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## Employer: Beware of "Hostile Environment" Sexual Harassment

The women's rights movement has progressed to the point where it has become a common occurrence to see women emerging as corporate executives, members of Congress, and Presidential candidates. At the same time, women have entered the workforce of American businesses at a rate greater than ever. Proportionate to the emergence of the woman worker in America is the greater increase of incidents of sexual harassment of working women by males. Sexual harassment has been defined as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."<sup>1</sup> This definition encompasses all types of harassment including harassment of men by women and men or women by members of the same sex.<sup>2</sup> Sexual harassment is a form of discrimination in employment and is a cognizable violation of section 703 of Title VII of the Civil Rights Act of 1964.<sup>3</sup> In 1980, the Equal Employment Opportunity Commission (EEOC) promulgated guidelines in which sexual harassment was further defined:

(a) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a 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.<sup>4</sup>

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1. MacKinnon, *Sexual Harassment of Working Women* 1 (1979) [hereinafter cited as MacKinnon].

2. For the purposes of this article the term "sexual harassment" will describe only harassment of women by men.

3. 42 U.S.C. § 2000e-2(a)(1) (1972).

The relevant portion of Title VII states: It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or 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.

See also *Meritor Savings Bank v. Vinson*, \_\_\_ U.S. \_\_\_, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986); *Ferguson v. E. I. DuPont de Nemours & Co., Inc.*, 560 F. Supp. 1172, 1196 (D. Del. 1983); Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) [hereinafter cited as "Guidelines"].

4. Guidelines, § 1604.11(a) *supra* note 3.

Recent case law<sup>5</sup> and some scholars<sup>6</sup> have divided sexual harassment into two distinct categories. The first category is described as *quid pro quo* sexual harassment.<sup>7</sup> This type of harassment is created when an employee's supervisor or a person of higher employment rank demands sexual favors from a subordinate in exchange for tangible job benefits.<sup>8</sup> The second type of sexual harassment is termed *hostile environment* sexual harassment.<sup>9</sup> This form of harassment comprises claims of women employees that have been subjected to an intimidating, hostile or offensive environment in which to work.<sup>10</sup> In a hostile environment claim, the female employee normally argues that, because of her sex, she is forced to tolerate abusive conditions in which to earn a living.<sup>11</sup> In such instances, she does not claim she was denied tangible job opportunities or benefits because of her gender.<sup>12</sup> Rather, she claims that the working environment has become polluted with verbal or physical abuses of a sexual nature.<sup>13</sup> Sexual

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5. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).

6. MacKinnon, at 32-47; *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449 (1984) [hereinafter cited as *Harassment Claims*].

7. MacKinnon, at 32-40. Professor MacKinnon stated that women's experiences of sexual harassment can be divided into two distinct categories, *quid pro quo* and *condition of work*.

8. Although the elements of a prima facie case for sexual harassment are not fully settled, see *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857 (N.D. Ohio 1982), the court in *Henson* outlined elements necessary to prove a prima facie case for sexual harassment under Title VII. However, *quid pro quo* sexual harassment is analytically similar to claims of sex or race discrimination based upon a disparate treatment theory, and as such, the traditional Title VII framework can be utilized. See also *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (holding that a plaintiff in disparate treatment cases must first establish a prima facie case. The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions, and the plaintiff then has the burden of persuading the trier of fact that the defendant's reasons were pretext).

9. The United States Supreme Court used the term hostile environment in referring to non *quid pro quo* type harassment. 106 S. Ct. at 2405. Professor MacKinnon uses the term *condition of work* to describe non *quid pro quo* sexual harassment. MacKinnon, at 32.

10. See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 432-33 (E.D. Mich. 1984), where the court thoroughly analyzed the EEOC guidelines and defined instances in which a working environment can become either intimidating, hostile, or offensive.

11. See *Harassment Claims* at 1455, *supra* note 6.

12. *Id.*

13. *Id.* See also MacKinnon, at 40; *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981).

harassment, based upon claims of a hostile environment, is actionable even where the victim does not suffer a tangible, economic harm.<sup>14</sup>

This article will focus on the hostile environment type of sexual harassment. Part I discusses a standard from which to assess conduct that is claimed to create a hostile environment. Part II discusses the corresponding responsibilities of employer and employee with regard to claims of hostile environment sexual harassment. Part III suggests a framework for employers seeking to eliminate this type of harassment from the workplace.<sup>15</sup>

### I. A STANDARD FOR ASSESSING HARASSING CONDUCT

The early decisions regarding sexual harassment as a cognizable cause of action conceptualize the problem as a personal rather than a social phenomena.<sup>16</sup> This conceptualization by the courts focused on the theory that sexual harassment would encompass only extremely outrageous and abusive behavior by powerful individuals over subordinates.<sup>17</sup> Such extreme behavior would probably be limited to firing a female employee who refused the sexual demands of her boss.<sup>18</sup> Limiting a cause of action for sexual harassment in this manner is a rather narrow approach to the problem and is contrary to Congress's intentions in enacting Title VII.<sup>19</sup> The goal behind the enactment of this statute was to eliminate discrimination from the workplace.<sup>20</sup>

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14. *Meritor Savings Bank*, 106 S. Ct. at 2406; *Bundy*, 641 F.2d at 943-44; *Henson*, 682 F.2d at 902. See also *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding that Congress, in enacting Title VII, intended to eliminate disparate treatment of men and women).

15. This article does not discuss employer liability for conduct which is deemed a violation of Title VII, it merely attempts to outline the standards utilized for determining at what point the working environment becomes unbearable to work in. It should be noted that in *quid pro quo* sexual harassment situations employers are liable under agency principles of *respondeat superior*. See *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Henson*, 682 F.2d at 910; *Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645, 650 (E.D. Mich. 1982). In hostile environment cases an employer is only liable if the employer knew or should have known of the activity. See *Katz*, 709 F.2d at 255; *Henson*, 682 F.2d at 905; *Bundy*, 641 F.2d at 943; *Coley*, 561 F. Supp. at 650.

