2006

Overruling the Jury: Duncan v. GMC and Appellate Treatment of Hostile Work Environment Judgments

Dara Purvis
Penn State Law

Overruling the Jury: *Duncan v. GMC* and Appellate Treatment of Hostile Work Environment Judgments

Dara Purvis†

Duncan v. Gen. Motors Corp., 300 F.3d 928 (8th Cir. 2002)

INTRODUCTION

In August of 1994, Diana Duncan began work as a technical training clerk at the General Motors Corporation manufacturing plant in Wentzville, Missouri, placed through the Junior College District of St. Louis. Within the first two weeks of her employment, James Booth, the GMC employee who had first told her about the available clerk position, asked Duncan to meet with him at a restaurant during work hours. Although it is unclear whether Booth actually had supervisory powers over Duncan, she and the other workers employed through the Junior College District believed that he had the authority to promote them, terminate them, or change their salaries.[1] At the restaurant, Booth sexually propositioned Duncan.[2] After she rebuffed his advances, Booth's conduct towards Duncan at work became negative and often inappropriate. He repeatedly requested that she use his computer in order to use a particular software program, after he set the computer's screensaver to be an image of a naked woman.[3] He arranged to have Duncan mock-arrested for a charity fundraiser, even though he was told Duncan had just prosecuted a person who assaulted her and then threatened to have her falsely arrested. After participants were "arrested" at the GMC plant, they were held until someone paid their "bail" in the form of a donation. Booth paid Duncan's bail, but rather than taking her back to work as she requested, he drove her to a bar across the street from the apartment where she had been assaulted.[4]

When Duncan requested a promotion to a position as illustrator, rather than

---

† Yale Law School, J.D. expected 2008. M.Phil., University of Cambridge, 2005. B.A., University of Southern California, 2003. The author wishes to thank Professor Jeffrey G. Purvis, James T. Gibson, Wally Adeyemo, Monica C. Bell, and Ebunoluwa Taiwo for their valuable comments, as well as Geneva McDaniel for her insightful editing.

1. Duncan v. Junior Coll. Dist., No. 4:98CV01221, 1999 U.S. Dist. LEXIS 22451, at *4 (E.D. Mo. Nov. 15, 1999).
2. Duncan v. Gen. Motors Corp., 300 F.3d 928, 931 (8th Cir. 2002).
3. *Id.*
4. *Duncan*, 1999 U.S. Dist. LEXIS 22451, at *5.

evaluate her drawing skills by having her draw automotive parts, as all other applicants were required to do, Booth told Duncan that she would have to draw a planter he kept in his office shaped like a man with a cactus growing out of his groin.[5] Booth later, along with another coworker, drew a poster depicting Duncan as the President and CEO of the "Man Hater's Club," requiring that members "always be in control of . . . (Ugh) Sex," which they then posted on a bulletin board in the office. After Booth gave Duncan a draft of the "He-Man Women Hater's Club" charter to type up for him, calling for, among other things, repealing the Nineteenth Amendment, Duncan resigned and later filed a complaint with the Equal Employment Opportunity Commission.[6]

Duncan's suit against General Motors Corporation was eventually tried before a jury, which found that she had been sexually harassed under Title VII of the Civil Rights Act.[7] The jury awarded her $4600 in back pay and $1,000,000 in emotional distress damages on both her sexual harassment claim and her claim of constructive discharge.[8]

After the judgment, General Motors filed a post-trial motion seeking reversal of the verdict on a number of grounds, including a request for judgment as a matter of law on the grounds that the incidents described by Duncan did not rise to the level of altering the terms of her employment. The district judge denied this motion.[9] General Motors then appealed from that denial to a panel of the Eighth Circuit Court of Appeals, arguing inter alia that because the Supreme Court had "rejected the notion that workplace conduct must pass muster with Miss Manners," the verdict for Duncan should be overturned as a matter of law.[10] The appellate panel reversed the district court's denial of judgment and set aside the jury's verdict, stating that while Booth's conduct toward Duncan at work was "boorish, chauvinistic, and decidedly immature," it did not "meet the standard necessary for actionable sexual harassment" because it did not create "a sexually harassing hostile environment sufficiently severe or pervasive so as to alter the conditions of her employment."[11] The full Eighth Circuit split 4-4 on whether to hear the case en banc, and the Supreme Court declined Duncan's petition for certiorari.[12]

