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Sexual Harassment, Prostitution, and the Tort of Abusive Discharge: An Analysis and Evaluation of Recent Legal Developments

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SEXUAL HARASSMENT, PROSTITUTION, AND THE TORT OF ABUSIVE DISCHARGE: AN ANALYSIS AND EVALUATION OF RECENT LEGAL DEVELOPMENTS

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"A woman invited to trade herself for a job is in effect being asked to become a prostitute."[1]

The purpose of this article is to call attention to and comment on a recent development in the law of the tort of abusive discharge that has significant consequences for both plaintiff-employees and defendant-employers in quid pro quo harassment cases, specifically the use of state criminal statutes prohibiting solicitation of prostitution as a basis for the tort of abusive discharge in instances of statutory quid pro quo sexual harassment.[2] The result of this development is a possible double

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[1] Lucas v. Brown & Root, Inc., 736 F.2d 1202,1205 (8th Cir. 1984) (applying Arkansas law allowing a claim of abusive discharge based on the public policy of an Arkansas statute making prostitution a crime and holding that allowing such a claim does not circumvent the limitations of Title VII due to its non-preemption provision).

[2] Insignia Residential Corp. v. Ashton, 75 A.2d 1080 (Md. 2000) (holding an action for abusive discharge may lie when at -will employee is discharged for refusing to engage in sexual conduct that would violate state law against prostitution even though the discharge is also unlawful under Federal and state discrimination laws); Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984) (applying Arkansas law allowing a claim of abusive discharge based on the public policy of an Arkansas statute making prostitution a crime and holding that allowing such a claim does not circumvent the limitations of Title VII due to its non-preemption provision); Harrison v. Edison Bros. Apparel Store, 924 F.2d 530 (4th Cir. 1991); Collins v. Rizkana, 652 N.E. 2d 653 (Ohio 1995);

liability exposure for the employer, once under the equal employment opportunity (EEO) statute; the other, under the tort claim. The supervisory employee who is the source of the conduct is also potentially liable for criminal charges as well as other tort claims.[3] And if the plaintiff misses the filing datelines for the statutory claim, the plaintiff still has the longer limitations period for filing the tort claim.[4] In brief, the tort of abusive discharge may be available along with an EEO remedy whenever a specific instance of quid pro quo sexual harassment also simultaneously violates the public policy embodied in the state criminal law prohibiting solicitation of prostitution.

This article is divided into three parts. It first distills the law (a) of employment related sexual harassment, (b) of solicitation of prostitution, and (c) of the tort of abusive discharge. It then examines four recent cases on the issue of allowing use of the tort of abusive discharge in employment situations to vindicate the public policy of state sex offense statutes. Finally, it makes concluding comments about this development.

Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025 (Ariz. 1985) (recognizing an action for abusive discharge when at-will employee was discharged for refusing to engage in an act that would constitute indecent exposure under Arizona statute), superceded by statute as stated in Chaboya v. American Nat'l Red Cross, 72 F. Supp. 2d 1081 (D. Ariz. 1999).

[3] One use of common law tort claims in discrimination lawsuits is to obtain a finding of liability and damages against the individual who committed the discrimination, since the federal equal employment opportunity laws provide a basis for liability only against the employer-company. Depending on the circumstances, plaintiff-employees will often plead assault and battery, invasion of privacy, and intentional infliction of emotional distress. In contrast to these claims which target the individual who actually engaged in the harassing conduct, the tort of abusive discharge, similar to the EEO statutes, generally reaches only the employer-company and not the harasser. Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981).

[4] The statute of limitations under Title VII of the Civil Rights Act of 1964 is 180 days, and is the same under Maryland Art. 49B §9A(a), whereas under Maryland law it is three years for the tort of abusive discharge. Court and Judicial Proceedings Article, §5-101, MD. CODE ANN. (1994).

I. Is quid pro quo sexual harassment also solicitation for prostitution?

A. Employment related sexual harassment

The U.S. Supreme Court has recognized two kinds of sexual harassment as constituting illegal gender discrimination in violation of Title VII of the Civil Rights Act of 1964 - quid pro quo harassment and environmental harassment.[5] Quid pro quo harassment occurs when a supervisory manager makes acquiescence in his/her unwelcome demands for sexual favors a condition of receipt of a specific, tangible job benefit, such as being hired, promoted, transferred, continuation of employment, receiving special assignments or training or pay increases.[6] If the employee acquiesces, the supervisor grants the specific benefit. If the employee refuses, the supervisor denies the benefit. Either way the supervisor's employer is strictly liable for quid pro quo harassment.[7]

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[5] Meritor Fed. Sav. & Loan v. Vinson, 477 U.S. 57 (1986) (recognizing both quid pro quo harassment and environmental harassment as violations of Title VII); Harris v. Forklift, 510 U.S. 17 (1993) (recognizing the reasonable person standard as the basis for determining whether unwelcome conduct is sufficiently pervasive and severe to constitute environmental harassment); Farragher v. City of Roca Baton, 524 U.S. 775 (1998) and Burlington Mills v. Ellerth, 524 U.S. 742 (1998) (both holding that employers are vicariously liable for supervisory environmental harassment subject to a twofold employer affirmative defense). Catherine MacKinnon is usually credited with providing the bedrock legal analysis of sexual harassment as a systematic and socially pervasive form of discrimination based on sex. *See* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

[6] If these unwelcome demands include requests for sexual intercourse, this form of quid pro quo harassment may also constitute solicitation of prostitution. *See infra* notes 21-25 and accompanying text.

