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## TITLE VII: LEGAL PROTECTION AGAINST SEXUAL HARASSMENT

by

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Sexual harassment has been broadly defined as “the unwanted imposition of sexual requirements in the context of a relationship of unequal power.”<sup>1</sup> The Equal Employment Opportunity Commission (EEOC) has issued guidelines which state that “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature” may constitute sexual harassment.<sup>2</sup> While sexual harassment may be directed at either sex, this article will focus on the far more pervasive harassment of females by males.<sup>3</sup>

Sexual harassment is one of the most significant labor issues of the 1980's. The cost to both employers and employees is great<sup>4</sup> and the incidence of sexual harassment is quite pervasive. A study at Harvard revealed that 34% of female undergraduates, 41% of female graduate students and 49% of nontenured women faculty experienced sexual harassment.<sup>5</sup> It can be expected that the number of cases brought by women and men will greatly increase since sexual harassment “occurs across the lines of age, marital status, physical appearance, race, class, occupation, pay range, and any other factor that distinguishes women from each other.”<sup>6</sup>

It has been estimated that a substantial proportion of men in the work force, approximately 10 to 15 percent, complain of homosexual overtures or sexual intimidation by female supervisors.<sup>7</sup> A United States Civil Service survey concluded that 42% of females suffered some form of sexual harassment which in its more egregious forms broke down to 26%, deliberate touching; 15%, pressure for dates; 9%, pressure for sexual favors; 9%, letters and calls; and 1%, actual or attempted rape or assault.<sup>8</sup> The overwhelming majority of respondents who had worked for nonfederal employers in the past

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<sup>1</sup>C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*. 1 (1979).

<sup>2</sup>Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1984).

<sup>3</sup>Sexual harassment in gender-based discrimination would not apply in cases where a bisexual supervisor sexually harasses workers of both sexes or where the harassment is equally offensive to workers of both sexes because both sexes were accorded like treatment. *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

<sup>4</sup>The Merit Systems Protection Board found that the costs to the federal government between May 1978 and May 1980 is conservatively estimated to have been 180 million. The study found that 15.3% of the men surveyed and 42% of the women had encountered some form of sexual harassment. 107 LAB. REL. REP. (BNA) 3 (1981).

<sup>5</sup>Fair Harvard, Are You Fair?, *Time* 109 Nov. 14, 1983.

<sup>6</sup>C. MACKINNON, *supra* note 1, at 28.

<sup>7</sup>See, e.g., U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 36 (1981) [hereinafter cited as U.S. MERIT SYSTEMS].

reported that sexual harassment was no worse with the federal government than with their other employers.<sup>9</sup>

While victims at one time suffered in silence, they now are inclined to seek legal redress. In the first year after the EEOC promulgated its guidelines<sup>10</sup>, the EEOC received about 1,000 sexual harassment complaints and state and local human rights agencies received twice that number.<sup>11</sup> The first Supreme Court case<sup>12</sup> recently decided and the resulting favorable publicity will undoubtedly bring a new wave of litigation.

The difficulty of determining what constitutes sexual harassment has been written about extensively<sup>13</sup> and Professor MacKinnon clearly stated one of the most basic problems as: "between the clear coercion and the clear mutuality, exists a murky area where power and caring converge. Here arises some of the most profound issues of sexual harassment, and those which the courts are least suited to resolve."<sup>14</sup> Due to a lack of legislative guidance, the judiciary must undertake to define a cause of action that affects the private realm of interpersonal relationships. None of the extensive legislative history of Title VII or its 1972 Amendments specifically pertain to sexual harassment. Further, the amendment which added the word "sex" to the Civil Rights Act of 1964 was a last minute futile effort by Representative Smith of Virginia to defeat passage of the bill by making it unacceptable.<sup>15</sup> The courts must define the cause of action so as not to infringe upon the protected rights of privacy<sup>16</sup> and the protections guaranteed by the Constitution for freedom of expression.<sup>17</sup>

The law has changed a great deal since Professor Calvert Magruder characterized the law:

Women have occasionally sought damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse. This is peculiarly a situation where circumstances alter cases. If

<sup>9</sup>*Id.* at 39-40.

<sup>10</sup>45 Fed. Reg. 74, 676 (1980) (codified at 29 C.F.R. § 1604.11 (1981)).

<sup>11</sup>Bureau of National Affairs, Inc., *SEXUAL HARASSMENT AND LABOR RELATIONS* 6 (1981) (Interview of EEOC Vice-Chairman Daniel Leach).

<sup>12</sup>*Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

<sup>13</sup>E.g. Somer, *Sexual Harassment in the Office*, *MANAGEMENT WORLD*, 10-11 (1980).

<sup>14</sup>See C. MACKINNON, *supra* note 1, at 54.

<sup>15</sup>110 Cong. Rec. 2, 577-82 (1964).

<sup>16</sup>See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The important right of privacy must be balanced with the right not to be victimized by offensive sexual harassment, *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981).