Duncan is a paradigmatic example of the confusing state of sexual harassment law at the appellate level today. The Supreme Court's definition of what constitutes sexual harassment is a malleable standard that resists easy or

5. *Duncan*, 300 F.3d at 931-32.
6. *Id.* at 932.
7. *Id.* at 930.
8. *Id.* at 930-31.
9. *Id.* at 933.
10. Brief of Appellant at 30, Duncan v. Gen. Motors Corp., No. 00-3544, 2000 WL 33983440 (8th Cir. Dec. 22, 2000).
11. *Duncan*, 300 F.3d at 935.
12. Duncan v. Gen. Motors Corp., 538 U.S. 994 (2003).

quantifiable analysis—but this flexibility was intentionally created in order to respect the intent of Congress to leave the primary evaluation of sexual harassment claims (brought under the Civil Rights Act of 1991) in the hands of a jury.[13] Rather than remain as a last restraint upon damages which are "disproportionate to the defendants' discriminatory conduct or the plaintiffs' resulting loss,"[14] however, an increasing number of appellate courts have taken an activist path, consciously tightening the standard that plaintiffs in sexual harassment suits must meet, carving out safe harbors for offensive behavior of employers, and discounting the judgment of both the average woman facing harassing behavior and the jury meant to be a pool of her working peers. This tension between the role that Congress and the Supreme Court intended the jury to play in sexual harassment suits—and the increasing willingness of some appellate courts to impose their own determination in place of the jury's—has become an obstacle blocking plaintiffs like Diana Duncan and protecting employers who sexually harass their employees.

In the first Part of this Comment, I review the sexual harassment doctrine as established by the Supreme Court. I note the unresolved issue of whether the establishment of a hostile work environment is a question of law or fact, an ambiguity that has found differing treatments among different appellate courts and even different decisions by the same court. In Part II, I argue that what seems to be a gap in the Supreme Court's reasoning is in fact an acknowledgement of Congress's intent that a jury make the determination about whether a hostile work environment was created. In Part III, I explain how the *Duncan* opinion embodies several typical strategies used by appellate courts to dismiss the judgment of juries and reverse verdicts that were favorable toward sexual harassment plaintiffs. Finally, I note the danger that the growing pattern of appellate court reversals of jury verdicts presents to future claimants alleging sexual harassment in their workplaces.

I. SEXUAL HARASSMENT DOCTRINE AND THE QUESTION OF FACT OR LAW

The Supreme Court recognized sexual harassment as a violation of Title VII of the Civil Rights Act in *Meritor Savings Bank v. Vinson*,[15] in which the Court adopting the EEOC's 1980 guidelines that an employee could establish sexual harassment by demonstrating that sexual discrimination resulted in a

13. *See* H.R. REP. NO. 102-40, pt. 1, at 72 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 610 (citation omitted); *see also* Mendoza v. Borden 195 F.3d 1238, 1278 (11th Cir. 1999) (Barkett, J., concurring in part) ("The mistrust of juries evidenced by the majority is at odds with the specific directive of Congress [in the Civil Rights Act of 1991] that the jury is to decide whether gender discrimination has occurred in the workplace.").

14. H.R. REP. NO. 102-40, pt. 1, at 72.

15. 477 U.S. 57 (1996).

hostile or abusive work environment.[16] This is a different allegation than a quid pro quo claim of sexual harassment, in which sexual conduct is explicitly linked to a promotion, continued employment, or some other tangible economic good. Despite repeatedly affirming the distinction between the two, the Court has tended to minimize the significance of the categories, stating that "[t]o the extent they illustrate the distinction between cases involving a threat which is carried out and offensive conduct in general, the terms are relevant . . . ."[17]

The division, however, is more important for the purposes of appellate review of jury verdicts than the Court's description indicates. When reviewing the judgment of a trial court, questions of fact that were determined by a jury are given deferential treatment by the appellate court. In contrast, questions of law are reviewed by the appellate court de novo. Whether a given issue is one of fact or law, therefore, indicates how easy or exceptional a circumstance it is for a judgment to be overturned.[18]

