CASE NOTE

Can a Plaintiff Win These Days: An Examination of Recent Sexual-Harassment Cases

Clark County School District v. Breeden[1]
Lack v. Wal-Mart Stores, Inc.[2]
Barrett v. Applied Radiant Energy Corp.[3]

By
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Introduction

Title VII forbids actions taken on the basis of sex that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[4] Sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of employment and create an abusive working environment.'"[5] Workplace conduct is not measured in isolation; instead "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"[6] Courts have consistently found that "simple teasing, offhand comments, and isolated incidents (unless extremely serious)" are not necessarily discriminatory changes in the terms and conditions of employment.[7]

One recent U.S. Supreme Court case and two recent Fourth Circuit Court of Appeals cases have been decided in favor of defendants, effectively enforcing restrictions in sexual-harassment law. The premise of this Case Note, upon examining these recent decisions, is that the federal courts are holding to boundaries set in precedent and restricting the expansion of Title VII protection in the area of sexual harassment.

Clark County School District v. Breeden

In the U.S. Supreme Court case, *Clark County School District v. Breeden*, the respondent Breeden was a female employee for the petitioner, Clark County School District. In October 1994, a male coworker made a sexual comment during a meeting at which the respondent was present.[8] She later complained to the offending employee,

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[1] Clark County School District v. Breeden, 532 U.S. 268, 121 S. Ct. 1508 (2001).
[2] Lack v. Wal-Mart Stores, Inc., 240 F.3d 255 (4th Cir. 2001).
[3] Barrett v. Applied Radiant Energy Corp., 240 F.3d 262 (4th Cir. 2001).

[4] 42 U.S.C. sec. 2000e-2(a)(1)
[5] *Clark County School District,* 121 S. Ct. at 1509; Faragher v. Boca Raton, 524 U.S. 775, 786 (1998).
[6] *Clark County School District*, at 1510; *Faragher* at 787-788.
[7] *Clark County School District*, at 1510; *Faragher* at 788.
[8] The incident occurred as follows: During a review of job applicants, a male supervisor read aloud from an applicant's file that the applicant had once commented to a co-worker, "I hear making love to you is like making

to Assistant Superintendent George Ann Rice (the employee's supervisor), and to another assistant superintendent. In August 1995, Breeden filed a complaint with the EEOC.[9] The EEOC issued a right-to-sue letter in January 1997.[10] On April 1, 1997, Breeden filed an action against the school district.[11] Nine days after the filing, the assistant superintendent told a union representative that she was contemplating transferring Breeden.[12] The next day, April 11, 1997, the school district was served.[13] In May 1997, Breeden was transferred.[14] At this point, Breeden amended her complaint to include the allegation of a violation of adverse employment action in retaliation for protected activities.[15]

The United States District Court for the District of Nevada granted summary judgment in favor of Clark County School District. The Court of Appeals of the Ninth Circuit reversed in favor of Breeden.[16] The Ninth Circuit noted that the EEOC right-to-sue letter was issued three months before the assistant superintendent announced the possibility of transfer.[17] Also, the transfer occurred one month after Rice learned of respondent's suit.[18] The court reasoned that the timeline was more than coincidental and that the school district's actions constituted retaliation.[19]

The first issue the Supreme Court addressed was as follows: Does a single occurrence constitute sexual harassment?

The Supreme Court reversed the decision of the Ninth Circuit, holding that a single occurrence of an alleged vulgar comment is not considered sexual harassment. The Court concluded that no reasonable person could have believed that this particular single incident would violate the Title VII standard.[20] The ordinary terms and conditions of the respondent's job required that she review the sexually explicit statement in the course of screening job applicants.[21] The Court held to the standard established in *Faragher v. Boca Raton*[22] that an occurrence of sexual harassment must be "extremely serious," while this particular occurrence was at worst an "isolated incident."[23]

The other issue the Supreme Court addressed: Was respondent punished for complaining about the incident, filing EEOC charges against the petitioner, and/or for filing the lawsuit?

