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Strengthening Title VII: 1997-1998 Sexual Harassment Jurisprudence

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SYMPOSIUM

STRENGTHENING TITLE VII: 1997-1998 SEXUAL HARASSMENT JURISPRUDENCE

INTRODUCTION

Sexual harassment is a relatively new concept in the long history of Title VII, but its history already has progressed over a rough, lengthy road. From its inception as a cause of action in 1986,[1] sexual harassment has evolved to encompass several types of harassment and several different configurations of plaintiffs and defendants.[2] Once applicable to limited facts, sexual harassment has become the standard-bearer for claims of workplace discrimination.[3]

In its 1997-1998 Term, the United States Supreme Court added two significant twists to the winding history of sexual harassment jurisprudence: A trilogy of landmark cases opened Title VII to a new class of plaintiffs and made new theories of liability available to employees who suffer sexual harassment in the workplace. On March 4, 1998, the Court in *Oncale v. Sundowner Offshore Services, Inc.* recognized a cause of action under Title VII for harassment by someone of the victim's own sex.[4] On June 26, 1998, the final day of its Term, the Court in *Faragher v. City of Boca Raton*[5] and *Burlington Industries, Inc. v. Ellerth*[6] tightened

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[1] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986).

[2] The concept of sexual harassment includes mens' harassment of women, womens' harassment of men and either gender's harassment of a member of the same sex. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998) (man harassing man); *Meritor*, 477 U.S. at 64-67 (man harassing woman); Walker v. Taylorville Correctional Ctr., 129 F.3d 410 (7th Cir. 1997) (woman harassing man).

[3] *See* Steven L. Willborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677 (1999).

[4] *Oncale*, 118 S. Ct. at 1001-02.

[5] 118 S. Ct. 2275 (1998).

[6] 118 S. Ct. 2257 (1998).

Title VII's requirements for employers.[7] The Court found that an employer could be held vicariously liable for sexual harassment whether or not the victim had suffered a tangible job action.[8]

Many feminist and employment law scholars reacted favorably to the Court's decisions.[9] They made sweeping claims that the Court's revision of Title VII causes of action in *Oncale*, *Faragher*, and *Ellerth* made sexual harassment law simple, and that the heightened standards of employer liability would make possible a wave of harassment claims that plaintiffs had been unable to pursue in the past.[10] They praised the Court's hard-line stance, the strength of its words, and the clarity of its vision.[11]

From the initial celebration, however, emerged a host of issues. The impact of the decisions will depend upon the resolution of four questions: What the cases say about sexual harassment as a distinct cause of action; how courts should interpret the new proof structures and standards for vicarious liability articulated in *Faragher* and *Ellerth*; what influenced the Court's thinking; and what should influence lower courts

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[7] *See* Joan Biskupic, *High Court Draws Line on Sexual Harassment*, WASH. POST., June 27, 1998, at A1.

[8] The Court further stated:

> In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton*, also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . .

Ellerth, 118 S. Ct. at 2270 (citation omitted).

[9] *See, e.g.*, Lorna Brett, *Voice of the People*, CHI. TRIB., July 13, 1998, at 10; Linda Greenhouse, *Court Spells Out Rules for Finding Sex Harassment*, N.Y. TIMES, June 27, 1998, at A1; Andrea Kay, *Careers: Firms Need Effective Anti-Harassment Policies*, CIN. ENQUIRER, July 6, 1998, at B13. *But see* Anita K. Blair, *Harassment Law: More Confused Than Ever*, WALL ST. J., July 8, 1998, at A14 (arguing that it is unclear what companies may—or must—do to avoid liability for sexual harassment under *Faragher* and *Ellerth*); Karen Brune Mathis, *Harassment Rules Could Be 'Disastrous,'* FLA. TIMES-UNION, July 14, 1998, at B4 (reporting law firms' concerns that *Faragher* and *Ellerth* articulate too high a standard of conduct for corporations reasonably to demonstrate); John O. McGinnis, *Don't Call High Court Conservative*, NEWSDAY, July 27, 1998, at A27 (arguing that the Court's decisions in *Faragher* and *Ellerth* amount to judicial legislation because they create rules of liability that Congress did not).

