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Civil Rights Remedies For Gender-Motivated Violence Act

THE CIVIL Rights Remedies for the Gender-Motivated Violence Act of 1994 establishes a federal cause of action for victims of gender-motivated violence. This statute is only one component of the Violence Against Women Act of 1994 (VAWA),¹ a wide range of legislative initiatives aimed at curbing "the escalating problem of violent crime against women."² Due to the newness of VAWA only a handful of cases have thus far addressed its civil rights provisions. These initial cases have interpreted VAWA expansively, suggesting that its civil rights remedy will be an important tool in fighting gender motivated violence, and a valuable supplement to workplace sexual harassment laws.

VAWA's civil rights provision states: "[a] person . . . who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from such crimes] shall be



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liable to the party injured . . ."³ It defines, in relevant part, the term "crime of violence" as "an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in §16 of Title 18, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction . . ." Section 16 of Title 18, in turn, defines "crimes of violence" as follows:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing

Continued on page 6, column 3

Continued from page 1, column 2

the offense.

Finally, VAWA defines "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."

A person who commits a crime of violence motivated by gender "shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."

In addition, reasonable attorney's fees and costs of litigation are available under the Attorneys' Fees Award Act of 1976.⁴

Felonious Conduct

To be actionable under VAWA, the perpetrator's conduct must constitute a felony. The statute is silent as to whether the conduct must represent a felony under state or federal law, but courts have ruled that felonious conduct under either federal or state law is sufficient to establish the predicate offense under VAWA.⁵

Moreover, in determining whether a felony has been committed, courts have construed state and federal statutes in conjunction with one another. Thus, even if a state criminal code classifies a particular offense as a misdemeanor, the offense may be actionable under VAWA if it is punishable by imprisonment for a year or more.⁶

It is for the court to determine whether the asserted conduct constituted a felony, as a matter of law, while the jury is to decide, as a matter of fact, whether the asserted conduct occurred.⁷ The question whether a felony was committed, does not depend upon the alleged perpetrator having been criminally charged with a felony, or for that matter, with a crime at all. To the contrary, the statute specifically provides that "[n]othing in [VAWA] requires a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action"

Crisonino v. New York City Housing Authority illustrates this point. In *Crisonino*, a male superior, in a dispute with a female employee over the release of her paycheck, allegedly called her a "dumb bitch," and moments later, shoved her so hard that she fell backwards, sustaining injuries to her neck and arm, as well as severe psychological trauma.

The supervisor was criminally charged with assault in the third degree, a misdemeanor under New York law, which charge subsequently was reduced by the district attorney to harassment in the second degree. Defendants argued that the district attorney's decision to charge the alleged perpetrator with harassment in the second degree, a mere criminal offense under New York law, defeated the plaintiff's claim that the conduct was felonious.

The district court for the Southern District of New York rejected the Housing Authority's argument that the nature of the criminal charges

tact poses a "substantial risk of the use of physical force."¹²

Gender-Motivated

Under VAWA, a plaintiff, in addition to establishing the existence of a "crime of violence," must demonstrate that the predicate crime was "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."

VAWA does not apply to "random acts of violence unrelated to gender or . . . acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender."¹³ A crime is not gender motivated simply because the victim was woman; VAWA "requires subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender."¹⁴

The definition of gender-motivated crimes under VAWA is based upon Title VII of the Civil Rights Act of 1964, and 42 U.S.C. § 1981, the Civil War era statute prohibiting racial discrimination in the formation and execution of private contracts.¹⁵ Under those statutes, the court must evaluate the "totality of circumstances" to determine whether the act of violence was gender-motivated.¹⁶

As is true with Title VII and §1981 claims, bias can be proven by circumstantial as well as indirect evidence.¹⁷ Indicators that the defendant targeted the victim because of her gender include derogatory statements and epithets, patterns of behavior, and the nature and severity of the defendant's actions. S.Rep. at 52 (1993).