16. See *Tompkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D. N.J. 1976), *rev'd*, 568 F.2d 1044, 1048-49 (3d Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233, 234 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Carne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977); see also *Harassment Claims supra* note 6, at 1452.

17. See *Harassment Claims* at 1452.

18. *Id.*

19. *Id.*

20. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1973).

Because harassing behavior takes many forms, from outrageous abuse, such as sexual assault and rape, to mere sexist comments, courts need to adopt a standard from which actionable conduct can be assessed. The United States Supreme Court, while not fully addressing the issue of what standard should be utilized, stated in *Meritor Savings Bank v. Vinson*<sup>21</sup> that in order to be actionable, sexual harassment must be "sufficiently severe or pervasive" such that one's working conditions have been altered and an abusive environment has been created.<sup>22</sup> The threshold question, therefore, is what conduct can be classified as severe and pervasive enough to meet this criterion? Do sexist remarks in the work environment amount to actionable harassment if the victim is an extreme feminist? A second threshold question, and perhaps fundamental to answering the first, is from whose viewpoint should the determination that conduct is outrageous be made? Should conduct be assessed objectively from the viewpoint of the reasonable supervisor, employer, or boss? Should conduct be assessed objectively from the viewpoint of the reasonable woman, victim or person? Perhaps conduct should be assessed subjectively from the particular viewpoint of the harasser or victim. Recent cases have not explicitly adopted a standard from which to make this important factual determination, rather, courts have been deciding sexual harassment claims based upon the particular facts of each case.<sup>23</sup>

As the following analysis will demonstrate, adopting a subjective standard in these cases will not serve the intent of Congress in eliminating abusive environments nor will the adoption of a subjective standard protect employers from frivolous lawsuits. The adoption of an objective standard from the reasonable employer's viewpoint would be too difficult to define and would all but eliminate the hostile environment claims. The correct standard to utilize in hostile environment cases is the objective standard from the viewpoint of the reasonable person in the same or similar circumstances. By assessing alleged harassing behavior from the viewpoint of the reasonable supervisor, courts run the risk of condoning conduct which

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21. \_\_\_\_ U.S. \_\_\_\_, 106 S. Ct. 2399, 91 L. Ed.2d 49 (1986).

22. *Id.* at 2406, quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

23. See *Barrett v. Omaha Nat'l Bank*, 584 F. Supp. 22, 29 (D. Neb. 1983); *Ferguson*, 560 F. Supp. at 1198; *Scott v. Sears Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986); *Robson v. Eva's Supermarket, Inc.*, 538 F. Supp. 857, 861 (N.D. Ohio 1982).

is not outrageous or severe. Adopting this approach would be akin to allowing male supervisors to harass or degrade female employees to the point where the harassment would become unreasonable. This would circumvent Congress' goal of eliminating all forms of discrimination from the workplace.<sup>24</sup>

The ideal working environment is one where employees and supervisors work together to achieve maximum efficiency. Both employer and employee hope that the work environment is amicable and friendly, but realistically speaking, personalities sometimes clash and the ambiance so often strived for in the work environment is unavoidably absent. In such circumstances, supervisors should not be permitted to use their powerful positions to abuse and degrade employees. Furthermore, the mythological reasonable supervisor would be extremely difficult to define because supervisors are as different as the job and the worker they supervise. Such a conceptualization would be virtually impossible because the reasonable supervisor could take varying forms, from friendly to indifferent, from task-oriented to goal-oriented. Therefore, adopting this standard would probably create a greater ambiguity than it would cure.

Utilizing a subjective standard from the viewpoint of the particular harassing supervisor to make determinations of fact regarding the specific allegations of harassment would also circumvent the mission of Title VII. This standard would allow a court to determine whether or not harassment had occurred based upon the subjective thought processes of the alleged harasser. In most instances of sexual harassment by a male supervisor of a female employee, the supervisor subjectively believed that his behavior was not problematic.<sup>25</sup> It is clear that males do not, as a rule, perceive sexual episodes as the assaults their victims believe them to be.<sup>26</sup> Hence, in many harassment situations, the female feels as though she is being subjected to sexual harassment, while her alleged harasser believes that his conduct is merely trivial and harmless. Therefore, if such a subjective standard were based upon the view of the harassing supervisor, then hostile environment sexual harassment claims would become virtually extinct.

Although the Guidelines state in section 1604.11(a)(3) that harassment has occurred if conduct has the *purpose* or effect of creating

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24. *Griggs*, 401 U.S. at 431.

25. See *Barrett*, 584 F. Supp. at 24; *Ferguson* 560 F. Supp. at 1182; *Walter v. KFGO Radio*, 518 F. Supp. 1309, 1314 (D.N.D. 1981).

26. *MacKinnon*, at 163; see also *supra* note 1.

an abusive behavior,<sup>27</sup> it should not be applied to give an employee a cause of action merely because an employer intended to offend the employee but failed to do so. This would, in effect, lead to an onslaught of frivolous lawsuits.

Because of the divergence of male and female perceptions as to what constitutes offensive behavior, choosing a standard from which to evaluate behavior should result in the use of an objective standard.<sup>28</sup> Utilizing a subjective standard from the viewpoint of the victim would pose unreasonable dangers because using the subjective supervisor standard would greatly diminish employer liability for sexual harassment. As a result, utilizing a subjective victim standard would flood the courts with Title VII actions.<sup>29</sup> If a subjective victim standard were used, trivial conduct, sexist remarks, and isolated, yet not severe, instances of sexist behavior would become actionable so long as the victim perceived such conduct as creating a hostile environment.

The Supreme Court has implicitly denounced the use of this standard by stating that not all conduct that may be described as harassment is actionable.<sup>30</sup> Also, some federal courts have held that trivial and annoying conduct is not harassment,<sup>31</sup> and that in order to be actionable the conduct must be severe enough to alter the conditions of the victim's employment and create a hostile, intimidating or offensive working environment.<sup>32</sup> In addition to this rigid standard, a plaintiff must prove that the conduct was persistent enough to seriously affect the plaintiff's psychological well-being.<sup>33</sup> The Guidelines, section 1604.11(b), state that the totality of the

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27. See Guidelines, § 1604.11(a)(3).

