



A Look at the Law

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Insurance Ramifications of Jones v. Clinton

By Michael Sean Quinn

Insurance agents are asked almost every day, "Do I need coverage for such-and-such a risk? If so, then at what price?" Obviously, in the area of commercial insurance, one big question in recent years pertains to coverage for sexual harassment.

There is even a relatively new coverage called "employment practices liability

insurance" (EPLI), which was designed to cover some forms of sexual harassment, wrongful discharge and a few other exposures, as well.

Oddly enough, the trial court's resolution of *Jones v. Clinton* sheds some light on those topics, even in California. Of course, this is only a district court decision; it arose in Arkansas; it is applying federal law as understood by the Eighth Circuit; and the only state law it applies to is that of Arkansas.

Nevertheless, it looks as if courts are losing patience with problematic sexual harassment cases, even if they do involve famous people. This fact means that while some insureds may very much need EPLI containing a duty to pay defense costs, many of them may have less need for large indemnity limits. Of course, some backward, beastly, block-headed insureds continue to need EPLI policies with huge limits.

Paula Jones' case was decided on summary judgment. This means that the court assumed that all disputes about the evidence would be resolved in Jones' favor. It did not hold that Jones was telling the truth. It simply assumed that she was.

Jones tells a troubling story. According to her, while President Clinton was governor of Arkansas, he arranged to have Jones, then a clerical-level employee of the state, brought to a Little Rock hotel room. She was on the job at the time. While she was there, Clinton dropped his trousers, exposed himself and said, "Kiss this." Jones immediately began reporting to her friends and relatives how distressing—indeed shocking—all this was.

According to Jones' story, Clinton made no further sexual overtures to her. She worked for the state for some considerable

period of time thereafter. Her job required her to go to the governor's office to deliver papers on a daily basis.

On rare occasions she even saw the governor. He was friendly, as was she. She says that a state trooper who was on the "Guard Clinton Squad" indicated that the governor had continuing sexual interest in her, but this inquiry was not expressly connected to Clinton himself.

Defining the terms

On the basis of these facts, Jones alleged that she had been sexually harassed and that she had suffered severe emotional injuries. The court disagreed. Sexual harassment in the workplace comes in two forms. First, there is quid pro quo sexual harassment.

Second, there is hostile environment sexual harassment. Federal law regulates these sorts of conduct. So does the law of quite a few states. Jones sued under federal law. In addition, she brought a state law claim under Arkansas law alleging intentional infliction of emotional distress.

Quid pro quo harassment occurs when a more senior official propositions a more junior employee on the basis that he will improve her lot if she has

sex with him, or on the basis that he will not improve her lot if she does not.


Quid pro quo sexual harassment is "this for that" sexual harassment. The "this" must be sex, and the "that" must be a specific job benefit or detriment. It is a barter arrangement. It converts receptionists, clerks, secretaries, junior managers, claims handlers and other subordinate women, into prostitutes. (In theory, men, too, can be harassed in this way, as can older subordinate women.)

Hostile environment harassment sometimes occurs when a senior official pesters a junior employee for sex so frequently or in such a manner that the workplace becomes a kind of hell in the mind of the employee. Quid pro quo sexual harassment overlaps hostile environment sexual harassment when inducement is a threat rather than the offer of a reward.

Hostile environment harassment does not even require a demand for sex. If a lawyer were to hang lewd pictures all over



The Clinton case raises a number of insurance questions, including how much EPLI an employer should have.



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his office or display perverse paraphernalia on every available relatively flat surface, this might well create a hostile environment for his female paralegal.

Lots of lewd remarks, the importation of strippers, repeated inquiries about undergarments, the request for backrubs, and the use of peep holes into locker rooms may also create hostile environments.

Grounds for dismissal

The district judge held that Clinton had not harassed Jones in either of these two senses. First, Jones could not truthfully say that he had made any offers to her or had made any threats. Hence, there was no quid, and there was no quo.