[7] Meritor, Farragher, and Ellerth cases, *supra* note 5. *See infra* notes 35-38 and accompanying text for the U.S. Supreme Court's use of general agency principles in the Ellerth case to impose vicarious liability on the employer for quid pro quo harassment. EEOC guidelines define quid pro quo sexual harassment as follows: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or

Environmental harassment consists of unwelcome conduct based on one or more of the discriminatory factors[8] and is sufficiently pervasive and severe to constitute a hostile work environment from a reasonable person's viewpoint considering the totality of the circumstances.[9] Sexual environmental harassment is such conduct based on gender. Employers are liable for environmental harassment engaged in or by supervisory personnel when the employer fails to prevail on either prong of an affirmative defense: "(1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[10]

The Civil Rights Act of 1991[11] provides for compensatory[12] and punitive[13] damages[14] to be decided by a jury in disparate

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condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual...." 29 C.F.R. §1604.11(a) (2001).

[8] Factors under federal EEO laws include race, color, national origin, gender, religion (Title VII of the Civil Rights Act of 1964), age (Age Discrimination in Employment Act of 1967), and disability (American Disability Act of 1990). Additional factors under state and local law, depending on the jurisdiction, may include marital status, sexual orientation, political affiliation, and others.

[9] *Harris*, 510 U.S. at 22-23 (1993). EEOC guidelines suggest a number of factors to consider in determining whether there is a hostile environment: (1) whether the conduct was physical or verbal or both, (2) how frequently it was repeated, (3) whether the conduct was hostile and patently offensive, (4) whether the harasser was a co-worker or supervisor, (5) whether others joined in perpetrating the harassment, and (6) whether the harassment was directed at more than one individual. EEOC Compliance Manual, Sexual Harassment: EEOC Policy Guidance 3231.

[10] *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 76. In both these cases, the Supreme Court stated that the critical inquiry in determining employer liability is whether the harassment resulted in "direct economic harm" resulting from a "tangible employment action. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, at 761.

[11] Pub.L. No. 102-166, 105 Stat. 1071 (1991).

treatment[15] cases in addition to any equitable remedy[16] decided by the court. By definition, both kinds of sexual harassment are disparate treatment.

The statute of limitations for a Title VII claim is three hundred (300) days.[17] If a Title VII claimant fails to file with a complaint with the federal Equal Employment Opportunity Commission (EEOC)[18] within 300 days, she/he loses the Title VII action.

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[12] Compensatory damages serve to make the victim whole again and have economic and non-economic components. Insurance generally covers defense expenses and compensatory damages resulting from strict liability and negligence theories of recovery but not those resulting form reckless or intentional misconduct. By definition, harassment is intentional misconduct. Employers can purchase harassment insurance. *See* BMW v. Gore, 517 U.S. 559, 568 (1996).

[13] Punitive damages are awarded to deter the offender and to set an example to deter others from comparable misconduct. Liability and damages generally must be proven by clean and convincing evidence. Damages are subject to due process restraints. BMW v. Gore, 517 U.S. 559, 568 (1996). Approximately half of the states disallow insurance coverage for punitive damages.

[14] *See* 42 U.S.C. § 1981a(b)(3) (1994). The combination of non-economic compensatory damages (e.g. pain and suffering) and any punitive damages is limited depending on the workforce size of the employer up to a maximum of three hundred (300) thousand dollars.

[15] A disparate treatment case is one of intentional discrimination in the sense that one or more of the prohibited factors is a substantial contributing factor to the adverse employment conduct or decision. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In contrast, a disparate impact case is one where an employer uses a non-job related employment requirement that has an adverse impact on a member of a protected group. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Seven years after the Civil Rights Act of 1964, the Supreme Court first recognized the disparate impact theory in Griggs v. Duke Power Co. (1971). Twenty years later, Congress codified this theory in the Civil Rights Act of 1991. *See* Pub.L.No. 102-166, 105 Stat. 1071 (1991).

[16] Equitable remedies authorized by federal discrimination laws include back pay up to two years, retroactive seniority, and training, front pay in absence of reinstatement. Unlike common law remedies, statutory remedies also include reasonable attorney's fees and legal expenses for prevailing plaintiffs.

[17] 42 U.S.C. §706 (e) (1994).

