Legal Issues

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Two federal statutes apply to sexual harassment in higher education: Title VII of the Civil Rights Act of 1964[1] and Title IX of the Higher Education Amendments of 1972.[2] In recent years, several significant and encouraging developments have occurred in both case law and federal legislation applicable to sexual harassment. In 1993, the United States Supreme Court, decided *Harris v. Forklift Systems, Inc.*,[3] which clarified that a Title VII plaintiff claiming hostile or offensive work environment sexual harassment need not prove severe psychological damage to establish her right to recovery. Another Supreme Court case, *Franklin v. Gwinnett County Public Schools*,[4] established that a sexual harassment victim can recover money damages in a suit brought under Title IX. The Civil Rights Act of 1991[5] makes compensatory and punitive damages available to Title VII plaintiffs claiming intentional discrimination and accords them the right to a jury trial.

Lingering unresolved legal issues include the need for a clearer definition of the circumstances under which an institution can be held liable for co-worker harassment of employees and peer harassment of students. Also, some First Amendment issues have emerged in connection with claims of sexual harassment where the offensive conduct is exclusively verbal or involves displays of pornographic materials in the workplace.

In this chapter, the law under Title VII is discussed first and at some length. Many more harassment cases have been decided under Title VII, partly because it has been in effect longer and partly because, until recently, the incentives to pursue a private action were much better under Title VII than under Title IX.

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THE UNIVERSITY AS EMPLOYER: LIABILITY UNDER TITLE VII FOR SEXUAL HARASSMENT OF FACULTY, ADMINISTRATORS AND STAFF

Title VII addresses the educational institution in its role as employer and prohibits discrimination based upon sex in the terms, conditions, and privileges of employment.

Several important federal cases interpret and define sexual harassment as discrimination in employment. Though none of them was decided in the context of an educational institution, the principles they stand for are nevertheless relevant to harassment of a college or university employee.

Williams v. Saxbe,[6] decided in 1976, was the first federal court case in which sexual harassment was found to be a form of illegal sex discrimination under Title VII. Prior to that, even though Title VII had been in effect for more than ten years, courts said that sexual harassment was merely disharmony in a personal relationship (*Barnes v. Train*),[7] the result of personal urges of individuals, not part of company policy (*Corne v. Bausch and Lomb, Inc.*).[8] The courts justified their decisions, too, by suggesting that if women could sue for amorous advances, ten times more federal judges would be necessary to handle the upsurge in litigation (*Miller v. Bank of America*,[9] *Tomkins v. Public Service Electric and Gas Co.*)[10]

In 1976, however, the District Court for the District of Columbia found that Dianne Williams was the victim of sex discrimination based upon the job-related punishment her Department of Justice supervisor inflicted after she refused his sexual advances. This was the first in a line of cases accepting the *quid pro quo* definition of sexual harassment.

In a *quid pro quo* case, the employer or the employer's agent expressly or implicitly ties a "term, condition, or privilege of employment" to the response of the employee to unwelcome sexual advances. The Equal Employment Opportunity Commission (EEOC), the governmental agency charged with enforcement of Title VII, has published guidelines that define this type of sexual harassment as

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implictly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.[11]

Failure to receive a promotion, failure to be assigned preferred working hours, or retaliatory behavior, such as unjustifiably negative employment evaluations or elimination of job duties, are an important part of the evidence

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the employee must present to prove *quid pro quo* harassment. In *Barnes v. Costle*,[12] for example, the employee's job was eliminated after she refused her supervisor's sexual approaches.

An originally troublesome aspect of this type of case was the argument that an employer should not be liable if it knew nothing of the harassing behavior perpetrated, even by a supervisory employee. Fortunately, in 1986 the U.S. Supreme Court put this argument to rest. In *Meritor Savings Bank v. Vinson*,[13] discussed in further detail below, the Court strongly suggested that *quid pro quo* harassment of an employee by a supervisor results in automatic liability of the employer. This means that in *quid pro quo* cases, a victim can win her case without showing that her employer knew or should have known, or approved of the supervisor's unwelcome actions.

