

Crossing Boundaries: Sexual Harassment Liability of U.S.-Based Multinational Corporations in Developing Countries

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I. INTRODUCTION

In the growing global business environment, U.S.-based multinational corporations (MNCs) employ an increasingly diverse workforce in a workplace that crosses borders.² As the presence of U.S.-based MNCs in the global arena has grown, so has their liability for workplace sexual harassment.³ To what extent does this increased liability reach the overseas workplaces of the U.S.-based MNCs? After reviewing the relevant U.S. law, this article will discuss the practical shortcomings of its extraterritorial application. The article will then offer suggestions for U.S.-based MNCs to reduce the risk of sexual harassment liability arising in the global workplace, and to promote the fair and equal treatment of their workers abroad.

II. U.S. EMPLOYERS' LIABILITY FOR SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE: AN OVERVIEW

Federal protection from employment discrimination is provided through a “patchwork of statutes,⁴” the “centerpiece⁵” of which is Title VII of the Civil Rights Act of 1964 (Title VII).⁶ Title VII prohibits discrimination based on an individual’s race,

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² U.S.-based MNCs employ almost seven million workers overseas. Sandra Orihuela & Abigail Montjoy, *The Evolution of Latin America’s Sexual Harassment Law: A look at Mini-Skirts and Multinationals in Peru*, 30 CAL. W. INT’L J. 323, 324 (2000), citing Philip B. Rosen & Felice B. Ekelman, *The Global Impact of U.S. Employment Laws: Pitfalls for the Multinational Employer*, JACKSON LEWIS CORP. 2000, at 1 (1997).

³ See *infra* IIC for discussion of judicial recognition of employers’ vicarious liability for supervisory sexual harassment.

⁴ MACK PLAYER, FEDERAL EMPLOYMENT DISCRIMINATION LAW 12 (3rd ed. 1992)

⁵ *Id.*

⁶ 42 U.S.C. § 2000e-2 to 2000e-17 (1999).

color, religion, sex, or national origin⁷ in employment decisions, including those regarding the terms and conditions of employment.⁸ This prohibition covers all private employers with fifteen or more employees who are engaged in business affecting interstate commerce.⁹

A. Sexual Harassment as Sex Discrimination

Sexual harassment is a form of sex discrimination prohibited by Title VII.¹⁰

There are two distinct types of sexual harassment recognized under Title VII: “Quid Pro Quo” and “hostile work environment”.¹¹

“Quid Pro Quo” harassment typically involves an employee whose refusal to submit to a supervisor’s sexual demands resulted in a tangible job detriment.¹² A tangible employment action “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”¹³

Discriminatory creation of a hostile work environment is actionable, but the analysis is more complex.¹⁴ The successful Title VII claim for hostile work environment sexual harassment requires proof that the hostile environment was created “because of” the sex of the victim.¹⁵ The environment created by unwelcome verbal or physical

⁷ 42 U.S.C. § 2000e-2(a)(1).

⁸ 42 U.S.C. . § 2000e-2(a)(1) to 2000e-2(a)(2).

⁹ 42 U.S.C. § 2000e(b). Federal government as an employer is also included.

¹⁰ As a form of discrimination, claims of harassment based on race, religion, and national origin are actionable under Title VII. See *Player supra* note 4 at 155.

¹¹ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

¹² See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

¹³ See *Player supra* note 4 at 156, citing *Burlington Industries, Inc. v. Ellerth*.

¹⁴ See *Player supra* note 4 at 156.

¹⁵ See *Oncale v. Sundowner Offshore Services, Inc.* 118 S.Ct. 998 (1998). This decision also established that same-sex harassment claims may be brought under Title VII.

conduct of a sexual nature must be sufficiently severe or pervasive to alter the conditions of employment.¹⁶

The conduct must be “unwelcome” by the victim.¹⁷ A work environment tainted by sexual conduct that was welcomed by the victim and in which he or she participated does not constitute sexual harassment under Title VII.¹⁸ Whether the conduct was subjectively “unwelcome” is an issue of fact.¹⁹ Recognizing that employees often quietly tolerate behavior they genuinely find offensive, courts do not view plaintiff’s acquiescence or “voluntary” participation as necessarily establishing that the victim welcomed the conduct.²⁰

B. Reasonableness Standard in Hostile Work Environment Claims

Such conduct must be both objectively and subjectively offensive. The victim must show that he or she subjectively perceived the behavior as abusive.²¹ Further, the conduct must be shown to create an environment that a reasonable person would find hostile or abusive.²²

In determining whether conduct is objectively unreasonable, courts recognize that not all conduct that may be characterized as sexual creates a hostile work environment within the meaning of Title VII.²³ A single instance of unwelcomed touching, casual flirting, or random physical compliments probably would not result in a

¹⁶ See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)

¹⁷ See *Meritor* at 12.

