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Beyond #MeToo: Addressing Workplace Sexual Misconduct Cases and the Targeted Use of Non-disclosure Agreements

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BEYOND #MeToo: ADDRESSING WORKPLACE SEXUAL MISCONDUCT CASES AND THE TARGETED USE OF NON-DISCLOSURE AGREEMENTS

*Taylor Percival*¹

I. INTRODUCTION

Following the news of several sexual assault allegations filed against Hollywood gatekeeper Harvey Weinstein in late 2017, the #MeToo movement officially became a global phenomenon. Women across the United States and the world began sharing their experiences of sexual abuse and became committed to breaking the silence surrounding workplace harassment.² The millions of tweets and posts containing the “MeToo” hashtag represent only a fraction of the number of individuals affected by sexual misconduct. In 2018, several celebrities founded the Time’s Up legal defense fund with over 700 volunteer lawyers committed to providing legal defense for sexual violence victims. As is so often the case, victims of workplace sexual harassment suffer in silence for fear of retaliation from their employer.

Various tactics have been used to silence victims in the past. When the allegations against Harvey Weinstein came to light in 2017,

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2 Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018).

it was revealed that non-disclosure agreements, threats, and coercion had been used to prevent victims from going to law enforcement and seeking legal action against perpetrators of sexual misconduct in the workplace.³ The power imbalance and culture of victim-silencing in workplace settings became clear as more allegations came out against other powerful figures like Roger Ailes, Kevin Spacey, and Matt Lauer. The questions raised by these revelations attempt to uncover why it is that victims stayed silent for so long as their abusers continued to commit acts of sexual misconduct.

The widespread media attention on these victim-silencing tactics has sparked a national skepticism regarding their legality and ethicality. To what extent can non-disclosure agreements be enforced in cases of sexual misconduct before they encroach on unconscionability? This paper will elucidate the legal and historical precedents regarding non-disclosure agreements (NDAs) in an attempt to answer this question and bring clarity to a complex issue. Ultimately, federal legislation should reflect existing state measures in order to prevent workplace sexual harassment. This may take the form of comprehensive training, limiting the requirements of non-disclosure agreements in employment contracts, or imposing greater penalties for employers who seek to prevent the disclosure of sexual harassment or misconduct.⁴

We will address cases pertaining to sexual misconduct and non-disclosure agreements and explore the history of NDAs and current legislation. We will then explain how current state legislation and previous cases support our claim that NDAs are unconscionable and unlawful in sexual misconduct cases. Lastly, we will discuss proposed legislation that should be passed in order to federally limit the use of NDAs in sexual misconduct cases.

II. BACKGROUND

The Equal Employment Opportunity Commission (EEOC) defines sexual harassment as a form of sex discrimination that violates The

3 *Id.* at 2527.

4 BE HEARD in the Workplace Act H.R. 2148, 116th Cong. (2019).

Civil Rights Act of 1964.⁵ The EEOC outlines two main types of sexual harassment: first, “quid pro quo” or harassment that involves the exchange of sexual favors for employment benefits, and second, harassment that creates a hostile or offensive work environment. To be classified as harassment, the behavior must affect the individual’s employment (either implicitly or explicitly), interfere with the employee’s performance, or create an unacceptable work environment. Employers are responsible for creating an environment where sexual harassment is not tolerated.⁶

A. Key Concepts

Sexual assault is defined as any kind of sexual contact, as prescribed by law, that occurs without the direct consent of the victim.⁷ Consent can be withheld when the victim is conscious or unconscious, or physically unable to consent. Sexual assault can include, but is not limited to, rape and attempted rape, fondling or unwanted sexual touching, or forcing sex acts such as oral sex or penetration.⁸ Consent is a freely given agreement to participate in a sex act or behavior. Any lack of verbal or physical agreement is considered to be the absence of consent.⁹ Lack of resistance, submission due to force or threat of harm, a previous relationship, or the dress of the victim does not constitute consent. A person who is unconscious or physically incapable to agree to participation (due to substance use or other kind of impairment) cannot give consent.

