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Andrew W. Haines

EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN IN MINNESOTA: THE PROHIBITION AGAINST SEXUAL HARASSMENT©

ANDREW W. HAINES†

Many social practices imposed upon women because we are women are not considered by the law to be based on our sex. . . . Sexual harassment has been not only legally allowed; it has been legally unthinkable. As I came to analyze it, sexual harassment also appeared neither incidental nor tangential to women's inequality, but a crucial expression of it, a central dynamic in it. Is its centrality to women's condition connected to its legal and social permissibility? In particular, is sex discrimination law as constructed, by inner logic as much as by outer limits, unable to grasp the true dimensions of women's inequality? Does sex discrimination doctrine embody a conception of sexuality, gender, and power that can even begin to touch their fused reality as women experience it?

—Catherine MacKinnon[1]

† Professor of Law, William Mitchell College of Law 1973-1979 and 1980 to present; Visiting Professor of Law, Southwestern University Law School 1979-1980. University of Michigan, J.D. 1969; University of Minnesota, B.A. 1966; Reginald Heber Smith Fellow 1969-1971.

1. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN xi (1979).

If there will be justice in the world to come, women will be law givers and men have to have babies.

—Bertha Pappenheim[2]

I. INTRODUCTION

When the authors of the Declaration of Independence declared that "all men are created equal," they introduced to the consciousness of this nation an ideal that has constantly placed moral demands on all citizens who hear and use these words. While the authors neither intended to eradicate slavery nor eliminate racial discrimination, they did provide moral authority for those persons who would later seek to make equality a reality for all. The bright promise of the Declaration of Independence became the rallying cry of the abolitionists and the Radical Republicans who eventually captured its spirit in the fourteenth amendment's guarantee of "equal protection of the laws." Importantly, the latter group translated the concepts of justice and equality, through the guarantee of "equal protection of the laws," into a "relational concept" of equal employment opportunity. The equal protection clause was reinforced in the form of equal employment opportunity through the enactment of the employment sections of the Reconstruction Civil Rights Acts,[3] which, to some extent, put to flight the nineteenth century notion of "freedom of contract."[4] Never-

2. Bertha Pappenheim was the immortal Anna O. in Sigmund Freud's mental health case histories, playing an important role in the development of psychoanalysis. She later became a famous figure in her own right as a feminist, playwright, and humanitarian. Bertha made this statement near the end of her life, which included numerous battles against sexism.

3. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, *reenacted in* Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144 (current version at 42 U.S.C. § 1981 (1976)); Civil Rights Act of 1871, ch. 22, §§ 1-2, 17 Stat. 13 (current version at 42 U.S.C. §§ 1983, 1985(3) (Supp. IV 1980)).

4. For a discussion of this concept, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 293-98 & nn.94-100 (1978). The author discusses this concept in the following passage:

> Although contrary emphases on social control had never been excluded from the law of contracts, in the nineteenth century, freedom of contract doctrine reshaped and revised that law so as to provide a framework for protecting expectations and facilitating transactions deemed essential or desirable from the standpoint of the emerging capitalist order. In the spirit of laissez faire, the doctrine extolled the social virtue of uncompelled private-ordering of most transactions: the right of private citizens to establish the legal incidents and standards governing most of their relationships.

Id. at 295 (footnotes omitted).

Continuing, the author adds these points:

> The underlying philosophical assumptions of the freedom of contract doctrine parallel those that characterize the classical liberal political tradition,

theless, the astute chroniclers of history note an important fact about this relational concept during the eighteenth and nineteenth centuries: the proponents of this concept espoused it only for white and black males. In essence, this relational concept of equal employment opportunity *originated* in a climate of sexism.

Indeed, one must travel well into the sixth decade of the twentieth century to observe a concerted federal effort to translate "equal protection of the law" into the ancillary concept of equal employment opportunity for women.[5] Similarly, one must travel well into the seventh decade of the twentieth century to observe a concerted Minnesota effort to translate this same concept through the enactment of amendments[6] to the Minnesota Human Rights Act (the Minnesota Act).[7]

One finds the above facts noteworthy; they indicate that America had acknowledged sexism that resulted in denied access to employment long before America sought to extirpate this social

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> namely, that all values are arbitrary, subjective, and personal; that society is an artificial aggregation of autonomous individuals who come together solely for the instrumental purpose of maximizing personal satisfactions; that the state should do no more than facilitate the orderly quest for such satisfactions; and that, because values are arbitrary and subjective, only the concurrence, actual or constructive, of individual desires can provide standards of ethical obligation.

Id. at 295 n.95 (citations omitted).

The author then explains one of the underlying explanations for the jettison of the policy of freedom of contract:

> Since its appearance a century or more ago, the moral and social policy of freedom of contract has been assailed by critics who regard as its chief vice the fact that the substantive content of private-ordering reflects the gross disparities of economic power characteristic of capitalist society. In this view, freedom of contract is, in practice, an institutional framework for the legitimate exercise of coercive power. The amount of freedom created by the system of freedom of contract depends on the structure of economic power, yet differences of economic or class power are ordinarily either ignored or regarded as legitimate in contractualist jurisprudence, particularly in its late nineteenth- and early twentiety-century conceptualist version. The tendency of freedom of contract doctrine has been to treat as naturally preordained an historically contingent system of class relations.

Id. at 296-97 (citations omitted).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e (1976 & Supp. IV 1980)).

6. *See, e.g.*, Act of May 21, 1973, ch. 507, § 23, 1873 Minn. Laws 1120, 1139 (amending MINN. STAT. § 43.15 (1971)) (introduced prohibition against discrimination based on age, race, sex, or disability in civil service).

7. *See* Act of Apr. 19, 1955, ch. 516, 1955 Minn. Laws 802 (current version at MINN. STAT. ch. 363 (1982)). For an analysis of the history and framework of the pre-existing statute, see Auerbach, *The 1969 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioner's* [sic] *Model Anti-Discrimination Act: A Comparative Analysis and Evaluation*, 55 MINN. L. REV. 259 (1970); Auerbach, *The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A Comparative Analysis and Evaluation*, 52 MINN. L. REV. 231 (1967).

sickness. Sexism probably confronts America with sociological and psychological complexities that dwarf the problem of racism. For this reason, one can understand why America has only recently statutorily recognized one of the last important frontiers of gender-based employment discrimination: sexual harassment. While administrative agencies and courts have interpreted the various federal and state equal employment opportunity statutes to cover a variety of gender-based employment discrimination over the last fifteen to twenty years, these same agencies and courts are only now interpreting—and quite begrudgingly in the instance of several courts—these statutes to cover sexual harassment in the workplace.