Other pertinent characteristics which Congress considered useful in determining whether gender-motivation bias exists include: "language used by the perpetrator; the severity of the attack (including mutilation); the lack of provocation; previous history of similar incidents; absence of any apparent motive (battery without robbery, for example), common sense" S.Rep. No. 197, 102d Cong., 2d Sess. 50 n. 72 (quoted in *Mattison v. Click Corp.*, No. 97-CV-2736, 1998 U.S. Dist LEXIS 720 (E.D.Pa. Jan. 27, 1998) * 25, n.19.)

While avoiding a per se rule, courts have almost uniformly held that allegations of crimes of sexual assault, sexual exploitation, unwanted sexual advances and rape are committed "because of" and "due, at least in part, to an animus based on the victim's gender."¹⁸

In *Mattison v. Click Corp. of America*, the employer allegedly sexually harassed and raped his female employee. The district court made short shrift of the employer's argument that his previous long standing sexual relationship with the plaintiff demonstrated an affinity, not animus, toward women. "[T]hese occasional pretensions of 'affinity' are completely overshadowed by detailed allegations of outrageous, humiliating and degrading behavior on the part of defendant

OUTSIDE COUNSEL

Violence Against Women Act of 1994

the employer when engaging in the offensive conduct.²²

• A victim of workplace sexual assault cannot recover damages under Title VII if the employer has fewer than 15 employees.

• A claimant must file her EEOC charge of discrimination within either 180 or 300 days from the discriminatory acts.

• Title VII has an administrative exhaustion requirement that prior to filing suit in court, a plaintiff bring a charge of discrimination with the Equal Employment Opportunity Commission, wait at least 180 days, and then obtain a right to sue letter from the agency.

• Title VII has a damages cap for pain and suffering and punitive damages.

These restrictions do not apply to the Civil Rights Remedies provision of VAWA. For example, under VAWA an employer or supervisor can be sued directly. Also, VAWA has no administrative exhaustion requirements. There is no restriction against filing suit where the place of employment has fewer than 15 employees, and the statute provides for unlimited compensatory and punitive damages, as well as equitable relief. Because the Act does not specify a limitations period, the federal catch-all statute limitations of four years likely would apply.²³

Conclusion

As recognition of the Civil Rights Remedies provision and its expansive remedies grows, the statute will undoubtedly be more widely used. The availability of a federal forum under VAWA, as well as attorney's fees, will make VAWA an attractive remedy to combat gender motivated violence.

The lessons of the federal judiciary's response to another expansive civil rights law, the Americans with Disabilities Act of 1991, 42 U.S.C. § 12101 et seq., may be instructive. In response to a flood of ADA litigation, the federal courts have read the statute's substantive provision narrowly and have been quick to dismiss cases on the threshold grounds that the individual's physical or mental condition does not meet the definition of a "qualified individual with a disability."²⁴

In order to avoid a similarly cramped interpretation of the statute, VAWA claims should be presented as something more than a federally-based tort remedy. Rather, practitioners should be mindful of the civil rights nature of VAWA claims. Thus, the courts should be reminded that VAWA, like other federal civil rights statutes, is aimed at protecting a vulnerable minority — women — whose right to be free from violence to date, has not been adequately safeguarded by state and local laws.

(1) Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, codified as 42

U.S.C. § 13931 et seq. The Civil Rights provision of VAWA is codified at 42 U.S.C. § 13981. This provision is also known separately as the Civil Rights Remedies for Gender-Motivated Violence Act of 1994. Pub.L. 103-322 § 40301.

(2) *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (quoting Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322, n.3 S. Rep. 103-138, 103rd Cong., 1st Sess.; Violence Against Women Act of 1993, 38 (Sept. 10, 1993)). See also Rossein, Merrick T., *Employment Discrimination: Law and Litigation* ("Rossein"), Ch. 35, Violence Against Women Act (West 1997); Goldscheid, Julie and Kraham, Susan, *Civil Rights Remedy of the Violence Against Women Act*, ("Goldscheid & Kraham") Clearinghouse Review (Aug.-Sept. 1995) 505.

