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SEXUAL HARASSMENT LAW: HAS IT GONE TOO FAR, OR HAS THE MEDIA?

by DEBORAH ZALESNE*

INTRODUCTION

In June of 1998, the United States Supreme Court finished a term in which it heard an unprecedented number of sexual harassment cases. The media has hailed this series of decisions as "progressive" and a great victory for employees. The Court's attention to sexual harassment came at a time when sexual harassment was already in the headlines, as President Clinton faced accusations of sexual harassment by Paula Jones and criticism from

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2. See, e.g., Same-Gender Harassment is Also Banned, 219 N.Y.L.J. 1 (1998) (referring to Oncale decision as "case of enormous importance for American workplaces"); Robert D. Lipman & David A. Robins, Court's Harassment Rulings Provide Ammunition for Both Sides, 220 N.Y.L.J. 1 (1998) (describing message of Faragher and Burlington as "progressive social statement that tells employers they must do the right thing and take proactive steps to limit and remove this problem from the workplace"); John Cloud, Harassed or Hazed?: Why the Supreme Court Ruled that Men Can Sue Men for Sex Harassment, TIME, March 16, 1998, at 55 (reporting that "most lesbians and gays praised Scalia's ruling" in Oncale, and that "feminists have rejoiced"); Court's Good Ruling on Sexual Harassment, TENNESSEAN, March 8, 1998, at D4 (reporting that "the Supreme Court got it right saying a man could indeed be sexually harassed by another man"); John Gallagher, Friends of the Court: Landmark Decisions on Same-Sex Sexual Harassment and Marriage Side in Gays' Favor, ADVOCATE, March 31, 1998, at 13 (discussing how Oncale case will make for safer workplace for gays and lesbians); Linda Greenhouse, Court Spells Out Rules for Finding Sexual Harassment, N.Y. TIMES, June 27, 1998, at A1 (reporting that employer liability cases will make lawsuits easier for plaintiffs to win); Supreme Court's Sexual Harassment Decisions Spark New Advocacy Efforts, 11 NAT'L WOMEN'S LAW CENTER UPDATE 1 (1998) (stating that recent Supreme Court decisions were "clear victories for employees in the workplace").

the general public for having had an inappropriate sexual relationship with Monica Lewinsky. These recent events, both in the courts and outside, have brought the term “sexual harassment” into our vernacular and people are more conscious than ever about their interactions with others in the workplace. Society’s awareness about the prohibitions against sexual behavior in the workplace has led to widespread concern about avoiding liability. This has resulted in reforms of company policies and changes in employer and employee behavior in the workplace. We have finally progressed to the point where sexual harassment is taken seriously.

Despite these gains, however, there has been a growing move to reverse the successes. Advocates of sexual harassment law face new obstacles as hysteria mounts surrounding the question of liability. A common perception exists that the law has tipped too far in favor of employees and that plaintiffs now have tremendous power over their employers. This perception often translates into the larger idea that feminism has a hold on the American workplace. People have referred to “feminist ranting about sexual harassment.” Even some feminists have subscribed to the idea that women


5. Today, nine out of every ten companies have a sexual harassment policy. See CNN Morning News (CNN television broadcast, June 26, 1998). Many of these companies are enforcing “fraternization” policies which ban outright personal or romantic relationships in the workplace, even when both parties consent. For example, United Postal Service, American Express, Motorola, Wal-Mart, Safeco, Harvard University, and Tufts University, among many others, all have policies which bar relationships between superiors and subordinates. See Stephanie Armour, Romance at Work Tricky to Manage: Even Consensual Relationships Can Hurt Morale, USA TODAY, Jan. 23, 1998, at B2; Walter V. Robinson & Peter G. Gosselin, At Many Firms, Consent Doesn't Make Sex OK, NEW ORLEANS TIMES-PICAYUNE, Feb. 1, 1998, at A10; Lisa Black, Power Imbalance is Key to Most Policies on Sex, CHI. TRIB., Jan. 29, 1998, at 1.

6. Evidence indicates that individuals have begun to change their behavior in the workplace based on perceived changes in the law. See, e.g., Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (commenting that defendant would have to “think of [the plaintiff] as Ms. Anita Hill,” indicating he would have to alter his behavior so as not to be accused of sexual harassment). In an article in the Rocky Mountain News, the author explains, “I am more careful than ever about what I say.” Bill Maxwell, Sex Scandals Cast Shadow on Workplace Friendships, ROCKY MOUNTAIN NEWS, Mar. 30, 1998, at A36. He further states, “I am particularly wary of my body language in the presence of women” and “my relationships with females in the workplace are changing in ways that I do not like.” Id. See also Survey: Workplace Interaction Better, WASH. POST, April 19, 1998, at A25 (noting new cautious behavior of furniture sales representative: “If you're in a conversation with a woman, you don't want to have the door closed . . . . You want to be in threes, not in twos, in larger clusters, so there are more people involved, whether you are out for a drink after work or at dinner”).

have been able to use “anti-sexuality for political power,” and, like male chauvinists, feminists too can be “puritanical.”

Sympathy for women bringing suits is low, as people have become less concerned with the problem of sexual harassment and more concerned with the problems associated with false accusations and the victimization of men. A backlash has resulted in reaction to the legal blackmail perceived as the root of many sexual harassment lawsuits.

Not surprisingly, conservative commentators in both the mainstream and right-wing media have seized on the recent developments in both the White House and the law as an opportunity to challenge progressives and feminists, and their apparent zeal toward achieving political correctness. Critics express concern about what they view to be confusion regarding the law, excessive anti-harassment programs, and the courts' poorly conceived expansion of civil rights protections. Catharine MacKinnon observed that


9. In a recent Time/CNN poll, nearly 80% of men and women indicated they thought that false complaints were common. See Cathy Young, Groping Toward Sanity, 30 REASON 12 available in 1998 WL 19833292 (1998). For example, a 55-year-old former professor accused of sexual harassment stated that “It's a lie that women do not lie about sexual harassment. . . . If you are accused, you are guilty.” Carole Currie, Five Years Later His Life Is Still Shattered, ASHVILLE CITIZEN-TIMES, May 17, 1998, at C3. Another journalist addressed the “serious abuses” that take place in academic institutions, where a student is able to accuse a professor of sexual harassment and is capable of destroying that professor's career, even when the accusation is false. See Jeremy Rabkin, Rule of Law: New Checks on Campus Sexual-Harassment Cops, WALL ST. J., October 19, 1994, at A21; see also Dean von Germeten, Enough of this Male-Bashing, MILWAUKEE J., Feb. 23, 1994, at A15; Currie, supra, at C3.

10. In the same Time/CNN poll, just 26% of those surveyed called sexual harassment of women a “big problem,” down from 37% in 1991. See supra note 9; John Cloud, Sex and the Law Sexual Harassment Can Mean Firing Victims Who Don't Give In or Merely Telling a Dirty Joke, Clinton's Fate Rests on Laws That Tie Even Lawyers in Knots, TIME, March 23, 1998, at 48. The backlash more clearly presented itself in response to questions about the current state of the law. Fifty-seven percent of men and 52% of women polled in the Time/CNN survey agreed that “we have gone too far in making common interactions between employees into cases of sexual harassment.” Id. Catherine MacKinnon addressed the backlash in an article she wrote for the Houston Chronicle. She explained that the allegations that Monica Lewinsky had a sexual relationship with the President “further catalyzed the fears behind and bigotry toward the attempt to reverse the law.” Catherine McKinnon, Courts Clear on Sexual Harassment, But Public Isn't, HOUS. CHRON., Mar. 6, 1998, at 39. She continued, “sexual harassment law, it was said, had gone too far. Commentators professed shock that a woman could initiate a lawsuit based on mere allegation—as if any lawsuit begins any other way.” Id.