[10] *See* Janet Casto, Comment, *Redefining the Parameters of Title VII in Accordance With Equal Protection Standards: The United States Supreme Court's Recognition of Same-Sex Sexual Harassment as a Form of Discrimination*, 9 SETON HALL CONST. L.J. 123 (1998); S. Ashby Williams, *Long Overdue: The Actionability of Same-Sex Harassment Claims Under Title VII*, 35 HOUS. L. REV. 895 (1998).

[11] *See* Jeff Bleich et al., *A Term About Something*, 58 OR. ST. B. BULL. 19 (Sept. 1998).

in their application of these decisions. The Articles in this Symposium analyze the doctrines of *Oncale*, *Faragher*, and *Ellerth* and explore the implications of the Court's new Title VII jurisprudence with the goal of providing answers to some of these remaining issues.

I. WHAT THE CASES SAY ABOUT SEXUAL HARASSMENT AS A CAUSE OF ACTION

Steven L. Willborn's examination of *Oncale* indicates that the case may be interpreted as resurrecting a long-forgotten element of the cause of action for sexual harassment. In his Article, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*,[12] Professor Willborn argues that sexual harassment liability requires a finding that actual discrimination has occurred, yet courts have all but ignored this element for more than ten years.[13] After discussing how sexual harassment law would function if courts required plaintiffs to produce more evidence of discrimination than they currently must, Professor Willborn presents a discrimination-centered model of sexual harassment law and compares it to the law pre-*Oncale*. He argues that the element of actual discrimination should be emphasized further. If courts focus on discrimination, he says, sexual harassment will become a less exceptional cause of action for discrimination and take its rightful place as a subset of traditional discrimination.[14]

Rebecca Hanner White argues that the 1997-1998 trilogy accomplishes the result Professor Willborn advocates. Beginning with an examination of the history of sexual harassment jurisprudence, Professor White, in her Essay, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*,[15] notes that sexual harassment has received distinctive treatment from courts and commentators. Professor White criticizes this distinctive approach, contending that sexual harassment claims simply should be analyzed as disparate treatment claims.[16] Professor White then examines the Court's analysis in *Oncale*, *Faragher*, and *Ellerth*, and concludes that the Court has done just that. She argues that the Court's recognition that same sex harassment can constitute sex-based discrimination and its approach to vicarious liability for sexual discrimination represent a unification of sexual harassment with other disparate treatment claims of discrimination.[17]

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[12] *See* Willborn, *supra* note 3.

[13] *See id.* at 683-87.

[14] *See id.* at 698-703, 723-24.

[15] *See* Rebecca Hanner White, *There's Nothing Special About Sex: The Supreme Court Mainstreams Sexual Harassment*, 7 WM. & MARY BILL RTS. J. 725 (1999).

[16] *See id.* at 725-30.

[17] *See id.* at 730-33. "The question is not whether the harassment is sexual but whether it is being directed against this particular individual because of his sex." *Id.* at 753.

II. HOW COURTS SHOULD INTERPRET *FARAGHER*'S AND *ELLERTH*'S VICARIOUS LIABILITY DOCTRINES

One of the Court's more striking conclusions in *Faragher* and *Ellerth* was that employers may be held vicariously liable for supervisors' acts of harassment in hostile environment claims. In their Article, *Civil Rights Without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*,[18] Catherine Fisk and Erwin Chemerinsky compare the Court's treatment of respondeat superior liability in the Title VII cases of *Faragher* and *Ellerth* with its treatment of respondeat superior liability in the Title IX case of *Gebser v. Lago Vista School District*.[19] Noting that the Court's standard of liability for private employers under Title VII is considerably higher than the standards for government liability under Section 1983[20] and Title IX,[21] Professors Chemerinsky and Fisk argue that a better approach to statutory interpretation is needed in order to narrow the divide. The authors propose that employers should be strictly liable under Title VII for supervisors' harassment of employees, and schools should be strictly liable under Title IX for teachers' harassment of students.[22] This result, they say, would bring together the divergent threads of liability under Title VII and Title IX and increase employers' incentive to prevent harassment.[23]

