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The Proposition: Sexual Harassment as a Violation of Title VII

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BRIEFLY NOTED

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In 1972, Sandra Bundy began to experience sexual intimidation and harassment while working at the District of Columbia Department of Corrections.[1] The trouble started when she received and rejected sexual propositions from a fellow employee, who later became her department director. Two years later, two of her immediate supervisors, responsible for recommending her for promotion, repeatedly propositioned her, to no avail.[2] When Bundy thereafter became eligible for promotion, her supervisors did not promote her. She complained to a higher level supervisor, but he casually dismissed her complaint, telling her that "any man in his right mind would want to rape" her.[3] Sandra Bundy subsequently filed a complaint in the United States District Court for the District of Columbia after fully exhausting her administrative remedies under Title VII of the Civil Rights Act of 1964.[4] She sought declaratory and injunctive relief, claiming that her employer violated Title VII merely by subjecting her to sexual harassment. She also asked for back pay for the employer's failure to promote her when she became eligible, alleging that the reason for the delay in her promotion[5] was her refusal to grant her supervisors any sexual favors. The district court denied relief, finding that sexual propositions did not constitute discrimination based on sex, and that Bundy's employer had legitimate business reasons for not promoting her.[6] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed, remanded the question of

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1. Bundy v. Jackson, 641 F.2d 934, 939 (D.C. Cir. 1981).

2. One supervisor continually bothered Bundy by calling her into his office to request that she spend the afternoons with him at his apartment and to question her about her sexual tastes. The second supervisor also made sexual advances to Bundy, asking her "to join him at a motel and on a trip to the Bahamas." *Id.* at 940.

3. *Id.*

4. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e through 2000e-15 (1976 & Supp. III 1979).

5. 641 F.2d at 938-39, 941. Although Bundy was eligible for promotion in 1975, she did not receive a promotion until after commencing the Title VII action. *Id.* at 939 n.1.

6. *Id.* at 939.

the denial of Ms. Bundy's back pay, and concluded that when an employee like Sandra Bundy establishes a prima facie case of sexual harassment and a failure to promote when there is technical eligibility, the employer then must prove by clear and convincing evidence that there was a legitimate business reason for not promoting the employee.[7] The court of appeals also remanded the case for injunctive relief, holding that sexual harassment of a female employee by her supervisors, even if her resistance does not result in a loss of tangible job benefits, constitutes sexual discrimination in violation of Title VII of the Civil Rights Act of 1964.[8]

The concept that an employer may discriminate against a female employee by sexually harassing her is not a novel one. Four years before the *Bundy* decision, the same court of appeals paved the way for this holding in *Barnes v. Costle*,[9] in which a female employee alleged that her job at a government agency was abolished in retaliation for her rejection of her male supervisor's sexual advances. The lower court in *Barnes*, like the one in *Bundy*, held that the employee did not have a Title VII claim. She had suffered discrimination "*not* because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[10] Barnes had lost her job not because of gender alone, but because of a personal relationship. The court of appeals reversed the summary judgment for the employer and held that an employer who abolishes a female employee's job in retaliation for her resisting sexual advances violates Title VII.

Although the court in *Barnes* established a Title VII claim for sexual harassment resulting in the loss of a tangible job benefit, it did not answer the question whether sexual harassment, standing alone, constitutes sexual discrimination. The *Bundy* court addressed this "novel question"[11] and answered it affirmatively, based on the provision of Title VII stating that employers act illegally when they discriminate "with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[12] The court could have concluded that the failure to promote Bundy was closely enough linked to her sexual harass-

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7. *Id.* at 953.

8. *Id.* at 948.

9. 561 F.2d 983 (D.C. Cir. 1977).

10. Barnes v. Train, Civ. No. 1828-73 (D.D.C.) (order of Aug. 9, 1974), *quoted in* Barnes v. Costle, 561 F.2d 983, 986 (D.C. Cir. 1977) (emphasis added).

11. *Id.* at 641 F.2d at 940.

12. 42 U.S.C. § 2000e-2(a)(1) (1976).

ment to relate to "privileges" of employment, but it did not.[13] Instead, the court pinned its finding of discrimination on an expansive reading of "conditions of employment" to include the employee's psychological and emotional work environment.[14] This concept recognizes that sexually stereotyped insults and humiliating propositions directed to a female employee may cause her severe anxiety and debilitation. In Sandra Bundy's case, sexual harassment permeated her working environment even though it did not result in the loss of her job. In granting her request for injunctive relief, the court did not tread lightly; it carved out a new category of Title VII rights.