In the context of sexual harassment, this means that a finding of quid pro quo sexual harassment is generally deferred to on appeal, while the treatment of hostile work environment claims varies by circuit and often involves less deference. In a quid pro quo suit of harassment, the question of whether sexual harassment occurred is essentially a purely factual question: if a threat actually took place in which an employer threatened an employee with retribution unless the employee engaged in sexual activity, there is little question that sexual harassment occurred.[19] In contrast, a claim of sexual harassment by creation of a hostile work environment is a mixed question of both fact and law. There are the factual inquiries of whether the specific incidents alleged by the plaintiff indeed took place. After the factual determination, there is the further legal question of whether the facts as established rise to the level of a hostile work environment.

The Supreme Court has provided little guidance as to what creates a hostile work environment, even to the extent of whether this question should be regarded as one of law or of fact. And in the absence of that guidance, appellate courts have issued varied opinions, some operating under the belief that the question is a primarily factual one (thus granting jury determinations great weight), while others subject the question to de novo consideration at the

16. *Id.* at 65-66.

17. Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 753 (1998).

18. Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 827 (1999).

19. Indeed, even criticisms of typical quid pro quo sexual harassment cases focus on the responsibility of the employer based on the standard evaluating liability, rather than any further analysis of whether the facts established settle that quid pro quo sexual harassment occurred. *See* Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 TEX. L. REV. 435 (1997).

appellate level.[20]

The confusion among circuits is compounded when appellate courts reverse, alter, or simply ignore their previous understandings of sexual harassment cases. In 1997, the Eighth Circuit noted the lack of a clear standard set by the Supreme Court, and concluded that because "[t]here is no bright line between sexual harassment and merely unpleasant conduct," the evaluation of a jury "must generally stand unless there is trial error."[21] Yet in *Duncan*, the only citation to the Eighth Circuit's own previous ruling was in Judge Arnold's dissent.[22] Because the full Eighth Circuit declined to review the *Duncan* panel's decision, it is unclear whether the court intended to tacitly accept a reversal of their previous ruling, or whether the panel's disregard of precedent is a one-time aberration.

II. CONGRESS'S INTENT THAT JURIES EVALUATE SEXUAL HARASSMENT CLAIMS

It is a reasonable reaction, at least at first blush, to ask why this confusion among appellate courts is necessarily a problem. True, there is a vastly disparate treatment of standards for sexual harassment allegations in different appellate circuits, and courts may reverse themselves, but why should this cause any more concern than the same varied interpretations and changing standards in any other field of law?

The answer is that the seeming void in terms of standards, and the lack of a precise formulation of a judge-administered test, was intentionally left unarticulated. This superficial gray area is the product of an interpretation by the Supreme Court: that it was Congress's intention in passing the sexual harassment provisions of the Civil Rights Act of 1991 (establishing a right to punitive damages determined by a jury) that jury evaluations be given great deference in sexual harassment law. Rather than a true void in the law that appellate courts might attempt to fill with their own independent judgments, the evaluation of what a hostile work environment means is an analysis intended, by Congress and the Supreme Court, to be performed by juries.

When drafting the Civil Rights Act of 1991, both the House and Senate committees discussing the bill noted that "[a] serious gap exists in Title VII, one that leaves victims of intentional discrimination on the basis of sex or

---

20. *See* Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 298-99 ("In the Second and Eighth Circuits, strongly worded opinions insist that this is a factual issue and that juries properly have the central role in its resolution; the First, Third and Eleventh Circuits follow this approach. On the other hand, the Fourth, Sixth, Seventh and Ninth Circuits generally treat these issues as matters for de novo consideration by appellate judges.").

21. Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997).

