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## Relief for Health-Related Injury in Sexual Harassment Cases

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## COMMENTS

### RELIEF FOR HEALTH-RELATED INJURY IN SEXUAL HARASSMENT CASES

"I was trapped in that office and couldn't get out. They destroyed the relationship with someone I was in love with and very much wanted to marry. They just took everything. You lose hope in the future. You're powerless to do anything."\*

#### I. INTRODUCTION

Akin to the pain of a needle piercing the skin of a finger, these words evince the powerfully desperate suffering of the speaker. The speaker in this case is Catherine A. Broderick, a woman who has been tormented by a sexually harassing and hostile working environment. During a five-year period beginning in August of 1979, she was subjected to uninvited physical interaction, sexually suggestive remarks, and invasion of privacy by her superiors while working as an attorney in the Washington Regional Field Office of the Securities and Exchange Commission (SEC).<sup>1</sup> This treatment injected stress and trauma into her life which undermined her "motivation and work performance"<sup>2</sup> and pervaded her personal life.<sup>3</sup> The trauma ultimately de-

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\* Walsh, *The One-Woman War at the SEC*, Wash. Post, June 6, 1988, at C1, col. 2. These are the words of Catherine A. Broderick, an employee of the Washington Regional Office of the Securities and Exchange Commission, and a sexual harassment plaintiff.

1. *Broderick v. Ruder*, 685 F. Supp. 1269, 1272-73 (D.D.C. 1988). The specific conduct included instances when one supervisor "untied plaintiff's sweater and kissed her," a co-worker "made sexually suggestive remarks about plaintiff's dress and figure," and another supervisor "repeatedly offered her a ride home, and when she finally acceded, he barged into her apartment, and toured the premises, including her bedroom." *Id.* at 1273-74. Furthermore, other employees who submitted to advances which were sexual in nature were afforded preferential treatment while she received "unacceptable" performance evaluations for not being a "team player." *Id.* at 1272. Ms. Broderick's superiors labelled her a "festering morale problem" and her performance appraisals reflected a declining overall rating as well as a declining rating in the category of "Interaction with Supervisors." *Id.* All the while, other female employees who submitted to advances were being promoted. For example, Mary Bour, who had an "on-going sexual relationship" with John Hunter, a branch supervisor, "received three promotions, a commendation and two cash awards." *Id.* at 1274.

2. *Id.* at 1278.

The record is clear that plaintiff and other women working at the [Washington Regional Office] WRO found the sexual conduct and its accompanying manifestations which WRO managers engaged in over a protracted period of time to be offensive.

prived her "of promotions and job opportunities"<sup>4</sup> and ransacked her private affairs.<sup>5</sup>

In a sex discrimination action against the SEC under Title VII of the Civil Rights Act of 1964 (Act),<sup>6</sup> one psychiatrist diagnosed Ms. Broderick's condition as analogous to a "post-traumatic stress disorder" arising from her working conditions.<sup>7</sup> The United States District Court for the District of Columbia held that Ms. Broderick's "mental condition was caused and exacerbated by the hostile atmosphere in which she worked"<sup>8</sup> and awarded her judgment. In a "unique settlement,"<sup>9</sup> Ms. Broderick "will receive eight years of back pay, a promotion, counseling and her choice of two jobs at the agency."<sup>10</sup> The unique aspect of this settlement is the commission's agreement "to pay for up to 208 psychiatric counseling sessions over two years for Broderick and to pay for job counseling if she decides to leave the SEC."<sup>11</sup> Traditional Title VII remedies do not directly address the health-related injury of the victim.<sup>12</sup>

This settlement more accurately reflects the underlying objectives of Title VII. These values are "the removal of artificial, arbitrary, and unnecessary

The record also establishes that plaintiff and other women were for obvious reasons reluctant to voice their displeasure and, when they did, they were treated with a hostile response by WRO's management team.

*Id.*

3. Wash. Post, June 6, 1988, at C8, col. 3.

4. *Broderick*, 685 F. Supp. at 1278. By contrast, office worker Alice McDonald who allegedly had an affair with Herbert Brooks, Regional Trial Counsel, made rapid progress. "During a twelve-month period, she received two grade promotions, a \$300 cash award and a perfect score in each element of her performance appraisal in 1984." *Id.* at 1275.

5. She still seeks professional therapy in an attempt "to work through the anger." Wash. Post, *supra* note 3, at C9, col. 1.

6. 42 U.S.C. § 2000e-2 (1982).

7. *Broderick*, 685 F. Supp. at 1273. The court declined to accept the expert's testimony that plaintiff suffered "post-traumatic stress disorder," stating that "[h]is analogy relating the Buffalo Creek, West Virginia, flood and the Beverly Hills night club fire to plaintiff's reaction to a sexually hostile work environment is not convincing." *Id.* at 1273 n.3. On the other hand, an expert witness for the defense "diagnosed plaintiff as suffering from a paranoid personality disorder," which was defined as a "'selective way that people fall into to deal with stress, insecurity, discomfort with themselves.'" *Id.* at 1273.

8. *Id.* at 1280.

9. Walsh, *SEC Agrees to Outside Review in Sexual Harassment Case*, Wash. Post, June 17, 1988, at A1, col. 2.

10. *Id.* Estimates of total back pay range from \$35,000 to \$50,000 for the entire eight year period. *Id.* at A16, col. 1.

11. *Id.* at A16, col. 1. The agreement was signed by the judge that tried her case, U.S. District Judge John H. Pratt.

12. Traditional Title VII remedies address economic injury. The statute itself allows for "reinstatement or hiring of employees, with or without back pay." 42 U.S.C. § 2000e-5(g) (1982).

barriers to employment"<sup>13</sup> and the achievement of "equality of employment opportunities."<sup>14</sup> The objectives require courts to "focus on fairness to individuals rather than fairness to classes"<sup>15</sup> and award equitable relief as they "deem[ ] appropriate."<sup>16</sup> In focusing on fairness to Ms. Broderick, it is appropriate to require payment for psychiatric counseling in order to ensure the removal of artificial, arbitrary, and unnecessary mental and emotional barriers to her employment.

