DEVELOPMENTS IN THE LAW—
GENDER, EMPLOYMENT, AND THE LAW

INTRODUCTION

In the thirty-two years since the enactment of Title VII of the Civil Rights Act of 1964 (Title VII), it has become clear that its drafters gave little thought to the relationship between gender and employment. The statute's vague language and sparse legislative history forces courts to address issues even the most prescient could not have foreseen thirty years ago. As women have firmly established themselves in the workplace, the issues have increased in complexity, further exasperating those who seek easy answers in the text of Title VII and its sister statutes.

The increased participation of women in the workplace is at the heart of several current debates in employment law. First, in response to both Title VII and the increased marketability of women, public employers began instituting affirmative action programs for women in the 1960s. While courts have traditionally viewed such programs with a benign eye, the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena*,[1] suggests such a view may no longer be constitutional.[2]

1. 115 S. Ct. 2097 (1995).

2. The *Adarand* Court's rejection of intermediate scrutiny for any race-based classification creates an interesting anomaly, one noted by Justice Stevens in his dissent. Under current Supreme Court jurisprudence, race-based classifications that benefit minorities are subject to more exacting scrutiny than gender-based classifications. *Id.* at 2122. This seems to ignore the primary purpose of the Equal Protection Clause; *i.e.*, ending discrimination against minorities.

Constitutional or not, affirmative action has not been a panacea for women. Gender still plays a significant role in determining how much one earns and the job position one holds. How much of a role gender plays is difficult to determine; and perhaps this difficulty best explains why little has been done to remedy this disparity.

One problem area the law has attempted to remedy is the difficult balancing act men and women with families must perform to succeed in the workplace. Time taken to spend bearing and caring for a child is time spent away from work, often resulting in missed opportunities and lower pay. Unfortunately, federal attempts to reduce this impact through the enactment of the Pregnancy Discrimination Act (PDA)[3] and the Family Medical Leave Act (FMLA)[4] have not been altogether successful. The demands of family still prevent many, both male and female, from advancing as far in the workplace as they otherwise would.

The past ten years have also seen a change in sexual harassment issues. Since the Supreme Court recognized "hostile environment" harassment in *Meritor Savings Bank v. Vinson*,[5] litigants have forced courts to address issues of increasing subtlety. Whether the law should prohibit same-gender harassment, impute liability to individual supervisors and prohibit certain kinds of speech in the workplace are questions that deeply divide. Unfortunately, Title VII's vague language and scant statutory history forces courts to interpret the statute without guidance from the statute's drafters.

This piece addresses current developments in the law of gender and employment, focusing on six areas in which the legal response to increased female participation in the workplace is unclear or inadequate. These areas track the role of the employer-employee relationship, beginning with programs designed to increase female participation in the workplace, and then expanding to explore issues involving pay, promotions, relationships with other employees and, finally, the relationship of work and the family.

Part II discusses the continued viability of intermediate scrutiny of gender based affirmative action programs following *Adarand*. After examining the constitutional framework, it discusses the impact of *Adarand* on the lower courts. It concludes with a discussion of the

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1994).

4. 29 U.S.C. § § 2601-54 (1994).

5. 477 U.S. 57 (1986).

significance of gender-based affirmative action and proposes that employers take a more active role in educating themselves and their employees in this area.

Part III analyzes the traditional imbalance in pay between men and women. It begins with a discussion of the purpose and structure of the Equal Pay Act, emphasizing the Act's failure to close the "wage gap." It continues with a discussion of the comparable worth debate and explores several different options for implementing comparable worth systems.

Part IV examines the law's attempt to reconcile the often competing interests of family and employment. It begins with a discussion of the findings of the most recent attempt to remedy these competing interests. Focusing on the PDA and FMLA, it then describes the current federal law at issue in that conflict. Finally, it concludes by suggesting several changes that could be made to the FMLA that would better serve its purpose.

Part V examines the question of individual liability for sexual harassment under Title VII. It analyzes the split in recent court decisions in light of the purpose of Title VII and its limited legislative history. It concludes that Title VII's remedial purpose mandates that individuals be liable for their own sexual harassment actions.

Part VI analyzes a new defense to sexual harassment claims in which defendants argue that the First Amendment shields their harassing speech. It first examines judicial approaches to the particular arguments made in several cases. It then outlines the strengths and weaknesses of the contention that Title VII unconstitutionally prohibits protected speech. It concludes that such an argument rests on a misconception of Title VII's purpose and its impact on speech.

Part VII considers the question of whether Title VII prohibits same-gender harassment. It begins with a comparison of the reasoning of courts that allow same-gender harassment claims with the reasoning of courts that do not. It then examines the particular problem of Title VII and homosexual same-gender harassment. It concludes by suggesting an alternative approach be used by courts, one friendly to same-gender harassment claims.