¹⁸ See e.g. *Jones v. Flagship International*, 793 F.2d 714 (5th Cir. 1986)

¹⁹ See *Player supra* note 4 at 157.

²⁰ *Id.*

²¹ See *Harris supra* note 16.

²² *Id.*

²³ See e.g. *Faragher v. City of Boca Raton* 524 U.S. 775 (1998) (“A lack of sensitivity does not, alone, amount to actionable harassment”); *Oncale v. Sundowner Offshore Services supra* note 15 (“Title VII...requires neither asexuality nor androgyny in the workplace.”)

reasonable person finding that working conditions had been adversely affected.²⁴

However, repeated requests for a sexual relationship may create a workplace climate that is objectively offensive.²⁵ The focus of the reasonableness standard's application in hostile work environment claims is whether the reasonable person would agree with the victim that his or her job was made more difficult due to the conduct in question.²⁶

C. Employers' Liability and the Affirmative Defense

Employers covered by Title VII face liability for the sexual harassment of their employees. Liability for the harassing conduct of co-workers is limited to employers' negligence: If an employer knows or should have known of the questionable conduct but failed to respond adequately to correct it, then the employer faces liability for the co-worker's harassment.²⁷ Supervisory harassment places a higher level of liability on the employer: the supervisor's position of authority within the employer's organization makes his or her acts attributable to the employer.²⁸ Thus, the employer is "vicariously liable" for the actions of the supervisor. What if the employer is unaware of the supervisor's conduct?

In two 1998 decisions, the United States Supreme Court addressed the issue of employers' vicarious liability for supervisory harassment. In *Burlington Industries, Inc. v. Ellerth*²⁹ and *Faragher v. City of Boca Raton*³⁰, the Court distinguished between supervisory harassment resulting in a tangible job detriment, and a hostile work environment created by a supervisor which did not lead to a tangible employment action.

²⁴ See Player *supra* note 4 at 158.

²⁵ *Id.* citing *Burlington Industries v. Ellerth*, *supra* note 15.

²⁶ See *Harris v. Forklift Systems, Inc.*, *supra* note 16 at 25.

²⁷ See Player *supra* note 4 at 164.

²⁸ *Id.*

²⁹ See *supra* note 12.

³⁰ See *supra* note 23.

An employer is “strictly liable” for supervisory harassment resulting a tangible job detriment such as termination or demotion, regardless of whether it was aware of the supervisor’s actions. However, when no tangible employment action resulted from the supervisor’s harassment, the employer may raise an affirmative defense.

The affirmative defense available to employers facing liability for supervisory harassment that did not result in a tangible job detriment has two requirements. First, the employer must have exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Second, either the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or the employer took prompt and effective action after the employee availed himself or herself of the employer’s anti-harassment policy and procedure.³¹

Therefore, to preserve the affirmative defense against strict liability for supervisory harassment, employers must properly communicate a written anti-harassment policy and offer effective mechanisms for reporting and resolving complaints.³² Once a complaint is made, the employer must undertake a prompt and effective investigation and effectively remedy any harassment it discloses.³³

III. EXTRATERRITORIAL APPLICATION OF SEXUAL HARASSMENT PROTECTIONS ABROAD: A CRITIQUE

Prior to 1991, Title VII’s extraterritorial application remained in question.³⁴ The question was initially addressed by the United States Supreme Court in *EEOC v. Arabian American Oil Co.*³⁵ A U.S. citizen who was transferred by his U.S. employer to its Saudi

³¹ See *Player supra* note 4 at 161-163 citing *Burlington Industries, Inc. v. Ellerth supra* note 12.