Ms. Broderick's remedy, however, is an exception. The Act, as implemented, is normally unresponsive to health-related injury. "The federal courts have consistently limited Title VII to authorize only equitable remedies . . . In sexual harassment cases this generally takes the form of individual relief such as back pay, reinstatement, and attorney's fees and costs."<sup>17</sup> On the other hand, "compensatory damages based on emotional distress, mental anxiety and emotional disturbances . . . are not recoverable under Title VII."<sup>18</sup> In light of this background, Ms. Broderick's settlement raises the question as to whether Title VII sexual harassment cases should be more responsive to health-related claims.

This Comment begins with a discussion of the present state of sexual harassment law and the relevance of health-related claims. The subsequent section addresses the remedies currently available under Title VII and considers alternative methods to obtain monetary awards for health-related claims. The Comment then canvasses the problems associated with allowing and denying recovery of damages in a Title VII claim. The final section proposes amendments and reinterpretations of the law, and ultimately concludes by advocating adoption of changes in the law in order to allow sexual harassment plaintiffs to recover money damages for their health-related injury.

## II. PRESENT LAW

### A. *Elements of a Hostile Environment*

#### *Sexual Harassment Case*

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employ-

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13. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

14. *Id.* at 429.

15. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978).

16. 42 U.S.C. § 2000e-5(g) (1982).

17. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M.L. REV. 91, 106 (1987) [hereinafter *Interdisciplinary Examination*].

18. *Guzman Robles v. Cruz*, 670 F. Supp. 54, 56 (D.P.R. 1987).

ment, because of such individual's race, color, religion, sex, or national origin."<sup>19</sup> This statute indicates a congressional intent "to strike at the entire spectrum of disparate treatment of men and women"<sup>20</sup> in employment. Included within this spectrum of disparate treatment is sexual harassment. "A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment;"<sup>21</sup> therefore, this pattern of behavior constitutes an unlawful practice.

The Equal Employment Opportunity Commission (EEOC) has promulgated guidelines<sup>22</sup> upon which courts may rely in adjudicating sexual harassment claims.<sup>23</sup> These guidelines identify the different types of sexual harassment that violate Title VII. "[A] violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment."<sup>24</sup>

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19. 42 U.S.C. § 2000e-2(a) (1982).

20. *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

21. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

22. 29 C.F.R. § 1604.11 (1988). In relevant part, the Equal Employment Opportunity Commission guidelines are as follows:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition or an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

*Id.*

23. These guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

24. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 62 (1986). Health-related injury, such as emotional distress, may result where an employer conditions employment benefits on sexual favors. See *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (employer abolished female's job in retaliation for resistance of advances). Although this type, commonly known as "quid pro quo" sexual harassment, may result in injury, the scope of this Comment is limited to discussion of the latter type, known as "hostile environment," because Ms. Broderick's settlement ensued from this type of claim. *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 n.8. ("Since

The EEOC guidelines and the surrounding jurisprudence give guidance in defining the elements of a hostile environment sexual harassment claim.<sup>25</sup> The first of these elements is the fact that “[t]he employee belongs to a protected group. As in other cases of sexual discrimination, this requires a simple stipulation that the employee is a man or a woman.”<sup>26</sup> The second element is the employees’ desire to entertain the sexual advances. “The correct inquiry is whether [the protected employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”<sup>27</sup> It must be determined that the “employee did not solicit or incite”<sup>28</sup> the advances and that those advances were regarded as “undesirable or offensive.”<sup>29</sup> This question “turns largely on credibility determinations committed to the trier of fact.”<sup>30</sup>

The third element addresses the extent to which the advances affected the employment environment. “For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of

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there is no credible evidence that plaintiff herself was offered economic benefits in return for sexual favors, this type of conduct is not the subject of plaintiff’s basic complaint in the instant case, except to the extent that it created and contributed to a pervasive atmosphere of sexual hostility in the work environment.”).

25. Elements of a tort claim of intentional infliction of emotional distress are separate and identifiable from those elements of a Title VII claim. The elements of the tort claim are generally described as follows: (1) Outrageous conduct by the defendant; (2) The defendant’s intention of causing, or reckless disregard of the probability of causing emotional distress; (3) The plaintiff’s suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant’s outrageous conduct. See *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972) (Wife suffered emotional distress as a result of the insurer’s refusal to make payments on an insurance policy). The principal difference between the elements of the tort claim and those of a Title VII claim is that the tort must be a result of outrageous conduct while under Title VII the conduct must merely be unwelcome. Moreover, the “plaintiff in the damages phase of an employment discrimination suit need not make out the elements of the tort of intentional infliction of emotional distress in order to recover compensation for mental anguish. All a plaintiff need do is present evidence from which a jury could determine that the plaintiff has suffered mental anguish.” *Walters v. City of Atlanta*, 803 F.2d 1135, 1146 n.8 (11th Cir. 1986). See *Carey v. Phipps*, 435 U.S. 247, 266 (1978).

26. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982). In most cases, the victim will be a female, and therefore this Comment concentrates on those cases. This, however, does not discount the fact that men can be and are victims of sexual harassment in the workplace. See, e.g., *Edwards v. Dep’t of Correction*, 615 F. Supp. 804 (N.D. Ala. 1985) (Sex discrimination action brought by a man who was not appointed shift commander at women’s prison).

27. *Meritor*, 477 U.S. at 68. (“The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome.”).

28. *Henson*, 682 F.2d at 903.

29. *Id.*

30. *Meritor*, 477 U.S. at 68. See also *Moylan v. Maries County*, 792 F.2d 746, 749 (8th Cir. 1986) (“Whether the conduct is unwelcome is a fact question.”).

employment and create an abusive working environment."<sup>31</sup> In order to satisfy the standard for pervasiveness, the advances must be "sufficiently severe and persistent to affect seriously"<sup>32</sup> the work environment.<sup>33</sup> The fourth element is the appropriate standard of review in a sexual harassment case. The guidelines suggest that the courts "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."<sup>34</sup> An excellent example of this occurred in *Broderick* where it was held that on the record as a whole, the preferential treatment afforded to those who submitted to sexual advances created a hostile environment for those who did not.<sup>35</sup>

The final element is that of employer liability. Using the statutory construction of Title VII, which defines employer to include "any agent of such a person,"<sup>36</sup> the suggestion has been made that Congress wanted "to place some limits on the acts of employees for which employers under Title VII are to be held responsible."<sup>37</sup> Under the limits of agency principles "[i]f the employer knew of the sexual harassment, regardless of the identity of the perpetrator, and did not take remedial action, the employer is liable."<sup>38</sup>

Hostile environment claims were given legal credence in *Meritor Savings Bank v. Vinson*,<sup>39</sup> in which the United States Supreme Court found sexual harassment to exist in the branch office of a savings institution.<sup>40</sup> The Court

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31. *Henson*, 682 F.2d at 904.