28. As was discussed earlier in the article, using a subjective standard from the victim's viewpoint would permit oversensitive victims to state an actionable claim for any sexist behavior; also, using a subjective standard from the harasser's viewpoint would practically eliminate hostile environment sexual harassment actions.

29. *Id.*

30. See *Meritor Savings Bank*, 106 S. Ct. at 2405, citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

31. See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419 (E.D. Mich. 1984); *Scott v. Sears Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986).

32. See *Henson*, 682 F.2d 897 (11th Cir. 1982); *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22 (D. Neb. 1983); *Downes v. F.A.A.*, 775 F.2d 288 (Fed. Cir. 1985).

33. *Id.* See also *Scott*, 798 F.2d at 213; *Ferguson v. E. I. DuPont de Nemours & Co., Inc.*, 560 F. Supp. 1172 (D. Del. 1983) (holding that not every sexual innuendo or flirtation gives rise to an action for sex discrimination); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (holding that mere utterances of ethnic or racial slurs which evoke offensive feelings in an employee are not actionable).

circumstances of each particular case will be taken into consideration.<sup>34</sup> This approach has been followed by many courts that have decided sexual harassment cases.<sup>35</sup> By allowing courts to consider the totality of the circumstances, the Guidelines have effectively promoted the use of a subjective victim standard.<sup>36</sup> The wording of section 1604.11(b), that the nature of the conduct and the context in which it occurred will be considered, allows courts giving deference to these Guidelines to find actionable harassment even in instances where the conduct was not severe, pervasive or psychologically abusive.<sup>37</sup> Two recent cases, *Barrett v. Omaha National Bank*<sup>38</sup> and *Ferguson v. E. I. DuPont de Nemours*<sup>39</sup> superbly illustrate this notion.

In *Barrett*, the plaintiff, along with three co-employees of the defendant bank,<sup>40</sup> attended a seminar in a distant city which was a few hours drive from the branch office. The plaintiff alleged that during the trip she was subjected to verbal and physical harassment.<sup>41</sup> The physical harassment which she alleged amounted to offensive touching which occurred while she was seated in the middle of the automobile between the two male employees.<sup>42</sup> The verbal harassment amounted to lewd sexual comments and a practical joke in which the two men allegedly told plaintiff that because of a mistake in reservations the three of them would have to share a hotel room.<sup>43</sup> The District Court of Nebraska found that the activity which took place on the trip amounted to sexual harassment.<sup>44</sup> The court went on to determine whether or not the defendant bank had shown that

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34. See Guidelines, § 1604.11(b). The relevant portion of § 1604.11(b) states: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances.

35. Guidelines, § 1604.11(b); *Henson*, 682 F.2d at 904; *Ferguson*, 560 F. Supp. at 1198; see *Calcote v. Texas Educational Foundation, Inc.*, 458 F. Supp. 231, 237 (N.D. Tex. 1976), *aff'd*, 578 F.2d 95 (5th Cir. 1978).

36. See *Barrett*, 584 F. Supp. at 30, where the court stated: "while the usual rule is that trivial or isolated events do not give rise to liability, this court feels that the instant case warrants a different result." See also *Ferguson*, 560 F. Supp. at 1198, where the court assumed that the plaintiff established the requirement that the complained of conduct be severe or pervasive.

37. *Id.*

38. 584 F. Supp. 22 (D. Neb. 1983).

39. 560 F. Supp. 1172 (D. Del. 1983).

40. Although the other two employees were not the plaintiff's direct supervisors, one of them was acting in a managerial capacity.

41. *Barrett*, 584 F. Supp. at 24.

42. *Id.*

43. *Id.*

44. *Id.* at 29.



the harassment was so isolated and trivial as to effectively rebut the plaintiff's allegations.<sup>45</sup> The court stated: "While the usual rule is that trivial or isolated events do not give rise to liability, this court feels that the instant case warrants a different result."<sup>46</sup> The court acknowledged that the conduct of the two males was isolated and trivial, however, it noted that since the plaintiff was in a vehicle with no escape, the complained of conduct could not be rebutted.<sup>47</sup> This is an obvious instance where isolated and trivial conduct was held actionable.

The plaintiff's perception that she was harassed served as the standard by which the court seemingly made the determination that the plaintiff had stated a cause of action. This determination was made even though the conduct of the two males had not been "unwelcome" in that the plaintiff had engaged in conversation with one of the two men regarding her intimate sex life.<sup>48</sup> In this case, if the subjective perception of the two men would have been the basis for determining whether their conduct created a hostile environment, it is probable that a cause of action would not have been stated.

In *Ferguson*, the plaintiff alleged that her supervisor made sexist remarks about her, inquired about her sexual activity, referred to her as his girlfriend, and on one occasion, smacked her on the buttocks.<sup>49</sup> The District Court of Delaware used the subjective victim standard in finding that the complained of conduct was such that the plaintiff could find it insulting.<sup>50</sup> Analyzing this particular set of facts, the court noted that "not every sexual innuendo or flirtation gives rise to an actionable wrong,"<sup>51</sup> but in order to state a cause of action for hostile environment sexual harassment, the conduct complained of must be severe, pervasive and sufficient to seriously affect the plaintiff's psychological well-being.<sup>52</sup> The threshold question was whether the supervisor's actions were severe enough to meet this requirement.<sup>53</sup> The court assumed that the "relatively few enumerated

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45. *Id.*

46. *Id.* at 30.

47. *Id.*

48. *Id.* at 23, 29. Mrs. Barrett occasionally talked to Mr. Day, a bank employee, about her sexual relationship with her boyfriend, and also occasionally discussed sexual relationships of Mr. Day.

49. 560 F. Supp. at 1198.

50. *Id.* at 1197.

51. *Id.* at 1198, citing *Rogers*, 454 F.2d at 238.

52. *Ferguson*, 560 F. Supp. at 1198. See also *Henson*, 682 F.2d at 904.

