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### Recommended Citation

Marvin F. Hill Jr. & Curtiss K. Behrens, *Love in the Office: A Guide for Dealing with Sexual Harassment under Title VII of the Civil Rights Act of 1964*, 30 DePaul L. Rev. 581 (1981)

Available at: <https://via.library.depaul.edu/law-review/vol30/iss3/3>

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# LOVE IN THE OFFICE: A GUIDE FOR DEALING WITH SEXUAL HARASSMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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One of the most volatile and legally perplexing situations facing the labor practitioner is that of sexual harassment of employees. While the exact extent of sexual harassment is unknown, it has been estimated that between fifty and eighty percent of all women<sup>1</sup> in the workforce have been subjected to some form of sexual harassment.<sup>2</sup> One of the problems for the practitioner is

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1. While in theory anyone can be a harasser and anyone can be a victim of sexual harassment, virtually all reported decisions and studies concerning the issue involve a male who is accused of sexually harassing a female. It should be stressed, however, that men who have been subjected to sexual harassment may obtain relief under Title VII of the Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e-17 (1976 & Supp. III 1979). As stated by the district court in *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *vacated*, 587 F.2d 1240 (D.C. Cir. 1979):

It is also notable that since the statute prohibits discrimination against men as well as women, a finding of discrimination could be made where a female supervisor imposed the criteria of the instant case [retaliation because of a refusal to engage in sexual acts] upon only the male employees in her office. So could a finding of discrimination be made if the supervisor were a homosexual.

413 F. Supp. at 659 n.6. It has been reported that in Bonn, West Germany, a female private in the United States Army was convicted for indecently assaulting a male soldier. She was fined \$298 and sentenced to thirty days of hard labor. See D. NEUGARTEN & J. SHAFRITZ, *SEXUALITY IN ORGANIZATIONS* 13 n.26 (1980) [hereinafter cited as NEUGARTEN & SHAFRITZ].

2. Perhaps the most comprehensive review of recent surveys that attempt to ascertain the extent to which individuals have been subjected to acts of sexual harassment has been undertaken by Neugarten and Shafritz. Noting that the methodological approaches leave much to be desired, but are nevertheless valuable for illustrating the dimensions of the problem, the authors report the following results obtained from recent studies:

1) In May, 1975, the Working Women's Institute of New York, a research and advocacy center devoted to furthering the goals of equal employment opportunity for women, surveyed 155 women on the subject. Seventy percent reported that they had experienced sexual harassment at least once. Of these, the majority ignored it, only to find that the behavior continued or worsened. Of those who ignored it, some were penalized by unwarranted reprimands, sabotage of their work, transfers or dismissals. Only a minority of those harassed complained through established channels; and of these complaints, no action was taken in over half the cases. The women who did not complain said it was because nothing would be done, or their complaints would be ridiculed, or they would be blamed. For the women who experienced it, sexual harassment had negative emotional effects, with the large majority feeling angry or upset, and some feeling frightened or guilty. Some felt powerless,

ascertaining a working definition of what constitutes sexual harassment under Title VII of the Civil Rights Act of 1964.<sup>3</sup> A supervisor who conditions

diminished in their ambition, and impaired in their job performance. Working Women's Institute, *Sexual Harassment on the Job: Results of Preliminary Survey* (1975).

2) Also in 1976, the United Nations Ad Hoc Group on Equal Rights for Women polled all 875 women employed by the U.N. in professional and clerical positions. Half of the respondents indicated that sexual pressure currently existed on their jobs, yet less than one-third had complained. The reason most frequently cited for not complaining was the perceived absence of proper channels for lodging a complaint. United Nations Ad Hoc Group on Equal Rights for Women, Report on the Questionnaire xxxvi, noted in Comment, *Employment Discrimination—Female Employees' Claim Alleging Verbal and Physical Advances by a Male Supervisor Dismissed as Nonactionable—Corne v. Bausch & Lomb, Inc.*, 51 N.Y.U. L. REV. 148, 149 n.6 (1976) [hereinafter cited as Corne Comment].

3) In 1977, sociologist Sandra Harley Carey interviewed 401 working women on the topic of sexual politics in business. All these women, interestingly enough, reported experiencing sexual harassment, but only a minority felt embarrassed or intimidated or thought the behavior demeaning. Over 20% indicated that they would not report an incident of sexual harassment because their superiors would take no action. Over one-third of the women did not even know if their company had a policy against harassment. S. Carey, *Sexual Politics in Business* (1976) (unpublished paper, University of Texas at San Antonio).

4) In 1978-79, a small sample of 198 federal employees in the Departments of Health, Education and Welfare and Justice, and in the General Services Administration were interviewed by New Responses, Inc., a nonprofit organization of women's policy consultants based in Washington, D.C. Of the 79 women in the sample who reported experiencing sexual harassment, one-fourth had had promotions withheld, some were transferred, and a few were fired or were looking for another job. The majority of the respondents indicated that they experienced sexual harassment on a continual basis and reported feelings of anger, helplessness and physical illness which interfered with their performance. A few indicated that sexual harassment took the form of rape or attempted rape. *Sexual Harassment in the Federal Government: Hearings Before the Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 39-40 (1979) (statement of Mary Ann Largen, Director, New Responses, Inc.).

See NEUGARTEN & SHAFRITZ, *supra* note 1, at 4-6.

3. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). The National Organization for Women has defined sexual harassment as "any repeated or unwarranted verbal or physical sexual advance, sexually explicit derogatory statement, or sexually discriminatory remark made by someone in the workplace, which is offensive or objectionable to the recipient of [sic] which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance." *Approaches to Affirmative Action: Sexual Harassment*, [1979-1980 Transfer Binder] 8 LAB. REL. REP. (BNA) 443:306.

One author defines sexual harassment as "a sexual advance made with an explicit or implicit threat of adverse job consequences for a failure to comply or as one adversely affecting a condition of employment." Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1007 n.2 (1978).

Another commentator notes:

The term "sexual harassment" indicates verbal and physical advances of a sexual nature, including propositions of sexual relations. It is to be distinguished from harassment or intimidation based on sex, *i.e.*, that which has no sexual aspect al-

an employment benefit on sexual favors from a subordinate is clearly engaging in conduct proscribed by the statute. It is not at all certain, however, whether the statute is violated when a nonsupervisory employee requests a sexual favor from a colleague. Although the Equal Employment Opportunity Commission (EEOC) has recently issued guidelines on sexual harassment, many issues are still unresolved.

The purpose of this Article is to examine the problem of sexual harassment at the workplace. Reference is made to Title VII as a potential remedy for an employee who has been the victim of sexual harassment. After a discussion of early case law, sexual harassment is examined under recent court decisions and the EEOC's newly promulgated guidelines. A suggested format for addressing the problem of sexual harassment under civil rights legislation is offered as a guide for avoiding liability under the statute.

#### TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, as amended, explicitly prohibits discrimination in employment, including hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin.<sup>4</sup> Since 1972, the Act has applied to employers engaged in an industry affecting commerce who have fifteen or more employees each working day who are employed during twenty or more calendar weeks of the current calendar year.<sup>5</sup> It also applies to employment agencies procuring employees for such an employer<sup>6</sup> and to almost all labor organizations.<sup>7</sup> The 1972 amendments also extend coverage to all state and local governments, government agencies, political subdivisions, excluding elected officials, their personal assistants and immediate advisors, and the District of Columbia departments and agencies, except where subject by law to the federal competitive service.<sup>8</sup>

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though it is directed solely against one sex. The latter activity has been found to violate Title VII.

Corne Comment, *supra* note 2, at 148-49 n.4.

4. Civil Rights Act of 1964, Title VII, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). Section 703(a) of Title VII provides in part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976 & Supp. III 1979).

5. *Id.* § 2000e(b).

6. *Id.* § 2000e(b), (c).

7. *Id.* § 2000e(c), (d).

8. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103 (amending 42 U.S.C. § 2000e(a)). As originally enacted in 1964, Title VII's coverage was not extended to employees of the federal government. In 1972, however, the statute was amended to

Any person claiming to be aggrieved under the statute may file a complaint with the EEOC. The EEOC is vested with the authority to investigate individual charges of discrimination, to promote voluntary compliance with the statute, and to institute civil actions against parties named in a discrimination charge.<sup>9</sup> The EEOC cannot adjudicate claims or impose administrative sanctions; rather, it prosecutes violations in the federal courts which are authorized to issue injunctive relief and to order such affirmative action as may be appropriate.<sup>10</sup>

To effectuate the purposes and policies of the statute,<sup>11</sup> Congress included section 704(a),<sup>12</sup> which essentially prohibits employers from retaliating against employees who initiate complaints under Title VII.<sup>13</sup> This section has been held to afford protection even though the conditions and conduct complained of do not constitute a violation of Title VII.<sup>14</sup> Moreover, even

include most federal employees. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16 (1976 & Supp. III 1979)).

9. 42 U.S.C. § 2000e-5(b), (f)(1) (1976 & Supp. III 1979).

10. *Id.* § 2000e-5(f), (g).

11. As expressed in the EEOC Regulations and Guidelines:

Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.

29 C.F.R. § 1608.1(b) (1981).

12. Section 704(a) provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1976). *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969). As the *Pettway* court noted, "the Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action." *Id.* at 1005. *See also East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Johnson v. Lillie Ruben Affiliates, Inc.*, 5 Empl. Prac. Dec. ¶ 8542 (M.D. Tenn. 1973).

13. "Employee" is defined by Title VII as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (1976). The statute has been held to prohibit discrimination relating to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct. *See, e.g., Pantchenko v. C.B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) (claim allowed against former employer for discriminatorily refusing to furnish recommendation letter to plaintiff's prospective employer despite absence of employment relationship at time of refusal).

14. *See Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235 (3d Cir. 1978), cert. granted, 439 U.S. 1066, vacated, 442 U.S. 366 (1979). The Third Circuit held in *Novotny*:

We recognize that to construe § 704(a) as protecting "opposition" beyond that embodied in participation in Title VII proceedings carries with it the prospect of a greater burden of litigation for employers. . . . Indeed, it may present the danger of harassment by employees who suffer some imagined slight based on a chance re-

relatives of persons who exercise rights under the statute are protected from employer retaliation.<sup>15</sup>

Discrimination based on religion, sex or national origin is regulated under Title VII by a different statutory standard than that applied to race or color. The former types of employment discrimination are tolerated when religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.<sup>16</sup> Accordingly, the statute mandates a two-step analysis in these employment discrimination cases. First, the court must find that the employer has engaged in discrimination under one of the prohibited classifications. After the court makes a determination that a prohibited form of discrimination has occurred, the employer has the opportunity to demonstrate that the discrimination was justified as a BFOQ under the second step.

SEXUAL HARASSMENT AS DISCRIMINATION  
"ON ACCOUNT OF SEX" UNDER TITLE VII:  
EARLY CASE LAW AND THE SEARCH  
FOR A THEORY

To better comprehend the current status of the law and the problems inherent in asserting a successful claim under the statute, a review of early federal court decisions is instructive. Many of the early decisions by the federal district courts were adverse to complaining employees.<sup>17</sup> Some

mark. Yet these dangers are implicit in any decision to recognize legal rights; to decrease the pressure of litigation on employers by the simple expedient of refusing to protect employees is always an option. Congress, however, has passed legislation extending the shield of Title VII to "opposition," and the possibility of abuse by litigious plaintiffs cannot justify withdrawal of the bulwark.

584 F.2d at 1261.

15. *E.g.*, *Kornbluh v. Stearns & Foster Co.*, 73 F.R.D. 307 (S.D. Ohio 1976) (husband brought § 704(a) claim against his former employer because of his sudden dismissal during the course of his wife's Title VII suit for sex discrimination against that company).

16. Section 703(e) provides:

Notwithstanding any other provision [of this subchapter], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e) (1976).

It is noteworthy that section 703(e) does not permit a BFOQ exception with respect to "race," which, according to the legislative history of Title VII, was excluded intentionally. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLE VII AND TITLE XI OF THE CIVIL RIGHTS ACT OF 1964, 3183-85, 3191-92 (1968).

17. *E.g.*, *Garber v. Saxon Indus., Inc.*, 14 Empl. Prac. Dec. ¶ 7586 (E.D. Va. 1976) (employee's allegation that she was fired for refusing to engage in sexual relations with her

courts were of the opinion that Title VII is simply not applicable to claims of sexual harassment.<sup>18</sup> Other decisions indicated that only in certain situations would a cause of action lie under the statute.<sup>19</sup> While many of the early federal court cases that refused to recognize Title VII claims based on sexual harassment were later overturned on appeal, most of the decisions concerned three major issues: (1) the conditions under which a sexual harassment claim is cognizable under Title VII's proscriptions against gender discrimination; (2) when, if ever, the conduct of an employee, usually a supervisor, can be attributed to the employer; and (3) the effect upon the employee-employer relationship, as well as on the court system, if the plaintiff is allowed to assert a harassment claim under the statute. A closer analysis of the early opinions reveals some of the background conditions that prompted the EEOC to formulate its Guidelines on Sexual Harassment.