11. See generally infra nn. 13-16.

12. For example, the Center for Individual Rights explains in its website the fear that “the ongoing, nationwide crusade to eradicate sexual harassment poses a grave threat to individual rights.” See CENTER FOR INDIVIDUAL RIGHTS, Sexual Harassment: Principles and Objectives (visited Mar. 24, 1999) <http://www.wdn.com/cir/sh.htm>. Specifically, it worries that:

[o]n many campuses, expansive sexual harassment rules chill academic freedom and prohibit constitutionally protected speech that conflicts with feminist dogma. Similarly, sexual harassment procedures often abrogate fundamental rights to due process (for instance, the right to confront one's accuser and the presumption of innocence), on the theory that such protections might discourage women from filing
particularly after the publicity surrounding the Paula Jones lawsuit and Monica Lewinsky's testimony, many people claimed that "sexual harassment law is vague, reckless, anti-sex, and lacking in standards." Others fear that "freedom of speech is being trampled by political correctness, undermining creativity, spontaneity and morale in the workplace." As one journalist wrote, "we talk and joke about sexual harassment, but we choose our words carefully. Our laughter is strained. Forty years ago, everyone knew how to act at school and work. Now most of us wonder what the rules are."

Forty years ago, of course, we knew what the rules were because there were no rules about sexual harassment. Today we do not all understand the rules because they have only recently emerged and we only hear part of the story from the media. But the sexual harassment laws are clearer than most people think. In fact, other than a recent development regarding employer liability, the laws have changed very little in the past decade. What has changed is our awareness of the problems relating to sexual harassment, our willingness to put up with inappropriate behavior in the workplace, and companies' recent push to hold employees and employers accountable for their actions in the workplace.

This Article addresses some of the roots of the backlash against sexual harassment law and posits that it is part of a greater backlash against feminism and political correctness. I argue the media has distorted the meaning of the law so that our common understanding of the law is disconnected from what is actually going on in the courts. I then conclude

and pursuing harassment complaints. Alas, the demise of due process often invites false and reckless accusation of harassment, with ruinous consequences for the individual accused.

Id. Similarly, in reference to a professor who was suspended for classroom remarks he made involving a sexual reference, under a school's policy which defines sexual harassment to include, among other things, "verbal ... conduct of a sexual nature ... creating [an] offensive working academic environment," one journalist noted that "if the term 'conduct of a sexual nature' can encompass such off-hand references as Mr. Silva's, feminists would seem to have an open-ended veto right over classroom speech." Rabkin, supra note 7.


17. The Supreme Court first addressed the issue of sexual harassment in a 1986 landmark case that recognized "hostile environment harassment." Meritor, 477 U.S. at 67. In Meritor, the Court ruled that harassment could occur even if the victim had not lost any job benefits, as long as the environment was "sufficiently severe and pervasive to alter the conditions of [the plaintiff's] employment." Id. (quoting Rogers v. EEOC., 454 F.2d 234, 238 (5th Cir. 1971)). The only other time the Supreme Court addressed the issue was in 1993 when it established that the victim of harassment need not establish that he or she suffered serious psychological injury in order to recover under Title VII. See Harris, 510 U.S. at 21-23.

that the answer to the backlash is not taking a step backward to afford less protection to employees, but rather to educate the public better about the law in an effort to assure the workplace is free from unwelcome intimidation and abuse.


A. The Paradigm: The Repressive Workplace and the Eradication of the Personal

In 1991, the world watched as Anita Hill described her allegations of sexual harassment against then-Supreme Court nominee Clarence Thomas. Hill’s testimony spawned thousands of sexual harassment lawsuits. The media attention of Hill’s testimony empowered women to assert their Title VII rights. Women learned that they did not have to put up with unwelcome sexual contact at work, and as a result, employers were no longer getting away with behavior that, although it had been illegal under Title VII since at least 1986, had nonetheless been considered acceptable. This new accountability led a few employers to take drastic steps in an effort to avoid liability, such as forbidding dating among coworkers altogether, or firing employees for behavior which would not have been forbidden under Title VII. Because certain actions of a few extreme employers were

19. On NEXIS, references to sexual harassment grew from fewer than 1500 in 1990 to more than 8000 in 1992 and nearly 15,000 in 1994. See Young, supra note 9, at 12. One study shows that sexual harassment complaints to the government rose from 6000 in 1990 to more than 15,000 in 1996. See Elizabeth Mehren, L.A. TIMES, March 4, 1998, at E1.

20. See generally Philip Weiss, Don't Even Think About It (The Cupid Cops Are Watching), N.Y. TIMES, May 3, 1998, (Magazine), at 43. The National Organization for Men claims that up to five thousand of the nation’s 20.5 million businesses have adopted policies which prohibit fraternization between the sexes at work. See Jerry Moskal, Sexual Harassment: Group Promotes “No Fraternization,” GANNETT NEWS SERVICE, May 4, 1994. Large companies like United Parcel Service and American Express and universities such as Harvard, the University of Virginia, Tufts and Amherst all have policies barring relationships between superiors and subordinates. See Walter V. Robinson & Peter G. Gosselin, At Many Firms, Consent Doesn’t Make Sex OK, NEW ORLEANS TIMES-PICAYUNE, Feb. 1, 1998, at A10; see also Eileen Ambrose, Employers Take Steps to Prevent Harassment: Office Romance is OK at Most Indiana Firms, But Some are Beginning to Ban Fraternization, INDIANAPOLIS STAR, Aug. 27, 1995, at E1 (describing the Indiana Chamber of Commerce’s sample nonfraternization policy included in its Model Employee Policies for Indiana Employers Handbook); John Caher, Employers May Prohibit Dating—New York Wal-Mart Workers Were Fired for Fraternization, HARRISBURG PATRIOT, Jan. 9, 1995, at B4 (describing Wal-Mart’s policy prohibiting “dating relationship” between married employee and another worker); Allen Fishman, Non-Fraternization Policy Makes Sense, DENVER POST, March 20, 1995, at C4 (describing unnamed company’s policy which prohibits supervisors and managers from developing personal relationships with employees they supervise); Fraternization Sparks Problems for Businesses, TULSA WORLD, Nov. 3, 1997, at A9 (describing Staples’ fraternization policy prohibiting managers from having personal or romantic relationship with subordinate).

21. See infra notes 111-35 and accompanying text.
sensationalized and overemphasized, employees began to live in fear of being fired for innocuous behavior, and complained they were unnaturally altering their personal behavior. Companies were described as having gone off the deep end in their efforts to control personal behavior. As reported in Ms. Magazine just last year, when employers do not know for sure where the line is, "they’ll draw it far enough back so hardly anyone can claim they didn’t know they were stepping over it."\(^22\) A cartoon in Ms. Magazine exemplifies the belief that the rules have become so strict that people are better off if they don’t interact at all in the workplace: below the caption “Confused by the rules” is a cartoon of people attempting to avoid eye contact with each other in the workplace, hiding behind their briefcases and averting each other’s glances.\(^23\) The message being sent is that people are walking around their workplace in fear, feeling horribly constrained by a set of unnecessary rules.

The Thomas-Hill episode, and the proliferation of claims that followed, established a widely-believed, fantastical paradigm of sexual harassment: “any manifestation of sexuality in the workplace, from romantic pursuit to racy humor, is abusive if someone decides, perhaps long after the fact, that it was ‘unwelcome.’ Even if they don’t mean harm, men who ‘just don’t get it’ bear all the blame for sexual conflicts.”\(^24\) People have been described as becoming afraid to talk to one another about anything personal or have a drink with a co-worker in a business situation. Employers are believed to be enforcing “new rules [that] forbid everything from flirting to joking to falling in love with your cubicle-mate.”\(^25\) People complained that the law created “a repressive workplace where no one can tell a joke, no one can flirt, no one can date.”\(^26\) This misperception and confusion surrounding the law led to a backlash against what was viewed as laws that were unrealistically rigid.