<sup>17</sup>See U.S. CONST. amend. I. In *EEOC v. Sage Realty Co.*, 507 F. Supp. 599, 610 & n. 17 (S.D.N.Y. 1981) the employer asserted that construing Title VII to ban revealing costumes designed for the employer and coordinated with the Bicentennial violated his first amendment rights. The court rejected the argument because the employer conceded that it had no "intention to express itself artistically." *Id.* It is clear that dress is an area where employers must be concerned about sexual harassment suits under federal and state laws and that customary practices of an industry will not be a defense to rebut a prima facie case of sex discrimination. See *Slayton v. Michigan Host, Inc.*, 376 N.W.2d 664, 669 (Mich. App. 1985).

there has been no incidental assault and battery, or perhaps trespass to land, recovery is generally denied, the view being, apparently, that there is no harm in asking.<sup>18</sup>

In November 1980, the EEOC placed freedom from sexual harassment within its ambit by issuing guidelines defining actions which constitute violations of Title VII. According to *Griggs v. Duke Power*,<sup>19</sup> the EEOC's administrative interpretations of Title VII are entitled to great deference. The strength of an EEOC decision lies in the force of its logic, not the force of its authority.<sup>20</sup> Recently the Supreme Court, in *Meritor v. Vinson*,<sup>21</sup> has sustained the EEOC guidelines providing that the "plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."<sup>22</sup>

The purpose of this article is to examine early case law and recent court decisions involving sexual harassment, especially *Meritor v. Vinson*. The article will discuss employer avoidance of liability under the EEOC guidelines and will urge employers to implement steps to investigate, prohibit, and sensitize supervisors to sexual harassment.

### EARLY CASE LAW UNDER TITLE VII

Examination of the early legal status of sexual harassment is useful in understanding the present legal issues concerning employer liability. Prior to the issuance of the EEOC Guidelines in 1980 the legality or illegality of sexual harassment and employer liability rested entirely upon the courts interpretation of Title VII of the Civil Rights Act of 1964. The initial district court decisions<sup>23</sup> almost uniformly rejected sexual harassment as a cause of action under Title VII because of fear of widespread and frivolous litigation.<sup>24</sup> These early cases often cited a lack of employment relatedness and held the cause of action unconnected to gender based discrimination. These early cases which rejected

<sup>18</sup>Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055, (1936). For examples of the law today see Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 U. CINN. L. REV. 1 (1982).

<sup>19</sup>401 U.S. 424 (1971).

<sup>20</sup>*Id.* at 433-34.

<sup>21</sup>*Meritor*, 106 S. Ct. at 2399.

<sup>22</sup>*Id.* at 4706.

<sup>23</sup>See e.g. *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd* 600 F.2d 211 (9th Cir. 1979); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd* 568 F.2d 1044 (3rd Cir. 1977).

<sup>24</sup>The District Court in *Tomkins v. Public Serv. Elec. & Gas Co.* warned that "if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit . . . if a promotion or a raise is later denied . . . we would need 4,000 federal trial judges instead of some 400." 422 F. Supp. 553, 557 (D.N.J. 1976). The court of appeals rejected this opening of a Pandora's Box of litigation argument as a justification for dismissing the action. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F. 2d

sexual conduct as a basis for a cause of action ignored the fact that most sexuality is gender-related. In *Corne v. Bausch & Lomb, Inc.*<sup>25</sup> no liability was imposed because no employer policy was served by the supervisor's alleged conduct; no benefit to the employer was involved; and the supervisors alleged conduct had no relationship to the nature of employment. The early cases viewed sexual harassment as a "personal" dispute and gave little weight to the employment context within which the sexual harassment took place. As one judge suggested: "[A]n outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual."<sup>26</sup>

One year after the *Corne* decision in 1976, the district court in *Williams v. Saxbe*<sup>27</sup> held sexual discrimination to be actionable. The court applied the respondeat superior doctrine to sexual harassment by holding that if sex-based discrimination was found to be the policy of a supervisor, then it was imputed to be the policy of the employer.<sup>28</sup> The court made it clear that an employer was not liable for personal, isolated instances of sexual harassment<sup>29</sup>, nor did a violation occur if a bisexual supervisor made advances to both genders.<sup>30</sup> In *Heelan v. Johns-Manville Corp.*<sup>31</sup>, the District Court of Colorado agreed with *Williams* that sexual harassment of females was gender-based discrimination under Title VII. The *Heelan* court required a number of conditions to establish a prima facie case, while taking note that Title VII does not provide relief for a mere flirtation that has no substantial effect on employment.<sup>32</sup> The plaintiff must plead and prove that employees of the opposite sex were not similarly affected by the alleged harassment<sup>33</sup>, and that the sexual advances of a superior were a term or condition of employment.<sup>34</sup>

The appellate courts firmly rejected the notion that sexual harassment in the workplace was not gender-related<sup>35</sup> relying to a considerable extent on the

<sup>25</sup>*Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated* 362 F.2d 55 (9th Cir. 1977).

<sup>26</sup>*Id.* at 163-64.

<sup>27</sup>413 F. Supp. 654 (D.D.C. 1976), *rev'd* on other grounds, *sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 660-61.

<sup>30</sup>*Id.* at 659 n. 6.

<sup>31</sup>451 F. Supp. 1382, 1388 (D. Colo. 1978).

<sup>32</sup>*Id.* at 1388-89.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 1388.