One element crucial to an employee's *quid pro quo* case is the loss of a tangible benefit of employment. Often, however, no such loss accompanies the harassing conduct. Another line of cases is therefore equally important to the definition of sexual harassment as unlawful sex discrimination by an employer under Title VII. *Bundy v. Jackson*[14] was the first case to hold that sexual harassment could exist without the loss of a tangible job benefit. This type of sexual harassment is called offensive or hostile environment harassment, defined by the EEOC guidelines as

> Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when 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.[15]

The EEOC guidelines recommend automatic liability for the employer in offensive environment harassment cases, but federal courts deciding offensive environment cases have not always followed the guidelines.

One important case, *Henson v. City of Dundee*,[16] said that an employee could not establish offensive environment harassment against her employer unless the employer knew or should have known of the intimidating, hostile, or offensive work environment. Other circuit courts found the reasoning in *Henson* persuasive (*Katz v. Dole*).[17] Adopting the EEOC position that the employer should be automatically liable were the D.C. Circuit Court in *Vinson v. Taylor*[18] and the District Court for Alaska (*Jeppsen v. Wunnike*).[19] When the United States Supreme Court agreed to hear an appeal of *Vinson v. Taylor*, advocates for both employees and employers hoped the Court would clarify the confusion about the standard of liability for an employer.

Reviewed under the name *Meritor Savings Bank v. Vinson*,[20] the case established important precedent for the proposition that an offensive work

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environment constitutes sexual harassment where the offensiveness is severe and pervasive.

Meritor did not, however, clearly resolve the important question of which theory of employer liability should be used in a hostile environment case. Writing for the majority, Chief Justice Rehnquist said that "general principles of agency" should apply.

He first explained that in a *quid pro quo* case involving a supervisor, the supervisor exercises authority given him by the employer when he makes or threatens to make decisions concerning the employment circumstances of the harassment victim. His actions are thus properly charged to the employer, resulting in automatic employer liability. Rehnquist went on to say that Title VII should not be read to hold employers to this same standard in offensive environment cases where the employer is typically unaware of the harassing conduct. It cannot be assumed that the harassing employee is acting with the authority of the employer when he engages in the harassing behavior that creates the hostile environment but is unrelated to tangible job benefits. The Court seemed to indicate that the employer should not be liable unless the victim could show that the harassing employee was acting in this role as agent of the employer.

Meritor was the first Supreme Court decision on sexual harassment and provided guidance to employers in three respects:

In-house grievance procedures. Although the automatic standard for offensive harassment was discarded, the Court did indicate that the employer is not "insulated" from liability by the mere existence of a procedure, a policy against discrimination, and the failure of the harassed employee to come forward. In his opinion, Rehnquist implied that if the employer's procedure properly informs employees that it will promptly investigate and resolve sexual harassment complaints, and if the procedures encourage victims to come forward, then an employer *might* avoid liability for offensive environment sexual harassment.

EEOC guidelines. The Court concluded unanimously that both *quid pro quo* and offensive environment harassment constitute illegal sex discrimination under Title VII, citing with approval the definitions in the EEOC guidelines. That the Court gave its blessing to these definitions increased their value to institutions preparing sexual harassment policy statements and to the lower courts in deciding other cases of sexual harassment, not only under Title VII, but also under state statutes addressing sexual harassment, or under Title IX.[21]

Evidence on the issue of welcomeness. There is an emphasis in the EEOC definitions of harassment on whether the behavior of the harasser is "welcome." The circuit court in the *Meritor* case had ruled that evidence of the victim's

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provocative dress and sexual fantasies was not relevant to the question of welcomeness. Unfortunately, the Supreme Court disagreed, stating expressly that in a hostile environment case, there must be an evaluation of the totality of the circumstances, including evidence concerning the victim's dress, speech, and actions. This aspect of the decision is reminiscent of a not-long-bygone day when victims of rape were accused of inviting attack by their behavior and dress. The Court's indication that the harasser and his employer may present such evidence has undoubtedly discouraged victims of harassment from coming forward.