53. *Ferguson*, 560 F. Supp. at 1197.

incidents"<sup>54</sup> complained of by the plaintiff were enough for her to establish the element of pervasiveness.<sup>55</sup>

It does not follow that a few trivial incidents would be enough for a plaintiff to meet the pervasiveness burden, unless those few incidents were highly offensive or when added together amounted to psychological harm. The plaintiff in *Ferguson* would probably not have stated a cause of action if an objective standard were used, or if a subjective supervisor standard were used.

The pervasiveness standard was first enunciated in *Henson v. City of Dundee*.<sup>56</sup> There, the plaintiff alleged that during her two years with the City of Dundee Police Department she was subjected to demeaning vulgarities and requests for sexual relations.<sup>57</sup> The city manager took no action to curtail this abuse after being notified by the plaintiff, and she was prevented from attending the local police academy because she refused the sexual advances.<sup>58</sup> The Court of Appeals for the Eleventh Circuit held specifically that in order for sexual harassment to be actionable under Title VII, it must be "sufficiently pervasive," severe and persistent to seriously affect the employee's psychological welfare.<sup>59</sup> The requirement is given little or no meaning if hostile environment sexual harassment claims are decided by assessing the severity of the conduct through the eyes of the victim. If this standard, the subjective victim standard, continues to be utilized, then federal courts will soon become backlogged with sexual harassment claims.

In all facets of employment—from office buildings to steel mills—where men and women must work together, it is inevitable that insulting and offending remarks will be occasionally directed at women workers by male supervisors. It is unfortunate that sexual stereotypes are still harbored and are sometimes directed at women on the job. However, each insult or sexist remark should not create a cause of action. This is not to say that the price women must or

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54. *Id.* at 1198. The plaintiff perceived certain actions on the part of her supervisor to be abusive. These actions consisted of the supervisor smacking her on the buttocks on one occasion, calling her into his office for "heart to breast" talks, referring to her as his girlfriend, inquiring about her sexual proclivities, making coarse comments to her, and describing his working relationship with her by analogy to the marital state.

55. *Id.*

56. 682 F.2d 897 (11th Cir. 1982).

57. *Id.* at 899-900.

58. *Id.* at 904.

59. *Id.*

should pay for entering the workforce is the risk that they will be sexually abused. Suffice to say that a small degree of thick skin is probably required, on the part of everyone, to be a part of the American workforce.

The EEOC Guidelines require that the discrimination of sexually harassed employees be "unreasonable" before it is actionable.<sup>60</sup> The Guidelines recognize the EEOC's awareness that *de minimis* conduct can, in certain situations, be actionable by allowing the EEOC to look to the record of each particular case to determine whether sexual harassment has occurred.<sup>61</sup>

This caveat allows courts, as the *Barrett* and *Ferguson* courts did, to consider the context and the nature of the alleged incidents in determining whether the conduct is actionable.<sup>62</sup> Hence, the Guidelines provide that isolated and trivial acts may be actionable. It seems as though this caveat in the Guidelines may have been misinterpreted.<sup>63</sup> Rather than allowing a cause of action for isolated and trivial occurrences by permitting courts to consider the context and nature of the conduct, section 1604.11(b) should be read to allow a cause of action where one incident alone is so severe and debilitating that the required harm to a plaintiff has resulted. Thus, isolated and trivial incidents would still not state a cause of action, but the courts would have an out in cases where one incident is claimed as the basis for the action. This interpretation would emphasize the nature of the alleged conduct in determining whether or not an isolated incident was severe enough to be actionable.

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60. Guidelines, § 1604.11(a)(3). It should be noted that the Guidelines are not controlling upon courts, but do constitute a body of experience to which courts can resort for guidance. *Meritor Savings Bank*, 106 S. Ct. at 2405.

61. Guidelines, § 1604.11(b). The relevant portion of this section reads: In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

*Id.*

62. See *Barrett*, 584 F. Supp. at 28-30; *Ferguson*, 560 F. Supp. at 1196-99, where the court stated that not every flirtation or sexual innuendo gives rise to a cause of action, but in this particular case the plaintiff could find the acts of which she complained to be reasonably insulting. Neither the *Barrett* court nor the *Ferguson* court cited § 1604.11(b), however, both courts gave deference to the guidelines as a whole in deciding sexual harassment cases. *Barrett*, 584 F. Supp. at 28-30; *Ferguson*, 560 F. Supp. at 1196-99.

63. Although § 1604.11(b) was not interpreted in *Barrett* or *Ferguson*, it has been used as persuasive authority in resolving such conflicts.

There still remains the necessity of adopting an objective standard in all hostile environment sexual harassment claims. This standard would assess conduct through the eyes of the proverbial reasonable person in similar circumstances. By utilizing such a standard, courts would be able to determine with uniformity what type of behavior would be actionable. Plaintiffs should be required to prove that a series of related incidents had occurred which the reasonable person in the plaintiff's work environment would find offensive. In other words, the plaintiff would demonstrate an environment free from abuse changed to one that became intolerable to a reasonable person. A plaintiff would not have to prove that the behavior was so severe and pervasive that her psychological well-being was affected, but would merely have to show that a reasonable person would now find the working environment intolerable. This would eliminate causes of action where a particularly sensitive individual is subjectively offended and at the same time would protect women from unreasonable and uncalled-for abuses.

Another concern of a sexual harassment analysis is the classification of insults and verbal abuses as actionable sexual harassment.<sup>64</sup> The concern here is that many times the sexual harassment which is present in a work environment contains mostly verbal abuses or mere insults. By allowing causes of action for verbal abuses only, courts could be impinging a person's first amendment right to freedom of expression.<sup>65</sup> Because the right of free speech (as long as it is not obscene) is such an important one, a different standard would have to be adopted. Such a standard would consider the frequency and severity of the abusive language in determining whether first amendment rights have been violated. In other words, only where verbal abuses alone are so outrageous and severe that the employee is psychologically affected, would a claim be actionable. This analysis is the current standard supposedly used in sexual harassment claims, although in many instances this standard is not applied.<sup>66</sup> Of course, this analysis would be a painstaking process for any court. Therefore,

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64. See *Rabidue*, 584 F. Supp. at 431. The court stated that where the complained of conduct is "verbal abuse of a sexual nature", a first amendment issue is raised.

