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SEXUAL HARASSMENT AS UNLAWFUL DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

By
*James S. Bryan**

I. INTRODUCTION

Long a subject confined largely to office gossip and similarly dignified forums, the problem of sexual harassment¹ of female employees by male supervisors² has begun to command the attention of legal

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1. The phrase "sexual harassment" is inevitably imprecise. Conduct so described ranges from "leering and ogling to pinching and bodily exposure." L.A. Times, May 27, 1980, § 1, at 2, col. 5. "The behavior can range from sexual comments, suggestions and gestures to physical contact sometimes resulting in attempted or even actual rape." Polansky, *Sexual Harassment at the Workplace*, 8 HUMAN RIGHTS 14, 15-16 (1980) [hereinafter cited as Polansky].

A precise or comprehensive definition will not be attempted here, but some readily apparent prerequisites for calling conduct sexual harassment would include the following. The conduct must be unconsented to and unsolicited. *See, e.g.*, Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389 (D. Colo. 1978). If the conduct is not an obviously offensive act like a physical assault of some sort or is not self-evidently demeaning to one sex, the person engaging in the offensive conduct must persist in such conduct after the other person has in one way or another indicated that it should stop. *Id. Cf.* AMERICAN HERITAGE DICTIONARY 600 (1971) ("Harass implies systematic persecution by besetting with annoyances, threats, or demands.").

It should also be noted that sexual harassment, as the phrase has been used in cases, agency regulations, and articles and as it will be used herein, does not encompass all forms of harassment that may be directed to a woman because of her sex. It refers rather to harassment carried out by conduct that is in some sense "sexual" and that would not ordinarily be directed to someone of the opposite sex. But a woman could also be harassed because of her sex in ways that were "nonsexual" and that could also be used against a man. *See Comments on Proposed EEOC Guidelines on Sexual Harassment*, Daily Lab. Rep., June 17, 1980, at E-6 (comments by Working Womens' Institute) ("Co-worker harassment [of women] is best understood by considering it as a spectrum of conduct ranging from work harassment at one end to sexual harassment at the other.") [hereinafter cited as *Comments on Proposed EEOC Guidelines*]. The distinction is significant because in sexual harassment cases it is the sexual nature of the harassing conduct that frequently gives rise to the inference that the harassment is gender-based. *See* text accompanying notes 104-06 *infra*. When the harassing conduct is "nonsexual," the gender-based nature of the harassment must be determined from facts other than the harassing conduct itself. Not all conduct of a "sexual nature," however, would necessarily be gender-based. *See* text accompanying notes 142-45 *infra*.

2. All of the cases and articles discuss the problem as the sexual harassment of women

writers³ and, inevitably, the courts. Perhaps reflecting ancient biases or perhaps for better reasons, some trial courts⁴ initially rejected claims that such conduct violated Title VII of the Civil Rights Act of 1964 (Title VII)⁵, the federal statute enacted to eliminate discrimination in the workplace. More recently, several courts of appeals⁶ and two federal agencies, the Equal Employment Opportunity Commission (EEOC)⁷ and the Office of Federal Contract Compliance Programs (OFCCP),⁸ have ruled that sexual harassment may sometimes be a form of sex discrimination proscribed by Title VII or by Executive Order No. 11,246.⁹ The District of Columbia¹⁰ and several states¹¹ have reached a similar conclusion.

by men. *See, e.g.*, Polansky, *supra* note 1. This article will follow that convention. As a matter of logic, however, women supervisors could sexually harass male subordinates, and the analysis herein would apply.

3. *E.g.*, Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 BOSTON COLLEGE L. REV. 345, 371-76 (1980). Seymour, *Sexual Harassment: Finding a Cause of Action under Title VII*, 30 LAB. L. J. 139 (1979); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007 (1978) [hereinafter cited as Note, *Sexual Harassment*]; Comment, *Employment Discrimination—Sexual Harassment and Title VII—Female Employee's Claim Alleging Verbal and Physical Advances by a Male Supervisor Dismissed as Nonactionable—Corne v. Bausch and Lomb, Inc.*, 51 N.Y.U.L. REV. 148 (1976) [hereinafter cited as Comment, *Sexual Harassment and Title VII*]; Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977) [hereinafter cited as Comment, *Legal Protection Against Sexual Harassment*].

4. *See* notes 16-18, 24-29, 35-38 & 44-51 *infra* and accompanying text.

5. 42 U.S.C. §§ 2000e to 2000e-17 (1976). Section 703(a) of Title VII states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

42 U.S.C. § 2000e-2(a) (1976).

6. *Bundy v. Jackson*, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Bus. Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (*per curiam*).

7. 45 Fed. Reg. 25,024 (1980) (to be codified in 29 C.F.R. § 1604.11). The EEOC is the agency charged with administering Title VII. Title VII § 705, 42 U.S.C. § 2000e-4 (1976).

8. 44 Fed. Reg. 77,017 (1979) (proposed 41 C.F.R. § 60-20.8). The OFCCP is the agency charged with administering the federal government's contract compliance program under Exec. Order No. 11,246. 41 C.F.R. § 60-1.2 (1979).

9. 3 C.F.R. 339 (1964-65 Compilation), *as amended by* 43 Fed. Reg. 46,501 (1978). Exec. Order No. 11,246 imposes certain nondiscrimination and affirmative action obligations on federal contractors. For a description of the Order and how it is administered, see Note, *Recovery of Back Pay Under Executive Order 11,246*, 52 S. CAL. L. REV. 767, 770-76 (1979).

These developments can be viewed in part as a response to what several studies suggest may be a pervasive and long-standing problem.¹² Whatever the exact cause of these developments, however, the large increase in the number of women entering the work force at all levels¹³ and their increasing unwillingness to tolerate conditions long thought immutable both presage a steady increase in sexual harassment claims, unless employers¹⁴ take action to deal with the problem.¹⁵

In this article, court decisions dealing with sexual harassment and the regulations promulgated by the EEOC and the OFCCP are first reviewed. The article then analyzes how sexual harassment claims fit the model of discrimination developed in more conventional discrimination cases, evaluates the EEOC and OFCCP regulations in light of that analysis, and proposes certain changes in the EEOC regulations. Finally, the article briefly discusses how employers should attempt to reduce the incidence of such claims and place themselves in the best position to defend against the claims.

10. 34 D.C. Rules & Regs. § 7.A(8); D.C. Mayor's Order No. 79-89 (May 24, 1978), 8A FAIR EEMPL. PRAC. MANUAL 453:1771.

11. *Continental Can Co. v. Minnesota*, 23 Empl. Prac. Dec. ¶ 30,997 (Minn. 1980); *Hamilton v. DILHR*, 22 Fair Empl. Prac. Cas. 241 (D. Wis. 1980); CONN. GEN. STAT. § 31-126(a); 17 WIS. STAT. ANN. § 111.32(5)(g)(4) (West Supp. 1980); 2 CAL. ADMIN. CODE § 7291.1(f)(1); Ill. Exec. Order No. 80-1 (Jan. 24, 1980), 8A FAIR EEMPL. PRAC. MANUAL 453:2671.

12. See Polansky, *supra* note 1, at 16-17 & nn. 1-12 and sources cited therein.

13. See 1 A. LARSON, EMPLOYMENT DISCRIMINATION: SEX § 2.10, 8-9 (1979); Ehrbar, *The Upbeat Outlook For Family Incomes*, FORTUNE, Feb. 25, 1980, at 122, 127 ("[W]omen . . . have flooded into the job market over the last twenty years. The flood was truly prodigious: women have accounted for well over half the new entrants to the labor force since 1960, and an unprecedented 51 percent of all women of working age are now either employed or looking for jobs. The more remarkable phenomenon . . . is the increase in working wives. In 1977, 55 percent of all wives were in the paid labor force; thirty years ago, the figure was 23 percent.").

14. Like most of the cases to date, the discussion herein will focus on employer liability for alleged sexual harassment. But the problem may be widespread within unions. *Cf. Seritis v. Lane*, 22 Empl. Prac. Dec. ¶ 30,747, at 1484-87 (Cal. Super. Ct. 1980) (a union with knowledge that its officer is abusing his position of authority by making sexual advances to its members is liable for his actions). It may also be widespread within government. See *Sexual Harassment Pervasive in Federal Government*, says MSPB, GOV'T EEMPL. REL. REP. (BNA), Sept. 29, 1980, at 881:8 (42% of women and 15.3% of men surveyed in study of federal employment claimed they had been subjected to some form of sexual harassment). For a discussion of the attitudes of business managers and executives towards the problem of sexual harassment, see Safran, *Sexual Harassment: The View from the Top*, REDBOOK, Mar. 1981, at 46 (reporting results of a joint REDBOOK-HARV. BUS. REV. survey of 2,000 executives).

