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From North to South Country: Race, Gender and Immigration and the Role of Unions in the Sanitized Workplace

Ruben J. Garcia
University of Nevada, Las Vegas -- William S. Boyd School of Law

FROM NORTH TO SOUTH COUNTRY: RACE, GENDER, IMMIGRATION, AND THE ROLE OF UNIONS IN THE SANITIZED WORKPLACE

By Ruben J. Garcia*

INTRODUCTION

Professor Vicki Schultz's ground-breaking article, *The Sanitized Workplace*,[1] questions whether all sexual conduct is inappropriate in the workplace, whether sexually-charged work environments necessarily disadvantage women, and whether sanitizing the workplace of sexuality impedes gender equality.[2] Her article proposes that a less sanitized workplace with less over-reaction to sexuality would allow for more freedom of sexual expression and be more advantageous to women.[3] According to Professor Schultz, the misuse of sexual harassment law may lead to increased segregation and employers' unwillingness to hire women.[4] In many workplaces today, where office romances are seen as a litigation threat instead of a natural occurrence, sexual harassment laws prevent the realization of a fully human workplace.[5]

Despite recent progress, sexual harassment remains a major problem in the workplace.[6] As Professor Schultz's article

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* Associate Professor of Law, California Western School of Law, San Diego, California. I thank Professors Susan Bisom-Rapp and Julie Greenberg for inviting me to participate in this Symposium. Thanks also to Emma Bennett-Williams, California Western Class of 2006, for her research help on this article. Finally, thanks to my wife Tori for her advice and suggestions.

1. Vicki L. Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

2. *See* Julie A. Greenberg, *Sexuality at Work: Sanitized Workplaces and Gender Equality*, SAN DIEGO LAWYER, July/Aug. 2006, at 12.

3. Schultz, *supra* note 1, at 2070.

4. *Id.* at 2135.

5. *Id.* at 2069.

6. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 766 (1998) (employer subject to liability for hostile work environment created by supervisor although employee suffered no tangible job consequences); Faragher v. City of Boca

describes, many of the landmark harassment cases involved one or a small number of women employed in male-dominated workplaces.[7] Professor Schultz's work seeks to: (1) empower women; (2) decrease the sex segregation that continues to exist in many workplaces; and (3) humanize the workplace to allow for romance or harmless flirting without fear of litigation.[8] Professor Schultz gives us a vision of what the workplace could be like. But in reality, the current workplace has multiple identities and is rapidly diminishing worker bargaining power.

While Professor Schultz contributes to realistically appraising workplace dynamics, I question whether her prescription is the right medicine in all situations. This Article begins by discussing whether majority rule in unionized workplaces makes instances of sexual harassment difficult to remedy by examining the real-life case that formed the basis for the movie *North Country*.[9] Next, the Article will discuss how re-inserting sexuality into the workplace affects same-sex or gender identity harassment. These issues are addressed in the recent Ninth Circuit Court of Appeals case, *Rene v. MGM Grand Hotel*.[10] Finally, this Article examines whether sexually de-sanitized workplaces might lead to the unintended consequence of more racial harassment.

I. THE SANITIZED WORKPLACE AND POWER IN NUMBERS

Professor Schultz acknowledges that in heavily sex-segregated areas, the healthy sexuality she advocates would not be appropriate—largely because women lack power in the

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Raton, 524 U.S. 775, 807-08 (1998) (setting standards for employer liability for hostile work environment); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (male on male harassment committed against oil rig worker, because of the worker's perceived sexuality, is discrimination based on "sex" in violation of Title VII); Harris v. Forklift Systems, Inc., 510 U.S. 17, 22-23 (1993) (opining that the effect on the employee's psychological well-being was relevant to determine whether the female equipment rental manager found her work environment abusive); Meritor Savings Bank FSB v. Vinson, 477 U.S. 57, 73 (1986) (establishing sexual harassment as a violation of Title VII).

