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Kepler v. Hinsdale Township High School District 86: Entering the Point of No Return

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CASE COMMENTS

KEPPLER v. HINSDALE TOWNSHIP HIGH SCHOOL DISTRICT 86: ENTERING THE POINT OF NO RETURN

IN *KEPPLER v. Hinsdale Township High School District 86*,¹ the United States District Court for the Northern District of Illinois denied the sexual harassment claim of a woman who had entered into a consensual sexual relationship with her boss. The court held that once the sexual relationship between the parties had ended, the plaintiff was precluded from recovering under Title VII for sexual harassment. The plaintiff, Rose Keppler, was employed by the school district as the Coordinator of Education Services, an administrative position. A sexual relationship developed between Keppler and Dr. Miller, who was the assistant principal of one of the schools in the district. The relationship continued for nearly four years, with Keppler receiving several promotions throughout this time.²

Although their sexual relationship terminated in the spring of 1986, Miller and Keppler saw each other socially on three more occasions. On the first occasion, in April, Keppler accompanied Miller to his parents' house. After driving back to his house, Miller invited Keppler inside. When she refused to accompany him, he became angry, and insisted that their sexual relationship should continue. After Keppler refused a second time, Miller threw Keppler's car keys in her lap, and stormed inside.³

1. 715 F. Supp. 862 (N.D. Ill. 1989).

2. She was promoted to Director of Special Services in 1982. In 1986, her responsibilities increased when she was promoted to Director of Curriculum, Instruction, Staff Development and Special Services. *Id.* at 864-65.

3. *Id.* at 865.

The next incident occurred later that month when Miller invited Keppler to join him for dinner with several other couples. Keppler agreed. After dinner, Miller again suggested that they return to his house for sex. Keppler refused again.⁴

In May, at the request of one of her friends, Keppler invited Miller to accompany her to a dinner party thrown by Keppler's friend. Miller agreed and attended the party with Keppler. This was the last time the two of them went out socially.⁵

In August, Miller began making negative comments to Keppler about her professional conduct. Eventually, Miller repeated these criticisms to Keppler's superior, District Superintendent John Thorson. With full knowledge of the turmoil between Keppler and Miller, Thorson transferred Keppler's office to a different school in the district, and suggested that she resign from her current position as Director of Curriculum. School Board President Richard Spiegel also advised Keppler to resign. Two months later, the Board terminated Keppler's position, ostensibly for financial reasons. She then was transferred to a position as a special education teacher, with a reduction in salary.⁶

Keppler brought suit against both Miller and District 86 for sexual harassment.⁷ The court held that Keppler was unable to prove that she had been sexually discriminated against. Therefore, the court granted the defendants' motion for summary judgment, and declined to consider whether the District was liable for Miller's actions.⁸

The *Keppler* decision merits attention because of the court's confused reasoning, questionable interpretation of precedent, and bias against Keppler in the opinion. This Comment analyzes these flaws and argues that the court should have found for Keppler.

I. HISTORY

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or potential employees on

4. *Id.*

5. *Id.*

6. *Id.* at 865-66.

7. Keppler requested relief under: 1) 42 U.S.C. § 1983 (1982) for sexual discrimination by Miller in violation of her equal protection rights; 2) section 1983 against the District for denial of her due process rights when firing her; and 3) Title VII of the Civil Rights Act of 1964 against District 86 for sexual discrimination for relying upon Miller's recommendation that she be terminated. *Id.* at 866.

8. *Keppler*, 715 F. Supp. at 866-70.

the basis of race, sex, religion, national origin or color.⁹ Sexual discrimination is also prohibited by the Equal Protection Clause of the United States Constitution.¹⁰ Whether a claim is based on Title VII or the fourteenth amendment, the plaintiff must prove he or she was discriminated against on the basis of sex.¹¹

An action for sexual harassment originates as a subset of sexual discrimination.¹² There are two types of sexual harassment. The first, called hostile environment sexual harassment, occurs when an employer subjects an employee to repeated sexual comments, innuendos or touching. As long as the sexual harassment alters the conditions of the employment and creates a hostile and abusive working environment, the employer's actual motivation is irrelevant.¹³ Litigation usually occurs when an employee is repeatedly exposed to such harassment, rejects the employer's advances, and then is either denied some type of promotion, demoted, or fired.¹⁴ However, sexual harassment also exists when an employee succumbs to her employer's sexual advances out of fear of being fired.¹⁵

The second type of sexual harassment is called *quid pro quo* sexual harassment. This "occurs when an employer expressly or impliedly makes sexual favors a condition for the employee to receive or retain job benefits, or deprives the employee of job benefits on the basis of the employee's refusal to engage in sexual rela-

9. The relevant portion of the statute states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

Title VII, 42 U.S.C. § 2000 e-2(a)(1) (1982).