[18] The EEOC is the federal enforcement agency established by Congress in 1964 for federal EEO laws, including the Equal Pay Act of 1963, Title VII of the Civil

Title VII covers all private sector employers with 15 or more employees.[19] Employees working for employers with 14 or fewer employees have no statutory remedy under Title VII, although they may have a common law remedy.[20]

This article is focused on instances of quid pro quo sexual harassment where the sexual favor requested by the supervisor manager is sexual intercourse.

B. Solicitation for Prostitution

Under a state criminal law statute,[21] the act of prostitution and the solicitation of prostitution are crimes. Prostitution is defined as "the offering or receiving of the body for sexual intercourse for hire."[22] "For hire" can mean the giving of anything of value in exchange for the sexual intercourse. "Solicitation" is not defined in the statute and is to be "read in terms of its ordinary meaning as understood and used by the general public."[23]

Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the American Disabilities Act of 1990. Civil Right of 1991, Pub. L. No. 102-166 (1991).

[19] 42 U.S.C. § 704(c) (2000). The count includes part-time as well as full-time employees, temporary and regular.

[20] I refer to employers with 14 or fewer employees as statutory small employers. It has not yet been decided that employees of statutory small employers have available the tort of abusive discharge to vindicate Title VII's public policy against discrimination. Maryland's highest court has held that the tort is available to employees of statutory small employers to vindicate Maryland's public policy against discrimination. *See* Molesworth v. Brandon 672 A.2d 616 (1996). *See* Gray, John A., *Statutory Workforce Size Requirement and the Tort of Abusive Discharge: Small Employers Beware*, LAB. L. J. 13-24 (1996). On the tort of abusive discharge, *see infra* notes 28 to 36.

[21] This section uses Maryland criminal law as illustrative of comparable criminal law in other states. MD. CODE ANN., [Crime and Punishment] §§ 15 and 16 (2000). *See also* McNeil v. State, 739 A.2d 86 (1999), in which the Court traced the history of the efforts in Maryland to control prostitution and the social problems generated by the commercialization of that activity.

[22] MD. CODE ANN., [Crime and Punishment] §§ 15,16.

[23] *In Re* Appeal No. 180, 365 A.2d 545 (1976). The Maryland Court of Appeals iterated this meaning of "solicit" in McNeil v. State of Maryland, 739 A.2d 93 (1999), by referring to the definition of "solicit" provided in WEBSTER'S NEW

"Solicitation" can mean "requesting sexual intercourse in exchange for something of value." Clearly, the offer of a job, or a promotion, of even of continuing employment given the at will employment relationship is "something of value."[24] The crime of solicitation and the crime of prostitution apply to both the party providing sex for payment and the party receiving the sex in return for payment.[25] The penalty for soliciting prostitution and for prostitution is "a fine of not more than $500 or confinement in or commitment to any penal or reformatory institution in this State for not more than one year, or to both such fine and imprisonment in the discretion of the court."[26] It is reasonable to assume that at the time of the enactment of these anti-prostitution laws in the early 1920s, state legislatures did not include in their considerations what we refer to today as employment related quid pro quo

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UNIVERSAL UNABRIDGED DICTIONARY: 1. To ask or seek earnestly or pleadingly; to beg to entreat; as, we solicit your support, he solicited them for help. 2. To tempt or entice another to do wrong. 3. To accost another for some immoral purpose, as a prostitute does. 4. To disturb, to disquiet. [Rare]. The Court stated; "Any one of the first three definitions would suffice as an "ordinary meaning ... understood and used by the general public. Even the third ... references a solicitation by a prostitute only as an example, not as a limitation. . . . An entreaty, or offer, by a potential customer also qualifies as an accosting for some immoral purpose." *Id.* at 420.

[24] *See* Lucas v. Brown Root, 736 F.2d 1205 (1st Cir. 1984) for a distinction between a criminal proceeding in which a job might not be considered a "fee" within the meaning of a criminal statute and a civil action where no such narrow interpretation is required or appropriate.

[25] McNeil v. State of Maryland, 739 A.2d 85 (1999) (holding that the crime of soliciting for prostitution stated in the statute covers the conduct of both the prostitute and his/her agents in soliciting potential customers and of the potential customer in soliciting the prostitute). Recent changes in some state statutes recognize situations in which the party providing the sexual intercourse has been coerced into doing so and thus is to be held blameless. Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 24 N.Y.U. L. Rev. 1220 (1999). Under this approach, an acquiescing employee who does not welcome a supervisor's request for sexual intercourse as a condition of employment may be held blameless due to the coercion. This articles focuses on the situation where the employee or applicant rejects the solicitation.