32. *Id.*

33. In *Henson*, the court held that where a police department dispatcher's boss used vulgar language and repeated requests for sexual relations the standard of pervasiveness was satisfied. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (standard satisfied where sexually stereotyped insults created an emotionally charged atmosphere and caused anxiety in a municipal employee).

34. 29 C.F.R. § 1604.11(b) (1988).

35. *Broderick* is a natural expansion of the standard of review because the totality of the circumstances standard of review is now deemed to include preferential treatment of others and how that affects the plaintiff. Presumably, "others" means employees in the work environment.

36. 42 U.S.C. § 2000e (1982). Under this statute, "such a person" includes "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."

37. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (the Supreme Court suggested that agency principles should be used to determine employer liability).

38. Note, *Employer Liability For Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U.L. REV. 245, 247 (1987). Employer liability goes to the topic of whom the plaintiff can recover against, whereas this Comment concentrates on what can be recovered. The two are intertwined, however, because if employers are not "automatically liable" then the goal of recovering damages under Title VII will be more difficult to obtain. To the extent that recovery of damages cannot be attained, the goals of Title VII suffer.

39. 477 U.S. 57 (1986).

40. The employee's superior "fondled her in front of other employees, followed her into

held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."<sup>41</sup>

### B. Health Related Claims

Commensurate "[w]ith the enactment of Title VII, [where] Congress intended to define discrimination in the broadest possible terms,"<sup>42</sup> the legislation has been deemed to include protection of the health of employees. In *Rogers v. EEOC*,<sup>43</sup> an Hispanic complainant established "a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele."<sup>44</sup> The Court of Appeals for the Fifth Circuit held "that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse."<sup>45</sup>

The ability to invoke the Act for the protection of the victim's health is based upon Title VII language. The statute declares that it is illegal to discriminate with respect to "terms, conditions, or privileges of employment."<sup>46</sup> A state of mental or emotional well-being is necessarily a term or condition of employment within the meaning of the Act.<sup>47</sup> The EEOC guidelines, particularly the element which addresses the pervasiveness of harassment, set the appropriate standard of review for health-related injuries. The sexual harassment must be "sufficiently severe and persistent to affect the psychological well being of the employee"<sup>48</sup> in order to satisfy this element.

Since the Act is regarded as protective of psychological interests and the EEOC guidelines address the standard of protection of employee health, the health-related consequences of sexual harassment may be properly addressed. These consequences are normally couched in terms of emotional or psychological injury.<sup>49</sup> They include, but are not limited to, depression, "an-

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the women's restroom [sic] when she went there alone, exposed himself to her, and even forcibly raped her on several occasions." *Id.* at 60.

41. *Id.* at 65.

42. *Interdisciplinary Examination*, *supra* note 17, at 101.

43. 454 F.2d 234 (5th Cir. 1971).

44. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 61 (1986).

45. *Rogers*, 454 F.2d at 238. ("One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, . . . Title VII was aimed at the eradication of such noxious practices.").

46. 42 U.S.C. § 2000e-2(a)(2) (1982).

47. *See Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981) ("'conditions of employment' include the psychological and emotional work environment.").

48. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

49. Although the injuries cognizant under a Title VII claim may be mental or emotional,



ger, fright, . . . defeat, diminished ambition, decreased job satisfaction, [and] impairment of job performance . . . ."<sup>50</sup> Just as courts consider these effects to invoke the protection of the Act, they should consider these effects to address remedies available in a health-related sexual harassment claim under Title VII.

### III. REMEDIES AVAILABLE UNDER TITLE VII

The language of Title VII grants the ability to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."<sup>51</sup> This language has consistently been construed to include only equitable relief.<sup>52</sup> "Since damages are not equitable relief, most courts have held that damages are not available to redress violations of Title VII."<sup>53</sup> This, however, appears to contravene the original value behind the statute, that being "when a party's deliberate conduct is so extreme that it intentionally interferes with another's ability to practice a profession or earn a livelihood, the wrongdoer must be punished and deterred."<sup>54</sup> The present interpretation of the Act, however, suggests that an award of damages will not better deter sexual harassment in the workplace.

Some courts have disregarded this contention as erroneous and have at-

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the claim does not necessarily translate into a claim for intentional infliction of emotional distress. The tort claim can be distinguished from a Title VII claim because the tort claim requires outrageous conduct while the Title VII claim merely requires unwelcome conduct. See *supra* note 25 for elements of Title VII and tort claims.

50. Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 152 n.8 (1979) [hereinafter *Legal Remedies*]. See also U.S. Public Health Service, *Report of the Public Health Service Task Force on Women's Health Issues*, 100 Public Health Reports 73, 87 (1985) ("[S]exual harassment on the job can hinder work performance, increase stress, and lower women's morale.").

51. 42 U.S.C. § 2000e-5 (1982).

52. See *Shah v. Mt. Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981); *Bundy v. Jackson*, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981) ("We follow the great majority of the federal courts in construing 'equitable relief' to preclude any award of damages for emotional harm resulting from a Title VII violation.").

53. *Bohen v. City of East Chicago*, 799 F.2d 1180, 1184 (7th Cir. 1986) (citations omitted). Aside from a strict construction of the statute, "the legislative history indicates that the damages provision of Title VII was modeled on a provision of the National Labor Relations Act dealing with unfair labor practices which has been interpreted not to permit an award of compensatory damages." *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992 n.2 (8th Cir. 1984). See also *Interdisciplinary Examination*, *supra* note 17.