³² *Id.* at 162-163.

³³ *Id.* at 163.

³⁴ See article cited *supra* note 2 at 336.

³⁵ 499 U.S. 244 (1991).

Arabia subsidiary and later terminated sued the U.S. company claiming racial and religious discrimination.³⁶ The former employee argued that Title VII's express exemption of aliens employed by U.S. employers outside the United States implied that U.S. citizens so employed were included in its protection.³⁷ The United States Supreme Court rejected this argument, holding that the exemption of aliens employed outside the U.S. merely indicated Congressional intent to include only those aliens who were employed within the United States.³⁸

The Court's decision spurred Congress to clarify its intent regarding Title VII's extraterritorial application.

A. Civil Rights Act of 1991 and "Protection of Extraterritorial Employment"

As an amendment to Title VII, the Civil Rights Act of 1991³⁹ addressed, among other things, the "Protection of Extraterritorial Employment."⁴⁰ Congress clarified its intent to include in its definition of "employee" any U.S. citizen employed by a U.S. company in a foreign country.⁴¹ However, while aliens working within the United States for a U.S. employer are protected under Title VII, foreign nationals working for U.S. companies outside the U.S. are not able to bring a Title VII claim against the employer.⁴² The Civil Rights Act of 1991 makes this exclusion explicit by limiting Title VII's extraterritorial protection to U.S. citizens.⁴³

³⁶ See *supra* note 34 citing EEOC v. Arabian American Oil Co.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* citing Civil Rights Act of 1991, P.L. 102-166 109, 105 Stat. 1071, 1076 (1991).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* 336-337.

Recognizing the realities of global business, Congress extended the definition of “employer” to include not only those organizations incorporated within the United States, but also those employers “controlled by an American employer.”⁴⁴ Control of an American employer over a foreign corporation is determined by such factors as the interrelation of operations, common management, the centralized control of labor relations, and common ownership or financial control of the American employer and the corporation.⁴⁵

Besides proof under these factors that it does not exert control over a foreign subsidiary, the Civil Rights Act of 1991 provides U.S.-based MNCs another defense against claims brought by employees working abroad. The “foreign law defense” provides that where compliance would require the employer to violate the law of the host country, the employer need not comply with Title VII.⁴⁶ The foreign law defense requires that specific legislation, and excludes religious beliefs or cultural norms and customs.⁴⁷

B. The Boundaries of Protection: Civil Rights Act of 1991 “at work”

As has been noted, the Civil Rights Act of 1991 offers a shifting boundary of protection for aliens working for covered employers.⁴⁸ For example, if a French citizen works for a large U.S.-based MNC’s office in New York is sexually harassed by his manager, he could make a claim against his American employer under Title VII. However, if the French citizen had been transferred back to the employer’s Paris office

⁴⁴ *Id.* at 337.

⁴⁵ *Id.* at 338.

⁴⁶ See article cited *supra* note 2 at 338-339.

⁴⁷ *Id.* at 339.

⁴⁸ *Id.* at 337.

where he was harassed by his manager, the employee would not be protected under Title VII.

This limitation on the statute's protection creates a practical challenge for the global employers it covers. To continue with the hypothetical situation illustrated above: What if the French employee is just one of several employees enduring the sexually harassing behavior of the Parisian manager? To add to this hypothetical problem, what if among these affected employees is a U.S. citizen? Title VII would protect the U.S. citizen from such harassment, but would not offer protection to the French citizens.

The U.S.-based MNC would wish to know of the situation so as to allow it to promptly and effectively address the harassment, as required by the affirmative defense.⁴⁹ To continue with the hypothetical illustration, suppose that the French citizen is the only employee willing to complain about the manager's behavior. If the employer's anti-harassment policy and complaint procedure was narrowly focused on the prevention of liability arising from an employee's complaint, it may not act promptly to effectively investigate the French citizen's voiced concerns. In so doing, the employer would have missed the opportunity to prevent further harm to its employees, and possibly undermined its affirmative defense to any future claims brought by the affected U.S. citizens protected by Title VII.