B. The Sources of the Paradigm: The Media and the Backlash Against Feminism

This pervasive fear of liability is based more on news reports than on actual interpretations of Title VII. Especially prior to the dismissal of the Paula Jones case, the media portrayed sexual harassment law as out of control. When headlines read “Enough of this Male-Bashing,”\(^27\) “Fear of

\(^{22}\) Gloria Jacobs & Angela Bonavoglia, *Sex @ Work: What are the Rules*, MS. MAGAZINE, May/June 1998, at 50.

\(^{23}\) *See id.*

\(^{24}\) Young, *supra* note 9, at 24.

\(^{25}\) Jacobs & Bonavoglia, *supra* note 22, at 50.

\(^{26}\) *Id.* at 54 (statement of Ellen Bravo); *see also* Americans Lighten Up A Tad on the Topic of Sex; But it’s Still Legally Risky Subject in a Workplace, HARRISBURG SUNDAY PATRIOT-TIMES, Feb. 22, 1998, at F1 (“Even joking about sex in the American workplace remains a serious legal risk”).

\(^{27}\) *See* von Germeten, *supra* note 9, at A15.
Flirting,"28 or "Five Years Later his Life is Still Shattered"29 people certainly get the idea that women are taking advantage of their right to sue for sex discrimination in the workplace.30 Cathy Young observed that "the law allowed Clinton to be sued over an alleged crude advance which involved no threat of reprisals and caused the plaintiff no harm."31 By suggesting that Paula Jones should not even have the right to sue, Young suggests that sexual harassment is not worth taking seriously.

The media has directed specific ridicule at cases of harassment overkill. In several highly publicized cases, the press hit hard with the idea that the rules being applied do not seem to work in context: in one case, a six-year-old elementary school boy was reported as having been suspended for kissing a little girl classmate;32 in another, an executive was reportedly fired for telling a female co-worker about a racy Seinfeld episode;33 another case involved an esteemed theology professor who was reportedly ordered into counseling for a classroom discussion of a classic story from the Talmud that includes a sexual reference;34 and in another, a graduate student was allegedly forced to take down from his desk a small photograph of his wife in a bikini.35

These exceptional cases received an enormous amount of derogatory press. What they represent, though, is not so much sexual harassment overkill, but media overkill on the topic of sexual harassment. The media has unerringly focused on extreme cases in which employers overreacted because of their hostility, bewilderment, or confusion over new sexual harassment rules. By focusing on the absurdity of suspending a six-year-old child for kissing a girl on the cheek, for example, the press ignores the "grabbing, groping and sexual assault" that actually occurs,36 and trivializes the

28. See Jong, supra note 8, at C1.
29. See Currie, supra note 9, at C3.
30. This fear of women's power of accusation is reminiscent of the visceral fear men have that women will accuse them of rape. See, e.g., Susan Brownmiller, Against Our Will: Men Women and Rape 12-13, 25 (1975) (recounting famous biblical story of young man falsely accused of rape); Susan Estrich, Real Rape 45 (1987) (discussing the notion that women will lie about rape or sexual assault is entrenched in societal attitudes toward women and rape); Lynn Hecht Schafran, Is the Law Male?: Let me Count the Ways, 69 Chi.-Kent L. Rev. 397, 401 (1993) ("rape laws are a codification of men's fears of false accusations"); Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape, 100 Dick. L. Rev. 795, 812 (1996) ("until social scientists began to research the meaning of rape statistics in the 1980's, men's fears of false rape complaints were regularly reinforced by police statistics showing high rates of false reports of rape").
31. Young, supra note 9, at 12.
34. See Graydon Snyder v. Chicago Theological Seminary, 94 L 1423 (Cir. Ct., Cook Co., Ill 1994).
36. Jacobs & Bonavoglia, supra note 22, at 53 (statement of Ellen Bravo). Studies show that harassment of teenage girls in middle and high schools is pervasive and has devastating effects. See id. (citing study by the American Association of University Women).
importance of controlling sexual harassment among adolescents.\textsuperscript{37}

The media has also been diligent in its accounts of male victimization from false claims of sexual harassment.\textsuperscript{38} One British reporter, commenting on sexual harassment in the United States, is concerned that "witch-hunts have returned to the United States, and are destroying not just reputations but the principle of freedom."\textsuperscript{39} In reference to sexual harassment in schools, Sommers argued that "charges of harassment are made so carelessly and on such slight grounds that we now have a genuine witch hunt on many of your campuses . . . . Every man now stands to be accused if he's ever been alone in a room with a woman."\textsuperscript{40} A common theme that emerges from these accounts is the image of "fearful, confused, and powerless heterosexual males" faced with a tyranny of political correctness.\textsuperscript{41} These types of accounts affirm a series of sexist stereotypes that women bring false claims of victimhood in order to punish the patriarchy by attacking innocent males, and they create a safe harbor for the belief that women can exploit men through a code of political correctness, thereby exerting disproportionate influence in the workplace.

The backlash that has resulted against sexual harassment law can be seen as a larger backlash against women's equality that has arguably been going on since the beginning of the feminist movement. In her book \textit{The Undeclared War Against American Women}, Susan Faludi comments that "the last decade has seen a powerful counterassault on women's rights, a backlash, an attempt to retract the handful of small hard-won victories that the feminist movement did manage to win for women."\textsuperscript{42} Faludi explains that the frequent flare-ups of resistance to women's rights are not random, but rather occur when men fear that women are making progress that will threaten men's economic and social well-being.\textsuperscript{43} As Gloria Steinem wrote in an article commemorating the Ten Year Anniversary issue of Ms. Magazine back in 1978:

[T]his seems to be where we are, 10 years or so into the second wave of feminism. Raised hopes, a hunger for change, and years of

\textsuperscript{37} See infra nn. 87-98 and accompanying text.

\textsuperscript{38} See infra nn. 50-98 and accompanying text. The media has also picked up on men's complaints of reverse discrimination in the area of sexual harassment. For example, a suit involving a man who claimed sexual harassment in a lesbian professor's class made national news. See Cynthia Hubert, \textit{SAC State Prof Cleared of Sex-Harass Charges}, SACRAMENTO BEE, May 19, 1995, at A1; \textit{Sex Lecture Complaint, WASH. TIMES}, May 22, 1995, at A2; \textit{University Rejects Claim on Sex Lecture / Ex-Student Plans to Sue, Says He Was Traumatized}, S.F. CHRON., May 24, 1995, at A21.


\textsuperscript{40} Martha McCluskey, \textit{Fear of Feminism: Media Stories of Feminist Victims and Victims of Feminism on College Campuses in FEMINISM, MEDIA AND THE LAW} 62 (Fineman and McCluskey eds., 1997).

\textsuperscript{41} See id. at 61.

\textsuperscript{42} SUSAN FALUDI, BACKLASH, THE UNDECLARED WAR AGAINST AMERICAN WOMEN xviii (1997).

\textsuperscript{43} See id. at 46.
hard work are running head-on into a frustrating realization that each battle must be "fought over and over again at different depths," and that one inevitable result of winning the majority to some changed consciousness is a backlash from those forces whose power depended on the old one.44

Steinem's thoughts seem aptly relevant today as well. The media has a history of inflicting damage on feminists and other progressives. Faludi noted that:

[In the last decade, publications from the New York Times to Vanity Fair to the Nation have issued a steady stream of indictments against the women's movement, with such headlines as “when feminism failed” or “the awful truth about women’s lib.” They hold the campaign for women's equality responsible for nearly every woe besetting women, from mental depression to meager savings accounts, from teenage suicides to eating disorders to bad complexions. The "Today" show says women's liberation is to blame for bag ladies. A guest columnist in the Baltimore Sun even proposes the feminists produced the rise in slasher movies. By making the "violence" of abortion more acceptable, the author reasons, women's rights activists made it all right to show graphic murders on screen.]45

The media has inflicted significant damage in the arena of sexual harassment. As a result of the negative media attention, the sexual harassment laws have become the subject of ridicule. Commentators have attempted to mask this resurgence by noting that "even making fun of a woman who claims sexual harassment is no longer politically incorrect."46 One high school senior, writing a column on sexual harassment at her school, wrote "from experience, I can say that sexual harassment is often spoken of and made the butt of ridicule."47 Monica Lewinsky's predicament has also been used to "incoherently ridicule sexual harassment law,"48 when in fact she never filed a lawsuit for sexual harassment and most legal scholars and feminists would not argue that the consensual relationship at issue there would be grounds for a sexual harassment suit under Title VII. The backlash against feminism fed the media, which created the backlash against sexual harassment.