5 *Fact Sheet: Sexual Harassment Discrimination*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination>.

6 *Id.*

7 *Sexual Assault, Rape, Abuse & Incest National Network*, <https://www.rainn.org/articles/sexual-assault>.

8 *Id.*

9 May 5, 1950, ch. 169, § 1 (Art. 120), 64 Stat. 140.

B. *The Civil Rights Act of 1964*

Title VII of The Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, sex, religion, and nationality.¹⁰ In the case of Title VII, “on the basis of sex” is defined as conditions such as childbirth and pregnancy, or related medical conditions. Under this section, discrimination includes the following: failing or refusing to hire an individual; unequal treatment of individuals in terms of compensation, work conditions, or work privileges; segregating individuals in a way which would adversely influence their employment status; and unfairly terminating employment of an individual on the basis of the aforementioned attributes.¹¹ Accordingly, the Supreme Court has interpreted that sexual harassment is considered discrimination on the basis of sex and is therefore prohibited.

C. *Meritor Savings Bank v. Vinson*

In September of 1978, Mechelle Vinson sued her former employer, Sidney Taylor, for sexual harassment.¹² Vinson argued that such harassment created a “hostile working environment” which constitutes discrimination under Title VII of the Civil Rights Act of 1964.¹³ The case reached the U.S. Supreme Court in 1986 and the question was raised, “Did the Civil Rights Act prohibit the creation of a “hostile environment” or was it limited to tangible economic discrimination in the workplace?”¹⁴ In a unanimous decision, the Court decided in favor of Vinson and concluded that sexual harassment is a form of sex discrimination prohibited by Title VII.

In *Meritor Savings Bank v. Vinson*, the Supreme Court ruled that harassment was any workplace conduct that severely and negatively

10 *Title VII of the Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>.

11 *Id.*

12 *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

13 Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

14 *Meritor Savings Bank*, 477 U.S. at 62.

impacted the victim's employment.¹⁵ The Supreme Court further clarified this ruling in *Harris v. Forklift*¹⁶ and *Oncale v. Sundowner*¹⁷. In these cases, it was determined that harassment is subjectively and objectively offensive and is motivated by the victim's membership in a protected category (such as a gender or racial group).

D. Silencing Tactics and Non-disclosure Agreements

In the past, many tactics have been used to silence victims of sexual misconduct in the workplace. One of the most commonly used has been non-disclosure agreements (NDAs). Because employee's speech is protected under Title VII, employers have historically used NDAs to prevent public disclosure of sexual misconduct in the workplace.¹⁸ NDAs are intended to be mutually agreed upon, but issues may arise when there is a power imbalance between the two signing parties, therefore increasing the risk of coercion, whether intended or not. NDAs can be composed of different provisions; the most common provisions are non-disclosure provisions, non-disparagement provisions, non-cooperation provisions, and affirmative statements.¹⁹

A non-disclosure provision prevents one or both parties from disclosing certain information established in the NDA. This may include, but is not limited to, the settlement proceedings and settlement claims. Non-disparagement provisions can either be narrow or broad. A narrow non-disparagement provision restricts parties from participating in libel, slander, or defamation only. In the case of narrow provisions, truth is a viable defense for breach of the agreement. On the other hand, broad non-disparagement provisions prevent one

15 Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. LAW REV. 229, 237 (2018).

16 *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993).

17 *Onclave v. Sundowner Offshore Serv.*, 523 U.S. 75 (1998).