The first case to reach the federal courts was *Barnes v. Train*,<sup>20</sup> decided in 1974. Granting the defendant's motion for summary judgment, the District Court for the District of Columbia stated that retaliatory action taken against a female employee for her refusal to have an after hours affair with a supervisor was not the type of discriminatory conduct contemplated by Title VII.<sup>21</sup> The acts that the plaintiff complained of, the court reasoned, were taken not because she was a woman, but because she refused to engage in a sexual affair with her supervisor.<sup>22</sup> The court explained that this was a controversy "underpinned by the subtleties of an inharmonious personal relationship based on plaintiff's sex."<sup>23</sup>

Similarly, in *Corne v. Bausch & Lomb, Inc.*,<sup>24</sup> decided one year after *Barnes*, the District Court of Arizona held that unwelcome verbal and physical sexual advances by a male supervisor to two female employees,

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supervisor not actionable under Title VII), *rev'd sub nom.* *Garber v. Saxon Bus. Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977). See also notes 20-30 & 34-38 and accompanying text *infra*.

18. See notes 20-30 & 39-43 and accompanying text *infra*.

19. *Stringer v. Pennsylvania Dep't of Community Affairs*, 446 F. Supp. 704 (M.D. Pa. 1978) (female employee who alleged she was subject to unjustified criticism, harassment, and eventual discharge because she refused sexual advances did state claim under Title VII); *Neeley v. American Fidelity Assurance Co.*, 17 Fair Empl. Prac. Cas. 482 (N.D. Okla. 1978) (Title VII violated where it is clear that continued employment and benefits are conditioned upon plaintiff's acquiescence to advances of superior); *Rinkel v. Associated Pipeline Contractors*, 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978) (allegation that employer refused to hire plaintiff because she would not submit to sexual advances of senior management official states valid claim for relief under Title VII); *Smith v. Rust Eng'r Co.*, 20 Fair Empl. Prac. Cas. 1172 (N.D. Ala. 1978) (allegation of sexual advances and remarks made a condition of employment is sufficient to state a claim under Title VII); *Price v. John F. Lawhon Furniture Co.*, 16 Empl. Prac. Dec. ¶ 8342 (N.D. Ala. 1978) (summary judgment granted for defendant employer absent evidence that employer knew about discriminatory conduct and either authorized or acquiesced to it).

20. 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

21. 13 Fair Empl. Prac. Cas. at 124.

22. *Id.*

23. *Id.*

24. 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated on other grounds*, 562 F.2d 55 (9th Cir. 1977).

which caused the employees to terminate their employment, created no cause of action under Title VII. The court stated that nothing in the complaint alleged, nor could be construed to allege, that the conduct complained of was a company-directed policy that deprived women of employment opportunities.<sup>25</sup> The court further reasoned that there is nothing in Title VII which could be construed reasonably to apply to " 'verbal and physical sexual advances' by another employee, even though that individual was in a supervisory capacity, where such complained of acts or conduct had no relationship to the nature of the employment."<sup>26</sup> The alleged sexual advances, noted the court, "appeared to be nothing more than a personal proclivity, peculiarity or mannerism" on the part of the supervisor.<sup>27</sup> The court stated that it would be ludicrous to hold that sexual harassment of a female by a male was the type of activity contemplated by Title VII.<sup>28</sup> To do so would mean that if the conduct complained of was directed equally to males there would be no basis for a lawsuit. Moreover, every time an employee made sexually oriented advances toward another employee a federal lawsuit could result. The court concluded that the only sure way an employer could avoid such charges would be to have employees who were asexual.<sup>29</sup> Although ruling against the plaintiff, the court in *Corne* did not clarify whether sexual harassment that is attributable to the employer, as opposed to a mere supervisory employee, is cognizable under Title VII.<sup>30</sup>

Two 1976 decisions addressed the question of whether sexual harassment attributable to an employer could constitute discrimination on account of gender under Title VII. In *Williams v. Saxbe*<sup>31</sup> the District Court for the District of Columbia denied the defendant's motion to dismiss and held that retaliatory actions taken because a female employee declined her supervisor's sexual advances could constitute gender discrimination under Title VII. The *Williams* court made it clear that an allegation of the existence of a policy or practice imposed on women similarly situated such that the conduct complained of was not a mere "isolated personal incident" was essential to the cause of action.<sup>32</sup> Accepting the veracity of the plaintiff's claim, the court

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25. 390 F. Supp. at 163.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 163-64.

30. *Cf. Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977) (employer may be held liable under Title VII for sexually harassing conduct of supervisory employees if employer knew of activities and failed to investigate). *See also* notes 44-48 and accompanying text *infra*.

31. 413 F. Supp. 654, 657 (D.D.C. 1976), *vacated on other grounds*, 587 F.2d 1240 (D.C. Cir. 1979).

32. 413 F. Supp. at 660 n.8. In the words of the court:

Whether this case presents a policy or practice of imposing a condition of sexual submission on the female employees . . . or whether this was a non-employment related personal encounter requires a factual determination. It is sufficient for purposes of this motion to dismiss that the plaintiff has alleged it was the former in this case.

*Id.* at 660.



declared that the conduct of the supervisor "created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were [otherwise] similarly situated."<sup>33</sup>

As in *Williams*, the District Court for the Northern District of California stated, in *Miller v. Bank of America*,<sup>34</sup> that there could be situations where a cause of action would arise under Title VII for "an employer's active, or tacit, approval of a personnel policy requiring sexual favors as a condition of employment."<sup>35</sup> The *Miller* court, however, dismissed a female employee's complaint that alleged her employer promised her a better job if she would be sexually cooperative and thereafter caused her discharge when she refused. Because the attraction between males and females is a natural phenomenon playing at least a subtle part in most personnel decisions, the court reasoned that it would be unwise for courts to delve into these matters without clear evidence of consistent gender-based discrimination, as opposed to an isolated act; otherwise every flirtation of the smallest order could give rise to liability.<sup>36</sup>

A relevant factor in the *Miller* decision was the court's resolution of the plaintiff's argument that the acts of her supervisor should be imputed to the employer. The court acknowledged that it had not been clearly established whether an employer can be held liable for isolated acts of discriminatory misconduct on the part of its lower echelon employees, but ruled that when a company-wide policy expressly condemns the alleged misconduct, and when an internal grievance mechanism exists for resolving complaints of this sort, a failure on the part of the employee to avail him or herself of these internal procedures would render tenuous a finding of employer culpability.<sup>37</sup> Following this line of reasoning, the court held that since plaintiff failed to bring the matter to the attention of her employer in order that it might investigate the incident, she could not claim that the employer tacitly approved the actions of her supervisor.<sup>38</sup>

Clearly *Miller*, as did *Corne*, rejected the ruling in *Williams* that conduct resulting in an impediment to the employment of one gender and not another may be cognizable under the statute. Instead, the *Miller* court appeared to find a violation only when plaintiff could demonstrate that a policy or practice existed at the organizational level. While this criterion would ensure that claims involving mere flirtations would not be litigated at the district court level, a heavy burden is placed on an employee who is the object of sexual harassment.

Of special note is *Tomkins v. Public Service Electric & Gas Co.*,<sup>39</sup> in which the District Court of New Jersey rejected the *Williams* reasoning and held

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33. *Id.* at 657-58.

34. 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

35. 418 F. Supp. at 236.

36. *Id.*

37. *Id.* at 236 n.2.

38. *Id.* at 235-36.

39. 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

that Title VII could not be used to remedy sexual harassment. The court stated that the statute was enacted to remove those artificial barriers to employment that are the result of unjust and long encrusted prejudice, such as race or gender.<sup>40</sup>

Title VII, according to the *Tomkins* court, was not drafted to afford a federal tort remedy "for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."<sup>41</sup> While in the present instance the supervisor was male and the employee female the court noted that the gender of the parties could have been reversed, or the parties could have been of the same gender. Thus, since the gender of each was only incidental to the claim of abuse, the plaintiff's claim of sexual harassment was not within the scope of the statute.<sup>42</sup>

Finally, the court noted that if a sexual advance made by a supervisor to a subordinate was actionable under Title VII, no supervisor could prudently enter into a social dialogue with any subordinate of either sex. In the words of the court:

An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to a subordinate, we would need 4,000 federal trial judges instead of some 400.<sup>43</sup>

During this period of the development of the substantive law, the District Court for the Eastern District of Michigan held, in *Munford v. James T. Barnes & Co.*,<sup>44</sup> that a former employee who alleged that she was discharged for refusing the sexual advances of a male supervisor did state a cause of action under the statute. More importantly from the standpoint of developing a theory of liability for the acts of supervisors—a recurring problem in obtaining relief for acts of sexual harassment—the court issued guidelines for determining what constitutes an employment practice of sexual harassment for which an employer may be held liable. The court pointed out that under the statute an employer is defined as a person engaged in an industry affecting commerce who has fifteen or more employees for each working day who are employed for twenty or more calendar weeks of the current calendar year, and any agent of such person.<sup>45</sup> Since both the supervisor who allegedly made the advances and the supervisor's superior who agreed to the discharge were responsible for making personnel decisions for James T.

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40. 422 F. Supp. at 556.

41. *Id.*

42. *Id.*

43. *Id.* at 557.

44. 441 F. Supp. 459 (E.D. Mich. 1977).

45. *Id.* at 466 (citing 42 U.S.C. § 2000e(b) (1976)).

Barnes & Co., the court concluded that both would be considered agents of the company under the statute.<sup>46</sup>

It is especially noteworthy that the *Barnes* court refused to hold that an employer is automatically vicariously liable for all acts of its agents—a position that is arguably at odds with the EEOC's current guidelines.<sup>47</sup> The court did stress, however, that an employer has an affirmative duty to make appropriate investigations of complaints of sexual harassment and to deal appropriately with the offending personnel.<sup>48</sup>

In a case similar to *Munford*, the District Court of Colorado held, in *Heelan v. Johns-Manville Corp.*,<sup>49</sup> that sexual harassment of females is gender-based discrimination under Title VII. In making this ruling the court articulated a number of criteria. First, in order to establish a prima facie case of gender discrimination by way of sexual harassment a plaintiff must plead and prove that submission to the sexual advances of a superior was a term or condition of employment.<sup>50</sup> Second, Title VII does not provide relief for a "mere flirtation" that has no substantial effect on the plaintiff's employment.<sup>51</sup> Finally, a plaintiff must plead and prove that employees of the opposite gender were not similarly affected by the alleged harassment of the employer.<sup>52</sup> The court emphasized, however, that as in other areas of employment discrimination it is not necessary for the plaintiff to prove that the sexual harassment was the result of a company-directed policy. To require such proof would be to extend a claim for relief with one hand and to take it away with the other.<sup>53</sup> The criteria articulated by the *Heelan* court subsequently reflected the better weight of court and administrative authority in the sexual harassment area.

#### SEXUAL HARASSMENT AS GENDER-BASED DISCRIMINATION UNDER TITLE VII: CONSTRUCTING A CAUSE OF ACTION

Title VII was drafted primarily to remedy discrimination based on race, national origin, and religion. The amendment adding "sex" as a prohibited employment criterion was inserted into the 1964 Act on the floor of the House by Representative Howard Smith of Virginia who stated that he wanted to prevent discrimination against the "minority sex."<sup>54</sup> Congress-

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46. 441 F. Supp. at 466.

47. See notes 166-74 and accompanying text *infra*.

48. 441 F. Supp. at 466. The court stated that it "agrees that an employer may be liable for the discriminatory acts of its agents or supervisory personnel if it fails to investigate complaints of such discrimination. The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior." *Id.*

49. 451 F. Supp. 1382, 1388 (D. Colo. 1978).

50. *Id.*

51. *Id.* at 1388-89.

52. *Id.*

53. *Id.*

54. 110 CONG. REC. 2577 (1964) (remarks of Rep. Smith). See also *Barnes v. Costle*, 561 F.2d 983, 990-91 (D.C. Cir. 1977); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975).

man Smith had actually opposed the passage of Title VII and was accused by some of attempting to sabotage its passage by means of the "sex amendment."<sup>55</sup> In any event, little legislative history exists to aid the courts in interpreting the meaning and scope of such a complex and evasive phenomenon as discrimination "on account of sex."<sup>56</sup> Moreover, the statute itself does not even define "discrimination."<sup>57</sup>

In contrast to many early decisions by the federal district courts, a review of current decisions indicates that a cause of action is readily available under Title VII for acts of sexual harassment. In analyzing these decisions, it is again important to keep the statutory framework in mind. There is often a tendency to conclude that sexual activity is prohibited by Title VII simply for the reason that there is no apparent business justification for such conduct. As previously discussed, the statute provides that a practice must first be determined discriminatory before the bona fide occupational qualification justification of section 703(e) may be considered.<sup>58</sup>

Once it is determined that employment-related conduct is of a sexual nature and is directed at one gender by the employer or the employer's agent, a violation of Title VII results. The BFOQ defense which otherwise would be available in a disparate treatment case is simply inoperative in the sexual harassment area. The most imaginative attorney would be hard-pressed to assert that a practice of sexual harassment directed at one gender is justified as a bona fide occupational qualification reasonably necessary to the safe and efficient operation of a business. Accordingly, to state a successful claim under the statute a plaintiff must plead and prove that the conduct is sexual in nature, discriminatory within an employment context, and in some way attributable to the employer. The remainder of this article analyzes the problems and policy issues addressed by the courts and the EEOC in developing a cause of action for acts of sexual harassment under Title VII.

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55. 110 CONG. REC. 2581-82 (1964) (remarks of Rep. Green in response to remarks of Rep. Smith).

56. *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166-67 (1971); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791 (1965).

57. In order of their historical development, Alfred Blumrosen articulated three concepts describing the nature of employment discrimination. First, acts causing economic harm to an individual that are motivated by personal antipathy to the group of which that individual is a member are discriminatory. Proof of discrimination requires evidence of an act, motive (*mens rea*), and harm. Second, economic harm caused to an individual by treating members of his or her minority group in a less favorable manner than similarly situated members of the majority group is discriminatory. Proof involves evidence of differential treatment and harm, but defense of justification is available. Third, conduct that has an adverse effect on minority group members is discriminatory. The defense of justification for compelling reasons of business necessity is recognized in these disparate impact cases. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 67 (1972).