44. Gloria Steinem, Far From the Opposite Shore, Or How to Survive Though a Feminist, MS. MAGAZINE, June 5, 1978, at 90.
45. FALUDI, supra note 42, at xi.
46. Young, supra note 9, at 12. Young notes that “[o]n MSNBC, Wendy Murphy, a staunch feminist victims’ advocate, caustically observed that it was ridiculous to 'ask for $3 million merely because you saw a penis.'” Id. When feminists admit there is a problem, it lends credence to the idea that women are exploiting the system.
47. Teena K. Wise, Many Students are Unsure About Sexual Harassment, VA. PILOT, June 23, 1995 (Daily Break), at E12.
C. The Problem with the Paradigm: Misleading News Stories and Their (Dis)connection to the Law

Our understanding of the law comes in large part from the media, and expectedly, what people remember are the high-profile cases. Unfortunately, by focusing on the sensational, the media does not always paint a complete or accurate picture. While, as news consumers, we are concerned primarily with learning what is going on in our own community and in the greater world around us, the press presumably has sales and profitability as top priorities. To achieve that end, reporters often choose news stories with widespread appeal, and emphasize the sensational aspects of the story, limited in what they report by the short attention span of the average reader.49 Since sexual harassment has become a profitable issue, we no longer suffer from a lack of awareness of the problem. But the media’s concern about sales has ultimately led us astray with respect to the details.

For example, in 1993 the media latched on to a case of sexual harassment gone awry, when Jerold Mackenzie, a manager at Miller Brewing Company, was fired after a co-worker complained she was offended when he talked about a previous night’s Seinfeld episode. In the episode, Jerry was dating a woman whose name he could not remember—all he could remember was that her name (Dolores) rhymed with a female body part. The press had a field day with what was viewed as not only a wrongful termination, but a termination that was “more laughable than the TV episode itself.”50

The press seized on this extreme termination as a way of criticizing the “large defects of sexual harassment law.”51 In reference to the Seinfeld firing, the Chicago Tribune stated “[g]ood laws must be clear. Otherwise, people can’t obey them and can construe conduct they dislike to be illegal.”52 The Seinfeld firing, however, did not involve an application of the law, only a company’s application of its own policy. When Mackenzie sued for wrongful termination, the court made clear that such a termination would not have been proper under Title VII and awarded Mackenzie $26 million in damages.53

49. See, e.g., Watterson et al., The Media Are Making Sport of Legal Reporting, JUPITER COURIER, July 10, 1996, at B2 (stating that “Lawyer-commentators are recruited to make sure the news coverage is entertaining enough that viewers will continue to watch insufficient numbers to sell advertising at its highest rates . . . . Much of what passes for legal journalism is information delivered without knowledge, opinion without explanation, and soothsaying without heed of consequences.”).


51. See Samuelson, supra note 50, at A23.

52. See id.

53. Circuit Judge Louise Tesmer later reduced the amount the jury awarded to $24.7 million.
Mackenzie’s predicament drew unusual media attention because of the popularity of the Seinfeld TV show and the unusual nature of the facts. The case, however, was an aberration, and resulted in a big win for the accused. It also involved facts that were not publicized, which might better explain Miller’s decision to fire Mackenzie. Based on the facts as reported by the media, Mackenzie was fired for innocuous behavior that most people would consider acceptable in the workplace, and he was vindicated when the court awarded him millions of dollars to compensate for the mistake. Even if those facts are true, this does not paint the picture of laws that favor the sexual harassment victim. If anything, that case is about laws which have little tolerance for false claims of harassment. But the company’s actions are better explained in light of the facts that were left out of most reports of the story. Miller’s attorneys argued at trial that the Seinfeld incident was the culmination of a pattern of inappropriate behavior and poor job performance by Mackenzie. Among other things, Mackenzie had once been accused of sexual harassment by his secretary—allegations which were serious enough to lead to an out of court settlement. Presumably, an award of $26 million to the wrongly accused should deter overreaction to harassment complaints. Since that kind of follow-up story is usually not as well-publicized as the company’s initial decision to fire the accused harasser, however, that has not been the result. Despite Mackenzie’s big victory, cases like this lead to the illogical conclusion that there are too many frivolous lawsuits, and the law has advanced too far in favor of people who claim to be victims of sexual harassment.

Then there is the case of the theology professor who was disciplined for discussing a risqué tale from the Talmud. Again, the media painted a picture of political correctness run amuck. In that case, Professor Graydon Snyder sued the Chicago Theological Seminary for defamation because the school released a memo to students and faculty about its conclusion that he had been the perpetrator of sexual harassment. He was accused of sexual harassment after reading a passage in the Talmud involving sex. The offending passage involved a roofer who inadvertently had sex with a woman after falling off a roof. The roofer had taken his clothes off because it was so hot. In the courtyard below, a woman had also taken her clothes off because of the heat. The roofer then lost his footing and fell off the roof, landing on the woman, and accidentally inserting his penis into her, resulting in sexual intercourse. Snyder claims to have taught that passage as a way of explaining how different religions perceive sex. He explained that “[t]he New


55. The Talmud is an authoritative body of writings on Jewish law and tradition. WEBSTER’S ENCYCLOPEDIC UNABRIDGED DICTIONARY 1450 (Deluxe ed. 1994).

56. See Judge Alters Ruling in Miller Co Complaint, supra note 53, at A26.
Testament says if you think about doing the act, you’ve done it. The Talmud says if you do the act but didn’t think about it, you didn’t do it.”

The woman who complained to school administrators alleged that in relating the tale Snyder “had created an intimidating, hostile, offensive and abusive academic environment, particularly for women.” Snyder told the Washington Post that “she was offended because men in her life and men generally say they don’t intend to do anything and they do it anyway.” By telling the biblical story, the student claimed Snyder “gave support to those men who—without intending to harm women—abuse and hurt them anyway.” She was offended because she believed the story justified brutality toward women.

The media presented the image of a man victimized by political correctness. After the Chicago Sun-Times picked up the story on March 25, newspapers and magazines from around the world began running the story as an example of “the effect of political correctness on academic discourse.” Headlines such as “Assaulted by the Talmud” and “Banning Holy Writ” made a mockery of the case and of sexual harassment law. As many newspapers reported, his only sin was to explain a difference between Christianity and Judaism by using a story from the Talmud. One reporter noted that “for the first time in all the centuries of its contemplative existence, the Talmud had been accused of being an instrument of sexual harassment.”

The press jumped on the sexual harassment overkill bandwagon, without fully investigating the facts. Less frequent were reports of the additional accusations students and faculty had made about Snyder. Officials from the Seminary said Snyder gave “selective facts” to the media that the seminary was not in a position to rebut because of the pending defamation lawsuit.