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love to the Grand Canyon." He then stated, "I don't know what that means." Another male co-worker replied, "Well, I'll tell you later," and both men chuckled. *Id*. at 1509.

[9] *Id.* at 1509.
[10] *Id.* at 1510.
[11] *Id*.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1509.
[17] *Id.* at 1510.
[18] *Id.* at 1511.
[19] *Id.* at 1509.
[20] *Clark County School District,* 121 S. Ct. at 1510.
[21] *Id*.
[22] *Faragher*, 524 U.S. at 788.

The Court ruled that, under Title VII of the Civil Rights Act, the case did not support a claim of retaliation resulting from any of Breeden's actions regarding the incident.[24] The Court dismissed the reasoning of the Ninth Circuit as immaterial for two reasons. First, the school district was contemplating the transfer before Breeden filed the suit. Additionally, Breeden did not introduce the issue of the EEOC right-to-sue letter until she filed her reply brief at the appeals level, not relying on it in the district court or in her opening brief on appeal.[25]

Ultimately, the U.S. Supreme Court held for the employer, Clark County School District, on both issues, reversing the ruling of the Ninth Circuit below.

Lack v. Wal-Mart Stores, Inc.

The Fourth Circuit Court of Appeals decided the *Lack* case and *Barrett v. Applied Radiant Energy Corp.* on the same day. In both cases, the court reversed district-court decisions, ruling in favor of defendant employers in each of these two sexual-harassment cases.

Christopher Lack sued Wal-Mart, his employer, and his supervisor, James Bragg, for sexual harassment under two theories. First, Lack alleged a hostile work environment, illustrated by introducing numerous incidents of lewd joking and demeaning humor, many of which were corroborated by witnesses.[26] Lack also sued under the theory of retaliation. After an alleged confrontation between Lack and Bragg, along with an alleged threat by Bragg to make Lack work on Christmas, Lack asserted that his work schedule became more onerous. The jury found in favor of Lack and awarded $80,000, together with fees and costs.

The Fourth Circuit reversed, holding that Lack failed to establish one of the four required elements to sustain a sexual harassment claim based upon a hostile or abusive work environment, namely that the offending conduct was based on his gender.[27] A plaintiff must prove four elements regarding the subject conduct, that it is (1) unwelcome; (2) based on the sex of the plaintiff; (3) sufficiently severe and pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) imputable on some factual basis to the employer.[28] Wal-Mart did not challenge the third or fourth elements, but did assert that Lack failed to prove the second and third elements. The Fourth Circuit agreed with Wal-Mart, concluding that Lack failed to prove the second element. Because a plaintiff must prove all four elements to prevail, the court had no reason to address whether Lack proved the third element.[29]

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[23] *Clark County School District,* 121 S. Ct. at 1510.
[24] *Id.* at 1511
[25] *Id.*
[26] Lack testified at trial that, "Any time if you saw Bragg coming toward you, you could expect something to come out of his mouth sexually." Bragg was known to tell jokes containing the word "F-ing" every day. Bragg was also apparently fond of juvenile wordplay. He made comments that had double meanings with sexual overtones and would deliver them and other jokes in a "very sexual manner." Additionally, Bragg allegedly grabbed himself in the crotch in front of Lack. *Lack*, 240 F.3d at 258.
[27] *Id.* at 257.
[28] *Id.* at 259.
[29] *Id.* at 260.