This Article will examine the first sexual harassment case[8] decided by the Minnesota Supreme Court and the subsequent 1982 amendment[9] to the Minnesota Act proscribing sexual harassment. To do so, the Article will consider the answered and unanswered questions about sexual harassment arising from the *Continental Can Co. v. State* decision and will explore the contours of sexual harassment under the amended Minnesota Act. The Article will also explore the contours of sexual harassment under the Minnesota Act within the larger context of "equal protection of the law" and its ancillary concept of equal employment opportunity for women. For this reason, the Article begins its analysis with a consideration of the concept of equal employment opportunity for women and an examination of the jurisprudential complexities that arise in defining sexual harassment in the context of equal employment opportunity.

II. AN OVERVIEW OF THE CONCEPT OF EQUAL EMPLOYMENT OPPORTUNITY FOR WOMEN

American society continually struggles to theoretically and practically render equality for its citizenry by eliminating and preventing certain artificial and unnecessary social inequalities.[10] Indeed,

8. Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980).

9. *See* Act of Mar. 23, 1982, ch. 619, §§ 2-3, 1982 Minn. Laws 1508, 1511 (codified at MINN. STAT. § 363.01(10), (10a) (1982)).

10. For a very illuminating discussion of the role of equality, see E. BODENHEIMER, POWER, LAW, AND SOCIETY 133-34 (1973). Bodenheimer stated the quest in the following manner:

> The truly critical problem posed to legal and social policy is not to extirpate all forms of inequality, but to segregate irrational and arbitrary categories of differentiation from reasonable and constructive schemes and to eliminate or reduce

our Anglo-American political theory demonstrates that the individual's and the society's well-being is a function of the society's ability to achieve this equality. This social well-being depends on differentiating reasonable and socially constructive behavior that promotes equality *from* irrational and socially destructive behavior that undergirds the objectionable inequality within grand political and economic designs.

Society's achievement of this differentiation is intellectually, economically, psychologically, and practically very difficult, as this harsh social reality illustrates: society pursues only a "limited equality" for individuals or groups by retaining, and even legally protecting, those inequalities (both natural and artificial) deemed necessary for preserving and furthering various indispensable individual and societal interests. For example, American society permits employment decisions based on natural talents and abilities as well as decisions based on "bona fide" seniority systems. American society has had difficulty achieving this constructive differentiation for another reason: the dominant male group has had great psychological difficulty, and hence occasional lapses in willpower, in overcoming its penchants for racism and sexism. America's beatification of equality, especially for oppressed individuals, has appeared as a "social illusion" for black people and women. The resultant legal treatment—the various omissions and comissions—represents major examples of America's social callousness and, accordingly, the serious disjunction between America's ideology and idealism and its social practice. To a small extent, the society rectified part of the problem with the passage of the various constitutional provisions and civil rights acts during the late nineteenth century; however, the major efforts to rectify the problem, on the part of the federal and state governments, did not come until several decades into the twentieth century with the passage of the various unfair discriminatory practices statutes. America has unevenly identified and responded to the various demands for equality, thereby bringing them within the moral injunction of the Declaration of Independence and making the differentiation between constructive and destructive social behavior even more of a faint hope than without the lethargic historical advances discussed above.

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the former ones. It will always be necessary to preserve those inequalities which are indispensable to the effective discharge of social function.

Id. (footnotes omitted).

But once American society has surmounted its psychological barriers and identified its dispensable inequalities, how has it accomplished its goal of equal employment opportunity under the various federal and state laws? To travel from the transcendent theoretical plane into the heart of social action, American jurisprudence has developed several "social constructs" for achieving this "limited equality." One such construct is that of equal employment opportunity (EEO). Tersely stated, the EEO construct is an *equation* that first identifies various societal interests, and then, using a "social calculus," weighs the respective interests within a given employment context. This social equation combines various jurisprudential notions of equality that defend the employment rights of the protected class, and then applies a "social calculus" that balances these employment rights against other competing individual and social interests via "standards of equilibrium."[11] In turn, this entire conceptual complex is installed within various federal and state constitutions, federal civil rights statutes, and state unfair discriminatory practices statutes—in this instance the Minnesota Act—thereby creating a sensitive, finely tuned gauge for differentiating rational from irrational employment behavior that affects the protected classes of persons. For present purposes, the Article focuses only on the notion of equality for women, leaving for another time a consideration of how this overarching concept of EEO—this complicated *plexus* of sub-ideas that synergistically achieves the desired end product of equal access—actually functions.

The general societal notion of equality (as well as that of justice) subsumed within a varietal concept of EEO is itself a very complicated body of ideas. In fact, the societally derived notion of equality possesses a "polymorphous character,"[12] particularly at this

11. This discussion represents the author's own statement of the concept of equal employment opportunity. Owing to space limitations, the backdrop of this very important legal concept is not fully developed here.

12. *See, e.g.*, E. BODENHEIMER, *supra* note 9, at 128. Bodenheimer demonstrates the polymorphous character of equality by listing these "five basic kinds of equality configurations":

> (a) equality of rule classifications; (b) commutative equality; (c) equal treatment of equals; (d) equality of fundamental rights; (e) equality of need satisfaction. These five categories by no means exhaust the wide variety of patterns that may be encountered in social attempts to deal with the problem; they merely represent broadly-defined ways of approach to a solution.

Id.; *see also* J. TENBROEK, EQUAL UNDER LAW 19 (1965) (describing three definitions of equality—"one-for-one," the "natural rights," and the "classification" definitions); G. SARTORI, DEMOCRATIC THEORY 334 (1967) ("We must now cease to speak of equality in

juncture in American legal history. Hence, equality clearly denotes *more* than "equal treatment" for individuals or groups—if that phrase can even make much sense with reference to some protected persons (e.g., "handicapped" persons) without further elaboration. Owing to the confluence of these complicated ideas about equality and the complicated social needs of the various classes of protected persons, our eventual idea of equality for a given class of persons is a composition of "equal treatment," "equality of needs," "equality of fundamental rights," and "commutative equality." Accordingly, this composite statement of equality translates into the following: Within the ancillary concept of EEO, equality requires the creation of a fundamental employment right for the protected class members and a mandate that employers provide equal treatment and reasonable accommodation of the employment setting for the various protected class members. The concept also includes a mandate of commutative justice in the redistribution of societal goods, services, and wealth to eliminate the previous maldistribution and disproportionate injury to the protected class members. In addition, since the concept of EEO amounts to a social equation that factors in a variety of societal interests when society strives to achieve equality, the following interests also find their places within the construct: the employer's constructive schemes for differentiating among applicants and employees; the employment rights of individuals not within the protected classes (co-workers or co-job applicants); the employees' right of collective bargaining; the health and safety of the society; and the various views about how society defines the term "reasonableness" when used in balancing the numerous competing interests in a given employment setting.

