

## **Law falls short on workplace sexual harassment**

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Admittedly, the evidence is largely anecdotal but the trend is unmistakable. The number of women unhappy about their working conditions is out of proportion to their numbers in the labor force. Their dissatisfaction runs the gamut from mild frustration to anger to barely contained rage.

Many of the women who seek legal assistance have already sought medical treatment or counseling. Many who haven't wish they had. The diagnoses that come back range from stress to depression to full-blown post-traumatic stress disorder. A significant percentage of the women who contact my firm are willing to spend a large amount of money on legal counsel even if there isn't that much in it for them financially.

The major legal weapon in the battle against workplace misconduct is Title VII of the Civil Rights Act of 1964. So, what does Title VII mandate? Not enough. The law, although broad, is necessarily vague. This vagueness allows for, indeed requires, interpretation of the statute's language, a search for what Congress meant when it enacted the law. And that seems to be where the disconnect lies between the mostly male judges who interpret Title VII and the women sitting in my conference room thinking that this landmark legislation certainly must protect them from the conduct they have endured at work.

One decision from a federal appeals court, about seven years ago starkly highlights this dichotomy. A female corrections officer sued her employer, alleging that 12 incidents over a five-year period violated Title VII. Eight of the incidents were described by the court as administrative and personnel decisions in which plaintiff claimed she was treated unfairly because she was a woman. She alleged she had been treated differently from her male colleagues merely because she was a woman. The plaintiff never made it to the jury on this claim, the trial court finding she had failed to show her similarly situated male co-workers had received more favorable treatment.

The plaintiff also proceeded on a theory known as hostile work environment, claiming her working conditions were permeated with hostility based on her gender. Four of the 12 incidents cited by the plaintiff had what the court referred to as "an overtly sexual overtone." The plaintiff had much better luck with this claim, with the jury awarding her \$150,00 in damages for emotional distress. Even by today's standards, this is a nice chunk of change, indicating that the jury was appalled by the treatment that the plaintiff had suffered.

However, plaintiff's luck ended quickly, as the appeals court held that she should not even have been allowed to get to the jury on her hostile work environment claim. The appeals court ruled that only five of the 12 incidents constituted a hostile work environment.

Courts will say there is no magic number of incidents that must be suffered in order to establish a hostile work environment, but a survey of the case law suggests that the requisite number is larger than most people might expect.

In addition to the case mentioned above, in the following situations, the claim of hostile work environment was found not to entitle plaintiff to consideration by the jury:

- Repeated sexual jokes and at least five other sexually offensive remarks in a four-month period.
- Nine sexually offensive incidents in a seven-month period, including an episode of simulated masturbation.
- Six incidents in three years, consisting of remarks concerning plaintiff's bra strap, her underclothing and whether she had sexual dreams.
- The claimed sexual "conquest" of another female employee, "pornographic architectural analogies" and taking the plaintiff to Hooter's during a business trip.

It is difficult to believe that many would agree that none of the above situations satisfied the legal standard for hostile work environment based on gender. It seems more likely that a substantial number would believe that all of those cases entitled the plaintiff to relief.

At the other end of the spectrum, a plaintiff was allowed to go to the jury where she was touched in an unwelcome manner on a daily basis and subjected to obscene leers by a co-worker as he tried to peer down her blouse and up her skirt, as well as 10 or 20 remarks about her sex life. I suspect that the average woman employee, told she would have to put up with this level of abuse in order to state a Title VII harassment claim, would conclude that the law gave her no protection at all.

Courts are wary of becoming what they term "courts of personnel appeals" that second guess employers' business judgments. However, it is apparent something is seriously amiss in the realm of employment relations as it involves women employees. An online search reveals that there were more than 2,500 case decisions relating to Title VII and sex or gender in the last year alone.

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