In so ruling, the Fourth Circuit referred to the standards set in the U.S. Supreme Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*[30] *Oncale* dealt with same-sex harassment, which is a legitimate and viable claim.[31] The decision distinguishes between harassment that is sexual in content versus harassment that is sexually motivated.[32] The Supreme Court found that Title VII does not prohibit all harassment in the workplace. Harassment is not automatically sex discrimination merely because the words used have sexual content or connotations.[33]

To prove the second element of a hostile-environment claim, a plaintiff must show that the offending conduct is based on his or her gender.[34] It is not enough that the conduct be sexual and offensive. The Fourth Circuit explained that, because a hostile- environment claim is fundamentally a sex discrimination claim, a male plaintiff must establish that the harasser discriminated against him because is a man.[35] Unfortunately for the plaintiff Lack, he could not prevail because the offending coworker Bragg was equally abusive and offensive to both men and women.[36] Lack also failed to show that Bragg's comments and actions were "earnest sexual solicitation."[37]

Ultimately, the message sent by this opinion was summarized well in *Holman v. Indiana*:[38] "Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not *discriminating* on the basis of sex. He is not treating one sex better (or worse) that the other; he is treating both sexes the same (albeit badly)."[39]

Barrett v. Applied Radiant Energy Corp.

In this case, the defendant, Applied Radiant Energy Corporation (ARECO), conceded that one of its employees, Richard Ramsey, sexually harassed another employee, Lynne Barrett, in numerous, offensive ways.[40] At the time, ARECO had an extensive anti-harassment policy strictly prohibiting all forms of harassment.[41] The policy provided numerous notification options, including the option of discussing the situation with any member of

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[30] 523 U.S. 75, 118 S. Ct. 998 (1998).
[31] Joseph Oncale was an employee on an oil platform in the Gulf of Mexico. On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him by several crewmembers in the presence of the rest of the crew. He was also physically assaulted in a sexual manner and threatened with rape. Oncale complained to supervisory personnel, with no result. Oncale quit his job, stating "I felt that if I didn't leave my job, that I would be raped or forced to have sex." *Oncale,* 119 S. Ct. at 1000-1001, 523 U.S. at 76-77.
[32] *Lack*, 240 F.3d at 260.
[33] *Oncale*, 118 S. Ct. at 80.
[34] *Lack*, 240 F.3d at 260.
[35] *Id.* at 261.
[36] *Id.* at 262.
[37] *Id.* at 261.
[38] 211 F.3d 399 (7th Cir. 2000).
[39] *Id.* at 403.
[40] While on a business trip together, Ramsey told Barrett sexually provocative stories, propositioned her, grabbed her, kissed her on the mouth, and directed vulgar, threatening, and offensive comments to her. After that trip, Ramsey repeatedly propositioned Barrett, showed her pornographic pictures, attempted to engage her in sexually explicit conversation, and touched her without permission. *Barrett*, 240 F.3d at 264.
[41] *Id.* at 265.

the management team, including the company president. The policy provided assurances that complaints would be dealt with immediately and confidentially, with no penalty to the person reporting the incident.[42]

Barrett admitted that she was aware of and consulted the policy.[43] ARECO management did not learn of the harassment from Barrett, but instead discovered the problem during an unrelated investigation of Ramsey's phone use. The company fired Ramsey once the investigation revealed he was engaging in sexual harassment.[44]

The Fourth Circuit agreed with the district court in finding for the defendant employer. Both courts found that although Ramsey sexually harassed the plaintiff, Barrett's failure to report Ramsey's conduct to ARECO management was unreasonable under the circumstances.[45]

In so deciding, the Fourth Circuit relied on the U.S. Supreme Court's opinion in *Faragher v. City of Boca Raton*.[46] In *Faragher*, the Supreme Court established an affirmative defense that allows an employer to avoid strict liability for an employee's sexual harassment of another employee, if the defendant employer can meet two requirements. First, the employer must prove that it exercised reasonable care in preventing and promptly correcting any sexually harassing behavior. The second requirement is that the employer must show that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[47]

Regarding the first requirement, the Court stated that the distribution of an anti-harassment policy provides "compelling proof" that the employer exercised reasonable care in preventing and promptly correcting sexual harassment.[48] Using this analysis, the Fourth Circuit found no evidence that ARECO's policy was defective or dysfunctional. In fact, the policy allowed Barrett to go directly to the president, and stated that the response would be immediate and confidential with no penalty for those who make such a report.[49] ARECO's quick and definitive action supported its commitment to the policy. Management commissioned an immediate investigation as soon as they became aware of possible harassment by Ramsey, and fired him after evidence was gathered.[50]

