

When Is Sexual Harassment Not Actionable Sexual Harassment:

A Review of *Holman v. State of Indiana and Indiana DOT*

The important fact to remember is that the conduct must adversely affect the victim's conditions of employment.

It is not surprising that sexual harassment case law has caused the layman a good deal of confusion over the 27 years since its inception as a violation of Title VII of the Civil Rights Act of 1964. At first it was viewed primarily a supervisory personnel using tangible employment benefits to extort sexual employees from opposite-sex subordinates (*Williams v. Saxbe*, 1976). Later sexual harassment was expanded to include any behavior by supervisors and coworkers that created an abusive working environment for an opposite-sex employee/coworker (*Meritor Savings Bank v. Vinson*, 1986). Eventually, even non-employees, such as vendors and customers, were later found to be sources of sexual harassment (*Cronin v. United Service Stations*, 1992; *EEOC v. Sage Realty Corp.*, 1981). As the federal courts expanded the potentially harassing behaviors and pool of potential harassers, the Equal Employment Opportunity Commission (EEOC) developed its own *Guidelines on Sex Discrimination* requiring covered employers (those subject to Title VII) to maintain a harassment free workplace (29 C.F.R. ' 1604.11). As a result of these changes, and the evolving definition resulting from litigation, it is not surprising that managers are confused by what constitutes actionable sexual harassment.

In one of the latest developments, sexual harassment — while though initially was assumed to apply to conduct involving persons of the opposite sex — now encompasses conduct involving persons of the same sex (*Oncale v. Sundowner Offshore Services*, 1998). In *Oncale*, male coworkers were found to have created a hostile work environment for a fellow male employee. More recently, a development has arisen from a decision in the U.S. Court of Appeals for the Seventh Circuit involving alleged harassment by a bisexual. The result of this decision is the coining of a new class of harassers, "equal opportunity harassers," those who sexually harass both male and female employees alike (*Holman v. State of Indiana and Indiana DOT*, 2000).

This article examines the *Holman* decision, the Court's rationale in framing

this decision and its ramifications for employers is discussed. To assist readers in understanding the legal issues involved in our discussion, we first provide a brief review of what constitutes actionable sexual harassment. Ultimately, an assessment of the potential impact this decision will have on anti-harassment policies is provided.

One of the many problems confronting organizations is the lack of consensus as to just what sexual harassment is. Too often, it is viewed strictly as offensive behavior of a sexual nature. Though this is a necessary condition in establishing the legal (or actionable) form of sexual harassment, it is not the sufficient condition. The *Holman* decision serves as a useful tool to demonstrate it takes more than just objectionable behavior to create a workplace situation which violates equal employment opportunity laws. Regardless of how distasteful or appalling the behavior is, it must, above all else, be discriminating in nature. The *Holman* decision is an explanation of the legal necessity of viewing sexual harassment as a discriminatory phenomenon.

Actionable Sexual Harassment

Perhaps the first place to begin is distinguishing between "sexual harassment" and "actionable sexual harassment." The term "actionable" merely means that a particular issue can be taken to court under a particular law for resolution. The term "sexual harassment" may mean different things to different people. In fact, research has already established that men and women have different opinions on what workplace behaviors are sexual harassment (Powell, 1986; Gutek, 1989; Terpstra and Baker, 1990). However, the studies merely allowed the respondents to frame their own definitions of sexual harassment, and not the legal definition.

For a legal definition of what constitutes sexual harassment, the reader's attention is first directed to Title VII of the Civil Rights Act of 1964, the pertinent statute for handling most

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federal discrimination charges. This is the portion of the Civil Rights Act that makes it illegal to discriminate against any individual in terms and conditions of employment on the basis of the individual's race, color, religion, sex, or national origin (29 U.S.C. ' 2000e). At this juncture, it should be clarified that the term "sex" in Title VII refers to a biological condition and not to a behavior or preference (*Ullane v. Eastern Airlines*, 1984, p. 1084). This is a point that is central to the equal opportunity harasser issue.

For workplace behavior to be actionable sexual harassment and be litigated as a Title VII violation, the behavior first must meet certain pre-established criteria. These criteria are often referred to as "proofs." If these criteria, or proofs, are not satisfied, the Act is not violated and no resolution of the conduct can be achieved under Title VII. Quite simply, the workplace behavior does not violate Title VII.

To complicate matters, actionable sexual harassment comes in two distinct forms: (1) *quid pro quo* and (2) hostile environment. There are separate proofs for establishing either.