15. See *House Subcommittee Sex Harassment Report Calls for Federal Action*, GOV'T EEMPL. REL. REP. (BNA), June 23, 1980, at 867:7.

II. JUDICIAL DISCUSSION OF SEXUAL HARASSMENT

The first reported case to address the issue whether a charge of sexual harassment stated a claim for relief under Title VII was *Barnes v. Train*,¹⁶ decided in 1974. The plaintiff, a black woman, alleged she was reassigned and her job abolished because she refused to have sexual relations with her male supervisor.¹⁷ The district court granted the defendant's motion for summary judgment, ruling that plaintiff failed to state a claim cognizable under Title VII. The court stated:

The substance of plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. This is a controversy underpinned by the subtleties of an inharmoonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex.¹⁸

The Court of Appeals for the District of Columbia Circuit reversed.¹⁹ It stated that the "discrimination as portrayed was plainly based on [plaintiff's] gender."²⁰ Plaintiff had alleged facts showing that "retention of her job was conditioned upon submission to sexual relations—an exaction which the supervisor would not have sought from any male."²¹ These allegations, the court ruled, sufficed to state a violation of Title VII. The court noted, however, that the sexual advance itself did not give rise to a Title VII violation. The sexual advance had to be tied into a term or condition of employment.

The vitiating sex factor . . . stemmed not from the fact that what [plaintiff's] superior demanded was sexual activity—which of itself is immaterial—but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee.²²

The circuit court also addressed, in a conclusory fashion, the issue

16. 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

17. 13 Fair Empl. Prac. Cas. at 124.

18. *Id.*

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

20. *Id.* at 989.

21. *Id.*

22. *Id.* at 989 n.49.

of the employer's liability under Title VII for the actions of its supervisors:

Generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel. We realize that should a supervisor contravene employer policy without the employer's knowledge and the consequences are rectified when discovered, the employer may be relieved from responsibility under Title VII.²³

The plaintiffs in the next reported case addressing the issue were equally unsuccessful before the district court. In *Corne v. Bausch and Lomb, Inc.*,²⁴ the plaintiffs alleged that they and other women were repeatedly subjected to verbal and physical sexual advances by their supervisor, that cooperation resulted in favored treatment, and that they were forced to resign to escape these conditions.²⁵ Defendant moved to dismiss, asserting a failure to state a claim, among other grounds. The court granted the motion.

The basis of the court's holding is not wholly clear. It relied in part on the notion that the supervisor's actions did not reflect any company policy or produce any benefit for the company, but instead were "nothing more than a personal proclivity, peculiarity or mannerism."²⁶ There was thus no discrimination by the employer and, hence, Title VII did not apply.²⁷ The court also noted that "there is nothing in [Title VII] which could reasonably be construed to have it apply to 'verbal and physical sexual advances' by another employee, even though he be in a supervisory capacity where such conduct had no relationship to the nature of the employment."²⁸ Finally, the court expressed its concern that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another" if sexual harassment were held actionable under Title VII.²⁹ On appeal, the decision was vacated and remanded without opinion.³⁰

The plaintiff in *Williams v. Saxbe*³¹ was more successful. She al-

23. *Id.* at 993 (footnote omitted).

24. 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded without opinion*, 562 F.2d 55 (9th Cir. 1977).

25. 390 F. Supp. at 162.

26. *Id.* at 163.

27. *Id.*

28. *Id.*

29. *Id.*

30. 562 F.2d 55 (9th Cir. 1977).

31. 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

leged she had been terminated from her job in the Justice Department for refusing the sexual advances of her supervisor. The court found that she stated a valid claim. "It was and is sufficient to allege a violation of Title VII to claim that the rule creating an artificial barrier to employment has been applied to one gender and not to the other."³² The court rejected the argument that it should find as a matter of law that the supervisor's conduct was a simple personal encounter. Whether the supervisor's conduct was a personal act, with no employment consequences, or imposed a condition of submission to sexual advances was a question of fact.³³ On appeal, the court's decision in favor of the plaintiff was reversed on procedural grounds, but judgment in favor of plaintiff was subsequently reinstated after rehearing in the district court.³⁴

In *Miller v. Bank of America*,³⁵ the plaintiff, a black female, alleged she was discharged after refusing the sexual advances of her supervisor. The district court granted defendant's motion for summary judgment, finding that the undisputed facts demonstrated that Title VII had not been violated.³⁶ The court relied primarily on the existence of an employer policy prohibiting sexual advances by supervisors and plaintiff's failure to invoke an internal grievance procedure in an effort to obtain redress.³⁷ In addition, the court echoed the concern expressed in earlier decisions that to allow Title VII actions in such cases would bury the judiciary in a mass of cases in which it would be impossible to disentangle innocuous affairs from genuine harassment:

[I]t would not be difficult to foresee a federal challenge based on alleged sex motivated considerations of the . . . superior in every case of a lost promotion, transfer, demotion or dismissal. And who is to say what degree of sexual cooperation would found a Title VII claim? It is conceivable . . . that flirtations of the smallest order would give rise to liability. The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction

32. 413 F. Supp. at 659.

33. *Id.* at 660-61.

34. *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). The district court's decision was reversed on the ground that the court should have conducted a de novo hearing instead of relying on the record made at a prior administrative hearing. *Id.* at 1248. On remand, the district court ruled again for the plaintiff, finding "that submission to the sexual advances of the plaintiff's supervisor was a term and condition of employment in violation of Title VII." *William v. Civiletti*, 23 Empl. Prac. Dec. ¶ 30,916, at 15,725 (D.D.C. 1980).

35. 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

36. *Id.* at 235-36.

37. *Id.*

plays at least a subtle part in most personnel decisions. Such being the case, it would seem wise for the Courts to refrain from delving into these matters short of specific factual allegations describing an employer policy which in its application imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group.³⁸

On appeal, defendant's counsel narrowed the issue by conceding "that if the Bank, rather than just Miller's supervisor, can be held responsible, the discharge can properly be called one because of Miller's race, color or sex . . . , and so a violation of both Title VII and [42 U.S.C.] § 1981."³⁹ Thus, the issue was not whether the complaint stated facts sufficient to constitute a cause of action, an issue not decided by the appellate court,⁴⁰ but whether "respondeat superior should not apply because the Bank had an established policy against what Miller said that her supervisor did, that the Bank had provided her with a means of redress through its internal procedures, and that she did not use it"⁴¹

The Ninth Circuit rejected defendant's arguments in their entirety:

Title VII and § 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which even hints at a congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits the tort. Such a rule would create an enormous loophole in the statutes. Most employers today are corporate bodies or quasi-corporate ones such as partnerships. None of any size, including sole proprietorships, can function without employees. The usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to us to be just as appropriate here as in other cases, at least where, as here, the actor is the supervisor of the wronged employee.⁴²

The court also declined to read into Title VII any requirement that a plaintiff exhaust an employer's internal remedies before filing a

38. *Id.* at 236.

39. 600 F.2d 211, 212 (9th Cir. 1979). The plaintiff alleged that her supervisor's conduct discriminated against her because of both her sex and race. *Id.*

40. *Id.*

41. *Id.* at 213.

42. *Id.*

charge.⁴³

The next case followed the same pattern of dismissal in the trial court and success for the plaintiff in the appellate court. In *Tomkins v. Public Service Electric & Gas Co.*⁴⁴ the plaintiff alleged that her supervisor made sexual advances towards her and "detained [her] against her will through economic threats and physical force."⁴⁵ She complained to the company and sought and received a transfer. Thereafter, she was allegedly subjected to disciplinary threats and eventually terminated in retaliation for complaining about her supervisor's sexual advances.⁴⁶

On defendant's motion to dismiss, the district court agreed that the claim of harassment should be dismissed, but ruled that plaintiff was entitled to a trial on her claim of retaliation.⁴⁷ The court reasoned in part that Title VII was "not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley."⁴⁸ There was also no sex discrimination because "[t]he gender lines might as easily have been reversed, or even not crossed at all."⁴⁹ And, like the earlier decisions, the court expressed the concern that the courts would be flooded if this type of suit were allowed.⁵⁰ The retaliation claim stood, however, because "[w]hen a female employee registers a complaint of sexual abuse and the company chooses to fire her rather than investigate, the corporate response may constitute discrimination based on sex."⁵¹

The Third Circuit reversed the dismissal of the sexual harassment claim.⁵² It found that the demand for sexual favors amounted to a condition of employment imposed upon plaintiff because of her sex. It first

43. *Id.* at 214.