Richard Lewis, a professor and member of the Seminary’s Sexual

57. See Adrienne Drell, Professor Cites Complaint as an Excuse for Firing, CHICAGO SUN-TIMES, Aug. 31, 1995, at 5 (quoting plaintiff’s complaint).
58. See id.
60. See id.
61. See Adrienne Drell, Court Stalls Prof’s Bid to Clear Name, CHI. SUN-TIMES, Aug. 5, 1994, at 5.
62. See Hentoff, supra note 59.
63. See Levin, supra note 39.
66. See Drell, supra note 61, at 5.
Harassment Task Force, said the charges involved "more than just this one case," and Seminary President Kenneth Smith said the Seminary was troubled by a longtime "pattern of inappropriate behavior involving women." The task force said that three other women had complained that he had touched them or "undressed them with his eyes." According to Snyder, about three weeks before the Talmud incident, he was confronted by the seminary's academic dean and a female student who accused him of "rubbing his body against her in the school's office, where the student worked part time." Two days after the Talmud incident, he was again accused of sexual harassment. This time a female faculty member described by Snyder as "a leading feminist in the theological world" accused Snyder of hugging her "in an erotic or sexual manner." Although formal charges were never brought by those women, these incidents indicate that Snyder might have had a history of harassing women.

It is difficult to know, without all the facts, if Snyder's actions amounted to sexual harassment. We often, however, form immediate conclusions when we read one-sided reports. This was not a case of a woman suing for sexual harassment under Title VII and prevailing based on the telling of the story from the Talmud. Rather, the decision to reprimand Snyder was made by a committee of his peers, "a group not usually inclined to discipline one of their own." The disciplinary action taken against Snyder was not simply in response to one sexual remark made in the classroom, as the media have reported, but rather reflected his overall demeanor in the school and the atmosphere he created in his classroom. Also, the action seems proportional to the conduct described. Snyder still teaches a full course-load at the school. The school simply issued a formal reprimand, ordered that he not teach the introductory Bible class, and told him not to be alone with students, protective measures that might make sense in light of the totality of the circumstances.

The case of the offending photograph was similarly misreported. In 1993, a University of Nebraska-Lincoln graduate student, Chris Robison, was reportedly told to remove a photograph from his desk that showed his

68. Dirk Johnson, Professor's Case Focus of Correctness Concerns, SEATTLE POST-INTELLIGENCER, May 11, 1994, at A3.
69. Drell, supra note 57, at 5.
70. Id.
71. Id.
73. Id.
74. See id.
77. See id.
78. See Professor Sues Seminary Over Harassment Case, GREENSBORO NEWS & REC., Mar. 27, 1994, at A9; Witham, supra note 67.
"bikini-clad" wife.\textsuperscript{79} He shared the office space with two women who said the picture made them uncomfortable and contributed to an unfriendly environment for women.\textsuperscript{80}

The press ran the story as an example of sexual harassment overkill, consistently pointing out that a student should be allowed to have a photograph of his wife in a bikini at his own desk.\textsuperscript{81} Commentators reacted to the story in disbelief, claiming the obsession over political correctness had gotten out of control and had a "suffocating effect on free speech."\textsuperscript{82} An editorialist in the \textit{Washington Times} proclaimed that a rational response to the incident would be "incredulous laughter," and suggested that women who express concerns about this photo should have their mental health questioned.\textsuperscript{83}

The news stories, however, repeatedly reported incorrect facts.\textsuperscript{84} Robison's immediate supervisor, the professor who made the decision to require that the picture be taken down, admonished the press for not having viewed the photo before running the story and explained that the picture was an "intimate 'boudoir' photograph of the student's wife wearing lingerie, not a snapshot of his wife at the beach."\textsuperscript{85} He told the \textit{Washington Times} that the office was used as a testing location for undergraduates and he and others found the picture to be inappropriate for that setting.\textsuperscript{86} By failing to confirm the facts, the press was again able to make mockery of the sexual harassment situation in our society.

Finally, one of the biggest sexual harassment cases discussed in the press the past few years was the case involving Jonathan Prevette, the six-year-old North Carolina boy reportedly suspended for the "sex crime" of kissing a little girl on the cheek.\textsuperscript{87} Professor Deborah Rhode wrote of the incident, "hard cases may make bad law but bad cases make great press."\textsuperscript{88} This story, which according to the media was perhaps the ultimate example of the

\textsuperscript{79} \textit{See The Second Victorian Age}, \textit{WASH. TIMES}, June 11, 1993, at F2.
\textsuperscript{80} \textit{See id.}
\textsuperscript{82} Ruggles, \textit{supra} note 81, at 13SF.
\textsuperscript{83} \textit{See The Second Victorian Age}, \textit{WASH. TIMES}, June 11, 1993, at F2.
\textsuperscript{85} Berman, \textit{supra} note 84, at C2.
\textsuperscript{86} \textit{See Rhode, supra} note 84, at A28.
\textsuperscript{87} \textit{See id.}
\textsuperscript{88} \textit{Id.}
ridiculous place to which feminists have taken the law of sexual harassment, was no exception. News headlines such as "Loose Lips," "Kiss and Yell" and "Peck of Trouble" were common in the papers, as the media ridiculed sexual harassment law. Prevette became a celebrity as his picture appeared in newspapers around the country and abroad, and he appeared on talk shows evidencing "feminist fanaticism."

The misinformation with respect to this incident is perhaps the greatest of the cases focused on by the press. The school's sexual harassment policy was arguably overbroad for presuming a six-year-old boy was capable of perpetrated sexual harassment. But the facts of the case were blown out of proportion. Although it is true the boy was suspended for the kiss, the suspension was only an "in-school" suspension that involved being separated from his class for a day and missing coloring and an ice cream party. Sexual misconduct can start at a very early age and young boys should be taught that unwanted sexual contact with any female is unacceptable. Consequently, the school's mild sanction seems appropriate to the child's behavior.

The press' treatment of this story shows its failure to take abuses of children seriously. Emily Edwards, a UNCG media professor, says the story "reinforces the notion for a patriarchal society that the whole idea of sexual harassment is silly." By generalizing from an incident like this one, the media lost sight of the serious problem with sexual harassment of school-aged children. In a recent study by the American Association of University Women, four-fifths of students reported being targets of harassment, only a few of whom actually complained. Studies like this one indicate that the Prevette suspension was still the exception to the rule. Too often, girls who have genuinely been subjected to repeated instances of verbal and physical abuse are afraid to report the harassment for fear of retaliation.

89. See, e.g., Sexual Politics, RICHMOND TIMES-DISPATCH, May 1, 1998, at A18 (editorial) (stating that "Businesses have been scrambling to implement harassment policies—sometimes with absurd results: the suspension of six-year-old Jonathan Prevette for kissing a classmate on the cheek"); John Temple, Postlude to a Kiss: "This Ain't Over" Says Boy's Father, GREENSBORO NEWS & REC., April 13, 1997, at A1; Betsy Hart, Title IX Scores Even More Points for Absurdity, CHI. SUN-TIMES, Mar. 14, 1998, at 16 ("Jonathan Prevette... became an early casualty of this new 'awareness' when he was suspended from school for his crime").

90. See generally Deborah L. Rhode, supra note 84, at A28.

91. See id. Jonathan "starred in two parades and in a number of TV talk shows. He posed for a kiss with Tatiana Dragovic, 18, one of the year's top models, for a photo in Life Magazine's year-end issue," and he is often asked for his autograph. John Temple, Postlude to a Kiss: "This Ain't Over" Says Boy's Father, GREENSBORO NEWS & RECORD, April 13, 1997, at A1.

92. See supra notes 87-91 and accompanying text.

93. Professor Marina Angel explains, "An unwanted kiss from a six-year-old male classmate is as much sexual harassment as an unwanted kiss from a sixty-year-old male coworker. The failure to sanction the unwanted kiss of a six-year-old boy teaches that boy that he can, with impunity, violate the bodily integrity of females. Teaching young boys respect of the rights and bodily integrity of girls and women would be a major step toward the elimination of sexual harassment." 8 TEMP. POL. & CIV. RTS. L. REV. 283, 303 (1999).