William R. Corbett explains in his Article, *Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, that vicarious liability doctrine incorporates elements of both state tort law and Title VII sexual harassment law.[24] Traditionally, state law has influenced courts' findings of vicarious liability for sexual harassment even though many courts have adopted a state-influenced Title VII version of respondeat superior. Professor Corbett argues, however, that *Faragher* and *Ellerth* embody a rejection of state respondeat superior law and bring vicarious liability under a federal umbrella.[25] The Title VII version of vicarious liability, he finds, no longer enjoys its relationship with state law when the analysis is one of supervisor liability for sexual harassment.[26]

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[18] Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999).

[19] 118 S. Ct. 1989 (1998).

[20] 42 U.S.C. § 1983 (1994).

[21] *See* 20 U.S.C. §§ 1681-88 (1994).

[22] *See* Fisk & Chemerinsky, *supra* note 18, at 795-99.

[23] *See id.* at 799-800.

[24] *See* William R. Corbett, *Faragher, Ellerth, and the Federal Law of Vicarious Liability for Sexual Harassment by Supervisors: Something Lost, Something Gained, and Something to Guard Against*, 7 WM. & MARY BILL RTS. J. 801, 804-08 (1999).

[25] *See id.* at 821-22.

[26] *See id.* at 817-20.

III. INFLUENCES ON THE COURTS IN SEXUAL HARASSMENT CASES

Sexual harassment is rapidly moving towards the forefront of employment litigation and, as Andrew P. Morriss notes in his Article, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*,[27] it is a subject worthy of everyone's attention. Professor Morriss conducts a detailed examination of the thirteen amicus curiae briefs that private interest groups filed in *Oncale*, *Faragher*, and *Ellerth* in order to examine the amici's ability to influence the Court. Noting that amicus briefs often lack substantiated legal, scientific, or sociological bases for their arguments and conclusions,[28] Professor Morriss makes suggestions for how groups should make amicus briefs more useful and advocates how the legal community should rely on these arguments to increase efficiency in the function of the law.[29]

Looking to the future of *Oncale*, Catherine J. Lanctot demonstrates that the cases already decided in reliance on *Oncale* reveal problems with attempts to deduce Justice Scalia's intent in the majority opinion.[30] It is an error, Professor Lanctot says, to interpret the case based on Scalia's ideology or prior holdings.[31] Especially in light of the Court's unanimity in its decision, lower courts applying *Oncale* must use the plain language of the decision rather than attempt to delve into underlayers of its meaning. As the title of her Article reflects, she proposes that *The Plain Meaning of Oncale* should govern the future of sexual harassment jurisprudence.[32]

CONCLUSION

No single issue of a law journal can resolve the doctrinal struggles that accompany every major Supreme Court decision. Just as interest group lobbying, creative lawyering, and unforeseen injustice begin the process of reforming a body of law, theoretical discussions, retrospective analysis, and insightful questioning begin the process of implementing the changes. They serve as a leap-off point from which attorneys and courts can begin to analyze the new wrinkles in what was once a familiar landscape.

The latest twists in the history of Title VII, and the analysis here of what they mean and how they should be managed, remain raw material for practitioners and

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[27] *See* Andrew P. Morriss, *Private Amici Curiae and the Supreme Court's 1997-1998 Term Employment Law Jurisprudence*, 7 WM. & MARY BILL RTS. J. 823 (1999).

[28] *See id.* at 826.

[29] *See id.* at 908-11.

[30] *See* Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL RTS. J. 913, 916-17, 920-21, 925-35 (1999).

[31] *See id.* at 936-40.

[32] *See id.* at 940-41.

courts to use in the coming years. There are no definitive answers to the questions *Oncale*, *Faragher*, and *Ellerth* left—at least, not yet—but it is the hope of the *William & Mary Bill of Rights Journal* that some of their beginnings lie here.

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