Fundamentally at Odds: Is the Sex Industry Compatible with the Mandates of Title VII?

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Lua Kamál Yuille, *Sex in the Sexy Workplace*, 9 **Nw. J.L. & Soc. Pol'y** 88 (2013).

With the continual evolution of anti-discrimination law and an endless array of new, unexplored wrinkles and nuances of the law seemingly unfurled with each new holding, it is more important than ever that scholars persist in identifying open issues and problems in the jurisprudence. One of the primary practical benefits of scholarship in the field of employment discrimination has been to expose the gaps and cracks in the law's coverage and regulation of the workplace, and the best scholars have made their contributions by surveying the landscape, contouring the fault lines, and proposing solutions. *Sex in the Sexy Workplace* by Professor Lua Kamál Yuille does just this.

Addressing itself to the issue of how to properly adjudicate the hostile work environment sexual harassment claim of a non-sexualized worker (like assistants, etc.) in a so-called "sexy workplace," the article deftly raises the issue of how neither the law of sexual harassment, nor any of the critiques levied at that law, adequately responds to this unique situation in a way that vindicates the victim or recognizes the injustice of what has been allowed to occur. It then posits what Professor Kamál Yuille terms a "doctrinal fix that draws inspiration from the 'bona fide occupational qualification' and 'business necessity defense' exceptions to Title VII's prohibition on workplace discrimination." Finally, the article seizes upon the opportunity to point to this particular deficit in the law as being illustrative of a more rudimentary tension worthy of note in the law of sexual harassment: the so-called "sex industry," Professor Kamál Yuille claims boldly, "is fundamentally incompatible with the principles of Title VII's prohibition of gender discrimination."

Noting that sexual harassment is an "intractable and evasive problem," the article uses as its premise the facts alleged in recent cases that highlight the plight of the non-sexualized worker in the sex industry. It goes on to ask whether, presuming that the law allows a "sexy workplace" to exist, and even to provide certain defenses to sex-based discrimination due to the inherently "sexy " nature of the workplace, such a workplace can demand that all of its employees put up with sexualized treatment and behavior that would otherwise not be allowed at work. Analyzing this type of a workplace and the non-sexualized workers within it, against the backdrop of current Title VII law, the article concludes that non-sexualized employees of businesses whose "essence" is sexual titillation are subjected to the same lower standards of Title VII protection as those who opted to accept sexualized employment in the first place.

The article is tremendously useful, in that it then goes beyond that astute observation to posit a change in courts' approach to hostile work environment claims in the form of a new model that draws upon extant defenses like the bona fide occupational qualification (BFOQ) exception and the business necessity defense (BND) to heighten the protection afforded. Further, it reflects upon the larger significance of the project of examining the sexy workplace, observing that there is a basic incompatibility between the very existence of sexy workplaces and the mandates of Title VII, and laying the foundation to truly question the existence of such workplaces. This is a very powerful observation.

The article's discussion of unwelcomeness, in particular, is useful and enlightening. Noting that in its establishment of the cause of action of sexual harassment in 1986, the Supreme Court stressed that the claim's "gravamen" or hallmark was unwelcomeness, the article highlights how hard it will be for a non-sexualized employee, to prove that sexualized or otherwise offensive banter or treatment is, in fact, unwelcome "even under a liberal approach to unwelcomeness." This is because receptiveness to what would otherwise be harassment is imputed to these employees; they are readily seen as willingly participating in these exchanges because they opted for employment in a workplace with an "environment inherently pervaded by sexuality." The article's critique of both courts' handling of

the unwelcomeness prong of the analysis of cases, even those beyond the “sexy workplace,” and courts’ “inordinate focus on the type of language used by the claimant” is also tremendously valuable and insightful.

After raising and dismissing many responses to the problem she has identified, the author posits that “the BFOQ would become an exception for bona fide occupational requirements—the BFOR,” and that “the business necessity defense (BND) supplies another” model for examination, making up the so-called “BFOR/BND exception.” So not only does this article shed light on the plight of a uniquely-situated group of employees, but it moves beyond critiques to both ponder new approaches and to make a larger statement about both the state of Title VII jurisprudence and its gaping holes and about the existence of sexy workplaces and what they will invariably do to the perceptions of and protections afforded to all of the employees who work in them. There is much in this article that provokes and enriches thought and debate on the state of Title VII, sexual harassment, and certain accepted workplace terms and conditions.

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