7. Schultz, *supra* note 1, at 2139-40.

8. *See generally id.*

9. NORTH COUNTRY (Warner Brothers 2005).

10. Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2005) (en banc).

workplace.[11] However, power does not always follow when women, or any group, have large numbers in the workplace. Intrinsic legacies of power exist even in integrated workplaces, and the number of female workers may not translate to power in management. Indeed, even in gender homogenous workforces, hierarchies of sexual orientation and identity complicate the de-sanitization of the workplace.[12]

It is questionable whether meaningful bargaining can take place over the proper level of sex in the workplace when workers today increasingly have to bargain over wages, health care, and sometimes over the effects of globalization.[13] The traditional vehicle for worker power—collective bargaining—has waned, with union membership declining to less than twelve and a half percent in the private sector workplace, from a peak of approximately thirty-five percent in the 1950s.[14] Past examples of gender discrimination in unions show that collective bargaining has not always been effective in dealing with sexual problems in the workplace.[15] Nevertheless, collective bargaining can be an important way of dealing with gender discrimination.

Professor Schultz clearly recognizes the dynamics of workplace power, as her numerous influential publications show.[16] However, Professor Schultz's allocation of burdens

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11. *See* Schultz, *supra* note 1; *see also* ANNA-MARIA MARSHALL, CONFRONTING SEXUAL HARASSMENT: THE LAW AND POLITICS OF EVERYDAY LIFE (2006); THERESA M. BEINER, GENDER MYTHS AND WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW (2005).

12. *Rene*, 305 F.3d at 1061, 1064 (finding that a male butler employed with male co-workers and a male supervisor experienced sexual harassment because of his homosexuality).

13. *See* Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 66 (1995).

14. *See* Michelle Amber, *BLS Reports Percentage of Workers in Unions Still 12.5 Percent, But Overall Numbers Up, Daily Lab. Rep.* (BNA), Jan. 23, 2006, at AA-1; NANCY F. GABIN, FEMINISM IN THE LABOR MOVEMENT: WOMEN AND THE UNITED AUTO WORKERS, 1935-1975, at 225 (1990).

15. Marion Crain & Ken Matheny, *"Labor's Divided Ranks": Privilege and the "United Front" Ideology*, 84 CORNELL L. REV. 1542 (1999); EEOC v. Mitsubishi Motor Mfg. of Am., 990 F. Supp 1059 (C.D.Ill. 1998) (wherein the E.E.O.C. brought action for pattern and practice of sexual harassment since Mitsubishi ignored most (if not all) of its female employees' complaints).

16. Vicki Schultz, *Talking About Harassment*, 9 J.L. & POL'Y 417 (2001); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Vicki

based upon the gender integration at the workplace misses the power dynamics that sometimes occur even in integrated workplaces. Schultz's proposal comes at a time when unions, the traditional vehicle for workers to increase their power, are on the ropes. Even in areas where unions are strong, they have often crossed the line from fostering a sexually healthy environment to a sexually pathological workplace.

A good example of a strong union failing to preserve a healthy sexual environment in the workplace is depicted in the recent feature film *North Country*.[17] The film dramatizes the true struggle of female mine workers in Northern Minnesota against sexual harassment, which culminated in the first class action in a sexual harassment case.[18] The film depicts the female miners' battle with the male coworkers who resented the presence of women in the mines, as well as the women's struggle against the union, which tended to side with the male majority's version of the facts.

North Country, though a dramatization of certain events, depicts an unfortunately typical account of the tensions created by the union's status as a majoritarian institution charged with protecting the interests of all members. Several scholars have examined this tension and the legal structures that serve to create it.[19] The consensus view is that—notwithstanding

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Schultz & Stephen Petterson, *Race, Gender, Work and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992).

17. NORTH COUNTRY, *supra* note 9.

18. Jensen v. Eveleth Taconite Co., 824 F. Supp. 847 (D.Minn. 1993); *see also* CLARA BINGHAM & LAURA LEEDY GANSLER, CLASS ACTION: THE STORY OF LOIS JENSEN AND THE LANDMARK CASE THAT CHANGED SEXUAL HARASSMENT LAW (2002); RAYMOND F. GREGORY, UNWELCOME & UNLAWFUL: SEXUAL HARASSMENT IN THE AMERICAN WORKPLACE (2004) (discussing *Jensen*).