22. Duncan v. Gen. Motors Corp., 300 F.3d 928, 938 (8th Cir. 2002) (Arnold, J., dissenting).

religion without an effective remedy for many forms of bias on the job, while victims of intentional race discrimination in employment have such a remedy."[23] In order to "conform remedies for intentional gender . . . discrimination to those currently available to victims of intentional race discrimination,"[24] compensatory and punitive damages were made available to victims of gender discrimination in addition to equitable relief.[25]

The House report noted that, under the Seventh Amendment, whenever compensatory or punitive damages are requested, any party to the litigation may request a jury trial.[26] The importance of a jury, however, was not simply as a procedural requirement, as Congress stressed the reasoning power of a jury to judge both the strength of discrimination claims and the appropriate level of damages:

> The jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee. Just as they have for hundreds of years, juries are fully capable of determining whether an award of damages is appropriate and if so, how large it must be to compensate the plaintiff adequately and to deter future repetition of the prohibited conduct.[27]

In contrast to this expansive language in praise of the judgment of juries, the role of judges was much more narrowly circumscribed, stating that judges would "serve as an additional check: they can and do reduce awards which are disproportionate to the defendant's discriminatory conduct or the plaintiffs resulting loss."[28]

The Supreme Court recognized the deference this showed to the evaluation of juries, cognizant of the increased sensitivity juries would likely have to the claims of plaintiffs, in *Harris v. Forklift Systems, Inc.*[29] *Harris* established that a sexual harassment charge through an abusive work environment does not have to result in an actual psychological injury; rather, it merely must be an environment that "would reasonably be perceived, and is perceived, as hostile or abusive."[30] Justice O'Connor noted for the Court that "this is not, and by its nature cannot be, a mathematically precise test,"[31] and Justice Scalia acknowledged in a concurrence that the Court's opinion does not set "a very clear standard," and "as a practical matter . . . lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."[32] Despite leaving sexual

23. H.R. REP. NO. 102-40, pt. 2, at 24 (1991); S. REP. NO. 101-315, at X (1991).
24. H.R. REP. NO. 102-40, pt. 2, at 64.
25. *Id.* at 24-25.
26. *Id.* at 29.
27. H.R. REP. NO. 102-40, pt.1, at 72 (citation omitted).
28. *Id.*
29. 510 U.S. 17 (1993).
30. *Id.* at 22.
31. *Id.*
32. *Id.* at 24 (Scalia, J., concurring).

harassment judgments in the hands of these "virtually unguided" juries, however, Scalia concluded, "I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts."[33]

III. *DUNCAN* AS AN EXAMPLE OF APPELLATE COURT STRATAGEMS TO SUPPLANT THE JUDGMENT OF JURIES

Despite the direction allowing juries to apply their own standard as what a reasonable person would perceive as a hostile or abusive workplace, the court in *Duncan* cited language from the *Harris* opinion as though it explicitly demanded an extremely rigorous showing of conduct shocking to the conscience, while discounting Duncan's experiences and reactions. In doing so, the panel illustrated several of the most common problems that arise when appellate courts decide that they understand the mind of the reasonable worker better than do the members of a jury.

A chief technique in arguing that no reasonable worker could possibly have considered challenged conduct as creating a hostile work environment is to set the standard of what constitutes a hostile work environment extremely high.[34] The opinion in *Duncan* accomplishes this by selectively citing Supreme Court precedent and by imposing its own, more rigorous, interpretation upon the language used. The panel began by stating that Duncan had fulfilled three of the four elements required to successfully establish a claim of hostile work environment sexual harassment: "that she was a member of a protected group, that she was subjected to unwelcome sexual harassment [and] that the harassment was based on sex."[35] The panel reversed the district court's determination that, taking the facts in the light most favorable to her, Duncan showed that the harassment "alter[ed] a term, condition, or privilege of her employment."[36]

Citing *Harris*, the Eighth Circuit declared that "to clear the high threshold of actionable harm, Duncan has to show that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult,'" and denied that Duncan demonstrated this saturation of harassment.[37] The portion of the *Harris* opinion in which the description "permeated with discriminatory intimidation" appears, however, is hardly a list of severe conditions which must appear before a charge of hostile work environment sexual harassment may be brought. The previous sentence in the opinion described the "congressional intent 'to strike at the entire spectrum of disparate treatment of men and women in

33. *Id.* at 25 (Scalia, J., concurring).

34. *See* Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 809 (2002).

35. *Duncan*, 300 F.3d at 933.

36. *Id.* at 934.

37. *Id.* (quoting *Harris*, 510 U.S. at 21).

employment.'"[38] Justice O'Connor's later description of how to evaluate a claim states that the factors to consider "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[39] By its selective citation, the *Duncan* court portrayed the bar that Duncan had to hurdle as higher than it actually was.