To justify its seemingly radical expansion of these rights, the court of appeals in *Bundy* based its interpretation of Title VII guarantees on determinations by the Equal Opportunity Employment Commission (EEOC) and on cases in several circuits, concluding that the statute guarantees an employee a working environment free of discrimination.[15] The court especially noted that the Fifth Circuit, in *Rogers v. EEOC*,[16] had adopted an expansive concept of discrimination that envisioned a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."[17] In *Rogers*, an Hispanic employee claimed that by requiring her to serve only Hispanic clients, her employer created a discriminatory and offensive work environment. The Title VII principle enunciated by the Fifth Circuit in *Rogers* treats an employee's psychological state as an intangible fringe benefit statutorily entitled to protection from employer abuse.[18] The *Rogers* court recognized that employment discrimination is a "complex and pervasive phenomenon, as nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues"[19] such as hiring, firing, and promoting.

The court of appeals in *Bundy* built upon the concept of a discriminatory environment and incorporated sexual harassment into a judicial framework that had already extended protection

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13. The court of appeals in *Bundy* noted that the record contained evidence that Bundy's supervisors "at least created the impression that they were impeding her promotion because she had offended them. . . ." 641 F.2d at 940.

14. *Id.* at 945-46.

15. *Id.* at 945 n.10.

16. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

17. 454 F.2d at 238.

18. *Id.*

19. *Id.*

against ethnic and racial discrimination. Previously, courts had imposed liability for harm to employees caused by ethnic discrimination against a company's minority clients,[20] and racial slurs directed at individuals.[21] Analogizing to these cases, the court asked, "[h]ow then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?"[22] This question placed "beyond serious dispute"[23] the proposition that sexual harassment, standing alone, poisons the atmosphere of employment.

Not content with expanding the contours of liability set out in *Barnes*, the court of appeals in *Bundy* suggested, in exquisite detail, the form that injunctive relief should take in Sandra Bundy's case. The recommended order of injunction included a definition of sexual harassment[24] and requirements that the agency employer notify all its employees that sexual harassment was discriminatory. It also instituted procedures for hearing complaints of sexual harassment, and developed sanctions for supervisors and other employees who sexually harass female employees.[25]

Moreover, in its remand to the district court on the issue of Sandra Bundy's back pay, the court set forth a new test for Title VII burdens of proof. Specifically, in cases of sexual harassment, the burden of proof resting on the plaintiff is much less than on other Title VII plaintiffs; the burden of proof on the defendant is much heavier.[26] Sandra Bundy established her prima facie case of loss of promotion simply by showing sexual harassment and that she applied for and was denied promotion when she was technically eligible. She did not have to show that her employer had promoted unharassed employees with the same qualifications. The court of appeals instructed the district court to determine whether the defendant could show, not by a preponderance of the evidence,

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20. *Id.*

21. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978); Steadman v. Hundley, 421 F. Supp. 53 (N.D. Ill. 1976).

22. 641 F.2d at 945.

23. *Id.*

24. *Id.* at 947-48.

25. *Id.*

26. *Id.* at 951-53. Normally, the plaintiff must show, as part of her prima facie case, that the employer promoted other employees in the same group as the plaintiff at about the same time as he failed to promote the plaintiff. The traditional burden of proof on the defendant is that he must show by a preponderance of the evidence that he had legitimate reasons for failing to promote the employee.

but by clear and convincing evidence, that he had not promoted Sandra Bundy because she could not meet the stringent qualification criteria that promoted employees had met.[27]

Why did the court go so far to protect Sandra Bundy? The court reasoned that unless it extended the *Barnes* holding, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance. . . ."[28] Thus, an employer could make his employee's endurance of sexual intimidation a "condition" of her employment while creating the false impression that he did not take the ritual of harassment and resistance seriously enough to retaliate against her.

The *Bundy* decision may trigger varying interpretations. Either the court contributed to social awareness by squarely confronting sexual harassment, or it overstepped its bounds by meddling in human relationships. Whether the *Rogers* concept of a discriminatory work environment includes sexual harassment, or the *Bundy* court unjustifiably extended *Barnes,* will determine the future impact of the *Bundy* decision. The prospect for Supreme Court review of *Bundy* will increase if the Court perceives the decision as essentially a radical departure from settled principle.

Although the result in *Bundy* follows logically from the *Rogers* court's recognition of claims of subtle and pervasive forms of discrimination, *Bundy* presents a unique fact-finding problem for Title VII litigation. Distinguishing between a male employer's benign, complimentary attention to female employees and a subtle but illegal sexual imposition is difficult. Additionally, in light of the pervasiveness of such conduct, the eradication of sexual impositions from the work environment is no small endeavor for Congress or the courts.