IV. ADDRESSING SEXUAL HARASSMENT IN THE GLOBAL WORKPLACE: A SUGGESTED APPROACH FOR U.S.-BASED MNCs

In order to prevent the situation described above,⁵⁰ U.S.-based MNCs should resist a "compliance approach" in creating anti-harassment policies and procedures for its global workplace. Allowing the limits of protection offered by Title VII under the Civil

⁴⁹ See *supra* IIC.

Rights Act of 1991 to dictate the treatment of aliens employed in their foreign offices will undermine the effectiveness of the U.S.-based MNC's efforts to prevent and address workplace harassment.⁵¹ Instead, these employers should seek to prevent and address sexual harassment not only to minimize risk of liability, but to resolve an ethical challenge deserving serious attention.

A. Common Ground Crosses Boundaries: Defining Harassment in the Global Workplace

At a glance, cultural differences may appear to create an insurmountable fissure in U.S.-based MNCs' attempts to effectively address sexual harassment in the global workplace. A report on Czechoslovakians' view of sexual harassment seems to illustrate this apparent barrier.⁵² "Obscene jokes, suggestive remarks, unwelcome advances, [and] gentle slaps on one's buttocks...are all part of a regular day for many [Czech] women" in the Czech workforce, that one is "supposed to laugh about."⁵³ On closer examination, these statements reflect the concern that any sexual innuendo in the workplace should not amount to a successful claim of harassment.

Judicial development of the meaning of sexual harassment under Title VII does not veer far from these concerns. In fact, Justice Scalia set forth in the majority opinion in *Oncale v. Sundowner Offshore Services, Inc.*⁵⁴ that "ordinary horseplay" such as men patting each other on the buttocks and mild flirtation between the sexes in the workplace

⁵⁰ See *supra* IIIB.

⁵¹ See article cited *supra* note 2 at 343, stating that although the "best alternative" solution to the limitations of the Civil Rights Act of 1991 is changes in local laws to provide adequate labor protections, the interim approach should involve the extension by U.S.-based MNCs of anti-harassment protection to its foreign workers abroad.

⁵² See article cited *supra* note 2 at 325 citing Ladka Bauerova, Czech Poll: Harassment of Women is Common, N.Y. Times, Jan. 9, 2000, at 7.

⁵³ *Id.*

⁵⁴ See *supra* note 15.

do not themselves create a hostile work environment.⁵⁵ The conduct must be severe and pervasive enough that a reasonable person would find it more difficult than not to do his or her job.⁵⁶

Although not as sophisticated as the protection offered by Title VII, the increased attention given to sexual harassment by the European Union (“EU”) and its Member States arguably has resulted in notable legal developments addressing workplace conduct. For example, in Belgium, unfair dismissal laws allow an employee to quit his or her job because of sexual harassment and then assert a claim for compensation.⁵⁷

An EU Commission Recommendation on the Protection of Dignity in the Workplace, approved in 1991⁵⁸ partially borrowed from Title VII in defining sexual harassment as “conduct of a sexual nature...affecting the dignity of women and men at work...that is unwanted, unreasonable, and offensive *to the recipient* ... (emphasis added).⁵⁹

This definition of sexual harassment analyzes conduct under a subjective rather than objective standard.⁶⁰ The objective standard may be seen as creating a layer of protection for those accused of sexual harassment, and a barrier against seemingly frivolous claims. Given the beliefs illustrated in the Czech report noted above⁶¹, U.S.-based MNCs’ anti-harassment policies and procedures employing the subjective and

⁵⁵ *Id.* at 1002.

⁵⁶ *See supra* notes 14 to 26.

⁵⁷ Ursula R. Kubal, U.S. MULTINATIONAL CORPORATIONS ABROAD: A COMPARATIVE PERSPECTIVE ON SEX DISCRIMINATION LAW IN THE UNITED STATES AND THE EUROPEAN UNION, 25 N.C.J. INT’L LAW AND COM. REG. 207, 268 (1999), citing Victoria Carter, WORKING ON DIGNITY: EC INITIATIVES ON SEXUAL HARASSMENT IN THE WORKPLACE, 12 NW. INT’L L & BUS. 431, 441 (1992).

⁵⁸ *Id.* citing Council Declaration of 19 December 1991 on the Implementation of the Commission Recommendation on the Protection of the Dignity of Women and Men at Work, Including the Code to Combat Sexual Harassment, 1992 O.J. (C 27).