The *Meritor* opinion left open a number of questions regarding hostile environment sexual harassment. In an effort to define with more specificity the circumstances under which a working environment was sufficiently replete with harassing behavior severe and pervasive enough to alter an employee's working conditions, federal appellate courts focused on the psychological harm to the employee victim; some of these courts held that unless the plaintiff's psychological well-being was seriously affected, no claim existed under Title VII.[22] Other courts rejected such a requirement.[23] This conflict in Title VII interpretation was resolved by the Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*[24] In an opinion written by Justice Sandra Day O'Connor, the Court held unanimously that tangible psychological harm is not a required element of a hostile environment sexual harassment claim under Title VII. The Court reiterated that, instead, to determine whether an environment is hostile requires looking at the totality of the circumstances.

> These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. . . . [P]sychological harm, like any other relevant factor, may be taken into account, [but] no single factor is required.[25]

Justice O'Connor observed that the purpose of Title VII, to establish workplace equality, is met only if "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[26] She pointed out that a "discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[27]

Another issue addressed by the *Harris* case was whether the conduct alleged to create the hostile environment should be judged from an "objective" or a "subjective" point of view. Using an objective standard requires a court

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to ask whether a reasonable person would find the environment abusive; the subjective standard inquires whether the victims reasonably or unreasonably—found the environment abusive.

The Ninth Circuit Court in *Ellison v. Brady*[28] had posited a "reasonable woman" standard that received considerable attention from legal experts.[29] The court's point was that conduct that men would find acceptable may be objectionable to women. The court's concern was that the reasonable-person standard seems to incorporate too much of male-oriented popular culture and stereotypically sexist attitudes into the determination of whether behavior is objectively welcome, or severe, or offensive. The law of sexual harassment addresses the elimination of sexist behaviors from employment settings. Asking whether a reasonable person would find the conduct harassing risks reinforcing the prevailing level of discrimination because the reasonable person in law has frequently assumed a stereotypically male point of view. "In evaluating the severity and pervasiveness of sexual harassment we should focus on the perspective of the victim,"[30] concluded the court.

The Supreme Court in *Harris* articulated an objective/subjective standard without commenting on the "reasonable woman" rational of the *Ellison* case. Under the standard articulated by Justice O'Connor, there are two relevant questions: Would a reasonable person find the environment hostile? and Did the victim subjectively find the environment hostile?

The *Harris* opinion does not define further the situations in which an employer may be held liable for the harassing behavior of its employees, because that issue was not presented by the facts of the case.

Title VII and the law of sexual harassment in the workplace apply to institutions of higher education.[31] Therefore, under *Meritor*, administrators and managers who have supervisory roles vis-à-vis other institutional employees expose their institutions to automatic liability if they engage in *quid pro quo* harassing activities. It is less clear that liability results where the administrator or manager is responsible for creating a hostile work environment, though if he were in some way acting as agent of the institution in his harassing activity, the institution would be liable.[32]

One area in which the Supreme Court's decisions provide little guidance is harassment by a co-worker. An employee would have a difficult time making a case of *quid pro quo* harassment, because a co-worker is not typically in a position of power, and therefore not in a position to offer the bargain in an expressed or implied way. In that more commonly encountered situation where the offensive work environment is created by a co-worker, no automatic institutional liability attaches; a court deciding such a case would probably look to the institution's knowledge of the existence of the harassing situation and find the institution liable for offensive environment harassment if the victim had complained of the harassment to a supervisor or if offensive behavior

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were pervasive and sustained over a period of time, such that the institution must have been aware of it. The institution, if it *is* aware of the harassing conduct, may be able to avoid liability by taking immediate action to eliminate the offensive conduct.[33] At the least, Rehnquist in *Meritor* gave clear instruction that colleges and universities as employers cannot avoid liability by ignoring the problem. The absence of clear, effective, and well-publicized procedures that encourage victims to report harassment, as well as grievance procedures for following up on reported instances of harassment, may lead to institutional liability.