19. *See, e.g.*, Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993); Maria L. Ontiveros, *A New Course for Labour Unions: Identity Based Organizing as a Response to Globalization*, *in* LABOUR LAW IN AN AGE OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 417 (2002); Mary O'Melveny, *Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harassment Complaints by Represented Employees*, 15 LAB. LAW 321 (2000) (addressing sexual harassment complaints by represented employees and unions defending the accused more than protecting the accusor); Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMPL.

majoritarian politics and inadequate legal protections—unions can and should do more to protect women and minorities from harassment and discrimination.

From the perspective of organized labor, it is unclear whether a less sanitized workplace would help unions in organizing a greater number of women and people of color into its ranks. On one hand, Professor Schultz's thesis represents an opportunity to de-regulate sexual harassment law, which many believe has served to drive a wedge through union solidarity. But on the other hand, many would look to the *North Country* experience as an example of the physical and psychological violence that resulted before law triumphed where union solidarity failed.[20]

Schultz presents compelling evidence that sexual harassment law is sometimes used as a reason for ridding the employer of union adherents or activists.[21] While this might be a reason to ask whether sexual harassment law is serving its purpose, the better question is whether the law of retaliation is to blame for the misuse of protective labor laws.[22] Although Schultz cites to several arbitration cases, the tests arbitrators use for retaliation will inevitably be the same employer-friendly tests the courts use.[23] Thus, the real problem may lie with the way

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L. 1 (1999) (discussing the wedge between women and unions).

20. *See generally* BINGHAM & GANSLER, *supra* note 18, at 236-41.

21. Schultz, *supra* note 1, at 2132-35; *see also* Beth A. Quinn, *The Paradox of Complaining: Law, Humor and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151 (2000); David M. Engel & Frank W. Munger, *Re-Interpreting the Effect of Rights: Career Narratives and the Americans with Disabilities Act,* 62 OHIO ST. L.J. 285 (2001) (finding that relatively few rights violations actually lead to explicit or formal invocations of the law; the primary effect of the ADA on careers can be profound, but is primarily indirect or symbolic); L. Camille Hebert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 62 INDIANA L.J. (forthcoming 2006); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment,* 83 CORNELL L. REV. 1169 (1998) (discussing sexual harassment being used to preserve male dominance).

22. *See generally* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006).

23. *See* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) (holding that an employee must demonstrate that the discrimination was a motivating factor in deciding not to rehire him); Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, 1087 (1980) (holding that in a dual-motivation case, the employee must establish that the protected conduct was a

courts and arbitrators decide cases, rather than with the law itself.

Aside from sexual discrimination and harassment laws, there are few mechanisms and institutions to protect working women in asymmetrical power situations. In theory, organized labor could play a larger role in protection. However, unions have sometimes perpetuated the asymmetrical power relationship, rather than provide protection for women. This commentary argues that sexual harassment laws are needed because the inherent power dynamic in the workplace leaves women vulnerable, even when unions are present. And even in the most gender-integrated workplaces, power dynamics will still exist.

Schultz's argument to build incentives into the law that encourage employers to integrate has particular currency in light of the increasingly global demographics of the workforce. As unions seek to organize in the new workplace, their new recruits may be more comfortable in the kind of sexualized workplace that Schultz describes because of their respective national origins. Thus, they might favor the kind of deregulated regime Schultz favors. New members might also be attracted to collective bargaining as a way to legislate "hostile work environment" protections by contract, rather than by statute.

However, the deregulated approach fails to offer much to the labor movement. First, it is not clear that most immigrant workers are looking to the unions as a way to protect against discipline for sexualized behavior. Second, it is quite likely that white women have been losing interest in unions because of their perceived inaction toward sexualized behavior. Finally, unions have more to gain by winning sexual harassment protections through legislation rather than at the bargaining table.