Plainly, as the opening quote indicates, the concept of EEO for women cannot help extirpate sexual harassment in the workplace without the law's constant examination of the cornerstone of the concept: the notion of equality for women under the law. Administrative agencies and courts must be ready to adjust the notion of equality to the subtleties and complexities of sexual harassment on the job. These bodies—if they are to do justice to women—cannot adopt only a truncated idea of "equal treatment" when con-

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the singular and proceed to deal with equalities in the plural."); Wilkerson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 946 (1975) (constitutional equality subdivided into "(1) political equality, (2) equality of opportunity, and (3) economic equality").

fronting sexual harassment in the workplace; they cannot hold back the tide of legal reasoning with reference to the notion of equality. Hence, one can easily see—if one reflects on the above discussion—that the modern concept of equality, with its involved composition, can encompass the varieties of sexual harassment in the workplace *without* great difficulty. For example, the notion of "equal treatment" can be applied to find unequal treatment where an employer allows harassment of females by male employees but forbids harassment of males by female employees; the notion of "equality of needs" lends itself to application where the law wants to find that an employer that permits its male employees to create harmful work conditions through sexual harassment for the employer's female employees fails to recognize the female employees' special need for protection against the males' powerful combination of social and economic dominance.

The failure to extend the concept of equality, and therefore the concept of EEO, to extirpate the irrational and socially destructive employment behavior of sexual harassment *does not* reside in the inelasticity of the concept of equality. The failure to extend the concept probably comes from the myopic willingness of male lawyers and judges to view harassing sexual behavior simply as isolated, innocuous, interpersonal disagreements between men and women, unconnected to the job and not within the employer's responsibility of controlling the work environment. This view disingenuously removes the employer from the pale of the moral injunction of equality by holding that the employer's failure to control a personal intersexual dispute on the job is not a denial of equal employment opportunity for women. In fact such a view masks the exploitation of men's economic dominance over women. This regrettable and probably subconscience recalcitrance toward EEO for women compels close examination of an important subject: the "employment consequences" of sexual harassment or the nexus between a particular instance of sexually harassing behavior and the subject female's employment. "Employment consequences" serve as the touchstone[13] that elevates sexually harassing behavior above the level of a purely personal act for which neither the employer nor the involved male employee should be chal-

13. Nonetheless, one could take the position that *any* sexual behavior that a male directs toward a female in the workplace, irrespective of any "employment consequences," has the "aura" of intimidation and exploitation of social and economic dominance, so that the law ought to prohibit all sexual behavior that males direct toward females in the workplace to protect against any subtle intimidation, exploitation, and denial of respect

lenged under the various equal employment opportunity statutes. A female employee may encounter conceptual problems when she tries to extend the concept of equality to reach work-related sexual behavior viewed as harmless and natural in the eyes of a majority of persons. Yet, "employment consequences" should not be permitted to take an unduly narrow meaning. To maintain the integrity of the concept of equality, we should not interpret "employment consequences" to mean simply economic losses resulting from sexual harassment. Owing to the sometimes subtle nature of sexual harassment, women may suffer "employment consequences" of an intangible nature that are as worthy of rectification as any tangible economic detriment. A work environment saturated with intimidation may not immediately lead to a demotion, job termination, salary loss, or the like, but is nevertheless a deprivation of equal employment opportunity.

This was the jurisprudential background that faced the Minnesota Supreme Court as it examined the issues in *Continental*. The various parties called on the court to determine whether the employer had engaged in socially constructive or destructive employment behavior, within the framework of the concept of EEO for women. While the commendable job of the *Continental* court in advancing the employment equality of women was fortified by the 1982 amendment to the Minnesota Act, one cannot avoid the supreme irony: Some two hundred years after the Declaration of Independence, our society still struggles to achieve equality in the workplace for a large segment of our population. Any sense of social advancement must be tempered by the soberness that comes from the recognition that our system of justice arrived only yesterday to address sexual harassment, though it started out on the journey over two centuries ago.

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for female personhood. In sum, *all* sexual behavior that males direct toward females in the workplace ought to be "harassment" for social policy reasons.

The notion of "employment consequences" becomes the gauge for our EEO statutes because such an element permits us to identify socially destructive behavior that our concept of EEO ought to prohibit. Indeed, if our society dismisses the notion of "employment consequences" to embrace all sexual behavior in the workplace, our law assumes an overly intrusive quality and imposes such a stringent burden on employers that the law seems totalitarian and hence begins to lose its binding capabilities. Moreover, one can argue that the EEO statutes ought to concern themselves with *significantly* work-related sexual behavior, admitting that the law should liberally interpret "employment consequences."

III. The Definition of Sexual Harassment

Since society's concern now centers around identifying socially destructive behavior that denies women equality in the workplace, we naturally turn to the task of defining one type of this behavior: sexual harassment. Given our primal concern of equality in the workplace, how should our legal machinery define sexual harassment? The long opening quote demonstrates that a threshold step in this definitional process is the willingness to denominate some sexual behavior in the workplace according to the behavior's true character; sexual behavior that harasses women to the point of denying them equal access to employment should be denominated sexual harassment. Yet, how should the legal machinery determine when certain sexual behavior amounts to "harassment"? What gives the sexual behavior its harassing character? Several persons have attempted to define "sexual harassment."[14] This Article will examine three of these definitions. The first definition starts from a broad socio-economic base, providing a general analytic:

> Sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power. Central to the concept is the use of power derived from one social sphere to lever benefits or impose deprivations in another. The major dynamic is best expressed as the reciprocal enforcement of two inequalities. When one is sexual, the other material, the cumulative sanction is particularly potent.[15]

The second definition introduces greater specificity than the first: "Sexual harassment is any unwanted physical or emotional contact between workers or supervisors and workers, which makes one uncomfortable and/or interferes with the recipients [sic] job performance or carries with it either an implicit or explicit threat of adverse employment consequences."[16] The third definition also introduces specificity and, like the second, provides an operational definition: "Sexual harassment is any repeated or unwarranted verbal or physical sexual advances, sexually-explicit derogatory

14. *See, e.g.*, *Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173 n.1 (1980).

15. C. MACKINNON, *supra* note 1, at 1.

16. *Sexual Harassment in the Federal Government: Hearings Before the Subcommittee on Investigations of the House Committee or Post Office and Civil Service*, 96th Cong., 1st Sess. 113 (1979) (statement of Kenneth T. Blaylock, National President of the American Federation of Government Employees).

statements, or sexually discriminatory remarks made by someone in the workplace which is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's job performance."[17]

Importantly, all of the definitions highlight the complex interaction of biological behavior with social behavior, leaving one, however, with the impression that, in the final analysis, sexual harassment centers primarily around socio-economic behavior.[18] These definitions help us to perceive that sexual harassment is *not* solely and purely sexually motivated behavior on the part of men; it is more clearly an acting out of the socio-economic tensions and hostilities of the male, as well as a manifestation of larger social stereotypes and entrenched mythologies. For example, rather than being the product of an uncontrollable biological urge, sexual harassment may be conduct that reflects an image of superiority and dominance, a perceived incompetence and powerlessness in the face of a female's competence and potential for acquiring greater power, or the tension and hostility that males have toward females who do not fit the social stereotype—that is, the idealized sex object who is submissive, responsive, and not in competition with the dominant male.[19]

If one desires, one can classify these definitions into two general patterns of sexual harassment on the job: the *quid pro quo* pattern and the *condition of work* pattern.[20] In the first pattern, the male premises the demand for sexual compliance on the promise of an employment opportunity. Behind the demand/promise lies the threat of penalties for failure to comply, such as unfavorable job evaluations, demotions, transfers, denial of pay increases, or termination. In the *condition of work* pattern, the female encounters a work environment permeated with sexual offense, intimidation, and abuse. Here the exchange of sexual favors for employment opportunities may be indirect or nonexistent.