Quid Pro Quo Sexual Harassment

The oldest form of sexual harassment is *quid pro quo* sexual harassment. This is self-descriptive as "*quid pro quo*" literally means "something for something." In this instance, the first "something" is often sexual favors (or tolerating unwanted behavior of a sexual nature) in exchange for the second something, tangible job benefits. For example, a manager asks a subordinate to have a sexual liaison with him or her in exchange for continued employment (a tangible job benefit). If the subordinate acquiesces, he or she gets the tangible job benefit (i.e., continued employment). If he or she refuses, the subordinate is deprived of the tangible job benefit (i.e., the employment relationship is terminated).

In order to establish this as a situation that is actionable under Title VII, the complaining party (the subordinate filing the Title VII complaint) must satisfy the following criteria:

1. The complaining party must show that he or she belongs to a class or group protected under Title VII. That is to say, the object of the alleged harassment was either male or female. This may sound absurd to many, but it does preclude a complaining party from filing an action based on sexual preference/

orientation which is not actionable under Title VII (*DeSantis v. Pacific Telephone & Telegraph*, 1979).

2. The complaining party was subjected to unwelcomed sexual harassment. The alleged victim did nothing, by word or deed, to encourage the harassing behavior. Neither did the complaining party do anything to indicate that the behavior was acceptable to her (or him). Had the complaining party voluntarily and actively participated in the behavior, it could hardly have been "unwelcome" (*Ellert v. University of Texas at Dallas*, 1995).
3. Because sexual harassment is a form of sex discrimination, the sexual harassment in question must be shown to have been based on the alleged victim's sex. The complaining party must prove the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex (*Oncale*, 1998). The critical issue here is whether the members of one sex are exposed to disadvantageous conditions of employment (in this case unwelcomed behavior of a sexual nature) to which members of the other sex are not exposed. This situation is at the heart of the *Holman* decision and will be discussed in greater detail shortly.
4. Submission or rejection of these advances is made explicitly or implicitly a condition of the victim's employment, so-called *quid pro quo* sexual harassment (*Meritor*, 1986). In essence, submission to such requests by the employee or student becomes the basis for future employment decisions affecting that individual.
5. *Respondeat superior*
The critical condition making this *quid pro quo* sexual harassment is that tangible employment benefits are involved. Only a very small group of employees can engage in this form of sexual harassment, those who control employment benefits (those who can hire, fire, promote, demote, give raises, etc.) (*Henson v. City of Dundee*, 1982). In other words, supervisory personnel and other members of management would be potential harassers, since

only they have the authority over an employee's tangible job benefits.

Hostile Environment Sexual Harassment

The other form of actionable sexual harassment has the same first three proofs as *quid pro quo* sexual harassment (see Figure 1). However, the distinction between hostile environment and *quid pro quo* sexual harassment is made on the fourth proof, the conduct of a sexual nature must be sufficiently *severe* or *pervasive* as to have the effect of unreasonably interfering with the employee's work performance or creating "an intimidating, hostile, or offensive working environment" (*Meritor*, 1998, p. 65). Just what conduct can create this adverse work environment is still hotly debated. In some circumstances, this is easily discerned. For example, in instances involving sexual assault or outrageous physical contact, a single incident of sexual behavior can meet these criteria (29 C.F.R. ' 1604.11). However, in the vast majority of cases, less severe conduct (conduct of a verbal nature) makes assessing actionable sexual harassment a matter of evaluating the cumulative effect of behavior. To make such an assessment, the frequency of the conduct must be considered. Single and isolated incidents will not be sufficient to adversely alter the employee's working conditions. For example, an employee merely telling a joke of a sexual nature in the presence of another employee would not, of and by itself, be sufficient to create an actionable hostile environment sexual harassment situation.

The important fact to remember is that the conduct must adversely affect the victim's conditions of employment. Again, this criterion is not achieved by merely showing the sexual behavior in question offended the victim. It must be clearly shown that as a result of the frequent unwelcomed behavior, the victim's *terms, conditions or privileges of employment* were altered (*Doe by Doe v. City of Belleville, IL*, 1997). If the first employee tells an offensive joke every time he or she is in the presence of the second employee, the frequency of this conduct might create an abusive work environment.

It is important to note that the behavior in question does not have to cause substantial psychological harm to the individual. The Supreme Court has rejected the notion that hostile environment claims are only established by demonstrating that the complaining

party's psychological well-being had been adversely affected by the harasser's actions (*Harris v. Forklift Systems, Inc.*, 1993). It is still important to remember the mere utterance of any epithet which causes offensive feelings is not sufficient to create a hostile work environment. When making a hostile environment determination, courts consider the effect of all the incidents surrounding the alleged harassment (*DeAngelis v. El Paso Municipal Police Officer's Ass'n*, 1995). Because of the ambiguous nature inherent in these standards, there has been inconsistency in the courts. For employers, this means that hostile environment complaints are resolved on a case by case basis.