54. *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 340 (D.N.J. 1979). See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1970) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

tempted to obviate the rule against damages by fashioning new remedies where they deem appropriate. For example, "attorneys' fees are awarded to . . . plaintiffs in Title VII actions as a matter of course."<sup>55</sup> Other courts have endowed victorious plaintiffs with front pay where reinstatement is not possible.<sup>56</sup> Without either this award or reinstatement, the plaintiff would be "uncompensated for the time between the date of judgment and the date the plaintiff attains the position he or she would have occupied but for the discrimination."<sup>57</sup>

On the whole, the remedies available to redress the health-related injury and protect the employee are limited. Reinstatement or back pay may indirectly soothe the anger and depression, but they do not directly compensate the plaintiff for suffering the inflicted injury or resultant expenses in pursuing counseling. The statute is interpreted to exclude those remedies which would directly atone for emotional or psychological injury and its effect on victims' lives. Therefore, "the remedies which would appear best suited to hostile environment cases . . . are not available in Title VII cases."<sup>58</sup> For this reason, the health-related injuries of the sexual harassment plaintiff go uncorrected and the perpetrator is not deterred from further harassment under present legislation.

#### IV. ALTERNATIVE METHODS OF PROTECTING HEALTH-RELATED INTERESTS

Courts have stated that "Title VII does not preclude all other claims for relief."<sup>59</sup> The reason behind this is "that Title VII fails to capture the per-

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55. *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 548 (7th Cir. 1986).

56. *See, e.g., Fitzgerald v. Sirlain Stockade Inc.*, 624 F.2d 945, 957 (10th Cir. 1980); *Guzman Robles v. Cruz*, 670 F. Supp. 54, 56 (D.P.R. 1987); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) ("Front pay is the term used to describe damages paid as compensation for training or relocating to another position. An award of front pay is made in lieu of reinstatement when the antagonism between employer and employee is so great that reinstatement is not appropriate.").

57. *Shore v. Federal Express Corp.*, 777 F.2d 1155, 1158 (6th Cir. 1985) (refusing an award of the cost of college education in the form of front pay because such cost could not be considered a post-judgment effect of the defendant's discrimination).

58. *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 642 (N.D. Ohio 1986), *appeal dismissed without opinion*, 816 F.2d 681 (6th Cir. 1987). This Comment contends that the best remedies are ones which directly atone for the injury because they give incentive to bring suits and to police the work place, which leads to an eradication of artificial barriers to employment.

59. *Otto v. Heckler*, 781 F.2d 754, 757 (9th Cir. 1986) (The supervisor's job-related acts of harassment produced injuries remediable under Title VII and were not separately actionable under an alternative constitutional theory). *See White v. General Serv. Admin.*, 652 F.2d 913 (9th Cir. 1981) (In a racial discrimination action the court noted that Title VII does not preclude separate remedies for unconstitutional action other than discrimination). *But see Brown v. General Serv. Admin.*, 425 U.S. 820, 835 (1976) ("[Title VII] provides the exclusive judicial

sonal nature of the injury done to [the] plaintiff as an individual, [and] the remedies provided by that statute fail to appreciate the relevant dimensions of the problem."<sup>60</sup> The goals of the present statute may be better served by allowing alternative claims for relief. Those claims might include tort, contract, constitutional, or other federal statutory claims. There are, however, limitations on the availability and effectiveness of these alternative methods of recovery.

There are various causes of action in tort which may accompany Title VII claims. "For example, a victim might allege intentional infliction of emotional distress, assault, battery, or invasion of privacy. Thus, in addition to receiving Title VII remedies, a plaintiff who also files a tort claim may recover compensatory damages, an award for pain and suffering, and/or punitive damages."<sup>61</sup> There are, however, limitations concerning jurisdictional authority. In order for a federal court to entertain a common-law claim and a Title VII claim, the rigorous challenges of pendent jurisdiction must be satisfied.<sup>62</sup> These challenges include constitutional, interpretative, and discretionary restrictions which result in a number of ways that courts can re-

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remedy for claims of discrimination in federal employment."); *Stewart v. Thomas*, 538 F. Supp. 891, 895 (D.D.C. 1982) ("[t]he exclusive remedy for all acts of sexual harassment on the job must be within Title VII, even though the acts might be cognizable as common-law torts had they occurred elsewhere."); and *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335, 340 fn.10 (D.N.J. 1979) ("under Title VII law, collateral recoveries are not permitted . . . [t]herefore, *Kyriazi* may not recover under state law the same damages she recovers under Title VII."). Imposing exclusivity of recovery restricts sexual harassment victims from being compensated for their injury. This restriction would deter support of Title VII goals as plaintiffs would have less incentive to bring suits and employers would have less incentive to police the workplace.

60. *Stewart v. Thomas*, 538 F. Supp. 891, 897 (D.D.C. 1982).

61. Morlacci, *Sexual Harassment Law and the Impact of Vinson*, 13 EMPLOYEE REL. L. J. 501, 518 (Winter 1987-88). See *supra*, note 25, for elements of a tort claim of intentional infliction of emotional distress.

62. *Zabkowitz v. West Bend Co.*, 789 F.2d 540, 546 (7th Cir. 1986) ("In order to establish pendent [ ] jurisdiction a two-prong test must be satisfied. First, the requirements of Article III of the Constitution for the exercise of federal judicial power must be fulfilled. Second, relevant statutory limitations on the exercise of pendent jurisdiction must be examined . . . The constitutional prong of the test is satisfied when (1) there is a federal claim which is of sufficient substance to confer federal jurisdiction and (2) the federal and state claims are derived 'from a common nucleus of operative fact' such that a plaintiff 'would ordinarily be expected to try them all in one judicial proceeding . . .' *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). The second prong of the test requires 'an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim,' in order to determine whether 'Congress in [that statute] has . . . expressly or by implication negated the exercise of jurisdiction over the particular nonfederal claim.' *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) . . . Even when the two-part test is satisfied, however, the exercise of pendent jurisdiction is still a matter left to the discretion of the district court, and is not a right belonging to any plaintiff.") Title VII is not an exclusive federal remedy and an action may be brought in state court. Concerns over pendent jurisdiction are not present where the action is originally brought in a

ject exercising jurisdiction over a common-law claim in a Title VII case. For example, in *Zabkowicz v. West Bend Co.*<sup>63</sup> a female warehouse worker bringing a Title VII sexual harassment action was denied her claim in tort due to statutory interpretation. The court declared that "Title VII does not provide a means for an employee to sue non-supervisory co-workers for discriminatory acts"<sup>64</sup> and refused to exercise pendent jurisdiction over a tort claim against a co-worker who was the immediate source of the harassment. Also, the discretionary aspect of the doctrine permits courts to refuse to exercise jurisdiction over common-law claims whenever contrary to the ideas of "judicial economy and convenience."<sup>65</sup>

