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Barbara J. Fick

Notre Dame Law School, barbara.j.fick.1@nd.edu

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Does Sexual Harassment Require Proof of Psychological Injury?

by Barbara J. Fick

Teresa Harris
v.
Forklift Systems, Inc.
(Docket No. 92-1168)

Argument Date: October 13, 1993

ISSUE

Is a plaintiff required to prove that he or she suffered psychological injury as a result of sexual harassment in the workplace in order to prove a hostile-environment, sexual harassment case under Title VII?

FACTS

Teresa Harris was employed as a rental manager by Forklift Systems, Inc. ("Forklift") at its office in Nashville, Tennessee. Her immediate supervisor was Charles Hardy, the president of the company. During her tenure with the company, Hardy made sexually derogatory and demeaning remarks to Harris as well as to other female employees. When Harris eventually complained to Hardy about his comments, he apologized, said he was only joking, and promised that he would no longer make such remarks.

A few weeks later, however, Hardy resumed his offensive behavior which included a remark that Harris used sex to land an account. Several weeks later, Harris quit.

Harris subsequently filed a lawsuit alleging that Forklift had violated Title VII by, among other things, creating a sexually hostile working environment and that the environment was so bad that she was constructively discharged, i.e., forced to quit. A hearing was held before a federal magistrate who found that Hardy had indeed engaged in a continuing pattern of sex-based derogatory conduct.

The magistrate specifically found that, in the presence of other employees, Hardy said to Harris, "You're a woman, what do you know" and called Harris "a dumb ass woman." Hardy

also remarked that the company needed "a man as the rental manager" and suggested to Harris that they go to the Holiday Inn to negotiate her raise. The magistrate also found that Hardy made sexually suggestive comments about the clothing worn by Harris and other female employees, and commented on aspects of their anatomy. The magistrate further found that Hardy asked Harris and other female employees to retrieve coins from his front pants pocket and threw objects on the ground in front of female employees and asked them to pick up the objects, making comments about their clothing.

Having found that Hardy engaged in this conduct, the magistrate, nonetheless, concluded that it was not so severe as to create a hostile work environment. In reaching this result, the

magistrate relied on the test set forth by the Sixth Circuit in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), for determining when sexual harassment rises to the level of a hostile work environment.

The *Rabidue* court held that a hostile environment is created where the harassing conduct "would interfere with that hypothetical reasonable individual's work performance and affect the psychological well-being of that reasonable person." In applying this test to the facts of Harris' case, the magistrate concluded that Hardy's conduct would not have interfered with a reasonable person's work performance and that Harris did not suffer any psychological injury as a result of Hardy's harassment. Following *Rabidue*, the magistrate

dismissed the hostile-environment, sexual harassment claim.

The magistrate also concluded that, because Harris was not subjected to a hostile environment, she was not constructively discharged because of the Hardy's actions. Accordingly, the magistrate dismissed Harris' constructive-discharge claim.

The U.S. District Court for the Middle District of Tennessee adopted the magistrate's report in an unpublished opinion, and the Sixth Circuit Court of Appeals affirmed. The Supreme Court granted Harris' petition for writ of certiorari to decide the question whether proof of psychological injury is a necessary element in a hostile-environment, sexual harassment case.

Case at a Glance

Title VII of the Civil Rights Act of 1964 prohibits sexual harassment when 1) it is made a term or condition of employment or 2) it creates an abusive or hostile work environment. Where sexual harassment is a condition of employment, the plaintiff alleges a tangible injury — for example, being fired for refusing to date his or her boss. This case presents the question of whether a plaintiff claiming that sexual harassment created a hostile work environment must allege that the harassing conduct caused a tangible injury — for example, psychological harm.

Barbara J. Fick is associate professor law at Notre Dame Law School, Notre Dame, IN 46556; telephone (219) 631-5864.

BACKGROUND AND SIGNIFICANCE

The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), recognized a cause of action under Title VII where sexual harassment creates a hostile work environment. The Court held that a hostile environment is created when harassing conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment.

In focusing on the issue of when harassing conduct is sufficiently severe to alter employment conditions, the lower courts have developed two tests: 1) did the conduct interfere with the plaintiff's work performance when viewed from the perspective of a reasonable employee in the plaintiff's position; and 2) did the conduct cause psychological injury to the plaintiff. The Ninth Circuit applies the first test, while the Third and Eleventh Circuits apply the second. Other courts find a violation of Title VII if either test is satisfied. The Sixth Circuit, however, requires a plaintiff to meet both tests. The Supreme Court will decide if proof of psychological harm is a necessary predicate to finding that sexually harassing conduct altered employment conditions.

Mandating a requirement of proof of psychological injury could adversely affect plaintiffs in several ways. Whenever a court imposes an additional proof factor on a party, it makes the case that much more difficult for the party to win. This effect is exacerbated in sexual harassment cases, where studies have shown that only a small percentage of sexually harassing behavior is even reported to begin with.