65. *Id.* The issue in such instances is framed as follows: Can Title VII prohibit people from verbally expressing themselves with language that is not *obscene* under the legal definition of the term?

66. See *Barrett*, 584 F. Supp. 22 (D. Neb. 1983) and *Ferguson*, 560 F. Supp. 1172 (D. Del. 1983).

one approach to this type of claim would be for a court to consider the totality of the circumstances as described in section 1604.11(b) of the Guidelines.

Although the totality of the circumstances should always be considered in these types of cases, in verbal abuse only situations, courts could look closely to find one instance of offensive touching or some other non-verbal offensive conduct. In many sexual harassment claims, one such incident can usually be found, even though most of the abuse claimed is merely verbal.<sup>67</sup> Hence, if one incident of non-verbal behavior, such as offensive touching or having to perform demeaning tasks, is present in conjunction with outrageous and severe verbal abuse, the first amendment protections would not be granted.<sup>68</sup> Courts could then find liability if a reasonable person in the same situation would find that the working environment had changed from non-abusive to abusive.

An example of this analysis can be found in the recent case of *Porta v. Rollins Environmental Services, Inc.*<sup>69</sup> There, the plaintiff was hired as a shift supervisor of the Rollins plant in New Jersey.<sup>70</sup> She claimed that the defendant created an intimidating, hostile or offensive working environment because she was allegedly subjected to crude comments, humiliating treatment, and was told that her opinion was not respected because she was a woman.<sup>71</sup> The District Court of New Jersey held, in denying defendant's motion for summary judgment, that a jury could find that the conduct of which the plaintiff complained was actionable sexual harassment.<sup>72</sup> The specific conduct of which the plaintiff complained amounted to sexually offensive handwritten notes directed to her, crude graffiti bearing her name on a staff refrigerator, and crude remarks made by male supervisors about her breast size.<sup>73</sup>

The plaintiff also claimed that her job was terminated because of this harassment.<sup>74</sup> She refused to work weekends because much of

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67. See *Barrett*, 584 F. Supp. at 23-24; *Katz*, 709 F.2d at 254.

68. Courts could look to the totality of the circumstances to determine if an isolated or trivial act of touching was present along with the verbal abuses. Even if the touching would not itself be actionable, coupled with severe verbal abuses, it would be enough to overcome first amendment protection.

69. 654 F. Supp. 1275 (D. N.J. 1987).

70. *Id.* at 1278.

71. *Id.* at 1282.

72. *Id.*

73. *Id.* at 1279.

74. *Id.* at 1280.

the harassment allegedly occurred when a certain supervisor was at the plant on weekends.<sup>75</sup> Here, the court did not decide whether the defendant was ultimately liable to the plaintiff, but rather the court denied the defendant's motion for summary judgment. This case is illustrative of a situation where most of the harassing behavior is verbal. A court deciding whether or not liability should rest with the defendant would most certainly have to address whether or not the verbal expression by the defendant's supervisor was protected by the first amendment.

Using an analysis where a court would consider the totality of the circumstances to determine whether there was any non-verbal abuse, which in conjunction with verbal abuse could overcome first amendment protections, courts could reasonably determine that the plaintiff's discharge was related to the abusive behavior. Job dismissal affects a person's economic posture. If such a dismissal is related to verbal abuses, then first amendment protection would not be granted. Thus, liability could be found if the reasonable victim standard were then applied to determine if a reasonable person in these circumstances would find that the working environment had changed from non-abusive to abusive.

In *Katz v. Dole*,<sup>76</sup> the plaintiff, an air traffic controller, was subjected to a workplace pervaded with sexual slurs, insults and innuendoes,<sup>77</sup> and was personally the object of vulgar and sexually related language.<sup>78</sup> In addition to the vulgar and offensive language of which she complained, there was evidence that the plaintiff was also the object of sexual advances.<sup>79</sup> Although it is difficult to define "sexual advances", harassment has been described as including repeated, unwanted sexual propositions, non-consensual touching, and extortion of sexual favors.<sup>80</sup> Others have equated "sexual advances" to sexual incidents, including demands for sexual relations.<sup>81</sup> Again, a gray area is encountered. Flirtatious behavior and romantic attrac-

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75. *Id.* at 1279.

76. 709 F.2d 251 (4th Cir. 1983).

77. *Id.* at 254.

78. *Id.*

79. *Id.*

80. See McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII*, 10 U. BALT. L. REV. 275 (1980) [hereinafter cited as EEOC Sexual Harassment Guidelines].

81. MacKinnon, at 31.

tion surely cannot be classified as "sexual advances" in the sense of harassment.<sup>82</sup>

The United States Supreme Court in *Meritor Savings Bank* implicitly suggests that "sexual advances" are conduct.<sup>83</sup> In analyzing the discrepancy between voluntariness to a sexual relationship and unwelcomeness to sexual advances, the Court noted that the plaintiff's conduct was voluntary, i.e., she did not have to participate against her will to her supervisor's outward manifestations of a sexual relationship.<sup>84</sup> However, the Court emphasized that the proper inquiry was whether or not the sexual advances were *welcome*.<sup>85</sup> Hence, the Court decided that in hostile environment sexual harassment claims the conduct of the harasser must be analyzed in conjunction with the conduct of the victim to determine whether or not sexual advances were welcome or unwelcome. It seems that the criterion for determining the difference between welcome and unwelcome behavior is subjective from the victim's point of view.<sup>86</sup> There is nothing wrong with this type of analysis because in order for behavior to be considered harassing it must not be requested or wanted by the object of the advances.<sup>87</sup>

The term "sexual advances", however, should encompass attempts to make physical contact, repeated sexual propositions, and demands for sexual relations. In *Katz*, the plaintiff was subjected to sexual advances through repeated sexual propositions.<sup>88</sup> Therefore, it could be found that the reasonable person in these circumstances could have been subjected to a hostile environment even though most of the complaints consisted of language alone. Courts should have no difficulty determining that sexual harassment has created an abusive environment in situations where unwanted physical or sexual advances are coupled with persistent verbal insults.