(3) 42 U.S.C. § 13981(c).
(4) 42 U.S.C. § 1988(b).

(5) See *Doe v. Hartz*, 970 F. Supp. 1388, 1397 (N.D.Iowa 1997) ("*Hartz*"); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385, 392 n.8 (S.D.N.Y. 1997) ("*Crisonino*").

(6) *Hartz*, 970 F. Supp. at 1399. See also 18 U.S.C. § 3559(a) (an offense with a maximum term of imprisonment less than five years but more than one year is classified as a Class E felony).

(7) *Crisonino*, 985 F. Supp. at 393; *Hartz*, 970 F. Supp. at 1402. See, e.g., *Wesley v. Don Stein Buick, Inc.*, 985 F. Supp. 1288, 1300 (D.Kan. 1997) (where woman was chased off a car lot by agents making violent threats and wielding pens, the court held, as a matter of law, that a writing instrument may constitute a deadly weapon for the purpose of showing that the VAWA victim was subjected to the felony of aggravated assault).

(8) 42 U.S.C. § 13981(d)(2)(A).

(9) *Crisonino*, 985 F. Supp. at 392-93; see also *Wilson v. Diocese of New York of the Episcopal Church*, 96 Civ. 2400 (JCK), 1998 U.S. Dist. LEXIS 2051 * 40 (S.D.N.Y. Feb. 23, 1998).

(10) *Crisonino*, 985 F. Supp. at 392 ("bias and discrimination in the criminal justice system often deprives [sic] victims of violence motivated by gender of equal protection of the laws and the redress to which they are entitled" (quoting H.R. Conf. Rep. No. 103-711, at 385 (1994), reprinted at 1994 U.S.C.A.N. 1839, 1853 S.Rep. No. 103-138 at 149 (1993) ("Study after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men."))

(11) See *Hartz*, 970 F. Supp. at 1400.

(12) *Id.* at 1404.

(13) 42 U.S.C. § 13981(d)(1), (e)(1).

(14) *Hartz*, 970 F. Supp. at 1406 (quoting S.Rep. No. 103-138, at 49-50). See also S. Rep. No. 103-195, at 49-50 (1993) ("The committee is not asserting that all crimes against women are gender motivated. As discussed below, Title III requires, subjective proof on a case-by-case basis that the criminal conduct was motivated by the victim's gender.")

(15) *Id.* at 1405 (citing S.Rep. 103-138 at 52-53).

(16) *Crisonino*, 985 F. Supp. at 391.

(17) S. Rep. at 52 (1993).

(18) *Mattison v. Click Corp. of America, Inc.*, 1998 U.S. Dist. LEXIS 720 (Jan. 27, 1998); *Doe v. Hartz*, 970 F. Supp. at 1406; *Anisimov v. Lake*, 982 F. Supp. 531, 541 (N.D. Ill. 1997); but see *Bronkhal v. Virginia Polytechnic and State University*, 935 F. Supp. 779, 783, 784 (W.D.Va. 1996) ("[a]l rapes are not the same"; "stranger rape generally more likely than date rape involves gender bias").

(19) *Mattison*, 1998 U.S. Dist. 720 * 24 (quoting *Bronkhal*, 935 F. Supp. at 785).

(20) *Hartz*, 970 F. Supp. at 1408 (quoting *EEOC v. Former Bros. Co.*, 31 F.3d 891, 897-98 (9th Cir. 1994) (citation omitted in the original)).

(21) See *Tomka v. Seiler Corp.*, 66 F.3d at 1313; 16 (2d Cir. 1995) (Title VII does not subject individuals to liability).

(22) See *Kariban v. Columbia Univ.*, 14 F.3d 773 (2d Cir.), in *Merritt Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), the Supreme Court stated that traditional agency principles apply in deciding employer liability for hostile environment, sexual harassment claims. The Court has an opportunity to clarify the contours of an employer's liability for its supervisor's sexually offensive conduct in the case pending before it, *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), cert. granted, 118 S. Ct. 438 (1997).