10. U.S. Const. amend. XIV; see, e.g., *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986) (citing *Davis v. Passman*, 442 U.S. 228, 234-35 (1979)).

11. *Volk v. Coler*, 845 F.2d 1422, 1433, 1436-37 (7th Cir. 1988) (equal protection clause and Title VII do not require a plaintiff in a sexual harassment suit to show that defendant discriminated against women as a class, but that defendant discriminated against the plaintiff because of her membership in the class).

12. Thus, sexual harassment is one type of sexual discrimination. *Kepler v. Hinsdale Township High School Dist.* 86, 715 F. Supp. 862, 865 (N.D. Ill. 1989) (citing *Bertoncini v. Schrimpf*, 712 F. Supp. 1336 (N.D. Ill. 1989)).

13. *Kepler*, 715 F. Supp. at 866. Furthermore, a finding of sexual harassment requires no evidence of economic harm to the plaintiff. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67-68 (1986).

14. See, e.g., *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988) (plaintiff denied promotion and later sued employer and supervisor for sexual harassment).

15. This was the case in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

tions."¹⁶ In order to prevail in this type of action, an employee must prove:

(1) that the employee was a member of a protected class;

(2) that the employee was subjected to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors;

(3) that the harassment complained of was based on sex;

(4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and

(5) the existence of respondeat superior liability.¹⁷

In a *quid pro quo* action, one instance of discrimination is enough to give rise to a claim of sexual harassment.¹⁸

Because courts have infrequently addressed cases where the parties have previously been involved in a consensual romance, they have been uncertain in their resolution of the situation. *Koster v. Chase Manhattan Bank*¹⁹ involved a consensual affair between the employee and her supervisor. While the employee was fired after the affair ended, the decision to fire her was not her supervisor's, nor was there any evidence that the supervisor had recommended that she be terminated.²⁰ The court ruled there was no *quid pro quo* sexual harassment because the employee did not suffer any adverse consequences after the affair had ended; in fact, she was promoted several times thereafter and received salary raises more frequently than when the affair was ongoing.²¹ Moreover, the court also ruled that there was no hostile environment harassment because the employee could not prove that her supervisor had ever harassed her or that her participation in the affair was involuntary.²²

Another consensual relationship that turned sour was litigated in *Huebschen v. Department of Health and Social Services*.²³ David Huebschen had received a one-year probationary

16. *Kepler*, 715 F. Supp. at 866 (citing *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 648 (6th Cir. 1986)).

17. *Highlander*, 805 F.2d 644, 648 (6th Cir. 1986).

18. *Kepler*, 715 F. Supp. at 867.

19. 687 F. Supp. 848 (S.D.N.Y. 1988).

20. *Id.* at 861-62.

21. *Id.* at 861.

22. *Id.* at 862-63.

23. 716 F.2d 1167 (7th Cir. 1983).

promotion to a supervisory position, under the supervision of the defendant Jacquelyn Rader.²⁴ After the two had engaged in a "one-night stand," the relationship became strained. After Rader began making sexually insulting remarks about Huebschen, Huebschen told her he merely wanted them to be friends. Rader later told him there were problems with his job performance, and the probationary period was terminated at her request.²⁵

The United States Court of Appeals for the Seventh Circuit, in reversing the district court's verdict, held that this did not constitute sexual discrimination.²⁶ In order to prevail on such a claim, the plaintiff must show that he was intentionally discriminated against because of his membership in a particular class.²⁷ For instance, a man commits sex discrimination when he refuses to hire any women. However, it is not sex discrimination if a person is treated unfairly merely as an individual. An employer must act "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."²⁸

This was not a violation of the Equal Protection Clause because Rader did not intentionally discriminate against Huebschen because he belonged to the "class of men." There was also no evidence that Rader attempted to discriminate against other men in the workplace. Rather, Huebschen's treatment stemmed from his former relationship with Rader, of which his gender was merely coincidental.²⁹ "Thus the proper classification . . . was the group of persons with whom Rader had or sought to have a romantic affair. . . . As unfair as Rader's treatment of Huebschen may have been, we simply are not persuaded that the Equal Protection Clause should protect such a class."³⁰ Against this background, *Kepler* was decided.

II. *Kepler v. Hinsdale Township High School District 86*

In a memorandum opinion, United States District Judge

24. *Id.* at 1168.

25. *Id.* at 1169. Other evidence of harassment included the testimony of the plaintiff that Rader called him and threatened that he would lose all of his friends and be exposed as a chronic liar if he ever mentioned the real reason for his demotion. *Id.*

26. *Id.* at 1171.

27. *Id.*

28. *Id.* at 1171 (*quoting* Personnel Administrator v. Feeney, 442 U.S. 256 (1979) (footnote omitted)) (emphasis omitted).

29. *Id.* at 1172.