44. 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

45. 422 F. Supp. at 555.

46. *Id.*

47. *Id.* at 556-57.

48. *Id.* at 556.

49. *Id.*

50. In somewhat colorful language, the court stated:

If the plaintiff's view were to prevail, no supervisor could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit . . . if a promotion or a raise is later denied . . . , we would need 4,000 federal trial judges instead of some 400.

Id. at 557.

51. *Id.*

52. *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1049 (3d Cir. 1977).

reviewed prior decisions and attempted to harmonize their conflicting results: "The courts have distinguished between complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category."⁵³ It then noted that for Title VII to be violated the employer must have imposed a term or condition of employment and imposed it in a discriminatory fashion. The court concluded:

Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to these advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.⁵⁴

Because plaintiff had sufficiently alleged all these elements, her complaint was ordered to be reinstated.

The Third Circuit did not expressly address the issue of the employer's liability for the acts of its supervisors. Instead, that issue was effectively subsumed within the definition of the elements of the Title VII violation itself. The supervisor's sexual advances did not amount to a violation until the employer acquired knowledge of them and failed to remedy the problem.⁵⁵

In *Fisher v. Flynn*,⁵⁶ the First Circuit upheld the district court's dismissal of a complaint for failure to state a claim. The appellate court did not decide whether sexual harassment violated Title VII.⁵⁷ Instead, it held only that plaintiff failed to allege facts showing a "sufficient nexus between her refusal to accede to the romantic overtures and her termination."⁵⁸ A sexual advance was not a per se violation of Title VII.

Besides the court of appeals decisions discussed, the Fourth Circuit has also addressed the issue of whether a claim of sexual harassment states a claim for relief under Title VII. In *Garber v. Saxon*

53. *Id.* at 1048.

54. *Id.* at 1048-49.

55. *See id.*

56. 598 F.2d 663 (1st Cir. 1979).

57. *Id.* at 665.

58. *Id.*

Business Products, Inc.,⁵⁹ the appellate court, in a four-sentence per curiam opinion, reversed the district court's dismissal of a complaint alleging that a female employee had been terminated for refusing to comply with the sexual advances of her male supervisor.⁶⁰ The court stated that "the complaint and its exhibits, liberally construed, allege an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of Title VII."⁶¹

Other lower court decisions, not appealed, have been equally varied in results and reasoning. One court has held that the employer will be liable only if it fails to investigate a complaint of sexual harassment and thereby effectively sanctions it.⁶² Another court has held that the plaintiff's failure to bring to the company's attention her supervisor's sexual advances precluded her Title VII claim, where the company had always reacted properly to such claims.⁶³ Recently, one court has held that an employer will not be deemed to have knowledge of a supervisor's sexual advances and hence will not be held liable "where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice."⁶⁴

These cases do not yield a wholly consistent set of principles for evaluating whether and when sexual advances will be considered as violative of Title VII. The appellate cases, however, do indicate that sexual advances can constitute sex discrimination in violation of Title VII under certain circumstances. Thus, it is increasingly unlikely that future complaints will be dismissed out of hand for failure to state a claim. And, whatever their other differences, virtually all courts agree that the sexual advances must be tied into some term or condition of employment; a sexual advance by a supervisor does not alone violate Title VII.⁶⁵

59. 552 F.2d 1032 (4th Cir. 1977) (per curiam).

60. *Id.*

61. *Id.*

62. *Munford v. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977) ("The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior.").

63. *Neeley v. American Fidelity Assurance Co.*, 17 Fair Emp. Prac. Cas. 482, 485 (W.D. Okla. 1978) (vice president made sexual remarks to plaintiff, told "dirty jokes," and placed hands on her shoulder).

64. *Vinson v. Taylor*, 22 Empl. Prac. Dec. ¶ 30,708, at 14,691 (D.D.C. 1980). For a novel factual situation, see *EEOC v. Sage Realty Corp.*, 24 Fair Empl. Prac. Cas. 1521, 1528-31 (S.D.N.Y. 1981) (termination of plaintiff for refusal to wear provocative uniform that subjected her to sexual harassment from customers violated Title VII).

65. See text accompanying notes 22, 23, 54 & 58 *supra*; accord, *Clark v. World Airways, Inc.*, 24 Fair Empl. Prac. Cas. 305, 307-08 (D.D.C. 1980); *Heelan v. Johns-Manville Corp.*,

The largest point of difference among the cases centers on the extent to which, and under what circumstances, an employer will be held responsible for the acts of its supervisors. The Ninth Circuit in the *Miller* case has adopted the strictest test: the employer will be held liable for the actions of its supervisors, even if those actions are unknown to it and are contrary to its stated policy.⁶⁶ The District of Columbia Circuit, although it has not articulated this position as unambiguously, appears to be in accord.⁶⁷

The Third Circuit, on the other hand, would likely find a Title VII violation only if the employer had knowledge, "actual or constructive," of the supervisor's actions and failed to remedy them.⁶⁸ A number of district courts have reached a similar conclusion.⁶⁹ A question thus arises as to the meaning of constructive knowledge. Does it mean that the employer will be imputed with the knowledge of the supervisor making the advances? If it does, the Third Circuit's formulation of when a sexual advance violates Title VII would mean little, because an employer would always have constructive knowledge of the supervisor's actions and the only issue would be whether it acted to remedy them. At least one district court has held that notice to the supervisor committing the unlawful action cannot be the sole basis for finding that there was notice to the employer as well.⁷⁰ Under this standard, the employee would have to complain or the supervisor's conduct would have to be so public that knowledge on the part of the employer would be presumed.

III. EEOC AND OFCCP GUIDELINES

On December 28, 1979, the OFCCP published for comment amendments to its existing regulations relating to sex discrimination.

451 F. Supp. 1382, 1388-90 (D. Colo. 1978). *But see* *Brown v. City of Guthrie*, 22 Fair Empl. Prac. Cas. 1627, 1631-32 (W.D. Okla. 1980) (construing EEOC Guidelines). In a case that was decided too late to be discussed extensively in this article, the District of Columbia Circuit held that when sexual harassment was "standard operating procedure," Title VII was violated, "regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." *Bundy v. Jackson*, 24 Fair Empl. Prac. Cas. 1155, 1159-60 (D.C. Cir. 1981).

66. *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

67. *See Bundy v. Jackson*, 24 Fair Empl. Prac. Cas. 1155, 1162-63 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 993 (D.C. Cir. 1977).

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

69. Cases cited in notes 62-64 *supra*; *Ludington v. Sambo's Restaurant's, Inc.*, 474 F. Supp. 480, 483 (E.D. Wis. 1979).

70. *Vinson v. Taylor*, 22 Empl. Prac. Dec. ¶ 30,708, at 14,691 (D.D.C. 1980).

The amendments included a provision dealing with "sexual advances and favors." In its entirety, it states:

(a) It shall be a violation of [Executive Order 11,246], for an official or supervisor who is authorized to recommend or take personnel actions affecting employees to (1) use official authority in making sexual advances toward employees over whom the official or supervisor is authorized to make or recommend personnel actions; (2) grant, recommend, or refuse to take any personnel action because of sexual favors; and (3) take or fail to take a personnel action as a reprisal against an employee for rejecting or reporting a sexual advance.

(b) It also shall be a violation of the Order if a contractor knows or should have known of one or more of the violations set forth [above] and fails to take appropriate corrective action.⁷¹

The proposed amendments were open for comment until February 26, 1980, and had not been formally adopted.⁷²

On April 11, 1980, the EEOC adopted "proposed and interim guidelines" dealing with "sexual harassment."⁷³ The regulations took effect upon publication, on April 11, 1980, but were open for comment for sixty days after publication.⁷⁴ A wide range of comments was received.⁷⁵

On September 23, 1980, the EEOC adopted final guidelines on sexual harassment, which modified the interim guidelines in certain respects.⁷⁶ In part, the guidelines state:

Harassment on the basis of sex is a violation . . . of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition

71. 44 Fed. Reg. 77,017 (1979) (proposed 41 C.F.R. § 60-20.8).