<sup>35</sup>*See, e.g., Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77 (3rd Cir. 1983); *Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes*, 755 F.2d 599 (7th Cir. 1985).

sex-plus cases in *Phillips v. Martin-Marietta Corp.*<sup>36</sup> and *Sprogis v. United Air Lines, Inc.*<sup>37</sup> The sex-plus rationale prohibits use in the employment situation of the stereotype of women as sex objects.<sup>38</sup>

The analysis of the early sexual harassment case law reflects the disagreement courts have had in relation to the extent of employer liability for the conduct of supervisors. The court in *Williams* imposed what is virtually strict liability upon the employer for harassing conduct by a supervisor<sup>39</sup>, while the court in *Corne* held the employer not liable for acts unrelated to the supervisor's functions.<sup>40</sup> Early cases were also inconsistent as to the harm which a victim of harassment must endure before a successful cause of action can be brought. In *Bundy v. Jackson*<sup>41</sup> a claim for a discriminatory atmosphere was recognized while in *Johns-Marville*<sup>42</sup> the court required concrete job status harm. The lack of consistency of case law created chaos in litigation of sexual harassment claims. The Supreme Court's recent decision in *Meritor v. Vinson* affords some resolution of the inconsistencies.<sup>43</sup>

#### RECENT CASE LAW: THE TITLE VII CAUSE OF ACTION

Title VII of the Civil Rights Act of 1964<sup>44</sup>, as amended, requires the plaintiff to establish an "unlawful employment practice."<sup>45</sup> Title VII defines an unlawful employment practice as an "employer . . . discriminat[ing] 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."<sup>46</sup> The Act applies to employers engaged in an industry affecting commerce who have fifteen or more employees<sup>47</sup> as well as employment agencies<sup>48</sup> procuring employees for such an employer and to almost all labor organizations.<sup>49</sup> The 1972 amendments cover state and local governments, and agencies.<sup>50</sup>

<sup>36</sup>400 U.S. 542, 544 (1971).

<sup>37</sup>444 F.2d 1194 (7th Cir.), *cert denied*, 404 U.S. 991 (1971).

<sup>38</sup>*Id.*

<sup>39</sup>*Williams v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976), *rev'd* on other grounds; *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>40</sup>*Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated* on procedural grounds, 562 F.2d 55 (9th Cir. 1977).

<sup>41</sup>641 F.2d 934, 953 (D.C. Cir. 1981).

<sup>42</sup>451 F. Supp. at 1390.

<sup>43</sup>*Meritor*, 106 S. Ct. at 2399.

<sup>44</sup>42 U.S.C. §§ 2000e-2000e-17 (1982).

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* (emphasis added).

<sup>47</sup>*Id.* § 2000e(b).

<sup>48</sup>*Id.* § 2000e(b), (c).

<sup>49</sup>*Id.* § 2000e(c), (d).

<sup>50</sup>*Id.* § 2000e-16.

Generally, sexual harassment cases will be brought under a disparate treatment theory<sup>51</sup> which occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin."<sup>52</sup> In *McDonnell Douglas Corp. v. Green*<sup>53</sup> the Supreme Court held that for a plaintiff to prove a prima facie case he must show:

(i) that he is a member of a [protected group]; (ii) that, he applied for, and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>54</sup>

The *McDonnell Douglas* formulation applies to job status harms or "economic" discrimination. While the case involved a hiring action, it has been applied to promotion<sup>55</sup> and termination cases.<sup>56</sup> The *McDonnell Douglas* formulation was designed to bring out the employer's intent in confidential and complex personnel decisions and allows plaintiffs to infer discrimination by focusing on their protected status and qualifications. In sex discrimination cases, where manifest sexual impropriety is present some of the elements of *McDonnell Douglas* should not be necessary. As the case itself recognized the criteria are "not necessarily applicable in every respect to differing factual situations."<sup>57</sup> Under the *McDonnell Douglas* formulation, the plaintiff needs only to allege a single incident of discrimination.<sup>58</sup> A plaintiff is not obligated to prove a pattern or practice of discrimination. The severity of the discrimination is relevant to damages and not to liability.

The EEOC guidelines on sexual harassment (Guidelines)<sup>59</sup> provide for recognition of sexual harassment that involves the conditioning of employment benefits on sexual favors, which is often referred to as absolute or economic sexual harassment, as well as harassment that creates a hostile or offensive working environment.<sup>60</sup> The Guidelines provide that in determining whether there was a violation of Title VII the EEOC will examine "the record

<sup>51</sup>See C. MacKinnon, *supra* note 1, at 193-206.

<sup>52</sup>*International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

<sup>53</sup>411 U.S. 792 (1973).

<sup>54</sup>*Id.* at 802. In *Bundy v. Jackson* the court substituted the phrase "protected group" for the "racial minority" found in *McDonnell Douglas*. 641 F.2d 934, 951 (D.C. Cir. 1981).

<sup>55</sup>See *Wright v. National Archives & Records Serv.*, 609 F.2d 702, 714 (4th Cir. 1979).

<sup>56</sup>*Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979).

<sup>57</sup>411 U.S. at 802 n. 13.

