

Spring 1994

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### Recommended Citation

Haller, Bruce L. and Aitken, Richard C. (1994) "Minimizing Employer liability in Federal Sexual Harassment Claims After the Civil Rights Act of 1991," *North East Journal of Legal Studies*: Vol. 2 , Article 5. Available at: <https://digitalcommons.fairfield.edu/nealsb/vol2/iss1/5>

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MINIMIZING EMPLOYER LIABILITY IN FEDERAL SEXUAL HARASSMENT  
CLAIMS AFTER THE CIVIL RIGHTS ACT OF 1991  
by

Bruce L. Haller\* and Richard C. Aitken\*\*

Part I Introduction

The seriousness of sexual harassment was firmly established by the Anita Hill-Clarence Thomas hearings held by the Senate Judiciary Committee in October, 1991.<sup>1</sup> The hearings directed the country's attention to the shortcomings of Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, religion, sex or natural origin.<sup>2</sup> According to the 1981 U.S. Merit System Protection Board Report, forty-two percent of the women who were questioned had answered that they had been subjected to some form of sexual harassment.<sup>3</sup> Unfortunately, in 1988 when the Board conducted the same survey, the results were identical<sup>4</sup>; moreover, the percentage was even greater in male dominated workplaces.<sup>5</sup>

The victims of sexual harassment<sup>6</sup> not only become less efficient employees, but also suffer depression, loss of confidence as well as, physical effects.<sup>7</sup> In addition to the toll it takes on the employee, sexual harassment costs the federal government over a hundred million dollars a year.<sup>8</sup> The money represents the cost of absenteeism, reduced productivity, job turnover, medical costs, and litigation.<sup>9</sup> Finally, sexual harassment creates an offensive working condition that alienates its victims and decreases job morale.

It is therefore in the best interests of employers, employees and society to prevent all forms of sexual harassment. Short of this employers can take steps to minimize their liability in Title VII sexual harassment claims.

Part II of this article will review the evolution of sexual harassment claims under Title VII of the Civil Rights Act of 1964. Part III outlines how the 1964 Act was changed by the Civil Rights Act of 1991. Part IV outlines the procedures an employer may implement to minimize their liability.

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Part II Evolution of Sexual Harassment Claims

A. Background

Although sexual harassment<sup>10</sup> is currently actionable under Title VII, claims of sexual harassment had fallen on deaf ears until 1976.<sup>11</sup> Prior to this, the courts had held that victims of sexual harassment had no recourse under Title VII.<sup>12</sup> For example, the United States District Court for the District of Columbia in Barnes v. Train denied a plaintiff relief under Title VII because she had not been discriminated against on the basis of her sex, but rather on the basis of her refusal to submit to the sexual advances.<sup>13</sup> Thus, in order to recover a plaintiff had to use the traditional tort theories of assault, battery, defamation, or intentional infliction of emotional distress.<sup>14</sup>

It should be noted that, even though Title VII was proposed to eliminate all barriers to employment for all, the provision regarding sex discrimination was only added as a last-minute attempt to defeat the act.<sup>15</sup> Presently Title VII not only prohibits sex discrimination in all of its forms, section 704 of Title VII prohibits employers from retaliating against employees who initiate complaints.<sup>16</sup>

In 1976 the District Court of the District of Columbia became the first district court to recognize a sexual harassment claim under Title VII.<sup>17</sup> The plaintiff, Diane Williams, who was an employee of the Justice Department refused to submit to sexual advances of her supervisor. In response, her supervisor retaliated with unfavorable reviews and unwarranted reprimands. The district court determined that the supervisor's retaliatory measures discriminated against Ms. Williams on the basis of her sex and was therefore a violation of Title VII.<sup>18</sup>

In the aftermath of Williams, courts started to recognize sexual harassment as actionable action under Title VII. However, a majority of the courts required that the plaintiff show a loss of a tangible job benefit.<sup>19</sup> This type of harassment has been referred to as quid pro quo harassment or "this for that" harassment. Quid pro quo sexual harassment involves conduct of a sexual nature when submission to such conduct is made explicitly or implicitly a term or condition of employment or when submission or rejection of such conduct is used as a basis for employment decisions affecting the employee.<sup>20</sup> Therefore when a supervisory employee conditions concrete employment benefits on sexual favors, he imposes an additional burden on subordinate employees that they need not suffer. As a result, an employer may be sued for the action of the supervisor.<sup>21</sup>

The Equal Employment Opportunity Commission drafted a set of guidelines regarding the problem of sexual harassment in

the workplace.<sup>22</sup> The guidelines reinforced the various court rulings regarding quid pro quo harassment and then went a step further, defining sexual harassment as:

[R]equests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment<sup>23</sup>

According to the EEOC's guideline,<sup>24</sup> a plaintiff does not have to show that she suffered from a loss of tangible job benefit but rather that she was subjected to unwelcome sexual advances, jokes, suggestive remarks or comments, physical touching, or the displaying of objectional material in the workplace rising to the level of creating an offensive or hostile working environment.<sup>25</sup> The hostile work environment claim differs from the quid pro quo claim, because it is not limited to harassment by one with authority to make substantive employment decisions.

To promote hostile work environment as a valid claim for sexual harassment, the EEOC's guidelines call for the strict liability for employers regardless of whether they knew or should have known of the discriminatory acts of its agents or supervisors. The guidelines state:

Applying general Title VII principles, an employer, ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job function performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.<sup>26</sup> After the release of the Guidelines, the courts agreed that hostile environment sexual harassment claims are actionable under Title VII.<sup>27</sup> In Bundy v. Jackson<sup>28</sup> the Circuit Court for the District of Columbia announced that hostile work environment sexual harassment violates Title VII of the 1964 Civil Rights Act. The court based its decision on Title VII race discrimination cases.<sup>29</sup> The court stated:

Indirect discrimination is illegal because it may constitute a subtle scheme designed to create a working

environment imbued with discrimination and directed ultimately at minority group employees. As potentially discriminated practices become outlawed, those employers bent on pursuing a general policy declared illegal by congressional mandate will undoubtedly devise more sophisticated methods to perpetrate discrimination among employees.<sup>30</sup>

The circuit court in Bundy recognized both quid pro quo and hostile environment sexual harassment. The court stated that by only allowing quid pro quo actions the courts are condoning the actions of employers who sexually harass their workers but stop before dismissing or depriving an employee of a tangible job benefit.<sup>31</sup>

In similar fashion, the Eleventh Circuit held that hostile environment sexual harassment violates Title VII in Henson v. City of Dundee.<sup>32</sup> Barbara Henson was a dispatcher for the city of Dundee's police department. She claimed that during the two years she had worked for the department she and her female co-workers were subject to "numerous harangues of demeaning sexual inquiries and vulgarities."<sup>33</sup> In addition, she alleged that her supervisor had repeatedly asked her to have sexual relations with him. In reversing the lower Courts decision, which denied her claim because she had not lost a tangible job benefit, the court set forth a five point analytical frame work for hostile environment claim.