18 Vasundhara Prasad, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507 (2018).

19 Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, 2019 DISP. RESOL. MAG. (2019).

party from making comments about the other party that could damage their reputation. This means even negative statements that are true but could harm the other's reputation are prohibited. Non-cooperation provisions state that the signing party will not assist anyone else in pursuing legal action against the accused party. These provisions are the most controversial because they are considered by some to be obstructions of justice.²⁰ Lastly, affirmative statements are provisions that require one or both parties to participate in affirmative speech. This may range from providing references or letters of recommendation to requiring that one party says positive things about the other party publicly, as was the case in one of Weinstein's NDAs.²¹

E. BE HEARD Act

The BE HEARD in the Workplace Act (H.R.2148) was introduced to the U.S. House of Representatives in March of 2019, sponsored by Massachusetts Representative, Katherin M. Clark. The acronym BE HEARD stands for: Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination.²² If passed, the act would (1) make it unlawful for employers to discriminate against any individual based on sexual orientation, gender identity, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. It also (2) prohibits employers from entering into contracts with employees which contain certain, restrictive non-disparagement or non-disclosure clauses. It would (3) ban the use of mandatory or forced arbitration agreements. Additionally, the act would (4) establish grant programs dedicated to preventing workplace discrimination and offering legal resources to victims of workplace harassment.²³

Based on Title VII of the Civil Rights Act of 1964, *Meritor Savings Bank v. Vinson* concluded that sexual harassment is defined

20 *Id.*

21 *Id.*

22 BE HEARD in the Workplace Act H.R. 2148, 116th Cong. (2019).

23 *Id.*

as a form of discrimination.²⁴ Consequently, disclosure of workplace sexual misconduct is protected and individuals who wish to pursue legal action against an employer have the right to do so. Any form of retaliation or coercive non-disclosure agreement on the part of the employer to prevent employees from reporting or seeking legal action is unlawful. In order to uphold this protection, legislation should be passed which offers increased legal support for victims of workplace sexual harassment, such as the BE HEARD in the Workplace Act.

III. PROOF OF CLAIM

A. State Legislation

Although the BE HEARD Act has yet to be passed by the House of Representatives, many states have taken the initiative to crack down on workplace sexual harassment. The year 2018 witnessed a surge in legislation moving to restrict non-disclosure and non-disparagement agreements, likely in the wake of the #MeToo movement. In this section, we will discuss the extent of these legislative efforts, and highlight notable examples.

According to the National Conference of State Legislatures, over 20 states introduced legislation addressing workplace sexual harassment in 2018, and 16 states introduced legislation specifically limiting the use of non-disclosure agreements in relation to sexual harassment.²⁵ Furthermore, four states, California, Connecticut, Illinois, and New York, proposed legislation which would implement or increase training on sexual harassment policies.²⁶ Additionally, there are currently eleven states making efforts to enact legislation

24 *Meritor Savings Bank*, 477 U.S. at 57.

25 Suzanne Hultin, *Addressing Sexual Harassment in the Workplace*, National Conference of State Legislatures Vol. 26, No. 17 (May 2018). <https://www.ncsl.org/research/labor-and-employment/addressing-sexual-harassment-in-the-workplace.aspx>.

26 *Id.*

aimed at prohibiting the use of non-disclosure agreements relating to workplace sexual misconduct altogether.

In March of 2018, the state of Washington enacted a total of four bills relating to sexual misconduct in the workplace.²⁷ First, Senate Bill 5996 determines that it is unfair for an employer to “discharge or otherwise retaliate against an employee for disclosing or discussing sexual harassment or sexual assault occurring in the workplace.”²⁸ Additionally, it determines that any non-disclosure agreements imposed with the intent to prevent an employee from disclosing sexual harassment is “void and unenforceable.”²⁹ Second, Senate Bill 6068 determines that the use of non-disclosure agreements in any “civil judicial or administrative action relating to sexual harassment or sexual assault” in unenforceable.³⁰ Third, Senate Bill 6313 preserves an employee’s right to publicly file a complaint for discrimination in employment contracts and agreements.³¹ Finally, House Bill 2759 establishes the Washington state women’s commission which aims to “address issues relevant to the problems and needs of women,” including sexual discrimination and sexual harassment.³²

In early 2020, Massachusetts State Senator Diana DiZogli proposed an amendment to an economic bill that would institute a ban on taxpayer-funded non-disclosure agreements throughout the state government.³³ This piece of legislation would help prevent forced NDAs, while still allowing their use in the private industry at the request of the employee. The amendment was approved by an overwhelming majority of 38-1 in July of 2020. Additionally, the

27 *Id.*

28 S.B. 5996, 65th Leg. § 1 (2018) at 2.

29 *Id.* at 2.