There still remains the problem of work environment sexual harassment where the employee is *only* abused through words. Again,

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82. See *Sand v. Johnson*, 33 FEP Cases 716 (E.D. Mich. 1982)(holding that an employee was not subject to hostile environment where supervisor attempted mere flirtatious relationship).

83. 106 S. Ct. at 2406.

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.*

87. See *Reichmann v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1177 (M.D. Pa. 1977).

88. *Katz v. Dole*, 709 F.2d at 254. It is not explicitly stated in the opinion whether the supervisor physically made an advance or merely suggested that he and the plaintiff have sexual relations.

the proper standard of assessing whether or not the conduct rises to the level to be actionable would be the reasonable person standard. However, because there is no other outward manifestation to link with the verbal abuses, and because first amendment rights are so fundamental, the analysis must go one step further.<sup>89</sup>

In order to protect freedom of expression rights and to insure that *de minimis* conduct is not actionable, a standard for determining liability should be outlined where sexual harassment based upon insults alone is claimed. In most instances where insults and sexist comments are the only behavior claimed to be harassing, the victim is overly sensitive to the subject matter of the insult.<sup>90</sup> The common law of torts fails to recognize a cause of action for mere insults.<sup>91</sup> However, when mere insults become so pervasive, severe, and abusive that they interfere with the psychological well-being of a reasonable person in the victim's particular working environment, a cause of action should be available. If such intolerable insults are offensive and psychologically abusive to the ordinary person, then the freedom to express these thoughts should be impeded. Thus, even though free speech is a constitutionally protected right, and insults alone do not make a cause of action,<sup>92</sup> when insults go as far as becoming psychologically debilitating to the ordinary person, and the ordinary person would find that the working environment was substantially and adversely affected, there should be redress in the judicial system.<sup>93</sup>

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89. See *Rabidue*, 584 F. Supp. at 431. This court suggests that where "verbal conduct of a sexual nature" is the only conduct complained of, a first amendment issue is immediately raised. Because verbal conduct is the only conduct complained of, perhaps a more probing analysis is needed to determine whether in fact actionable sexual harassment has occurred.

90. See EEOC Sexual Harassment Guidelines at 310-11, *supra* note 80; see also *Higgins v. Gates Rubber Co.*, 578 F.2d 281, 283 (10th Cir. 1978). The *Higgins* court stated that employers are not insurers against all insults and discriminatory insults that occur in the workplace.

91. Prosser, *HANDBOOK OF THE LAW OF TORTS* § 12 at 54-55 (4th ed. 1971); *EEOC Sexual Harassment Guidelines* at 311, *supra* note 80, citing *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 744, 565 P.2d 1173, 1178 (1977) (en banc)(Stafford, J., concurring in result).

92. See *EEOC Sexual Harassment Guidelines* at 310, citing *Higgins*, 578 F.2d 281; *Friend v. Leidinger*, 446 F. Supp. 361, 383 (E.D. Va. 1977), *aff'd*, 558 F.2d 61 (4th Cir. 1978) (holding that infrequent insults do not create a cause of action); but see EEOC Decision No. CL 68-12-431 EU, 2 Fair Empl. Prac. Cas. 295 (1969) (holding that Polish employee offended by Polish jokes stated cause of action).

93. *MacKinnon*, at 211; see *supra* note 1. A single incident of insult would probably not be enough to show an atmosphere which condoned racial and ethnic intimidation, but a sufficiently derogatory remark or remarks may, and in some cases, should. See also [1973] EEOC Decisions (CCH) ¶ 6346 (1972) in which the EEOC found cause to believe that racial discrimination had occurred when a district manager used the term "nigger" in a joke.



The objective victim standard illustrated throughout this article would protect women from unreasonable, uncalled for abuses in the workplace, while also protecting employers from lawsuits filed by overly sensitive victims. The recent case of *Rabidue v. Osceola Refining Co.*<sup>94</sup> exemplifies this notion. In *Rabidue*, a female employee brought an action under Title VII in which she claimed a hostile and abusive work environment was created when her supervisor directed vulgar language at her and displayed sexually oriented posters in front of her.<sup>95</sup> The District Court for the Eastern District of Michigan applied an objective victim test in determining whether or not this conduct amounted to a significant factor which an average female employee would find to substantially and adversely affect her overall work experience.<sup>96</sup> The court held that EEOC Guidelines section 1604.11(a)(3) state that the conduct complained of must have the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment."<sup>97</sup> The word "unreasonably" was construed to mean that courts may consider the nature of the employment environment in which the plaintiff suffered the alleged harassment.<sup>98</sup> In this context, the court would be able to apply the objective victim test.<sup>99</sup> The objective victim in the particular working environment of the plaintiff would be the standard from which to assess whether or not sexual harassment occurred.<sup>100</sup> This court also considered the particular educational backgrounds of the employees and the physical make-up of the plaintiff's work area.<sup>101</sup> The reason for the extra analysis to the objective test was that people in different social classes and varying educational backgrounds have come to expect certain types of behavior and language in the workplace.<sup>102</sup> The court did not state that because women were now viable members of all facets of the workforce, such particular behavior and language should change.<sup>103</sup> This attitude reflects a type of consent. In other words, before women began to work in certain occupations, those work

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94. 534 F. Supp. 419 (E.D. Mich. 1984).

95. *Id.*

96. *Id.* at 433.

97. *Id.* at 429; Guidelines, § 1604.11(a)(3).

98. *Rabidue*, 534 F. Supp. at 430.

99. *Id.*

100. *Id.* at 430, 433.

101. *Id.* at 430.