58. 42 U.S.C. § 2000e-2(e) (1976). See note 16 and accompanying text *supra*.

*Defining Sexual Harassment*

When addressing claims of sexual harassment as sex discrimination under Title VII it is suggested that the allegedly impermissible conduct must be subjected to an initial test of "sexuality" before determining whether the conduct is directed solely at one gender in an employment context. Although an employer imposing different terms and conditions of employment on females than on similarly situated males without business justification will be found to violate the statute irrespective of whether the conduct is "sexual" in nature, an analysis of allegedly "sexually harassing" conduct aside from the issue of discriminatory application is useful as a pedagogical tool.

With respect to the problem of defining a "sexual" advance, the most comprehensive effort was made jointly by *Redbook* magazine and the *Harvard Business Review*.<sup>59</sup> In an attempt to measure opinions on and awareness of the issue of sexual harassment in the workforce, 7,408 questionnaires were mailed to *Harvard Business Review* subscribers in the United States, and 1,846 replies, representing approximately twenty-five percent of the mailed questionnaires, were tabulated. Furthermore, to serve as a benchmark for the sample, the surveyors provided the respondents with the EEOC guidelines on sexual harassment in the introduction to the questionnaire. Finally, to ensure a representative response from women, a questionnaire was mailed to virtually every *Redbook* subscriber in the United States. This produced a male/female ratio of thirty-two percent to sixty-eight percent, and a resulting overall response of fifty-two percent male and forty-four percent female.

Respondents were given various fact situations and asked whether that behavior constituted sexual harassment and whether they had either heard of or observed such behavior in their organizations. While the respondents generally agreed that the extreme fact situations constituted sexual harassment, there was disagreement regarding the ambiguous situations.<sup>60</sup> As summarized by the researchers, the perceived seriousness of the conduct was a function of who made the advance, the apparent intent of the actor, and the victim's perception of the consequences for failure to acquiesce.

Part of the problem in ascertaining a definition of sexual harassment from court and administrative decisions is the terminology used when resolving claims under section 703 of the statute. For example, courts have denied

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59. Collins & Blodgett, *Sexual Harassment . . . Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 76, 78.

60. The results are reproduced in the following two exhibits:

**EXHIBIT I**

The situations listed below are four of the 14 listed in the survey that were perceived by most people to be misconduct. In these extreme cases, there was a minimal difference of opinion between men and women and between upper and lower level management. For instance, the first listed situation—"I can't seem to go in and out of my boss' office without being patted or pinched"—was regarded as harassment by 89% of the men and 92% of the 1,846 respondents.

Almost 87% of the upper level management and 91% of the lower level management viewed the situation as harassment.

IEWS ON EXTREME BEHAVIOR  
(based on percentage of 1,846 total respondents)

	Not Harassment.	Possibly harassment.	Sexual Harassment.	Don't know.	Heard of or observed in company.	Not heard of or observed in company.
I can't seem to go in and out of my boss' office without being patted or pinched.	1%	8%	90%	1%	14%	83%
Mr. X has told me that it would be good for my career if we went out together. I guess that means it would be bad for my career if I said no.	2%	17%	79%	2%	12%	85%
Mr. X has asked me to have sex with him. I refused, but now I learn that he's given me a poor evaluation.	1%	20%	78%	1%	10%	87%
I have been having an affair with the head of my division. Now I've told him I want to break it off, but he says I will lose out on the promotion I've been expecting.	4%	7%	87%	2%	7%	90%

*Id.* at 84.

EXHIBIT II

Less extreme examples of harassment included in the survey produced a greater divergence of opinion. This part of the survey also measured the perceived seriousness of the harassment based on whether the harasser was the female employee's supervisor or coworker. In all but two of these situations, the supervisor's behavior was rated more serious than the coworker's. This result exemplifies a major finding of this survey that sexual harassment is perceived as an issue of power. That is, the more powerful the individual, the more threatening the behavior is to the employee.

IEWS ON LESS EXTREME BEHAVIOR  
BASED ON SUPERVISOR/COWORKER SPLIT SAMPLE  
[The response to supervisor harassment is listed first  
with response to coworker harassment following the slash]

	Not Harassment.	Possibly harassment.	Sexual Harassment.	Don't know.	Heard of or observed in company.	Not heard of or observed in company.
Whenever I go into the office my supervisor (a man I work with) eyes me up and down, making me feel uncomfortable.	20% / 26%	60% / 54%	16% / 15%	4% / 4%	61% / 71%	37% / 27%
My supervisor (a man I work with) starts each day with a sexual remark. He insists it's an innocent social comment.	5% / 10%	46% / 49%	44% / 37%	4% / 4%	35% / 45%	63% / 53%

relief under the statute because the conduct complained of did not involve the imposition of a term or condition on employment, even though the conduct at issue clearly involved a sexual advance.<sup>61</sup> Other courts have concluded that the statute has not been violated because the acts complained of were simply not "sexually harassing."<sup>62</sup> Still other courts assumed outright that the acts were sexual advances, but nevertheless resolved the case against the plaintiff by concluding that the conduct was an "isolated incident" that was "personal" in nature.<sup>63</sup> Frequently, concluding that an act of sexual harassment was "isolated" or "personal" would mean either that the act was not employment-related or if employment-related, the act was for some reason not attributable to the employer. An example would be an unwelcome pinch by a coworker or a half-serious invitation for sexual activity by a supervisor.

It seems clear that the conduct complained of must be both "sexual" and "harassing" in order to fall within the sexual harassment proscriptions as outlined by recent court and administrative interpretations. In this respect *Halpert v. Wertheim*<sup>64</sup> is particularly noteworthy. In *Halpert*, the District

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	Not Harassment.	Possibly harassment.	Sexual Harassment.	Don't know.	Heard of or observed in company.	Not heard of or observed in company.
Often in meetings my supervisor (a man I work with) continually glances at me.	62% / 65%	26% / 26%	1% / 2%	10% / 6%	50% / 61%	47% / 36%
Every time we meet, my supervisor (a man I work with) kisses me on the cheek.	4% / 17%	43% / 47%	46% / 20%	7% / 10%	11% / 18%	86% / 79%
My supervisor (a man I work with) asked me out on a date. Although I refused, he continues to ask me.	10% / 13%	39% / 41%	48% / 20%	4% / 5%	26% / 42%	71% / 56%
My supervisor (a man I work with) puts his hand on my arm when making a point.	43% / 46%	44% / 42%	3% / 4%	10% / 9%	59% / 63%	36% / 33%

*Id.* at 85.

61. See, e.g., *Smith v. Amoco Chem. Corp.*, 20 Fair Empl. Prac. Cas. 724 (S.D. Tex. 1979); *Neeley v. American Fidelity Assurance Co.*, 17 Fair Empl. Prac. Cas. 482 (N.D. Okla. 1978); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated on other grounds*, 562 F.2d 55 (9th Cir. 1977).

62. See, e.g., *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980) (no Title VII claim when plaintiff's sexual relations with employer were voluntary and unrelated to continued employment).

63. See, e.g., *Fisher v. Flynn*, 598 F.2d 663, 666 (1st Cir. 1979) (Richey, J.); *Smith v. Rust Eng'r Co.*, 20 Fair Empl. Prac. Cas. 1172, 1173 (N.D. Ala. 1978); *Miller v. Bank of Am.*, 418 F. Supp. 233, 235 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9 Cir. 1979); *Williams v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976), *vacated*, 587 F.2d 1240 (D.C. Cir. 1979); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. 123, 124 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

64. 24 Empl. Prac. Dec. ¶ 31,243 (S.D.N.Y. 1980).

Court for the Southern District of New York held that a female securities trader was not the subject of sexual harassment under the statute by virtue of her exposure to coarse language, including references to male and female genitalia and to sexual activity. Although the court found that plaintiff Halpert was at times the subject of such language, as were other women, the court stressed that the language did not involve "harassment" in light of the fact that plaintiff used such "truck driver" language.<sup>65</sup>

Also significant is *Bundy v. Jackson*,<sup>66</sup> in which the District Court for the District of Columbia found that the acts complained of did constitute sexual advances, but nevertheless rejected plaintiff's Title VII claim because none of the advances were harassing. No fewer than three supervisors had made sexual advances to the plaintiff. The record further indicated that one supervisor had on numerous occasions called plaintiff into his office to discuss his theory that women rode horseback to obtain sexual relief.<sup>67</sup> The same supervisor also suggested that plaintiff come to his apartment to view books that could not be purchased in a bookstore. A second supervisor made sexual suggestions which included a vacation for two in the Bahamas.<sup>68</sup> When plaintiff finally registered a complaint to a third supervisor, he too informed her that he wanted to have sexual relations with her, and later told her that "any man in his right mind would want to rape [her]."<sup>69</sup>

While the district court's decision that the conduct was not harassing is puzzling, especially in light of the court's finding that sexual advances were made, the *Bundy* decision arguably can be reconciled with current law. The court's decision that the sexual advances were not "harassing" was, in part, based on a finding that the acts complained of were not considered either unusual or highly improper and insulting.<sup>70</sup> Indeed, the plaintiff waited a full two years after the first advance was made in 1972 before making an informal, oral complaint in late 1974. Moreover, the court concluded that plaintiff's 1975 complaint was triggered by her eligibility for a promotion rather than feeling harassed by the sexual advances of her supervisors.<sup>71</sup> Arguably, the court's holding that the advances were not harassing was premised on an implicit finding that the sexual advances were not unwelcome to the plaintiff.

What is important in this regard is the recognition that in asserting a cause of action under Title VII it may not be sufficient merely to prove sexual advances were made that would be considered harassing to most employees. As other courts have done, the *Bundy* court indicated that the plaintiff's

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65. *Id.* at ¶ 17,560.

66. 19 Fair Empl. Prac. Cas. 828 (D.D.C. 1979).

67. *Id.* at 830.

68. *Id.*

69. *Id.*

70. The court noted that plaintiff's complaints of sexual molestation were not taken seriously. Plaintiff's superiors appeared to consider the making of sexual advances to female employees as merely a game that was played. *Id.* at 832.

71. *Id.* at 831.



response to the advances, including the timing of any complaints, would be closely scrutinized in determining whether conduct was in fact "harassing."<sup>72</sup> Thus, a female who voluntarily submits to the sexual advances of a supervisor or co-employee would not have a cause of action under the statute, as long as the relationship continued to be consensual.

### *The Concept of Discrimination*

Title VII forbids discrimination only under specific circumstances. As outlined by Barbara Schlei and Paul Grossman in their treatise on employment discrimination law,<sup>73</sup> discrimination is an unlawful employment practice only if: (1) committed by a "respondent"<sup>74</sup> cognizable under Title VII; (2) on a "basis"<sup>75</sup> cognizable under the Act; (3) with regard to an "issue"<sup>76</sup> cognizable under Title VII; and (4) where a causal connection, or nexus, exists between the basis and the issue.

Two theories by which the causal connection or nexus may be proved are "disparate treatment" and "disparate impact." The most easily understood type of discrimination is disparate treatment, which involves treating an individual less favorably than others similarly situated because of race, color, religion, sex, or national origin.<sup>77</sup> Proof of a discriminatory motive is required, although it may be inferred from the mere fact of a difference in treatment.<sup>78</sup> Disparate impact involves employment practices that are facially neutral but which have a discriminatory effect that cannot be justified by business necessity.<sup>79</sup> Proof of a discriminatory motive is not required under a disparate impact theory.<sup>80</sup>

While both the disparate treatment and impact theories are often applicable in a given factual situation, claims of sexual harassment fall most frequently within the disparate treatment category. A typical fact pattern

72. *Id. Accord*, *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37, 41 (D.D.C. 1980) (plaintiff conceded that she did not file a complaint with any representative of her employer).

73. B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 15 (1976) [hereinafter cited as SCHLEI & GROSSMAN].

74. The respondent must be either an employer, 42 U.S.C. § 2000e(b) (1976), an employment agency, *id.* § 2000e(c), or a labor organization, *id.* § 2000e(d). SCHLEI & GROSSMAN, *supra* note 73, at 15.

75. The statutory bases are race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1) (1976). SCHLEI & GROSSMAN, *supra* note 73, at 15.

76. The cognizable issues are: hiring, discharging, compensation, contract terms, conditions, or privileges of employment, 42 U.S.C. § 2000e-2(a)(1) (1976); limitations, segregation or classification of employees or applicants for employment, *id.* § 2000e-2(a)(2); unwillingness to refer, *id.* § 2000e-2(b); exclusion or expulsion from membership, *id.* § 2000e-2(c)(1); limitation, segregation, or classification of membership, *id.* § 2000e-2(c)(2); retaliation, *id.* § 2000e-3(a); printing or publishing a discriminatory employment notice or advertisement, *id.* § 2000e-3(b). SCHLEI & GROSSMAN, *supra* note 73, at 15.

77. *See, e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 325 n.15 (1977).