95. See Rhode, supra note 84, at A28.

96. See id.
story like the Prevette story gets overblown and scoffed by the media, “the next time a real sexual harassment case comes up, people will be hesitant to come forward.”97 Professor Rhode put the Jonathan Prevette story in perspective when she said, “[m]any girls experience serious abuse and cut classes or school to avoid it. These youngsters miss more than ice cream.”98

These well-publicized stories led to the view that colleges are applying standards “with no thought to academic freedom,”99 and companies are overreacting to the call for political correctness.100 The “victimized” men complained that their employers were limiting their freedom to speak in the workplace, in violation of their First Amendment rights.101 As Bernice Sandler, senior associate of the Washington, D.C.-based Center for Women Policy Studies, said, however, these critics are missing the point—“Free speech was always subject to restrictions. Harassment is one of them.”102 In fact, the First Amendment implications of sexual harassment liability are “minimal when private employers regulate the speech of their employees because no government action is involved. Thus, an employer may voluntarily impose an anti-harassment policy with no First Amendment implications.”103 Even where government employers control the speech of their employees, such regulation is often permitted if it involves the restriction of fighting words, offensive speech, obscenity, or speech that falls in another category that the Supreme Court has recognized as permissible restrictions of First Amendment rights.104 Those categories are often the type of speech that creates a discriminatory, hostile environment.

The common perception based on the cases the media chooses to report

98. Rhode, supra note 84, at A28.
is that most sexual harassment cases being brought are frivolous.\textsuperscript{105} While frivolous claims are possible in any area of the law, the number of frivolous sexual harassment lawsuits is actually lower than the media would have us think. Frivolous harassment claims are minimal because of the economic and emotional cost of bringing a lawsuit and because of the effects such drastic action has on an employee's life. In fact, while dating and propositioning at work is on the rise because of longer working hours and more women working, "only a tiny proportion of office come-ons result in harassment complaints; of those that do, just 9\% end up in formal proceedings, whereas 38\% of relationships that start on the job survive into the long term."\textsuperscript{106} Also, the type of employment practices claims employers fear most do not directly correlate with the employers' claims histories. A survey done in 1997 of about 2000 employers that subscribe to a Sedgwick Financial Risk Specialists Newsletter revealed that of the various categories of claims filed by employees,\textsuperscript{107} after wrongful termination, employers worry most about being sued for sexual harassment. However, only 10.6\% of claims filed by workers actually involved sexual harassment, making that issue only the fifth most common claim.\textsuperscript{108}

The media has us convinced that feminism is holding the workplace hostage, that employees are recklessly bringing false claims, and that employers are overreacting to their fear of liability by enforcing overbroad policies in ways that lead to absurd results. As one women's advocate observed, "[b]y playing up the ridiculous, the exaggerations, or the aberrations, what the [media] tries to do is make it seem that that's the main thing that's going on, and it isn't."\textsuperscript{109} What is really going on is continued discrimination and sexual harassment in the workplace, and committed

\textsuperscript{105} In a recent Time/CNN poll, nearly 80\% of men and women indicated they thought that false complaints were common. See Young, supra note 9, at 24, available in 1998 WL 19833292.

\textsuperscript{106} John Cloud, Clinton's Crisis, TIME, March 23, 1998, at 48, available in 1998 WL 7694747:

The huge surge in sexual harassment cases that took place in the early '90's has slowed. Such cases are still being filed at the rate of 15,500 a year—some 60 new cases every working day—compared with 6,900 in 1991, but the number hasn't changed much for three years. A recent survey of human-resources managers found that 7 out of 10 handled at least one sexual harassment complaint last year, down from 9 out of 10 in 1995.

\textsuperscript{107} See John Mello, A Shield for the Workplace Wars: As the Cost of Defending Employee Claim Soars, Carriers Suddenly Come Up With Meaningful Products, CFO, THE MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, May 1, 1998, at 73, available in 1998 WL 17610680. Categories in which employees file claims include age discrimination, gender discrimination, wrongful termination, racial discrimination, sexual harassment, retaliation, discrimination based on national origin, workplace harassment, breach of contract, ADA suits, defamation, religious discrimination, and FMLA suits. See id. The survey indicates that 94\% of employers worry about being sued for wrongful termination and that 89\% worry about sexual harassment. See id.

\textsuperscript{108} See id. Age discrimination was the most common claim at 23.5\%, followed by gender discrimination, wrongful termination, and racial discrimination. See id.; see also Dave Lenckus, Employers Not Doing Enough on Growing EPL Risks: Survey, BUS. INS., April 20, 1998, at 2.

\textsuperscript{109} Jacobs & Bonavoglia, supra note 22, at 53 (discussing statement of Ellen Bravo, codirector of "9to5", a working women's advocacy group).
attempted by the courts and companies to address and resolve those problems. By emphasizing the absurd, the media is helping to blur the line between serious abuses which continue to persist, and trivial annoyances, and is perpetuating the myth that any expression of sexuality at work is abusive if a woman says it is. But the purpose and effect of hostile environment law is, and always has been, to put an end to unwelcome, offensive behavior of a sexual nature in the workplace, to remove arbitrary barriers to sexual equality at the workplace, and to assure that no employee must "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." It remains true under Title VII that "even the most boorish contact between men and women isn't necessarily grounds for a lawsuit. The objectionable conduct must be frequent, severe, or physically threatening." Our perception of the law is disconnected from what is really happening in the courts.

II. RECENT SUPREME COURT PRONOUNCEMENTS: SEXUAL HARASSMENT LAW IN THE POST-PAULA ERA

The backlash against sexual harassment law saw renewed energy when, in the 1997-98 term, the Supreme Court made sexual harassment a priority,

110. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

111. Joan Vennochi, Wright and Wrong, BOSTON GLOBE, April 3, 1998, at C1; see also Meritor, 477 U.S. at 62-69 (holding that claim of "hostile environment" sexual harassment is form of sexual discrimination actionable under Title VII); Baskerville, 50 F.3d at 430-31 (holding that handful of offensive remarks without any physical touching, without any invitations to go out on a date, and without any exposure to dirty pictures did not constitute harassment); Devaughn v. City of Clanton, 992 F. Supp. 1318, 1324 (M.D. Ala. 1997) (holding that comments by employer in which he asked employee if she "need[ed] any help with the paperwork" while she was in the bathroom, while inappropriate, were not sufficiently severe or pervasive to create a hostile work environment); Kantar v. Baldwin Cooke Co., No. 93-6239, 1995 WL 692022, at *4 (N.D. Ill. Nov. 20, 1995) (holding that plaintiff was not subjected to severe or pervasive sexual harassment where employer occasionally asked plaintiff about her sexual activities); Smith v. Oakland Scavenger Co., Nos. 96-15797, 96-15797, 1997 WL 661335, at *2 (9th Cir. Oct. 16, 1997) (holding plaintiff's exposure to pornographic magazine in truck she cleaned, rodent among her tools and related incidents were not incidents of sufficient severity to expose her to hostile work environment); Vigil v. City of Las Cruces, No. 96-2059, 1997 WL 265095, at *2 (10th Cir. May 20, 1997) (holding plaintiff's exposure to pornographic, sexually explicit pictures and sexual jokes did not amount to sexual harassment); Dwyer v. Smith, 867 F.2d 184, 187-88 (4th Cir. 1989) (affirming directed verdict in Title VII case despite evidence that female police officer was subjected to pornographic material placed in her station mailbox and to fellow officers' sexually explicit conversations); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998) (holding that supervisor's telling plaintiff she had been voted the "sleakest ass" in the office, and deliberately "touch[ing] her breasts with some papers he was holding in his hand" were insufficient to support a sex discrimination claim for hostile work environment); Richmond-Hopes v. City of Cleveland, No. 97-3595, 1998 U.S. App. 1998 WL 808222, at *12 (6th Cir. Nov. 16, 1998) (holding that actions of supervisor, including crotch grabbing, simulated masturbation, and comments such as "stroke me" and "bitch," were not "because of sex" because the supervisor had directed similar behavior at male employees).
demonstrating that it was prepared to address issues that had been causing confusion in the workplace and splits among the circuit courts. A trio of cases received the most attention: Oncale v. Sundowner Offshore Services, in which the Court held that Title VII’s prohibition against sex discrimination applies equally to men and women, regardless of the harasser’s gender, and Faragher v. City of Boca Raton and Burlington Industries v. Ellerth, in which the Court held that employers can be held liable under Title VII when supervisors sexually harass their subordinates, whether or not the employer has actual notice of the harassment. These decisions were hailed by the media as great victories for plaintiffs, and the Court was even referred to by one journalist as “The Supreme Feminist Court.” Even many legal magazines and journals would have us believe that these recent Supreme Court decisions were “clear victories for employees in the workplace.” There was much, however, the media did not tell us.

