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Liability for sexual harassment in criminal justice agencies☆

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Abstract

This article focuses on sexual harassment in criminal justice agencies from a legal perspective. The article briefly describes sexual harassment cases that address agency liability decided by the United States Supreme Court, discussing the standards of liability articulated in *Burlington Industries Inc. v. Ellerth* (1998), *Faragher v. City of Boca Raton* (1998), and *Meritor Savings Bank v. Vinson* (1986). A more precise understanding of when agencies are liable for the actions of their subordinates is developed through an examination of lower federal court decisions. Trends in the law are identified, as case law is categorized according to harassment by supervisors and co-workers. The article concludes by exploring the policy implications flowing from court decisions and by calling for further research on this troubling aspect of the criminal justice workplace.

Introduction

Title VII of the Civil Rights Act (1964) made employers liable for sexual harassment within their agencies. Despite the existence of this law for over four decades, ample evidence suggested that sexual harassment was a significant problem in the criminal justice workplace. Martin (1980) conducted one of the first studies on the incidence and nature of sexual harassment in a police agency and found that policewomen were subjected to a wide range of sexual indignities, including comments about their personal appearance, sexual teasing, crude jokes of a sexual nature, and invitations to engage in various sex acts. Wong (1984) studied the experiences of policewomen in a large metropolitan police department and reached similar conclusions. Other researchers also reported that policewomen and applicants continued to be exposed to sex discrimination and sexual harassment on a frequent basis (e.g., Hunt, 1990; Morash & Haar, 1995; Timmons & Hainsworth, 1989).

Policewomen were not alone in being subjected to sexual harassment in the workplace, as the criminal justice literature was replete with research on the existence of a sexualized environment in jails and prisons (Jurik, 1985; Pollock, 1986). Zimmer (1986) studied female officers in two state correctional facilities and reported the occurrence of numerous acts that demeaned their feminine identity. Similarly, Stohr, Mays, Beck, and Kelley (1998) examined the prevalence and nature of sexual harassment in all women's jails and found that 22 percent of the respondents had been victims of sexual harassment (p. 147). Pogrebin and Poole (1997) studied the sexualized work environment of female deputy sheriffs in several county jails and adult detention centers and reported the existence of sexual harassment both on and off the job. In many cases, the sexual harassment was so blatant that female officers "expressed a concern that some of their male

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colleagues actually believed they were entitled to sexual favors" (p. 51).

Some criminal justice agencies continue to experience sexualized work environments, even though women have a right to work in environments that are free from sex discrimination and sexual harassment (*Harris v. Forklift Systems, Inc.*, 1993; *Meritor Savings Bank v. Vinson*, 1986). This article focuses on the legal obligation of employers to ensure that sexual harassment does not occur, and how agency liability results when agencies fail to respond appropriately to incidents of sexual harassment. Where agency supervisors commit acts of sexual harassment, criminal justice employers may be found vicariously liable based on the doctrine of *respondeat superior*. Under this legal theory, the employer is strictly liable for damages caused by the employee's torts committed while acting in the scope of employment (Vaughn, 1999; Vicarious Tort Liability, 2003).

In 1998, the United States Supreme Court adopted the doctrine of respondeat superior whereby employers might be held vicariously liable for unlawful sexual harassment by supervisors (*Burlington Industries Inc. v. Ellerth,* 1998; *Faragher v. City of Boca Raton,* 1998). Since that time, lower courts sought to add meaning to this legal framework through a diversity of opinions. This article examines court decisions from criminal justice agencies pertaining to sexual harassment in light of *Ellerth* and *Faragher*, devoting particular attention to the emergence of legal patterns in the area of employer liability.[2]

U. S. Supreme Court precedent on agency liability for sexual harassment

Meritor Savings Bank v. Vinson (1986) was the first case in which the United States Supreme Court considered whether an employer could be held vicariously liable for sexual harassment. The issue before the Court was whether a supervisor's conduct, which created a hostile or abusive work environment, without economic loss to the complaining employee, violated Title VII of the Civil Rights Act (1964).

In *Meritor Savings Bank v. Vinson* (1986), the U. S. Supreme Court held that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, the supervisor discriminate[s] on the basis of sex" (p. 64). The Court also concluded that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment. . .[The victim's] allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for 'hostile environment' sexual harassment" (p. 67).

Also at issue in *Meritor Savings Bank v. Vinson* (1986) was whether "the mere existence of a grievance procedure and a policy against discrimination, coupled with [an employee's] failure to invoke that procedure must insulate [the employer] from liability" (p. 72). Rejecting the employer's argument, the Court held that while these facts are "relevant. . .they are not necessarily dispositive" (p. 72); rather, as evidenced here, the employer's "general non-discrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting" the problem (pp. 72–73). Additionally, the Court observed that since the employer's "grievance procedure apparently required an employee to complain first to her supervisor. . . it is not altogether surprising that the respondent failed to invoke the procedure. . ." (p. 73).

The significance of *Meritor Savings Bank v. Vinson* (1986) lies in the fact that the Supreme Court clearly established hostile environment sexual harassment as a viable cause of action and held that employers might be vicariously liable for the actions of supervising employees; however, the Court stopped short of "issu[ing] a definitive rule on employer liability," stating only that "Congress wanted courts to look to agency principles for guidance in this area" (p. 72). In the aftermath of *Meritor*, the Court's admonition to lower courts to follow agency principles when assessing employer liability seemed to create as much confusion as it resolved. Over the ensuing years, lower courts adopted numerous approaches as they "struggled to derive manageable standards to govern employer liability for hostile environment harassment perpetrated by supervisory employees" (*Faragher v. City of Boca Raton,* 1998, p. 785). The Supreme Court decided *Burlington Industries Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998), "to address the divergence" of opinions (*Faragher v. City of Boca Raton,* 1998, p. 786) in the lower courts.

Although factually dissimilar, both *Burlington Industries Inc. v. Ellerth* (1998) and *Faragher v. City of Boca Raton* (1998) dealt with an employer's liability for sexual harassment committed by a supervisor against a subordinate employee. At issue in *Ellerth* was whether "an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions" (1998, p. 747). Similarly, the issue in *Faragher* was the "identification of the circumstances under which