Harassment and the Law

Case reveals the current legal limits of a sexual harassment claim under Title VII

By Perry A. Zirkel

The recent national news alleging improprieties among various political figures and celebrities is a poignant reminder that the abuse of power relationships to foster sex-based harassment—especially, although not exclusively, against females—is an ongoing problem. Supreme Court decisions such as *Meritor Savings Bank v. Vinson* (1986) and *Faragher v. City of Boca Raton* (1998) show that these problems are not new in the employment context, and more cases will arise as women are increasingly empowered to come forward.

The following case and accompanying breakdown of the decision that resulted from it illustrate the applicable legal boundaries for employee sexual harassment claims against school principals.

The Case

In 1993, the school district in Westbury, New York, hired a middle-school teacher, "Ms. A." In 1995, she received tenure. In 1997, the district adopted a sexual harassment policy and disseminated it to all employees. The policy provided that employees should make complaints to the Title IX officer and either their immediate supervisor or (where that person is the alleged harasser) the next level of management. It also provided for a prompt, thorough, and impartial investigation upon receipt of the complaint.

In 2003, the district hired "Mr. P" as principal of the middle school. As a routine part of the hiring process, he received a copy of the sexual harassment policy. In September 2005, Mr. P invited Ms. A to have lunch with him. She accepted but did not show up. During the remainder of the 2005–2006 school year, he did not mention the matter, but he reached out to embrace and kiss her at the end of occasional individual meetings in his office. On these occasions, she turned her head so that the kisses landed on her cheek.

At one meeting, Mr. P suggested extending interpersonal activities outside of school, and Ms. A gestured toward the photographs of his wife and children on his desk, indicating that she was flattered but respected the institution of marriage. Toward the end of the year, Mr. P proposed transferring Ms. A to a program for at-risk older students for the 2006–2007 school year because she was an effective teacher; she protested the transfer to the assistant superintendent successfully, noting that her certification was limited to grades K–6, but did not mention any harassment.

In September 2007, while Ms. A was in the middle school's crowded main office talking with a colleague, Mr. P interrupted, saying "I'm going to get my sugar." He then leaned over the counter and kissed Ms. A on the check. In spring 2008, upon encountering her leaving the building, Mr. P put his hands on her shoulder and said, "You are going to give me some." "Some of what?" she asked. He replied, "You know what." He then walked away, saying they would discuss it at another time.

In August 2008, Mr. P saw Ms. A in the school parking lot and asked if he could drive her to her car. She assented for a drive around the block. He said that he wanted her to stay in the car for sexual intercourse. Shocked, she asked how his wife and daughters were doing. She escaped to her own car and drove away, but did not report the matter to the administration or the school board.

When a female guidance counselor at the school reported Mr. P for sexual harassment via the union representative to the district's Title IX officer in November 2008, however, Ms. A came forward. When the union president asked her why she hadn't reported the incidents sooner, she said she had feared an undesirable transfer and did not want to tarnish Mr. P's reputation as an African-American male.

When the Title IX officer (also the district's assistant superintendent) interviewed the parties, he decided that the matter merited an outside investigator. In February 2009, after receiving the report from the attorney the district hired for the investigation, the school board suspended Mr. P subject to a disciplinary hearing. Based on the hearing officer's findings and recommendation, the board terminated Mr. P's employment.

In April 2009, while these disciplinary proceedings were in process, the district notified Ms. A and two other teachers of an impending

three-way transfer. But when Ms. A filed an EEIC complaint in May 2009, the district rescinded the transfer.

In February 2010, Ms. A filed suit in federal court against the district and various administrators under Title VII, which prohibits employment discrimination based on sex and other protected status. Her claims charged (a) a hostile work environment, (b) quid pro quo (i.e., conditioning favorable or unfavorable employment action on submission or rejection of unwelcome sexual advances), and (c) retaliation.

The defendants filed a motion for a summary judgment, which would ultimately decide the matter in their favor without a trial. The following is a breakdown of the federal court's ruling in regard to each of Ms. A's Title VII claims:

(a) Hostile work environment. In *Alexander v. Westbury Union Free School District* (2011), a federal district court first dispatched the claim against the individual administrators, pointing to precedents that established that individual defendants are not subject to liability under Title VII.

Second, the court granted the motion for summary judgment in favor of the district based on two applicable questions for an employer's vicarious liability for hostile work environment under Title VII: (a) Did the employer exercise reasonable care? and (b) Did the employee reasonably access available opportunities for preventive or corrective action? More specifically, the court concluded that (a) the district's adoption and dissemination of a sexual harassment policy and its prompt investigation and correction of the harassing behavior met the "reasonable care" criterion, and (b) Ms. A's failure to take advantage of the sexual harassment policy did not, because though it was well-intentioned, it was based on a subjective belief rather than an objective deterrent.

(b) Quid pro quo. The court again ruled in favor of the district defendants for this alternate theory, citing judicial precedents establishing that "for a plaintiff to succeed on a quid pro quo claim, she must not only show that a threat was made, but also that a tangible employment action, i.e., an explicit alteration in the terms or conditions of employment, resulted from her refusal to submit to the employer's sexual advances." The court concluded that the proposed transfer was not a tangible employment action.

(c) Retaliation. The initial elements of a Title VII retaliation claim are (a) protected action, (b) adverse employment action, and (c) a causal connection between the protected action and adverse employment action. The court ruled against Ms. A because although her November 2008 complaint was a protected action, the proposed transfer and other alleged unfair treatment, such as exclusion from meetings, did not rise to the level of adverse employment action under Title VII, such as demotion, termination, or other significant change in employment status. In the court's words, "[She] did not lose any seniority, salary, or benefits."

Elementary School Examples Lacking

Few claims against elementary school principals have been filed. A nonexhaustive search yielded only one court decision, which, like Ms. A's, is from more than five years ago. In *Holleman v. Colonial Heights School District* (2012), a female kindergarten teacher and a female paraprofessional filed a Title VII sexual harassment suit against the new principal based on his authoritarian, disrespectful, and callous treatment of the staff, which was almost entirely female.

Based on applicable precedents, the court granted the defendants' motion for summary judgment, concluding that the plaintiffs failed to show that the treatment was based on gender, and even if it were, the plaintiffs failed to show that it was so severe and pervasive as to constitute a hostile work environment or to alter the conditions of their employment. The court similarly rejected their retaliation claim for lack of the requisite adverse employment action.

This brief examination of the applicable statutory and case law reveals at least two legal lessons. First, the relative rarity of court decisions specific to middle school and elementary school principals would seem to suggest that such abuses of power are not as rampant, at least in comparison to the corresponding case law in the corporate context. Second and equally significant, elementary principals, like their secondary school counterparts, have legal responsibilities to not only avoid such behavior on their own, but also to prevent and correct it among staff members.

Legally, the consequences include potential liability and potential discipline, including dismissal.

Obviously, a power relationship is only part of the equation. Sexual harassment—whether committed between school staff members or as is seen much more commonly in case law, where students are the victims and the perpetrators are other students or staff members—is a legal and a professional concern. Legally, the consequences include potential liability under federal and state law and potential discipline, including dismissal. Professionally, the concern is one of ethical educational leadership, which affects academic success, physical safety, and the moral conduct of students and staff. P

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