As originally enacted, Title VII enabled a victim of sexual harassment to recover economic damages, such as back pay, lost wages, and benefits, and also to receive injunctive relief (i.e., a court order that the offensive behavior stop). One type of remedy that was not available was monetary damages for mental suffering and emotional upset. Title VII sexual harassment cases would often, therefore, combine an action under the federal statute with an action under state common law in the tort area, which would allow for these damages.

Since the Civil Rights Act of 1991, victims of sexual harassment have be allowed to recover both compensatory and punitive damages in cases in which discriminatory behavior is intentional.[34] Compensatory damages, which may be awarded for pain, suffering, and emotion upset, as well as future financial losses, plus punitive damages where they are awarded, are capped at different levels, depending on the size of the employer's operation.[35] The addition of compensatory damages to the list of remedies for Title VII plaintiffs appears to be a direct response to the plight of sexual harassment victims whose remedies for hostile environment sexual harassment were limited to an injunction and attorneys fees.[36]

The Civil Rights Act also permits a Title VII victim to demand a jury trial if she is asking for compensatory and punitive damages. Since the act was passed, one lingering issue has been its applicability to lawsuits filed before its effective date, 21 November 1991. In *Landgraff v. U.S.I. Film Products*,[37] the Supreme Court held, in a Title VII action for sexual harassment, that the provisions of the Civil Rights Act authorizing compensatory and punitive damages, and creating the right to a jury trial in such cases, do not cover a case pending on appeal on the act's effective date.

THE UNIVERSITY AS EMPLOYER: LIABILITY UNDER TITLE IX FOR SEXUAL HARASSMENT

Title IX as a remedy for discrimination of an employee of an institution of higher education has a mixed history. Several recent legal developments may bring Title IX to the forefront for employees who experience sexual harassment in colleges and universities.

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Title IX of the Education Amendments of 1972[38] was passed to prohibit sex discrimination in higher education. Enforced by the Office for Civil Rights (OCR) of the U.S. Department of Education, Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." The sanction threatened against an institution found in violation of Title IX is withdrawal of federal funds.

Under Title IX regulations, institutions receiving federal finds must establish a procedure through which victims of sex discrimination can complain, but the victim may also go directly to the OCR, if she prefers, with no obligation first to work through to completion the institutional process. The OCR may seek termination of the institution's federal funding if the complaint is valid and cannot be resolved informally.

In 1979, the Supreme Court held that an individual could also bring a private lawsuit directly against an educational institution for violation of Title IX (*Connon v. University of Chicago*).[39] In 1982, in *North Haven Board of Education v. Belt*,[40] the Court approved regulations promulgated under the Act that indicated that Title IX protects not only students, but also employees of educational institutions. Combined, these two cases should have enabled educational employees to sue their institutions directly for sex discrimination in employment, which would have included, presumably, sexual harassment. The OCR has no regulations[41] like the EEOC Title VII guidelines that define sexual harassment, but by that time *Alexander b. Yale*[42] had been decided, holding that the definition of sex discrimination under Title IX includes sexual harassment.

In 1984, however, the Court decided *Grove City College v. Belt*,[43] which had the effect of narrowing the interpretation of Title IX so that its prohibitions were deemed "program specific." In *Walters v. President and Fellows of Harvard College*,[44] the District Court for Massachusetts, following the *Grove City College* precedent, held that a custodial worker could not recover for sexual harassment under Title IX. Although Title IX does protect employees from sex discrimination, including sexual harassment, the position held by the employee was not directly enough related to the delivery of educational services and was not in a *specific* educational program or activity receiving federal funds.

The Civil Rights Restoration Act, passed in March 1988,[45] overruled the "program specific" requirements of *Grove City College*. Under this act, if any program of an educational institution receives federal funds, then the entire operation of the institution is subject to the requirements of Title IX.