Employer Liability

One of the many reasons managers and HR professionals are concerned about actionable sexual harassment is the very real potential for employer liability. The Equal Employment Opportunity Commission's *Guidelines on Sex Discrimination* hold the employer responsible for maintaining a work environment free of sexual harassment (29 C.F.R. ' 1604.11). This is coupled with the Civil Rights Act of 1991 which allows victims of sexual harassment, and other victims of intentional discrimination, to sue employers for punitive and compensatory damages (see Table 1). Consequently, employers are not only confronted with the expense of defending themselves in court, but potential monetary damages should they lose. This issue of employer liability for sexual harassment occurring in the workplace is the focus of the last proof in both *quid pro quo* and hostile environment sexual harassment.

The last proof, *respondeat superior*, deals strictly with the issue of employer liability for the harassment of his or her supervisory personnel and employees. *Respondeat superior* literally means "let the master [employer] answer." Another way of saying this—the employer is responsible for the actions (in this case, sexual harassment) of his or her employees.

Standards for determining employer liability are based on the status of the harasser, whether he or she is a supervisor or a coworker (*Faragher v. City of Boca Raton*, 1998; *Burlington Industries v. Ellerth*, 1998). When the harasser is a supervisor, the employer is held to a stricter level of liability than in cases where the harassment is perpetrated by a coworker. In the case of a *quid pro quo* sexual harasser, the employer can be found liable for the harassment of its agent regardless of whether or not the employer knew, or should have known that the harassment

had occurred (*Faragher*, 1998, pp. 791-2). Remember that coworkers cannot directly control a fellow worker's behavior and, therefore, cannot engage in *quid pro quo* sexual harassment.

Coworkers can, however, create a hostile work environment. When a hostile work environment has resulted from the actions of coworkers, the employer is held to a standard of direct liability (*Henson*, p. 909). Direct liability means the employer is liable for the actions of his/her employees (non-supervisory employees only) when the employer knew, or should have known, about the harassment and failed to take appropriate action to stop it and prevent it from recurring (*Katz v. Dole*, 1983; *Barrett v. Omaha Nat'l Bank*, 1984). Therefore, the employer can avoid liability by taking disciplinary action against the harassers that is reasonably sufficient to stop the harassment.

In the event that the person creating the hostile environment is a supervisor, the employer is initially held to a stricter liability. When the supervisor is involved in hostile environment sexual harassment (but no tangible benefits are involved), the employer is permitted an affirmative defense (*Faragher*, 1998). If the employer fails with the affirmative defense, liability is assessed.

Under the affirmative defense, the employer must meet two critical standards. First, the employer must show that he or she exercised responsible care to prevent the sexual harassment (*Faragher*, 1998). This can usually be accomplished by having a good written anti-harassment policy that is consistently enforced (*Robinson*, 1998). Second, it must be shown that the complaining party unreasonably failed to take advantage of any corrective opportunities provided by the employer (*Faragher*, 1998). This usually means the employee was aware of the employer's policy, aware that the employer enforced the policy, and failed to report the policy violation to the employer.

Having set the general nature of sexual harassment case law before the *Holman* decision, it is now time to move to the latest development. In evaluating the *Holman* decision, it is important to remember the third proof—"but for her (or his) sex, she (or he) would not have been subjected to sexual harassment" (*Henson*, 1982; *Bundy*, 1979).

The Holman Case

The *Holman* case involved the harassment of two employees, one male and one female, by their supervisor. The complaining parties were a husband and

wife who were employed as maintenance workers for the Indiana Department of Transportation. Both complained that they had been repeatedly harassed by their male supervisor. The wife alleged that the supervisor had unlawfully harassed her by touching her body, making sexist comments, standing too close to her and asking her for sexual favors (*Holman v. State of Indiana and Indiana DOT*, 1998). She further testified that when she refused her supervisor's advances, he retaliated by giving her poor performance evaluations.

Up to this point, the case looks like a typical *quid pro quo* sexual harassment claim; the employee's response to the supervisor's sexual conduct affects a tangible job benefit. Had the complaint stopped at this point, the complaining party would only have to prove that her allegations were true and the employer would be liable for the supervisor's harassment.