There have been several well-publicized examples of discrimination in unionized workplaces. For instance, *Equal Employment Opportunity Commission v. Mitsubishi Motor Manufacturing of America*, settled in the late 1990s, provides a good example of a workforce where a union was unable to

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motivating factor, and once established, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct).

prevent widespread harassment.[24] For unions, sexuality at work might be best dealt with through negotiation and alternative dispute resolution, rather than litigation. The more ambiguity taken off the bargaining table, the more bargaining power unions will have. This is one of the reasons unions have supported the enactment of protective labor legislation in the past century.[25]

II. GENDER AND SEXUAL IDENTITY AND THE HOMOGENOUS WORKPLACE

While Schultz's "power in numbers" analysis might work for women in some workplaces, sexual minorities (men or women) may not find a sexualized workplace.[26] The case of *Rene v. MGM Grand Hotel* shows that same sex harassment might not be prevented in a "de-sanitized workplace."[27] In this case, Medina Rene was an openly gay man who was subjected to sexual harassment over a two-year period while working as a butler in the MGM Grand Hotel in Las Vegas.[28] His harassment included his supervisor and fellow employees calling him "sweetheart," and "muñeca" (Spanish for "doll"), telling crude jokes, and giving sexually oriented "joke gifts."[29] They also forced him to look at pictures of naked men, whistled, and blew kisses to him.[30] On numerous occasions, according to Rene, he was caressed and hugged by his coworkers.[31] His coworkers also

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24. E.E.O.C. v. Mitsubishi Motor Mfg. of Am., 990 F. Supp 1059 (C.D.Ill. 1998); *see also* Marion G. Crain, *supra* note 13; Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in Unionized Workplaces*, 54 HASTINGS L.J. 79 (2002) (discussing new forms of representation that might be more responsive to the needs of gender and race minorities).

25. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, in* FEMINISM CONFRONTS HOMO ECONOMICUS (Martha Albertson Fineman, ed. 2005); JOAN WILLIAMS, UNBENDING GENDER (2000).

26. On the other hand, Professor Zachary Kramer has argued that the sanitization of the workplace has a negative effect on sexual minorities because they are unable to share details about their personal lives. Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII,* 2004 U. ILL. L. REV. 465 (2004).

27. Rene v. MGM Grand Hotel, 305 F.3d 1061 (9th Cir. 2005) (en banc).

28. *Id.* at 1064.

29. *Id.*

30. *Id.*

31. *Id.*

"grabbed him in the crotch and poked their fingers through his clothing."[32]

Even though Rene believed he was being harassed because of his sexual orientation, he brought a lawsuit under Title VII of the Civil Rights Act of 1964 alleging that he was "discriminated [against] because of my sex, male."[33] The district court granted summary judgment in favor of MGM Grand, largely based on Rene's admitted belief that his sexual orientation, not his gender, was the underlying cause of the harassment.[34] Title VII prohibits discrimination "because of such an individual's . . . sex . . . ."[35] If Rene was not discriminated against because of his male gender, he would not meet the prima facie case and his claim could be disposed of on summary judgment.[36]

The Ninth Circuit Court of Appeals, sitting en banc, reviewed the decision of a three-judge panel that affirmed the trial court's dismissal of Rene's lawsuit.[37] The court reversed summary judgment for the employer, holding that Rene's subjective belief in the reason for his harassment neither provided nor precluded the Title VII claim.[38] To find in Rene's favor, the court relied on the United States Supreme Court's finding that a Title VII action could occur entirely among men as occurred in *Oncale v. Sundowner Offshore Services, Inc.*[39] Two judges in a concurring opinion also mention reliance on the gender stereotyping theory established in 1989 in *Price Waterhouse v. Hopkins.*[40]

The *Rene* case speaks to Schultz's analysis. The case shows that in order to "de-sanitize" or "re-sexualize" the work place, we must first determine what "sex" is. Even the composition of the butler staff, which was exclusively male, shows that gender diversity or even male uniformity will not prevent sexual

32. *Id.*
33. *Id.*
34. *Id.*
35. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2).
36. *Rene*, 305 F.3d at 1064.
37. *Id.* at 1061.
38. *Id.* at 1066, 1068.
39. *Id.* at 1066-67 (citing Oncale v. Sundowner Offshore Services Inc., 523 U.S. 75, 81 (1998)).
40. *Id.* at 1068 (Pregerson, J., concurring) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1998)).

harassment from occurring. Further, the workforce at the MGM Grand Hotel is unionized.[41] Even in unionized, diverse workplaces, those presumably in power might still feel over-sexualized.

