

Sexual Harassment Law

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History, Cases, and Theory

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*To the men and women who help
to prevent and prosecute sex-based harassment
and
for Michal Jillian McDowell*

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Preface

Law attempts to force a legalistic overlay on everyday experience. . . . [T]he legal mind seeks to glean order out of chaos by imposing pre-formed philosophical constructs. The problem is that the Law's philosophical stance, not to mention its lock-step application, leaves too much out. It tends to empty ordinary experience of its passionate, emotional, and imaginative aspects—all of which are seen by the Law as interfering with its own definitions of stability, consistency, and predictability.¹

This casebook traces the development of American law and legal theory concerning sexual harassment. It begins with the passage of Title VII of the 1964 Civil Rights Act.² In its discussion of statutory law, case law, and legal theory, this text acknowledges the usefulness of traditional legal analysis of sex-based oppression. This book also recognizes, however, the experiences, emotions, and creativity of parties and lawyers involved in sexual harassment litigation. Thus, in addition to careful analysis of relevant law, and study of applied professional responsibility, this book also examines topics such as pansexuality, press coverage, psychological motivations and responses, and alternative dispute resolution. It explores how these topics influence the development of legal principles and the practice of law. These materials light the avenues for legal and cultural change to promote personal dynamics and relationships built upon enlightenment and equity, not prejudice and oppression.

To achieve these objectives, the book is divided into two parts. Part I of this book concentrates on the legal and theoretical developments of sexual harassment law. It covers the early interpretation of the 1964 Civil Rights Act and the rejection of the notion that Title VII prohibits sexual harassment. It follows the shifting tide that resulted in the understanding that sexual harassment constitutes discrimination “because . . . of sex.” It credits, in part, early feminist theorists who facilitated that shift and the necessary recognition of the plight of many female workers. The impact of the Anita Hill/Clarence Thomas hearings, also featured in Part I, demonstrates how real life intervenes to emphasize the insidiousness of this problem and highlights the law's limitations. Ethics hypotheticals in the Appendix incorporate the study of professional responsibility into this examination of sexual harassment law.

Part I also traces the development of the sexual harassment *prima facie* case and the redress of sexual harassment in contexts other than the workplace. Chapters explore each element of the plaintiff's *prima facie* case to reveal the ambiguous and problematic aspects of the elements. The materials demonstrate how courts interpreted the law narrowly to deny relief to many harassed individuals. This section also features the acade-

1. Benjamin Sells, *The Soul of the Law* 180–81 (1994).
2. 42 U.S.C. § 2000e et seq.; *see infra* Chapter I.

mic response to sexual harassment law's development, revealing the consensus that the "[law] leaves too much out." Following a discussion of liability and damages, this section addresses sexual harassment in schools, housing, and in the highly regimented environments of prisons and the military.

Part II offers a more practical, but no less important, look at the twists and turns of sexual harassment litigation. By revealing the practical hurdles to recovery and settlement, Part II clarifies why sexual harassment litigation seems more like a trial of the plaintiff than of the alleged harasser's behavior. An in-depth examination of *Jones v. Clinton*³ accomplishes this task, as well as showcases how state law serves or fails to serve sexual harassment claimants. The rules of discovery and evidence, also explored in this second part, demonstrate how the law exposes the parties, focusing scrutiny on their behavior and most intimate information, including psychiatric and medical records.

Part II also examines the roles of all the participants in sexual harassment litigation. It reviews the steps employers, respondents, and federal and state agencies take to prevent and cure harassment. It surveys how counsel prepare their allegations and defenses, taking into consideration nonlegal influences such as publicity, their clients' psychic motivations and health, insurance, and ethics. It probes whether the First Amendment constrains employers and others or works as a defense against plaintiff claims. It encourages a theoretical discussion concerning hostile environments and free speech. Part II also investigates the role of non-parties such as expert witnesses, mediators, and arbitrators. It concludes with a discussion of alternative dispute resolution since settlement concludes most sexual harassment cases.

I commenced assembling the materials for this casebook because none like it existed when I first taught Sexual Harassment Law at Stanford Law School in 1997. I believed then, and am still convinced, that sexual harassment law merits full semester coverage. The pervasiveness of sexual harassment, as well as the many substantive law fields that influence its redress, prompt in-depth analysis.

A product of my eight years practicing sexual harassment law and my years of teaching, this book offers comprehensive coverage of this topic. The one or two chapters devoted to sexual harassment law in other texts fail to address the specialized law practice issues and breadth of legal theory perspectives. In response and for this text, I drafted the ethics hypotheticals in the Appendix based upon real experiences. I modified actual pleadings and contracts to serve as examples in the later chapters. I selected theoretical excerpts and quotes that provide a variety of different perspectives regarding sexual harassment and the legal response to it. My practice, scholarship, and teaching all influenced the formulation of the chapter questions.

This book necessarily reflects my philosophy that one cannot separate the "law" from legal theory or from practical application. Only an integrated approach to legal problems produces the most effective tool for managing our society and personal relations. Thus, I incorporate legal theory and practice considerations into every chapter. I debated calling this book *Sex-Based Harassment: History, Cases, and Theory* because sexual harassment law was originally a common law creation from the sex-based discrimination prohibition in Title VII. In the end I chose the more common appellation to avoid confusion and because sexual harassment law has evolved to become a substantive legal field in its own right, distinct and distinguishable from other types of anti-discrimination law.

3. 990 F. Supp. 657 (E.D. Ark. 1998); see *infra* Chapter XI.

The hard work of many contributors including my dissertation advisor, Professor Barbara Babcock, and committee readers, Professors Deborah Rhode and Robert Weisberg, enhances this text. I am grateful for comments from Stanford Law School students in Sexual Harassment Law 1997–99, especially Todd Heyman, Cheryl Mandala, Susan Brown, Tonya Osborne, and David White. I also appreciate comments I received from Indiana University students, especially Libby Kiefner, Elaine Guidroz, and Katie Ours. I extend sincerest thanks to my research and administrative team, Evelina Bozek, Nicole Cox, Margaret Esler, Theresa Gheen, Meghan Lehner, and Sandie McCarthy-Brown.

In editing the excerpted cases, articles, and other materials, I omitted footnotes and citations without indication. Ellipses indicate missing text.

Finally, I invite comments and suggestions regarding this book. You can reach me at Professor Jennifer Drobac, Indiana University School of Law-Indianapolis, 530 W. New York St. Rm. 215, Indianapolis, IN 46202-3225, (317) 278-4777, jdrobac@iupui.edu.

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