These two patterns help us understand both *why* such employment behaviors are socially destructive not simply in terms of their

17. Brief Amici Curiae of the National Organization for Women and Working Women's Institute at 15-16, Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980).

18. *See* C. MACKINNON, *supra* note 1, at 1-7.

19. The author first read this interpretation in a paper submitted by Carole Harper for my employment discrimination seminar.

20. *See* C. MACKINNON, *supra* note 1, at 32.

role in the denial of "social primary goods"[21] in the sense of rights, but also in the denial of the "social primary good" of women's self-respect—and *why* a host of "critical questions" arise about *when* sexual behavior that males direct toward females in the employment setting actually becomes socially destructive within our concept of EEO. The *quid pro quo* pattern underscores the usual concatenation between the sexual behavior, the female's response, and any employment consequences, so that we focus all attention on the social damage and how we can reestablish the integrity of the female and the workplace. On the other hand, the *condition of work* pattern draws our attention to the possibility that the sexual behavior is not harassment and that the female's response is simply an overreaction, or to put it another way, the sexual behavior, the female's response, and the job are unconnected, so that a particular instance of sexual behavior is not socially destructive within a given employment context via our concept of EEO for women. Accordingly, with respect to this second understanding, we start asking the following types of questions:

> Where is the line between a sexual advance and a friendly gesture? How actively must the issue be forced? If a woman complies, should the legal consequences be different than if she refuses? Given the attendant risks, how explicitly must a woman reject? Might quitting be treated the same as firing under certain circumstances? To get legal relief, must a job benefit be shown to be merited independent of a sexual bargain, or is the situation an injury in itself? When a perpetrator insists that a series of touchings were not meant to be sexual, but the victim experienced them as unambiguously sexual, assuming both are equally credible, whose interpretation controls when the victim's employment status is damaged?[22]

Our hope is that the answer to these questions will, in this moment of uncertainty, give us more confidence in our judgments and hence, in our use of the concept of EEO.

In conclusion, this discussion provides some insight into the character of the legal definition of sexual harassment in the workplace. One should sense both the ease and difficulty of this definitional process, given the possible range of sexual behavior on the job. Moreover, one should also appreciate that given the need for a probing and careful analysis of this wide range of social behav-

21. *See* J. RAWLS, A THEORY OF JUSTICE 92 (1971). One should especially examine Rawls' discussion of the social primary goal of self-respect. *See id.* at 440.

22. *See* C. MACKINNON, *supra* note 1, at 31.

ior, many observers will not probe deeply enough to uncover the more subtle forms of sexual harassment. Hence, the working defintion of sexual harassment, in some instances, will ultimately depend on the thoroughness and sophistication of the analyzer.[23]

IV. THE COURT'S ANALYSIS IN *CONTINENTAL*

Having laid the foundation for analysis, the Article now turns to the case decided by the Minnesota Supreme Court before sexual harassment was explicitly prohibited by the Minnesota Act. Willie Ruth Hawkins, a black female, was one of two females (the other white) who worked at one of Continental's plants. Shortly after Hawkins began working in December 1974, she and the other female were the subjects of "explict sexually derogatory remarks and verbal sexual advances"[24] from three male Continental employees, with occasional offensive touching by one of the males. The two women complained to their supervisor in March of 1975, though neither woman identified the harassers. Continental took no action in response to the complaints. The offensive remarks and touching continued, culminating in a more serious incident on October 13, 1975. On that occasion, one of the male workers approached Hawkins from behind and grabbed her between her legs as she performed her work. Hawkins immediately complained to Continental's plant manager but again Continental neither took immediate action to investigate the complaint nor did it stem the harassment.[25]

Owing to the highly offensive character of the sexual grabbing incident, Hawkins' husband entered the picture seeking to protect his wife. He confronted the harasser in the Continental parking lot after work hours. This action prompted further intimidation of Hawkins. Continental's plant manager did reprimand Hawkin's harasser for the parking lot confrontation. The plant manager later informed police of the increasing level of tension and the possibility of violence. The plant manager then discovered that Hawkins had filed a criminal complaint against one of the harassers, since this man had confronted Hawkins at her home threatening her with a gun. One of Continental's supervisors later learned

23. For an excellent illustration of this point, see Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

24. Continental Can Co. v. State, 297 N.W.2d 241, 244 (Minn. 1980).

25. *Id.*

about the gun incident from the harasser.[26]

During October 1975, the Hawkins family held a series of meetings with representatives of Continental. Hawkins was asked to return to work but she refused, claiming that the company gave no assurances for her safety. Later in October, Continental suspended two of the harassers, the man who grabbed Hawkins and the man who assaulted her, largely because of pressure from black community groups. Finally near the end of October, Continental initiated a formal company investigation, during which Continental disseminated its policy against verbal or physical harassment and discrimination. Continental fired Hawkins in December 1975 after she refused to return to work.[27]

Before the termination, Hawkins had filed a discrimination charge with the Minnesota Department of Human Rights against Continental and the plant manager, alleging sexual discrimination with respect to work conditions in violation of the Minnesota Act. The Department found probable cause to believe that a violation of the statute occurred, and filed a lawsuit against Continental and the supervisor after unsuccessful conciliation. Following a hearing, a hearing examiner concluded that only Continental committed unfair discriminatory employment practices and that Continental had constructively discharged Hawkins. The hearing examiner awarded back pay damages, but reduced these because he attributed responsibility for the tension at the plant to Hawkins' husband and racial discrimination. Although the hearing examiner denied punitive damages and job reinstatement, he ordered Continental to cease and desist from discrimination based on sex in work conditions.[28]

Continental appealed the decision to district court; the Department cross-filed and Hawkins intervened. The district court reversed the decision and dismissed the complaint with prejudice. The Department appealed the district court's decision to the Minnesota Supreme Court. The supreme court reversed the district court's decision.[29]

While the Minnesota Supreme Court addressed five issues[30] in its decision, only two of those issues are important for understand-

26. *Id.*
27. *Id.* at 244-45.
28. *Id.* at 245.
29. *Id.*
30. *Id.*

ing the contours of sexual harassment under the Minnesota Act as it existed at that time: first, when does verbal and physical sexual harassment become sex discrimination in an employment setting, and second, whether Continental committed an unfair discriminatory employment practice under the statute.[31] The reader can note that neither issue alone nor the two issues taken together indicate the direction of the court's opinion. One must examine the opinion to understand why the supreme court reversed the district court.

