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The Next Challenge in Sexual Harassment Reform: Racial Disparity

*Tanya K. Hernandez**

In order to do my homework in discussing both a tribute to women's lawyering and activism and also discuss emerging issues, I am going to focus on sexual harassment.

First, brief remarks about this tribute to women's lawyering and activism. We would not have a sexual harassment cause of action if it were not for women being lawyers and activists. Although some federal courts recognize a sexual harassment claim under Title VII of the 1964 Civil Rights Act as early as 1976, and then by the Supreme Court in 1986, it was only after feminist activists lobbied for such recognition both through their legal scholarship and their on-the-street grass roots work. The EEOC, in fact, reports that sexual harassment is now the fastest growing area of employment discrimination, so this hard work paid off. Indeed, feminist lawyers describe a sexual harassment as now being part of the national consciousness. So this is a true legal gain for women in the past three decades.

Now, emerging issues. One challenge that women's rights activists will face in the coming decade with respect to sexual harassment is the challenge of how to reform the cause of action to be more responsive to issues of gender and race. With that I want to turn to a project that I've been undergoing with respect to sexual harassment and race disparity. I studied women's filing rates for Title VII claims for sexual har-

assment for the last seven years, to be specific after examining seven years worth of these sexual harassment charge claims from the years 1992 to 1999 and then Lexus and West Law Electronic Reports of women's sexual harassment claims for that last 20 years, I discovered two striking patterns. Women of color are over-represented as charging parties in sexual harassment claims as compared to their numbers in the work force. I looked specifically at a female work force in order to be able to do the analysis. White women are underrepresented as charging parties as compared to their numbers in the work force.

So to speak in numerical terms just for a few moments, for the years studied, white women generally made up 84 percent of the female labor force, but typically only represented 59 percent of all women's sexual harassment charges. In contrast, women of color who made up 16 percent of the female work force were disproportionately filing 33 percent of all women's sexual harassment claims. For those of you who are fascinated by statistics, here is a brief thrill. The standard deviation for each year of data range from 71 to 84 for white women and from 31 to 66 for women of color. For us nonstatisticians, please note that the statistical probability of such extraordinarily large standard deviations occurring is approximately zero. In fact, a social scientist views anything

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larger than three standard deviations – and we are talking here 80, 70 – anything larger than three standard deviations as indicating that, quote, the data is not the result of pure chance.

Now, some early speculations about the correlation between race and the filing statistics are undermined by many recent social science studies of sexual harassment victims and their behavior and attitudes. The very first explanation that is generally proffered especially when it was noticed anecdotally that so many of the noteworthy sexual harassment claims were often brought by black women and other women of color plaintiffs. When that pattern started to emerge and was noticed, the explanation that was proffered was that women of color, and particularly black women, are more sensitized to using litigation because of their experience in the civil rights movement; and, furthermore, their experience of a racially and gender-charged work environment makes it clearer to them than white women that sexual harassment is, indeed, harassment and not some overly aggressive form of dating practice. So that women could really understand that this was truly hostile and not some sort of favor that the boss, co-worker is doing for you.

I am not saying this explanation does not have some validity. I am not here to discount it, but only to speak to the ways in which this data set from '92 to '99 speaks of something additional going on. Why the years as being so important? This racial disparity is existing after the Clarence Thomas, Anita Hill public discourse about sexual harassment; meaning all women now know something about what is sexual harassment. We can no longer look at ways in which women of color have a particular understanding. Now white women, if they were innocent before about what was sexual harassment, certainly have been educated, one would say, about what sexual harassment is and that it is not merely overly aggressive dating overtures.

So the post 1991 data points to something else going on. In addition, much of social science research indicates that women of color, in fact, underreport their experiences of sexual harassment. They are not actually more inclined to report it to the authorities, for a number of reasons. One, when psychologists interview women of color about their attitudes towards sexual harassment, they have discov-

ered that women of color have a more narrow definition of what they view as sexual harassment. Whereas, in contrast, white women have a fuller range of behaviors that for them indicate sexual harassment is occurring. So a greater opportunity, you would think, for one experiencing it and then identifying it.