<sup>58</sup>42 U.S.C. § 2000e-2 (1976). Even if an employee is fired because of her sex based on a single incident discrimination exists even where her employer has never fired another woman because of her sex. *Doe v. Osteopathic Hospital of Wichita, Inc.*, 333 F. Supp. 1357, 1362 (D. Kan. 1971). Also the court held that proof of a single act of discrimination was sufficient to state a claim of race discrimination in *King v. Laborers Int'l Union*, 443 F. 2d 273, 278 (6th Cir. 1971).

<sup>59</sup>29 C.F.R. § 1604.11 (1986).

as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination . . . will be made from the facts, on a case by case basis."<sup>61</sup>

The Supreme Court recently in *Meritor v. Vinson* firmly supported the 1980 EEOC Guidelines specifying that Title VII applies to a hostile or offensive work environment and is not limited to "economic" or "tangible" discrimination.<sup>62</sup> The Supreme Court stressed that the phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment.<sup>63</sup> The Court emphasized that the 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."<sup>64</sup> The Supreme Court quotes approvingly the Guideline language that "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"<sup>65</sup> are prohibited conduct. Moreover the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "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."<sup>66</sup>

The Supreme Court held that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."<sup>67</sup> The Court cited cases involving harassment, involving race<sup>68</sup>, religion<sup>69</sup> and natural origin<sup>70</sup> to illustrate that hostile environment cases have received judicial recognition as Title VII violations. The Supreme Court stated: "Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The guidelines thus appropriately drew from, and were fully consistent with existing case law."<sup>71</sup>

<sup>61</sup>29 C.F.R. § 1604.11(b) (1986).

<sup>62</sup>106 S. Ct. at 2399.

<sup>63</sup>*Id.* quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978), quoting in turn *Sprogis v. United Air Lines, Inc.* 444 F.2d 1194, 1198 (7th Cir. 1971).

<sup>64</sup>Quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976) quoting in turn *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

<sup>65</sup>29 C.F.R. § 1604.11(a) (1985).

<sup>66</sup>§ 1604.11(a)(3) quoted in *Meritor*, 106 S.Ct. at 2401 (1986).

<sup>67</sup>*Meritor*, 106 S. Ct. at 2401.

<sup>68</sup>*Firefighters Institute for Racial Equality v. St. Louis*, 549 F.2d 506, 514-515 (8th Cir. 1977); *Banta v. United States* 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976).

<sup>69</sup>*Compston v. Bordon, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976).

<sup>70</sup>*Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977).



The Supreme Court in *Meritor* cited *Rogers v. EEOC*<sup>72</sup> which was the first case that recognized a cause of action based upon a discriminatory work environment. In *Rogers*, a Hispanic employee brought a Title VII suit against her former employer, an optical company which had segregated patients by national origin.<sup>73</sup> The Fifth Circuit reversed the lower court by finding that Title VII protects an employee's psychological, as well as economic benefits.<sup>74</sup> The segregation of patients by national origin could violate Title VII because of the psychological effects on the employees. The Supreme Court in the *Meritor* case approvingly quoted from *Rogers*,

[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .<sup>75</sup>

The court found no reason to distinguish a racially harassing environment from a sexually harassing environment and quotes from *Henson v. Dundee*<sup>76</sup> to support its position as well as citing other federal court decisions.<sup>77</sup>

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.<sup>78</sup>

It is important to note that in *Meritor* the Supreme Court quoted from both *Rogers* and *Henson* in finding that not all "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII.<sup>79</sup> "The mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee"<sup>80</sup> would not affect the conditions of employment to a significant degree to violate Title VII. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."<sup>81</sup>

<sup>72</sup>454 F.2d 234 (5th Cir. 1971), *cert denied* 406 U.S. 957 (1972).

<sup>73</sup>*Id.* at 236.

<sup>74</sup>*Id.* at 238.

<sup>75</sup>454 F.2d at 238.

<sup>76</sup>682 F.2d 897 (11th Cir. 1982).

<sup>77</sup>*See* *Katz v. Dole*, 709 F.2d 251, 254-255 (4th Cir. 1983) *Bundy v. Jackson*, 641 F.2d 934-944 (D.C. Cir. 1981); *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (E.D. Wisc. 1984).

<sup>78</sup>682 F.2d 981, 902 (D.C. Cir. 1982).

<sup>79</sup>106 S. Ct. at 2401.

<sup>80</sup>*Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) *quoting* *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971).

<sup>81</sup>*Meritor*, 106 S. Ct. at 2401.

In the *Meritor v. Vinson* case, the plaintiff Vinson was hired by Sidney L. Taylor, who was a vice president of the Savings and Loan. Vinson began as a teller-trainee and successfully was promoted to teller, head teller and finally assistant branch manager. Her supervisor was Taylor but her advancement was achieved on merit alone. After working four years at the branch savings and loan, she took indefinite sick leave and was discharged two months later for excessive use of that leave.