102. *Id.*

103. *Id.*

environments were cluttered with various types of behavior that many women would find offensive.<sup>104</sup> Hence, the court seemingly believed that it was the woman who had to accept the work environment, rather than the work environment changing to accept the woman.<sup>105</sup> The court stated:

It cannot seriously be disputed that in some work environments, humor and language are rough hewn [sic] and vulgar. Sexual jokes, sexual conversations and girlie 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 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>106</sup>

By utilizing the objective victim standard, traditional work environments, where rough language and sexual conversation abound, would not need to change. However, when individual women employees become the object of unreasonably offensive conduct of a sexual nature, then Title VII protections could be enforced. In *Gan v. Kepro Circuit Systems, Inc.*,<sup>107</sup> and *Evans v. The National Post Office Mail Handlers Union*,<sup>108</sup> the respective courts concluded that some work environments, even though polluted with harsh language, could be conducive to charges of sexual harassment. In *Gan*, the plaintiff alleged that a hostile working environment was created when she was allegedly subjected to unprovoked propositions and sexually suggestive remarks.<sup>109</sup> It was held that because she participated in the vulgarities which were prevalent in the work environment, she was not a victim of sexual harassment.<sup>110</sup> However, the court stated: "The evidence established that the working environment at defendant Kepro Circuit Systems, Inc., was a very distasteful one which, under different circumstances, could certainly be conducive to sexual harassment charges."<sup>111</sup>

*Gan* suggests that if the plaintiff had not participated in the vulgarities and sexual conversations in the workplace, there would have been a different result. It would be much more effective in

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104. *Id.*

105. *Id.*

106. *Id.*

107. 28 FEP Cases 639 (E.D. Mo. 1982).

108. 32 FEP Cases 634 (D. D.C. 1983).

109. 28 FEP Cases at 640.

110. *Id.* at 641.

111. *Id.*

situations where a work environment is pervaded with vulgarities and sexual talk if the conduct which is alleged to be abusive were assessed objectively. If, for instance, Ms. Gan had not been a participant who welcomed the vulgarities, and the work environment was such that conduct, behavior, and language directed at the plaintiff would offend the ordinary prudent person, the result would have been different from a situation where such conduct was merely commonplace among the workers and was not directed at anyone. In the latter instance, it would be difficult to say that the reasonable prudent person would find that the work environment was substantially and adversely affected.<sup>112</sup>

In *Evans*, the plaintiff had a consensual sexual relationship with her supervisor but, after the relationship soured, she alleged sexual harassment based upon the creation of a hostile environment.<sup>113</sup> The work environment became extremely distasteful for the plaintiff and it was pervaded with sexual innuendoes.<sup>114</sup> However, because the plaintiff welcomed the conduct of which she later complained, no Title VII violation had occurred.<sup>115</sup> The court cited *Gan*, stating that if the plaintiff had not freely welcomed the advances of her supervisors, then a different result may have ensued.<sup>116</sup>

In summary, if courts adopt an objective victim standard for assessing behavior in hostile environment sexual harassment claims, then the interest of Title VII in eliminating workplace discrimination would be furthered while also protecting employers from frivolous lawsuits from overly-sensitive individuals.<sup>117</sup> The standard would assess behavior from the viewpoint of the ordinary reasonable person in the particular employment setting of the plaintiff.<sup>118</sup> If the conduct of which the plaintiff complained was severe enough that the reasonable prudent person would be so offended that she would find that her working environment had changed from an abuse-free environment to an abusive environment, a cause of action would be stated. In situations where the conduct complained of amounts to

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112. In situations where the working environment is cluttered with hard-core profanities and abusive remarks, the test would be to determine whether or not the ordinary prudent person would be adversely affected in such a way that she would find the existing environment intolerable to work in.

113. 32 FEP Cases at 636.

114. *Id.* at 637.

115. *Id.* at 636.

116. *Id.* at 637.

117. See *Harassment Claims* at 1458.

118. See *Rabidue*, 584 F. Supp. at 433.

mostly verbal abuse, courts would consider the totality of the circumstances to see if any overt, non-verbal behavior related to the sexual abuses had occurred. If even one instance of overt, non-verbal behavior was found, then coupled with the verbal abuses, it could be enough to overcome the first amendment right to free speech. In cases where speech is absolutely the only complained of behavior, courts could further determine whether or not the verbal abuses would be psychologically debilitating to the ordinary prudent person. If the ordinary prudent person would find that the verbal abuses did substantially affect her psychological well-being, then first amendment protections would be overcome. Finally, Title VII was not meant or designed to change certain work environments wherein vulgar language, sexual jokes and offensive conversations may abound.<sup>119</sup> In these circumstances one who enters such a workforce has consented to the existing environment.

## II. RESPONSIBILITIES OF EMPLOYER AND VICTIM IN SEX HARASSMENT SITUATIONS

### A. Responsibility of Management

There are different theories as to why workplace sexual harassment occurs. Professor MacKinnon suggests that the historical subservience of women in society and the disproportionate share of wealth and power between the sexes is a viable explanation.<sup>120</sup> There is no question that the workforce in American society and the majority of supervisory and managerial positions are dominated by males.

In this regard, employers have a responsibility to provide a working environment which is free from all types of discriminatory behavior.<sup>121</sup> This responsibility consists of management's duty to inform employees of company policies regarding sexual harassment, and to take immediate action to deal promptly with known sexual harassment situations.<sup>122</sup>

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119. *Id.* at 430.

120. MacKinnon, at 9.

121. See *Meritor Savings*, 106 S. Ct. 2399.

122. Employers are liable for hostile environment sexual harassment only when the employer either knew or should have known of the activity. However, the United States Supreme Court in *Meritor Savings Bank*, 106 S. Ct. 2399 (1986), declined to address this issue. See also *Ferguson*, 560 F. Supp. at 1198; *Coley v. Consolidated Rail Corp.*, 561 F. Supp. 645 (E.D. Mich. 1982)(holding that in hostile environment sexual harassment cases, a supervisor who demeans and offends an employee acts outside the scope of the authority he possesses, and thus, his behavior cannot be imputed to his employer); *Katz*, 709 F.2d at 255; *Cummings v. Walsh Constr. Co.*, 561 F. Supp 872 (S.D. Ga. 1983). See also Cope, *Executive Guide To Employment Practices* 118 (1984) [hereinafter cited as Cope].