[26] MD. CODE ANN. [Crime and Punishment] §17 (2000).

harassment. Much less did they consider it to be conduct in violation of these criminal laws.[27]

C. Tort of Abusive Discharge[28]

An employer commits the tort of abusive discharge when its discharge of an employee contravenes a clear mandate of public policy.[29] While the public policy may be found in a constitution, statute, agency regulation, or court decision, the tort is frequently applicable in circumstances where the statute whose public policy has been contravened itself does not provide a remedy to vindicate it.[30] Typical examples of this tort are when an employer fires an employee in retaliation for the employee's refusal (1) to commit an illegal act,[31] (2) to forgo some statutory employment related right,[32] or (3) to forgo some important civic responsibility.[33] Also in

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[27] Significant contemporary scholarship is analyzing anti-violence legal reforms in the areas of domestic abuse, sexual harassment, and rape over the last three decades. Balos & Fellows, *supra* note 25, in which the authors describe how domestic abuse, sexual harassment, and rape are interrelated and how prostitution figures into these forms of sexual violence and into the laws that address them, and in which they propose the creation of a civil remedy to address the inequality perpetuated by prostitution as well as the amendment of criminal statutes so that persons used in prostitution are no longer penalized.

[28] Also referred to as wrongful or retaliatory discharge and as the Public Policy exception to the At-Will Employment Doctrine.

[29] Adler v. American Standard Corp., 432 A.2d 464 (1981) (recognizing a cause in action in tort for abusive discharge when the motivation for the discharge contravenes a clear mandate of public policy). The public policy can derive from stature, judicial decision, constitution, or administrative regulation. *Id.* at 38.

[30] Makovi v. Sherwin-Williams Co., 561 A.2d 179 (1989) (holding that an action for abusive discharge will not lie when the public policy violated by the discharge arises from a statute that provides its own remedy for the violation). Watson v. People's Ins. Co., 588 A.2d 760 (1991) (holding that an abusive discharge may lie when there are multiple sources of public policy and at least one violated by the discharge arises from a law that does not provide its own remedy for the violation).

[31] For commentary and examples, see STANLEY MAZAROFF, MARYLAND EMPLOYMENT LAW §5.1(B)(1) (1990 and 1994 Cumulative Supplement).

[32] *Id.* at B(3).

[33] *Id.* at B(2).

abusive discharge cases, only the employer is liable and not the harassing supervisor.[34] The cases this article considers fall into the first group, *viz.*, discharging an employee in retaliation for that employee's refusal to commit an illegal act, specifically an act of prostitution.

In abusive discharge cases, typically the motivation of the supervisory manager in some way serves the interest of the employer. That is, the illegal act demanded or the demand that some statutory employment right or civic responsibility be forgone is something that in some way benefits the employer; even discriminating on the basis of gender may be seen as in some way benefiting the employer.[35] This motivation for the supervisory manager's action provides a basis for imputing liability to the employer. The question arises whether the tort should be available where the supervisor's motivation is purely personal and in no way serves any interest of the employer. In the *Ellerth* case, the Supreme Court, in its effort to apply common law agency principles pursuant to legislative intent as the basis for employer liability under Title VII of the Civil Rights Act of 1964, acknowledged that sexual harassment by a supervisor generally is outside the scope of employment and therefore not imputable to the employer under the doctrine of *respondeat superior*.[36] The Court, however, used the general common law of agency stated in the Restatement (Second) of Agency to affirm an employer's vicarious liability for a supervisor's sexual harassment resulting in an adverse tangible employment action against an employee. The Restatement

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[34] *Id.* at 13. "We believe the *Adler* court did not intend to create an additional cause of action for wrongfully discharged employees against an individual officer of a corporation, at least where the evidence does not show that the officer was clothed with the essential attributes of an employer."

[35] In Molesworth v. Brandon, 672 A.2d 608 (1996), the plaintiff, a veterinarian, convinced a jury that her employer fired her, in part because the clients did not want a woman veterinarian working on their horses.

[36] "Only conduct motivated at least in part by a motive to serve the employer may confer liability on the employer." *See supra* note 5, at 756. "Therefore, because "sexual harassment under Title VII presupposes intentional conduct," an employer may be liable only for harassment intended to further the employer's business. *Id.* "The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment. *Id.* at 757.

(Second) of Agency §219 (2)(d) states that "a master is not subject to liability for the torts of his servants acting outside the scope of their employment unless ... the servant ... was aided in accomplishing the tort by the existence of the agency relation."[37] The Court stated that "The aided in the agency relation standard ... requires the existence of something more than the employment relation itself."[38]

> Every Federal Court of Appeals to consider the question has found vicarious liability when a discriminatory act results in a tangible employment action. . . . In *Meritor* we acknowledged this consensus. . . . When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor . . . can cause this sort of injury. . . . Tangible employment actions fall within the special province of the supervisor . . . [and] are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act . . . [and] becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate.[39]

The same approach is applicable to a challenge to imputing liability to the employer under the tort of abusive discharge when the conduct demanded by the supervisor in no way serves any imaginable interest of the employer.

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[37] *Id.* at 760-63.

[38] *Id.* at 760.

[39] *Id.* at 761-63.