78. *Id.*

79. *Id.*

80. *Id.*

involves the discharge,<sup>81</sup> transfer,<sup>82</sup> refusal to promote,<sup>83</sup> or elimination of an employee's job<sup>84</sup> for refusing to be sexually cooperative. A manager acting for his employer may also simply fail to hire an individual for another position within the company because of his or her failure to acquiesce to sexual advances.<sup>85</sup>

Current law clearly indicates that for a finding of gender discrimination under the statute it is not necessary that the discriminatory conduct depend upon a characteristic peculiar to one gender. Employers have argued as a defense to a charge of gender discrimination that the basis of the discriminatory conduct was the plaintiff's refusal to submit to sexual advances rather than plaintiff's gender. For instance in *Williams v. Saxbe*,<sup>86</sup> the employer argued that the supervisor did not discriminate against women since the "primary variable" of the affected class was refusal to furnish sexual favors, rather than gender itself. While the employer conceded that examination of prior gender discrimination decisions revealed that stereotypes regarding women may have created the class, the company nevertheless asserted that the actual impetus behind the creation of a class must be distinguished from the primary variable which defined the class.<sup>87</sup> The court, in rejecting this argument, reasoned that the supervisor's conduct placed an effectual barrier to employment before one gender and not the other, even though both genders were otherwise similarly situated.<sup>88</sup>

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81. See, e.g., *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980) (community service worker fired for failure to submit to supervisor's sexual advances); *Ludington v. Sambo's Restaurants, Inc.*, 474 F. Supp. 480 (E.D. Wis. 1979) (waitresses discharged after complaining that they were subjected to vulgar suggestions and physical contact).

82. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977) (plaintiff's request for a transfer following sexual harassment by supervisor resulted in transfer to inferior position).

83. See, e.g., *Bundy v. Jackson*, 19 Fair Empl. Prac. Cas. 828 (D.D.C. 1979) (female corrections employee allegedly denied promotions for refusing to submit to supervisor's sexual advances), *rev'd*, 641 F.2d 934 (D.C. Cir. 1981).

84. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (plaintiff's position eliminated after plaintiff resisted supervisor's sexual advance).

85. *Rinkel v. Associated Pipeline Contractors, Inc.*, 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978) (plaintiff allegedly denied another position within firm for refusal to have sex with senior management official).

86. 413 F. Supp. 654 (D.D.C. 1976), *vacated*, 587 F.2d 1240 (D.C. Cir. 1979).

87. As argued by the company:

In previous sex discrimination cases, this primary variable was gender and, therefore, the applicability of the Act was triggered. Thus, conceptually, sexual stereotypes are irrelevant to the actual determination of whether an impermissible class exists. For example, if an employer enforced a policy that only women could be "roustabouts," an impermissible classification would arise, a classification described by the primary variable, gender, and the Act would be triggered despite the absence of a sexual stereotype. Therefore, in the instant case, even assuming that a sexual stereotype was at the root of [the supervisor's] alleged imposition of a sexual condition, such a factor is irrelevant to the description of the alleged class.

413 F. Supp. at 657.

88. *Id.*

Furthermore, the statute is not limited to differentiation based wholly upon an employee's gender. In *Phillips v. Martin Marietta Corp.*,<sup>89</sup> the Supreme Court held that an employer's refusal to hire women with pre-school age children when no such hiring policy was applied to men could constitute discrimination within the meaning of Title VII. There was no evidence that the employer excluded women entirely, because most of the workforce was female. Nevertheless, since gender was one criterion in employment, a prima facie violation of Title VII was shown. Other courts, in analogous fact situations, have similarly concluded that a cause of action was cognizable under the statute.<sup>90</sup> For example, the Court of Appeals for the District of Columbia held, in *Barnes v. Costle*,<sup>91</sup> that it is sufficient that gender is a substantial factor behind the discrimination. The *Barnes* court stated that the appellant's gender, not simply her failure to comply with her

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89. 400 U.S. 542, 544 (1971) (per curiam).

90. The issue of discrimination between different categories of the same gender has been addressed repeatedly by the courts. See *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (grooming regulation applicable to males with long hair not sex-based discrimination since employer applied personal grooming code to all employees); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (unlawful to restrict employment of married females but not married males, even though most flight attendants were females), *cert. denied*, 404 U.S. 991 (1971).

The classification of employees on the basis of sex plus some other ostensibly neutral characteristic has generally been termed "sex-plus" discrimination. As stated by the Fifth Circuit in *Willingham*:

The practical effect of interpreting [42 U.S.C. § 2000e-2] to include this type of discrimination is to impose an equal protection gloss upon the statute, i.e., similarly situated individuals of either sex cannot be discriminated against vis-a-vis members of their own sex unless the same distinction is made with respect to those of the opposite sex. Such an interpretation may be necessary in order to counter some rather imaginative efforts by employers to circumvent [42 U.S.C. § 2000e-2].

507 F.2d at 1089.

It is noteworthy that Congress defeated an amendment that would have added the word "solely" to the bill, modifying "sex," 110 CONG. REC. 2728 (1964), thereby providing some legislative support for the inclusion of "sex-plus" discrimination within the proscription of § 703. See *Willingham*, 507 F.2d at 1089. In addition, the EEOC has stated in its guidelines on sex discrimination that "so long as sex is a factor in the application of the rule [restricting the employment of married women], such application involves a discrimination based on sex." 29 C.F.R. § 1064.4(a) (1981).

While it is clear that not every dissimilarity between the sexes in employment requirements transgresses the proscription of Title VII, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976), courts have generally held that those "plus" factors that are based on immutable characteristics will warrant a finding of gender discrimination. See, e.g., *Barnes v. Costle*, 561 F.2d 983, 990 n.57 (D.C. Cir. 1977) (citing *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1337 (D.C. Cir. 1973)); *Fagen v. National Cash Register Co.*, 481 F.2d 1115, 1124-25 (D.C. Cir. 1973). In addition, the Supreme Court has held that those differentials that have a significant effect on employment opportunities of one gender will warrant a finding of gender discrimination. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Moreover, courts are receptive to allegations of discrimination based on constitutionally protected activities such as marriage or child-rearing because they present insurmountable obstacles to one gender. See *Earwood v. Continental S.E. Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976) (dicta).

91. 561 F.2d 983 (D.C. Cir. 1977).

supervisor's sexual demands, was essential to her loss of position unless the employer could show that similar demands were placed on male employees.<sup>92</sup>

Current law also indicates that an employer will not be successful in defending a sexual harassment charge by a female by merely proffering the argument that males *may* be equally harassed.<sup>93</sup> Likewise, it is no defense to assert that a similar condition could be imposed on a male subordinate by a heterosexual female supervisor, or upon a subordinate of either gender by a homosexual superior of the same gender.<sup>94</sup> As expressed by the District of Columbia Circuit, these situations are to be distinguished from the case where a bisexual supervisor harasses employees of both genders equally. Under the bisexual situation, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.<sup>95</sup>

### *Condition of Employment*

When ruling on complaints alleging acts of sexual harassment, courts have indicated that a distinction must be made between complaints alleging sexual advances of an individual or personal nature and those alleging adverse employment consequences flowing directly from those advances. Declaring

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92. *Id.* at 991-92. As summarized by the Court of Appeals for the District of Columbia in *Barnes*:

To briefly illustrate, suits have been entertained where a woman charged that she was fired because she was pregnant and unmarried, notwithstanding the fact that no other woman was discharged for that reason, and where a male nurse asserted that he was denied assignments to care for female patients, although no allegations were made with respect to the assignments of other male nurses. Close analogies emerge from situations wherein a black woman was terminated ostensibly for personality conflicts but allegedly was told that she probably did not need the job anyway because she was married to a white male, and where a white woman attributed loss of her job to her relationship with a black man. In each of these instances, a cause of action was recognized although it did not appear that any other individual of the same gender or race had been mistreated by the employer.

*Id.* at 993-94.

93. In reversing the district court, the Third Circuit stated, in *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977):

In holding that there was no sex discrimination because "gender lines might as easily have been reversed, or even not crossed at all," . . . the district court took much too narrow a view of what can constitute sex based discrimination under Title VII. It is not necessary to a finding of a violation that the discriminatory practice depend upon a characteristic "peculiar to one of the genders," . . . or that the discrimination be directed at all members of a sex . . . It is only necessary to show that gender is a substantial factor in the discrimination and that if the plaintiff "had been a man she would not have been treated in the same manner."

*Id.* at 1046 n.4.

94. *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

95. *Id.* See also *Williams v. Saxbe*, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976), *vacated*, 587 F.2d 1240 (D.C. Cir. 1979); EEOC Dec. No. 70401, 2 Fair Empl. Prac. Cas. 427 (1970).

that "the protection of the rights of equality in employment guaranteed by Title VII must be balanced against the unauthorized use of the statute as the vehicle for maintenance of personal non-employment claims," the District Court for the Northern District of Alabama held, in *Smith v. Rust Engineering Co.*,<sup>96</sup> that claims of sexual advances and remarks must be related to some term or condition of employment in order to state a claim under Title VII. The court granted summary judgment for the employer even though the court assumed, for purposes of the motion, that the acts of which plaintiff complained were "sexual advances." The *Smith* court ruled that the uncontroverted facts established that no "nexus" existed between the alleged statements and any term or condition of employment.<sup>97</sup> Both employees were cost engineers doing the same type of work. The alleged offender did not promise plaintiff anything with respect to employment. Moreover, there was no claim that acquiescence in the sexual advances was made impliedly or expressly a condition of employment.<sup>98</sup>

In *Fisher v. Flynn*,<sup>99</sup> the First Circuit likewise emphasized that a successful complaint must allege facts sufficient to establish a nexus between the sexual conduct and some term or condition of employment. The *Fisher* court found that the romantic adventure at issue was but an "unsatisfactory personal encounter with no employment repercussions."<sup>100</sup> As such, the conduct was not actionable under Title VII.

The issue of a nexus between a sexual advance and a term of employment arose in a different context in *Cordes v. County of Yavapai*.<sup>101</sup> In *Cordes*, a former legal secretary in the county attorney's office alleged that she was not reappointed to her position by the new county attorney because of her refusal to grant sexual favors to him *before* he became county attorney. Ruling for the employer, the federal district court of Arizona stated that unlike the situation in *Barnes* and *Tomkins*, the imposition of the "condition of employment" and the supervisor's "sexual advances" did not coincide.<sup>102</sup> The *Barnes* and *Tomkins* plaintiffs knew, reasoned the *Cordes* court, that absent consent to a supervisor's amorous desires, their employment opportunities would suffer. In the present action, neither the plaintiff nor the defendant related the sexual advances to the plaintiff's employment.<sup>103</sup>

What is particularly noteworthy in the *Cordes* case is the court's rejection of the plaintiff's argument that her supervisor imposed a condition upon her

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96. 20 Fair Empl. Prac. Cas. 1172 (N.D. Alaska 1978). Similarly, in *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37, 42 (D.D.C. 1980), the court held that the plaintiff did not state a cause of action under Title VII because the plaintiff's intimate relationship to her immediate supervisor was voluntary and unrelated to plaintiff's continued employment or promotion.

97. 20 Fair Empl. Prac. Cas. at 1174.

98. *Id.* at 1173-74.

99. 598 F.2d 663 (1st Cir. 1979).

100. *Id.* at 666.

101. 17 Fair Empl. Prac. Cas. 1224 (D. Ariz. 1978).

102. *Id.* at 1227.

103. *Id.*

reappointment that he did not impose upon male applicants. The court stated that plaintiff did not state a cause of action since at the time she was harassed there were no employment ramifications. Moreover, the court declared that spiteful retaliatory conduct, although petty and deplorable, does not amount to a condition of employment.<sup>104</sup> The *Cordes* court concluded that absent an allegation that the supervisor would have reappointed the plaintiff if she would have granted sexual favors at the time reappointment was denied, the plaintiff could not maintain that her employer imposed a present condition of employment in a discriminatory manner.<sup>105</sup>

Further emphasis that a plaintiff must allege a nexus between the sexual act and employment in order to establish a cause of action under the statute can be found in *Clark v. World Airways, Inc.*<sup>106</sup> The court declared that even assuming that plaintiff was subjected to sexual advances by the president and chief stockholder of World Airways, the president did not at any time relate submission to his advances to the employment prospects of any of the complaining females.<sup>107</sup> At no point did the president either explicitly or implicitly threaten to terminate plaintiff's employment or otherwise disadvantage her if she did not acquiesce. In fact, after plaintiff rebuffed one advance, the president called a company car for her. Moreover, the court observed that the advances occurred in a primarily social context, although the court did recognize that the distinction between a business and social context is not always clear.<sup>108</sup>

While current law holds that in order to recover on a claim of sexual harassment the complaining plaintiff must establish that submission to the sexual advance was a term or condition of employment,<sup>109</sup> recent interpretations of the statute, both judicial and administrative, have expanded the concept of an "employment-related" condition. Specifically, the notion that Title VII mandates that an employee be provided with a work environment free from verbal and physical sexual abuse has surfaced in the gender discrimination context. Analogous "hostile environment" theories of employ-

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104. *Id.*

105. *Id.*

106. 24 Fair Empl. Prac. Cas. 305 (D.D.C. 1980).

107. *Id.* at 307.

108. *Id.* at 308 n.9.

109. *E.g.*, *EEOC v. Sage Realty Corp.*, 22 Fair Empl. Prac. Cas. 1660, 1662 (S.D.N.Y. 1980) (holding that a plaintiff must establish that a condition of employment was imposed by the employer on the basis of gender); *Smith v. Amoco Chem. Corp.*, 20 Fair Empl. Prac. Cas. 724, 726 (S.D. Tex. 1979) (foreman's verbal passes insufficient to give rise to Title VII violation when plaintiff not terminated for rejecting advances); *Neeley v. American Fidelity Assurance Co.*, 17 Fair Empl. Prac. Cas. 482, 485 (N.D. Okla. 1978) (employer did not violate statute when male vice-president told female employee dirty jokes and placed his hands on her shoulders while explaining work assignment when (1) employer was unaware of vice-president's acts; (2) employer had policy against sexual advances at workplace; and (3) none of the acts of the vice-president were made conditions of female's employment, i.e., she was not required to submit to such acts or endure such treatment in order to maintain her job and enjoy rights of employment).

ment discrimination have developed in the race,<sup>110</sup> national origin<sup>111</sup> and religion<sup>112</sup> contexts.