In both legal and nonlegal news, these cases were reported as taking giant strides toward protecting employees in the workplace and imposing heavy burdens on employers. Reports by the media which tout clear successes for plaintiffs, however, have been exaggerated. In fact, the Oncale decision permitting lawsuits against a harasser of the same sex as the plaintiff could be read as a restriction on the rights of same-sex plaintiffs and the employer liability cases were actually quite neutral, giving an even-handed solution to the issue of when an employer can be held responsible for the actions of an employee. Additionally, there was another big case decided by the Supreme Court this term which has been widely ignored by the media. In Gebser v. Lago Vista Independent School District, the Court imposed a higher burden on students suing for sexual harassment before they can collect damages.

A. Same-Sex Sexual Harassment

In Oncale v. Sundowner, the Supreme Court revisited the issue of what conduct constitutes sexual harassment. In 1991, Joseph Oncale, a self-identified heterosexual oil rig worker, was sexually harassed by his heterosexual coworkers and supervisor on an oil rig off the coast of Louisiana. He claimed that he was sexually assaulted, battered, touched and

113. See id. at 75.
116. See Faragher, 118 S. Ct. at 2290-91; Burlington Industries, 118 S. Ct. at 2269.
117. See supra note 2.
118. See Rabkin, supra note 7.
120. See supra note 2.
122. See id. at 1995-96.
threatened with rape by his direct supervisor and others, including one instance where three male coworkers held him down in a shower and shoved a bar of soap between his buttocks.\footnote{124} He sued under Title VII of the Civil Rights Act of 1964, which bars sex discrimination in the workplace,\footnote{125} claiming he was subjected to a hostile work environment, but the lower courts denied his claim since both he and his harassers were male.\footnote{126} The Supreme Court reinstated Oncale’s claim stating that “nothing in Title VII necessarily bars a claim of discrimination ‘because of sex’ merely because the plaintiff and the defendant . . . are of the same sex.”\footnote{127}

The \textit{Oncale} opinion was viewed as greatly expanding the scope of protection of Title VII. For example, after the \textit{Oncale} decision was handed down, the headline in the \textit{Advocate}, a gay and lesbian journal, read “Friends of the Court: Landmark Decisions on Same-Sex Sexual Harassment and Marriage Side in Gays’ Favor.”\footnote{128} The article then went on to discuss how the \textit{Oncale} decision has “made for a safer workplace,” quoting Kevin M. Cathcart, Executive Director of Lambda Legal Defense and Education Fund, as saying “[t]his is a resounding statement that sexual harassment laws mean what they say and that lower courts cannot artificially carve out exceptions - even in a same-sex context.”\footnote{129} Nonlegal journals and newspapers reported the case in a similarly optimistic fashion. For example, \textit{Time} Magazine reported that “most lesbians and gays praised Scalia’s ruling” and that feminists “have rejoiced.”\footnote{130}

What these reports fail to emphasize is that the Court’s ruling does not address whether Oncale was in fact sexually harassed in that case, leaving it to the lower courts to work out what proof is required to establish that same-sex harassment is “because of sex.” Oncale’s case was remanded and Oncale was left to convince a jury that his coworkers and supervisor discriminated against him because of his sex. The parties ultimately settled the case, so it remains unclear whether the Supreme Court’s ruling would have helped Oncale.\footnote{131}

\begin{itemize}
\item \footnote{124} See id. at 77.
\item \footnote{125} Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual’s . . . sex . . . .” 42 U.S.C. § 2000e-2(a)(1) (1994).
\item \footnote{126} See Oncale v. Sundowner Offshore Services, 83 F.3d 118 (5th Cir. 1996), rev’d, 523 U.S. 75 (1998).
\item \footnote{127} Oncale, 523 U.S. at 79.
\item \footnote{128} John Gallagher, \textit{Friends of the Court: Landmark Decisions on Same-Sex Sexual Harassment and Marriage Side in Gays’ Favor}, \textit{Advocate}, Mar. 31, 1998, at 13.
\item \footnote{129} \textit{Id.}
\item \footnote{130} John Cloud, \textit{Harassed or Hazed?: Why the Supreme Court Ruled that Men Can Sue Men for Sex Harassment}, \textit{Time}, Mar. 16, 1998, at 55; see also \textit{Court’s Good Ruling on Sexual Harassment}, \textit{The Tennessean}, Mar. 8, 1998, at D4 (reporting that “[t]he Supreme Court got it right saying a man could indeed be sexually harassed by another man.”); \textit{Same-Gender Harassment is also Banned}, N.Y.L.J., Mar. 5, 1998, at 1 (referring to \textit{Oncale} decision as “case of enormous importance for American workplaces.”).
\item \footnote{131} See Mary Judice, \textit{L.A. Offshore Worker Settles Sex Suit: Harassment Case Made History}}
In *Oncale*, the Supreme Court set forth several examples of the type of conduct, directed at an employee of the same sex as the harasser, that might amount to sexual harassment. One evidentiary route a plaintiff could pursue is proving that the accused “treated members of both sexes in a mixed-sex workplace” differently. That route would be unavailable to *Oncale*, as there were no women on the rigs. Another option presented by the Court is proving that the same-sex bias arose from “general hostility to one’s own gender.” Again, this factual argument would probably not help *Oncale* since in his case, the harassment was directed specifically at him, and not toward all or even any other men at the job site.

*Oncale* was harassed not because he was a man, but more likely because he was a small, effeminate man who did not conform to stereotypical notions about how a man should behave. In typical cases involving male on male sexual harassment, the harassers invoke imagery which “explicitly equates the harasser with the male biological capacity to penetrate and dominate sexually while equating the target with the typically female role of being penetrated and dominated sexually,” thereby allowing dominant masculine males to “communicate their superior position in the gender-based hierarchy to men who are less masculine and thus of lower status on the gender-based hierarchy.” That type of factual scenario, which motivates a large majority of same-sex sexual harassment, typically does not involve hostility toward one’s own gender, but rather hostility to a certain subset of one’s own gender. So, while the *Oncale* decision allows the possibility of a case of same-sex sexual harassment, there is no indication that the Court would recognize the right of such a plaintiff based on the gender stereotyping that is typical of same-sex sexual harassment. Accordingly, even if *Oncale’s* coworkers did everything he said they did, he still might have lost his case on remand.

The media, while correctly reporting the technical holding of the *Oncale* case, left readers believing *Oncale* had won his suit already, or that he would have been likely to prevail on remand. Many news reports did not recognize the wide leeway lower courts now have to define what it means to discriminate “because of sex” in a way which excludes protection for gay or effeminate men, and the possibility that the Court’s ruling may actually make

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133. *Id*.


it easier to eliminate most same-sex sexual harassment cases earlier.