She then brought suit against her supervisor Taylor and the Savings and Loan alleging sexual harassment on the part of her supervisor Taylor. Vinson testified that Taylor asked her to have sexual relations with him claiming that she "owed him" because he had obtained the job for her. She ultimately yielded out of what she described was fear of losing her job, and thereafter he made repeated demands upon her for sexual favors. She estimated that over the course of several years she had intercourse with him some 40 or 50 times, and she even alleged that he forcibly raped her on several occasions. He stopped these activities when she started seeing a steady boyfriend.<sup>82</sup>

The supervisor denied Vinson's allegations and contended instead that her accusations were in response to a business-related dispute. The district court<sup>83</sup> denied relief, but did not resolve the conflicting testimony about the sexual relationship between the parties. It found instead:

If [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution.<sup>84</sup>

The court found that Vinson "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank.<sup>85</sup>

The Court of Appeals for the District of Columbia<sup>86</sup> reversed on a number of grounds<sup>87</sup> including the fact that uncertainty existed as to what the district court meant by the relationship being "voluntary" and that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment

<sup>82</sup>For a detailed chronology of the plaintiff's allegations and contentions, see *Vinson v. Taylor*, 23 Fair Empl. Prac. Case 37-43 BNA (1980).

<sup>83</sup>*Vinson v. Taylor*, 23 FAIR EMPL. PRAC. CASES, 37 BNA (1980).

<sup>84</sup>*Id.* at 42 (footnote omitted).

<sup>85</sup>*Id.* at 43.

<sup>86</sup>753 F.2d 141 (D.C. Cir. 1985).

<sup>87</sup>The reversal was based on the failure of the district court to consider whether "Vinson's grievance was clearly of the hostile environment type." 753, F.2d at 145 with the Court of Appeals relying heavily on its earlier opinion in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). The reversal also was based on the issue of employer liability with the Court of Appeals holding that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct, 753 F.2d at 150, while the district court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions by Taylor." 23 F.E.P. Cases 37, 43 (D.D.C. 1980).

a condition of her employment" her voluntariness "had no materiality whatsoever."<sup>88</sup> The court surmised that the district court's finding of voluntariness was based on "the voluminous testimony regarding respondent's dress and fantasies" which the Court of Appeals believed "had no place in this litigation."<sup>89</sup>

The Supreme Court in *Meritor v. Vinson* rejected the district court's test of when sexual harassment occurs by holding that the test is not whether sex-related conduct was "voluntary" but whether the sexual advances were "welcome."<sup>90</sup> The Supreme Court recognized that whether particular conduct is welcome presents difficult problems of proof and turns largely on the credibility determinations committed to the trier of fact. It held that the district court erroneously focused on the voluntariness of her participation rather than the correct inquiry of whether it was unwelcome.<sup>91</sup>

The Supreme Court decision in *Meritor v. Vinson* is consistent with *Bundy v. Jackson*<sup>92</sup> in that it required pattern of repeated as opposed to isolated incidents. Where behavior is outrageous, it should not have to be repeated for it to constitute actionable sexual harassment. The extreme and outrageous nature of the conduct is relevant.<sup>93</sup> The *Bundy* court pointed to criteria from the ethnic harassment case of *Cariddi v. Kansas City Chiefs Football Club*<sup>94</sup> in making such a determination. The Supreme Court has put to rest the notion that loss of a tangible job benefit is necessary for a sexual harassment case. This unanimous interpretation of Title VII is consistent with cases involving other forms of discrimination and with the EEOC Guidelines. The "unwelcome" standard seems to eliminate the need for the plaintiff to demonstrate resistance to the harassment and recognizes the practical difficulties on the plaintiff in the employment context.<sup>95</sup>

### VICARIOUS LIABILITY OF THE EMPLOYER

If the plaintiff establishes that he was subjected to sexually harassing conduct within the employment context, it is still necessary to establish that the employer was responsible either directly or vicariously for the conduct. If the alleged harassment is committed by the employee's supervisor, the employee will have a cause of action against the supervisor.<sup>96</sup> As was noted in the early

<sup>88</sup>753 F.2d at 146.

<sup>89</sup>*Id.* at 146 n. 36.

<sup>90</sup>106 S. Ct. at 2401.

<sup>91</sup>*Id.*

<sup>92</sup>641 F.2d at 943-45.

<sup>93</sup>*Id.* at 944.

<sup>94</sup>568 F.2d 87, 88 (8th Cir. 1977).

<sup>95</sup>See *Bundy*, 641 F.2d at 946 for the difficulties which an employee faces.

<sup>96</sup>Title VII defines an employer against whom suit may be instituted as a "person engaged in an industry affecting commerce . . . and any agent of such a person." 42 U.S.C. 2000e(b) (1985). See also RESTATEMENT

case analysis the federal district courts were very reluctant to hold employers liable for the alleged sexual harassment of their supervisors.<sup>97</sup> The appellate courts have discarded this reluctance and found that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to subordinate employees.<sup>98</sup>