With respect to the first issue, the Minnesota court turned to the cases under Title VII of the Civil Rights Act of 1964 to obtain direction in analyzing this case of first impression. The court first noted that a majority of federal courts have held that sexual harassment does constitute sex discrimination;[32] however, the court noted that *Continental* did not factually resemble those cases, since the employer in *Continental* had not tried to make the woman's sex a term or condition of employment.[33] Further, the court noted that the various federal courts did not agree on the theory of the employer's liability for actions of supervisory personnel.[34] While some courts require a form of notice to the employer coupled with a failure to undertake remedial action, others automatically impose responsibility based on vicarious liability. The court did not explicitly note its opinion on this disagreement; however, the court did implicitly voice its position by its reference to a couple of racial harassment cases which the court believed more closely resembled *Continental*.[35] Importantly, the two racial harassment cases the court cited illustrate that liability attaches only "where the employer knows or should know of the condition and permits it to continue without attempting to 'discourage' it."[36]

For further guidance on what constitutes sexual harassment, the court relied on the then-interim sexual harassment guidelines of the Equal Employment Opportunity Commission (EEOC).[37] The court noted that those guidelines very broadly defined sexual harassment: any conduct of a sexual nature that interferes with an

31. The court broadly stated the issue. In actuality the question was whether Continental exculpated itself by an adequate and timely response to the complaint of Hawkins.

32. 297 N.W.2d at 246.

33. *Id.*

34. *Id.* at 247.

35. *Id.* at 247-48.

36. *Id.* at 247.

37. *Id.* at 248. The Final Guidelines were published at 45 Fed. Reg. 74,676 (1980).

individual's work performance or that creates an unhealthy work environment is within sexual harassment, not simply the demand that sexual conduct become a condition of employment.[38] Furthermore, the court noted that those guidelines stated that liability attaches for acts of agents and supervisory employees regardless of whether the employer authorized or prohibited the challenged acts and regardless of whether the employer knew or should have known of their occurrence and that liability attaches for acts of co-employees when an employer knew or should have known about such misconduct.[39]

In light of the case law and interim guidelines, the court gave its own interpretation of sexual harassment, keeping in mind that the facts before it did not resemble the typical sexual harassment case. The court noted that while an employment action premised on "dispensation of sexual favors" obviously smacks of a differential treatment based on sex, and is easily recognized as such, an employment action that demands that a female adapt herself to a workplace in which males direct other "repeated unwelcome sexually derogatory remarks and sexually motivated physical contact"[40] is no less invidious and disparate treatment. Such treatment confronts female employees with working conditions different from those faced by male employees. Accordingly, the court held that the then-existent statutory[41] prohibition against sex discrimination "includes sexual harassment which impacts on the conditions of employment when the employer knew or should have known of the employee's conduct alleged to constitute sexual harassment and fails to make timely and appropriate action."[42]

On the issue of whether Continental, as the employer of the harassers, committed an unfair discriminatory employment practice under the Minnesota Act, the court relied on its own analysis of the facts. First, the court found that the remarks Hawkins initially complained about in March 1975 represented verbal sexual harassment, while the "sexual grabbing" incident represented physical sexual harassment.[43] Second, the court addressed the disagreement between the hearing examiner and district court about whether Continental properly investigated and curtailed the

38. 297 N.W.2d at 248.
39. *Id.*
40. *Id.*
41. MINN. STAT. § 363.03, subd. 1(2)(d) (1980).
42. 297 N.W.2d at 249 (footnote omitted).
43. *Id.*

sexual harassment after Hawkins' notification. The hearing examiner divided the time period and found that Continental violated the statute by failing to investigate the complaints and take affirmative action to remedy the behavior[44] *during* the period of March to October 13, 1975. The examiner then concluded that Continental again violated the statute *after* October 13, 1975 because it did not immediately investigate Hawkins' complaint and did not take prompt action to stem the harassing behavior.[45] The district court concluded that Continental could not investigate a claim when Hawkins withheld the harassers' names *during* the March to October 13, 1975 period[46] and that Continental did take appropriate action *after* October 13, 1975.[47]

The supreme court sided with the hearing examiner. As the court stated about the pre-October 13, 1975 conduct:

> We appreciate the fact that without the harassers' identities, Continental's options were limited. However, Continental took no action whatsoever. Even without the harassers' identities, Continental could have disseminated an anti-harassment policy to its employees as did the employer in *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976) when faced with complaints about unidentified harassers.[48]

Further, the court stated that as to the post-October 13, 1975 conduct, the question it faced was determining the point at which "Continental's duty to act was activated—before or after the parking lot and gun confrontations."[49] The hearing examiner concluded that Continental had a duty to act the same day Hawkins complained about the grabbing conduct or shortly thereafter. The supreme court agreed that the second violation turned on Continental's failure to act promptly.[50] As the court noted about this violation:

> The essence of the second unfair discriminatory practice lies not in the *inadequacy* of Continental's later responses to the situation but instead on the fact that these responses were not *timely*. This failure to respond promptly to Hawkins' complaints regarding the grabbing incident "connected" Continental to the act of sexual harassment perpetrated by its employee on Octo-

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 250.
48. *Id.*
49. *Id.*
50. *Id.*

ber 13, 1975.[51]

Hence, the court found that Continental failed to take timely action during the important *post*-October 13, 1975 period.

V. The 1982 Sexual Harassment Amendment to the Minnesota Act

Partly in response to *Continental* and largely because of the pervasiveness and seriousness of sexual harassment in the workplace, the Minnesota legislature amended the Minnesota Act in 1982 to prohibit sex-based discrimination in the form of sexual harassment discrimination.[52] The legislature amended the statute by making two changes. First, the statutory definition of the word "discriminate" was expanded to include sexual harassment for purposes of discrimination based on sex.[53] Second, the legislature defined "sexual harassment":

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . . ;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . ; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.[54]

VI. Answered Questions About Employment Sexual Harassment Claims

Having examined the *Continental* opinion and having introduced the 1982 amendment to the Minnesota Act, one can ask what they tell us about the claim of sexual harassment in Minnesota? Con-

51. *Id.* at 250-51 (emphasis added).

52. Act of Mar. 23, 1982, ch. 619, §§ 2-3, 1982 Minn. Laws 1508, 1511 (codified at Minn. Stat. § 363.10(10), (10a) (1982)).

53. *Id.* § 2, 1982 Minn. Laws at 1511 (codified at Minn. Stat. § 363.01(10) (1982)).