II. Cases allowing tort of abusive discharge even though EEO law also provides a remedy.

At least four states (Maryland, Arkansas, North Carolina, and Ohio) have recognized the availability of the tort of abusive discharge to vindicate a public policy independent of federal and state discrimination statutes that is violated by conduct that also is quid pro quo sexual harassment. Establishing the tort in these circumstances requires establishing by a preponderance of the evidence that (1) there was a discharge, (2) that it was motivated by the employee's refusal to engage in sexual intercourse in exchange for a tangible, valuable job-related favor, (3) that conditioning the tangible employment benefit on acquiescing to the unwelcome request for sexual intercourse would be an act in violation of the state's public policy against solicitation of prostitution,[40] and (4) that the criminal statute did not provide a civil remedy to the plaintiff to vindicate the statute's public policy. Tort remedies include compensatory[41] and punitive damages to be decided by a jury. The statute of limitations for a tort is generally three years from when its victim knew or had reason to know of its commission.[42]

The significance of the availability of the tort of abusive discharge to victims of quid pro quo harassment in violation of Title VII and state EEO law is that it either creates another liability for the employer along with its EEO liability or, in the event that the employee-plaintiff did not meet the EEO law's statute of limitations, provides a common law remedy. Clearly, employers do not favor any common law development making this tort available for quid pro quo sexual harassment. And, equally clearly, employee potential victims of quid pro harassment welcome this

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[40] For example, based on the Maryland Statute, MD. ANN. CODE, Art. 27 §§ 15 and 16.

[41] Compensatory remedies include an economic component and a quality of life component and essentially are not overturn-able on review. Punitive damages are subject to constitutional limits under the Due Process Clause of the 14th and 5th Amendments. *See* BMW v. Gore, 517 U.S. 559 (1996) establishing guidelines to determine constitutionally excessive punitive damages.

[42] MD. ANN. CODE, Courts and Judicial Proceedings Article, § 501.

development. Under this development, employees may be able to choose to file either a Title VII claim or a tort claim or both the statutory and common law claims.

Maryland. In *Insignia Residential Corp. v. Ashton*,[43] Maryland's highest court recognized an action for abusive discharge when an at-will employee was discharged for refusing to engage in sexual conduct that would violate state law against prostitution, even though the discharge also constituted unlawful quid pro quo sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and of its Maryland counterpart, Article 49B, each of which provides a civil remedy.[44]

Ms. Ashton contended that she was discharged for her refusal to engage in sexual intercourse with one of Insignia's officials, Michael Coleman. She contended that Mr. Coleman's conduct, which she regarded as a form of quid pro quo sexual harassment, also violated another clear mandate of public policy independent of the federal and state EEO laws, namely that against solicitation of prostitution articulated in the Maryland Code, Article 27, § 15 (e).[45] The case proceeded to trial only on two counts - a claim of battery against Michael Coleman and a wrongful discharge claim against Insignia.[46] The jury found that Coleman had not intentionally and offensively touched Ms. Ashton and thus returned a verdict for him on the battery. The jury, however, did find that Ms. Ashton was terminated from employment for her refusal to engage in sexual intercourse with Mr. Coleman and awarded $22, 240.00 in damages.[47]

> [Michael] Coleman's entreaties, she avers, constituted a solicitation for her to engage in prostitution, as defined in § 16 -- to offer her body for sexual intercourse for hire -- but there is no

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[43] 755 A.2d 1080 (Md. 2000).

[44] *Id.*

[45] MD. CODE ANN., Art. 27, §15(e) 1957. Unlawful Acts, states: "It shall be lawful: ... (e) ... to solicit ... for the purpose of prostitution ...."

[46] 755 A.2d 1080. There is nothing in the case regarding any EEO claim.

[47] 755 A.2d at 1083.

> other civil remedy available to her for the loss of her employment due to her resistance to that entreaty.[48]

On appeal, Maryland's highest court held that Maryland recognizes a wrongful discharge cause of action when an employee is discharged in retaliation for refusing a supervisor's request for sexual intercourse even when a civil remedy for quid pro quo harassment is also available under an EEO statute for the same misconduct. The tort is available to provide a civil remedy to the victim to vindicate the public policy of the state criminal statute prohibiting solicitation of prostitution. The Court cited *Lucas v. Brown & Root, Inc.*,[49] approvingly: "Sometimes the facts underlying a discharge constitute both a violation of an anti-discrimination statute and of another, more narrowly focused, statute reflecting clear public policy but providing no civil remedy."[50]

The statute precluding prostitution and attempts to induce or coerce women and men into engaging in prostitution represents a clear mandate of public policy that is violated when an at-will employee is discharged for refusing to engage in conduct that would constitute prostitution or lewdness or assignation, which is also prohibited by § 15 of Article 27. The fact that both the inducements themselves and a discharge for rejecting them may constitute a violation of the Federal and State employment discrimination laws does not require that we ignore that such conduct also violates the entirely separate, independently based, public policy embodied in § 15.[51]

The Court does not assume that every incident of quid pro quo sexual harassment automatically equates with a solicitation of prostitution. The issue articulated by Insignia, as appellant, is much broader - whether Maryland recognizes a wrongful discharge action based on a theory that the employee was wrongfully terminated "because she refused to acquiesce to 'quid pro quo'

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[48] *Id.* at 1081.