⁵⁹ *Id.* citing Commission Recommendation of 27 November 1991 on the Protection and Dignity of Women and Men at Work, 1992 O.J. (L 49).

objective standard required by Title VII⁶² may not meet with the resistance expected upon a cursory glance at “cultural differences.”

B. Providing Effective Policies and Procedures in the Global Workplace

In its enforcement guidance regarding employers’ vicarious liability for supervisory harassment⁶³, the Equal Employment Opportunity Commission (EEOC) offers advice on how to preserve the affirmative defense offered by *Ellerth* and *Faragher*.⁶⁴ The anti-harassment policy and complaint procedure should be written in a manner that will be “clearly understood” by all employees in the employer’s workforce, and provide a “clear explanation” of prohibited conduct.⁶⁵ The policy must then be adequately communicated to the employees, preferably through training.⁶⁶ The complaint procedure must provide “accessible avenues” for employees to voice concerns, and result in a prompt, thorough, and impartial investigation.⁶⁷

In implementing these suggestions, U.S.-based MNCs should consider taking the following actions:

- ***Extend protection against workplace harassment to aliens under the anti-harassment policy.*** To have foreign nationals obliged not to harass their colleagues who are U.S. citizens, but to simultaneously exclude them from protection against harassment will create an adversarial relationship that may breed the very conduct the employer is seeking to prevent.

⁶⁰ *Id.* at 265 citing Catherine Barnard, EC Employment Law 4.1 (1996).

⁶¹ *See supra* note 52.

⁶² *See supra* note 21-22.

⁶³ *See* <http://www.eeoc.gov/docs/harassment.htm> : Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors. EEOC June 1999.

⁶⁴ *See supra* IIC.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

Further, including all employees within the policy will encourage increased use of the complaint procedures, allowing the employer to effectively address workplace harassment.

- *Further encourage use of complaint procedure through confidential hotlines:* BE and K, Inc. (“B E and K”), a U.S.-based global engineering firm with nearly eight thousand employees, offers an Employee Hotline in which a program coordinator responds to questions, concerns and complaints of employees.⁶⁸ Employees are referred to experts who can provide free, expert and confidential advice on problem solving.⁶⁹ Such a model may also be supplemented by referring complaints of sexual harassment to an HR representative based in the U.S. to oversee the resulting investigation.
- *Ensure proper investigation by properly training supervisors.* The “accessible avenues” under the complaint procedure may lead an employee to report concerns directly to a manager, officer, or director at the foreign office. All those who could receive a complaint under the procedure should be properly trained in how to properly respond and undertake an investigation.
- *Centralize employment practices management* in the U.S. base to properly assess investigations and their results. This centralization will reduce the risk of improper investigations due to, for example, local supervisors’ lack of sensitivity or understanding of sexual harassment. Assessment

⁶⁸ See EEOC Task Force Report on “Best Practices”

⁶⁹ *Id.*

mechanisms for determining weaknesses and areas of needed improvement in the receipt and investigation of harassment complaints should also be put in place.

- *Train foreign employees:* Do not let local culture, customs or stereotypes thereof prevent professional training on anti-harassment policy and procedure. Emphasize anti-harassment policies and procedures as an implementation of fairness and equality, core values in the global environment.
- ***Provide Alternate Dispute Resolution (ADR) that is voluntary, neutral, confidential, and enforceable.*** Given that aliens working in foreign offices may not make Title VII claims, offering an informal dispute resolution mechanism helps to ensure proper and effective treatment of their complaints. Such systems should maintain fairness by not creating undue financial burdens on the employee, allowing the employee access to documents and other evidence relied on by the employer, and the ability to obtain witness statements.

V. CONCLUSION

Presence in the global business environment demands of U.S. corporations both fulfillment of legal obligations created under American law, and sensitivity to the customs and practices of their host countries. These pressures are felt no more strongly than in issues of employment practices management, particularly sexual harassment. The challenges may be met through a delicate balance of seemingly competing concerns. In achieving this balance, U.S.-based MNCs may be the first to fully explore the common

ground of core values found throughout the global business environment. On this common ground, the U.S.-based MNCs may then reach a point where the core values of equality and fairness are truly integrated into business practices.