72. *Id.* at 77,006. On December 30, 1980, the OFCCP published revised sexual harassment regulations, which were essentially identical to the regulations adopted by the EEOC and which were to take effect on January 29, 1981. 45 Fed. Reg. 86,216, 86,250-51 (1980). However, on January 26, 1981, the Reagan administration delayed the effective date of those and other regulations "to allow the Department of Labor to review the rules fully before it takes effect." 46 Fed. Reg. 9084 (1981). Because the OFCCP's regulations may be revised further, and to highlight the scope of the EEOC's regulations, this article will discuss the OFCCP's regulations as they were initially proposed.

73. 45 Fed. Reg. 25,025 (1980) (to be codified in 29 C.F.R. § 1604.11).

74. *Id.* at 25,024.

75. See *Comments on Proposed EEOC Guidelines*, *supra* note 1, at E-1.

76. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11).

of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.⁷⁷

Despite their differences in wording, the two sets of regulations are consistent, though the EEOC's are broader. Initially, both recognize that sexual advances may constitute sexual discrimination in some but not all circumstances. In every case, however, the OFCCP's regulations require some connection between a term or condition of employment and the sexual advance. The supervisor must take or refrain from taking some "personnel action"—a raise, promotion, or termination—as a result of acceptance or refusal of his sexual advance.⁷⁸ Or, the supervisor must invoke his "official authority" in making the advance.⁷⁹ Presumably, this language encompasses promises or threats by a supervisor to grant a promotion, a raise, or other benefit in exchange for compliance with the advance, or to fire, demote, or transfer in retaliation for a refusal.

By comparison, the EEOC's regulations make unlawful a potentially greater number of sexual advances. The sexual harassment made unlawful by subparts 1 and 2 of section 1604.11(a) is the same sort of conduct that the OFCCP's regulations proscribe. But, subpart 3 of section 1604.11(a) makes unlawful sexual advances that have "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."⁸⁰ Under this provision, a sexual advance not directly linked to compensation, promotion, retention of employment, or any other term or condition of employment could be unlawful. It appears, however, that the EEOC does not contemplate that all sexual advances by a supervisor to a subordinate would automatically violate Title VII. They would do so only if they interfered with the person's work performance or created a working environment in which a person's work would likely be adversely affected. In essence, sexual advances not otherwise linked to a term or condition of employment could become unlawful when they are so frequent or so abusive that they become in themselves a working condition and can no longer be treated as a joke

77. *Id.* at 74,677 (to be codified in 29 C.F.R. § 1604.11(a)).

78. 44 Fed. Reg. 77,017 (1979) (to be codified in 41 C.F.R. § 60-20.8(a)).

79. *Id.*

80. 45 Fed. Reg. 74,674 (1980).

of questionable taste, an isolated incident, or the innocent act of a supervisor.

Though potentially far reaching, the EEOC's position does not mark the development of new doctrine for the Commission. For many years, the EEOC has taken the position that use of racial epithets or the making of ethnic jokes violates Title VII because it creates an offensive or hostile working environment for the group that is the target of the attacks.⁸¹ The EEOC holds that an employer has "an affirmative duty to maintain a working environment free of discriminatory intimidation whether based on sex, race, religion, or national origin."⁸² At least one circuit court has indicated some agreement with the EEOC,⁸³ and the United States District Court for the District of Minnesota has recently followed the EEOC's reasoning in a race discrimination case.⁸⁴

The EEOC's regulations also sweep more broadly than the OFCCP regulations in another respect. Under subsection (d) of section 1604.11, the employer may be held liable for acts of sexual harassment committed by its nonsupervisory agents if it "knows or should have known of the conduct."⁸⁵ However, the employer can escape liability if "it can show that it took immediate and appropriate corrective action."⁸⁶ The EEOC's position does not appear to be based on any notion of respondeat superior, but rather on the notion that an employer has the obligation to maintain a discrimination-free working environment.

The EEOC's regulations even go one step further to provide that

81. *E.g.*, EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. 852 (1972) (employer tolerating atmosphere of intimidation by allowing barrage of racial and ethnic jokes and derogatory restroom wall graffiti); EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. 837 (1972) (employer tolerating ethnic jokes, thereby providing different conditions for black and white employees); EEOC Dec. No. 71-2598, 4 Fair Empl. Prac. Cas. 21 (1971) (employer failed to maintain working atmosphere which was free from racial intimidation or insults); EEOC Dec. No. 71-909, 3 Fair Empl. Prac. Cas. 269 (1970) (employer allowing supervisors' habitual reference to black employees as "niggers").

82. 45 Fed. Reg. 25,024 (1980).

83. *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). There, Judge Goldberg stated:

[I]t is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 [of Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.

Id. Accord, *Bundy v. Jackson*, 24 Fair Empl. Prac. Case 1155, 1160-62 (D.C. Cir. 1981).

84. *EEOC v. Murphy Motor Freight Lines, Inc.*, 22 Empl. Prac. Dec. ¶ 30,888, at 15,608-10 (D. Minn. 1980).

85. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(d)).

86. *Id.*

“[a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”⁸⁷ This potentially broad liability is limited somewhat by the provision that in these cases “the Commission will consider the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.”⁸⁸

The regulations of both agencies hold the employer bound by the acts of its supervisors or managers. The EEOC’s regulations do so explicitly.⁸⁹ The OFCCP’s regulations do so by simply making the acts of sexual harassment by supervisors a violation of Executive Order 11,246⁹⁰ and making the employer’s failure to remedy those acts an independent violation.⁹¹ Both agencies thus adopt the position taken in *Miller v. Bank of America*.⁹²

IV. SEXUAL HARASSMENT AS DISCRIMINATION

Only two years ago a student commentator described “[t]he law of sexual harassment [as] inconsistent, ambiguous, and nascent.”⁹³ By now, the law has emerged, but it remains inconsistent and ambiguous. The confusion seems to result from the apparent difficulties of fitting the problem of sexual harassment into the discrimination model developed in more conventional cases. Both because of the importance of the problem and because employers need to have reasonably clear guidelines, the issue should be analyzed again in view of recent case law and the new agency regulations.

If it is unlawful discrimination at all, sexual harassment is what has been described as “disparate treatment” discrimination rather than “disparate impact” discrimination.⁹⁴ Disparate treatment discrimina-

87. *Id.* (to be codified in 29 C.F.R. § 1604.11(e)).

88. *Id.*

89. *Id.* (to be codified in 29 C.F.R. § 1604.11(c)).

90. 44 Fed. Reg. 77,017 (1979) (proposed 41 C.F.R. § 60-20.8(a)).

91. *Id.* (proposed 41 C.F.R. § 60-20.8(b)).

92. 600 F.2d 211, 213 (9th Cir. 1979).

93. Note, *Sexual Harassment*, *supra* note 3, at 1019.

94. The Supreme Court has described these two sorts of discrimination as follows:

“Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII

Claims of disparate treatment may be distinguished from claims that stress

tion is discrimination in its traditional sense: some persons are deliberately treated differently than others because of their sex, race, or ethnic origin.⁹⁵

In clarifying when sexual harassment constitutes sex discrimination violative of Title VII, it is useful to return to the basic elements of a claim of disparate treatment discrimination. To establish a case of disparate treatment discrimination, proof of five elements is required.⁹⁶ First, persons in the protected group must be treated differently from other persons in some respect; there must be discrimination in the simple dictionary sense. Second, the discrimination must be engaged in by a person or entity defined as a "respondent" by Title VII. Third, the discrimination must be on a proscribed basis—sex, race, color, religion, or national origin. Fourth, the discrimination must be with respect to an "issue" cognizable under Title VII; it must involve a term or condition of employment. Fifth, there must be a causal connection between

"disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (citations omitted). For further discussion of these and other theories of discrimination, see B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1-232 (1976) [hereinafter cited as SCHLEI & GROSSMAN]; Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and The Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-75 (1972).

Sexual harassment is disparate treatment discrimination because it involves, as the District of Columbia Circuit stated, "an exaction which the [employer] would not have sought from any male"—the grant of sexual favors as a condition of continued employment. *Barnes v. Costle*, 561 F.2d 983, 989 (D.C. Cir. 1977). Sexual harassment situations would be facially neutral only if the supervisor were bisexual and demanded sexual favors of men and women alike. See *id.* at 990 n.55; Comment, *Legal Protection Against Sexual Harassment*, *supra* note 3, at 136-37. Presumably, such a situation would be subject to attack under a disparate impact analysis.

95. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

96. The analysis here is based on the discussion in SCHLEI & GROSSMAN, *supra* note 94, at 15-16. The analysis is not intended to deal with what a plaintiff must prove to establish a prima facie case of discrimination or how a defendant may rebut a prima facie case. For discussion of these matters, see *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973); S. AGID, *FAIR EMPLOYMENT LITIGATION* 520-24 (2d ed. 1979) [hereinafter cited as AGID]; SCHLEI & GROSSMAN, *supra* note 94, at 1147-58; B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 306-16 (Supp. 1979) [hereinafter cited as SCHLEI & GROSSMAN, SUPPLEMENT]. For a different approach to the legal analysis of the problem of sexual harassment than the one taken here, see Taub, *supra* note 3, at 361-91 ("Adverse employment actions that can be attributed to class membership because they are, at least in part, the product of stereotypic role expectations for that class should be recognized as unlawful under Title VII even in the absence of a comparative standard.").

the "basis" and the "issue"; the denial of the job or promotion, the termination, or other action must have been because of the person's sex, race, color, religion, or national origin.

The first, third, and fifth of these elements are interrelated and are most easily analyzed together. The first element in sexual harassment cases is self-evident: some persons are subjected to sexual advances and others are not. The gender-based nature of such discrimination or differential treatment, however, does not always loom so large in sexual harassment cases. The analysis is difficult largely because of the factual setting in which such cases frequently arise. Two types of factual patterns tend to obscure the gender-based nature of sexual harassment: the frequent absence of similarly situated males who are being favored by not being subjected to sexual advances, and the frequent restriction of the sexual advances to less than all women. To illustrate, the woman may work in a job category composed entirely of women,⁹⁷ and her supervisor may supervise only persons in that category. In such a situation, one cannot point to men being treated differently from women by the supervisor. And the supervisor's sexual advances will usually not be directed to all persons of the opposite sex or even to a majority of them. Some characteristics other than sex alone appears to be the basis for the supervisor's selection of his targets.

Neither of these factual patterns, however, necessarily defeats a claim that sexual harassment constitutes sexual discrimination. This is evident from an examination of the nature of "causation"—the fifth element—in disparate treatment discrimination cases as well as cases dealing with so called "sex plus" discrimination.

To establish "causation," using age and termination as an example, the plaintiff must ordinarily show that "but for" his employer's motive to discriminate against him because of his age, he would not have been discharged."⁹⁸ In the majority of individual disparate treatment cases, the issue of the employer's motivation will be the key⁹⁹

97. See generally Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 MICH. J.L. REF. 397, 400 n.3, 402-08 (1979) (discussing job segregation on the basis of sex).

98. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979). Although *Textron* was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1975), as amended by Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189, the same "but for" test has been applied in Title VII cases. *E.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979). See generally *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 285-87 (1977). For a discussion of other standards employed, see SCHLEI & GROSSMAN, *supra* note 94, at 124-25 & nn. 40 & 41 and cases cited therein.

99. SCHLEI & GROSSMAN, *supra* note 94, at 1153-54 and cases cited therein.

because the plaintiff can usually establish a "prima facie" case without great difficulty. In a case of sex discrimination in hiring, the plaintiff can readily show that she is female, that the employer did not hire her, that she had the qualifications for the job, and that the employer continued to recruit to fill the job.¹⁰⁰ At the same time, the employer also will generally encounter little difficulty in articulating a "legitimate nondiscriminatory reason" for its action.¹⁰¹ The plaintiff will then have to prove that the stated reason was pretextual and that the real reason for the employer's action—the "motive"—was sex.¹⁰² To show what the employer's motive was, the plaintiff will frequently point to lesser qualified males who were hired.¹⁰³ The inference can then be drawn that sex was the deciding factor; "but for" the plaintiff's sex she would have been hired.¹⁰⁴

In the example just given, the difference in treatment was being hired or not being hired. That men were hired and women were not hired tends to show both that the difference in treatment was on the basis of sex and that the denial of employment to plaintiff was because of her sex. The same evidence tends to prove both the third and fifth elements. To establish gender-based discrimination or "but for" causation, however, it is not necessary that the plaintiff must always be able to identify male employees who are being treated differently. What is at issue is whether the plaintiff would be treated differently if she were a man and all other things were equal. Although the ability to point to male employees who are receiving preferred treatment makes the plaintiff's burden easier, it is not a prerequisite for showing discrimination or causation; it is merely one way of showing it. The plaintiff can also prove both gender-based discrimination and causation by demonstrating that something would or would not have been done to her had she been a male.¹⁰⁵

100. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1978); *Jackson v. U.S. Steel Corp.*, 23 Empl. Prac. Dec. ¶ 31,004, at 16,196-97 (3rd Cir. 1980).

101. See *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam); *Ligons v. Bechtel Power Corp.*, 23 Empl. Prac. Dec. ¶ 30,017, at 16,232-33 (8th Cir. 1980); *Jackson v. U.S. Steel Corp.*, 23 Empl. Prac. Dec. ¶ 31,004, at 16,197-98 (3rd Cir. 1980).

102. See *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 578 (1978).

103. See AGID, *supra* note 96, at 523; SCHLEI & GROSSMAN, *supra* note 94, at 521-22, 525.

104. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977) ("Proof of discriminatory motive . . . can in some instances be inferred from the mere fact of differences in treatment.")

105. See note 94 *supra*. See also *Bundy v. Jackson*, 24 Fair Empl. Prac. Cas. 1155, 1159 & n.7 (D.C. Cir. 1981); *IUE v. Westinghouse Elec. Corp.*, 23 Fair Empl. Prac. Cas. 588, 598-99 n.2 (3d Cir. 1980) (Van Dusen, J., dissenting).

In the case of sexual advances, the plaintiff would only need to show that the supervisor did not make or would not make advances to men. Once the supervisor's heterosexuality has been shown, it follows that he would not have made the sexual advances to the plaintiff had she been a male. Thus "but for" her sex, the plaintiff would not have been subject to sexual advances. In order to show gender-based differential treatment, there would be no need to demonstrate that the supervisor in fact had male subordinates to whom he did not make sexual advances. Of course, to establish causation the plaintiff would still have to show, for example, in the case of promotion, that she would have been promoted absent the sexual advance. And, the employer could always show she would have been denied promotion even if she had acceded to the sexual advance or the sexual advance had never occurred.¹⁰⁶

This conclusion is not inconsistent with the decision in *Stroud v. Delta Air Lines, Inc.*¹⁰⁷ There, the Fifth Circuit held that a policy forbidding flight attendants from being married did not violate Title VII, even though all flight attendants were female and the policy applied to no other category of employees.¹⁰⁸ The court found no "dissimilarity in treatment between the sexes," because "[t]he distinction made in the application of the policy was between flight attendants and other job classes."¹⁰⁹ Any discrimination was based on marriage, not sex.¹¹⁰ In effect, although the court did not explicitly say so, the plaintiff could not prove that a male flight attendant, had there been one, would not have been subject to the same no-marriage rule. The rule was in effect one of the requirements for holding a particular job, all the occupants of which were female, but the requirement did not rest on the sex of the incumbents of the job.¹¹¹

In the case of sexual harassment, the differential treatment does turn on the sex of the employee and not on the nature of the job. Although the supervisor may have no male subordinates, he would not make a sexual advance to any male in the first instance. Accordingly, the mere fact that the supervisor making the sexual advance may supervise only women does not preclude a determination that sexual harass-

106. See sources cited in note 98 *supra*.

107. 544 F.2d 892 (5th Cir. 1977).

108. *Id.* at 893.

109. *Id.* at 893-94.

110. *Id.* at 893.

111. *Cf.* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (the employer's no-marriage rule discriminated against females where no such policy was ever enforced against male flight attendants).

ment constitutes sex-based discrimination.¹¹²

Nor does the fact that all female subordinates are not subject to the supervisor's sexual advances preclude a finding of discrimination. Sexual harassment will almost invariably be a form of what has been termed "sex plus" discrimination;¹¹³ the sexual advances will be made only to women who possess certain attributes. With some exceptions,¹¹⁴ such forms of "sex-plus" discrimination have been almost invariably struck down.¹¹⁵ For example, an employer violates Title VII by refusing to hire females with dependent children while hiring males with dependent children,¹¹⁶ or by refusing to hire married women while hiring married men.¹¹⁷

What the "sex plus" cases, and their counterparts in other areas, recognize is that discrimination need not be against all women or all members of the protected group to be unlawful.¹¹⁸ This conclusion is hard to quarrel with. Aside from cases of total exclusion of protected group members, virtually all forms of disparate treatment discrimination will be "sex plus" or "race plus" or "ethnic origin plus." For example, cases involving an alleged termination because of race, where the employer claims the employee engaged in misconduct, are almost always going to be "race plus" cases. The terminated employee will usually have done something wrong. The case will turn on whether a

112. An example may clarify the distinction. In the not-too-distant past, and even today, the attorneys in many law firms were all male whereas the legal secretaries were all female. Frequently, the secretaries were required to be in the office from nine to five, while the attorneys were allowed to schedule their work as they saw fit, so long as they got it done. This difference in treatment would not be sexually discriminatory. Presumably, the firm could show that the nine-to-five rule was applied to secretaries not because of their sex, but to insure the efficient functioning of the office, and would have been applied to any secretary, male or female. A different conclusion would result, however, if an attorney required a secretary to submit to sexual advances as a condition of keeping her job. Such action would be sex based.