A 1985 Supreme Court case interpreting a law with wording similar to Title IX, *Atascadero State Hospital v. Scanlon*,[46] construing the Rehabilitation Act of 1973, also limited the reach of Title IX.

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In *Atascadero*, the Supreme Court held that a private suit could not be filed against a state institution unless the state expressly waived its immunity from suit granted by the Eleventh Amendment of the U.S. Constitution. Because of the similarity between the Rehabilitation Act and Title IX, this case was thought to prevent employees working at state-funded institutions of higher education from bringing suit against those institutions under Title IX for sex discrimination, including harassment. Given the significant number of state-funded institutions, this posed a real barrier to many institutional employees. Once again, Congress stepped in to counteract the narrowing of Title IX coverage by the Supreme Court. The Civil Rights Remedies Equalization Amendment[47] eliminated the states' Eleventh Amendment immunity as a defense to a plaintiff's suit under Title IX, thus reexposing state-funded institutions to liability for violations of Title IX.

Today, with help from Congress, a person suing under Title IX for harassment need no longer be concerned with the program-specific limitations of *Grove City College* or the Eleventh Amendment limitations of *Atascadero.*

Furthermore, following the Supreme Court's decision in *Franklin v. Gwinnett County Public Schoo.s*,[48] the remedies available to a Title IX plaintiff now include money damages. Prior to *Franklin*, the only remedy specified by Title IX was withdrawal of federal funding from the institution, which seemed inadequate compensation for an individual plaintiff. With monetary damages for emotional distress recoverable, individual incentives for pursuing private litigation under Title IX have increased. The winning Title IV plaintiff may be awarded monetary damages and attorneys fees, and may threaten an institution even more than a Title VII lawsuit because federal funding can be withdrawn from institutions under Title IX.

Yet to be decided definitively is whether the substantive standards that have evolved under Title VII sexual harassment litigation will be applied to cases decided under Title IX. In a case brought by a medical surgical resident against the University of Puerto Rico,[49] the first circuit court of appeals reviewed the legislative history of Title IX and previously decided cases and found that Congress intended substantive standards developed under Title VII to apply to Title IX employment cases. Although the Supreme Court has not been presented with an appropriate case for deciding this issue, it seems that the rationale that underlies the standards for determining when sexual harassment amounts to sex discrimination in an Title VII employment context is equally applicable to the same determination in the Title IX employment context.

In the final analysis, the many limitations that previously inhibited private complaints under Title IX have been overcome, and Title IX has become an effective companion to Title VII for combating sexual harassment of an employee of a college or university.

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THE UNIVERSITY AS EDUCATOR: LIABILITY UNDER TITLE IX FOR SEXUAL HARASSMENT OF STUDENTS

Although educational employees may bring suit under either Title VII, Title IX, or both, for students who experience sexual harassment, Title IX provides the only federal remedy. Few students have brought sexual harassment actions under Title IX, probably for reasons having to do both with the student circumstance and with the nature of the relief that until recently has been available. Students are transient members of the institutional community; they have little to gain personally by reform. Further, litigation takes a long time; it is not unusual for a student's case to be moot because she graduated before it was heard. Students are also inhibited by the perception that the institution will defend the accused harasser. Reprisals may come from peers; sexual harassment is somewhat like rape in that the victim may find herself stigmatized because she brought the charge.[50] Until *Franklin v. Gwinnett County Public Schools*, the relief available—the withdrawal of federal funds from the institutions—provided little satisfaction and no financial compensation to a student suffering the mental and emotional distress caused by sexual harassment.

Despite this discouraging picture, some few early Title IX cases articulate the law with respect to harassment of students. In *Alexander v. Yale*[51] the Second Circuit court of Appeals, affirming the lower courts' decision, approved the action of a student victim of *quid pro quo* harassment. The student alleged that she received a low grade in a course because she rejected her professor's proposition for an A in exchange for "sexual demands." The court cited a Title VII case, *Barnes v. Costle*,[52] for the principle that conditioning academic advancement on sexual demands is sex discrimination, just as is conditioning employment advancement on such demands.