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110. *See, e.g.*, *Winfrey v. Metropolitan Util. Dist.*, 467 F. Supp. 56 (D. Neb. 1979) (foreman's reference to black meter reader as "boy" falls short of Title VII violation since foreman personally apologized); EEOC Dec. No. 76-89, [1980] EML. PRAC. GUIDE (CCH) ¶ 6667 (1976) (holding that the psychological as well as economic conditions of employment are entitled to protection, and that the phrase "terms, conditions, and privileges of employment" as set forth in § 703 encompasses the practice of creating and maintaining a working atmosphere free of ethnic and racial discrimination).

In *Higgins v. Gates Rubber Co.*, 578 F.2d 281 (10th Cir. 1978), the plaintiff alleged that the lower court erred in not holding that his employer committed an unlawful employment practice by not providing him a workplace free from racial insults, invectives, intimidation, or other forms of racial discrimination. In *Higgins*, evidence of the plaintiff's work environment was introduced at the trial court for the purpose of ascertaining whether an assault by plaintiff was justified by the provocation of other employees. The lower court held that the assault on the plaintiff, in and of itself, cannot be held to justify an assault or battery upon another person. Absent a finding that the employer was or should have been aware of this unfavorable atmosphere, the Tenth Circuit stated that it could not hold that the trial court erred as a matter of law by not finding defendant in violation of Title VII. 578 F.2d at 283.

111. *See, e.g.*, *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (upholding lower court's determination that use of ethnic slurs by employee's supervisor did not amount to a violation of Title VII when comments made were part of casual conversation and were not excessive or shameful); *Kidd v. American Air Filter Co.*, 23 Empl. Prac. Dec. ¶ 31,126 (W.D. Ky. 1980) (disrespect and prejudice by fellow employees not within ambit of Title VII unless "excessive and opprobrious"); *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (no violation of Title VII for isolated acts of harassment which the employer did not always know about but which the employer took steps to prevent when informed); EEOC Dec. No. 74-05, 6 Fair Empl. Prac. Cas. 834 (1973) (holding that Title VII requires an employer to maintain an atmosphere free of racial and ethnic intimidation and insult by taking positive action when necessary to redress or eliminate employee intimidation); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. 852 (1972) (reasonable cause to believe statute was violated when employer tolerated atmosphere of intimidation in which blacks and Spanish-surnamed employees were subjected to barrage of racial and ethnic "jokes" and derogatory restroom wall graffiti); EEOC Dec. No. 72-0621, 4 Fair Empl. Prac. Cas. 312 (1971) (reasonable cause found where employer transferred Spanish-surnamed employee to different work area after employee complained of repeated on-the-job harassment by a nonsupervisory Anglo employee); EEOC Dec. No. 70-683, 2 Fair Empl. Prac. Cas. 606 (1970) (derogatory remarks made by supervisors to Spanish-surnamed employees constituted unlawfully disparate term or condition of employment); EEOC Dec. No. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. 295 (1969) (holding that employer violated Title VII by permitting acts of harassment of foreign-born employee, including: (1) subjecting employee to Polish jokes and other vulgar Polish names and general derogatory remarks; (2) driving a vehicle at him only to stop short of striking him; (3) throwing objects at his feet; (4) lighting welding torches near his face; (5) assigning him jobs beyond his physical capacity; and (6) requiring him to sweep out the plant while other employees rested).

112. *See, e.g.*, *Compston v. Borden, Inc.*, 424 F. Supp. 157, 160-61 (S.D. Ohio 1976) (Title VII violated when a person vested with managerial responsibilities demeaned an employee because of the employee's professed religious views); *Marlowe v. General Motors Corp.*, 11 Fair Empl. Prac. Cas. 1357 (E.D. Mich. 1975) (employer did not violate Title VII's ban on religious discrimination despite other workers' harassment of Jewish employee where record indicated that (1) the harassment, intimidation, or coercion of employees violated shop rules; (2) the employer had a policy against harassment and intimidation and investigated all reported incidents of harassment; and (3) in most instances the employer had been unable to identify the perpetrator of the act, but where identification was confirmed, that employee had been disci-

The EEOC has promulgated guidelines on employment discrimination,<sup>113</sup> including a recent guideline on sexual harassment.<sup>114</sup> Although the EEOC does not define sexual harassment, section 1604.11(a) provides that harassment on the basis of sex is a violation of the Act and that such unwelcome behavior may be either verbal or physical.<sup>115</sup> The guidelines articulate three criteria for determining whether a violation exists, including the situation when "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>116</sup> Thus the EEOC appears to have interpreted Title VII to include within its gender discrimination proscription the guarantee of a work environment free from verbal and physical sexual abuse.

Several recent cases reveal a judicial interpretation of Title VII analogous to that of the EEOC. An early example of this theory was argued in *Tomkins v. Public Service Electric & Gas Co.*,<sup>117</sup> in which the Third Circuit held that an employee's allegation that her employment was conditioned on her acceptance of the sexual favors of a male supervisor did state a claim under Title VII. Tomkins, the plaintiff, argued that in addition to prohibiting specific discriminatory acts, the statute mandates that employees be afforded "a work environment free from the psychological harm flowing from an atmosphere of discrimination."<sup>118</sup> Tomkins contended that analogous to the EEOC's findings of Title VII violations when employees are subjected to supervisors' racial epithets and ethnic jokes, Title VII affords protection from sexual advances and subsequent retaliatory harassment that creates an envi-

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plined); EEOC Dec. No. 72-1114, [1973] EEOC COMPL. MAN. (CCH) ¶ 6347 (reasonable cause existed to believe that employer violated statute by allowing supervisor to preach about his religious views to employees during working hours when employee subjectively felt that job security could be affected by his reaction to his supervisor's conduct).

113. 29 C.F.R. § 1604.1-.11 (1981).

114. *Id.* § 1604.11 (effective November 10, 1980).

It is noteworthy that in *Clark v. World Airways, Inc.*, 24 Fair Empl. Prac. Cas. 305 (D.D.C. 1980), the plaintiff argued in the alternative that if the alleged advances did not constitute a term or condition of employment, they may still violate Title VII under the then published EEOC Interim Guidelines. The court ruled that the weight to be accorded these regulations is slight because they are interim regulations offered, in part, to secure public comment. In any event, the evidence did not support a finding that plaintiff's employer's conduct had the effect of substantially interfering with her work environment. *Id.* at 308 n.11.

115. 29 C.F.R. § 1604.11(a) (1981).

116. *Id.* § 1604.11(a)(3). The full text of § 1604.11(a) reads:

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 of 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.

*Id.*

117. 568 F.2d 1044 (3d Cir. 1977).

118. *Id.* at 1046 n.1.



ronment of "debilitating sexual intimidation," thereby constituting a barrier to employment opportunities.<sup>119</sup> Because the court of appeals held, however, that the sexual demands of Tomkins' supervisor did constitute a cause of action, it declined to rule on the hostile environment argument proffered by the plaintiff.

In *Brown v. City of Guthrie*,<sup>120</sup> the District Court for the Western District of Oklahoma considered a claim falling within the hostile environment category of the EEOC Guidelines. The plaintiff was hired by the city's police department and assigned to dispatch and communication duties. She subsequently was given additional duties and placed on 24-hour call, requiring her to report to the police station at any time of the day or night to search the female prisoners taken into custody. The record indicated that during her tenure of employment Brown was continually harassed by her shift commander. As a usual practice, magazines containing photographs of nude women were stored in the dispatcher's desk for the policemen to look at in their spare time.<sup>121</sup> Brown was shown nude pictures by her supervisor and asked to compare herself with the women displayed in the magazines. Another incident involved a call to the police station at two a.m. to perform a search of a female prisoner. Although Brown conducted the search in a private room, she was later shown a videotape of the search by the police officers on duty who critiqued her efforts. Moreover, her commander repeatedly played the tape back commenting to Brown on the physical attributes of the prisoner. On other occasions her supervisor entered the dispatcher's area and made lewd sexual gestures and remarks derogatory to the female gender.

The *Brown* court ruled that the plaintiff established the factual part of her prima facie case, namely, that as a female she was subjected to such sexual harassment from her supervisor that she was forced to terminate her employment.<sup>122</sup> The court cited extensively from Judge Goldberg's opinion in *Rogers v. EEOC*.<sup>123</sup> In *Rogers*, the Fifth Circuit was among the first courts to state that Title VII mandates that employees be afforded a work environment free from the psychological harm flowing from an atmosphere of discrimination. The *Rogers* court emphasized that Title VII was innovative legislation that should be interpreted liberally in order to effectuate its purpose of eliminating the inconvenience, unfairness, and humiliation of ethnic discrimination.<sup>124</sup> Further, the court noted that Title VII protection extends to the psychological as well as to the economic interests of the employee.<sup>125</sup> Accordingly, the *Brown* court held that sexual harassment that permeates the workplace, thereby creating an intimidating, hostile, or offen-

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119. *Id.*

120. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

121. *Id.* at 1629.

122. *Id.* at 1631.

123. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

124. 454 F.2d at 238.

125. *Id.* at 238. *See also* *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. 1627, 1632 (W.D. Okla. 1974) (citing *Rogers*).

sive work environment, is an impermissible condition of employment under Title VII.<sup>126</sup> In so ruling, however, the court made it clear that the statute would not be violated every time a supervisor makes a sexually oriented advance or comment toward an employee.<sup>127</sup>

Similar to *Brown*, the Supreme Court of Minnesota held, in *Continental Can Co. v. State*,<sup>128</sup> that verbal and physical sexual harassment directed at a female employee by fellow male employees may constitute sex discrimination under Minnesota's fair employment statute.<sup>129</sup> The conduct at issue involved the comments of three male employees to a female coworker that they could make her feel good sexually and that due to their sexual prowess, she would want to leave her husband. Other derogatory sexual remarks were made including a reference by one of the employees to the movie *Mandingo*. The plaintiff was told by her co-employee that he wished slavery days would return so that he could train her to be his sexual slave.<sup>130</sup> Although plaintiff reported these incidents, without identifying the source of the remarks, her employer informed her that nothing could be done about the conduct and that she should expect that type of behavior when working with men. Finally, after plaintiff reported an incident in which one of the male employees grabbed her between the legs, the employer conducted an investigation.

In ruling for the female employee, the court applied principles developed in analogous Title VII cases as well as the EEOC Guidelines. The court reasoned that conditioning employment on adaption to, and tolerance of, an environment of pervasive sexual harassment, imposed solely on female employees, is discrimination as invidious as requiring sexual favors for employment.<sup>131</sup> As a remedy the employer was issued an order to cease and desist from discriminating against any person because of gender with respect to

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126. 22 Fair Empl. Prac. Cas. at 1632. The District of Columbia Circuit in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), further declared that there could be no question the "discriminatory environment" cases were applicable to sexual harassment "which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on the individual's innermost privacy." *Id.* at 945 (citing *Brown*).

127. 22 Fair Empl. Prac. Cas. at 1632. Citing *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978), and the EEOC's recently published guidelines, 29 C.F.R. § 1604.11 (1980), the court emphasized that "the exact quantum of harassment necessary to trigger the protection of Title VII is not clear." 22 Fair Empl. Prac. Cas. at 1632.

128. 297 N.W.2d 241 (Minn. 1980).

129. The Minnesota Human Rights Act provides in relevant part: "Except when based on a bona fide occupational qualification, it is an unfair employment practice . . . (2) for an employer because of . . . sex . . . to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." MINN. STAT. § 363.03(1)(2)(c)(1978).

Interpreting this section, the *Continental Can* court held that "the prohibition against sex discrimination in Minn. Stat. § 363.03, subd. (1)(2)(c) (1978) includes sexual harassment which impacts on the conditions of employment when the employer knew or should have known of the employees' conduct alleged to constitute sexual harassment and fails to take timely and appropriate action." 297 N.W.2d at 249.

130. 297 N.W.2d at 245-46.

131. *Id.* at 248.

terms and conditions of employment.<sup>132</sup> In addition, the employer was ordered to take prompt action "when it knows or should know of conduct in the workplace amounting to sexual harassment."<sup>133</sup>

In *Kyriazi v. Western Electric Co.*,<sup>134</sup> a federal district court acknowledged the importance of a working environment free from sexual harassment and held that gender-based discrimination resulted when an indecent cartoon was created, disseminated, and thrust upon a female employee by her coworkers in order to humiliate her. In addition, the record indicated that plaintiff's three coworkers "made loud remarks concerning her marital status, and trumpeted their speculations and even made wagers concerning her virginity."<sup>135</sup> As in *Continental Can*, the *Kyriazi* court found that the employer's supervisory personnel took no action to correct the situation. Instead, the court stated that the plaintiff's supervisors were well aware of the harassment, but they chose to disregard her complaints and failed to take any action against the employees who harassed her.<sup>136</sup> This conduct, reasoned the court, aggravated the situation.<sup>137</sup>

As in the cases where the courts found racial harassment, *Brown*, *Continental Can*, and *Kyriazi* all involved persistent and clearly outrageous conduct by either supervisors or co-employees. In all three decisions, the supervisors either directly participated in the conduct or failed to take any actions after being placed on notice that acts of sexual harassment were present in the workplace.