113. At times an employer does not discriminate against a protected class as a whole, but rather disparately treats a subclass within a protected class. Disparate treatment of a male or female subclass has come to be denominated "sex plus." . . .

[A] sex plus problem arises wherever an employer adds a criterion or factor for one sex which is not added for the other sex.

SCHLEI & GROSSMAN, *supra* note 94, at 337.

114. *E.g.*, *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (denial of disability benefits to pregnant woman not sexual discrimination in violation of Title VII); cases cited in note 119 *infra*.

115. *See Harper v. Thickol Chem. Corp.*, 23 Empl. Prac. Dec. ¶ 31,041, at 16,387-89 (5th Cir. 1980) and cases cited therein.

116. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1970) (per curiam).

117. *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197-98 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

118. *See SCHLEI & GROSSMAN, supra* note 94, at 337.

white employee would have been terminated had he engaged in similar misconduct. If a white employee would not be terminated for the same misconduct, the discrimination is present, even though not all minorities are discriminated against because not all minorities have engaged in the misconduct.

The logic of the "sex plus" cases applies to sexual harassment claims. The only "sex plus" cases in which the courts have consistently rejected findings of discrimination are those involving differing dress codes or grooming rules for men and women.¹¹⁹ For the most part, the "sex plus" cases rest on the notion that the differences do not pose any significant barriers to employment opportunities and do not involve important personal interests.¹²⁰ By comparison, sexual harassment cases frequently involve an important personal interest; a person ought not to be coerced into having sexual relations with another by the threat of loss of employment. Sexual harassment may also be a barrier to employment opportunities. To avoid unwanted sexual advances, a person may avoid certain kinds of jobs or quit her employment.

The second element—that the discrimination be engaged in by an "employer"—points to the issue of the employer's liability for the acts of its supervisors or employees. As phrased, this issue has seldom been litigated. By and large, in areas other than sexual harassment, employers have not attempted, in reported cases at least, to avoid liability for the actions of supervisory employees,¹²¹ and courts have rejected such attempts out of hand.¹²² Indeed, few of the reported decisions state anything other than a short conclusion such as "[t]he defendant is a corporation which can only operate through its authorized personnel."¹²³ In *Tidwell v. American Oil Co.*,¹²⁴ the district court gave the

119. *E.g.*, *Fountain v. Safeway Stores Inc.*, 555 F.2d 753, 755-56 (9th Cir. 1977); *Earwood v. Continental Southeastern Lines, Inc.*, 539 F.2d 1349, 1350-51 (4th Cir. 1976); *Longo v. Carlisle DeCoppet & Co.*, 537 F.2d 685 (2d Cir. 1976) (per curiam); *Knott v. Missouri Pacific Ry. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc). *But see* *Carroll v. Talman Fed. Savings & Loan Assoc.*, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); *EEOC v. Sage Realty Corp.*, 23 Empl. Prac. Dec. ¶ 31,046 (S.D.N.Y. 1980).

120. *See* sources cited in note 119 *supra*.

121. A widely cited treatise on the subject of employment discrimination makes no mention of the issue outside the area of sexual harassment. *See* SCHLEI & GROSSMAN, *supra* note 94.

122. *See* *Calcote v. Texas Educ. Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723, 725 (6th Cir. 1972); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971). *See also* *Friend v. Leidinger*, 588 F.2d 61, 67 (4th Cir. 1978).

123. *Calcote v. Texas Educ. Foundation, Inc.*, 578 F.2d 95, 98 (5th Cir. 1978).

lengthiest exposition to date on the point in a case not involving sexual harassment:

When [the employer] gave its Regional Accounting Manager authority to fire employees, it also accepted responsibility to remedy any harm caused by his unlawful exercise of that authority. The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action.¹²⁵

In effect, the courts have held that when a supervisor exercises his authority to hire, promote, assign work, or determine compensation, the employer may not escape liability for the supervisor's unlawful actions simply because the supervisor in exercising that authority had a motive that was contrary to the employer's stated policy and unlawful as well. This conclusion rests on the correct assumption that a corporation necessarily implements employment policies only through its supervisors.

Many courts have been reluctant to extend this reasoning to sexual harassment.¹²⁶ This reluctance appears to stem in part from a fear that an employer will be found liable for unauthorized, wholly personal actions by its supervisors that it would remedy if brought to its attention.¹²⁷ It also appears to stem in part from a related concern that an employer will be found liable for every off-color joke or flirtation by a supervisor. These concerns are legitimate. But the effort to resolve them through limiting employer liability for the acts of supervisors reflects a confusion of the issue of employer liability for the acts of its agents with the issue of defining what conduct by a supervisor will give rise to a Title VII violation in the first place. It is the requirement that there be a causal connection between the differential treatment (sexual advances to a female employee) and an "issue" cognizable under Title VII (a term or condition of employment) that meets these concerns.

To violate Title VII, the allegedly discriminatory treatment must be with respect to a term or condition of employment.¹²⁸ In most instances, the connection is self-evident: the employee is paid less, de-

124. 332 F. Supp. 424 (D. Utah 1971).

125. *Id.* at 436. The court was quoting the EEOC's "Post-trial Memorandum of Law."

126. *See* cases cited in notes 24 & 35 *supra*.

127. *See* text accompanying notes 26-27 *supra*.

128. *See* Title VII § 703(a), 42 U.S.C. § 2000e-2(a) (1976); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979).

nied a promotion or employment, disciplined, or terminated because of his or her sex or race. The differential treatment directly involves a term of employment. But a sexual advance would not itself ordinarily be considered a term of employment. By making the advance, the supervisor does not automatically exercise his authority as a supervisor. Were he held to do so, a supervisor could never ask a subordinate of the opposite sex for a date without violating Title VII. To the contrary, for the sexual advance to violate Title VII, it must be tied into the employment relationship. The supervisor must use or threaten to use his power as a supervisor to affect the subordinate's employment status in an effort to obtain compliance with his sexual advance.

This approach takes into account the concern of some courts and employers that holding employers liable for the sexual advances of their supervisors would make them liable for purely personal acts of supervisors. When the male supervisor, without invoking the power the employer has given him to affect his subordinate's employment status, makes a sexual advance to a female employee, Title VII is not violated, because no term or condition of employment is involved. This approach, however, does not result in applying to sexual harassment cases a test of employer liability for its supervisors' acts which is different from that applied to every other type of discrimination claim. In effect, the sexual advance becomes unlawful only when the supervisor attempts to use, or uses, the authority which the employer has given him as a supervisor to coerce compliance with his sexual advance, or to retaliate for a refusal to comply. This requirement thus protects the employee from having her employment status based on whether she acceded to unwanted sexual advances, while protecting the employer's legitimate interest in not being dragged into every flirtation or affair within its operations.

