

PANEL III: AMONG FRIENDS AND COLLEAGUES: HARASSMENT, SEX DISCRIMINATION AND RAPE

THE PROMISE AND PROBLEMS OF SEXUAL HARASSMENT LITIGATION

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Good morning, and welcome. This panel discussion, entitled "Among Friends and Colleagues: Harassment, Sex Discrimination and Rape," concerns a difficult area of the law. The difficulty stems largely from the private nature of sexual harassment and acquaintance rape. Because these offenses are usually carried out in private, without any witnesses, their reconstruction in the courtroom has often depended on inference, speculation and sheer guesswork. Mistakes have been made: Innocent persons have been found liable, and serious offenders have been let off the hook. Furthermore, this area of the law suffers from an absence of social consensus regarding the boundaries of acceptable behavior. Drawing the line between improper conduct and ordinary interaction between the sexes is a hazardous undertaking, with various scholars and judges advocating different standards.¹

The Supreme Court recently addressed some of these concerns in *Harris v. Forklift Systems, Inc.*,² and in so doing, expanded the range of conduct that can constitute gender discrimination under Title VII. Although the Supreme Court had already recognized the validity of sexual harassment claims based on the creation of a "hostile or abusive work environment,"³ it was unclear before *Harris* whether such an environment could only be created by direct sexual overtures, such as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁴ *Harris* answered that a plaintiff need not show that the alleged harasser made such overtures in order to establish a Title VII violation. Indeed, the Court recognized an oral

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1. See Toni Lester, *The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 227-29, 237-47 (1993) (listing contrasting views in various jurisdictions as to what types of action constitute sexual harassment).

2. 114 S. Ct. 367 (1993).

3. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

4. *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

stereotyping claim based upon the harsh and abusive comments of a supervisor toward his female employees on the basis of their gender.⁵

Expanded liability under Title VII makes it easier for women—and men, for that matter—to bring harassment suits and prevail. But at the same time, it raises the question of the extent to which litigation can be relied upon to resolve problems in the relationships between the sexes. In answering this question, we must consider both the pros and cons of harassment litigation. On the con side, we must concede that the potential for misunderstanding between the sexes is virtually limitless. There exists the potential that routine personality conflicts and shattered romances will ripen into lawsuits, with all of their attendant burdens upon litigants and courts. Some defendants will be unfairly slandered. Some suits will be brought merely for their settlement value. The private lives and personal affairs of many citizens will be increasingly opened to public scrutiny. The discovery process in sexual harassment litigation will frequently entail inquiry into the private sexual lives of both the accused harasser⁶ and the plaintiff herself.⁷ Moreover, fear of liability on the part of employers might lead them to censor controversial comments on the part of employees, thus resulting in a net reduction in the right of free expression.⁸ Fear of litigation arising both from the workplace and from social interactions could well deepen feelings of distrust and anxiety between the sexes, and discourage what are nothing more than genuine gestures of friendship between men and women.⁹

5. In *Harris*, the alleged harasser's offensive behavior consisted partly of gender-based insults such as "You're a woman, what do you know" and "We need a man as the rental manager," as well as the "joking" suggestion that Harris must have arranged a deal with one of Forklift's customers by offering to sleep with him. *Harris*, 114 S. Ct. at 369. In recognizing Harris' claim, the Court emphasized that it was taking "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.* at 370.

6. See Lawrence J. Baer et al., *Discovering Sexual Relations—Balancing the Fundamental Right to Privacy Against the Need for Discovery in a Sexual Harassment Case*, 25 NEW ENG. L. REV. 849, 851-52 (1991) (also noting the possible infringement of the privacy rights of disinterested third parties).

7. See Susan R. Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 827-29 (1991).

8. See Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 547-50 (1991).

9. See Stephen Reinhardt, *The End of the Age of Ignorance*, 65 S. CAL. L. REV. 1431, 1438 (1992) (raising the possibility that our concern over sexual harassment might lead us to "transform the male-female relationship into a hostile or adversary one."); Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458

There are, of course, prospective benefits to sexual harassment litigation as well. Litigation heightens the profile of an issue. In this case, it may make men more aware of conduct that women find offensive. An increase in awareness might actually narrow the gender gap over where to draw the line between harmless interaction and offensive harassment.¹⁰ Litigation might also lessen the stigma attached to harassment complaints, and make true harassment victims less hesitant to come forward and report unlawful behavior.¹¹ In addition, fear of lawsuits might deter men from engaging in the kind of conduct that creates a hostile working environment for female colleagues and employees. The work environment might become a place of increased professionalism and mutual respect. Finally, more litigation today might ironically lead to less litigation tomorrow by encouraging companies to adopt preventive measures and to put in place internal procedures designed to mediate misunderstandings.¹²

How should we balance the many pros and cons of litigation between the sexes? We shall turn to the panelists to help us with the answer.

(1984) (“[R]elations between the sexes may be chilled if men fear that behavior offensive to a sensitive woman may be actionable in court.”).

10. See Robert S. Adler & Ellen K. Pierce, *The Legal, Ethical, and Social Implications of the “Reasonable Woman” Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773, 775-76 (1993); Deborah S. Brenneman, Comment, *From a Woman’s Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 *U. CIN. L. REV.* 1281, 1281-82, 1292-95 (1992).

11. See Estrich, *supra* note 7, at 851-52 (noting that many women do not even discuss the topic of harassment generally, much less report specific instances).

12. See *id.* at 860-61; Brenneman, *supra* note 10, at 1297.