54. *Id.* § 3, 1982 Minn. Laws at 1511 (codified at Minn. Stat. § 363.01(10a) (1982)).

tinuing the format developed above, the Article will examine the questions that have been answered that relate to the issue of when verbal and physical sexual harassment become sex discrimination in an employment setting. An important threshold question now answered is how Minnesota defines sexual harassment. Clearly, any definition must separate noncognizable, personal sexual overtures, or friendly gestures, from cognizable sexual harassment. The *Continental* court adopted and the Minnesota legislature enacted the broad view of the EEOC: sexual conduct becomes harassment when it constitutes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature."[55] Both bodies obviously saw merit in the broad EEOC definition, which itself comes close to the operational definition the Article sets forth above, rather than trying to create a very narrow judicial or legislative definition.

In addition to the above, any definition of sexual harassment must secondarily separate noncognizable, personal sexual overtures from cognizable, *job-related* sexual harassment. Here too the court and legislature indicated their refusal to adopt a narrow concept of sexual harassment. When the court noted that many Title VII sexual harassment cases seemed "factually distinguishable" from the *Continental* facts, the court was merely indicating that it would not demand that a sexual harassment claim fit the *quid pro quo* pattern to be cognizable under the Minnesota Act. In a sense, the court announced that it viewed sexual harassment as a more complicated notion than, for example, the notion of racial harassment. Some sexual harassments fit the *quid pro quo* pattern, while other sexual harassments fit the *condition of work* pattern that courts have generally encountered in the race context. Hence, both the court and legislature took a broad approach on the nexus of the sexual harassment to the given employment. They adopted that part of the EEOC's sexual harassment definition that tells us *when* the unwarranted sexual conduct connects up with the job so that we can begin fairly examining the employer's liability: Employer conduct becomes sexual harassment when the employee must submit to it as a condition of her employment; when submission to such conduct becomes the basis of employment decisions affecting the employee; or, when such conduct "has the purpose or effect of substantially interfering" with the employee's work or "creating an

55. 45 Fed. Reg. 25,025 (1980) (codified at 29 C.F.R. § 1604.11(a) (1982)).

intimidating, hostile, or offensive" work environment.[56]

A second important question now answered is what theory is to be used for visiting liability on an employer when some of the employer's workers engage in the sexual harassment of a female worker. Like the EEOC, the court and the legislature attached liability based on the employer's *actual* and *constructive* knowledge of the misconduct, leaving the employer with the defense of demonstrating that it undertook timely remedial action.[57] The legislature's enactment of the language from the EEOC guidelines leaves so little doubt that the answer to this question does not require further analysis.

Beyond these important questions about when sexual harassment becomes employment discrimination, two other questions have been answered. In response to how one determines whether actionable sexual harassment exists in a given case, the court outlined a procedure that calls for close examination of the facts surrounding the incident, the notice to the employer, and the nature of the employer's reaction. One can safely argue that this suggested procedure simply states the obvious, without providing much insight. If one seeks greater insight than the court's opinion supplies, then one must closely examine the EEOC guidelines which the court incorporated by reference.

Both the court and legislature also addressed the important question of whether the employer has a duty to maintain a "discrimination free" work atmosphere.[58] The question arose in *Continental* because of the conclusion of the hearing examiner that the pre-amendment statute imposed "a duty on an employer to maintain a working environment free from discriminatory insults, intimidation and harassment."[59] In response, however, the court indicated that the hearing examiner placed too onerous a burden on the employer: "In our view, the Act does *not* impose a duty on the employer to maintain a pristine working environment."[60] According to the court, the employer only need take timely, remedial action upon notice that one worker is sexually harassing another worker. Taking an approach nearer to that of the hearing exam-

56. *Id.* (quoted in *Continental*, 297 N.W.2d at 248). As codified, the word "substantially" was replaced by the word "unreasonably." *See* 29 C.F.R. § 1604.11(a) (1982).

57. 297 N.W.2d at 249.

58. *See id. But see infra* note 62 (discussion of possible confusion this language can cause).

59. 297 N.W.2d at 249.

60. *Id.* (emphasis added).

iner, the legislature prohibited unwelcomed sexual conduct that creates an intimidating, hostile or offensive employment environment.[61] In short, the amended Minnesota Act clearly places a duty on the employer to control the often subtly intimidating or sometimes blatantly hostile work atmosphere that frequently attends sexual harassment. An employer *cannot* simply adopt a reactive posture; the employer must affirmatively act to avoid or eliminate the "climate of sexual harassment."

Turning to the issue of whether Continental committed an unfair discriminatory employment practice under the Minnesota Act, the court affirmatively answered the question of whether the employer has a duty to investigate when notified by an employee that she is being sexually harassed by co-workers,[62] and that this duty is triggered even though the notifying employee fails to name the harassers. Silence, inaction, and passivity in the face of notification amounts to the employer's complicity and hence liability. The legislature did not depart from this position. Equally important, in answering the question about the character or nature of the employer's response, both the court and the legislature noted that the employer's action must be *prompt*—not just a response *after* events escalate to a crisis as they did in *Continental*—and *adequate*—as the court indicated in referring to the adequacy of the employer's response in *Howard v. National Cash Register Co.*,[63] where the employer, in response to notification of racial harassment, transferred the complainant to another shift, held frequent meetings to discuss the problem, disseminated an anti-harassment policy to all employees, and undertook disciplinary action against the harassers.[64]

Finally, the court indicated how it viewed the discriminatee's conduct throughout the harassment, particularly whether quitting

61. MINN. STAT. § 363.01, subd. 10a(3) (1982)).

62. In Note, *Sexual Harassment in the Workplace: Title VII's Imperfect Relief*, 6 J. CORP. L. 625, 644 (1981), the author indicates that *Continental* lends itself, with help from Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), to a determination that the employer is liable for sexual harassment committed by fellow employees under Title VII, although no federal court case has so expressly held.

Beyond the above, *Continental* clearly indicates that under the Minnesota Act, the employer can be liable for co-worker sexual harassment regardless of the presence of the *Bundy* analytical foundation. The Minnesota Supreme Court relies on the precedential base of the Title VII racial harassment cases, as does the above-cited Note. *See* Note, *supra*, at 644.

63. 388 F. Supp. 603 (S.D. Ohio 1975).

64. *See id.* at 605.

might be a "discharge" under certain circumstances. The court first demanded that the discriminatee notify the employer of the co-worker's harassment to activate the employer's duty to investigate. The court did not, however, demand that an employee await protection from an obviously dilatory employer. The court announced that it would use the concept of "constructive discharge"[65] to equate quitting, under certain circumstances, with termination. To be expected, the legislature did not address what is a judicial creation.