30. *Id.*

Brian Barnett Duff ruled that Keppler failed to prove any evidence of *quid pro quo* sexual harassment, and granted summary judgment for Miller.³¹ After an interesting narrative of the facts, the court began examining the merits of Keppler's three causes of action³² by explaining the distinction between *quid pro quo* and hostile environment sexual harassment.³³ Judge Duff noted that Keppler did not specify which type of harassment she was alleging. He determined that *quid pro quo* sexual harassment was intended by Keppler's allegations that Miller had embarked on a campaign to have Keppler removed from her position once she began rejecting his requests for sex. Consequently, Keppler was precluded from claiming hostile environment sexual harassment.

Next, the court held that in light of *Huebschen*, Keppler's *quid pro quo* argument could not prevail. The court interpreted *Huebschen* as applying only to *quid pro quo* cases.³⁴ It reasoned that employees who had entered into consensual relationship with their employers are estopped from asserting any type of *quid pro quo* claim. "[O]nce a person engages in consensual sex with an employer, the employee may not thereafter complain if the employer threatens termination as a penalty for ending the relationship."³⁵ However, hostile environment claims were still available to employees who had had consensual relationships with their employers after *Huebschen*.³⁶

The court then interpreted *Huebschen* as distinguishing between standard *quid pro quo* cases and retaliatory *quid pro quo* cases. Standard *quid pro quo* occurs when an employer expressly or impliedly conditions job benefits on the receipt of sexual favors, *i.e.*, "You have sex with me and you will get a raise . . ."³⁷ On the other hand, retaliatory *quid pro quo* occurs when an employer makes sexual advances without expressing or implying that job benefits are contingent upon complying. After rejection by the employee, the employer either fires or demotes the employee, or makes life miserable for the employee in retaliation for rejecting

31. *Keppler v. Hinsdale Township High School Dist.* 86, 715 F. Supp. 862, 872 (N.D. Ill. 1989).

32. *See supra* note 7.

33. *See Keppler*, 715 F. Supp. at 866-67.

34. *Id.* at 868.

35. *Id.*

36. *Id.*

37. *Id.*

the advances.³⁸

When a consensual relationship does not exist, courts do not distinguish between types of *quid pro quo* cases as both amount to sexual discrimination. However, the court stated that the distinction is vital when there has been a prior consensual relationship.³⁹ If the employer threatens reprisals should the sexual relationship not continue (*i.e.*, standard *quid pro quo*), then the employer is using gender as a basis for acting.⁴⁰ When the employer makes no threats in an effort to maintain the relationship, but only harasses the employee after termination of the relationship (*i.e.*, retaliatory *quid pro quo*), the employer is not acting on the basis of gender but rather, on the basis of a failed interpersonal relationship.

An employee who chooses to become involved in an intimate affair with her employer . . . removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting.⁴¹

Therefore, retaliatory claims create a presumption that no sexual harassment occurred. The presumption is only rebuttable by proof that the employer demanded further sexual relations before acting as he did.⁴²

Thus, Judge Duff reasoned that the existence of sexual discrimination ultimately depended upon the employer's motivations for acting. An employer who treats unfairly an employee who has rejected the employer's advances, has committed sexual harassment because it is wrong for the employer to feel differently about the employee because of the rejection.⁴³ But *Huebschen* taught that an employer who reacted because of a failed interpersonal relationship had every right to feel differently about the employee, and that this was not sexual harassment. Although Miller bore a grudge and "then embarked on a campaign to denigrate [Keppler] in the eyes of Superintendent Thorson, with the ultimate goal of having her removed from her administrative position,"⁴⁴ this was not actionable under *Huebschen*. The only way Keppler could

38. *Id.*

39. *Id.* at 868.

40. *See id.*

41. *Id.* at 869.

42. *Id.*

43. *Id.* at 869 n.4.

44. *Id.* at 869.

have prevailed was if she could have shown that Miller had threatened the denial of some benefit if the relationship did not continue (*i.e.* standard *quid pro quo*). Since Keppler could not show that Miller made any threats, her sexual discrimination claim failed.⁴⁵

III. ANALYSIS

The *Keppler* case gives new meaning to the term sexual harassment. It forges a standard in which *quid pro quo* sexual harassment cannot occur in consensual relationship cases unless the plaintiff can prove that the employer had threatened a denial of benefits if the relationship did not continue. However, the court's interpretation of prevailing case law, and its ruling in *Keppler*, is an example of skewed reasoning.

First, the court gave much more meaning to *Huebschen* than seems to have been intended. *Huebschen* did not distinguish between *quid pro quo* and hostile environment sexual harassment. Thus, Judge Duff's interpreting *Huebschen* to allow claims for hostile environment sexual harassment when a prior consensual relationship existed, but not to allow a *quid pro quo* claim is questionable.