According to Henson, the elements for a prima facie case of hostile environment sexual harassment are (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a "term, condition or privilege" of employment; (5) employer knew or should have known of the harassment in question and failed to take prompt remedial action.<sup>34</sup>

#### B. Meritor Savings Bank FSB v Vinson<sup>35</sup>

In 1986, the issue of sexual harassment reached the United States Supreme Court.<sup>36</sup> In 1974, Michelle Vinson, respondent, met Sidney Taylor of Capital City Federal Savings and Loan Association (now Meritor Savings Bank) and discussed the possibility of employment. Vinson was eventually hired with Taylor as her supervisor and started as a teller-trainer. Thereafter she was promoted to teller, head teller, and assistant Branch Manager. She worked at the same branch for four years and it is undisputed that all of her promotions were based on merit.<sup>37</sup> In September of 1978 Vinson notified Taylor that she was taking sick leave for an indefinite period and on November 1, 1978, she was discharged from the bank for excessive use of that leave.

Pursuant to this Vinson brought a Title VII action against Taylor and the bank alleging that "she had been constantly subjected to sexual harassment" by Taylor.<sup>38</sup>

At trial, Vinson testified that shortly after her probationary period was concluded Taylor had asked her out to dinner and while at dinner he suggested that they go to a motel and have sexual relations. Out of what she described as fear of losing her job, Vinson agreed. Vinson further testified that Taylor had made repeated sexual demands upon her and that during the course of her employment she had intercourse with him 40-50 times. In addition, she testified that Taylor had fondled her in front of other employees, followed her into the ladies room, exposed himself to her, and forcibly raped her several times.<sup>39</sup>

The District Court held for Taylor and the Bank. The court concluded that:

[if] Vinson and Taylor did engage in an intimate sexual relationship, during the time of her employment with the bank, the relationship was a voluntary one having nothing to do with her continued employment with the bank or her advancement for promotions at the institution.<sup>40</sup>

The court also concluded that the bank was not in violation of Title VII because "the bank was without notice and cannot be held liable for the alleged actions of Taylor".<sup>41</sup>

The District Court's holding was reversed by the Court of Appeals for the District of Columbia.<sup>42</sup> Drawing support from its decision in Bundy v. Jackson<sup>43</sup> and the EEOC Guidelines the court announced that a violation of Title VII may be based upon either quid pro quo sexual harassment or hostile environment sexual harassment. Therefore since the Appellate Court believed that Vinson's allegations were clearly of the hostile environment type,<sup>44</sup> and concluded the District Court had not addressed the issue, the court remanded the case.

In regard to the bank's liability the Court of Appeals held that an employer is absolutely liable for the sexually harassing conduct of its supervisory personnel, regardless of whether the employee knew or should have known about the misconduct. The Court concluded that Title VII's definition of "employer" includes "any agent of such person".<sup>45</sup> Therefore, the court held that a supervisor is an agent of his employer for Title VII purposes.<sup>46</sup>

The Court of Appeals' decision was affirmed by the Supreme Court, but on other grounds. The court determined that "the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evidences a legislative intent "to strike at this entire spectrum of disparate treatment of

men and women."<sup>47</sup> The court also relied on the EEOC Guidelines<sup>48</sup> in determining that sexual harassment, regardless of whether or not there is any loss of a tangible job benefit is actionable under Title VII. The court did however, caution that:

Not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" or employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the actions] employment and create an abrasive working environment."<sup>49</sup>

In regard to employer liability the Court disagreed with the Court of Appeals' decision that employers should be held absolutely liable for the conduct of its supervisors.<sup>50</sup> Although the court refused to give a definitive answer on employer liability, it did agree with the amicus curiae brief by the EEOC which stated "that Congress wanted courts to look to agency principles for guidance in this area."<sup>51</sup>

Finally, the court rejected the bank's view that the existence of a grievance procedure and policy against discrimination, insulates the bank from liability. The reasons the court gave are two-fold. First, the bank's policy did not address sexual harassment in particular. Secondly, the bank's procedure required an employee to report any discrimination to her supervisor. Therefore, since Taylor was Vinson's supervisor it is quite evident why she did not choose to implement the grievance procedure.<sup>52</sup>

### C. Burdens of Proof in Sexual Harassment Cases

#### Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment claims are similar to the traditional discrimination claims under Title VII. Therefore, in order to establish a quid pro quo claim<sup>53</sup> a plaintiff must use the tripartite framework for proving a Title VII claim of disparate treatment established by the Supreme Court in McDonnell Douglas Corp. v. Green.<sup>54</sup> The plaintiff must first establish by a preponderance of the evidence she was denied a tangible job benefit because she refused to submit to the sexual advances of her supervisor. Upon doing so the burden of proof shifts back to the employer to demonstrate by clear and convincing evidence that it had a legitimate, non discriminatory reason for denying the plaintiff of this benefit. Finally, if the employer is able to meet this burden of proof, the plaintiff has the opportunity to show that the employer's stated "legitimate" reason is pretextual and unworthy of credence.<sup>55</sup>

Evidence of sexual advances made to other employees may be admitted on this issue of motive, intent, or plan in making the sexual advances toward the plaintiff.<sup>56</sup> In regards to imputing liability for quid pro quo sexual harassment, the federal courts have held employers strictly liable, based on agency principles.<sup>57</sup> For example, in the Sixth Circuit case of Shrout v. The Black Clawson Co.,<sup>58</sup> the District Court for the Southern District of Ohio found the employer strictly liable for the acts of a supervisor who attempted to force the plaintiff "to submit to his sexual advances by withholding performance evaluations and salary reviews."<sup>59</sup> The court stated:

Respondeat superior liability exists because in a quid pro quo action "an employer is held strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, dismissal and discipline..."<sup>60</sup>

Similarly, in Sowers v. Kemira<sup>61</sup> the District Court for the Southern District of Georgia held an employer strictly liable for quid pro quo sexual harassment by its supervisor, Mr. Skinner. The court records show that Mr. Skinner made numerous sexual advances to the plaintiff, many of which occurred during discussion regarding the possibility of her promotion. Citing Henson v. City of Dundee, the district court held the employer liable on the basis of agency because the supervisor was using "his apparent or actual authority to extort sexual consideration from an employee...[T]he supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose."<sup>62</sup>

Opponents to implying strict liability on employers argue that supervisors who practice quid pro quo sexual harassment are acting outside of their scope of employment. Therefore, their argument continues, an employer should not be held liable for the consequences of these acts.<sup>63</sup> Although at first this appears to be a valid defense, upon closer examination this theory is flawed.