**B. Employer Liability**

In two other cases decided this past term, the Supreme Court resolved a split in the circuit courts over the correct standard for holding employers liable for the sexual harassment of an employee by a supervisor. In *Faragher v. City of Boca Raton*, the Court addressed the issue in the context of a hostile environment claim. That case involved a lifeguard who was subjected to repeated and uninvited offensive touching, sexual comments and gestures and threatening sexual requests by her two male supervisors. Her employer, the City of Boca Raton, asserted that it could not be held responsible for hostile environment harassment that occurred at a remote location and which, although reported to an intermediate supervisor, was never reported to higher-ups in the city. In *Burlington Industries v. Ellerth*, the Court addressed the question of employer liability based on a claim of quid pro quo sexual harassment. *Ellerth* involved a claim that the plaintiff's supervisor repeatedly implied that her job would be in jeopardy unless she succumbed to his advances. The Court of Appeals found that her employer, Burlington Industries, should not be held liable because she suffered no job consequences (she actually got promoted before she quit), and because she failed to utilize the company's sexual harassment complaint procedure.

In considering these two cases, the Court determined first that the distinction between hostile environment and quid pro quo harassment did not control the issue of employer liability. The Court then held that under either type of claim, employers are potentially liable for their supervisors' misconduct, whether or not the company was aware of it. Specifically, an employer will vicariously be held strictly liable to a victimized employee who has an actionable claim of sexual harassment created by a supervisor who has authority over the employee, when the exercise of supervisory authority results in tangible harm to the plaintiff. When the plaintiff cannot prove tangible detriment, the employer can raise the affirmative defense that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

137. See id. at 2281.
138. See id. at 2282.
140. See id. at 2262.
141. See id. at 2263.
142. See id. at 2265.
143. See id.
144. See id.
145. See id. at 2270.
These cases were decided during the height of the sexual harassment backlash when common perception was at its strongest that sexual harassment law is out of hand. As a result, reaction to these cases was strong. At a time when people were already convinced that too many frivolous suits were being brought, the feeling was that these decisions will lead to more lawsuits and greater expense to employers, and ultimately "further complicate a workplace already confused about male-female relations." Critics fear that these two rulings will cause employers to adopt overbroad zero-tolerance policies under which "offending employees [can be] disciplined or discharged for trivial offenses."  

The Court's decisions, however, have also been viewed by many as even-handed. Employers are relieved that effective sexual harassment policies can shield them from liability while employees are pleased that the burden of proof for any affirmative defense is on the employer. Justice Souter, writing for the majority in Faragher, explained that although Title VII seeks to remedy injuries suffered because of unlawful discrimination, its primary objective "is not to provide redress, but to avoid harm." That, in fact, is exactly what these two decisions accomplish. While these new rulings might cause some initial confusion, the cases provide incentives for preventing harassment and dealing promptly with problems. The likely result is that more workplaces will adopt sexual harassment policies thereby discouraging sexual harassment in the first place. Ultimately, more victims will feel safe reporting sexual harassment to their supervisors, and more cases will be resolved without resort to litigation.

C. School Liability

In a fourth sexual harassment case decided by the Supreme Court last term, the Court took a different approach on the issue of employer liability.


147. See Men, Women, Work and Law, supra note 146, at 21 (statement of Kingsley Browne, law professor at Wayne State University) (stating that "[t]he law already forced employers to engage in massive censorship of employee speech. The new cases put even more pressure on them to do so . . . So much for the land of the free."); McGinnis, supra note 146, at A27 (stating that "[i]n order to avoid lawsuits, companies thus will react by creating inflexible, overbroad codes that are likely to chill much social behavior that does not constitute harassment.").


149. Faragher, 118 S. Ct. at 2292 (quoting Albermarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975)).
Victims of sexual harassment experienced the biggest setback in Gebser v. Lago Vista Independent School District.\textsuperscript{150} In Gebser, the Court held that a plaintiff is not entitled to damages for teacher-student sexual harassment unless a school district official with authority to institute corrective measures has actual notice of, and is deliberately indifferent to, the teacher’s misconduct.\textsuperscript{151} In that case, Alida Star Gebser, a junior high school student, was subjected to a campaign of sexual innuendo and provocation by her teacher.\textsuperscript{152} She subsequently had an affair with the teacher which lasted for a year, and ended in prosecution for statutory rape.\textsuperscript{153} Gebser never reported the incidents to anyone, including her parents, because “she was uncertain how to react and she wanted to continue having him as a teacher.”\textsuperscript{154} The couple was ultimately discovered having sex and the teacher was fired and arrested.\textsuperscript{155}

Gebser sued under Title IX of the Education Amendments of 1972,\textsuperscript{156} which bars sex discrimination at educational institutions receiving federal funds. Although Title VII and IX had been analogized in the past in determining liability for sexual harassment, in a 5-4 decision, the Court departed from Title VII, holding that the school was not liable for sexual harassment because no one with authority to take corrective action had actual notice of the harassment.\textsuperscript{157} The result of the Court’s ruling is that school employees are now better protected from sexual harassment than are students at the same school. In fact, practically speaking, in some instances where even the principal of the school does not have authority to take corrective action, a harassed student may be required to report any instances of sexual harassment to the school board in order to take advantage of the protections of Title IX.

This ruling actually encourages schools to turn their backs on sexual harassment altogether as a means of avoiding liability. “What this does is reward school districts who refuse to have meaningful anti-harassment policies for students,” says employment law scholar Charles Craver of George Washington University National Law Center.\textsuperscript{158} In Gebser, the Court has taken away the incentive to have an anti-harassment policy, putting the responsibility on a thirteen-year-old for reporting an incident rather than putting the responsibility on the school or the teacher.

\textsuperscript{151} See id.
\textsuperscript{152} See id. at 1993.
\textsuperscript{153} See id.
\textsuperscript{154} Id.
\textsuperscript{155} See id.
\textsuperscript{157} Gebser, 118 S. Ct. at 1999.
CONCLUSION

Change is inherent in any society. Social change in the United States flourished during the Civil Rights Movement and throughout the 1960s, as the demand for racial and gender equality led to massive social upheavals. During the Civil Rights Movement, white people complained that they had always treated blacks as second-class citizens and did not know how to respond to a new set of expectations. Anita Hill, during a lecture at Queens College, admonished that uncertainty about appropriate behavior under a new set of rules is not a good reason to resist change. She remembered society's cultural excuses for why we could not get beyond racism, but points out that we have in fact progressed. Today the law requires us to. The same can be said about the laws against sexual harassment.

In recent years there has been a push to change what type of conduct, both verbal and physical, is acceptable in the workplace and in the classroom. Often times, when people are accused of sexual harassment, they do not see their behavior as wrong because it has never been considered wrong in the past. They think their actions are acceptable because they are unable to distinguish them from "normal" social relations between men and women. They fail to see that normal social relations are not always acceptable in the workplace because sexist or sexual speech or conduct can contaminate the workplace in a way that has a greater effect on women. Sexualized interactions exploit gender-based differences, subordinate certain individuals, and are frequently used to communicate and create sex- and gender-based distinctions between individuals which are intended to demean women. They do not understand that what is wrong with sexual harassment is that it is an abuse of power. When men abuse their power over women in the workplace, they are in effect discriminating against women and may be liable under Title VII.

It has been said that "confusion about the law and deliberate distortion of the meaning of the law has "plunged the nation into a rancorous, passionate debate about what is—and is not—sexual harassment." As these rules are being tested in the workplace and in the courts, people will undoubtedly feel they have been unfairly wounded by the application of the new harassment laws because their behavior has not changed and no one had complained about it in the past. But the rules have been consistent for years. While sexual harassment law might limit personal interactions in the workplace, it does so in a principled and important way—it limits behavior of a sexual nature which is unwelcome and pervasive. While the line between harassment and acceptable social behavior might be difficult to draw definitively, the cases which make it through the courts involve behavior that any reasonable man or woman would recognize as sexual harassment.

160. See id.
Change is inevitable but takes time. Eventually we will settle into an understanding of what type of behavior constitutes sexual harassment, and it will hopefully become clear that this is not the "end of spontaneous and warm feelings between the sexes," as some might argue, but rather, it is the beginning.