A different form of environmental-type sexual harassment was at issue in *EEOC v. Sage Realty Corp.*,<sup>138</sup> where the District Court for the Southern District of New York denied an employer's motion for summary judgment against an employee's claim that she was made the subject of sexual harassment when she was forced to wear a revealing and provocative uniform. The court found that the plaintiff stated a cause of action in that a term or condition of employment had been imposed by the employer on the basis of

132. *Id.*

133. *Id.* at 251.

134. 461 F. Supp. 894 (D.N.J. 1978).

135. *Id.* at 934.

136. *Id.* at 935.

137. *Id.* The court went on to state:

Aside from the implicit encouragement of such harassment which the superiors' knowing disregard engendered in Kyriazi's male coworkers, such conduct by her superiors was infuriating to Kyriazi, and justifiably so. When they totally disregarded Kyriazi's complaints about the cartoon, and the boisterous speculations about her virginity, she was left with the understanding that her superiors were discriminating against her and in favor of her male co-workers.

*Id.*

In the remedy phase of her trial, the court held that Kyriazi's three coworkers were liable for \$1,500 each in punitive damages. Moreover, the court ordered the company not to indemnify these men. *Kyriazi v. Western Elec. Co.*, 476 F. Supp. 335 (D.N.J. 1979).

138. 22 Fair Empl. Prac. Cas. 1660 (S.D.N.Y. 1980).

gender since, but for that she was a woman, she would not have been required to expose her body and to endure the public's sexual harassment.<sup>139</sup>

While recent decisions have held that Title VII provides a remedy for acts of sexual harassment that create a sexually obnoxious atmosphere at the workplace, they have not interpreted the statute as mandating that the employer provide each employee with a working environment suitable to his or her liking. For example, in *Halpert v. Wertheim*,<sup>140</sup> the District Court for the Southern District of New York rejected the sexual harassment claim of a female securities trader who claimed that she was verbally harassed by other traders at the desk. The court noted that the trading desk was operated in a chaotic manner, and that the language of the market place was coarse. Frequent references were made to male and female genitalia and to sexual activity. The court held that although plaintiff Halpert was the subject of such language on occasion, as were other women with whom the traders had contact, this sexually obnoxious work atmosphere did not constitute harassment of Halpert or demonstrate an intent to discriminate.<sup>141</sup>

Similarly, in *Gan v. Kepro Circuit Systems, Inc.*,<sup>142</sup> the federal court for the Eastern District of Missouri held that a female failed to make a prima facie case for constructive discharge through the maintenance by the employer of a distasteful working environment, at least where it was found that she welcomed and encouraged the alleged sexually harassing conduct. The court found that during the course of her employment the plaintiff regularly used crude and vulgar language and initiated sexually oriented conversations with her male and female coworkers. The record indicates that she frequently asked male employees about their marital sex lives and whether they engaged in extra-marital sexual relationships. Moreover, plaintiff was found to have volunteered information to coworkers concerning the intimate details of her pre-marital sexual encounters with her husband. Although the court determined that the working environment was "permeated by an extensive amount of lewd and vulgar conversation and conduct,"<sup>143</sup> and that supervisory personnel were aware of this conduct, the court concluded that the plaintiff was not subjected to unprovoked propositions and sexually suggestive remarks. In the words of the court, "any such propositions that did occur were prompted by her own sexual aggressiveness and her own sexually explicit conversations."<sup>144</sup>

It is not clear in the *Halpert* decision whether plaintiff's sexual harassment claim concerning the working environment failed because the acts were not of a sexual nature, or, alternatively, because the environment was not polluted to the level required to trigger the protection of the statute. Of note in *Halpert* is the court's finding that the plaintiff had at times used the very

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139. *Id.* at 1662.

140. 24 Empl. Prac. Dec. ¶ 31,243 (S.D.N.Y. 1980).

141. *Id.* at ¶ 17,560.

142. 28 Fair Empl. Prac. Cas. (BNA) 639 (E.D. Mo. 1982).

143. *Id.* at 640.

144. *Id.*

language that she complained created an offensive working environment. An alternative explanation of *Halpert* is that the courts will apply a flexible standard of what constitutes a discriminatory environment gauged with regard to the conditions inherent in the particular work environment and the plaintiff's subjective reaction.

In this same regard courts have long recognized that an employer cannot be an insurer against all insults and racial and sexual incidents, and cannot reasonably be expected to provide a work environment that is completely pure.<sup>145</sup> The Ninth Circuit has stated in *Silver v. KCA, Inc.*<sup>146</sup> that the "specific evil at which Title VII was directed was not the eradication of all discrimination by private individuals, undesirable though it is, but the eradication of discrimination by employers against employees."<sup>147</sup> As best noted by one commentator: "Against a large part of the frictions and irritations and clashing of temperaments incident to participating in community life, a certain toughening of the mental hide is a better protection than the law ever could be."<sup>148</sup>

### *Employer Liability*

Assuming the plaintiff establishes that he or she was subjected to sexually harassing conduct that was discriminatorily applied within an employment context, it is still necessary to establish that the employer, as defined by the statute, was responsible either directly or vicariously for the conduct. While in theory a labor organization or employment agency could be subject to liability under the statute for acts of sexual harassment, in practice it is the immediate employer who is the likely defendant in a sexual harassment suit. As such, this section focuses only on the problem of establishing employer liability under Title VII.

### Employer Liability for Acts of Supervisors and Agents

If the alleged harassment is perpetuated by an employee's supervisor, the employee will have a cause of action directly against the supervisor.<sup>149</sup> The

145. See *Higgins v. Gates Rubber Co.*, 578 F.2d 281 (10th Cir. 1978) (dictum) (employer not required to provide working environment devoid of racial prejudice); *Purvine v. Boyd Coffee Co.*, 13 Fair Empl. Prac. Cas. 1015 (D. Or. 1976) (holding that Title VII does not make an employer responsible for every inconsiderate remark made by office personnel); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (occasional harassment of Hungarian employee because of unconventional habits not cognizable under Title VII).

146. 586 F.2d 138 (9th Cir. 1978).

147. *Id.* at 141.

148. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936). See also *Howard v. National Cash Register Co.*, 388 F. Supp. 603, 606 (S.D. Ohio 1975).

149. 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) (1976). See, e.g., *Mumford v. James T. Barnes Co.*, 411 F. Supp. 459 (E.D. Mich. 1977). See also RESTATEMENT (SECOND) OF AGENCY § 1(3) (1958).

possibility of agent/supervisor liability does not, however, protect the employer from joint and several liability as well.

As noted in the early case analysis, federal district courts were initially reluctant to hold employers liable for the alleged sexual harassment of their supervisors.<sup>150</sup> Many of the decisions required a showing that the supervisory conduct was pursuant to a company policy or plan, thereby precluding employer liability for the "personal proclivity, peculiarity or mannerism" of the supervisor.<sup>151</sup> These cases are especially confusing, however, as the courts' analyses do not distinguish between conduct not actionable under Title VII and conduct which, although actionable against the immediate perpetrator/supervisor, will not be attributable to the employer. In this regard, a review of selected decisions is instructive.

The first federal court of appeals to hear a sexual harassment case was the Fourth Circuit in *Garber v. Saxon Business Products*.<sup>152</sup> In *Garber*, the court appeared to require the showing of either an employer policy, or employer acquiescence, in the male supervisor's practice of compelling female employees to submit to sexual advances.<sup>153</sup> Since the district court's dismissal of this claim was reversed and the case remanded for further proceedings, the appellate court never addressed the issue of vicarious liability.

The issue of employer liability for the actions of supervisors was explicitly addressed in *Barnes v. Costle*.<sup>154</sup> The majority opinion stated that an employer is generally liable for violations of Title VII by its supervisory personnel unless the employer was unaware of discriminatory practices or, when made aware, rectified the consequences.<sup>155</sup> Clearly, under this pronouncement an employer is not absolved from liability merely because he promulgated a policy prohibiting sexual harassment. However, there seemingly would never be a successful plaintiff if the employer, after discovering the conduct, rectified the consequences. Judge MacKinnon's concurring opinion offered a more constructive analysis for a finding of vicarious liability against an employer. After a review of the common law of agency and tort, Judge MacKinnon concluded that the employer would not be vicariously liable at common law under the facts alleged. Judge MacKinnon reviewed employer liability for violations of Title VII<sup>156</sup> and under the National Labor Relations

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150. See notes 17-43 and accompanying text *supra*.

151. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). *Accord*, *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) (plaintiff must allege a policy or practice of her supervisor in harassing plaintiff and other female employees), *vacated*, 587 F.2d 1240 (D.C. Cir. 1979).

152. 552 F.2d 1032 (4th Cir. 1977), *rev'g sub nom.* *Garber v. Saxon Indus., Inc.*, 14 Empl. Prac. Dec. ¶ 7586 (E.D. Va. 1976).

153. 552 F.2d at 1032.

154. 561 F.2d 983 (D.C. Cir. 1977), *rev'g sub nom.* *Barnes v. Train*, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974). See notes 20-23 and accompanying text *supra* for a discussion of the facts in *Barnes*.

155. 561 F.2d at 993.

156. Judge MacKinnon stated:

Title VII includes in its definition of employer "any agent" of one who fits the general definition. The District Court in *Tomkins v. Public Service Electric & Gas*

Act<sup>157</sup> and suggested three general rationales for ignoring the common law and imposing employer liability.<sup>158</sup> Judge MacKinnon found that since the allegations of the plaintiff were sufficient to raise a suspicion that the employer either knew or should have known of the harassment, the common law result of no employer liability was effectively reversed by the statute.<sup>159</sup>

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*Co.* emphasized the reference to agent in the general definition, though eventually that court found that the sexual advances involved there were outside the purview of the supervisor's authority:

Inssofar as the quoted language suggests that acts done for the private benefit of an individual supervisor cannot be imputed to the Employer for the purpose of finding a violation of Title VII, this Court respectfully disagrees. If a supervisor is acting within the purview of his authority, the doctrine of *respondeat superior* may be employed whether he is driving a company car or victimizing a female. See Title 42 United States Code, § 2000e(b) which expressly includes any agent of an employer within the meaning of "employer."

*Id.* at 997 (citations omitted).

157. The reasoning of Judge MacKinnon is particularly noteworthy:

The other significant legislative scheme governing employer-employee relations, the National Labor Relations Act, defines employer in a similar way: "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. § 152(2) (1970). To the extent that the term "agency" is used, however, the usual principles of agency are invoked; and, as has been seen, those rules would deny government liability as an employer in a case such as this. The supervisor is not acting as an agent when he commits the tort complained of; hence, no unlawful employment practice has been committed by the "employer."

A different interpretation has been followed, however, where the tortious conduct is also violative of the National Labor Relations Act. While granting fullest rein to an employer's discretion to hire, promote, or fire for a "good reason, a bad reason, or no reason at all," that statute, as interpreted by the courts, delineates certain impermissible reasons (such as discrimination for or against union members); and when those impermissible reasons are involved, the normal rules of vicarious liability are not applied. For example, if a supervisor singles out union members for abusive treatment, neither actual nor constructive knowledge by the personnel director is required to find a section 8(a)(3) violation. The supervisor might even be acting outside the scope of his employment and contrary to the announced policy of the employer, still, to hold that no violation occurred "would provide a simple means for evading the Act by a division of corporate functions." *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962). This approach has even been extended so far as to find a violation in the combination of two acts, by two different members of management, where each was itself permissible.

*Id.* (footnote omitted).

158. 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. *Id.* at 998.

159. *Id.* at 1000. However, Judge MacKinnon went on to emphasize that the plaintiff still has a substantial burden to prove:

As alleged, EPA officials other than Barnes' own supervisor must be shown to have incorrectly or falsely advised plaintiff in processing her complaint, and to have

One of the most recent federal circuit courts to address the issue of employer liability for a supervisor's sexual harassment of subordinates was the Ninth Circuit in *Miller v. Bank of America*.<sup>160</sup> Plaintiff Miller claimed that she was fired shortly after she refused her supervisor's demands for sexual favors. The district court, relying on *Corne* and *Williams*, granted summary judgment for the employer, finding that Title VII was not intended to hold an employer liable for isolated and unauthorized sexual misconduct between employees.<sup>161</sup>

On appeal, the appellee bank conceded that the only bar to a successful cause of action was the issue of whether it should be held responsible for its supervisor's actions under the doctrine of respondeat superior. The employer argued, as it had in the lower court, that it had an established policy prohibiting the supervisor's alleged misconduct and therefore should not be held liable. In addition, the bank contended that Miller failed to utilize the bank's internal procedures for redressing her complaint and thus forfeited whatever claim for relief she might otherwise have had.

The Ninth Circuit disregarded the employer policy reasoning, finding no reason to exempt sexual harassment cases from the usual rule that an employer is liable for the torts of its employees acting in the course of their employment.<sup>162</sup> Relying on *McDonnell Douglas Corp. v. Green*<sup>163</sup> and prior case law, the *Miller* court also rejected the bank's argument that Miller had failed to take advantage of internal procedure, holding that exhaustion of the

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treated her adversely in job assignment, for the purpose of frustrating her Title VII charge and punishing her for bringing it, or with that effect. If plaintiff can prove this, she should prevail.