Another limitation on bringing common-law tort claims is the degree to which those claims are considered separate from the Title VII claim. In *Stewart v. Thomas*,<sup>66</sup> an EEOC legal clerk complained of verbal and physical sexual harassment. The district court required the injuries associated with the sexual harassment to be "distinct and independent"<sup>67</sup> from the injuries associated with the intentional tort. This requires plaintiffs to prove that their common-law claims seeking recovery for health-related injuries are separate and distinct from their Title VII claims.<sup>68</sup> Juxtaposing this requirement against pendent jurisdiction's constitutional requirement of a "common nucleus of operative fact"<sup>69</sup> creates a narrow gauntlet for sexual harassment plaintiffs to run in order to gain adequate recovery.

Finally, the fact that tort law varies by jurisdiction creates some limitations on ability to gain favorable remedies. Two plaintiffs in the exact same situation may gain disparate awards due solely to their geographic location. This type of outcome fails to support the goal of eradication of arbitrary barriers to employment as random outcomes still exist. "A Title VII plain-

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state court, because state courts may simultaneously entertain common law and Title VII claims.

63. 789 F.2d 540 (7th Cir. 1986).

64. *Id.* at 546.

65. *Id.* at 548.

66. 538 F. Supp. 891 (D.D.C. 1982).

67. *Id.* at 895. The two injuries included the plaintiff's "right to be free from discriminatory treatment at her jobsite [sic] and her right to be free from bodily or emotional injury caused by another person."

68. The court in *Stewart* held:

"[T]o the extent that her emotional injuries were the result of the stressful work situation created by the defendant, her claim of intentional infliction of emotional distress is dismissed as subsumed within Title VII but to the extent that her emotional injuries were a direct result of the defendant's assaultive behavior she may maintain her claim."

*Id.* at 892. Evidently, the court was attempting to avoid awarding remedies twice for the same injury.

69. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

tiff should not have to depend on the existence of favorable state tort laws in order to be fully compensated for violation of rights created by the federal statute."<sup>70</sup> To the extent that plaintiffs must rely on favorable state tort law the goals of Title VII suffer.

Reliance on a theory in contract creates the same problems.<sup>71</sup> Pendent jurisdiction must also be exercised over this type of common-law claim and plaintiffs must rely on favorable state law in order to recover. It is possible, however, for employees to exercise some discretion in this area, as they can insist on the inclusion of an anti-sexual harassment clause in their employment contract.<sup>72</sup> In this respect, "[w]hen sexual harassment culminates in the dismissal of a victimized employee, that employee may be able to recover her resulting economic loss in a suit for breach of contract."<sup>73</sup> Health related claims become significant where the dismissal arose from mental or emotional stress due to sexual harassment.<sup>74</sup> This scenario is limited however, (1) because not all employees work under contract, (2) those who do may not have appropriate clauses to protect themselves, and (3) health-related claims do not necessarily result in economic losses.

Constitutional claims are another alternative method whereby sexual harassment plaintiffs may seek damages. In *Bivens v. Six Unknown Fed. Narcotics Agents*,<sup>75</sup> the Supreme Court held that where an individual's fourth

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70. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1465 (1984) [hereinafter *Claims*].

71. The theory may be either express or implied contract. Under an express theory the contract will contain a clause which binds the employer to provide a work environment free from harassing behavior. Under an implied contract, Title VII must be read into the document by the court.

72. See, e.g., AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, ON-THE-JOB SEXUAL HARASSMENT: WHAT THE UNION CAN DO 33 (available from American Federation of State, County and Municipal Employees, 1625 L Street, N.W., Washington, D.C. 20006) for an example of a specific provision that can be incorporated in the employment contract:

"The employer and the union agree to cooperate in a policy of equal opportunity for all employees. Discrimination because of race, color, sex, religion, age or union activity is expressly prohibited. Sexual harassment shall be considered discrimination under this Article. Disciplinary action will be taken against employees and supervisors who engage in any activity prohibited under this Article. The employer agrees to take corrective action to ensure that such practices are remedied and that such discrimination does not continue. Reprisal against a grievant or witness for a grievant is prohibited."

*Id.*

73. *Legal Remedies*, *supra* note 50, at 175.

74. Claims in contract would arise where the employee was subjected to sexual harassment and such harassment violated her contract. The harassment will have also caused a situation where the employee can no longer adequately perform her tasks and is dismissed as a result thereof.

75. 403 U.S. 388 (1971).

amendment rights are violated by federal agents, that individual is "entitled to recover money damages for any injuries he has suffered as a result."<sup>76</sup> Where the government regulates employment in a sexually discriminatory manner, it would seem that a claim for damages may be based upon the Equal Protection Clause of the fourteenth amendment or the due process clause of the fifth amendment.<sup>77</sup> Under a due process claim, the regulation must survive strict scrutiny in order to pass constitutional muster.<sup>78</sup> Similarly, under an equal protection claim, unless the regulation's gender classification is substantially related to a sufficiently important governmental interest it would not pass constitutional muster and the sexually harassed plaintiff may be able to recover damages.<sup>79</sup> The values behind *Bivens*, that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief,"<sup>80</sup> seem applicable to Title VII cases.

There are, however, strict limitations on such a claim. The doctrine of separation of powers has led the Court to conclude "that federal courts are courts of limited jurisdiction whose remedial powers do not extend beyond the granting of relief expressly authorized by Congress."<sup>81</sup> The express authorization of Title VII remedies, therefore, effectively limits the availability of redress under alternative constitutional claims.<sup>82</sup> This is evident from the

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76. *Id.* at 397.