The same court, however, dismissed claims by a male faculty member that he was unable to teach in the atmosphere of distrust created by faculty harassing women students. The court also dismissed the claim of a student that she suffered distress because of harassing activity directed toward another woman student.

None of the plaintiffs in *Alexander v. Yale* tried to make a claim of hostile environment sexual harassment, and the development of substantive standards for determining when hostile environment sexual harassment is sex discrimination of a student in violation of Title IX is still a challenge on the legal horizon. To date only a few lower courts have looked at this issue, none definitively.

In 1985, a Pennsylvania district court decided *Moire v. Temple University School of Medicine*,[53] a case in which a medical student did make such a claim. Although the court found that the student did not prove her particular case, it recognized that an "abusive" environment is sexual harassment under Title IX. The court accepted the EEOC Title VII guidelines as "equally applicable"

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to Title IX and said that "[h]arassment from abusive environment occurs where multiple incidents of offensive conduct lead to an environment violative of a victim's civil rights."[54]

By contrast, in 1989 a different Pennsylvania district court said that Title IX reaches *quid pro quo* harassment but not hostile environment harassment. The plaintiff urged the courts to adopt for Title IX purposes the hostile environment theory of harassment developed under Title VII, but the court refused to do so.[55] On appeal the case was affirmed, but on grounds unrelated to the substantive coverage the district court accorded Title IX. The circuit court recognized the importance of the issue presented, but expressly refused to decide "whether the evidence of a hostile environment is sufficient to sustain a claim of sexual discrimination in education in violation of Title IX."

The Supreme Court all but put this issue to rest in *Franklin v. Gwinnett County Public Schools*. There, the Court cited the *Meritor* case and analogized a student's relationship to a teacher to an employee's relationship to her supervisor. The Court said:

> [W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex, *Meritor Saving Bank v. Vinson* [citation omitted]. We believe the same rule should apply when a teacher sexually harasses and abuses a student.[56]

Having cited *Meritor*, a Title VII hostile environment case, with approval in this Title IX case, the Supreme Court appears to signal that the case law developed under Title VII is an appropriate guide as courts develop sexual harassment definitional standards under Title IX. Several student sexual harassment cases have been decided under Title IX since the *Franklin* decision; they have all been brought against secondary schools, and the results have been mixed. It is becoming increasingly important for the OCR to issue guidelines on sexual harassment to provide guidance to institutions seeking to comply with the requirements of Title IX and to bring some consistency to the court decisions addressing the issue.[57]

As courts develop the standard of liability of the educational institution for offensive environment harassment, the special nature of the enterprise should be considered. A student expects her college or university to provide an environment that promotes learning, or at least one that does not hinder it. The student is relatively powerless in almost every relationship she experiences with faculty, teaching assistants, and administrators. Because sexual harassment occurs "in the context of relationship of unequal power," the student is especially vulnerable. Given the damaging effect harassment can have on the educational environment, it would not be unreasonable for courts to hold institutions of higher education to a more demanding standard of

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liability in a case where the victim of harassment is a student, rather than an employee. Thus, while in *Meritor* the Court stopped short of holding the employer automatically liable to an employee in a Title VII offensive environment case, it might be argued that automatic liability of the institution is appropriate in a Title IX offensive environment case where the victim was a student harassed by a member of the faculty or staff in a position to influence that student's future.

There are few legal guideposts where a student is sexually harassed by another student. However, Rehnquist's comments in *Meritor* concerning policies and procedures may enlighten the area somewhat. While institutional liability would not be automatic, no college or university can safely ignore any complaint of harassment, whether by faculty, staff, or fellow students. If the institution knows of the harassment and does nothing, the possibility of liability increases. Strong policies and effective grievance procedures, both well publicized to encourage students to report instances or patterns of harassment, are crucial.

Two remaining issues arise that institutions must address to deal effectively with the sexual harassment of students.