VII. Unanswered Questions About Employment Sexual Harassment Claims

While we should analyze the *Continental* decision and the 1982 amendments for the questions they have answered to learn about sexual harassment claims in Minnesota, we should likewise consider questions left unanswered. An important unanswered question is how the court and legislature will view a claim of sexual harassment allegedly creating a "harmful work environment" where the claimant *does not* assert tangible "employment consequences," such as a termination, non-promotion, or undesirable transfer. *Continental* did not present such a set of facts in its final form, even though Hawkins did raise this question initially when she filed her charge on October 20, 1975, after her refusal to return to work in late October but before her termination on December 5, 1975.[66] The court probably concluded that it did not need to address such a question given the final shape of the facts, although the court partially addressed the issue when it decided that the "Act does not impose a duty on the employer to maintain a pristine working environment."[67]

Yet, Hawkins' initial question is important. Many women want to know whether certain sexual behavior is sexual harassment and hence sex discrimination with respect to the terms and conditions of employment, irrespective of whether the woman loses tangible job benefits. Indeed, if the notion that sexual harassment can create a "harmful employment atmosphere" is to have any meaning, the discriminatee should be able to end the sex discrimination *before* it results in tangible employment losses. Should not the notion lead a court to grant preliminary relief to a claimant before

65. 297 N.W.2d at 251.
66. *See id.* at 245.
67. *Id.* at 249.

the loss of tangible job benefits? The recent opinion from the Circuit Court of Appeals for the District of Columbia in *Bundy v. Jackson*,[68] a Title VII case, indicated that logic *does* lead us to find sex discrimination and a basis for injunctive relief when the victim of harassment has *not* lost tangible job benefits. As the *Bundy* court noted,

> [A]n employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance, thereby creating the impression—the one received by the District Court in this case—that the employer did not take the ritual of harassment and resistance "seriously."[69]

The *Bundy* court continued its analysis with this observation about ignoring the logic of its opinion:

> The employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma." She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.[70]

While one has to look to the logic of the *Continental* opinion to conclude that the Minnesota Supreme Court has implied a right to injunctive relief (in effect the *Bundy* approach) in cases of sexual harassment not resulting in loss of tangible employment benefits, one can look to the language of the 1982 amendment to conclude that sexual discrimination occurs even when a discriminatee has not lost tangible job benefits.[71] The statutory reference to sexual

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68. 641 F.2d 934 (D.C. Cir. 1981). For a discussion of this case, see Note, *supra* note 57, at 635.

69. 641 F.2d at 945. The *Bundy* court relied heavily on the previous analysis of the federal court in Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). *See* 641 F.2d at 944-45.

70. *Id.* at 946 (footnote omitted).

71. *See* Note, *supra* note 62, at 644. *But see* 297 N.W.2d at 249 (employer has no duty to maintain "pristine" working environment). The author of this student note argues that the *Continental* opinion "allowed the court to hold the employer liable for the coworkers' actions even though the plaintiff suffered no tangible economic employment consequences as a direct result of the harassment." *Id.* The author argues that the "employer's failure to take prompt steps to curtail the harassment constructively discharged the plaintiff." *Id.* at 644 n.169. The Note stretches the *Continental* facts to fit its analysis.

The sexual harassment by the co-workers directly led to the constructive discharge. When the co-workers created the environment of sexual harassment, they caused Hawkins

behavior that has the "effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile or offensive employment . . . environment"[72] easily leads to the *Bundy*-type analysis. If the Minnesota Act prohibits sexual harassment that prevents an employee from performing her job and that creates a climate of discrimination, one can argue that an employee need *not* suffer some further tangible employment consequence such as a termination or demotion. In sum, the statute imposes a duty on the employer to protect the employee's *intangible* employment rights through, namely, the creation of a right to have the sexual harassment obstacles removed from the path to an acceptable job performance and the right to a non-offensive work environment.

Another important but unanswered question is what theory of liability is appropriate when an employer's agents or supervisors rather than employees are the source of conduct alleged to constitute sexual harassment. The *Continental* court expressly reserved

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to demand that Continental protect her. However, Hawkins had already removed herself from the job by the time of this demand. *See* 297 N.W.2d at 244. Further, what if the sexual harassment interfered with the ability of Hawkins to make her production quota, because of which she would lose compensation? Moreover, owing to the nature of the sexual harassment at the time of Hawkins' last day on the job, one could argue that the harassment discouraged Hawkins' return to work *even if* Continental had given assurances of protection. Hence, Continental's failure to act did not serve as the only causal agent that led to Hawkins' loss of tangible economic employment consequences; this failure to act served as a second causal agent in the sense of another agent helping cause a second set of losses, and it worked in tandem with the harassment to cause the constructive discharge. Consequently, the Note is correct only if one ignores the realities of *Continental*.

Putting aside the question of the constructive discharge because of a failure to promptly act, and assuming that the employee seeks injunctive relief before the occurrence of some tangible economic employment consequences, does the language in *Continental* pose an analytical hurdle for the employee making a sexual discrimination claim in the *Bundy* manner? Only on the surface does this *Continental* language pose a problem. If one reads the court's language carefully one concludes that the court allows for the *Bundy* scenario and the resultant claim of sexual harassment even if immediate economic losses do not occur. The court states that the employer has a duty to act promptly and adequately whenever it knows or should know about sexual harassment in the workplace. What the court states is that it refuses to impose an "abstract duty" to maintain a nondiscriminatory work environment separate from a duty to respond to announced discrimination or discrimination about which the employer ought to know. In essence, an employee cannot get relief *simply* because the employer failed to keep the environment free of discrimination; rather, the employee must canalize its action down the notification channel, or she must argue that the notification was precluded because the nature of the facts indicate that the employer ought to have known about the harassment. Accordingly, the *Continental* opinion leaves ample room for the *Bundy* analysis; it creates a duty to respond triggered by the discriminatee, without the discriminatee's having to prove resistance to the harassment or that the resistance caused tangible economic losses.

72. MINN. STAT. § 363.01, subd. 10a(3) (1982).

this question;[73] the legislature took no position beyond imposing liability for actual and constructive knowledge of the misconduct.[74] Nonetheless, the answer is far from a mystery. In light of the great deference the court and legislature have given the EEOC guidelines, one can expect the court to follow the lead of the EEOC which provides that an employer is responsible for the sexually harassing behavior of its agents and supervisory employees regardless of the employer's authorization, prohibition or knowledge of the acts complained of.[75] Indeed, one does not find other logic compelling. Imposing a notice requirement on the claimant ignores the tradition of imputing knowledge to and hence responsibility on the employer when its agents or supervisors—those functionaries that employers deem synonymous with management—engage in sexual harassment. Requiring notice also ignores the logical and practical difficulties of compelling the employee to search throughout the organization (what if a "web of conspiracy" exists?) for other agents or supervisors who will both entertain a complaint and undertake an investigation.

