . his character is firm," "a man who takes his point and pounds it in," and "a man who will go to the very end—even the climax, for each and every one of you." *Id.* at 3167. Students at the assembly hooted and yelled during the speech, mimicking the sexual activities alluded to in the speech, while others appeared to be shocked and embarrassed. Prior to Fraser's delivery of the speech, two of his teachers with whom he had discussed the contents of his speech in advance, advised him that it was inappropriate and should not be given.

The day after he delivered the speech, Fraser was asked to report to the assistant principal's office. At the meeting, Fraser was given notice that he was being charged with violating the school's disruptive conduct rule, which prohibited conduct that substantially interfered with the educational process, including the use of obscene, profane language or gestures. After being given an opportunity to explain his conduct, in which he admitted that he deliberately used sexual innuendos in the speech, Fraser was suspended for three days. In addition, he was informed that his name would be removed from a list of candidates on a ballot for graduation speakers.

Fraser initiated a grievance of the disciplinary action through the school district's grievance procedures. The hearing officer affirmed the decision but Fraser was allowed to return to school after serving only two days of his suspension. Fraser, joined by his father as guardian *ad litem*, then filed a civil rights action in federal district court, seeking injunctive relief and monetary damages under 42 U.S.C. § 1983. The district court, holding that the sanctions violated the student's rights under the first and fourteenth amendments, awarded Fraser monetary damages and enjoined the school district from preventing him from speaking at graduation. Fraser was elected graduation speaker and spoke at the commencement ceremonies.

The United States Court of Appeals for the Ninth Circuit affirmed the district court judgment, rejecting the argument that the nomination speech had a disruptive effect on the educational process. The court also rejected the argument that the school district had an interest in protecting