30 S.B. 6068, 65th Leg. § 1 (2018) at 1.

31 S.B. 6313, 65th Leg. § 1 (2018).

32 H.B. 2759, 65th Leg. § 1 (2018) at 2.

33 Sarah Betancourt, *Senate votes to ban government non-disclosure agreements*, Common Wealth (Jul. 30, 2020), <https://commonwealthmagazine.org/state-government/senate-votes-to-ban-government-non-disclosure-agreements/>.

amendment bars all state government branches from making non-disparagement or non-disclosure agreements a condition of settlement. Sen. DiZogli has also introduced a bill which would prevent employers from any form of retaliation against an individual who does not consent to a non-disclosure agreement related to sexual harassment. This bill has not yet been voted on. These two efforts from Senator DiZogli were prompted by the #MeToo movement, as well as her own experience with workplace sexual misconduct.³⁴

Significant efforts to defend and protect victims of workplace sexual harassment have already been undertaken by multiple states. These pieces of legislation vary in method and severity, but most aim to do the following: Prevent workplace sexual harassment through comprehensive training, protect the rights of victims by limiting the requirements of non-disclosure agreements in employment contracts, and impose greater penalties for employers who seek to prevent the disclosure of sexual harassment or misconduct. Thus, federal legislation should reflect these efforts.

B. Non-disclosure Agreements

One way that employers have historically failed to protect their employees and their rights is the use of non-disclosure agreements to settle cases of workplace sexual misconduct. Historically, sexual misconduct cases have been settled outside of court using non-disclosure agreements, Harvey Weinstein being one of the most notable examples. These agreements often allow powerful individuals to coerce their victims into silence through payouts. Because these payouts are usually large, those in positions of leadership are especially apt to use their money to hide from the legal consequences of their actions. The Gender Policy Report asserts that “US federal law prohibits retaliation for reporting discrimination, yet NDAs offer legal routes to discourage victims from reporting harassment

and sharing information with others.”³⁵ Because employees have the right to speak publicly about workplace sexual misconduct, employers use secrecy provisions in NDAs to prevent them from exercising that right.

Non-disclosure agreements may be signed preemptively or after the incident has occurred. This means that someone may sign an NDA before an incident has even occurred, meaning that there is no way that they can make a conscious choice about whether or not they will take legal action. Some may argue that those who accept NDAs and their payouts are not victims. But, the reality is that many victims agree to NDAs for fear of losing their jobs or of not being believed—not for the money. Almost any time an NDA is signed in a workplace setting, there is an inherent power imbalance. This dynamic risks the possibility of coercion because one party will always have more power when signing the agreement than the other.

As mentioned before, the #MeToo movement has been instrumental in this transition from secrecy to public disclosure. By giving victims a platform and a voice to share their experiences, it is systematically fighting against the culture of silence and shame. The publicity that has come from the media basis of #MeToo has raised public awareness of sexual misconduct—especially in the professional world. This new narrative fostered by the #MeToo movement is what has led to the unprecedented media coverage and public interest around sexual misconduct trials of prominent individuals and to calls for changes in legal legislation and in the workplace. It has also been the catalyst for proposed federal legislation that will ensure greater protections for all employees.

C. Unconscionability

As they pertain to workplace sexual misconduct, non-disclosure and non-disparagement agreements might be considered unconscionable, as per standard contract law defenses. The inequitable power

35 Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, THE GENDER POLICY REPORT (NOV. 14, 2017), [HTTPS://GENDERPOLICYREPORT.UMN.EDU/NONDISCLOSURE-AGREEMENTS-SEXUAL-HARASSMENT-AND-THE-CONTRACT-OF-SILENCE/](https://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/).