(23) See *Rossein* at 35-36.

(24) 42 U.S.C. § 12111. For a discussion of the courts' interpretation to date of the term "qualified individual with a disability," see Lee, Michel, *Searching for Patterns and Anomalies in ADA Employment Constellation: Who Is A Qualified Individual with a Disability and What Accommodations Are Courts Really Demanding?* 13 Labor Lawyer 149 (1997).

brought against a defendant can determine whether a defendant's acts constitute a "crime of violence" under VAWA.⁹

The court noted that if it were to accept the Housing Authority's argument, local prosecutors effectively would be given a "veto" over the viability of the victim's federal civil rights claim. Such a result would be wrong headed since Congress had established the federal remedy for violence against women, in part, to compensate for the local criminal justice system's inadequate response to domestic violence and other gender-motivated crimes.¹⁰

The *Crisonino* court denied defendants' motion for summary judgment, holding that a reasonable jury could believe that the Housing Authority official had committed the uncharged felony of assault in the second degree, or assault with intent to cause serious physical injury to another. The district court observed that the plaintiff had presented medical proof records of the seriousness of her injuries, and that Crisonino, an architect, could not engage in manual drafting for a year after the assault.

Crime of Violence

To be actionable under VAWA, it is not enough that the conduct be felonious; the offense, whether against the victim, or property, must also be a "crime of violence."¹¹ Pursuant to 18 U.S.C. §16, a "crime of violence" may occur even in the absence of physical force or the threat of physical force so long as it is the type of crime where there was "a substantial risk that physical force" may have been used.

In *Hartz*, a parishioner accused a priest of grabbing her during evening mass, pulling her into him, kissing her neck and rubbing his hand up and down her back. The victim claimed the priest's actions constituted the crime of "sexual exploitation by a counselor or therapist."

Although the crime represented an aggravated misdemeanor under state law, it carried with it a maximum penalty of two years' imprisonment, making it a felony under federal law. The district court also held that the priest's alleged conduct, even though it did not involve physical force or threatened force constituted a crime of violence, pursuant to 18 U.S.C. § 16, because non-consensual sexual con-

duct, which, if proven, demonstrates 'disrespect for women in general and connects this gender disrespect to sexual intercourse.'¹²

In *Hartz*, the district court held that unwanted sexual advances generally are sufficient to show gender-motivated animus. Quoting from a Ninth Circuit sexual harassment case, the district court made the point that regardless of the precise motive of the harasser, repeated unwanted sexual advances necessarily demean the victim:

Individuals who engage in sexual harassment may have different motives. Sometimes, an employer or supervisor may use his power within the company's hierarchy in order to gratify his sexual desires. When an employee becomes the victim of her boss's unwanted sexual attention, she may be forced to tolerate his sexually harassing conduct for fear that her job or her advancement in the company are at risk. A woman in this circumstance may reasonably feel subordinated and belittled even though the harasser's primary purpose is to seduce her rather than to demean her or cause her anguish and distress. . . . In other circumstances, however, sexual harassment may be symptomatic of gender-based hostility, the employer or supervisor using sexual harassment primarily to subordinate women, to remind them of their lower status in the workplace, and to demean them. In this latter circumstance, the "sexual" element of the harassment is secondary.²⁰

It is well established that Title VII of the Civil Rights Act of 1964 makes unlawful a sexually hostile environment in the workplace. However, gaps exist in Title VII's protections against sexually motivated workplace violence:

- The majority of circuit courts, including the Second Circuit, have held that individuals are not liable under Title VII,²¹ making the perpetrator of the workplace violence immune from suit under the federal sex harassment protections.