With regard to the second requirement – a showing that the employee unreasonably failed to report or attempt to correct the situation – the Fourth Circuit concluded this had also been met by ARECO. Barrett asserted that, although she was aware of ARECO's policy, she was afraid of retaliation, and that she also doubted her complaints would be taken seriously.[51]

As for Barrett's first assertion, the Fourth Circuit determined that "a generalized fear of retaliation does not excuse a failure to report sexual harassment. Instead, the law is specifically designed to encourage harassed

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[42] *Id.* at 265.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Faragher*, 524 U.S. at 775, 118 S. Ct. at 2275.
[47] *Id.* at 807.
[48] *Barrett*, 240 F.3d at 266.
[49] *Id.*
[50] *Id.* at 265.
[51] *Id.* at 267.

employees to turn in their harasser because doing so inures to everyone's benefit."[52] In this vein, sexual-harassment law is designed to encourage the reporting of Title VII violations so that employers can stop further harassment.[53] Additionally, Title VII specifically prohibits retaliation and provides for recourse should it occur.[54]

Barrett's second assertion was based upon her belief that reporting the behavior would not result in any action by ARECO. Although the Fourth Circuit specifically acknowledged that discussing sexual harassment with management could be an awkward and uncomfortable situation, this fact does not excuse an employee from utilizing an employer's established complaint procedure.[55] The opinion repeats from *Faragher*, "Allowing subjective fears to vitiate an employee's reporting requirement would completely undermine Title VII's basic policy 'of encouraging forethought by employers and saving action by objecting employees.'"[56] The Fourth Circuit also noted that Barrett should not have felt awkward relaying her story to management, as required by company policy, given the fact that she shared her story with a number of friends and colleagues, as well as with two lawyers.[57]

Implications of These Recent Decisions

As stated previously, the premise of this Case Note is that the federal courts are holding to boundaries set in precedent, as well as restricting the expansion of Title VII protection in the area of sexual harassment. Clearly, federal courts are not willing to allow such an extension of sexual-harassment protection under Title VII to general workplace harassment. If there is legal recourse for victims of workplace harassment, it must be developed separately from sexual-harassment doctrine. Certainly, courts do not condone the treatment Christopher Lack experienced, but they also are forced to acknowledge that such treatment does not rise to the level of an actionable claim. Public policy might dictate the legal system hold an employer responsible for the obnoxious or offensive actions of one employee to another. Perhaps the movement towards protection from workplace bullying is the avenue a plaintiff (such as Christopher Lack) could pursue at some future juncture.

Additionally, the decision in the *Barrett* and *Clark County School District* cases clearly demonstrate that plaintiffs must adhere to the requirements set by precedent to succeed in a sexual-harassment cause of action. Whether one or several legitimate and offensive episodes of harassment have occurred, plaintiffs must comply with the procedures established through precedent and statutory law. The Courts are not willing to act on sympathy in light of offensive conduct, and thereby give a free pass to plaintiffs if the facts do not comply with standards and elements set by precedent.

To reiterate the Supreme Court's position in the *Oncale* opinion, the courts will continue to distinguish between harassment that is sexual in content, versus harassment that is sexually motivated. Title VII does not prohibit all harassment in the workplace, harassment is not automatically sex discrimination merely because the words used have sexual content or connotations.

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[52] *Id.*
[53] *Id.*
[54] *Id. At* 267, 42 U.S.C. Sec. 2000e-3(a).
[55] *Barrett*, 240 F.3d at 268.
[56] *Faragher*, 524 U.S. at 807, *Barrett*, 240 F.3d at 268.
[57] *Barrett*, 240 F.3d at 268-269.