dynamic of an employer-employee relationship requires a nuanced approach, especially in the case of sexual harassment. If a court finds a contract to be unconscionable, the contract may be considered legally invalid and void.³⁶ In order for a contract to be void using an unconscionability challenge, there must be sufficient proof of both substantive and procedural unconscionability.³⁷ First you must ask whether or not the substantive contractual terms are so unfair or oppressive as to “shock the conscience.”³⁸ Then consider whether the parties involved demonstrate unequal bargaining power, resulting in no real negotiation and therefore little evidence of a real choice. A pertinent example of this would be a provision in a non-disclosure agreement which silences the victim of workplace sexual harassment and prevents them from speaking out against their employer, while simultaneously allowing the employer to speak freely about the victim, even in a negative or accusatory way.³⁹ Such a provision would be both substantively and procedurally unconscionable.

In the case of *Equal Employment Opportunity Commission v. Astra USA, Inc.*, a district court in Massachusetts ultimately decided to restrain and enjoin Astra USA Inc., a pharmaceutical company, from entering into or enforcing “provisions of any Settlement Agreement which prohibit current or former employees from filing charges with the EEOC and/or assisting the Commission in its investigation of any charges.”⁴⁰ This decision was reached following an investigation by the EEOC about three sexual harassment charges claimed against Astra. It was later discovered that Astra had entered into at least eleven settlement agreements with employees who had been a victim or a witness of sexual harassment. Each settlement contained

36 Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2020 UNIV. ILL. LAW REV. 101 (2020).

37 Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53 (2018).

38 *Id.* at 70.

39 Weston, *supra* note 36.

40 *Equal Employment Opportunity Comm’n v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996).

agreements including: the settling employee would not file a charge with the EEOC, she would not help others file a charge with the EEOC, and she would “assent to a confidentiality regime.”⁴¹ These three stipulations represent non-disclosure, non-assistance, and confidentiality. Astra ultimately declined requests from the EEOC to rescind conditions which prevented employees from filing a charge with the EEOC. Consequently, the case was brought before a First District Court where it was determined NDAs that prohibit employees from disclosing information regarding sexual harassment claims may be unlawful, particularly if the EEOC is investigating the claims. Additionally, it was decided that provisions with non-assistance agreements which prevent communication with the EEOC are a matter of public policy, and therefore unlawful. The court emphasized that the EEOC is responsible for enforcing and defending the intentions and conditions in Title VII (namely, investigating charges of discrimination) and therefore any attempt to hinder the EEOC’s fulfillment of that responsibility is unlawful.

Thus, the decision made in *Equal Employment Opportunity Commission v. Astra USA, Inc.* and the implications of it are a salient support for our argument. The use of non-disclosure agreements to prohibit workplace sexual harassment victims from pursuing action against their employer or harasser is unlawful in that it impedes the efforts of the EEOC to investigate workplace discrimination charges. Additionally, non-disclosure agreements that are created on the basis of oppressive terms and unequal bargaining power should be void.

D. Meritor Savings Bank v. Vinson

As mentioned previously, the landmark Supreme Court case *Meritor Savings Bank v. Vinson* established that sexual harassment is a form of sex discrimination and is therefore prohibited under Title VII of the Civil Rights Act of 1964.⁴² In this section, we will expand upon the facts of the case, as well as its implications with regards to our claim.

41 *Id.*

42 *Meritor Savings Bank*, 477 U.S. at 57.

In September of 1974, Mechelle Vinson started work as a teller-trainer at a branch of Capitol City Federal Savings and Loan Association in Washington D.C. (later acquired by Meritor Savings Bank). Throughout her entire time working at the bank, Vinson's direct supervisor was a man named Sidney L. Taylor. In 1977, after four years of work, Vinson took an indefinite sick leave from her job and was subsequently fired. Shortly after being fired, Vinson filed suit against the bank and Taylor. Vinson claimed that Taylor sexually harassed and abused her for a period of three years. She testified that her supervisor "fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."⁴³ Vinson defended the fact that she never reported these incidents to the bank because she feared retaliation. The case was brought before a U.S. federal district court in 1980 and the judge ruled against Vinson. Taylor maintained his innocence and the bank denied liability. It was determined that, because Vinson never notified the bank of the misconduct, the bank was not liable. Furthermore, the court held that Vinson was not a victim of sexual harassment because any evidence of a sexual relationship demonstrated that it was voluntary.