A second technique for denying the existence of a hostile work environment is to downplay and minimize the charges alleged by the plaintiff, even as the court claims to be "construing the evidence in the light most favorable to [her]."[40] The court in *Duncan* dismissed Duncan's allegations as merely four categories of actions that were minor and isolated events. Booth's requesting that Duncan accompany him to a restaurant during the working day, telling her that his marriage was troubled (and then propositioning her) was disregarded as "a single request for a relationship, which was not repeated when she rebuffed it." A number of times, when Duncan was handing Booth a phone, he would make a point of taking the phone in a way that he touched her hand. This was glossed over as "isolated incidents of Booth briefly touching her hand," ignoring the reason that the touching was offensive: that the contact was not necessary and that he was clearly going out of his way to impose physical contact upon Duncan. Demanding that Duncan draw an object that was a crude sexual visual pun in order to apply for a higher-paying job, when male applicants had to draw automotive parts, became "a request to draw a planter." Posting a caricature of Duncan herself in the public area of her workplace depicting her as a harpy who hated sexual intercourse was disregarded as "teasing in the form of a poster."[41]

The *Duncan* court clearly minimized the incidents Duncan described in her testimony before the district court. The court glossed over Duncan's distress by stating that she doubtless was made "uncomfortable" and the conduct was "immature," but that the incidents did not "alter the conditions of her employment."[42]

CONCLUSION

It is notable that a common reason given for why juries make better judges of employment conditions is that appellate judges, appointed by Presidents to life terms, perhaps do not have the clearest picture of how a reasonable person

38. *Harris*, 510 U.S. at 21.
39. *Id.* at 23.
40. *Duncan*, 300 F.3d at 935.
41. *Id.* at 935.
42. *Id.*

perceives and reacts to a work environment. Even other judges have acknowledged this: For example, the Second Circuit noted that a judge "usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace."[43] When one of the most discussed developments in sexual harassment law is the move among some courts to a standard of the "reasonable woman" rather than the "reasonable person,"[44] to better understand how a woman is affected by sexual harassment, it seems odd to say the least that the judgment of relatively privileged men who serve as the heads of an exceedingly professional workplace is declared to be more accurate as to the judgment of a reasonable person than twelve citizens taken from varying walks of life and types of professions and offices.

Finally, the opinion in *Duncan* demonstrates one of the most troubling aspects of overturning jury verdicts as a matter of law: the lowest common denominator effect. The court argued that "numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here," then recited a laundry list of the most appalling examples available.[45] Because telling an employee "your elbows are the same color as your nipples," or saying that if an employee waved at police officers people would think she was a prostitute, or asking a supervisee out and then repeatedly trying to kiss her at work was not enough to support a claim of hostile work environment sexual harassment, the court seemed to believe, it would not be fair to allow Duncan's claims to proceed.[46] Every denial of a sexual harassment charge is thus used to bolster the preliminary dismissal of future charges in a crude balancing test: if you cannot show that your new charges are substantially more offensive and chronic than all these examples, you may not argue those claims before a jury.

The *Duncan* opinion thus demonstrates the serious flaws in the current interpretation of hostile work environment sexual harassment claims. Misunderstanding a grant of analytic power to the jury as a gap in the law to be filled, the panel of the Eighth Circuit that reversed the judgment favorable to Diana Duncan created a model of why the analytic power was granted to the jury in the first place. The jury is the ideal evaluator of whether a set of incidents created a hostile work environment, because the jury is made up of a variety of people, both male and female, who work in a variety of workplaces and have a breadth of experiences upon which to draw. The average slate of judges, predominantly male and working in the same atypical office, simply do not have the characteristics that Congress had in mind when giving juries the

43. Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998).
44. *E.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991).
45. *Duncan*, 300 F.3d at 934.
46. *Id.* at 924-25.

power to issue judgments in sexual harassment suits. Appellate review is intended to be a check upon judgments that are "disproportionate to the defendants discriminatory conduct or the plaintiffs resulting loss,"[47] not a new application of an overly rigorous standard.

47. H.R. REP. NO. 102-40, pt.1, at 72 (1991) *reprinted in* U.S.C.C.A.N. 549, 610.