V. COMMENTS ON EEOC AND OFCCP GUIDELINES

The above approach to sexual harassment by and large accords with the OFCCP's regulations¹²⁹ and with subparts 1 and 2 of section 1604.11(a) of the EEOC's regulations.¹³⁰ Those portions of the regulations similarly focus on a supervisor's use of his authority as a supervisor to exact sexual favors from subordinates. Subpart 3 of section 1604.11(a), however, would establish a violation of Title VII in situations not encompassed by the above approach. Subpart 3 provides:

129. See text accompanying notes 71-72 *supra*.

130. See text accompanying notes 75-76 *supra*.

"Unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹³¹ This provision goes beyond any of the cases discussed above¹³² because it makes unlawful a supervisor's sexual advances even though they are not otherwise linked to a term or condition of employment. The same conduct may also be unlawful if it is engaged in by a nonsupervisory employee, or by a non-employee, and the employer knows or should know of the conduct and fails to take appropriate corrective action.¹³³

Subpart 3 was relied upon in *Brown v. City of Guthrie*.¹³⁴ In *Brown*, the plaintiff was a civilian employee of the city police department. She had begun working in July 1976. In February 1977, plaintiff's shift commander twice asked her to take off her clothes. Plaintiff complained to the chief of police, but no action was taken against the commander. She submitted her resignation, but was persuaded to remain.¹³⁵ Following her attempted resignation, the commanding officer "heightened his efforts to humiliate and harass Plaintiff."¹³⁶ Among other things, he repeatedly showed plaintiff photographs of nude women in magazines kept around as a "usual practice" "for the policemen to look at during their sparetime."¹³⁷ He would ask plaintiff to compare herself to the women in the photographs. The shift commander also secretly filmed plaintiff conducting a strip search of a female prisoner and then frequently played back the film while making comments

131. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

132. In the *Tomkins* case, the Third Circuit declined to rule on the EEOC's argument that the employer had an obligation to maintain a discrimination-free environment. 568 F.2d at 1046 n.1. In *Bundy v. Jackson*, 24 Fair. Empl. Prac. Cas. 1155, 1166-62 (D.C. Cir. 1981), discussed at note 65 *supra*, the court ruled that an employer was obligated to maintain a discrimination-free environment, but did not expressly rely on the EEOC's regulations to reach that result, although it did rely on the regulations in shaping the remedy for the unlawful sexual harassment found there.

133. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. §§ 1064.11(d), (e)). Subsection (d) of § 1604.11 would impose liability on the employer for conduct of nonsupervisory employees that violated any portion of subsection (a). As a practical matter, however, nonsupervisory employees could violate only subpart 3 of subsection (a), for by definition nonsupervisory employees could not make or threaten to make decisions affecting the employment status of another employee. *Cf.* National Labor Relations Act §§ 2(3), (11), 29 U.S.C. §§ 152(3), (11) (1976) (defining "employee" and "supervisor").

134. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

135. *Id.* at 1629.

136. *Id.*

137. *Id.*

to plaintiff about the physical attributes of the prisoner.¹³⁸ Finally, on various occasions, the commander made lewd gestures and remarks to plaintiff. The plaintiff resigned on March 20, 1977, because of the sexual harassment and other allegedly discriminatory treatment.

Relying on subpart 3 of the EEOC's regulations, the district court found that the city had engaged in unlawful sexual harassment forcing plaintiff to resign. The court stated that it did not need to determine the precise quantum of harassment necessary to give rise to a Title VII violation, because this was not a "borderline case."¹³⁹ The court also said it need not decide whether an employer would always be liable for sexual harassment committed by its supervisor, since the plaintiff had complained to higher level management, which had failed to act.¹⁴⁰

The *Brown* case and other similar cases¹⁴¹ reveal the need for a prohibition against at least certain forms of sexual advances as well as a prohibition against use of supervisory authority to obtain sexual favors. Subpart 3 of the EEOC's guidelines, however, suffers from vagueness and over-inclusiveness that are likely to impair its effectiveness.¹⁴²

The phrases "sexual advances" and "requests for sexual favors" have a reasonably precise meaning; they connote verbal or physical conduct that seeks to induce another person to engage in some form of sexual activity or sex-related activity. But the phrase "verbal or physical conduct of a sexual nature" is all encompassing. It would arguably include everything from a rape to bringing a copy of *Playboy* (or *Playgirl*) to work to telling an off-color joke to winking at someone to use of certain four-letter words.¹⁴³ Indeed, the phrase would include virtually all conduct having any sexual content, even if such conduct was not directed at one sex alone, did not manifest a derogatory or insulting attitude towards one sex, and could have been engaged in by a member of either sex. Obvious examples of such conduct would include telling an off-color joke or use of obscene language.

Subparts 1 and 2 limit the impact of this sweeping definition of the conduct that might constitute sexual harassment by requiring that submission to such conduct be tied to a term or condition of employment. Subpart 3, however, effectively makes unlawful any conduct with a sex-

138. *Id.*

139. *Id.* at 1633.

140. *Id.*

141. See *Bundy v. Jackson*, 24 Fair Empl. Prac. Cas. 1155, 1156-58 (D.C. Cir. 1981); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 934-42 (D.N.J. 1978).

142. See *Comments on Proposed EEOC Guidelines*, *supra* note 1, at E-3 to E-4 (comments by law firm of Kirkland and Ellis).

143. See text accompanying notes 131-32 *supra*.

ual content that interferes with work performance or that someone finds to be "intimidating, hostile, or offensive." In so doing, subpart 3 will frequently proscribe conduct that is not discriminatory or that ought not to be considered a term or condition of employment.

First, subpart 3 effectively equates conduct "of a sexual nature" with gender-based discrimination. But the logic does not follow. Off-color jokes or obscene phrases will frequently be "of a sexual nature" and may be perceived by many as hostile, offensive, or intimidating. But unless they inherently demean one sex or are intentionally directed to members of one sex alone, the element of discrimination is absent.¹⁴⁴ The regulations thus ought to be revised to require that the offending conduct be demeaning to one sex or be intentionally directed exclusively to members of one sex.

Second, subpart 3 makes conduct "of a sexual nature" a term or condition of employment if someone finds it offensive, hostile, or intimidating. As the courts have recognized,¹⁴⁵ however, sexual advances, requests for sexual favors, or conduct of a sexual nature do not constitute what is ordinarily thought of as a term or condition of employment. They become such only if the "psychological" environment of the workplace is regarded as a term or condition of employment.¹⁴⁶

As noted above,¹⁴⁷ the EEOC's application of this concept of the psychological environment of the workplace to sexual harassment does not mark the development of a new doctrine, but merely its extension to a new area. The extension may perhaps be warranted, for it is not difficult to imagine examples of sexual harassment as potentially debilitating to their victims as racial harassment is to its victims.¹⁴⁸ But there are certain differences between sexual harassment and other forms of harassment which call for some modification of the doctrine.

Not all sexual advances, requests for sexual favors, or "conduct of a sexual nature" can reasonably be considered as offensive or intimidating. If they involved force, the threat of force, loss of employment benefits, or unsolicited offensive physical contact, they would undoubt-

144. See *Halpert v. Wertheim & Co.*, 24 *Empl. Prac. Dec.* ¶ 31,243, at 17,559-60 (S.D.N.Y. 1980) (use of obscene language in presence of female employee not sexual harassment).

145. See text accompanying note 65 *supra*.

146. See note 81 *supra*.

147. See text accompanying notes 81-83 *supra*.

148. See *Bundy v. Jackson*, 24 *Fair Empl. Prac. Cas.* 1155, 1161-62 (D.C. Cir. 1981). *Brown v. City of Guthrie*, 22 *Fair Empl. Prac. Cas.* 1627 (W.D. Okla. 1980); *Kyriazi v. Western Elec. Co.*, 461 *F. Supp.* 894, 934-42 (D.N.J. 1978); *Comments on Proposed EEOC Guidelines*, *supra* note 1, at E-6 (comments by Working Woman's Institute).

edly be condemned. But outside of such obviously objectionable conduct, there is a wide spectrum of behavior that is usually unobjectionable, although not meeting the highest standards of etiquette, and that is engaged in by men and women alike. In this day and age, both men and women sometimes tell dirty jokes, use obscene language or gestures, ask other persons for dates, make sexual innuendos, and look with lust in their hearts at members of the opposite sex or at revealing photographs of them. Inevitably, much of this conduct will occur at work, where people spend a third or more of their time, but its perceived offensiveness will depend more on an individual's sense of decorum than on his or her sex. As a result, it would be virtually impossible for an employer effectively to regulate such conduct, short of a total prohibition on all conduct of a sexual nature and installation of an extensive apparatus for monitoring employee compliance with the prohibition. And, efforts to regulate such conduct through Title VII will likely embroil the EEOC, the courts, and employers in a host of purely private, personal disputes, whose only connection to employment is that they happened to occur at the plant or the office instead of at a bar or supermarket.

To minimize these problems without leaving women unprotected, the regulations should be revised in at least three respects. First, in cases encompassed by subpart 3, the definition of sexual harassment ought to be revised to reflect the actual meaning of the term "harassment," which involves some notion of intentional and repeated efforts to persecute or annoy someone else, after the victim has indicated that the offending conduct should cease.¹⁴⁹ Under such a definition, the nature of the conduct and its frequency will obviously be critical. Trivial, one-time acts would not be proscribed, but serious, repeated acts would be.