Second, Clinton's activities were not extensive enough to create a hostile environment. After all, they only occurred once—twice at the most. Moreover, he was not present in her office on a frequent basis. When she came to the general vicinity of his office, he was frequently not there, and she was in no way mistreated.

The general implication of these holdings is that hostile environment harassment requires more than a single incident and that quid pro quo harassment requires explicit exchange-offers.

If implicit "this" for "that" offers were sufficient, Jones' testimony could estab-

lish quid pro quo harassment enough to go to trial. She stated that Clinton several times indicated that he was friendly with Jones' boss and that if she needed any help with him for having been absent from her job, she should call him, and he would help out. Surely, this is a quid-pro-quo-ish hint.

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The holdings and the reasoning of the court are good news for employers who are wondering when they face liability for sexual harassment.

The *Jones* decision, a highly publicized one, announces that the courts are tightening up on what counts as harassment.

This fact also means that employers may need less "indemnity" coverage for harassment claims than they once did.

Many national groups are decrying this decision. One feminist leader has described it as establishing a "one free feel" rule. This observation is false. Every grope is a battery. There are no free batteries. Still, it may capture the spirit of the times.

Moreover, the court suggested that if conduct is to create a hostile environment, then the conduct must somehow be pervasive. That does suggest "a few free passes" rule, unless the company creates a culture in which such passes are kin to a team sport. Such a rule winks at reality.

Once is enough

One big, deplorable act can reverberate around in the conscious and unconscious mind and create the perception of a hostile environment. Pervasiveness does not require multiple acts when one act is vivid and outrageous enough. Imposed, involuntary rumination creates pervasiveness.

Further, Jones tried to suggest that a number of problems at her job might be connected to Clinton's escapade. There was apparently a Secretary's Day upon which all of the clerical women in the office received flowers, except for her. She was also "isolated physically, made to sit in a location from which she was constantly watched, made to sit at her work station with no work to do," and so forth. These sound like pervasively present job detriments. The court did not think much of them, however.

Judge Susan Webber Wright, a pro-business Republican, sneered at this evidence: "Absent evidence of some more tangible change in duties or working conditions that constitute a material employment disadvantage ..., general allegations of hostility and personal animus are not sufficient to demonstrate any adverse employment action that constitutes the sort of ultimate decision intended to be actionable under Title VII." One might see Jones' claims differently: as quite specific allegations asserting a general pattern.

Notice that the district court does not fault Jones for failing to establish a causal connection between Clinton's actions and these somewhat subtle job detriments. Rather, the court says that these detriments—assuming they exist—are not actionable. This conclusion means that businesses are becoming safer from sexual harassment suits.

There is another component of this decision which is even more troubling. Jones sued Clinton for intentionally inflicting emotional distress upon her. For

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generations, common law courts required a bodily injury before they would award damages for mental anguish. Since World War II, this attitude has changed.

Now courts will award damages for intentional infliction of emotional distress, a new-ish common law tort, if (1) the conduct is atrocious, beyond all bounds of decency, and if (2) the resulting mental anguish is severe.

Thus, bad conduct merely causing some mortification will not trigger liability in this cause of action. The law of California and Arkansas are pretty much the same on this score.

The district court held, as a matter of law, that Bill's conduct was insufficiently atrocious and that Paula's mental distress, at least as she described it, was not extreme enough. This is a rather odd holding, since the judge described Clinton's conduct as not only "boorish and offensive" but also "odious."

One would have thought that "odious" conduct was also "atrocious" and "indecent." Perhaps the judge is saying that Bill's conduct is beyond many or even most of the bounds of decency but that it is not beyond all of them and therefore does not meet the elements of the tort. (No wonder citizens hate the semantical games lawyers play.)

A sticky scenario

In effect, the district court held that no American girl in our times, even one of delicate sensibilities, a sheltered background and a prudish nature, would get really, really, really upset at the following scenario.

