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Sexual Harassment: Moving Beyond The Law

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I. INTRODUCTION

The #metoo movement has pushed companies to think beyond the question of mere legal compliance and onto larger questions of right and wrong, societal tolerance, and market-based consequences. The live presentation accompanying this paper focuses on recent examples of companies and leaders who have underestimated this powerful (and hopefully lasting) cultural shift, while the paper provides a brief overview of the legal framework surrounding sexual harassment under Title VII of the Civil Rights Act of 1964.

It is extremely important ***not*** to confuse what is legally tolerable with what is socially tolerable. To be sure, the law is an important and necessary component in our societal evolution and provides a backstop and foundation for any societal movement against harassment, and it should continue to evolve to match our changing cultural intolerable for sexual harassment. At the same time, it is important to recognize that the law is often slow and should never been seen as something holding us back from aspiring to more than the minimum standards legislatures—and the politics that drive them—see fit to impose. In other words, the fact that the law may tolerate (at present) a certain form of behavior does ***not*** mean we as private actors should treat that same behavior as "normal" or "ok." There is a difference between that which is legal and that which is right.

II. HARASSMENT

A. *Meritor Savings Bank v. Vinson* (1986)

Title VII of the Civil Rights Act of 1964 does not actually make "harassment" illegal. In fact, the word does not even appear in the statute. Rather, modern day "harassment" jurisprudence traces its origin to the 1986 U.S. Supreme Court decision in *Meritor Savings Bank v. Vinson* and its adoption of the EEOC's 1980 Equal Employment Opportunity Commission's 1980 Guidelines on Discrimination Because of Sex (the "Guidelines"), which set forth two types of "sexual harassment": harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2403 (1986) (*citing* the Guidelines). These two types of sexual harassment have become more commonly known as "quid pro quo" (or this for that) harassment and "hostile environment" harassment.

In *Meritor*, Mechelle Vinson, was hired by Sidney Taylor, a Vice President, as a teller-trainee and then her way up to teller, head teller, and ultimately assistant branch manager. *Id.* at 2401-02. In September 1978, Vinson told Taylor she was taking an indefinite sick leave, and on November 1, 1978, Meritor fired her for excessive leave. *Id.* at 2402. After she was terminated, Vinson filed suit, claiming she had been a victim of constant sexual harassment by Taylor during her employment. At the bench trial that followed, Vinson testified Taylor was "fatherly" to her at first but took her out to dinner and suggested they have sex after she was promoted from teller-trainee to teller. Vinson testified she resisted at first but then agreed for fear of losing her job. According to Vinson, Taylor made repeated sexual requests after that, typically at work, both

during and after business hours, ultimately resulting in the two of them having sex some 40 or 50 times over the next several years. Vinson further testified that Taylor fondled her in front of other employees, followed her into the women's restroom and expose himself to her, and forcibly raped her on several occasions.[1] According to Vinson, Taylor stopped his sexual behavior when Vinson started dating a steady boyfriend. *Id*. at 2402-03. Vinson further testified she never reported the harassment, because she was afraid of Taylor.

For his part, Taylor denied Vinson's allegations of sexual activity in their entirety, testifying he never fondled her, never made suggestive remarks to her, never had sex with her, and never asked her to have sex. *Id*. For its part, the bank denied having any knowledge of any of this.

The district court held Vinson could not proceed absent an economic injury. *Id*. at 2406. The district court further found that if there was a sexual relationship, it was a voluntary one that could not support a claim for relief. *Id*. at 2402-03. Finally, the district court found the bank had an express policy against discrimination, that neither Vinson nor any other employee had complained about Taylor, and that the bank was thus without notice of Taylor's actions and could not therefore be held liable in any event. *Id*. at 2403.

Based in part on the Guidelines, the Eight Circuit Court of Appeals drew a distinction between *quid pro quo* and hostile work environment claims and noted the district court had not analyzed Vinson's claim under a hostile work environment theory. *Id*. at 2403. The Eight Circuit further rejected the district court's finding of voluntariness, suggesting it was perhaps grounded in "the voluminous testimony regarding respondent's dress and personal fantasies." *Id*. At the Eight Circuit explained, if "Taylor made Vinson's toleration of sexual harassment a condition of her employment," then Vinson's "voluntariness" was not voluntary at all. *Id*. Finally, as to the bank, the Eight Circuit held it was absolutely liable for sexual harassment practiced by supervisory personnel, whether or not it knew or should have known about the misconduct. *Id*. Accordingly, the Eight Circuit remanded the case to the district court for further proceedings. The defendants filed for certiorari, and the Supreme Court granted it.

On review, the Supreme Court flatly rejected the argument that Title VII could only reach sexual conduct that produced an economic injury and thereby gave full legal life to the concept of hostile environment sexual harassment:

> In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "such conduct has the purpose or effect of

[1] Notably, the district court allowed Vinson to present—in the absence of an objection from defense counsel—other female employees who testified that Taylor had likewise touched and fondled them, but the district court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief" and instead ruled she could only present such evidence in rebuttal to the defendants' cases, which she ultimately did not. *Id*. at 2402.

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First appeared as part of the conference materials for the
30th Annual Health Law Conference session
"From Hollywood to Healthcare: Sexual Harassment Revisited"