77. U.S. CONST. amend. XIV, § 1 states in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Alternatively, the fifth amendment states: "No person shall be . . . deprived of life, liberty, or property without due process of law. . . ." This latter alternative, however, is severely limited. *See Nolan v. Cleland*, 686 F.2d 806 (9th Cir. 1982) (Federal employee's due process claim arising from involuntary resignation caused by sex discrimination denied because the predicate for the due process claim was the basis of the Title VII claim).

78. *See Moore v. East Cleveland*, 431 U.S. 494 (1977) (The Federal Courts must examine carefully the interests advanced by governmental regulation and the extent to which they curtail fundamental individual rights). This argument assumes that a work environment free of sexual harassment is a fundamental right "implicit in the concept of ordered liberty." A potentially discriminatory regulation may substantially interfere with this fundamental right. *See also Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) ("[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationships may legitimately be imposed.").

79. *See Craig v. Boren*, 429 U.S. 190 (1976) (gender classification in an alcohol solicitation regulation did not support the government objective of enhancing traffic safety). The problem with these constitutional arguments is that sexual harassment is merely an activity asserted by individuals and not one that is mandated by regulation.

80. 403 U.S. at 392, quoting *Bell v. Hood*, 327 U.S. 678, 684 (1945).

81. *Bush v. Lucas*, 462 U.S. 367, 373 (1983).

82. Title VII, however, gives courts the ability to fashion new and suitable redress in sexual harassment cases. This is evident in the words "any other equitable relief as the court

holding in *Otto v. Heckler*<sup>83</sup> where, in response to a fourth amendment right-to-privacy claim, the United States Court of Appeals for the Ninth Circuit said that “[t]o the extent that the alleged defamation damaged Ms. Otto’s employment or advancement opportunities, her *Bivens* claim is defeated by the fact that those are precisely the injuries cognizable and remediable under Title VII.”<sup>84</sup> Finally, as the Constitution protects individuals from government intrusion and not intrusion by private parties, constitutional claims are also limited to situations where the government is the defendant in an action, such as in the *Broderick* case.

This limitation also applies to the final alternative avenue to seek redress for health-related injury: 42 U.S.C. § 1983, civil action for deprivation of rights.<sup>85</sup> This statute was successfully employed by a white male employee in a racial discrimination action to gain a \$150,000 award for mental distress.<sup>86</sup> In *Walters v. City of Atlanta*,<sup>87</sup> the court held that there was “ample evidence demonstrating that the award for mental anguish was not plain error.”<sup>88</sup> Presumably, sexual harassment could be similarly remedied, but there is a caution. “When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”<sup>89</sup> A remedy under section 1983 may, therefore, be precluded as remedies are specifically provided for sexual harassment in Title VII legislation.

As previously mentioned, the Title VII remedies have their limitations, as well. To the extent that alternative methods of recovery are limited, the health-related injury stemming from sexual harassment goes uncorrected

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deems appropriate.” The point, however, is that limitations exist on the availability of *Bivens* remedies.

83. 781 F.2d 754 (9th Cir. 1986).

84. *Id.* at 757.

85. 42 U.S.C. § 1983 (1982). The language of this statute provides that “Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.” There are other such statutes available, such as 42 U.S.C. § 1981 which provides:

“All persons . . . shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

*Id.* But see *Brown v. General Ser. Admin.*, 425 U.S. 820 (1976) (plaintiff barred from relief under section 1981 because the employment discrimination was remediable under Title VII).

86. *Walters v. City of Atlanta*, 803 F.2d 1135, 1146 (11th Cir. 1986).

87. *Id.*

88. *Id.*

89. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981).

and the goals of Title VII are poisoned. An award of damages may be the only antidote.

## V. PROBLEMS ASSOCIATED WITH RECOVERY OF DAMAGES

### A. Allowing Recovery of Damages

Damage remedies, however, are not without their own limitations. The first of these problems is that of assessment. In a racial discrimination action against an airline the United States Court of Appeals for the Eighth Circuit declared that "it is admittedly difficult to place a value upon the resulting emotional injury."<sup>90</sup> This problem could lead to awards which do not compensate the victims adequately as they are either too generous or too minuscule. This could easily be mitigated, however, as the courts could look to analogous claims in other areas of the law, such as the tort claim of intentional infliction of emotional distress, for guidance.

The second problem is that of increased litigation due to an incentive to gain a monetary award.<sup>91</sup> An increase in litigation becomes a problem because litigation is costly to society. This cost comes in the form of salaries to government employees and lost productivity in the private sector due to the absence from work of the litigants and jurors, alike. The development of increased litigation, however, is a double-edged sword. An increase in litigation may thwart the sexual harassment menace and may cut the costs associated with that menace by deterring such conduct in the future.<sup>92</sup>

Costs associated with employer liability present a problem, as well. "[R]emedies are particularly costly because they may be borne by the companies themselves, rather than by third parties."<sup>93</sup> Large damage awards against marginally profitable companies could suspend profit distribution, thereby spreading the cost of sexual harassment throughout society. In a worst case scenario, damage awards could force financially troubled companies into bankruptcy and thereby create unemployment for the victims of sexual harassment. This possibility, however remote, would lead to the

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90. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1273 (8th Cir. 1981).

91. *Wall St. J.*, Dec. 2, 1986, at 1, col. 5. This type of reaction was evidenced in the months following the *Meritor* decision. Due to the outcome of that case, people gained a greater expectation that they had the power to rectify their dilemma. State officials reported that they saw a "rising interest" in filing sexual harassment claims in the aftermath of *Meritor*. *Id.* "The Iowa human-rights commission's docket had 43 harassment cases . . . in . . . four months . . . compared to 63 new cases in the preceding 12 months." *Id.* This indicates a two-fold increase in the rate of litigation.

92. See U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* (1988).

93. Machlowitz, *Hug by the Boss Could Lead to a Slap From the Judge*, *Wall St. J.*, Aug. 25, 1986, at 20, col. 3-4.



anomalous situation in which the law harms the exact person it is trying to protect.

Employer liability also raises the specter that insurance will spread the costs of monetary awards throughout society. This cost is mitigated, however, as "[a]ll insurance contracts exclude willful acts,"<sup>94</sup> of which sexual harassment is one. This lack of insurance is actually a benefit as costs cannot spread to society through the increase of premiums.