A related question left unanswered is whether the employer should be liable for sexual harassment by customers or other unaffiliated persons on the same basis that the employer assumes liability for such conduct if its agents, supervisors, or employees harass a worker. The final EEOC guidelines do address the subject by holding employers responsible for actions of "non-employees" who sexually harass employees "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."[76] These guidelines demonstrate that the *Continental* court's

73. *See* 297 N.W.2d at 249 n.5.

74. MINN. STAT. § 363.01(10a) (1982).

75. The EEOC guidelines state the point as follows:

> (c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "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. The Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

29 C.F.R. § 1604.11(c) (1982).

76. *Id.* § 1604.11(e). The extent of the employer's control over and legal responsibility for the conduct of the non-employee are also considered in assessing the employer's liability. *Id.*

logic and the amendment's language should easily lead to the imposition of liability for actions of third parties. Hence, one can safely conclude that both *Continental* and the 1982 amendment spread the blanket of Title VII protection even to this point.

Still a further unanswered question is whether an employer's nondiscriminatory policy—in particular, an anti-harassment policy—insulates the employer from charges of sexual harassment even when an agent or supervisor has engaged in the harassing behavior. By the tone and direction of the *Continental* opinion, one can conclude that the court adopts the position of *Miller v. Bank of America*,[77] where the Ninth Circuit Court of Appeals held that the employer violated Title VII by permitting sexual harassment on the part of one supervisor that breached established company policy.[78] If the employee gives notice of harassment by co-workers, or if the harassment originates with agents or supervisors, and the employer fails to undertake a prompt and adequate response, the logic of *Continental* imposes liability on the employer, regardless of the employer's promulgated nondiscrimination policy. *Continental* calls for remedial action, not inaction insulated by a disseminated nondiscrimination policy.

A final unanswered question[79] is whether sexual harassment of a male, or sexual harassment by a bisexual of both a male and female, comes within the court's reasoning and the 1982 amendment. The *Continental* court's discussion about disparate treatment of female employees provides reasoning for the instance of sexual harassment of a male by a female, *provided* the female does not sexually harass a female at the same time; the "disparate treatment" analysis works equally well for either sex. This logic *does not* smoothly work, however, when one introduces the bisexual problem, as several earlier Title VII sexual harassment cases indi-

77. 600 F.2d 211 (9th Cir. 1979).

78. *Id.* at 213.

79. After initially reading *Continental*, some employers may be concerned about the vagueness of the court's opinion. For example, some employers may be uncertain over the standard they should use to determine whether conduct is offensive and to whom. What is an employer's responsibility in the instance of hypersensitive victims? If the employer is aware that co-workers have a personal relationship and allows such, is the employer chargeable with notice if the relationship changes and one party's conduct can become sexual harassment? The author holds that employers can answer these and other like questions by closely examining the EEOC guidelines and the Title VII cases that the *Continental* opinion cites.

cated.[80] Nonetheless, to bring this situation within the command of the law one can rely on the broad sweep of the 1982 amendment language of "unwelcome sexual advances,"[81] coupled with the approach of the *Bundy* court that "sex discrimination within the meaning of Title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is *sex* discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."[82] While the *Continental* court's logic arguably leaves room for the *Bundy* reasoning in the instance of the bisexual problem, the court's heavy reliance on the "disparate treatment" analysis does not clearly lead to the *Bundy* position. Hence, the 1982 amendment with *Bundy* is a stronger foundation for extending statutory coverage to the bisexual discrimination problem.

VIII. Final Reflections on Sexual Harassment and the Concept of Equal Employment Opportunity for Women

Several questions about sexual harassment and its deeper significance for the concept of equality for women remain. Did the Minnesota legislature actually take the proper course by amending the Minnesota Act to prohibit sexual harassment in the workplace? Did the legislature fairly serve the interests of female workers and the myriad employers with the logical compromises manifest in the enactment? Realizing that uncertainty in state employment practices discourages capital formation and deployment vital to the economic life of the state, did the legislature and court go beyond the necessary diminution of incentives and prerogatives normally implicit within all EEO statutes to establish a sexual harassment cause of action in the Minnesota Act? Finally, should the Minnesota legislature amend the Minnesota Act to provide any clearer protection for the interests of employers?

In *Continental*, the Minnesota Supreme Court followed a course started several hundred years ago. While the analyses discussed above have appeared only recently, the foundations for the embracing concept of EEO for women go far back in our history. In point of fact, addressing questions about the permissibility of sex-

80. *See* Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654, 659 n.6 (D.D.C. 1976).

81. Minn. Stat. 363.01 (10a) (1982).

82. Bundy v. Jackson, 641 F.2d at 92.

ual behavior within the employment setting represents one in a long line of concerns about equality in the workplace for women and one of the last major frontiers in women's struggle for equality in the workplace. Now that the coverage of the concept of EEO for women has been broadened, an employer's indulgence in or countenance of sexual harassment in the workplace unquestionably falls within the sphere of socially destructive behavior that the Minnesota concept of EEO for women prohibits, leaving no doubt that his behavior cannot conceivably be furthering important employment interests, or that such behavior is a "frolic" for which the employer should be exonerated and for which employees should be forgiven with the sheepish retort that "boys will be boys." Yes, *Continental* and the amended Minnesota Act reaffirm the social policy of providing equality in the workplace for women and retaining integrity for the statutory concept of EEO; and the case and subsequent legislation signal that the Minnesota Supreme Court and the Minnesota legislature do not perceive an overriding social policy that militates in favor of protecting the economic interests of employers by denying the legal existence of a sexual harassment claim. Like an idea whose trajectory we only now perceive though its launching predated these lives in being, these recent developments have had this monumental impact.[83]

The court and legislature also acknowledged that marking the perimeters of equality in the workplace can, at times, pose troublesome intellectual problems for the concept of EEO for women and, hence, for society. We must understand that both the *Continental* court and the 1982 amendment have provided only limited insight, relying heavily on the EEOC guidelines and the developed Title VII notions of racial harassment for analyzing the praxis of sexual harassment under the Minnesota Act, even then compelling us to go beyond this body of ideas to develop a further analytic to examine the praxis of sexual harassment within the employment context. For the present, however, we must accept the valiant efforts of the Minnesota Supreme Court and Minnesota legislature, replete with the unanswered questions. After all, Minnesota has proved Bertha Pappenheim partially incorrect by pushing the idea

83. *See, e.g.*, Peterson, *Sex harassment case attracts attention, suits*, Minneapolis Star, June 11, 1981, at 1A (referring to impact *Continental* has had on consciousness of women workers and employers and impact it has had on resolution of subsequent sexual harassment employment claims); *see also* Roedler, *Sexual harassment—Complaints soar as women find law an ally*, St. Paul Dispatch, Dec. 16, 1981, at 14A.

of justice and equality through another frontier to enforce the moral injunction of the Declaration of Independence.