[49] 736 F.2d 1202 (8th Cir.1984); *see infra* notes 55-58 and accompanying text.

[50] *Id.* at 1084.

[51] *Id.* 1087.

sexual harassment. Ms. Ashton phrases the question as whether an action lies when the employee is terminated " because she refused to become her boss's prostitute." Ashton's statement of the issue . . . is the more appropriate one . . . "Quid pro quo sexual harassment " covers a wide range of conduct, much of which might not fall under Article 27, §§ 15 and 16. And, although the answer may be the same with respect to some of that penumbral conduct, that issue is not before us in this case, and we do not address it.[52]

In a concurring opinion, Associate Justice Eldridge, referring to the "strained route of relying on the criminal statute making it unlawful 'to engage in prostitution,'"[53] took the position that the tort of abusive discharge is always available to vindicate EEO public policy even when the EEO statutory remedy is also available.[54]

> An employee . . . who is discharged from her employment because she refuses to engage in sexual intercourse with one of her employer's officials, clearly has a common law cause of action in tort for abusive discharge. . . . [and] that common law cause of action . . . should not be precluded simply because there may exist limited statutory remedies under the Human Relations Article of the Maryland Code (Art. 49B) or Title VII, particularly because this Court has held that the Art. 49 B and Title VII remedies are neither exclusive nor primary.[55]

For Associate Justice Eldridge, there is no need to rely on another statute's public policy.

The two dissenting Associate Justices rejected reliance on the public policy of the anti-prostitution criminal statute because in their view unwelcome supervisory requests for sexual favors as a

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[52] *Id.* at 1081, n.1.

[53] *Id.* 1087-1088.

[54] E.g. "Always available" in the sense that a plaintiff may use the tort claim along with the statutory claim whenever a discharge violates EEO public policy; e.g., a discharge motivated by race.

[55] *Id.* 1087.

condition of employment are not the "solicitation of prostitution" that the state legislature had in mind when it enacted the criminal stature.

Under the majority's reasoning, a person declining a sexual entreaty "until the ring is on my finger," is a prostitute or a person requesting sexual activity, promising marriage, or any other number of things in return, is soliciting prostitution. With its opinion, the majority, by logical inferential extension, has, I fear, turned millions of Marylanders into prostitutes or those who solicit prostitution. Whatever the majority and others think prostitution is, this, in vernacular language, "ain't it."[56]

Arkansas. In *Lucas v. Brown & Root, Inc.*,[57] the federal Court of Appeals for the Eighth Circuit, applying Arkansas common law, held that Ms. Lucas, an-at will employee, could use the tort of abusive discharge when she claimed that she had been fired because she refused to sleep with her foreman. The Eighth Circuit affirmed the dismissal of her Title VII claim because it was filed too late, but reversed the dismissal of her state common law claims. The Eighth Circuit recognized that Arkansas has accepted the public policy exception to the at-will employment doctrine. It noted that the Arkansas criminal statute prohibiting prostitution and solicitation of prostitution established a clear mandate of public policy. "Prostitution is a crime denounced by statute. It is defined as follows: A person commits prostitution if in return for, or in expectation of a fee, he engages in or agrees or offers to engage in sexual activity with any other person."[58] The court reasoned

It is at once apparent that the shoe fits. A woman invited to trade herself for a job is in effect being asked to become a prostitute. If this were a criminal prosecution, it might be argued

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[56] *Id.* at 1088 (Cathell, J. & Harrel, J. dissenting).

[57] 736 F.2d 1202 (8th Cir. 1984). The plaintiff's Title VII claim was dismissed as untimely because it was filed on the 91st day after plaintiff received her right-to-sue letter. The Court of appeals also sustained plaintiff's contract and intentional infliction of emotional distress theories of recovery.

[58] *Id. at* 1205 (citing ARK. STAT. ANN. §41-3002(1) (Supp. 1983)).

that a job is not a "fee" within the meaning of this statute, and a court, applying the maxim that criminal statutes are to be strictly construed, might agree, holding that "fee" means only money, and not other things of value. But in this civil action no such narrow interpretation is required or appropriate. A wage-paying job is logically and morally indistinguishable from the payment of cash. Indeed, it necessarily involves the payment of cash. Plaintiff should not be penalized for refusing to do what the law forbids.[59]

The court rejected the employer's argument that allowance of use of the tort of abusive discharge would circumvent the limitations of Title VII.