Second, when the sexual harassment does not otherwise involve a term or condition of employment, the employer should not be liable unless it knows or should know of the misconduct and fails to correct it.

149. See note 1 *supra*; Taub, *supra* note 3, at 376 ("seems fair to require as a general matter that the woman attempt to make known to the harasser that she finds his conduct offensive"); Comment, *Sexual Harassment and Title VII*, *supra* note 3, at 163-64. Cf. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (*per curiam*) (derogatory ethnic comments which were part of casual conversation did not rise to "excessive and opprobrious" level necessary to constitute an unlawful employment practice under Title VII); EEOC v. Murphy Motor Freight Lines, Inc., 22 Empl. Prac. Dec. ¶ 30,888, at 15,609-10 (D. Minn. 1980) (racial harassment was "not isolated, casual, accidental, or sporadic"); Winfrey v. Metropolitan Util. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (racial harassment must be "so excessive and opprobrious" to constitute Title VII violation).

In other words, the same standard should apply to supervisors and nonsupervisory employees. As the courts have recognized, a sexual advance is not in itself a term or condition of employment. It ordinarily becomes such only when a supervisor, using his authority as a supervisor, ties an employee's employment status to compliance with the advance.¹⁵⁰ When a supervisor does not attempt to invoke his authority as a supervisor in making a sexual advance, his actions should not be regarded as automatically giving rise to a term or condition of employment. Under such circumstances the supervisor effectively stands in the same position as a nonsupervisory employee. His actions constitute unlawful harassment only when the employer acquires knowledge of them and fails to remedy them.

Third, the regulations should relieve the employer from liability when it takes appropriate corrective action. The regulations provide such relief when a nonsupervisory employee commits the otherwise unlawful act.¹⁵¹ There is no reason not to apply the same rule when a supervisor engages in the otherwise unlawful conduct. In each case, the question is whether appropriate corrective action has been taken—whether the underlying wrong has been remedied. To do otherwise would tend to deter employers from taking such action when supervisors are involved, for fear of seeming to admit a violation of Title VII without deterring potential litigation.¹⁵²

Two other portions of the EEOC's regulations require further comment: the potential imposition of liability under subsection (e) on employers for sexually harassing conduct of non-employees and the granting of a remedy under subsection (g) to one denied an employment benefit because another has acceded to a request for sexual favors.¹⁵³ The scope of an employer's potential liability under subsection (e) is poorly defined. By its terms, subsection (e) seems to fasten on the employer liability for conduct of persons other than the employer's own agents, supervisors, or employees, because subsections (c) and (d) deal specifically with an employer's liability for the actions of such persons.¹⁵⁴ Yet subsection (e) appears to retain some notion of agency to limit its reach. It provides that "the Commission will consider the extent of the employer's control and any other legal responsibility which

150. See cases discussed in notes 52-65 *supra*.

151. 45 Fed. Reg. 25,025 (1980) (to be codified in 29 C.F.R. § 1604.11(d)).

152. *Comments on Proposed EEOC Guidelines, supra* note 1, at E-4 (comments by law firm of Kirkland and Ellis).

153. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. §§ 1604.11(e), (g)).

154. *Id.* (to be codified in 29 C.F.R. §§ 1604.11(c), (d)).

the employer may have with respect to the conduct of such non-employees."¹⁵⁵ This provision is so vague and ambiguous that it affords employers no guidance in determining their policies and potentially makes employers liable for actions which cannot reasonably be attributed to them.

By definition, a non-employee would have no direct supervisory authority over a female employee and could not take or effectively recommend any action directly affecting her employment status. Accordingly, a non-employee's conduct toward a female employee could violate only subpart 3 of section 1604.11(a).¹⁵⁶ But such actions by non-employees would be virtually impossible for an employer to control directly. An employer cannot fire or discipline non-employees or require that they attend meetings attempting to deal with the issue.

By and large, the only way an employer could remedy the problem would be by changing the job assignment of the female employee so that she would not come into contact with the offending individual. But such an approach raises more problems than it solves. Title VII has been interpreted to forbid an employer from relying on customer preference as a basis for denying certain positions to women or minority group members.¹⁵⁷ For an employer to deny a female employee an assignment because the persons with whom she would deal are all male and the employer suspects they might make some sort of sexual advances would itself potentially violate Title VII. The employer would be essentially acting on the basis of a sexual stereotype. Yet, for an employer not to act would potentially violate the EEOC's sexual harassment guidelines.

To avoid these problems, subsection (e) of section 1604.11 should be eliminated or at least amended to provide that a non-employee's conduct can be attributed to the employer only if the employer affirmatively sanctions such conduct, making it a term or condition of the female employee's employment. If the employer retaliates or threatens to retaliate against the female employee for her refusal to accede to the non-employee's sexual advances or, conversely, promises or grants some employment benefit if she accedes to them, the employer may be said to affirmatively sanction such sexual advances.

Subsection (g) of section 1604.11 provides: "Where employment opportunities or benefits are granted because of an individual's submis-

155. *Id.* (to be codified in 29 C.F.R. § 1604(e)).

156. *See* note 133 *supra*.

157. *See* *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 389 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971); 29 C.F.R. § 1604.2(a)(1)(iii) (1979).

sion to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."¹⁵⁸ This provision should be deleted.¹⁵⁹ The subsection potentially encompasses two kinds of situations. In the first, the female employee granted the employment benefit welcomed or did not object to the sexual advance. Under these circumstances, the employer's conduct would not violate Title VII in the first place, since the regulations require that sexual advances be "unwelcome" to be unlawful.¹⁶⁰

In the second situation, the sexual advance is unwelcome, but the female employee accedes to it and receives the promised benefit. The female employee, although she received the benefit, is nonetheless a victim; it is her rights that have been violated by having to comply with a condition imposed on her because of her sex. This situation differs from the normal situation in a discrimination case, in which the victim has been denied a promotion, raise, or other benefit because of his or her sex, race, or ethnic origin. Subsection (g), however, in this situation would reward the nonvictims¹⁶¹ and potentially punish further the victim through her demotion to allow a nonvictim to take her place.

VI. CONCLUSION

Contrary to statements in some of the earlier district court decisions, the principles applicable to sexual harassment claims do not mark any sharp break with principles established in more conventional disparate treatment discrimination cases. By emphasizing the need to show a connection between sexual advances and a term or condition of employment, the courts have avoided the problem emphasized in those early decisions that allowing sexual harassment claims to be heard

158. 45 Fed. Reg. 74,677 (1980).

159. Subsection (g) was not in the proposed and interim guidelines issued in April 1980, but was added with the adoption of the final guidelines. *Compare* 45 Fed. Reg. 25,025 (1980) with 45 Fed. Reg. 74,677 (1980). By contrast, the California Fair Employment and Housing Commission initially proposed a provision similar to subsection (g) in its employment discrimination regulations but dropped the provision in the final version of the regulations. *Compare* Proposed Regulations of the Fair Employment Practice Commission, June 6, 1980 (proposed 9 Cal. Admin. Code § 291.9(f)(2)) ("A charge of sex discrimination may be filed by an employee who has been denied an employment benefit because another employee has cooperated in the exchange of sexual favors for an employment benefit.") with 2 Cal. Admin. Code §§ 7287.6, 7291.1(f)(1).

160. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

161. This statement assumes that the persons who did not receive the benefit were not themselves the objects of an unrequited sexual advance.

would open the courts to a host of frivolous claims. Although it may be necessary also to proscribe certain forms of sexual harassment not directly linked to a term or condition of employment, the EEOC's regulations on this point are overly broad and vague and would likely be counterproductive. They should thus be amended.

The key, of course, to reducing the incidence of sexual harassment lies in appropriate preventive action, as the EEOC recognizes.¹⁶² As part of their general policy against discrimination, employers should include a statement that sexual harassment, as well as harassment on other proscribed bases, is against company policy. Employers should also establish procedures for receiving, investigating, and resolving employee complaints, and for disciplining supervisors or employees found to have violated company policy. Measures like these, although not necessary to defeat a sexual harassment claim, would likely reduce the incidence of sexual harassment, deter employees from pursuing unjustified claims, and make more credible the defense of such claims.

Employers and other Title VII respondents ignore the problem of sexual harassment at their own risk. If employers do not act to deter such conduct, women are likely to resort to the courts, and the courts are likely to be increasingly hospitable to their claims.

162. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(f)).