While it is correct that a master is not liable for the torts of his servants committed while acting outside their scope of employment, the Restatement (second) of Agency lists four exceptions to the general rule. The two exceptions which are applicable to quid pro quo sexual harassment claims are that the:

- (b) "master was negligent or reckless, or...
- (d) The servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation."<sup>64</sup>

The first exception cited is exemplified in the Eighth Circuit case of Hall v. Gus Construction Co.<sup>65</sup> In Hall, the plaintiffs were a group of women who work on one of the company's crews and were subject to various sorts of sexual harassment by their co-workers.<sup>66</sup> Although the court acknowledges that the harassment was not within the scope of employment it still imposed liability on the employer stating:

[A]n employer is directly liable...for those torts committed against one employee by another, whether or not committed in furtherance of the employer's business, that the employer could have prevented by reasonable care in hiring, supervising, or if necessary firing the tortfeasor.<sup>67</sup>

Therefore, although an act of sexual harassment may be outside the scope of employment, the employer may still be held liable if the plaintiff can prove that the employer was negligent in hiring, or supervising the supervisor.

Strict liability may be imposed by the second aforementioned exception when the supervisor uses the existence of the agency relation to accomplish his tort. This exception is the very basis upon which quid pro quo sexual harassment claims are based. By simply being in the position to hire, make recommendations, promote, supervise, and fire an employee, a supervisor has the capability and power by the existence of his agency relationship with the employer, to carry out all forms of sexual harassment. It would, therefore, be grossly inequitable to refuse to impose direct liability on an employer when one of its supervisors uses his relationship with his employer to sexually harass employees under him.

#### Hostile Environment Harassment

The primary procedure to proving a hostile environment sexual harassment was set forth by the eleventh circuit in Henson v. City of Dundee.<sup>68</sup> The court made it demonstrably clear that an employee's psychological well being is a term and condition of employment. The court further declared that the issue of sexual harassment must be viewed under the totality of circumstances. Finally, once the plaintiff establishes the five elements outlined in Henson the second and third step of the McDonnell Douglas test are triggered.

The Henson test has not been used without criticism. The element concerning the unwelcomeness of the harassment, as well as, the element regarding employer liability has<sup>69</sup> come under fire. The sixth circuit case of Rabidue v. Osceola Refining Co.<sup>70</sup> provides an excellent illustration of the shortcomings of the unwelcomeness requirement.

Vivienne Rabidue was the only female administrative assistant at the Osceola Refining Company. After her discharge in 1977, she filed a sexual harassment claim against her employer. She charged that her employer's refusal to stop the display of pornographic posters in private offices and common work areas at the company plant, as well as anti-female obscenities directed at her and other women by a co-worker in another department, constituted sexual discrimination in violation of Title VII.<sup>71</sup> Furthermore, she introduced evidence that she had been denied various managerial privileges accorded to male employees and in other ways had been given secondary status in the company.<sup>72</sup>

The conduct which Rabidue complained of was not mild and ambiguous. Pictures of nude and scantily clad women abounded at the company, including one that had hung on the wall for eight years. This poster depicted a prone woman with a golf ball on her breasts, straddled by a man holding a golf club and yelling, "Fore".<sup>73</sup> The language of co-workers was equally offensive. They engaged in generally uncooperative behavior that impaired Rabidue's ability to perform her job effectively.<sup>74</sup>

In writing for the majority, and applying the "reasonable man" standard in deciding whether or not the conduct complained of was unwelcome, Judge Krupansky held that the conduct complained of was not sufficiently severe or pervasive to alter the conditions of their employment. The court characterized the conduct as a legitimate expression of the cultural norms of the workers at the employer's plant and stated:

[I]t cannot be disputed that in some work environments humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlee magazines may abound. Title VII was not meant to or can change this. It must never be forgotten that Title VII is the federal court's mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.<sup>75</sup>

The court further argued that Rabidue had voluntarily and knowingly entered the Osceola workplace and therefore could not complain about the conditions she encountered there.<sup>76</sup> Hence, Rabidue was denied any relief under Title VII.

Despite the fact that the court attempted to make a proper assignment regarding the alleged sexual harassment at Osceola, the opinion in Rabidue reflected patriarchal attitudes about women. In the court's assertion that a proper assessment of a hostile environment claim includes evidence

about the personality of the plaintiff,<sup>77</sup> the court minimized the conduct engaged in at Osceola and reflected the common male attitude that the victim of harassment is to blame for her mistreatment.<sup>78</sup> Many men believe that women can avoid harassment if they behave properly and that the tactful registering of a complaint is usually an effective way of dealing with harassment when it occurs.<sup>79</sup> Clearly the court's focus on the character of the victim<sup>80</sup> echoes these male attitudes and thus undermines the "neutrality" of its analysis.

It has, therefore, been argued that by employing the reasonable man standard the courts cannot provide a neutral basis for the definition of discrimination because the courts' neutral analysis contains a hidden male perspective. In lieu of this the dissent in Rabidue advocated the use of the reasonable victim standard.<sup>81</sup>

Although the sixth circuit has not expressly overturned its own decision in Rabidue, it has called Rabidue into question in at least two subsequent opinions. In Vates v. Avco<sup>82</sup>, the court stated, "We acknowledge that men and women are vulnerable in different ways and offended by different behavior."<sup>83</sup> In lieu of this, the court adopted the "reasonable victim" standard which was one of the main arguments in the Rabidue dissent.