- An employer is not liable for the sexually violent acts committed by a supervisor or co-employee unless the employer knew or should have known of the harassment and did nothing to stop it, or the supervisor was acting with the real or apparent authority of

Cases Filed With the Court of Appeals

Special to the Law Journal

ALBANY — The New York Court of Appeals yesterday issued its weekly list of appeals filed during the weeks ended June 4 with descriptions of key issues in each case.

The Court reminded that some of these filed appeals may never reach decision on the merits because of dismissal on motion, sua sponte, or for time deficiencies or because of stipulated withdrawals by the parties. Also, some counsel fail to file timely jurisdictional statements and thus the list should not be treated as comprehensive for any particular week.

The Court also calls attention to Rule 500.11(e), which provides criteria to qualify as amici curiae to present views to the court. The subject matter of these newly filed cases may suggest appropriate motions and participation which the Court welcomes. Motions for amicus curiae relief must be made promptly and those interested are urged to contact the Clerk's office for information on the current calendar status of the appeal.

Following is the new list of appeals:

MOMAH, MATTER OF, v. ROGERS, et al.: Third Dept. App. Div. order of 1-29-98; dismissal of petition; leave to appeal granted by Court of Appeals, 5-14-98; Criminal Procedure — Doctor's Right to Transactional Immunity (CPL 190.40) for Producing Subpoenaed Records Compiled in the Course of Solo Practice and Used as Grand Jury Evidence; App. Div., in a proceeding commenced there, dismissed the petition to enjoin respondents from proceeding with prosecution on the indictment.

AMIEL (MELVIN), PEOPLE v.: Second Dept. App. Div. order of 1-26-98; modification; leave to appeal granted by *Wesley, J.*, 5-19-98; Criminal Procedure — Searches and Seizures; Suppression — Standing to Contest Execution of Pen Register Order; County Court, Rockland County, granted defendants' separate motions to suppress evidence; App. Div. modified as to defendant Amiel and denied the motion.

ANDRIELLO (JOHN), PEOPLE v.: Second Dept. App. Div. order of 1-26-98; modification; leave to appeal

granted by *Wesley, J.*, 5-19-98; Criminal Procedure — Searches and Seizures; Suppression — Standing to Contest Execution of Pen Register Order; County Court, Rockland County, granted defendants' separate motions to suppress evidence; App. Div. modified as to defendant Andriello and denied the motion.

THE CITY OF NEW YORK v. CROSS BAY CONTRACTING CORP., et al. AND COLONIA INSURANCE COMPANY, et al.: First Dept. App. Div. order of 9-16-97; modification; leave to appeal granted by App. Div., 5-19-98; *Llens* — Priority; Subrogation of Surety Who Had Made Payment on Bond in Connection With Public Improvement Project to the Rights of Owner/Obligee on Bond; Supreme Court, New York County, inter alia, granted plaintiff's cross motion to amend the interpleader complaint and denied Colonia Insurance Company's cross motion for summary judgment; App. Div., inter alia, modified and granted Colonia's cross motion for summary judgment for the reduced amount subject to distribution ordered by Supreme Court.

DANCER v. BERGMAN and SPORTS EYE INC.: Second Dept. App. Div. order of 1-20-98; affirmation; appeal taken pursuant to CPLR 5601(b); sua sponte examination whether a substantial constitutional question is directly involved; Torts; Defamation — Alleged Expressions of Opinion — Summary Judgment; Plaintiff's Burden to Show Actual Malice; Supreme Court, Westchester County, granted defendants' motion for summary judgment dismissing the complaint; App. Div. affirmed.

GARCIA (RAPHAEL), PEOPLE v.: Second Dept. App. Div. order of 2-17-98; affirmation; leave to appeal granted by *Ciparick, J.*, 5-26-98; Criminal Procedure — Right to Counsel; Conduct Without Counsel of Proceeding to Terminate Defendant's Participation in Drug Treatment Program; Deferred Sentence — Defendant's Liberty Interest; Preservation; Supreme Court, Kings County, revoked appellant's participation in an alternative drug treatment program; App. Div. affirmed.