Requiring proof of psychological injury could deter individuals from bringing valid harassment claims because of an unwillingness to portray themselves as mentally impaired. Were the Court to impose a psychological-injury requirement, a plaintiff's mental condition would be a fact "in controversy" and the defendant, as a matter of course, would seek an order requiring the plaintiff to undergo a psychological examination as part of pre-trial discovery. Such a forced psychological examination, with the results available to defendant, would serve as an additional deterrent to plaintiffs in these cases.

None of the parties before the Court in this case — neither Ms. Harris, Forklift, nor the many *amici* — advocate that the Court adopt the Sixth Circuit's position, thereby imposing a psychological-harm test in hostile-environment cases. All take the position that, while proof of psychological injury may be sufficient to prove a hostile-environment claim, it is not necessary. All parties agree that proof that the harassing conduct altered plaintiff's working conditions, when viewed from the objective position of the reasonable employee in plaintiff's position, is sufficient to establish a hostile environment claim. It appears unlikely, therefore, that the Supreme Court would adopt the Sixth Circuit's view and require proof of psychological injury.

The parties, however, join issue, on whether or not Hardy's conduct would have interfered with the work performance of a reasonable employee in Harris' position. Accordingly, the Court is asked to determine whether or not the magistrate applied the correct test to the facts of Harris' case in light of its decision in *Meritor*.

ARGUMENTS

For Teresa Harris (*Counsel of Record: Irwin Venick; Woods & Venick, 121 17th Avenue, South, Nashville, TN 37203, telephone (615) 259-4366*):

1. Proof of serious psychological injury is not necessary to establish hostile-environment liability on the basis of sex under Title VII.
2. Neither Harris' hostile-environment claim nor her constructive-discharge claim should have been dismissed.

For Forklift Systems, Inc. (*Counsel of Record: Stanley M. Chernau; Chernau, Milam & Weiss, 3rd National Financial Center, 424 Church Street, 13th Floor, Nashville, TN 37129, telephone (615) 244-5480*):

1. Sexual harassment is actionable only where there is a demonstrable effect on the victim's working conditions evaluated from the objective standpoint of a reasonable person in the victim's position.
2. The magistrate applied the correct test in this case and properly concluded that the work performance of a reasonable person in Harris' position would not have been affected by Hardy's conduct.

AMICUS BRIEFS

In Support of Teresa Harris

Joint brief of the American Civil Liberties Union and the American Jewish Congress (*Counsel of Record: Steven R. Shapiro; American Civil Liberties Union Foundation, 132 West 43 Street New York, NY 10036, telephone (212) 944-9800*);

Joint brief of the Employment Law Center, the California Women's Law Center, and Equal Rights Advocates, Inc. (*Counsel of Record: Patricia A. Shiu; Employment Law Center, 1663 Mission Street, Suite 400, San Francisco, CA 94103, telephone (415) 864-8848*);

Feminists for Free Expression (*Counsel of Record: Cathy E. Crosson; 406 South Eastside Drive, Bloomington, IN 47401, telephone (812) 855-2596*);

Joint brief of the NAACP Legal Defense and Educational Fund, Inc. and the National Council of Jewish Women (*Counsel of Record: Eric Schnapper; NAACP Legal Defense and Educational Fund, Inc., 99 Hudson Street, 16th Floor, New York, NY 10013, telephone (212) 219-1900*);

Joint brief of the National Conference of Women's Bar Associations and Women's Bar Association of the District of Columbia (*Counsel of Record: Edith Barnett; 11104 Post House Court, Potomac, MD 20854, telephone (301) 983-0230*);

National Employment Lawyers Association (*Counsel of Record: Margaret A. Harris; 3223 Smith, Suite 308, Houston, TX 77006, telephone (713) 526-5677*);

Joint brief of the NOW Legal Defense and Education Fund and 13 others (*Counsel of Record: Deborah A. Ellis; NOW Legal Defense and Education Fund, 99 Hudson Street, New York NY 10013, telephone (212) 925-6635*);

Joint brief of the Southern States Police Benevolent Association and the North Carolina Police Benevolent Association (*Counsel of Record: J. Michael McGuinness; McGuinness & Parlagreco, P.O. Box 8035, Salem, MA 01971, telephone (508) 741-8051*);

The United States of America (*William C. Bryson, Acting Solicitor General; Department of Justice, Washington, DC 20530, telephone (202) 514-2217*);

Joint brief of the Women's Legal Defense Fund, the National Women's Law Center, and 24 others (*Counsel of Record: Carolyn F. Corwin; Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, DC 20044, telephone (202) 662-6000*).

In Support of Forklift Systems, Inc.

The Equal Employment Advisory Council (*Counsel of Record: Ann Elizabeth Reesman; McGuinness & Williams, 1015 Fifteenth Street, N.W., Suite 1200, Washington, DC 20005, telephone: (202) 789-8600*).

In Support of Neither Party

Brief of the American Psychological Association (*Counsel of Record: Dort S. Bigg; American Psychological Association, 750 First Street, N.E., Washington, DC 20002, telephone (202) 336-6080*).