In Davis v. Monsanto Chemical Co.<sup>84</sup>, the sixth circuit criticized Rabidue's limited reading of Title VII. Specifically, the court qualified its statement in Rabidue that read "Title VII [was] not designed to bring about a magical transformation in the social mores of American workers."<sup>85</sup> The court, in Davis, emphasized:

In reading this passage, however, one should place the emphasis on the word "magical" not the word "transformation." Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers.<sup>86</sup>

In addition to the sixth circuit questioning its decision in Rabidue, other courts have rejected it in its entirety. For instance, in 1991, the ninth circuit in Ellison v. Brady<sup>87</sup> adopted the reasonable woman standard as opposed to the reasonable man standard. Kerry Ellison worked as a revenue agent for the Internal Revenue Service in San Mateo, California.<sup>88</sup> After turning down several requests for dates from a co-worker, she began to receive "love letters."<sup>89</sup> The court explicitly rejected the reasoning in Rabidue and employed the reasonable woman standard because men and women have different opinions of what type of conduct is objectionable.<sup>90</sup> In fact, the court stated that "If we only

examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination."<sup>91</sup> Therefore, a plaintiff can prove a prima facie case for hostile environment sexual harassment by showing "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."<sup>92</sup>

A few district courts across the country have also adopted the reasonable woman standard. In Spencer v. General Electric Co.<sup>93</sup>, the District Court for the Eastern District of Virginia employed the reasonable woman standard and found "[t]hat the conduct complained of would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable female employee."<sup>94</sup> Similarly, the District Court for the Middle District of Florida in Robinson v. Jacksonville Shipyard, Inc.<sup>95</sup> used the reasonable woman standard to determine that pervasive pornographic pictures, sexual comments, verbal harassment, abusive graffiti, and unwelcome touching of some of the plaintiff's female co-workers created a hostile environment.<sup>96</sup> Finally, as recently as October, 1992, the District Court of Nevada in Canada v. The Boyd Group, Inc.<sup>97</sup> used the reasonable woman standard in denying the defendant's motion for summary judgement.<sup>98</sup>

Notwithstanding this seeming emergence of the reasonable woman standard, the reasonable person standard can not be so easily discarded. In the recent unanimous Supreme Court decision regarding Harris, the court discarded the reasonable woman standard in favor of the reasonable person standard removing gender from the harassment issue.<sup>99</sup>

The facts of the case reveal that Teresa Harris, a former rental manager of Forklift Systems, was allegedly subjected to unwanted sexual comments by the owner. Harris accused the owner of making derogatory comments such as, "[l]et's go to the Holiday Inn to negotiate your raise;" forcing Harris and other female employees to retrieve coins from his front pocket; and throwing things on the floor, then asking women to pick them up while he commented suggestively on their clothes.<sup>100</sup> Although the trial judge acknowledged that the owner's behavior was crude, vulgar, and offensive, he ruled against Harris because he found that she had not suffered serious psychological injury.<sup>101</sup> The Supreme Court, Harris v. Forklift Systems, Inc., struck down the narrow interpretation of the federal sexual harassment law, instead taking a middle of the road approach stating, "a discriminatory abusive work environment, even one that does not seriously affect the employee's psychological well-being, can and often will detract from the employee's job performance, discourage employees from remaining on the job or keep them from advancing their careers."<sup>102</sup>

Notwithstanding which standard is used, once a plaintiff proves that the sexual harassment has in fact occurred, he or she is burdened with the additional task of proving employer

liability.<sup>103</sup> The fourth circuit in Katz v. Dole<sup>104</sup> further refined the analytical framework of Henson and opined that:

the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action. The plaintiff may do this by proving that complaints were lodged with the employee or that the harassment was so pervasive that the employer's awareness may be inferred. Thus, we posit a two step analysis. First the plaintiff must make a prima facie showing that sexually harassing actions took place and if this is done, the employer may rebut the showing either directly, by proving the events did not take place, or indirectly by showing that they were isolated or trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment, and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.<sup>105</sup>

Applying its own rule, the court in Katz imposed liability on the employee even though the agency did have an anti-harassment policy in place because it was not effective and was known to be not effective by the employer's supervisors.<sup>106</sup>

Not all plaintiffs have been as fortunate as Ms. Katz. The seventh circuit has held that a female factory worker failed to establish a Title VII claim when her claim was based on a single incident in which a co-worker made crude physical jokes in the guise of a sexual advance and the employees promptly disciplined the co-worker and the behavior was not repeated.<sup>107</sup> Similarly, a discharged engineering technician failed to establish a claim of hostile environment sexual harassment at a glass factory where sexually suggestive nude photos were circulated at the plant. The use of gender-based references to personnel, and whistles from male co-workers were met with prompt, remedial management attention.<sup>108</sup>

### Part III - The Civil Rights Act of 1991

Legal liability for unlawful acts of sexual harassment is now accompanied by significant monetary liability as a result of the Civil Rights Act of 1991.<sup>109</sup> Signed by President Bush on November 21, 1991, the Act has implemented a series of sweeping changes to federal anti-discrimination laws that expands the scope and amount of monetary relief available to prevailing plaintiffs, and also expands the types of conduct that may be deemed discriminatory under the law.<sup>110</sup> The Act went into effect on the date of enactment and is not retroactive.<sup>111</sup>

With passage of the amended law, a sexually harassed employee can now sue for more than the remedies available under Title VII which are injunctive relief and/or reinstatement, back pay, front pay and attorney's fees. Section 102 of the Civil Rights Act of 1991 provides for the possibility of recovery of compensatory punitive damages for victims of intentional employment discrimination on the basis of sex, religion, and disability.<sup>112</sup> A sexually harassed employee may therefore, sue for the pain and suffering caused by the discrimination (compensatory damages) and for an additional amount that serves to punish the employer (punitive damages).<sup>113</sup> Punitive damages are available when the employer deliberately planned to discriminate against an employee or acted without caring whether or not the employee would suffer when it was obvious that the employee would suffer.<sup>114</sup>

The damage awards granted under the new act are capped at \$50,000 for companies of 100 or fewer workers, \$100,000 for companies with 101 to 200 employees, \$200,000 for employers with 201 to 500 employees and \$300,000 for employees of over 500 employees.<sup>115</sup>

In addition, jury trials are now available in Title VII claims by any party to a discrimination action if the complaining party seeks compensatory or punitive damages.<sup>116</sup> Furthermore, since experts play an important role in sexual harassment cases,<sup>117</sup> the 1991 Act provides that expert witness fees are available in Title VII cases.<sup>118</sup>

