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Negligence Is Alive and Well In The Harassment Arena

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I. Introduction

Let's go back to basics. All actionable workplace sexual harassment claims against employers can be proven up as negligence claims, and the general concepts of negligence that jurors expect to see underlie all successful sexual harassment claims.

Workplace sexual harassment is employer negligence. This is because sexual harassment is a form of gender discrimination, and the presence of gender discrimination represents the failure of the employer to fulfill its duty to ensure a non-gender-discriminatory work environment. When properly applied, the negligence concept can shift the focus from the actions of the employee back to the employer and its actual/constructive knowledge of gender discrimination in the workplace and the actions it took to try to remedy it. In the post #MeToo era, where employees and jurors demand that employers provide sexual harassment-free work environments, whether the employer fulfilled its duty to rid the workplace of sexual harassment will be the battleground for both plaintiff and defense counsel.

Failing to fulfill a duty, of course, is another way to describe the core concept of negligence. Applying the concepts of duty, breach, and proximate cause suggests that an employer can be negligent whether or not the individual employee complained using specific methods set forth in the handbook—if the employer is actually or constructively aware of sexual harassment and fails to correct the problem, it is liable. The formulaic, judicially-created concepts underpinning the *prima facie* elements of sexual harassment, the determination of who qualifies as a supervisor

under *Vance v. Ball State*, and the application of the *Faragher/Ellerth* doctrine are merely ways to determine whether or not an employer ultimately acted negligently.[1]

Put another way, if the employer knows the workplace environment is one in which discrimination is occurring that affects the terms and conditions of employment for women and fails to act to correct it, regardless of whether the actor is a customer, coworker, or supervisor, the employer is negligent and will be liable. This back-to-basics understanding should help practitioners build or defend these cases.

II. Sexual Harassment

A. The 1986 Origin of Sexual Harassment Claims

The Supreme Court first held that sexual harassment/hostile work environment was a viable claim in *Meritor Sav. Bank, FSB v. Vinson*.[2] The Court based the concept on the roots of what could be called a negligent failure to ensure a non-discriminatory workplace. That concept finds its roots in the race discrimination cases of the 1970s, which cropped up as Title VII began to be enforced in workplaces across the country.[3] In adopting the sexual harassment hostile work environment claim, the Court noted that similar harassment claims already existed to protect against harassment on the basis of other protected categories like race, religion, and national origin.

In defining this cause of action, the Court discusses general working environments that are so unhospitable to women ("so heavily polluted with discrimination") as to "destroy the emotional

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[1] This is not to say you should disregard these requirements in your practice when pleading and briefing your sexual harassment case. However, paying undue attention to these rigid rules when taking discovery and preparing for trial may be losing the forest for the trees. Jurors want to know and decide the ultimate issue: was the employer aware of sexual harassment taking place (duty) and how did it respond (breach)?

[2] 477 U.S. 57, 65-66, 106 S. Ct. 2399, 2404-05 (1986).

[3] Interestingly, according to the Court, the 5th Circuit was the very first appellate court to recognize a cause of action based upon a discriminatory work environment.

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