


SEXUAL HARASSMENT IN THE WORKPLACE

Proceedings of New York University
51st Annual Conference on Labor

Edited by Samuel Estreicher



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SEXUAL HARASSMENT IN THE WORKPLACE

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51st Annual Conference on Labor

*for Aleta,
my little wing,
on our 30th*

Sexual Harassment in the Workplace

EDITOR'S PREFACE

New York University's Annual Conference on Labor is the premier forum for bringing together academics and practitioners in labor and employment relations and affiliated fields to explore solutions to problems in the American workplace. The Conference is one of many activities of the recently formed Center for Labor and Employment Law at New York University School of Law.

The theme of the 1998 Conference was "Sexual Harassment in the Workplace," an area of burgeoning litigation sparked by the Clarence Thomas-Anita Hill controversy and occasioning three major decisions from the U.S. Supreme Court in its 1998 Term. Perhaps the fastest-growing category of employment litigation in this country, and at the root of class actions against major companies like Mitsubishi, Smith Barney and Merrill Lynch, sexual harassment is a major concern for employers and employees alike.

The issues raised by this litigation require pro-active policy and training efforts by employers, sound counsel, and sustained academic attention. We hope that this volume, which reflects the proceedings of the 51st Annual Conference on Labor, aids that effort.

Among the questions considered within —

- What is the relationship between sexual harassment and other forms of gender discrimination: To what extent are sexual harassment problems better addressed as problems of "glass ceiling" discrimination against women?
- How should claims of same-sex harassment and sexual favoritism be treated?
- Do employees subjected to sexual harassment have a claim under the National Labor Relations Act in addition to federal and state anti-discrimination remedies?
- Is there a significant risk that regulation of sexual harassment will lead employers to deter workplace expression that should be protected by the First Amendment?
- What are the legal and ethical questions raised by employer efforts to investigate claims of sexual harassment? How are such investigations

best handled so as to preserve legitimate privileges protecting against disclosure of confidential communications?

- What rights do accused employees have? Are employers caught between the proverbial “rock” and “hard place,” damned if they act against suspected harassers and damned if they do not?
- How have companies that have been the target of high-visibility class action suits, maintained either by the EEOC or private litigants, responded to such challenges, and what sort of systemic relief is possible through negotiated resolutions?
- What is the proper scope of discovery into the mental history of sexual harassment complainants and accused employees?
- What is the proper role of experts in such cases, with particular reference to new social science methodologies such as “social framework” testimony?
- Even before suits are brought, what are the leading companies doing on their own to head off litigation and promote a healthy environment for cooperative effort in the workplace?
- Finally, what contribution can techniques of alternative dispute resolution, with particular reference to mediation, make to appropriate disposition of claims?

We are especially gratified that Gilbert F. Casellas, the outgoing chair of the Equal Employment Opportunity Commission, was our dinner speaker, and that Sheila Wellington, president of Catalyst, a research and advocacy group for women corporate leaders, offered luncheon remarks. (The text of Mr. Casellas’ speech is included as chapter 20, and that of Ms. Wellington’s remarks is included as chapter 4 in this volume.)

In addition to the papers and commentary provided at the 1998 Conference, we are pleased to include in this volume essays by Professors J. Hoult Verkerke of the University of Virginia School of Law and Jeffrey Rosen of George Washington University School of Law (who also serves as Legal Affairs Editor for *The New Republic*). Also, the research assistance of Annie Chang (NYU Class of 2000) and secretarial assistance of Rosetta Abraham are gratefully acknowledged.

Samuel Estreicher
Faculty Director
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NYU School of Law

Center for Labor and Employment Law at NYU School of Law

The Center for Labor and Employment Law is a new program established at New York University School of Law. Samuel Estreicher, Professor of Law at New York University and an internationally recognized expert on labor and employment law, serves as the Center's Director. The objectives of the Center are (1) To promote workplace efficiency and productivity, while at the same time recognizing the need for justice and safety in the workplace and respecting the dignity of work and employees; (2) To promote independent, nonpartisan research that would improve understanding of employment issues generally, with particular emphasis on the connections between human resources decisions and organizational performance; (3) To sponsor a graduate program for the next generation of law teachers and leading practitioners in the field; and (4) To provide a forum for bringing together leaders from unions and companies, as well as representatives of plaintiff and defense perspectives, for informal discussions exploring new frameworks for labor-management relations, workplace justice, fair and efficient resolution of employment disputes and representation in the workplace.

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PART I

The Substantive Law of Sexual Harassment in the Workplace — at the “Cutting Edge”

A. “Mapping” Sexual Harassment

1. Relationship to Other Forms of Gender Discrimination