Secondarily, the social scientists have discovered that women of color expect the work force to be hostile both from a gender perspective and from a race perspective. So that feeds into their more narrower definition of what is sexual harassment to them as individuals. They don't expect it to be a warm and fuzzy place to be, the work force, and thus in order for actions to be viewed as sexual harassment it has really to got to be severe, so the social scientists analysis goes. In addition, survey data has indicated that when women are harassed by opposite race harassers, or persons outside their racial grouping, that they more readily turn to internal coping mechanisms than they do to reporting mechanisms for dealing with the sexual harassment. So that this has a disproportionate influence on women of color because of the ways in which the men who are harassing them typically tend to be the employers or co-workers and often times are not of their race grouping.

Another sort of anecdotal explanation that is often proffered is that women of color must have greater experiences of sexual harassment because of their greater vulnerability in the work force. But this gets undercut somewhat by the survey information that indicates that sexual harassment occurs at all occupation levels, even in law firms for summer associates. That should be of particular interest to you. So it occurs at all occupational levels and, indeed, some control studies that control for occupational level found that – and this is just an examination of white and black women – found that 16.6 of white women indicated sexual harassment. So you still have the race disparity when controlling for the occupation level. Education nor occupational status — neither of these things overly determine women's responses to experiences of sexual harassment.

One thing that has been analyzed as determining what kind of response a woman will have to sexual harassment, whether she reports it and is willing to go to court or otherwise, and that is severity. The more severe the actions are,

the greater willingness the woman will have to report it.

The EEOC data that I have examined may suggest one of two things. It may suggest that women of color are either more severely harassed or that they are more frequently harassed. But in either case it speaks to an area that merits greater attention by those who are seeking real reforms in the prevention and prosecution of sexual harassment. So after undermining, if not completely eliminating, these predominant explanatory factors, many of the social conditions that correlate with race, it seems to me that we are left with race itself as an explanatory factor.

What do I mean by race? For the purposes of this analysis I treat race as a descriptively based social differentiation in a particular context. Here, to be very frank, I treat race as those characteristics which sexual harassers view as being imbued by race so that an uninvolved male stereotype that depicts women of color as wanton lascivious and, thus, sexually available. Whereas, a stereotype of white women would conform is of respectability and purity, it is the presumption of respectability and purity which race as white women as white and, thus, sexually sacred.

Empirical studies actually indicate that social stereotypes of women of color affect the views of perpetrators of sexual assault and may increase the chances that women of color are sexually harassed. It seems to me though, and this sort of stems from the earlier remarks as well, that you can't only look at women of color being harassed and having this racial disparity that the racing is what happens to white women as it is what happens to women of color. Just as race can be an explanatory factor for what is happening to white women with respect to sexual harassment.

So I want to conclude with the following. The compilation of the racially comparative data presented and analyzed here offers sexual harassment scholars and activists the opportunity to further expand their theories by incorporating an explicit recognition of the intersection of gender and race. While a number of scholars have focused on the ways in which women of color distinctly experience sexual harassment as a form of racial harassment different from white female victims of harassment, none of them have had the opportunity to analyze the importance of the racial differences in rates of sexual harassment as indirectly indicated by the sexual harassment charge statistics. Similarly, for those scholars who have suggested overall reconceptualization of the juris prudence of sexual harassment, the data highlights the importance of incorporating and examining the role of racialized gender stereotypes in understanding sexual harassment victimization.

Sumi Cho has suggested that the law's current dichotomist characterization of racial discrimination and sexual harassment as separate spheres of injury is inadequate to respond to racialized sexual harassment, and so she advocates for a new cause of action that would be the racialized sexual harassment. But regardless of whether a separate cause of action is developed for racialized sexual harassment or whether the current sexual harassment cause of action is simply modified to explicitly permit evidence of racial harassment as part of the sexual harassment claim, the analysis of sexual harassment charges reveals the need to begin to infuse sexual harassment law with the deeper understanding of the ways in which gender is racialized and consequently how race is gendered as well. Thank you.