*Id.*

After reading the concurring opinion, one is uncertain as to the exact parameters of employer liability in the District of Columbia appellate court. For example, the court in *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980), after reviewing *Barnes* and *Miller*, concluded that notwithstanding the broad language of the opinions they should be read within the context of the issues presented on appeal. The court announced, "it seems reasonable that an employer should not be liable in these unusual cases of sexual harassment where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice," and found that the employer was not vicariously liable. *Id.* at 42. Such a position seems questionable under *Barnes* and clearly inconsistent with the EEOC guidelines at 29 C.F.R. § 1604.11(c) (1981).

More recently, in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the appellate court again failed to resolve the confusion. In concluding that the employer would be liable for the supervisor's harassment, the court stated generally that an employer is liable for discriminatory acts committed by supervisory personnel. *Id.* at 943. The court then noted that this case also satisfied the more stringent test of employer respondeat superior liability advocated by Judge MacKinnon in his concurrence in *Barnes*. *Id.* at 943 n.8. Perhaps most noteworthy is the court's failure to cite the EEOC Guidelines with respect to employer responsibility; later in its opinion the court relies on the Guidelines rather extensively with respect to other issues.

160. 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

161. 418 F. Supp. at 236.

162. 600 F.2d at 213.

163. 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court outlined the scheme for allocating the burden of proof in a case involving disparate treatment on the basis of race. The



personnel complaint procedure is not a precondition to a Title VII suit.<sup>164</sup> The Ninth Circuit clearly adopted a strict standard of employer liability for sexual harassment by supervisors while leaving the issue of employer liability for nonsupervisory harassment unanswered.

The EEOC has adopted the *Miller* strict standard of liability for supervisory sexual harassment. Section 1604.11(c) of the Guidelines provides 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>165</sup> The EEOC acknowledged that it received a number of critical comments regarding the adoption of this strict standard of liability, but reaffirmed its position when it issued the Guidelines in their final form.<sup>166</sup>

Court stated that the complainant in a Title VII case must carry the initial burden of establishing a prima facie case. The Court further stated that this may be done by showing:

(i) that he belongs to a racial minority; (ii) that he applied 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.

*Id.* at 802.

After plaintiff establishes a prima facie case, the employer is required to "articulate a legitimate non-discriminatory reason" for its action. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978). In *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978), the Supreme Court held, consistent with *Furnco* and *McDonnell Douglas*, that to rebut a prima facie case it is sufficient for the employer to articulate some legitimate nondiscriminatory reason for the employee's rejection. The employer is not required to prove absence of discrimination. *Id.* at 25. As stated by the District of Columbia Circuit, "[t]he employer's burden to articulate a legitimate, non-discriminatory reason for this action is simply the burden of going forward with the evidence." *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981) (citing *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978)). Finally, after respondent presents a non-discriminatory reason for the conduct alleged to violate the statute, the claimant could challenge it on grounds that the reason given was a mere pretext for discrimination. 438 U.S. at 578.

While the *McDonnell Douglas* format fails to fit the sexual harassment cases, the District of Columbia Circuit has recognized that the principles are still applicable. In *Bundy*, that court held:

[T]he *McDonnell* formula presumes the standard situation where the alleged discrimination is due to the bare fact of the claimant's membership in a disadvantaged group. It therefore also fails to fit with precision the very unusual, perhaps unique, situation of sexual harassment, where the alleged basis of discrimination is not the employee's gender *per se*, but her refusal to submit to sexual advances which she suffered in large part because of her gender. *McDonnell* itself, however, recognizes very realistically that the courts must adjust the definition of a *prima facie* case and the allocation of burden of proof to the differing situations that may arise in Title VII cases.

641 F.2d at 951.

164. 600 F.2d at 214.

165. 29 C.F.R. § 1604.11(c) (1981).

166. 45 Fed. Reg. 74,676 (1980).

In summary, the extent of an employer's responsibility for acts of sexual harassment committed by its supervisors is unclear. Although the EEOC has expressly adopted a strict standard, the appellate courts appear unsettled, and what deference the courts will give to the newly promulgated guidelines remains to be seen.<sup>167</sup> Clearly, a strict standard of liability has more appeal than the standard adopted by the District of Columbia Circuit in *Barnes*. As noted by Judge MacKinnon in his concurring opinion in *Barnes*, Title VII includes in its definition of "employer" any agent of one who otherwise qualifies as a defendant.<sup>168</sup> Accordingly, there should be little difficulty attributing the conduct of a supervisor acting within the purview of his or her authority to his or her employer.

### Employer Liability for Acts of Nonsupervisory Employees

Unlike supervisory harassment, an aggrieved employee does not have a cause of action under Title VII against a co-employee for alleged sexual harassment. The reason, of course, is that an individual employee is not a "respondent" under Title VII.<sup>169</sup> As previously discussed, however, the aggrieved employee may allege employer liability for an offensive work environment.<sup>170</sup>

The EEOC seems to have adopted the more traditional agency analysis of employer liability in cases involving co-employee sexual harassment. Section 1604(d) of the Guidelines provides: "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>171</sup> Although the EEOC

167. It is noteworthy that the courts, particularly the Supreme Court, have not always agreed with the EEOC's interpretations. For example, the Supreme Court, in *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), stated that the EEOC's regulations are entitled to "great deference." *Id.* at 431 (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971)). However, in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), the regulations were accorded mere "consideration." The Court stated that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which gave it power to persuade, if lacking in the power to control." *Id.* at 141-42 (citing *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)). Finally, in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Court stated that:

Ordinarily an EEOC guideline is not entitled to great weight where, as here, it varies from prior EEOC policy and no new legislative history has been introduced in support of the change. . . . But where "Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation" . . . the guideline is entitled to some deference.

*Id.* at 76 n.11.

168. See note 152 *supra*.

169. An aggrieved employee, however, may assert a cause of action under one of several common law doctrines such as assault, battery, intentional infliction of emotional distress, or breach of contract. See Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 167-68 (1979).

170. See notes 109-39 and accompanying text *supra*.

171. 29 C.F.R. § 1604.11(d) (1981).

guideline is consistent with traditional agency analysis, no appellate court has addressed this issue to date. Furthermore, the decisions that have upheld employer liability under the hostile work environment theory all involved persistent and clearly egregious harassment by co-employees.<sup>172</sup>

### Employer Liability for Acts of Nonemployees

Although no cases involving sexual harassment by nonemployees were found, the EEOC has provided at section 1604.11(e) of the Guidelines that:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.<sup>173</sup>

This standard of liability appears merely to restate the traditional agency analysis of acquiescence and ratification, a standard under which employers have long been held accountable.<sup>174</sup> That the EEOC has made an express provision for such liability forecasts the vigor with which the EEOC will enforce its Guidelines to combat sexual harassment.

#### AVOIDING LIABILITY FOR ACTS OF SEXUAL HARASSMENT

It is clear that remedies are available under Title VII for discriminatory conduct that manifests itself as sexual harassment. As illustrated by the previous discussion, the plaintiff need only prove that the conduct was sexually harassing in an employment context, that the harassment was discriminatorily imposed, that acquiescence in the harassment was made a term or condition of employment, and that the harassment was attributable to the employer. Further, to illustrate the extent to which courts are willing to recognize Title VII claims based on sexual harassment, plaintiffs have recovered for sexual harassment that exists due to a hostile working environment. Thus, plaintiff's burden of proving that the harassment was a term or condition of employment is lessened.

It is readily apparent that the courts are willing to recognize Title VII claims based on sexual harassment in a variety of contexts. This increasing judicial acceptance of the cause of action, coupled with the EEOC's stance as evidenced in the recently issued Guidelines, promises to make the sexual

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172. *See, e.g.*, *Barnes v. Costle*, 561 F.2d 983, 996-97 (D.C. Cir. 1977) (MacKinnon, J., concurring).

173. 29 C.F.R. § 1604.11(e) (1981).

174. *See, e.g.*, *NLRB v. Cherokee Hosiery Mills*, 196 F.2d 286 (5th Cir. 1952) (discussion of an employer's responsibility under the NLRA for anti-union conduct of a nonemployee).

harassment form of discrimination a fertile source of Title VII litigation in the future. Therefore, any employer would be wise to consider new measures to insulate themselves from frequent claims and potential liability.

Given the current status of the law, there are a number of options available to the employer to minimize the probability that he or she will end up on the wrong side of a successful Title VII suit. One theoretical, but impractical, option is to exempt oneself from coverage of the statute by having fewer than fifteen employees during twenty or more calendar weeks. It should be stressed, however, that even if this option were feasible, state and even local legislation may effectively place such an employer under some type of fair employment coverage.<sup>175</sup>

Another equally impractical option to shield oneself from a Title VII infraction is to employ only asexual or bisexual employees.<sup>176</sup> The result will be no sexual harassment, or, in the alternative, equal harassment of all employees regardless of sex. It should be recalled that Title VII does not prohibit all forms of irrational or invidious behavior, but only discrimination in employment based on race, color, religion, gender, or national origin. Since the statute only addresses the discriminatory application of gender-based criteria not otherwise sanctioned by the BFOQ or business necessity

175. Of particular note is the Policy on Sexual Harassment of the District of Columbia, as issued by Mayor's Order 79-89 (May 24, 1979), providing in part:

Sexual harassment shall be deemed to be a form of sexual discrimination which is prohibited under District laws and regulations, including this Order.

. . . .

Sexual harassment is defined as the exercise or attempt to exercise by a person of the authority and power of his or her position to control, influence or affect the career, salary, or job of another employee or prospective employee in exchange for sexual favors. Sexual harassment may include, but is not limited to:

- (1) verbal harassment or abuse;
- (2) subtle pressure for sexual activity;
- (3) unnecessary patting or pinching;
- (4) constant brushing against another employee's body;
- (5) demanding sexual favors accompanied by overt threat concerning an individual's employment status;
- (6) demanding sexual favors accompanied by implied or overt promise of preferential treatment with regard to an individual's employment status.

*Id.*

176. As stated by the Court of Appeals for the District of Columbia: "Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike." *Bundy v. Jackson*, 641 F.2d 934, 938 n.7 (D.C. Cir. 1981).

Although numerous courts have upheld a female employee's claim based on her termination for having refused sexual advances from a male supervisor, *Wright v. Methodist Youth Services*, 25 Fair Empl. Prac. Cas. 563 (N.D. Ill. 1981), considered an alleged sexual demand made of a male employee that would not have been directed at a female. In *Wright*, the District Court for the Northern District of Illinois held that a male employee's claim that he was terminated because he refused the homosexual advances of a male supervisor stated a cause of action under Title VII, at least in the situation where the same demands would not have been made on female employees.

exception, employees of both genders that are subject to equal harassment will not have a cause of action under the Act.<sup>177</sup>

Fortunately, there are less ludicrous alternatives available. An employer may simply attempt to prohibit all "social fraternization" between employees within a particular working unit.<sup>178</sup> Such a rule, when supported by the threat of disciplinary action, may be effective in alerting employees that it does not pay even to attempt a sexual advance.

Absent a total ban on social interactions among all employees within a unit, there is much to be said concerning the establishment of a rule prohibiting all office romances between supervisors and subordinates. An employee

177. There is, however, some authority to the contrary. For example, in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the court stated that "discrimination is sex discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination." Also, in *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), that same court of appeals declared:

It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced.

*Id.* at 990 n.55.

To the extent that the courts adopt a "but for" theory of sex discrimination, i.e., but for a person's sex, he or she would not be subject to harassment of a sexual nature, all forms of sexual harassment would be prohibited by the statute regardless of whether the conduct was discriminatorily applied. Such a reading, while not unreasonable, is arguably at odds with the language of the statute.

178. Romantic relationships between males and females of the same organization were explored in a recent study by Robert E. Quinn. Quinn, *Coping with Cupid: The Formation, Impact, and Management of Romantic Relationships in Organizations*, 22 *Ad. Sci. Q.* 30 (1977). Using third-party reports, Quinn analyzed some 130 cases of men and women coworkers who became romantically involved. According to Quinn:

A little more than 10 percent of the cases are characterized by such positive results as increased coordination, lower tensions, improved teamwork, improved productivity, and improved work flow . . . .

Negative results vary in intensity. About one-third of the cases are characterized by only increased gossip and perceptions of favoritism. A third, however, are characterized by serious negative features, the most frequent being complaints, hostilities, and distorted communications. These are followed by the perception that the image or reputation of the unit is being jeopardized, there is slower decision making, a redistribution of work, client or customer awareness, lower morale, lower productivity, and someone loses a job.

*Id.* at 42.

Quinn also reports that managerial response is varied. "Once supervisors know about a romantic relationship, they may do three things: take no action at all, take punitive action, or take positive action." *Id.* at 43. Finally, Quinn reports that the effects of an office romance may not be equally distributed.

The female is twice as likely to be terminated as is the male. Because the male is usually in a higher position, he apparently is seen as less dispensable than the female. The female is also thought to be much less likely to benefit from an open discussion or from counseling by superiors. The latter two conditions, however, are mediated by the fact that the female's superior is often the other participant in the relationship.