Defendant argues that recognizing this wrongful discharge claim would allow plaintiff to circumvent Title VII's limitation provisions. Title VII does not, however, "exempt or relieve any person from any liability, duty, penalty, or punishment provided by an present or future law of an State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment act under this title.[60]

North Carolina. In *Harrison v. Edison Bros. Apparel Store*,[61] the Fourth Circuit Court of Appeals applying North Carolina common law held that an at-will employee who claimed that she has been fired for not acquiescing to the sexual demands of her employer could use the tort of abusive discharge. North Carolina recognized the public policy exception to the at-will employment doctrine. North Carolina had a statute criminalizing prostitution and the solicitation of prostitution. The Fourth Circuit held that "the exchange of sexual intercourse for the valuable economic benefit of a job fits within North Carolina's criminal prohibition" and that the plaintiff was fired for refusing to commit a criminal act and therefore stated a claim for wrongful discharge.[62]

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[59] *Id.* at 1205.

[60] *Id.* at 1025- 1206; 42 U.S.C. §2000e-7.

[61] 924 F.2d 530, 533 (4th Cir. 1991).

[62] *Id.* at 534.

Ohio.[63] In *Collins v. Rizkana*,[64] the plaintiff sued her former employer for wrongful discharge based on sexual harassment. *Collins v. Rizkana* is interesting in that it includes a number of dimensions. The plaintiff was bared from a statutory remedy under the Ohio EEOC statute because of small workforce size,[65] and instead of simply adopting the same approach as the Maryland Court in *Molesworth v. Brandon*[66] to which the Ohio court referred, it based its allowance of the tort on multiple statutory sources of public policy. The Supreme Court of Ohio held that a tort cause of action could be brought for wrongful discharge where the motivation for the discharge contravened the clear pubic policy against sexual harassment.

The Supreme Court of Ohio found two independent sources of public policy: (1) the state's criminal laws prohibiting sexual imposition and offensive sexual contact and prohibiting prostitution, and (2) the state's equal employment opportunity statute.

In order to more fully effectuate the state's declared public policy against sexual harassment, the employer must be denied his generally unlimited right to discharge an employee at will, where the reason for the dismissal (or retaliation resulting in constructive discharge) is the employee's refusal to be sexually harassed. Although there may have been no actual crime committed, there is nevertheless a violation of public policy to compel an employee to forgo his or her legal protections or to do an act ordinarily prescribed by law.[67]

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[63] This section relies on the analysis originally presented in Gray, *supra* note 5, at 17-18.

[64] 652 N.E.2d 653 (1995).

[65] *Id.* at 661. She did not file a claim with the Ohio Civil Rights Commission since at no time did her employer employ four or more persons, the statutory requirement.

[66] *Molesworth*, 672 A.2d 608 (recognizing the availability of the tort of abusive discharge to employees of statutory small employers for discharges violative of Maryland's public policy against discrimination in employment in the absence of a statutory remedy due to small workforce size).

[67] 652 N.E.2d at 658 (1995).

The court concluded that "in cases of *multiple*-source public policy, the statute containing the right and remedy will not foreclose recognition of the tort on the basis of some other source of public policy, unless it was the legislature's intent in enacting the statute to pre-empt common law remedies."[68]

The Ohio Court's reliance on sex offense statutes as an independent source of public policy is important, since every state has comparable sex offense statutes. If other state courts find this Court's "more fully effectuate" approach convincing, any employee without a statutory remedy whose discharge is related to sexual harassment has a tort theory of recovery.

In summary, these four states allow employee-plaintiffs to use the tort of abusive discharge to vindicate the public policy of the state's criminal sex offense statute when unwelcome supervisory requests for sexual intercourse as a condition of employment result in a discharge for refusing to comply or in a constructive discharge.[69] Theoretically, this tort is available regardless of whether the plaintiff-employee also has a statutory claim under the state or federal EEO law, since the public policy of the criminal sex offense statute is distinct from and independent of that of the EEO law. In these four states, theoretically, an employer may have a twofold liability exposure based on the same supervisory misconduct - one, at common law; the other, under the EEO statute.

III. Comments

What are these courts doing by making available to plaintiff-employees the tort of abusive discharge? They are recognizing that requiring an employee to give sex in exchange for having a job is in essence no different than soliciting prostitution. In making the tort available, these courts are providing a way to those who have a right not to be a victim of solicitation to vindicate

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[68] *Id.* at 660.

[69] Courts recognize a constructive discharge when an employer deliberately changes the working conditions with the result that a reasonable person finds them intolerable and quits.

the public policy underlying the criminal prostitution statute. The public policy underlying the criminal statute's prohibition against the giving of sexual intercourse in exchange for something of value is one of public morality regarding the nature and uses of sex, *viz.* that intimate, sexual relations, even in private between consenting adults, are not to be a matter of commerce because their purpose is to express love and to beget children within marriage. To allow the sale of sexual intercourse is to undermine marital fidelity and to cheapen sexuality. The public policy underling the crime of solicitation of prostitution is the prevention of prostitution itself by also outlawing the invitation to prostitution.[70] Just as this conduct is against the law on the streets, it should also be against the law in the workplace. Just as prostitution is against the law, even if carried out without any coercion whatsoever as a purely voluntary exchange, so also, *a fortiori*, it should be against the law when a supervisor in a position of power coerces sexual intercourse from an employee in need of a job. In addition to undermining the public morality in favor of sex in marriage and in favor of sex as a voluntary, mutual gift and against sex as a commodity, the solicitation of prostitution in the workplace undermines the values that are critical to an efficient, effective, work environment, *viz.*, that work and its rewards and burdens are assigned on the basis of work-related productivity, ability, and seniority