### Part IV Steps Employers Can Take to Avoid Liability

In addition to refuting the elements to a sexual harassment claim<sup>119</sup> an employer may improve the possibility of avoiding liability by implementing a strong viable anti-harassment policy. A strong policy promotes an understanding of harassment throughout an organization and makes everyone aware of the legal consequences of violating the policy. Having a written policy can reduce the risk of liability because harassment is least likely to occur when employees are aware of the rules.<sup>120</sup> As one commenter has said "Once a

company has a corporate policy, men are much more careful. Policies make employees more aware.<sup>121</sup> It is therefore imperative that all companies devise a policy that:

- states that sexual harassment will not be tolerated
- defines both quid pro quo and hostile environment harassment
- outlines a procedure for employees to make complaints about sexual harassment to a person with authority to resolve the complaint.
- guarantees that all complaints will be treated confidentially.
- guarantees that employees who complain about sexual harassment will not suffer adverse job consequences as a result of the complaint, and
- states that an employee who engages in sexual harassment is subject to discipline up to and including discharge.<sup>122</sup>

The company's policy should be outlined in a memo and distributed to all employees "using whatever the usual trusted mechanisms of the company are..."<sup>123</sup> The anti-harassment policy should also be contained, in its entirety, in any employee handbook that the company may furnish.

The procedure for filing of complaints should encourage employees to come forward and report the incidents of sexual harassment. It is important that there are at least two employees of the company in high level positions who will investigate the allegations and make the appropriate recommendations. It would be prudent to make sure that these two employees are from different departments in case the alleged harassment claim is against one of these individuals.

All complaints should be handled in a serious matter and investigated confidentially by trained personnel. The investigator should not only investigate the act complained of but should also find out if the employer was aware of any other instances of harassment.<sup>124</sup> Once the investigation is complete, the investigator should meet with management and recommend the possible remedial actions that should be taken.

The employer's remedial action should be reasonably calculated to end the harassment, make the action whole and prevent any future misconduct. By taking immediate remedial action, an employer has utilized his best defense to Title VII claims.<sup>125</sup> Normally if the EEOC finds that the harassment has been eliminated, the victim made whole, and the preventive measures instituted, it will normally drop the charge.

In addition to the implementation of a strong anti-harassment policy, employers must educate their employees as



to what conduct the law considers to be sexual harassment. The education program must stress that any type of unwelcome sexual conduct is strictly prohibited. Furthermore, the program should stress that an employee who voluntarily partakes in such conduct may still consider it unwelcome but feel as if she has no choice but to submit to such conduct.

Finally, educating the employees about the existence of and the matter in which an anti-harassment complaint procedure operates is as important as the details of the procedure itself. This may be accomplished through training seminars, that should be ongoing and presented on company time.

Moreover, whatever policy a given company asserts as a defense will have little effect if the court deems that such policy was neither known or readily acceptable to the employees.<sup>126</sup>

#### Part V Conclusion

In light of the popularity and political correctness of sexual harassment claims since the Thomas hearing, it is imperative that an employer takes the appropriate steps to limit his or her liability. Therefore, since the standard for liability has not yet been clearly expressed by the Supreme Court, the best way for an employer to escape liability is through prevention. The employer should not only implement a sexual harassment policy, but should also educate their employees as to what constitutes sexual harassment, develop appropriate sanctions, and inform employees of their right to raise the issue under Title VII. Once an employer has done this, a court will be reluctant to find liability if the implemented policy had been adhered to.

#### ENDNOTES

1. Gross, Jane, "Suffering in Silence No more, Women Fight Back in Sexual Harassment," New York Times Monday 13 July 1992 2P. A1, col.2.

2. 42 U.S.C. §2000 e-2 (a)(1) (1988) Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer...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 an individual's race, color, religion, sex or national origin..." Id.

The goal of eliminating employment discrimination has also been a goal on the state level. i.e., New York has enacted the "New York Human Rights Law," New York Executive Law §§290-301 (McKinney 1982 and Supp 1993) The statute covers employers who

employ four or more people, licensing agencies employment agencies as well as labor organizations.

3. U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Workplace: Is it a Problem?" 36 (1981).

4. U.S. Merit Systems Protection Board, "Sexual Harassment in the Federal Government: An Update" (1988) (hereinafter Merit Board Survey).

5. Kantrowitz, Barbara "Striking a Nerve" Newsweek October 21, 1991. In a 1990 Defense Department study, 64% of military women said they had endured such abuse.

6. Although men may also be victims of sexual harassment, this article focuses on female victims because the percentage of women who are sexually harassed far outnumber the number of men. The percentage of males experiencing sexual harassment was 14% in 1988. This represented a one percent drop from the Merit Board survey of 1981 Merit Board Survey. See note 3 supra.

7. Krista S. Schoenheider. "A theory of tort Liability for Sexual Harassment in the Workplace", 134 U. Pa. L Rev. 1461, 1464-65 (1986).

8. Merit Board Survey at note 4 supra.

9. Id.

10. The EEOC Guidelines define sexual harassment as follows:

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 or 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 work environment.

29 CFR §1604.11(a)

11. In William v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) a district court held for the first time that sexual harassment fell within the meaning of sex discrimination in Title VII of the Civil Rights Act of 1964.

12. See, e.g., Jane Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975) (sexual harassment not actionable because acts complained of were not sufficiently tied to the workplace, not "based on sex," and the "conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism...; [the offender]

was satisfying a personal urge"), vacated and remanded, 562 F.2d 55 (9th Cir. 1977); Paulette Barnes v. Russell Train, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974) (alleged discrimination attributed not to plaintiff's sex, but to her refusal to have sexual relations with her supervisor, which resulted in an "inharmonious personal relationship," no evidence of a gender-based barrier to employment found), rev'd sub nom. Paulette Barnes v. Douglas Costle, 561 F.2d 983 (D.D.C. Cir. 1977).