The EEOC Guidelines provide that an employer "is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."<sup>99</sup> However employer knowledge is a necessary element of a plaintiff's coworker harassment suit. The Guidelines state: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."<sup>100</sup> The plaintiff can establish that the employer knew or should have known of the sexual harassment either directly, by showing that she complained to the supervisor(s), or indirectly by showing that the harassment is so pervasive that the employer had constructive knowledge of its existence.<sup>101</sup> Judge MacKinnon in his concurring opinion in *Barnes v. Castle* offered an analysis of why vicarious liability should be found against an employer.<sup>102</sup> Judge MacKinnon's reasoning was threefold. First, if ambiguous conduct might be violative of the statute, the employer is in the best position to know the real cause, and to come forward with an explanation. Second, the employer, not the employee, can establish prophylactic rules which, without upsetting efficiency, could obviate the circumstances of potential discrimination. Finally, the type of conduct at issue is questionable at best, and it is not undesirable to induce careful employers to err on the side of avoiding possibly violative conduct.<sup>103</sup> Although the EEOC has adopted a strict standard of liability in the case of supervisors the language of appellate courts seems unsettled. The Supreme Court addressed the issue for the first time in *Meritor v. Vinson*.

<sup>97</sup>See *supra* notes 25-27 and accompanying text.

<sup>98</sup>See *Horn v. Duke Homes, Inc.*, 755 F.2d 599, 604-606 (7th Cir. 1985); *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 80-81 (3rd Cir. 1983); *Katz v. Dole*, 709 F.2d 251, 255 n. 6 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979). See also *Vinson v. Taylor*, 753 F.2d 141, 147-52 (D.C. Cir. 1985) which was overruled by the Supreme Court in *Meritor*, 106 S. Ct. 2399.

<sup>99</sup>29 C.F.R. § 1604.11(e) (1985).

<sup>100</sup>*Id.* at § 1604.11(d).

<sup>101</sup>See, e.g., *Katz* 709 F.2d at 256; *Henson*, 682 F.2d at 905.

<sup>102</sup>561 F.2d 983 (D.C. Cir. 1977), *rev'g sub nom.* *Barnes v. Train*, 13 Fair Empl. Prac. Case. 123 (D.D.C. 1974).

<sup>103</sup>*Id.* at 998.

The Supreme Court in *Meritor* with Justice Rehnquist writing the majority opinion<sup>104</sup> and Justice Marshall writing a concurring opinion, found that Title VII prohibits sexual harassment. However, the concurring judges did not want to leave the circumstances open in which the employer is responsible under Title VII for sexual harassment.<sup>105</sup> The four concurring justices relied upon the Guidelines and general Title VII law, as well as federal labor law,<sup>106</sup> in finding that the act of a supervisory employee or agent is imputed to the employer. The concurring justices point out that courts "do not stop to consider whether the employer otherwise had notice of the action" or even whether the supervisor had actual authority to act as he did.<sup>107</sup> The concurring justices did not accept the Solicitor General's position that where the supervisor merely creates a discriminatory work environment that the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim."<sup>108</sup> The Solicitor General conceded that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. The concurring justices found that a supervisor's abuse of tangible job benefits or his creating a discriminatory work environment, emanated from the authority vested in the supervisor by the employer in that it enabled him to commit the wrong. The concurring justices found no justification for special rules to be applied only in hostile environment cases and found no notification requirement in the statute or the law of agency.<sup>109</sup> The concurring justices recognized that agency principles and the goals of Title VII would place some limitation on the liability of employers for the acts of supervisors where for instance the supervisor has no authority over an employee.<sup>110</sup>

The majority of the court declined the parties invitation to issue a definitive rule on employer liability because given the state of the record in the case the appropriate standard for employer liability had a rather abstract quality about it.<sup>111</sup> The record was not clear whether Taylor made any sexual advances, or whether they were unwelcome, or whether they were sufficiently

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<sup>104</sup>Justices Burger, White, Powell, Stevens, and O'Connor joined the majority opinion. Justice Stevens wrote a concurring opinion and Marshall wrote an opinion concurring in the judgment joined in by Brennan, Blackman and Stevens.

<sup>105</sup>*Meritor*, 106 S. Ct. at 2403.

<sup>106</sup>The concurring opinion cited labor law cases in support of a supervisory employee or agents acts being imputed to the employer. *Id.* citing *Graves Trucking, Inc. v. NLRB*, 692 F.2d 470 (7th Cir. 1982); *NLRB v. Kaiser Agricultural Chemical*, 473 F.2d 374, 384 (5th Cir. 1973); *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898, 909 (D.C. Cir. 1966).

<sup>107</sup>106 S. Ct. at 2403. The Court cites for support *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Young v. Southwestern Savings and Loan Assn.*, 509 F.2d 140 (5th Cir. 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972).

<sup>108</sup>*Id.* at 4709. *Quoting* the Brief for United States and EEOC as Amici Curiae 24.