However, that decision was later reversed by the Court of Appeals for the District of Columbia Circuit. The court countered the conclusion that the sexual relationship was voluntary, positing instead that if the evidence determined that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness was irrelevant.⁴⁴ Additionally, the court reaffirmed that there are two forms of sexual harassment which are actionable under Title VII of the Civil Rights Act of 1964: "harassment that involves the conditioning of concrete employment benefits on sexual favors (*quid pro quo*), and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."⁴⁵ In other words, a work environment which prevents employees from doing their job effectively or feeling safe is a form of harassment. This

43 *Id.* at 60.

44 *Id.* at 62.

45 Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

definition is further substantiated by the United States Equal Employment Opportunity Commission (EEOC). Therefore, Taylor's sexual harassment of Vinson is a form of discrimination which is actionable under Title VII. What's more, the court ruled that the bank was indeed liable for the hostile work environment created by Taylor, despite Vinson not officially notifying the bank of the incidents.

Meritor Savings Bank then appealed the case to the U.S. Supreme Court, and it was brought before the Court on March 25 of 1986. In a unanimous decision, the Court held that a claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act of 1964. The Court further clarified that the conditions specified in Title VII are "not limited to 'economic' or 'tangible' discrimination," and therefore Vinson's claim is justifiable and actionable.⁴⁶ Additionally, the Court dismissed the inquiry over Vinson's voluntariness by asserting that the issue is not over whether an individual's participation was voluntary, but rather whether it was unwelcome.

The case of *Meritor Savings Bank v. Vinson* is significant in both its precedent and its implications. This case was the first in which the Supreme Court identified sexual harassment as actionable under law, and it did so by substantiating sexual harassment as a form of discrimination on the basis of sex. Thus, employers who commit sexual harassment are in violation of Title VII of the Civil Rights Act of 1964, and subject to retribution accordingly. Victims of workplace sexual harassment are entitled to the same protections given to victims of discrimination on the basis of race, religion, and nationality, according to Title VII. Therefore, it is unlawful to "fail or refuse to hire or to discharge" an individual, or to discriminate against an individual "with respect to [his or her] compensation, terms, conditions, or privileges of employment" in cases of workplace sexual misconduct.⁴⁷ Consequently, a victim of workplace sexual harassment cannot be terminated or withheld opportunities if they come forward about their mistreatment. Insofar as these implications apply to our claim, any employer who attempts to prevent the disclosure of

46 *Meritor Savings Bank*, 477 U.S. at 64.

47 Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964).

incidents of workplace sexual harassments is attempting to obstruct an incident of discrimination, which is unlawful. Therefore, the use of non-disclosure or non-disparagement agreements with the intent to silence victims of sexual harassment is unlawful.

E. Faragher v. City of Boca Raton

In 1998, former lifeguard Beth Ann Faragher brought an action against the City of Boca Raton and her former supervisors Bill Terry and David Silverman. She claimed that her supervisors had created a sexually hostile work environment, citing their actions as a form of discrimination under the precedent of *Meritor v. Vinson* because of the Civil Right Act of 1964. Faragher alleged that her supervisors had created the negative atmosphere through touching, remarking, and commenting of a sexual nature, mainly against female employees.⁴⁸

The District Court ruled that the supervisors' behavior was discriminatory harassment that substantially impacted the workplace environment. It was determined that the City was liable because the harassment was pervasive enough that it could not reasonably be determined that the City did not have knowledge of the supervisors' behavior.⁴⁹ The supervisors were considered agents of the company, meaning the company was liable for their actions. The Eleventh Circuit reversed this, concluding that there was not enough evidence that the City had adequate knowledge to be liable for the employees' actions.⁵⁰

The Supreme Court decided in a 7-2 decision that an employer is in fact vicariously liable under Title VII of the Civil Rights Act of 1964 for discrimination caused by a supervisor. This liability is subject to the employer's ability to prove that they took appropriate action.⁵¹ The defense proposed by the employers must include proof that the employers took reasonable action to prevent and address sexual harassment and the plaintiff failed to use available resources

48 *Faragher v. City of Boca Raton*, 864 F. Supp. 1552 (S.D. Fla. 1994).