Having said all this, the question still remains as to the wisdom of making the tort of abusive discharge available against an employer for the situations found in the four cases considered. In none of the four cases - *Ashton, Lucas, Harrison, Collins* - was there a viable federal or state discrimination claim, but not because of the underlying facts. Discrimination in employment claims were not available because the plaintiffs had either failed to file the federal or state claim in a timely way as in *Lucas*, or, as in *Collins*, the small size of the workforce precluded a statutory remedy. In

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[70] Often prostitution may not be a voluntary exchange from the side of the prostitute except in the most superficial sense. The prostitute may be in a position of being coerced to sell sexual intercourse, either by a third party, or by a situation of economic destitution without any realistic alternative to make a living.

these cases, one could still file a criminal complaint against the supervisor. And in Maryland, in statutory small employer situations, one can bring a tort of abusive discharge to vindicate the statutory public policy against discriminatory discharges.[71]

These cases raise a number of questions. One question is whether the courts would allow two awards based on two theories of recovery against an employer for the same misconduct by a supervisory employer. Theoretically, under the reasoning of these four courts, a plaintiff can bring an abusive discharge claim against the employer along with a statutory discrimination claim which is still viable because within the statutory limitations period and/or workforce size requirement. By doing so, the plaintiff is vindicating two distinct and independent public policies - one against prostitution, the other against discrimination in employment. Also, theoretically, for example, in Maryland, an employee of a employer with a workforce less than the statutory minimum can bring a tort of abusive discharge cause of action against the employer to vindicate the public policy of the EEO statute and simultaneously another tort of abusive discharge action to vindicate the public policy of the criminal prostitution statue.

A follow-up question is how to award damages under each theory in situations where the courts allow both the tort and statutory theories to be used against the employer. One answer is to award damages first under the discrimination statute. Then one would award some amount to the plaintiff under the tort theory to compensate for the injury suffered as a victim of solicitation of prostitution not already compensated by the statutory remedy (e.g., loss of wages) for discrimination in employment. In situations where the plaintiff allows the statute of limitations to run under the discrimination statutes (300 days), under the reasoning of these courts the plaintiff-employee still has available another two years to bring the tort cause of action.

Employers understandably think that a body of federal and state employment discrimination laws with well-defined enforcement mechanisms and remedies are in place. They are not

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[71] *Molesworth*, 672 A.2d at 608.

going to be sympathetic to former employees who fail to meet filing deadlines.

The law in Maryland is one specific example. One way to deal with the questions raised by these cases is for the Maryland General Assembly to amend the Maryland EEO statute (1) to extend its administrative enforcement scheme and statutory remedies to all employers in Maryland regardless of workforce size and (2) to make its remedies the exclusive remedies for any discriminatory workplace conduct, including quid pro quo harassment.[72] This approach would also provide to employees of statutory small employers a statutory remedy for any violations of Maryland's EEO statute (e.g., discriminatory failures to hire or promote or train) rather than the tort remedy only for discriminatory discharges. This approach will require greater resources for the state enforcement agency instead of the tort approach of shifting the enforcement cost to private parties.[73]

This approach also eliminates the use of criminal sex offense statutes to provide a remedy in those quid pro quo harassment situations consisting of unwelcome supervisory requests for sexual intercourse as a condition of employment and where the employee has no statutory remedy because of missing the filing deadline. The way to vindicate the public policy expressed by criminal sex offense statutes is to file criminal charges against the harassing supervisor instead of an abusive discharge claim against the employer. With regard to the problem created by late filings under the EEO statutes, the legislature had reasons to adopt specific deadlines for filing. To allow employee complainants to obtain relief based on the public policy of some

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[72] Statutory remedies under Maryland Article 49B currently are only equitable and do not include compensatory and punitive damages to be decided by a jury. The Maryland statute should also be amended to have its damage awards mirror those in the federal anti-discrimination laws.

[73] *Molesworth*, 627 A.2d at 705. The Maryland Court of Appeals held that "the legislative intent for the adoption of the number 'fifteen' as the cut-off for employers whose employees had statutory remedies was the legislature's desire to protect the enforcement agency from being overwhelmed by complaints if it lowered or eliminated the number. An obvious alternative is to provide adequate enforcement resources."

other statute is to circumvent the legislature's intent. If statutory filing deadlines are a problem, it should be addressed directly by amending the statute accordingly. The common law should not go out of its way to provide a remedy for someone who did not take advantage of the statutory remedy available.