III. WOULD A DE-SANITIZED WORKPLACE WORK FOR RACIAL MINORITIES?

Schultz's ideas also fit uncomfortably into the world of racial harassment, which is perhaps equally as serious and problematic as sexual harassment. Do laws against racial harassment prevent the advancement of minorities in the workplace? Is there something missing from the workplace without "race talk?" Perhaps there are clear differences between race and sex harassment. Racism can almost never be mistaken as welcome attention. Nevertheless, there are certainly examples of racist jokes that perhaps start "in good fun" but soon degenerate into racial harassment. There are also numerous examples of severe racial harassment, even in integrated workplaces.[42] Thus, it is not clear that a change in the law would change the culture in many workplaces.

Free speech for racial and sexual harassers has been a hobby horse for libertarian thinkers for some time. A sexually de-sanitized workplace might lead to more questioning of laws against racial harassment. For some, this would be a good thing, since some have argued the laws violate First Amendment rights.[43] The intersecting identities of many workers make any solution to sexual harassment difficult to attain.[44]

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41. Hotel Workers Rising, http://www.hotelworkersrising.org/hotelguide/ (type "MGM Grand" in "Hotel Name" search box; then click the "Search" hyperlink) (last visited Nov. 2, 2006).

42. Aguilar v. Avis Rent a Car Sys., 980 P.2d 846 (Cal. 1999).

43. R.A.V. v. St. Paul, 505 U.S. 377 (1992) (opining that a municipality cannot punish racist symbolic speech); *see also Aguilar*, 980 P.2d at 866-67.

44. Tanya Kateri Hernandez, *The Intersectionality of Lived Experience and Anti-Discrimination Research*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 325 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005); Susan Sturm, *Law's Role in Addressing Complex Discrimination*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 35 (Laura Beth Nielsen & Robert L. Nelson, eds., 2005).

CONCLUSION

Regardless of their race or gender, workers seek power in their workplaces. As *North Country* and other examples illustrate, perhaps the need is for more race and gender sensitive organizations. Perhaps different forms of worker organization will lead to more power for women, racial minorities, and immigrants. These nascent employee groups offer some promise, but as I have argued in other work,[45] the groups are unlikely at present to offer the same protection that the threat of legal enforcement does.

Schultz's ideas are put to the test in cases where men, gay or straight, are the victims of harassment. Would men be more interested in breaking down some of the barriers of sexuality if they were in the minority in many workplaces? Professor Schultz's provocative thesis will continue to be debated by scholars and practitioners who have the best interests of women in the workplace at heart. Workers' rights in the global economy are under stress. Professor Schultz recognizes this when she writes:

> At a cultural level, we must seek ways to empower women to band together to renounce the association of femaleness with sexual shame, while, at a structural level, encouraging management to dismantle the patterns of gender inequality that produce their vulnerability. In a world in which some men seek to degrade women through sexual overtures and ridicule, women can reclaim some control by refusing to exhibit the sense of sexual humiliation and degradation the gestures are designed to inspire.[46]

The idea that collective action and unity can separate sexual indignity from vulnerability is a noble one. The history of social movements tells us that collective action and empowerment have been about the mobilization of shame rather than a legal regime that changed power dynamics. At the same time, the changing diversity of the workplace and its multiple identities means solutions to sexual harassment must also take into account new global realities. Workers in the 21st-century workplace need collective action and bargaining power, but they also need to utilize existing legal structures to their fullest extent.

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45. *See generally* Garcia, *supra* note 24.
46. Schultz, *supra* note 1, at 2171.