13.13 Fair Empl Prac. Cas. (BNA) 123, 124 (D.D.C. 1974).

14. See Skousen v. Nidy, 90 Ariz. 215, 367 P 2d 248 (1961) (punitive damages and award for mental suffering, including "shame," appropriate for 65-year-old woman harassed by employee assault and battery proven); Mitra v. Williamson, 21 Misc 2d 106, 197 N.Y.S. 2d 689 (1960) (damages allowed for public disgrace, humiliation, mental and physical distress from obscene phone calls and letter); Edmisten v. Dousette, 334 S. W.2d 746 (Mo. App. 1960) (damages for worsened nervous condition resulting from physical advance). Similarly, in criminal actions, the taking of "indecent liberties or familiarities" with a female, or the purposeful infliction of shame or disrepute, were aggravating circumstances in many state assault and battery laws during this period. See, for example, Maine v. Towers, 304 A.2d 75 (Me. 1973); South Carolina v. Hollman, 245 S.C. 362, 140 S.E. 2d 597 (1965).

For a discussion of tort claims in sexual harassment cases see, comment, "A Theory of Tort Liability for Sexual Harassment in the Workplace," 134 U.Pa.L.Rev. 1461 (1986).

15.110 Cong. Rec 2577-82, 2851 (1964) (The word "sex" was added by Rep. Smith on Feb 8, 1964 in an attempt to defeat Title VII's passage.)

16. Title VII of the 1964 Civil Rights Act, §704, 42 USC §2000e-3(a) 1991.

17. Williams, 413 F. Supp. at 654.

18. Id. at 662.

19. First circuit: Fisher v. Flynn, 598 F.2d. 663, 665 (1st Cir. 1979).

Third circuit: Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976). rev'd, 568 F2d 1044, 1048-49 (3rd Cir. 1977).

Fourth circuit: Garber v. Saxon Business Prods., 14 Empl. Prac. Dec. (CCH) ¶7586 (E.D. Va. 1976), rev'd, 552 F2d 1032 (4th Cir. 1977).

Sixth circuit: Munform v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).

Ninth circuit: Miller v. Bank of Amer., 418 F. Supp. 233 (N.D. Cal. 1976), rev'd 600 F.2d 211 (9th Cir. 1979).

Tenth circuit: Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1388 (D. Colo. 1978).

District of Columbia Circuit: Barnes v. Costle, 561 F. 2d 983, 992 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F 2d 1240 (D.C. Cir. 1978), remanded for trial de novo sub nom. Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980).

20.29 CFR§ 1604.11(a) (1991).

21. "Defining Sexual Harassment" excerpt from Sexual Harassment: Walking the Corporate Fine Line, Training Program Workbook, (New York: National Organization of Women Legal Defense and Education Fund (NOWLDEF) 1988), p.1.

22.29 CFR §1604.11 (a-g) (1980).

23.29 CFR § 1604.11 (A) (1991) (emphasis added).

24. The EEOC guidelines are only inter-agency regulations and are therefore not binding on the Courts. However, courts have adopted the guidelines or portions thereof. See e.g., Meritor Savings Bank v. Vinson, 77 US 57, 57 (1986); such regulations constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance. Id. at 65 quoting General Electric v. Gilbert, 429 US 125,141-142 (1976).

25. See Waltman v. International Paper, Co., 875 F.2d 468, 477 (5th Cir. 1989).

26.29 CFR §1604.11 (C,) (D) (1991) (emphasis added). Furthermore the Guidelines provide for employer liability for sexual harassment by fellow employees when the employer knew or should have known of the harassing conduct.

27. See Jones v. Flagship Int'l., 793 F.2d 714, 720 (5th Cir. 1986); Moylan v. Maries County, 792 F.2d 746, 750 (8th Cir. 1986); Downes v. Federal Aviation Admin., 775 F.2d 288, 292-93 (Fed. Cir. 1985); Katz v. Dole, 709 F.2d 251, 254-56 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326-27 (S.D. Miss. 1986); Mitchell v. OsAir, Inc., 629 F. Supp. 636, 643 (N.D. Ohio 1986); Arnold v. City of Seminole, 614 F. Supp. 853, 868 (D.C. Okla. 1985); Harrison v. Reed Rubber Co., 603 F. Supp. 1457, 1461 (E.D. Mo. 1985); Ambrose v. United States Steel Corp., 38 Empl. Prac. Dec. (CCH) 35,641 (N.D. Cal. 1985); Zabkowitz v. West Bend Co., 589 F. Supp. 780, 783 (E. D. Wis 1984); Hayden v. Atlanta Newspapers, 534 F. Supp. 1166, 1178 (N.D. Ga. 1982); Coley v. Consol. Rail Corp., 561 F. Supp 645, 649 (E.D. Mich, 1982); Morgan v. Hertz Corp., 542 F. Supp. 123,128 (W.D. Tenn, 1981); Caldwell v. Hodgeman, EEOC Dec 81-18, 25 Fair Empl. Prac. Cas. (BNA) 1647, 1649 (Mass. Dist. Ct. 1981); EEOC Dec 81-17 27 Fair Empl. Prac. Cas. (BNA) 1791, 1793 (1981).

28. Bundy v. Jackson, 641 F.2d 934 (DC Cir 1981).

29. See Rogers v. EEOC, 454 F.2d 234, (5Cu 1972), cert. denied, 406 US 957(1972) employee liable for creating an hostile work environment for Hispanic employees in violation of there Title VII rights) Id. at 238.

30. Bundy at 940 quoting Rogers v EEOC, 454 F.2d 234, 239 (5th Cir. 1971).

31. Id. at 945 The Bundy court explained that: "conditions of employment include the psychological and emotional work environment that the sexually stereotyped insults and demeaning propositions to which she was indisputably subjected and which caused her anxiety debilitation,... illegally poisoned the environment. Id. at 944.

32. Henson v. City of Dundee, 682 F.2d 897 (11 Cir. 1982).

33. Id. at 899.

34. Id. at 903-905.

35. Meritor Savings Bank FSB v. Vinson, 477 US 57 (1986).

36. For a detailed analysis on the effects of the Supreme Court's decision in Meritor, see., Ecabeert, Gayle, "An employer's Guide to Understanding Liability for Sexual Harassment Under Title VII: Meritor Savings Bank v. Vinson." 55 U. Cin. L. Rev. 1181 (1987); Anderson, Katherine, "Employer Liability Under Title VII for sexual harassment after Meritor Savings Bank v. Vinson." 87 Colum L. Rev. 1258 (1987); Turner, Ronald, "Employer Liability Under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of Meritor Savings Bank, FSB v. Vinson." 33 How. L. Rev. 51 (1990); Barton, Christopher, "Between the Boss and a Hard Place: A consideration of Meritor Savings Bank FSB v. Vinson and the law of Sexual Harassment" 67 B.U. L. Rev. 445 (1987); Phillips, Michael "Employer Sexual Harassment Liability Under Agency Principles: A second look at Meritor Savings Bank, FSBV Vinson." 44 Vand L. Rev 1229 (1991), Vinciguerra, Marlisa. "The Aftermath of Meritor: A search for standards in the Law of Sexual Harassment 99" Yale LS 1177 (1990).