<sup>109</sup>*Id.*

<sup>110</sup>*Id.*

<sup>111</sup>*Id.* at 4707.

pervasive to constitute a condition of employment. The majority agreed with the EEOC that Congress wanted courts to look to agency principles for guidance. Given Congress' decision to define "employer" to include any "agent" of an employer, manifests an intent to limit the acts for which employers are held responsible. The Court found that the court of appeals erred in concluding that employers are always automatically liable since the absence of notice to an employer "does not necessarily insulate that employer from liability." The Court rejected the bank's position that the mere existence of a grievance procedure, and a policy against discrimination, along with the failure to invoke the procedure would preclude employer liability. The Court pointed out that the bank's nondiscrimination policy did not address sexual harassment in particular, and did not sufficiently alert employees of their employers' interest in correcting that form of discrimination.<sup>112</sup>

The *Meritor* case and prior case law make it clear that an employer should be vicariously liable where an employee is discharged, demoted, or loses other tangible job benefits because the supervisor who perpetrated the illegal act was authorized to fire or demote the employee. An employer is not vicariously liable for a co-worker's discriminatory acts unless it fails to take remedial action against discrimination which it knew or should have known. As the four concurring justices in *Meritor* discussed, even if the supervisor does not have power to hire or fire, he does have authority to direct employees in their work and should generally be held liable even in hostile environment cases. While *Meritor* rejected strict liability in hostile environment cases, the Court provided little guidance other than referring to agency principles in such cases. The Court was not prepared to provide definitive rules in such cases preferring instead to examine the particular circumstances of each case and the particular employment relationship and job.

#### REMEDIES UNDER TITLE VII AND OTHER POSSIBLE ACTIONS

In enacting Title VII, Congress apparently never considered the availability of either punitive damages or compensatory damages.<sup>113</sup> The legislative history indicates that it was modeled after the National Labor Relations Act.<sup>114</sup> The National Labor Relations Act does not provide for compensatory or punitive damages<sup>115</sup> and courts have not awarded compensatory and punitive damages under Title VII. The remedial section of Title VII provides:

[T]he court may enjoin the . . . [employer] from engaging in [the] unlawful employment practice, and order such affirmative action as may be ap-

<sup>112</sup>*Id.* at 4708.

<sup>113</sup>See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1209, 1262 (1971).

<sup>114</sup>29 U.S.C. §§ 141-187 (1986). See remarks of Senator Humphrey 110 Cong. Rec. 6549 (1964). Comment *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 432 (1965).

<sup>115</sup>B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1452 & n. 153-56 (1983).

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 . . . In any action under this subchapter the court, in its discretion, may allow the prevailing . . . party a reasonable attorney's fee . . .<sup>116</sup>

Courts have provided a wide variety of relief including reinstatement with back pay<sup>117</sup>, and awards of reasonable attorney's fees.<sup>118</sup> Courts can also issue injunctions to prevent sexual harassment and to take steps to deal with complaints.<sup>119</sup>

Victims of sexual harassment who are not protected by Title VII or who believe the remedies are inadequate under Title VII have rooted their claims in tort law and state law.<sup>120</sup> State law should be looked to because the regulations may be more comprehensive and provide broader remedies.<sup>121</sup> One who is wrongfully touched may sue for battery<sup>122</sup>; one reasonably put in fear of offensive touching may sue for assault.<sup>123</sup> Other possible tort theories include intentional infliction of emotional distress when conduct "go[es] beyond all possible bounds of decency, and . . . [is] regarded as atrocious and utterly intolerable in a civilized society";<sup>124</sup> and intentional interference with contractual relationships which would be appropriate where the person is a supervisor or co-worker and persuades the employer to institute the retaliatory action.<sup>125</sup> In many states there is an implied representation by the employer of fair treatment and equal opportunity for all employees<sup>126</sup>, which can result in a cause of action for fraud and deceit.<sup>127</sup> Plaintiffs must consider the main barrier to tort actions for sexual harassment against employers which may be the worker's compensation law of the state. Clearly sexual harassment is outside the contemplation of the worker's compensation system and discrimination cases have been successfully brought because of intentional acts of discrimination.<sup>128</sup>

<sup>116</sup>42 U.S.C. §§ 2000e-5(g), 2000e-5(k) (1986).

<sup>117</sup>*Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975).

<sup>118</sup>*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978); *Heelan*, 451 F. Supp. at 1391.

<sup>119</sup>*E.g.*, *Bundy*, 641 F.2d at 946 n. 13, 948 n. 15.

<sup>120</sup>*See, e.g.*, *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, (D. N.J. 1978); *Continental Can Co., Inc. v. State*, 297 N.W.2d 241 (Minn. 1980) This case was brought under the Minnesota Human Rights Act Minn. Stat. Ann. §§ 363.01 to .13 (1966 and Supp 1980) and upheld for the first time a cause of action against an employer for sexual harassment by co-employees).

<sup>121</sup>*See Comment, Sexual Harassment in the Work Place: New Rules for an Old and Dirty Game* 14, U.C.D.L. REV. 711, 725-29 (1981).

<sup>122</sup>*See W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 9, 36 n. 85 (4th ed. 1971); Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879, 898-99 (1980).

<sup>123</sup>*See, e.g.*, *Skousen v. Nidy*, 367 P. 2d 248 (1962); MACKINNON, *supra* note 1, at 165-67.

<sup>124</sup>RESTATEMENT (SECOND) OF TORTS § 46, Comment (d) (1977) [hereinafter cited as RESTATEMENT].

<sup>125</sup>*See Id.* § 767.

<sup>126</sup>*See e.g.*, CAL. LAB. CODE §§ 1411-1420. 15 (West Supp. 1980).

<sup>127</sup>*See* RESTATEMENT, *supra* note 124, § 525.