49 *Id.* at 1534.

50 *Id.* at 1536.

51 *Id.* at 1538.

to address the harassment and discrimination. Ultimately, the Court reversed the Seventh Circuit's reversal of the initial ruling and sided with the plaintiff, ruling that the City of Boca Raton was liable for the damages that came against Faragher.⁵²

F. Burlington Industries v. Ellerth

Similarly, the Supreme Court ruling on *Burlington Industries v. Ellerth* has significant implications for employer responsibility and liability with relation to workplace sexual misconduct.⁵³ Kimberly B. Ellerth left her job at Burlington Industries after 15 months because of alleged harassment by her supervisor, Ted Slowik. Ellerth rejected all of Slowik's advances and did not receive any negative retaliation as a result. She did not alert the company of the alleged harassment despite their anti-sexual harassment policies. Ellerth challenged the claim that she did not receive any negative retaliation by arguing that the Burlington Industries forced her constructive discharge.⁵⁴ The question raised by the lawsuit was whether the employer was liable for the harassment experienced by Ellerth and if the liability was vicarious of the result of negligence.

In a 7-2 opinion, the Court ruled in favor of Ellerth.⁵⁵ The official court opinion, citing *Meritor*, states that "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."⁵⁶ Essentially, it was ruled that even though there was not tangible evidence that the harassment impacted Ellerth's employment, the company was required to show that they took action quickly to prevent or correct the behavior in order to defend themselves for the liability. Whether there are job-related consequences for the victim or not, the company

52 *Id.* at 1539.

53 *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998).

54 *Id.* at 748.

55 *Id.* at 746.

56 *Id.* at 765.

is responsible for the harassment or misconduct experienced by the employee while in the workplace. In order to prove that they have fulfilled their responsibility to protect the employee, the employer must demonstrate that “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”⁵⁷ In the case of *Burlington Industries v. Ellerth*, the evidence that Burlington Industries had adequately protected Ellerth from discrimination or harassment in the workplace was insufficient.

As was decided in *Meritor Savings Bank v. Vinson*, harassment is a form of discrimination, and any discrimination on the basis of sex is in violation of Title VII.⁵⁸ As demonstrated by *Faragher v. City of Boca Raton*, employers are responsible for the environment in which their employees work, including the prevention and addressing of harassment in any form.⁵⁹ This means that employers are vicariously responsible for any harassment or discrimination that occurs between employees at work.

These cases (*Burlington Industries v. Ellerth*; *Faragher v. City of Boca Raton*) are important because they establish that employees are entitled to protection in the workplace under Title VII. They also establish that employers are responsible for protecting their employee’s rights when they are at work. This means having anti-harassment and discrimination measures in place and taking timely and reasonable action when misconduct does occur. Employers are also responsible for informing their employees about their rights and protections while at work. The only burden that falls on the employee is to use the resources provided to them.

57 *Id.*

58 *Meritor Savings Bank*, 477 U.S. at 57.

59 *Faragher*, 864 F. Supp.