37. Meritor, at 59.

38. Id. at 60. At the time Vinson sought injunctive relief, compensatory and punitive damages against Taylor and the bank, as well as attorney's fees.

39. Id. Vinson also testified that Taylor touched and fondled other women employees but the district court did not allow her "to present wholesale evidence of a pattern or practice relating to sexual advances to other female employees in her case in chief..." Id. at 61.

40. Id. at 61, quoting Vinson v. Taylor 23. For Empl Prac Cas (BNA) 37,39 (D.D.C. 1980).

41. Vinson at 42.

42. 243 U.S. App. D.C. 323., 753 F.2d 141 (1985).

43. See Notes 28-31 and accompanying text.

44. 243 U.S. App. D.C. at 327, 753 F.2d at 15.

45. 243 U.S. App. D.C., at 332, 753 F.2d at 150.

46. 243 U.S. App. D.C. at 330, 753 F.2d at 147.

47. Meritor, 477 U.S. at 64. Therefore the court concluded that an employee does not have to suffer from a tangible job benefit in order to recover under Title VII. See, Los Angeles Department of Water v. Manhart, 435 U.S. 702, 707 N. 13 (1978), quoting Sprogis v. United Air Lines, Inc. 444 F.2d 1194, 1198 (1971).

48. See notes 23-26 and accompanying text.

49. Meritor, 477 US at 67 (citations omitted).

50. Id. at 72.

51. Id. The court continued, "while such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any agent of an employer... surely evidences an attempt to place some limits on the acts of employees for which employers under Title VII are to be held responsible."

52. Id. at 72-73.

53. Generally the plaintiff must show that tangible job benefits are conditioned on an employee's submission to conduct of a sexual nature and that adverse job consequences result from employee's refusal to submit to the conduct." Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir 1987). See also notes 18-21 and accompanying text.

54. McDonnell Douglas v. Green, 411 U.S. 792 (1973).

55. Bundy, 641 F2d at 953. It should be noted a women may also recover via a quid pro quo sexual harassment claim based on a hostile environment created by supervisors who preferentially treat female employees who did submit to their sexual advance.

[S]uch conduct created a hostile or offensive work environment which affected the motivation and work performance of those who found such conduct repugnant and offensive... [P]laintiff and other women... found the sexual conduct and

its accompanying manifestations which [the] managers engaged in over a protracted period of time to be offensive.

Juliano, Ann, "Did She Ask for it?: The "Unwelcome" Requirement in Sexual Harassment Cases." 77 Cornell L. Rev. 1558, 1566 N. 53 (1992) (quoting Broderick v. Ruder, 685 F. Supp 1269 (D.D.C. 1988). (hereafter the Unwelcome Requirement).

56. Sowers v. Kemira, Inc. 46 Fair Empl Prac Cas (BNA) 1825 (SD GA 1988). However, evidence of the alleged victim's dress and conduct is also admitted Meritor 477 US at 69.

57. See generally Restatement (second) of Agency § 219-237 (1958).

58. Shrout v. The Black Clawson Co., 689 F. Supp 774 (S D Ohio 1988).

59. Id. at 779.

60. Id. at 780 (quoting Highlander v. KFC National Management Co., 805 F.2d 644, 648 (6th Cir 1986).

61. Sowers v. Kemira, 701 F. Supp 809 (S D Georgia 1988).

62. Id. at 824 (quoting Henson 682 F.2d at 910).

63. This agreement is analogous to the agency principle that "a master is not subject to liability for the torts of his servant while acting outside the scope of his employment..." Restatement (Second) Agency 219(2) (1958).

64. Restatement (second) Agency 219 (2) (b) and (d).

65. Hall v. Gus Construction Co., 842 F.2d 1010 (8th Cir. 1988). Although this case was primarily a hostile environment sexual harassment case the reasoning of the court provides an excellent example of how an employer may be found liable due to his own negligence.

66. The harassment included having nicknames such as "Herpe," "Blond Bitch" and "Cavern Cunt;" being asked if they "wanted to fuck;" and physical touching. Id. at 1012.

67. Id. at 1016.

68. See notes 32, 33 supra and accompanying text for description of Henson and the eleventh circuit five point test of hostile environment sexual harassment claims.

69. In contrast to Henson the third circuit, in Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3rd Cir 1990) did not require that the harassment be unwelcome. Instead the court relied on the objective and subjective effect the discrimination has on the plaintiff. The most recent tenth circuit decisions also do not require the element

of "unwelcomeness" see "The Unwelcome Requirement" 77 Cornell L. Rev 1558, 1571 N. 90 (1992).

70. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) cert. denied 1107 S. Ct. 1983 (1987).

71. Rabidue, at 615.

72. Id. at 624 (Keith J. dissenting).

73. Id.

74. Id.

75. Id. at 620 (quoting Rabidue v. Osceole Ref. Co., 584 F. Supp. 419, 430 (ED Mich. 1984).

76. Id.

77. The majority of the court presented the plaintiff as an excessively sensitive obnoxious woman who was incapable of getting along with others. The court also trivialized the conduct to which she was subjected. Rabidue at 622.

78. Collins and Blodgett "Sexual Harassment...Some See It, Some Won't". Vol. 68 Harvard Business Review (March-April) 76, 90 (many victims of harassment feel guilty and somehow to blame for what happened because of prevailing male attitudes.)

79. Id.

80. The court in Rabidue used the following factors in deciding the case:

the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environments coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.

Rabidue, 805 F.2d at 620.

81. Rabidue, 805 F.2d, at 626 (Keith dissenting) the dissent noted that the relevant inquiry is what would be offensive to the reasonable woman, not to society, "which at one point also condoned slavery". Id. at 627 (Keith J. dissenting).