*Id.* at 44.

who voluntarily enters into such a social relationship with a superior may command an unfair advantage with respect to job evaluations, merit increases, and promotions.<sup>179</sup> In this respect, the EEOC Guidelines indicate that employees who were not afforded this "opportunity" may have a cause of action under the statute. As stated by the EEOC, "[w]here employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified but denied that employment opportunity."<sup>180</sup> In *Williams v. Civiletti*,<sup>181</sup> a somewhat different twist to a sexual harassment claim was considered, albeit in dictum, by the District Court for the District of Columbia. In *Williams*, the court considered an employee's claim that she was fired because she had a vendetta against her immediate supervisor after he had jilted her. The *Williams* court stated that if a supervisor chooses to accept the sexual favors of a subordinate employee and such a relationship sours, resulting in the deterioration of their working relationship, no sanctions against the employee can be taken without disclosure of the employment-relation problem with the actual authority making the decision.<sup>182</sup> To rule otherwise, observed the court, would create an opportunity for excessive abuse. A supervisor would be able to take advantage of his position and remove his former lovers on the ground that a personality conflict had developed.<sup>183</sup> The court reasoned that a requirement of full disclosure to the proper managerial authorities would chill the willingness of supervisors to engage in such activity.<sup>184</sup>

An employer should also make it clear that sexual harassment is a prohibited employment practice that will not be tolerated at the workplace.<sup>185</sup>

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179. As argued by one commentator:

Where a sexually cooperative woman not only acquired parity with males but garnered an extraordinary employment advantage, males should be able to maintain an action for being denied the opportunity to make similar progress. Even if the target of the sexual advance were to decline the opportunity, males might still maintain their action, since they would have been denied the extraordinary employment opportunity offered the woman.

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).

180. 29 C.F.R. § 1604.11(g) (1981).

181. 487 F. Supp. 1387 (D.D.C. 1980).

182. *Id.* at 1389.

183. *Id.*

184. *Id.*

185. 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 mandate with respect to sexual harassment:

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

One method of communicating this to employees is through posting notices that sexual harassment is a form of prohibited sex discrimination under Title VII. A simple statement that the courts have declared that racial, ethnic, religious, or sexual harassment at the workplace is prohibited by Title VII should suffice. Another method of putting employees on notice is simply to incorporate Title VII's proscription against sexual harassment into existing plant rules. Thus, employees found to have been involved in sexual harassment will be subject to disciplinary sanctions.<sup>186</sup> An employer may also provide notice in a plant or organization newsletter.<sup>187</sup>

One method of putting employees on notice that sexual harassment will not be tolerated, and, at the same time, providing a mechanism for alleviating claims of harassment, is to institute a separate grievance procedure.<sup>188</sup>

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).

186. As a remedy for the improper sexually harassing environment maintained by the employer in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the court issued the following order, quoted in part:

Defendant is further required:

1. To notify all employees and supervisors in the Department, through individual letters and permanent posting in prominent locations throughout the Department offices, that sexual harassment, as explicitly defined in the previous paragraph, violates Title VII of the Civil Rights Act of 1964, regulatory guidelines of the Equal Employment Opportunity Commission, the express orders of the Mayor of the District of Columbia, and the policy of the Department of Corrections.

2. To ensure that employees complaining of sexual harassment can avail themselves of the full and effective use of the complaint, hearing, adjudication, and appeals procedures for complaints of discrimination established by the Department of Corrections pursuant to Civil Service Regulations. . . .

3. To develop appropriate sanctions or disciplinary measures for supervisors or other employees who are found to have sexually harassed female employees, including warnings to the offending person and notations in that person's employment record for reference in the event future complaints are directed against that person.

4. To develop other appropriate means of instructing employees of the Department of the harmful nature of sexual harassment.

*Id.* at 948 n.15.

187. This approach is illustrated by a recent notice in the U.S. Department of Housing and Urban Development's March, 1980 newsletter which provides in relevant part:

Employees who are subjected to sexual harassment by other HUD employees on the job may consider taking the following actions where appropriate: File a grievance under the Department's grievance system or a union contract grievance procedure; Notify the Office of Inspector General by calling the HUD Employee Hotline; File a formal complaint of discrimination; and Contact any of HUD's Federal Women's Program or EEOC Coordinators.

Department of Housing and Urban Development, HUDDLE (March, 1980) (inter-departmental newsletter). See also NEUGARTEN & SHAFRITZ, *supra* note 1, at 8.

188. One procedure implemented by an employer and a labor organization is as follows:

1. If the complaint involves alleged advances and/or other harassment by a Supervisor, the complaint should be filed by the Employee with the Personnel Manager.

2. If the complaint involves alleged advances and/or other harassment by a fellow-Employee, the complaint should be filed with the Complainant's Supervisor, who will then refer it to the Personnel Manager.

3. In either of the above, the complaint should be made in writing and contain but not [be] limited to the following: date, time, and location of incident, name of individual involved, witnesses, if any, and a detailed description of the alleged harassment.

A second procedure, suggested by Mary Faucher and Kenneth McCulloch, provides a separate grievance format for filing, investigating and resolving a sexual harassment case:

Possible Procedure for Processing Complaints:

1. Post notice of policy (including prohibitions of harassment by ANY employees)
2. Complaint
  - made to proper department/party
  - made to supervisory personnel and referred to proper department/party

Re: advances/harassment  
by supervisors

Re: advances/harrasment  
by co-workers (based on  
racial-epithet cases)

3. Investigation

- a. Interview with complainant
- b. Interview with accused
- c. Check of personnel files
  - i. Evidence of prior friction between parties
  - ii. Previous complaints
  - iii. Work records
- d. Interviews with witnesses/possible witnesses

4. Action to be taken

- a. No foundation other than complaint

No record in accused's  
file; no dissemination  
of charge

Reiteration of policy  
against harassment;  
general announcement

Warning/notation in file

- b. Some foundation

Warning/disciplinary slip

- Warning coupled with automatic suspension upon second complaint
- Reprimand coupled with automatic suspension upon second complaint
- Reprimand/threat of suspension
- c. Solid foundation for charge
  - Demotion
  - Suspension
  - Dismissal
  - Restoration of work record of complaining employee

Faucher & McCulloch, *Sexual Harassment in the Workplace—What Should the Employer Do?* 5 EEO TODAY 38, 38-46 (1978), reprinted in NEUGARTEN & SHAFRITZ, *supra* note 1, at 91.



The utility of enacting a separate grievance procedure cannot be understated. Although courts have made it clear that exhaustion of internal remedies is not a prerequisite to suit under Title VII, a failure on the part of a complaining employee to pursue the available internal avenues of redress does render tenuous a finding of employer culpability.<sup>189</sup>

Separate training programs also may prove useful. *The Wall Street Journal* reported in a recent article<sup>190</sup> that supervisors at General Motors were enrolled in an awareness course for dealing with sexual harassment. Topics covered included how to refer complaints and when not to interfere. Moreover, to advise subordinates, supervisors were given the benchmark question: "Would you be embarrassed to see your remarks or behavior in the newspaper or described by your own family?" It was further reported that rank-and-file employees learned of the policy against sexual harassment from bulletin board notices which included the name of a plant personnel staff member who would confidentially investigate complaints. The same article also noted that the Chicago Transit Authority enclosed reminders in pay envelopes informing employees that sexual harassment is illegal and that employees had a right to complain.

Of most importance is that an employer police the work environment. Cases frequently mention that a Title VII violation occurs whenever the employer should have known that employees were being subjected to acts of sexual harassment. As stated by the *Tomkins* court, Title VII is violated when a supervisor conditions some aspect of an employee's job status on compliance with sexual demands and the employer fails to take remedial action despite his having actual or constructive knowledge.<sup>191</sup> Another court has likewise explained: "If employers have reason to believe that sexual demands are being made on employees they are obligated under Title VII to investigate the matter and correct any violations of the law."<sup>192</sup>

When instances of sexual harassment are discovered, an employer should not hesitate to discipline an offending employee.<sup>193</sup> As noted above, an

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189. See *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 n.2 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

190. Lublin, *Resisting Advances*, Wall St. J., Apr. 24, 1981, at 1, col. 1. Lublin also reports that numerous corporations, colleges, hospitals, unions and government agencies are enacting policies, initiating training programs, strengthening grievance procedures, and reprimanding or firing known harassers in an attempt to mitigate the problem and protect themselves against lawsuits. Major employers include: General Electric Co., Bank of America, Ashland Oil, Inc., International Business Machines Corp., and the cities of Philadelphia, Los Angeles, and New York, as well as numerous state and federal agencies. *Id.*

191. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3rd Cir. 1977).

192. *Heelan v. Johns-Manville Corp.*, 451 F.Supp. 1382, 1391 (D. Colo. 1978). See also *Fisher v. Flynn*, 598 F.2d 663, 665-66 n.4 (1st Cir. 1979).

193. In *Snipes v. U.S. Postal Service*, 677 F.2d 375 (4th Cir. 1982), the Court of Appeals for the Fourth Circuit affirmed a Merit Protection Board decision upholding the discharge of a supervisor who sexually harassed female employees, even when the offense was his first in a long career with the government. According to the Fourth Circuit, "the counterpart of insubordination, abuse of supervisory authority, is in its way just as inimical to the efficiency of the service.

employer that fails to respond to a valid complaint will, in all likelihood, be found to have violated the statute regardless of whether the employer had prior knowledge that employees were subjected to sexually harassing conduct. While any discipline imposed under such a grievance procedure may be challenged by the employee disciplined,<sup>194</sup> that the employer took some action arguably will be evidence of the employer's efforts to police the workplace and to comply with the statute. In the words of the District of Columbia Circuit, "should a supervisor contravene employer policy without the employer's knowledge and the consequence [be] rectified when discovered, the employer may be relieved from responsibility under Title VII."<sup>195</sup> At least with respect to acts of sexual harassment committed by nonsupervisors, 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>196</sup>

An example dealing with racial harassment where the employer's response was deemed sufficient to escape liability under Title VII is *Howard v. National Cash Register Co.*<sup>197</sup> In response to complaints of racial harass-

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Consequently, the proof of abuse of supervisory authority satisfies on its face the provision of (5 USC) 7513(a) that discharge is permissible only when it will promote the efficiency of the service." *Id.* at 378.

194. See Marmo, *Arbitrating Sex Harassment Cases*, 35 *ARB. J.* 35, 39(1980).

In *Charles Champion and University of Missouri Health Sciences Center, Columbia, Missouri*, 78 L.A. 417 (1982), Arbitrator Sol Yarowsky upheld the discharge of a supervisor upon finding that the supervisor engaged in sexual-type discussions and physical contact with female housekeeper subordinates. Arbitrator Yarowsky found that the complainants perceived the supervisor's conduct as substantially interfering with their work performance by creating an intimidating, hostile, or offensive working environment, regardless of whether their response was tolerance or resistance.

Yarowsky declared that the supervisor engaged in subtle, not explicit, sexual harassment by putting his arm around one woman's waist; looking, smacking his lips, and commenting about the attractiveness of another; speaking of sex and virginity and touching another; touching and brushing the hair and uniform of another; and casting penetrating looks at another so that she imagined herself "undressed." "This is actually a 'course of conduct' and may not be gainsaid by replying that grievant was merely friendly or brotherly or merely considerate to his female subordinates," Yarowsky declared, calling this classic, limit-testing behavior, even though the grievant did not perceive this activity to be inappropriate.

Yarowsky further noted that even though the university had no announced policy on sexual harassment at the time of grievant's dismissal, supervisors need no explicit rules of conduct to constitute notice of what male-female activity is considered proper. Specific training as to what specifics of sexual harassment were objectionable would have been redundant, according to the arbitrator, so the grievant may not now rely on this gap even though the university adopted an explicit sexual harassment policy after his dismissal.

195. *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977).

As noted earlier, see notes 137-66 and accompanying text *supra*, the EEOC is arguably at odds with the proposition expressed by the appellate court in *Barnes*. See 29 C.F.R. § 1604.11(c) (1981), which states 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 employer knew or should have known of their occurrence."

196. 29 C.F.R. § 1604.11(d) (1981).

197. 388 F. Supp. 603 (S.D. Ohio 1975).

ment by an employee, the employer escaped liability under the Act when it transferred the employee to another shift, held frequent meetings with the complaining employee and the head of his department, disseminated the company's anti-harassment policy to all employees, and took disciplinary action against the harassers. Again, an employer that discovers sexually harassing conduct should be mindful that courts have found relevant the employer's attempts upon notification to alleviate the consequences of harassing acts.

#### CONCLUSION

One rationale expressed in the early decisions for denying acts of sexual harassment was the effect that recognizing such a cause of action would have on the court system. Courts feared that if claims of sexual harassment were cognizable under the statute, the judicial system would find itself embroiled in the resolution of personal vendettas between supervisors and employees. As correctly stated by the District of Columbia Circuit, this contention is misplaced for it cannot be assumed that Congress did not realize that problems also inhered in claims of employment discrimination stemming from race, color, religion, or national origin.<sup>198</sup> In designating gender as one of the impermissible criteria, Congress made a decision that courts are not free to disturb. In this respect it is not beyond serious dispute that Title VII provides a cause of action for sexually harassing conduct. The EEOC, in its recently formulated Guidelines, has announced that verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made an implicit or explicit condition of employment, (2) submission or rejection of such conduct by an individual is used as the basis for employment decisions affecting an individual, or (3) 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>199</sup> Moreover, a review of court decisions indicates that to successfully state a claim under the statute, the plaintiff must plead and prove that the conduct is sexual in nature, is discriminatorily applied within an employment context, and is in some way attributable to the employer. Recent decisions have also made it clear that Title VII may provide relief where an employer created or condoned an unreasonably discriminatory work environment, regardless of whether an employee loses any tangible job benefit as a result of the discrimination.<sup>200</sup> Accordingly, while not dead, love in the office is now clearly subject to close scrutiny by both the courts and the EEOC and employers should take action to guard against liability.

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198. *Barnes v. Costle*, 561 F.2d 983, 994 n.81 (D.C. Cir. 1977).

199. 29 C.F.R. § 1604.11(a) (1981).

200. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).