It is unrealistic and unfair, and probably counter to Rehnquist's admonishments about effective procedures that encourage victims to come forward, to expect the student victim to represent herself in the grievance proceedings or to hire a private attorney to represent her and prosecute the case. On the other hand, if the institution vigorously prosecutes those accused of harassment through the in-house grievance channels and makes a good argument on behalf of the victim against the accused, might not the student victim use that very same argument against the institution in a federal lawsuit under Title IX? The answer is yes, though the institution should be able to avoid liability by showing that, as soon as it learned of the harassment, it investigated and punished the offending individual.

The second issue concerns whether "welcomeness" is a defense to offensive environment harassment and whether consent on the part of the student victim is a defense to *quid pro quo* harassment. As mentioned above, the *Meritor* opinion instructs lower courts hearing charges of sexual harassment to permit evidence of the victim's behavior and dress to determine whether, given the totality of the circumstances, an offensive environment existed.

Courts should seriously question whether a student by her behavior and dress expresses any degree of "welcomeness" to the sexually oriented harassing behavior of a faculty member or administrator. Likewise there is serious doubt that a student in a *quid pro quo* situation "consents" to the sexual demands in any manner. Even though in both situations the student's behavior might not be physically coerced, the unequal power of the student and the

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faculty member make it unlikely that her behavior is voluntary, in the sense of being freely agreed to.

STATE LAWS AND THE EQUAL PROTECTION CLAUSE

State laws and the equal protection clause (Fourteenth Amendment, U.S. Constitution) should also be mentioned as providing alternative theories for relief of victims of sexual harassment, although they have become less important since the Civil Rights Act of 1991 and *Franklin v. Gwinnett County Public Schools*[58] have opened the door to monetary damages for individual plaintiffs under Title VII and Title IX, respectively. State tort law still provides employee and student victims with an alternative claim for monetary damages for the mental suffering and emotional distress associated with sexual harassment. Two examples of cases are *Howard University v. Best*[59] and *Micari v. Mann.*[60] Success with this theory depends on the common law of each state concerning damages for intentional infliction of emotional distress.[61]

There are also cases that recognize sexual harassment as discrimination prohibited by the equal protection clause. The Court of Appeals for the Seventh Circuit in *Bohen v. City of East Chicago*[62] approved the use of the equal protection clause, and said that the victim needed to prove only intentional discriminatory treatment, not that the harassment altered the terms or conditions of employment.

FIRST AMENDMENT ISSUES

Emerging issues in sexual harassment for plaintiffs may include meeting the First Amendment as a defense to harassing behavior that consists solely of harassing statements or posted pornography. The Supreme Court in *R.A.V. v. St. Paul*[63] suggests that constitutional issues arise when institutions attempt to prohibit harassing speech. Where a claim of harassment is based only on verbal harassment, the First Amendment rights of the speaker may come into play. The opinion in *R.A.V. v. St. Paul*, written by Justice Antonin Scalia, does note that Title VII's prohibition of discriminatory behavior is not called into question by the *R.A.V.* decision.[64]

Notes

1. 42 U.S.C. 2000e et. seq. (1982).
2. 20 U.S.C. 1681 (1982).
3. 114 S. Ct. 367 (1993).

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4. 112 S. Ct. 1028 (1992).

5. 42 U.S.C. (Supp. 1992).

6. 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds as *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

7. 13 F.E.P. Cases 123, (D.D.C. 1974), rev'd as *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (ultimately finding discrimination).

8. 390 F. Supp. 161 (D. Ariz. 1975), vacated without opinion, 562 F.2d 211 (9th Cir. 1977).

9. 418 F. Supp. 233 (N.D.Gl. 1976) rev'd on other grounds, 600 F.2d 211 (9th Cir. 1979).

10. 422 F. Supp. 553 (D.N.J. 1976) rev'd, 568 F.2d 1044 (3d Cir. 1977) (ultimately finding actionable harassment).

