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Class Action: What Happens When Employers Refuse To Remedy Sexual Harassment

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Recently published in paperback, *Class Action* by Clara Bingham and Laura Leedy Gansler (Anchor), offers an informative and immensely readable chronicle of one employee's battle to stop sexual harassment in the workplace. At the same time, it provides employers with a case study of what not to do.

Lois Jenson, the protagonist of this riveting account of the country's first class action sexual harassment case, was a single-mom on welfare living in northern Minnesota's "Iron Range," home of the largest iron-ore deposit in the world. Jenson was looking for a job that would pay enough to support herself and her son and possibly provide benefits such as health care.

Opportunity presented itself in April 1974 when nine of the country's largest steel companies signed a consent decree with the Equal Employment Opportunity Commission, the U.S. Department of Justice, and the Labor Department requiring the industry's mills and mines to provide 20 percent of its new jobs to women and minorities. As a result, in 1975, Jenson became one of the first female workers at Eveleth Mines Forbes Fairlane Plant.

The authors -- Bingham, a journalist, and Gansler, an attorney -- provide the historical, cultural and legal context that contributed to Lois Jenson ultimately being the lead plaintiff in a class action suit. Their narrative deconstructs the legal battle into a compelling personal story with historical and social meaning.

Jenson walked into Eveleth Mines looking for economic security. What she found on the job was taunting, graphic graffiti, posters and crude drawings, lewd jokes and unwelcome physical contact from many of her male co-workers and supervisors. The harassment Jenson and other female co-workers experienced escalated to stalking, assault, and direct quid pro quo propositions. Today almost any employer would recognize such conduct created an egregiously hostile environment based on sex.

Jenson and her colleagues reported the harassment and the pervasive, hostile work environment to the union, supervisors and management. Nothing changed.

Bingham and Gansler provide the parallel historical legal framework of sexual harassment law in this country. At the time that Jenson was experiencing an extremely hostile environment at work, the federal courts were just beginning to recognize "sexual

harassment" as actionable gender discrimination under Title VII of the Civil Rights Act of 1964.

The book's most instructive point is that the litigation could have been avoided – saving Eveleth Mines millions of dollars in legal fees and settlement payout, not to mention years of bad publicity – if Eveleth had been responsive to the women's complaints and taken corrective measures to rectify the situation and protect its employees. Jenson's initial request was merely coverage of her stress-related health problems, job security and an educational program on sexual harassment. But her employer refused.

On October 5, 1984, Jenson filed a Charge of Discrimination against Eveleth Mines with the Minnesota Department of Human Rights. The state found probable cause and requested the mine institute a sexual harassment policy and pay $6,000 in punitive damages and $5,000 for mental anguish to Jenson. Oglebay Norton, Eveleth's parent company, agreed to put a sexual harassment policy on the books, but refused to pay Jenson any money. The department then sued the Jenson's employer, but later dropped the case because of lack of resources.

Jenson called more than 50 attorneys before Paul Sprenger, an accomplished employment discrimination lawyer, took her case and in 1988 filed a class action suit in the U.S. District Court for the District of Minnesota. The court granted the request for class certification, raising the stakes for the litigation. At that time, the plaintiffs were willing to settle the case for a sexual harassment policy and $1.3 million, including attorneys' fees and costs. The employer offered only $300,000, and the litigation continued – for 10 more years.

In December 1992, the case went to trial, which was bifurcated between liability and damages. Upon conclusion of the liability phase, the court ruled that Eveleth Mines maintained a hostile work environment towards women and ordered injunctive relief, including that Eveleth Mines to develop a program to educate employees about sexual harassment and implement procedures for effectively addressing complaints.

The damages phase turned on the physical and emotional toll of the harassment on the women employees, and the defense attorneys had no choice but to probe the women's cases. But Eveleth Mines' attorneys parsed through every painful detail of the women's personal and sexual pasts, regardless of relevance, which proved costly and counterproductive for the employer. Although the trial judge awarded only nominal damages, the U.S. Court of Appeals for the Eighth Circuit reversed in a strongly worded opinion and remanded for another trial on damages. The U.S. Supreme Court declined the employer's petition for review. Finally, more than 14 years after Jenson filed her initial charge of discrimination, the District Court set a trial date of December 8, 1998.

After the plaintiffs conducted a practice trial in which a mock jury awarded $30 million in damages, the parties finally settled the case. Although confidentiality agreements prohibit disclosure of the settlement amount, court records show that the plaintiffs' attorneys ultimately received attorneys' fees of $6.28 million, an amount that barely covered the 10

years and 24,790 billable hours of work. The employer and its insurers paid out more than $15 million dollars throughout the course of this litigation in legal fees and settlement.

"The company could have ended it at any time," the plaintiffs' attorney said years later, "by adopting a sexual harassment policy. What would it have cost them?" Instead by asserting a scorched earth defense and making increasingly smaller settlement offers as the case progressed, the employer turned an inexpensive case into a potentially costly case and finally into a disastrously expensive outcome.

The book's message to employers is clear and by now well understood:

- Implement an effective anti-harassment policy.
- On receiving a harassment claim, have impartial employees investigate it.
- When warranted, take appropriate and prompt corrective action.
- Don't retaliate against the complaining employee.

When confronted with egregious and credible evidence, consider every opportunity for early (and inexpensive) resolution.

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