Unlike *Barnes,* which tied the existence of actionable sexual harassment to traditional modes of employment, *Bundy* so expands the standard of liability that offensive sexual propositions made to a female employee, without more, constitute a violation of Title VII. The court's statement that sexual harassment "always represents an intentional assault on an individual's innermost privacy"[29] fails to acknowledge that the offensive behavior sometimes is merely thoughtless, the product of social and cultural condition-

27. *Id.*
28. *Id.* at 945.
29. *Id.*

ing. Under the *Bundy* rationale, a male employer must exercise extreme caution when expressing an interest in a female employee, to avoid an illegal (even if unintended) imposition upon the woman's privacy.

The *Bundy* court, however, did qualify the application of its expanded standard, lest casual conversation fall under the umbrella of Title VII liability. The court noted that "casual or isolated manifestations of a discriminatory environment, such as a few ethnic or racial slurs, may not raise a cause of action."[30] The illegality of the conduct depends on its constituting "a practice of sexual harassment."[31] The pervasiveness of the practice, however, is not a mitigating factor that would render otherwise discriminatory conduct legal.[32]

Yet much of society assumes, as the district courts in *Barnes* and *Bundy* did, that sexual harassment in its milder forms is just a normal working condition, not Title VII discrimination. Although the government and courts have acted in concert to eradicate harassment and intimidation of readily identifiable racial and ethnic minorities in the workplace, the sheer number of women precludes their classification as a minority group. Conceivably, the more tenuous legal status of women in our society contributes to cultural tolerance of sexual harassment. An alternative explanation for the tolerance of sexual harassment is that an entrenched cultural attitude of male superiority and domination pervades employment relationships. The *Bundy* court expressly noted that "so long as women remain inferiors in the employment hierarchy, they may have little recourse against harassment beyond the legal recourse Bundy seeks in this case."[33]

Indeed, the dissenting opinion in *Carroll v. Talman Savings & Loan Association*[34] reflects how society may diminish an affront to a woman to an "emotional complaint of one disgruntled employee."[35] In *Carroll,* the Seventh Circuit upheld the claim that an employer's policy requiring female employees to wear uniforms and male employees to wear ordinary business clothes violated Title VII. Judge Pell's dissent characterized the majority opinion as

30. *Id.* at 943 n.9 (citing Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977); Felete v. United States Steel Corp., 353 F. Supp. 1177, 1186 (W.D. Pa. 1973)); *see* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 n.16 (1977).

31. 641 F.2d at 946.

32. *Id.* at 939, 942.

33. *Id.* at 945.

34. 604 F.2d 1028, 1033 (7th Cir. 1979) (Pell, J., dissenting).

35. *Id.* at 1034.

an encroachment by "Big Brother—or perhaps in this case Big Sister."[36] He further contended that the majority opinion would reinforce the fear expressed by opponents of the Equal Rights Amendment of "extreme applications bordering on the ridiculous when no meaningful discrimination exists."[37]

For all its shortcomings, the *Bundy* decision represents a courageous attempt by a court to resolve some of the sexual inequities in a female employee's work environment. Some commentators may criticize *Bundy* for dealing with a complex human issue under the guise of Title VII. *Bundy*, however, did not depart from precedent; it merely extended precedent to achieve a laudable result for the Sandra Bundys of the world. The ultimate question is whether the legal principle set forth in *Bundy* runs too far ahead of the nation's social conscience.

Satz v. Perlmutter: A Constitutional Right to Die?

Abe Perlmutter was a seventy-three year old patient, terminally ill. He sought judicial approval of his decision to discontinue extraordinary, life-sustaining medical treatment.[1] Perlmutter suffered from amytrophic lateral sclerosis,[2] an incurable disease for which the normal life expectancy following diagnosis is two years. In his case, the disease had progressed to the point where he had only a few months to live and could not breathe without the aid of a mechanical respirator. Every movement caused him excruciating

36. *Id.* at 1033.
37. *Id.* at 1038.

1. Satz v. Perlmutter, 362 So. 2d 160 (Fla. 4th DCA 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980). Extraordinary treatment is commonly defined as "all medicines, treatments and operations which can't be obtained or used without excessive expense, pain or other inconvenience, or which if used, would not offer a reasonable hope of benefit." Louisell, *Euthanasia and Biathanasia: On Dying and Killing*, 20 CATH. U.L. REV. 723, 736 (1973); *see In re* Quinlan, 70 N.J. 10, 21, 355 A.2d 647, 668 (1976), in which the court noted that "one would have to think that the use of the same respirator or life-support could be considered 'ordinary' in the context of the possibly curable patient but 'extraordinary' in the context of . . . an irreversibly doomed patient."

2. Amytrophic lateral sclerosis, commonly known as Lou Gehrig's disease, is a degenerative disease of the neurological system, characterized by increasing paralysis. It inevitably results in death within three years. *See generally* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1834, 1845 (7th ed. 1974).