82. Yates v. Avco Corp., 819 F.2d 630, (6th Cir. 1987).

83. Id. at 637 (quoting Rabidue 805 F.2d 611, 626 (Keith, dissenting)).

84. Davis v. Monsanto Chemical Co., 858 F.2d 345, (6th Cir 1988) Cert denied, 490 US 1110 (1989).

85. Rabidue, 584 F. Supp at 430. See also notes 62-64 and accompanying text.

86. Davis, 858 F.2d at 350. The court went on to state: "...while Title VII does not require an employer to file all "Archie Bunkers" in its employ, the law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers." Id.

87. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

88. Id. at 873.

89. Id. at 874. The letters included letters such as "I cried over you last night and I'm totally drained today." and "I have enjoyed you so much over the past few months. Watching you." Id.

90. Id. at 878. The court stated, "[W]e believe that in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim." Id.

91. Id.

92. Id. at 879.

93. Spencer v. General Electric Co., 697 F. Supp 204. (E.D. Va. 1988), affd 894 F.2d 651 (4th Cir. 1990).

94. Id. at 218. The alleged harassing conduct included sexual comments and suggestive behavior of plaintiff's superior such as sitting on female worker's laps and talking about the length of his penis.

95. Robinson v. Jacksonville Shipyard, Inc., 760 F. Supp 1486, (M.D. Fla. 1991).

96. Id. at 1524.

97. Canada v. The Boyd Group, Inc., 809 F.Supp 771 (D.C. Nev. 1992).

98. Id. at 776. The court stated: A prima facie case of hostile environment sexual harassment exists when a female employee alleges conduct that "a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Id. (quoting Ellison v. Brady 924 F.2d 872, 879 (9th Cir 1991)).

99. Harris v. Forklift Systems, Inc., 114 U.S. 367 (1993).

100. Harris, 60 Empl. Prac. Dec (CCH) at 42075.

101. Id.

102. Harris, at 370.

103. See note 33 and accompanying text. The fifth point of the Henson test is that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

104. Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

105. Id. at 254-56 (footnotes omitted).

106. Id. at 256.

107. Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990).

108. Tunes v. Corning Glass Works, 747 F. Supp 951 (S.D. NY 1990).

109. Pub L No. 102-166. 105 STAT. 701 (1991).

110. Furfaro, John and Josephson, Maury. "The Civil Rights Act of 1991," New York Law Journal (New York Law Publishing Co. 1992) Friday 3, April 1992, Volume 207, No. 64.

111. Whether or not the Act applies to cases pending at the time of enactment is still under dispute. See eg. Mojica v. Gannett Co., 57 Fair Empl Prac Cas (BNA) 537 (ND Ill 1991) (presumption of retroactivity) but see James v. American International Recovery, No. 1:j9-CV-321 (ND Ga. 1991).

112. Under the prior law, damage awards were only available to victims of intentional or ethnic discrimination. See Conte, Alba Sexual Harassment in the Workplace: Law and Practice, Wiley Law Publications, See 2.21 (1990 and 1992 Supp.).

113. Furfara supra note 75 at ed.

114. Overview of Federal Sexual Harassment Law. (New York: NOW LDEF 1991) p. 9.

115. See Conte, supra note 77.

116. Pub L. No 102-166 See 102, 1977A(c).

117. See eg. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp 1486 (MD. Fla. 1991) (The court relied on expert testimony to conclude that pin ups of nude and partially nude women and demeaning sexual remarks, created a hostile work environment).

118. Pub L. No 102-166, Sec 113 105 Statut 1079.

119. Conte, note 77 supra 7.1-7.17 eg. Conduct was not discriminatory. Conduct was welcome. Conditions and terms of employment not affected. Employer had no notice and employee took

prompt and appropriate remedial action.

120. Burns, Sarah. "Grounds of Action for Sexual Harassment," Sexual Harassment in the Workplace Litigation, (New York: NOW LDEF 1990) p. 2.

121. Moskal, Brian. "Sexual Harassment: An Update." Industry Week. November 18, 1991.

122. "Sexual Harassment Manual for Managers and Supervisors," CCH Business Law Editors, Commercial Cleaning House Inc. (1992) (hereinafter "Sexual Harassment Manual")

123. Bravo, Ellen and Cassidy, Ellen. The 9 to 5 Guide to Combating Sexual Harassment. (New York) John Wiley and Son, Inc. (1992) p. 101.

124. "Guidelines to Advocates: Effective Complaint and Investigation Procedures for Workplace ." Sexual Harassment. (New York: NOW LDEF) p. 4.

125. Although the Supreme Court decision in Meritor rejected the employer's contention that the mere existence of a grievance procedure and a policy against discrimination, coupled with [the plaintiff's] failure to invoke that procedure, must insulate [the employer] from liability. (Meritor, 477 U.S. at 72). Courts have denied such claims on that basis. See eg. Monroe-Lord v. Hytche, 668 F. Supp 979 (D. Md. 1987), aff'd, 854 F 2d 1317 (4 Cn 1988).

126. For samples of sexual harassment policies see Approaches to Affirmative Action The Bureau of National Affairs (1992) p. 47-48, "Sexual Harassment Manual" supra note 87 p. 46.

COMMERCIAL PAPER FORGERIES: A COMPLETE

ONE-HOUR LESSON

by

Arthur M. Magaldi\*

The members of the Academy of Legal Studies in Business have increasingly turned their attention and emphasis to the pedagogical aspect of our profession. This increased interest in the actual teaching of our material has given rise to many initiatives, for example, the publication of the Journal of Legal Studies Education and a teaching symposium at the annual convention of the Academy. In that collegial spirit of sharing teaching ideas which have been effectively used in the classroom, the following material is submitted as a lesson which students have found to be worthwhile. No suggestion is made that it is a model lesson. It is a lesson, however, which develops in a concise manner a number of principles concerning commercial paper forgeries. The lesson also develops a number of learning aids for students.

Implicit in the writing of this paper is the strongly held belief of the author that it is valuable for teachers of business law/legal environment courses to make available to colleagues approaches that have been found pedagogically effective. The lesson includes some mild attempts at levity, but they are not essential to the structure of the lesson. An outline of the lesson is provided in Appendix A.

The lesson on forgeries begins with the instructor asking the students a rather simple question: "What does the bank contract to do, in general terms, when a depositor opens a checking account?" After eliciting a number of responses, the instructor leads the students to the conclusion that the bank agrees to pay properly drawn checks on the account to the holders of the checks up to the balance in the account. The instructor may write the terms "properly drawn" and "holders" on the chalkboard for emphasis.

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