<sup>128</sup>*See, e.g.*, *Alcorn v. Anbro Engineering, Inc.* 468 P. 2d, 216 (1970); *Magliulo v. Superior Court*, 47 Cal. App. 3d 760 (1975).

## PREVENTIVE MAINTENANCE AND DEFENSES

With the clear establishment of sexual harassment under *Meritor* for both hostile environment and "economic" or "tangible" discrimination cases, sexual harassment is a very fertile source of Title VII litigation in the future. All employers would be wise to realize the many ways to limit employer liability exposure to sexual harassment claims. The employer should adopt and disseminate a clear policy that sexual harassment is a prohibited employment practice, and it will not be allowed. Those found guilty of violating the policy will meet with appropriate sanctions.<sup>129</sup> The communication should take several forms including posting, inclusion in existing plant rules, newsletters, inclusion in the personnel manual, as well as employee seminars, and training programs.<sup>130</sup> The policy must include a formalized grievance procedure and good faith encouragement of its use to prevent sexual harassment. Immediate investigation<sup>131</sup> and the development of appropriate sanctions is essential to prevent the appearance of employer acquiescence. The good faith adherence to the formal grievance procedure will often solve potentially litigious matters, and also gain the respect and loyalty of the company's employees.

In the case of sexual harassment committed by co-workers, the EEOC Guidelines clearly provide that "an employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action."<sup>132</sup> There is increasingly much to be said for prohibiting all supervisor and subordinate romances even where voluntarily entered into because such a volunteer may have an unfair advantage in job evaluations, merit increases, and promotions over other employees not afforded this "opportunity."<sup>133</sup>

<sup>129</sup>At the federal level, the United States Office of Personnel Management has issued a policy statement requiring that all federal agencies conform to the following mandates:

1. Issue a very strong management statement clearly defining the policy of the federal government as the employer with regard to sexual harassment;
2. Emphasize this policy as part of a new employee organization covering the merit principles and the code of conduct; and
3. Make employees aware of the avenues for seeking redress, and the actions that will be taken against employees violating the policy.

See U.S. OFFICE OF PERSONNEL MANAGEMENT, *Memorandum to Heads of Departments and Independent Agencies, Subject: Policy Statement and Definition of Sexual Harassment*. Washington, D.C., (Dec. 12, 1979).

<sup>130</sup>Samples of corporate policies on sexual harassment can be found in 107 LAB. REL. REP. (BNA) 75 App. G. (1981).

<sup>131</sup>See *Continental Can Co. v. State*, 297 N.W. 2d 241 (Minn. 1980) where the court approved of the findings of the hearing examiner:

The hearing examiner concluded that Continental committed a second unfair employment practice after [plaintiff] notified [the supervisor] of the grabbing incident on October 13, 1975 because Continental did not conduct an immediate investigation into the matter and did not promptly attempt to prevent further recurrences of the same conduct.

The essence of the second . . . discriminatory practice lies not in the inadequacy of Continental's later responses to the situation but instead in the fact that these responses were not timely. This failure to respond promptly to [plaintiff's] complaints regarding the grabbing incident 'connected' Continental to the act of sexual harassment perpetrated by its employee. *Id.* at 250.

<sup>132</sup>29 C.F.R. § 1604.11(d) (1985).

<sup>133</sup>See Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1032 (1978).



Employers must be mindful that the courts have found relevant the employer's actions, policies and programs to deal with sexual harassment. It is essential that privacy of individuals during the investigatory process be maintained in reaching a determination of the facts.

### CONCLUSION

The Supreme Court in its unanimous holding in *Meritor* has established that both "hostile environment" as well as "economic" sexual discrimination cases fall within the language of Title VII. The Court has established that the "voluntariness" of the participation is not an issue but instead the issue is whether the alleged sexual advances are "unwelcome." The Court rejected the argument in hostile environment cases that employers are automatically liable for sexual harassment by their supervisor, and the Court also rejected the defense that having a grievance procedure and policy against discrimination coupled with the victims failure to invoke the procedure insulates the employer from liability. The language of the opinion does however, stress the importance of a specific and well drafted sexual nondiscrimination policy that is widely disseminated and has a formal grievance procedure that is acted upon promptly by the employer when grievances are filed. Preventive measures taken before a charge is filed will provide important defensive and mitigating arguments, but will also save a great deal of needless expense in litigation while building employee loyalty.

Since the Equal Opportunity Commission started counting sexual harassment cases in 1981, the reports to the Commission are up nearly fifty percent and employees and labor unions are becoming increasingly aware of employee rights under Title VII.<sup>134</sup> The EEOC Guidelines and the case law impose an obvious duty on the employer to prevent sexual harassment. The question of when the employer is liable for the acts of a supervisor in the hostile environment cases is still apparently a question of fact to be determined in each instance. Prudent employers can take the necessary preventive measures and careful employee training to establish a work environment free from sexual harassment.

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<sup>134</sup>Simison & Trost, *Sexual Harassment at Work Is a Cause For Growing Concern*, Wall St. J., June 24, 1986, at 1, col. 6.  
<http://idealexchange.com/akron.edu/akronlawreview/vol20/iss3/1>