G. BE HEARD Act

The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, or BE HEARD Act, is a current piece of legislation that has been proposed in the U.S. House of Representatives.⁶⁰ In 2019, it was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, but remains unvoted on. The main tenets of the BE HEARD Act, as outlined previously, are that it (1) makes it illegal to discriminate against an individual in the workplace based on sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, or sex stereotypes, (2) prevents employers from entering into contracts with workers with certain non-disparagement or non-disclosure clauses, (3) bars pre-dispute arbitration agreements and post-dispute agreements with some exceptions, and (4) sets up grant programs for preventing and responding to workplace discrimination and harassment so that all employees will have equal opportunities to pursue legal action regardless of socioeconomic status through legal assistance and advocacy.⁶¹

According to the American Civil Liberties Union (ACLU), the BE HEARD Act has value because of its potential to expand anti-discrimination laws created under Title VII of the Civil Rights Act, remove economic and other barriers to justice, assist employers in forming safe, harassment free workplaces, and hold perpetrators of workplace sexual misconduct accountable.⁶² Historically, workplace harassment laws have only applied to companies with 15 or more employees, leaving many workers who are self-employed or work for small businesses unprotected under Title VII. It also protects

60 BE HEARD in the Workplace Act H.R. 2148, 116th Cong. (2019).

61 *Id.*

62 Vania Leveille & Lenora Lapidus, The BE HEARD Act Will Overhaul Workplace Harassment Laws, AMERICAN CIVIL LIBERTIES UNION (Apr. 10, 2019, 11:15 AM), [HTTPS://WWW.ACLU.ORG/BLOG/WOMENS-RIGHTS/WOMENS-RIGHTS-WORKPLACE/BE-HEARD-ACT-WILL-OVERHAUL-WORKPLACE-HARASSMENT-LAWS](https://www.aclu.org/blog/womens-rights/womens-rights-workplace/be-heard-act-will-overhaul-workplace-harassment-laws).

independent contractors, volunteers, interns, fellows, and trainees who may not always fall under the definition of “employee.”⁶³

The BE HEARD Act supports our claim that employees should not be prevented from taking legal action in response to workplace sexual misconduct. It should be placed under vote in the House of Representatives as soon as possible. Federal legislation such as the BE HEARD Act is necessary in order to ensure that sexual harassment and misconduct in the workplace are illegal on a national level. This legislation will also ensure that victims of workplace sexual harassment and misconduct will not be blocked from pursuing legal action should they choose to do so. The BE HEARD Act also breaks down barriers to justice by extending the time limit for challenging harassment, modernizing the definitions of harassment and discrimination, clarifying that motivation is not adequate to establish discrimination, and increasing access to legal services for employees in low-wage jobs.⁶⁴

BE HEARD and similar legislation is needed in order to protect the rights of employees in the workplace. Employees should be able to go to work knowing that if discrimination occurs, their employers will protect them. And, should their employers fail to protect them, they are protected under the law and have the right to speak out about any abuse or misconduct that they experience while at work.

IV. CONCLUSION

Title VII of the Civil Rights Act of 1964 establishes discrimination on the basis of sex as unlawful. The landmark case *Meritor Savings Bank v. Vinson* set the precedent that sexual harassment, including the perpetuation of a hostile work environment, is a form of sex discrimination and is actionable under Title VII. Furthermore, in the case of sexual harassment perpetrated by an employer against an employee, non-disclosure agreements may be deemed unconscionable and voided based on unequal bargaining power. Based on these foundations, the rights of victims of workplace sexual harassment

63 *Id.*

64 *Meritor Savings Bank*, 477 U.S. at 57.

are protected by law and any attempt by an individual or employer to prevent the disclosure of such an incident is unlawful.

With these arguments in mind, we recognize that there are circumstances in which a non-disclosure agreement in the case of workplace sexual misconduct may be beneficial to all parties involved. In fact, it may be the case that the victim is the one to pursue a non-disclosure agreement, for any number of reasons. However, the true intentions and wishes of a victim can be difficult to interpret when there is an imbalance of power at play. Efforts to distinguish between coercion and free will are complicated by unequal bargaining power. Herein lies the complexity of this issue. Suffice it to say, any attempts made by an individual or an employer to conceal an incident of workplace sexual harassment is justifiably unlawful, and the wellbeing of the victim must always take priority. Although state governments have made notable efforts to mitigate the unlawful use of non-disclosure agreements, such legislation should be adopted by the federal government. The BE HEARD Act is an exemplary piece of legislation which should be prioritized by lawmakers and passed immediately; the urgency of the issue demands it.