On the other hand, the market mechanism may act to spread the costs of employer liability. As the costs of production rise due to liability, the employer has incentive to raise the prices of his product in order to maintain profitability. The consumers of his product will then bear the burden of increased costs due to employer liability. Consumers, however, may willingly bear this burden in the realization that increased costs arise from the effort to eradicate unfair employment practices.

Employers can also incur costs combatting harassment in the workplace. Some companies rely on written policies to police their workplace.

Other companies, operating on the theory that written policies do not necessarily change attitudes, are scheduling seminars and films to sensitize their employees to harassment issues. Some have even hired consultants to train supervisors to recognize the nuances of sexually intimidating behavior and to train women to combat such behavior through so-called assertive techniques.<sup>95</sup>

These combative practices escalate company costs by dominating employees' time and effort as well as increasing spending. For example, a video training program developed by the Legal Defense and Education Fund of the National Organization for Women has a list price of \$495.00.<sup>96</sup> These types of costs, however, are necessary to the ultimate removal of sexual harassment from the workplace and should be encouraged.<sup>97</sup> Imposing the threat of a monetary payout would encourage employers to incur the costs of combatting sexual harassment.

A final type of cost which would be incurred by granting damage awards for health-related injury would be social costs. The effort to reduce liability costs through training programs may overly sensitize employees to the issue

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94. *Id.* at 20, col. 4.

95. Dullea, *Sexual Harassment Guidelines Create Uneasiness in Business*, L.A. Daily J., Oct. 28, 1980, at 2, col. 3-4 [hereinafter *Sexual Harassment*].

96. National Organization for Women, Legal Defense and Education Fund, General Publications List, at 2. (available from NOW Legal Defense and Education Fund, 99 Hudson Street, New York, N.Y. 10013).

97. The costs associated with removal should be encouraged because the costs associated with sexual harassment far outweigh the costs of removal. See U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 92, at 4-5 and *Sexual Harassment*, *supra* note 95, at 2, col. 2.

of sexual harassment and create a chilling effect upon the social environment of the workplace. "[S]ome fear the new policies will be seen as an invasion of privacy or a threat to an innocent office romance. Then, too, there are worries that the policies might undermine the friendlier, more casual working atmosphere that has sprung up between the sexes in recent years."<sup>98</sup> Sexual harassment is neither innocent nor friendly, however, and sensitizing workers to its sincere dangers will create a work force that will be less likely to sexually harass and more likely to productively work.

Discouraging harassment is but one example of how these problems associated with allowing the recovery of damages can be mitigated. Mitigation furthers the position that damages should be awarded to sexual harassment plaintiffs alleging health-related injury.

### B. Denying Recovery of Damages

The problems associated with prohibiting the recovery of damage awards for health-related injuries are two-fold. First, not allowing damage awards defeats the purposes of the Act. The goal of eliminating arbitrary and unnecessary barriers to employment is sacrificed because victims of sexual harassment have little incentive to bring suit when they cannot be adequately compensated for their injuries.

There is little incentive for a plaintiff to bring a Title VII suit when the best that she can hope for is an order to her supervisor and to her employer to treat her with the dignity she deserves and the costs of bringing her suit. One can expect that a potential claimant will pause long before enduring the humiliation of making public the indignities which she has suffered in private, as well as the anticipated claims that she has 'consented', and the attempts to trivialize her concerns, when she is precluded from recovering damages for her perpetrators' behavior.<sup>99</sup>

The undesirability of bringing suit makes it likely that sexual harassment barriers to employment will remain.

These barriers are also less likely to be broken down because employers lack incentive to police the workplace. "The threat of liability would give employers an incentive to educate and police the work force."<sup>100</sup> Such an incentive would aid in the effectuation of Title VII goals.

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98. *Sexual Harrassment*, *supra* note 95, at 2. Examples of employment policies are hiring consultants to "train women to combat" harassment, circulating written policies on the subject, showing training videos, developing an effective problem-solving procedure, and encouraging employees to report all incidents of sexual harassments and conducting investigations of complaints. *Id.* at 2, col. 4.

99. *Mitchell v. OsAir, Inc.*, 629 F. Supp. 636, 643 (N.D. Ohio 1986).

100. *Claims*, *supra* note 70, at 1466.

Stemming directly from the discouragement of Title VII goals is a second problem, the costs of sexual harassment. These costs are exemplified by the predicament of the United States government.<sup>101</sup> During a two-year period from 1985 to 1987, a time already marked by an alarmingly high national debt and deficit spending policies, "sexual harassment cost the Federal Government an estimated \$267 million."<sup>102</sup> According to a June 1988 survey by the U.S. Merit Systems Protection Board, this cost came in the form of job turnover, sick leave, and decreased individual and group work productivity.<sup>103</sup>

These costs are spread throughout society in the form of insurance. The survey reports "that in the long run, all employees and the Government bear some of the costs of treatment in the form of premium increases imposed by health plans when use increases."<sup>104</sup> Health plan use is a function of sick leave which costs the government approximately \$26.1 million during the two-year survey period.<sup>105</sup> The health-related injury of mental and emotional distress associated with sexual harassment is the precise cause of sick leave utilization.<sup>106</sup> More likely than not, because of sexual harassment the private sector incurs the same types of costs. In extrapolating these costs to private sector activity, the nation's gross national product could be decreased by billions of dollars.<sup>107</sup>

This multi-billion dollar reduction of gross national product is directly attributable to the discouragement of Title VII goals. In sheer quantitative

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101. The federal government is used as model of convenience due to the fact that a survey of the problem has been provided. There are however, no restrictions on extrapolating the results of the government survey to the private sector.

102. U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 92, at 4.

103. *Id.* at 40. The government survey reports that \$36.7 million was lost as a result of job turnover, \$26.1 million was lost as a result of sick leave, \$76.3 million was attributable to lost individual productivity, and \$128.2 million was attributable to lost work group productivity.

104. *Id.* at 41.

105. *Id.* at 40.

106. *Id.* at 40-41. ("To measure the dollar cost of sick leave used because of emotional or physical consequences of sexual harassment, victims were asked how much sick leave, if any, they used as a result of unwanted sexual attention. Responses show that an average of 13 percent of both male and female victims used sick leave after being harassed. Based on the responses, and the average salaries of federally employed men and women, the approximate cost of sick leave used is \$26.1 million.").