However, in the same complaint the husband alleged that he too was harassed by the same supervisor. Again, bodily contact and requests for sexual favors were alleged. The husband further contended that he too was retaliated against for refusing the sexual advances of the supervisor (*Holman*, 1998). Again, it appeared, on the surface, to be a typical *quid pro quo* sexual harassment.

When the case was initially heard before the United States District court for the Northern District of Indiana, it was dismissed on the grounds that no actionable sexual harassment under Title VII had occurred (*Holman*, 1998, p. 916). This surprised some observers because both the husband and wife had been subjected to unwanted and unwelcomed sexual behavior from their supervisor. However, as mentioned earlier, actionable sexual harassment must meet the proofs established in law. Again, recall that the third proof for both forms of sexual harassment requires the harassment to be based upon the victim's sex. Like any form of sex discrimination, to be a Title VII violation someone must be subjected to different treatment because of that individual's sex. Had the husband (a male) been treated differently from the wife (a female), or *vice versa*, there would have been actionable sexual harassment. However, they were treated the same.

The District Court in *Holman* ruled that this could not be actionable sexual harassment because the husband and wife were subjected to similar treatment. This may appear bizarre, but the purpose of Title VII is not to protect individuals from outrageous treatment in the

workplace; it only prohibits members of one sex from being "exposed to disadvantageous conditions of employment to which members of the other sex are not exposed" (*Oncale*, 1998, p. 80). Yes, the husband and wife were subjected to outrageous and disgusting behavior by their supervisor, but he did not treat either one of them differently. They were treated *equally* outrageously.

On appeal, the Seventh Circuit upheld the District Court decision on those same grounds (*Holman v. State of Indiana and Indiana DOT*, 2000). According to the Seventh Circuit, the supervisor was an "equal opportunity harasser" and as such could hardly violate the equal employment opportunity provisions of Title VII. Citing *Henson v. City of Dundee* (1982), the Court concluded:

There may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. In such cases, sexual harassment would not be based on sex because men and women are accorded like treatment . . . [and] the plaintiff would have no remedy under Title VII (*Henson*, 1982, p. 904).

What was offered as a legal theory in 1982 in *Henson* is now a reality, in *Holman*. What follows is an examination of the ramifications of an equal opportunity harasser on organizations and their HR policies.

Consequences for Employers

There is apparently little cause for concern as this type of case is extremely rare. One cannot imagine that there are many work environments in which the supervisor is bisexual. Is it possible that some persons accused of sexual harassment are likely to claim an "equal opportunity harasser" defense? More than likely.

Interestingly, the Seventh Circuit, in its opinion, stated that "It is hard to imagine that would-be harassers will know the intricacies of sexual harassment law and will manufacture additional harassments to avoid Title VII liability" (*Holman*, 2000, p. 404). This may be true, but we are not as certain that an alleged harasser's attorney, who may very well know the intricacies of sexual harassment law, would not attempt such a defense.

There is, also, the issue of proving that the harasser is bisexual. In *Holman*, this was apparent because both the male and female complaining parties alleged that they were harassed by their supervisor. How a harasser would establish that he or she was an "equal opportunity harasser" when only a single complaint is

filed has yet to be determined. While this would be a means to avoid liability, it is likely to be an extremely difficult one to establish without evidence of a preexisting history of bisexual behavior.

We are equally skeptical of a supervisory employee being able to use a bisexual defense in avoiding culpability for harassing actions in a work environment. Most employers have anti-harassment policies that prohibit the *type* of behavior exhibited in the *Holman* case. In the final analysis, all *Holman* has done is preclude harassed employees from suing their employers under Title VII when the harassment is of an "equal opportunity" nature. It in no way precludes suits being initiated under specific state laws (i.e., intentional infliction of emotional distress, invasion of privacy, outrage, etc.). Hence, the bisexual supervisor's actions may still expose the employer to litigation under state law.

In the rare event of sexually objectionable conduct being initiated by a bisexual supervisor, nothing in *Holman* protects that supervisor from the consequences of violating the company anti-harassment policy, which is a *bona fide* work rule. The decision merely declares such conduct does not violate Title VII. However, if the behavior in question is prohibited by an organizational policy, then the supervisor's offense is violation of a work rule. Violating a work rule is still a "just cause" reason for disciplining or terminating employees in most workplaces.

Though the actionable conduct perpetrated by heterosexual and homosexual employees is far more likely to result in litigation than those of bisexual employees, the *Holman* case does enhance our understanding the litigious nature of sexual harassment. As a consequence, employers and managers are better prepared to review their existing anti-harassment policies to ensure that they, at a minimum, meet the standards for preventing actionable sexual harassment.

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