11. 29 C.F.R. 1604.11 (1986).

12. 561 F.2d 983 (D.C. Cir. 1981).

13. 477 U.S. 57 (1986).

14. 641 F.2d 934 (D.C. Cir 1981).

15. 29 C.F.R. 1604.11 (1986).

16. 682 F.2d 897 (11th Cir. 1982).

17. 709 F.2d 251 (4th Cir. 1983).

18. 753 F.2d 141 (D.C. Cir. 1985), rev'd and remanded as *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

19. 611 F. Supp. 78 (D.C. Alaska 1985).

20. 477 U.S. 57 (1986).

21. 477 U.S. 57 (1986).

22. *Rabidue v. Osceola Refining Co.* (805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1047 (1987).

23. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

24. 114 5. Ct. 367 (1993).

25. 114 5. Ct. 367, 371 (1993).

26. 114 5. Ct. 367, 370 (1993).

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27. 114 5. Ct. 367, 370–71 (1993).

28. 924 F.2d 872 (9th Cir. 1991).

29. See, e. g. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L. J. 1177 (1990); Estridge, *Sex at Work*, 43 Stan. L.Rev. 813 (1991).

30. 924 F.2d 872, (9th Cir. 1991).

31. Added by amendment in 1972.

32. See *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994).

33. EEOC guidelines 29 C.F. R. §1604.11 (1)(d).

34. 42 U.S.C. §1981a. (b)(1) (Supp. 1992). Punitive damages are not recoverable against a government agency, the definition of which could be broad enough to include a state-supported institution of higher education.

35. 42 U.S.C. §1981a. (b)(3) (Supp. 1992).

36. 1 *Lex K. Lawson, Employment Discrimination: Special Pamphlet The Civil Rights Act of 1991*, 14 (1992).

37. 114 S. Ct. 1483 (1994).

38. 20 U.S.C. 1681 (1982).

39. 441 U.S. 677 (1978).

40. 456 U.S. 512 (1982).

41. The OCR has a policy memorandum defining sexual harassment, which it issued in 1981.

42. 631 F.2d 178 (2nd Cir. 1980), aff'g 459 F. Supp. 1 (D. Conn. 1977).

43. 465 U.S. 555 (1984).

44. 601 F. Supp. 867 (D. Mass. 1985).

45. 20 U.S.C. §1687 (2)(A) (1988).

46. 473 U.S. 234 (1985).

47. 42 U.S.C. §2000 d-7 (1988).

48. 112 S. Ct. 1028 (1992).

49. *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

50. R. Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L. Rev. 525 (1987).

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51. 631 F.2d 178 (2nd Cir. 1980), aff'g 459 F. Supp. 1 (D. Conn. 1977).

52. 561 F.2d 983 (D.C. Cir. 1977).

53. 613 F. Supp. 1360 (E.D. Pa. 1985).

54. 613 F. Supp 1360, (E.D. Pa. 1985).

55. *Bougher v. University of Pittsburgh*, 882 F.2d 74 (3rd Cir. 1989) aff'g 713 F. Supp 139 (W.D.Pa.).

56. 112 S. Ct. 1028, 1033 (1992).

57. Carrie N. Baker, *Comment: Proposed Title IX Guidelines on Sex-Based harassment of Students*, 43 Emory L.J. 272 (1994).

58. 112 S. Ct. 1028 (1992).

59. 484 A.2d 958 (D.C. Appl. 1984).

60. 481 N.Y.S. 2d 967 (Supp. 1984).

61. Some states have adopted statutes that require schools to establish policies and procedures to address sexual harassment. (See, e.g. *Minn. Stat. Ann.* §127.46 (West Supp.1993) and *Cal. Ed. Code* §212.5 (West Supp.1993).

62. 799 F.2d 1180 (1986).

63. 112 S. Ct. 2538 (1992).

64. R. Schneider, *The Law of Sexual Harassment: Some Brief Observations*, 4 Md. J. Contemp. Legal Iss. (1993).

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