107. Gross National Product is an indicator of national economic strength and overall wealth. Public sector activity is but one part of the measurement of gross national product. This sector, however, has ramifications for the remainder of the economy. For example, the government survey reports that "employees who said they took such leave after being sexually harassed lost a total of \$9.9 million in salaries." U.S. MERIT SYSTEMS PROTECTION BOARD, *supra* note 92, at 42. This loss in salary has a negative effect on the spending power of the employees and has a negative effect upon the economy as a whole. The remaining part of gross national product is attributable to private sector activity.

terms, these costs are potentially greater than those associated with the allowance of a damages award as they multiply throughout the economy in the form of lower employment and less disposable income resulting therefrom.<sup>108</sup> Furthermore, qualitatively, it is far less repugnant to the conscience to incur costs in an effort to combat the social disease of sexual harassment than to incur them by letting the epidemic spread. Allowance of a damages award in sexual harassment suits would deter these costs as it would encourage education and policing of the work force and create an incentive to bring suits to punish offenders of the law. Therefore, an award of damages should be granted to plaintiffs who have health-related injuries in sexual harassment suits. These awards would encourage the attainment of the goals of Title VII.

#### VI. PROPOSALS FOR CHANGE IN THE LAW

Encouragement of the goals of Title VII should be the objective of the law. At present, however, the goal of eliminating arbitrary and unnecessary barriers to employment is inhibited by the limited availability of adequate remedies. The limitations on alternative avenues of recovery also discourage the attainment of Title VII goals. On the other hand, an award of damages for mental and emotional distress would help to effectuate those goals as it would increase incentive to bring suits and increase employer incentive to police and educate the work force. The problems associated with allowing this award are diminished by the costs associated with denying such an award and by the necessity of effectuating the policy behind Title VII.

Congress should amend Title VII in order to allow courts to grant damage remedies. "Title VII remedies should be amended to include compensation for the mental anguish, physical manifestation of stress, and degradation suffered by a sexual harassment victim"<sup>109</sup> as well as other similar remedies.<sup>110</sup> These types of awards would encourage victims to undertake proper measures to penalize "egregious conduct"<sup>111</sup> and would thereby "serve the Congressional goal of deterring all forms of employment discrimination."<sup>112</sup>

Without a direct mandate from Congress, however, the courts are left to serve the goals of Title VII through reinterpretation of the existing law. In appropriate deference to the authority of Congress, the avenues of reinterpretation are narrow and courts are constrained to create adequate remedies by statutory language and the doctrine of *stare decisis*. There are paths to

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108. It is admittedly difficult to compare costs without empirical evidence.

109. *Interdisciplinary Examination*, *supra* note 17, at 106.

110. Other remedies, for example, would include punitive damages.

111. *Claims*, *supra* note 70, at 1459.

112. *Interdisciplinary Examination*, *supra* note 17, at 107.

reform, however, which courts may travel. The intellectual exercise in fashioning adequate relief should include the realization that workers cannot be made whole<sup>113</sup> without complete health. An award of damages can be helpful in restoring the health of the individual as the lessons of tort law<sup>114</sup> and the *Walters*<sup>115</sup> case indicate. Equitable remedies should, therefore, be construed to include damage awards for health-related injury.

The courts should also be creative in finding equitable vehicles to award monetary relief. For example, judges can define the reinstatement criterion<sup>116</sup> for receiving front pay extremely narrowly. Defining reinstatement to mean the exact same occupational position as held prior to the sexual harassment occurrence enables plaintiffs to accept promotions or similar jobs in different departments of the same company and to be awarded generous compensation for relocation expenses. Courts can also define the compensation for training or relocating criterion<sup>117</sup> of front pay very broadly to achieve the goal of generous compensation. Training or relocating should be read to include professional counseling for job-training or psychological injury. Granting remuneration for these types of expenses can indirectly lead to restoration of mental and emotional health.

Redress for health related injuries can also be aided by the denial of exclusivity for relief under Title VII. Easing the limitations on tort claims would enable plaintiffs to recover damages under the theory of intentional infliction of emotional distress. Federal courts should not be hesitant to exercise their discretionary jurisdiction over pendant common-law claims and, to the extent that it is legally possible, should view the common-law claim as separate and distinct from the Title VII claim. These steps would create greater opportunities for the plaintiff to gain adequate relief for health-related injuries in Title VII sexual harassment suits.

Attorneys also have a role to fulfill in creating opportunities for recovery. They must fashion contract language which would place employers in breach for sexual harassment in the work environment.<sup>118</sup> They must en-

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113. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *DiSalvo v. Chamber of Commerce*, 568 F.2d 593, 598 (8th Cir. 1978).

114. In tort cases, awards for mental and emotional distress are regularly given where the plaintiff has successfully proven his case. The damages are a vehicle to redress the injury sustained by the plaintiff.

115. *Walters v. City of Atlanta*, 803 F.2d 1135 (1986) ("The jury awarded Walters \$150,000 for mental distress.").

116. This criterion suggests that front pay is not available where reinstatement is available.

117. This criterion suggests that front pay is available to compensate plaintiff for counseling or training to another employment position.

118. See AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, *supra* note 72.

courage victims of sexual harassment to fight for the respect they naturally deserve. Finally, lawyers are instrumental in fabricating the arguments which will enlighten the courts to the deficiencies of Title VII remedies.

The unresponsiveness of Title VII remedies to health-related injuries results in unobtainable damage awards and creates a disincentive for plaintiffs to bring suits and for employers to police the workplace. These disincentives, in turn, discourage support of the values behind the Act. Artificial, arbitrary, and unnecessary barriers to employment on the basis of sex will continue to pervade the American labor force so long as the legislation remains unchanged. Attorneys, judges, and Congress must combine to eradicate the ineptitude of Title VII by creating remedies which will appropriately compensate victims for their injury. The *Broderick* settlement, although only a minor footnote in legal history, may be the initial step towards recognition of the personal nature of sexual harassment injuries and correction of the problems of Title VII. If this is so, it should be the policy of our society to encourage and expand upon these types of settlements in order to ensure that the goal of equality in employment is not blinded by sex.

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