One of the most powerful men around, and the supreme commander of her administrative hierarchy, gets her alone in a hotel room (already a suggestive move). He discusses how well he knows her boss, and comes on to her a little. She shows less than immediate and passionate interest. Nevertheless, he undoes his pants, exposing his penis. He thrusts it in her face and brings it near her lips. Perhaps he arches his eyebrows. Perhaps he undulates his hips a little, whereupon, he utters an obscene proposition.

Remember, he is saying all this to a young woman, in a powerless job position, whom he is meeting for the first time. Obviously, his behavior says that he believes she is a complete slut. He is implying he can see this fact immediately from her looks, bearings, dress and speech. How would that make one feel? Can such an action create a negative and injurious frame of mind? Can such an action shame a young woman mightily?

Do American courts really want to hold

that conduct of this sort is not outrageous, as a matter of law? Do they really want to say that this kind of conduct is never indecent? Yes is exactly what the Arkansas federal district court held in *Jones v. Clinton*.

In addition, the district judge held that no woman, no matter what kind of psyche she has, no matter how sheltered her upbringing, no matter what her religious scruples, and no matter what her views on morality, could possibly be severely affected by the kind of conduct alleged against Clinton.

According to the court, Jones did not, even prima facie, prove any severe mental distress. Her proof was not even close. She didn't enter a mental hospital. She didn't quit her job. She didn't outwardly manifest symptoms of depression. She didn't even seek out a shrink.

In effect, the district court suggested that if a woman stays on her feet and remains functional, she has not sustained severe emotional anguish.

Is this right? Jones, after all, wept profusely over this incident. She complained to everyone she knew over a long period

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of time and said to them that she was deeply disturbed by the incident. Why doesn't that make out enough of a case to let a jury think about it? Might not the severity of her anguish grow over time?

Implications for insurance

Right or wrong, the decision in *Jones v. Clinton* indicates that businesses are safer from suit in 1998 than they were in 1997. This fact has implications for insurance

sales. EPLI is coming into its own. One of its major coverages is sexual harassment. Judged from the point of view of lawsuits for sexual harassment, the *Jones* case suggests that EPLI coverage may not be as necessary as some think.

Certainly, sophisticated brokers should engage in dialogue with their customers about whether such insurance is needed, how much of it is needed, what the retention should be, what the limits should be,

and so forth. But the weight of the various factors is changing, if Jones conveys the spirit of the law.

Of course, this form of insurance is a darling of huge law firms with large employment law sections. The reason is that the insurance company does not control the defense, it merely pays for it.

Moreover, insurers insist that insureds use employment law specialists. Consequently, businesses will usually hire employment lawyers from their own (often) large law firms. Lawyers love the phrase "cash cow" above all others.

E&O exposure

On May 1, 1998, an employment lawyer from a major multi-city law firm, told a throng of lawyers at an educational meeting sponsored by the Houston Bar Association that insurance brokers who "fail to rec-



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The Jones decision means that employers may need less "indemnity" coverage for harassment claims.

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ommend EPLI coverage in their risk assessments for their clients risk liability for errors and omissions."

In other words, he said, it may well be insurance agent malpractice not to recommend EPLI coverage. This claim is simply not true. There are many circumstances under which it is not necessary to recommend the purchase of such insurance. This conclusion is fortified by *Jones v. Clinton*. All that is necessary is that the insurance intermediary recommend that it be considered and that he engage in informed dialogue with the customer.

Informed dialogue? Learned discussion? Good Lord! More complications to learn. More imponderables to balance. Subtleties and complexities galore. Is there no end to it? Didn't this used to be a simpler business? 17

Michael Sean Quinn is an Austin-based attorney with the law firm of Sheinfeld, Maley & Kay. He was recently selected to receive the 1998 Outstanding Law Journal Article Award by the Texas Bar Foundation.