Furthermore, the court's distinction between standard and retaliatory *quid pro quo* is troubling. *Keppler* seems to suggest that retaliatory *quid pro quo* is not considered to be harassment when there has been a prior consensual relationship. On the other hand, a standard *quid pro quo* claim was unavailable because implicit in the definition of standard *quid pro quo* is the idea that some type of threat had been made. Because no threat had been made and a prior consensual relationship existed, Judge Duff's interpretation of *Huebschen* foreclosed Keppler's claim.

Second, the court's reliance on *Huebschen* is unfounded because *Keppler* is factually distinguishable from *Huebschen*. It is true that no sexual harassment was found in the *Huebschen* case. In *Huebschen* the parties had a one-night stand, with no subsequent sexual requests by the employer, and thereafter the employee was fired.⁴⁶ In *Keppler*, although the four year affair had

45. *Id.* at 869-70. Regarding the other causes of action, Miller's request for sanctions pursuant to Federal Rule of Civil Procedure 11 was denied, and the court held that Keppler's due process rights were not violated since she did not have an entitlement to her administrative position. *Id.* at 870-72.

46. *Huebschen v. Department of Health and Social Servs.*, 716 F.2d 1167, 1169 (7th

ended, Miller requested sex from Keppler on two occasions. When she rejected his requests, Miller made a number of negative comments about her work to her supervisor.⁴⁷ Thus, it can be argued that this was sexual harassment because once the relationship ended, Miller's actions implied that if Keppler did not resume the relationship, there would be negative results. This was especially true since he contacted her more than once, and initially made the remarks to Keppler instead of to Superintendent Thorson. However, with *Huebschen*, a one-night stand arguably did not constitute a relationship, and further, there was not enough evidence to determine that the employee was actually demoted in retaliation for rejecting the employer.⁴⁸

Third, although *Huebschen* is binding, it is poorly decided. It is questionable why the existence of a prior consensual relationship should negate any later claim of sexual harassment. If the employee has ended the relationship, then any further advances by the employer are unwanted. If the employer then exerts his or her power to obtain sexual favors, or deprives the employee of potential benefits because the employee refuses the requests, then the employer is harassing the employee. Contrary to *Huebschen*, the employer should not be able to harass the employee, or use her power against the employee, simply because of a prior consensual relationship. The result is the same; the employer is punishing the employee for foregoing a sexual relationship with her.

Finally, Judge Duff's apparent bias against Keppler warrants some consideration. His attitude towards Keppler was first noticeable in his opening statement: "[Keppler] alleges sexual discrimination and due process violations, but what she really wants is to make others pay for her mistakes. She will not succeed here."⁴⁹ This attitude continues throughout the opinion. "In the fall of 1982, [Miller's] marriage was in trouble and he was seeking companionship and advice. Ms. Keppler provided them."⁵⁰ Judge Duff also attempted to give Miller the benefit of the doubt in some situations. After stating that Keppler might prevail if she could demonstrate Miller threatened her should the relationship not

Cir. 1983).

47. See *supra* text accompanying notes 3-4 & 6.

48. *Huebschen*, 716 F.2d at 1169.

49. *Keppler v. Hinsdale Township High School Dist.* 86, 715 F.2d 862, 864 (N.D. Ill. 1989).

50. *Id.*

continue, a footnote was inserted stating that had Keppler done so, "[Miller] still could have argued that it was her rejection of him, not her rejection of sex, that motivated his subsequent actions."⁵¹ Even after denying Miller's request for Rule 11 sanctions against Keppler, Judge Duff remarked:

Dr. Miller is understandably upset by Ms. Keppler's pleadings. An allegation of sexual retaliation is bad enough; when compounded with a claim that he was sexually abusing a woman in the workplace, it could prove devastating to a man who works closely with women every day, some only of high school age.

. . . Thus, while Ms. Keppler and her attorneys will have to live with pleading this case as something it is not, they do not have to pay sanctions for doing so.⁵²

Comments like these by Judge Duff were not only extremely unnecessary, but they were unprofessional. While Judge Duff was very careful to convey his feelings towards Keppler, he completely failed to take into account the fact that the relationship could have been as much Miller's mistake as Keppler's. Judge Duff's confused analysis of the law began to make sense once one considered his hostile attitude towards Keppler.

CONCLUSION

In sum, the *Keppler* decision was wrongly decided. The court read too much into the *Huebschen* decision, and its reliance on that case was misplaced. The existence of a prior consensual relationship should not make a difference in sexual harassment claims. Perhaps Judge Duff felt that he justified the result, but the opinion makes little sense, and all Judge Duff succeeded in doing was to embarrass Keppler. In the end, Keppler's claim for sexual harassment should have prevailed.

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51. *Id.* at 869-70 n.6.

52. *Id.* at 870.