Employers have a responsibility to ensure that best efforts have been undertaken to provide a work environment that is free from unreasonably abusive behavior.<sup>123</sup> This is not to imply that employers must ensure that the working environment is friendly or pleasant. The employer need only ensure that unreasonably abusive behavior is controlled. To provide such an environment, employers are wise to adhere to a few procedures that, if followed, will greatly reduce the incidents of harassment and cure those that do occur.

First, employers should adopt a company policy that defines sexual harassment and clearly indicates that such behavior will not be tolerated.<sup>124</sup> The policy should be presented to every employee, including managerial personnel.<sup>125</sup> It should outline what types of specific conduct are considered to be sexual harassment, including insults and verbal abuse.<sup>126</sup> The policy should outline a grievance procedure that employees should utilize if any of the aforementioned activities occur.<sup>127</sup> It would be appropriate to appoint a woman who has a high management ranking to hear complaints of women employees. It should be emphasized that such a complaint procedure would be implemented with strict confidentiality to encourage reporting of all such incidents. Finally, the policy should outline a disciplinary process when such conduct is found. This process could classify varying degrees of punishment depending upon the severity and frequency of abusive conduct. For example, first time offenders would be given a written warning to the effect that if such behavior is not discontinued then a harsher penalty would ensue. Second offenses would warrant suspension without pay and a third offense would warrant dismissal. By implementing and adhering to such a strict disciplinary procedure, employers not only shield themselves from liability if a Title VII action is brought, but also effectively diminish the occurrences of abusive behavior. Of course, the full cooperation of women employees is a necessary prerequisite to the effectiveness of such a policy, because merely having a policy that prohibits such behavior will not shield liability.

In *Cummings v. Walsh Construction Company*,<sup>128</sup> it was held that merely having a policy which prohibits sexual harassment has little

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123. See *supra* note 120.

124. Cope, at 119.

125. *Id.*

126. *Id.*

127. *Id.*

128. 561 F. Supp. 872 (S.D. Ga. 1983).

or no significance if prompt remedial action is not taken.<sup>129</sup> There, the plaintiff claimed that she was approached several times by her supervisor and propositioned for sexual relations.<sup>130</sup> She also claimed that on two occasions she submitted to these demands because the supervisor promised to leave her alone if she did so.<sup>131</sup> After submitting to these demands twice, the plaintiff refused the supervisor's further demands, and because of this refusal she claimed that she was required to perform menial, unpleasant tasks.<sup>132</sup> Following her refusal to perform such tasks, the plaintiff was fired.<sup>133</sup> The court concluded that even if the employer had a policy prohibiting such harassment, it could be liable if prompt remedial action was not taken upon discovering the harassing behavior.<sup>134</sup>

Conversely, in the *Ferguson* case, it was held that because the employer did take prompt remedial action no liability would be incurred,<sup>135</sup> and in *Barrett* because the bank took prompt disciplinary action once it discovered the offensive conduct, it was held not liable.<sup>136</sup> Thus, it can be said that even where sexual harassment occurs, if employers take prompt remedial and disciplinary action to stop it, no liability will be incurred.<sup>137</sup>

Secondly, employers must institute an effective investigatory procedure once complaints are lodged. It would be a great disservice to the entire workforce if someone was disciplined for no valid reason. There are numerous instances where a woman claims to have been sexually harassed when in fact she was partly or mostly at fault.<sup>138</sup> One such case is *Reichman v. Bureau of Affirmative Action*,<sup>139</sup> where the plaintiff alleged she was subjected to a "hostile environment" when her supervisor attempted to have sexual relations with her.<sup>140</sup> The *Reichman* court found the plaintiff had behaved flirtatiously

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129. *Id.*

130. *Id.* at 876.

131. *Id.*

132. *Id.*

133. *Id.* at 878.

134. *Id.*

135. 560 F. Supp. at 1199.

136. 584 F. Supp. at 31.

137. See *Ferguson*, 560 F. Supp. at 1199; *Barrett*, 584 F. Supp. at 31.

138. See *Gan v. Kepro Circuit Systems, Inc.*, 28 FEP Cases 639 (E.D. Mo. 1982); *Evans v. The Nat'l Post Office Mail Handlers Union*, 32 FEP Cases 634 (D. D.C. 1983); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149 (M.D. Pa. 1982).

139. 536 F. Supp. 1149 (M.D. Pa. 1982).

140. *Id.* at 1164.

and had welcomed any sexual advances which may have been made.<sup>141</sup> Therefore, no Title VII violation was found.<sup>142</sup>

*Reichman* illustrates the necessity for an effective investigatory process. In such cases where alleged harassment occurs, the facts and circumstances surrounding the alleged conduct must be discerned. Employers should appoint a committee to be in charge of investigating all complaints of harassment. By thoroughly investigating all matters, employers could determine whether the alleged conduct was in fact unwarranted, abusive and offensive. The *Reichman* case clearly shows there are instances where it is the woman who initiates the sexual contact. In cases where this occurs, women cannot claim they have been sexually harassed until the conduct of the male becomes unreasonably abusive.<sup>143</sup>

Finally, employers would be wise to institute training seminars for all managerial personnel. These seminars would educate all managers as to what types of behavior are prohibited and what can be done in potentially harassing situations. Such an education program would be very effective in eliminating certain types of behavior because many times behavior not meant to be demeaning, offensive, or harassing is perceived by women to be so.<sup>144</sup> Education would make all managerial staff members cognizant and perceptive of the problems faced in the workplace.

### B. Responsibility of Victim

While employers have a great responsibility to provide employees with a policy that explains what types of behavior will not be tolerated, what to do and where to report if such behavior does occur, and what measures will be taken to eliminate such behavior, the system cannot be effective without the cooperation of the entire workforce. It is imperative that aggrieved employees utilize the complaint procedures mentioned before marching into a court of law. Since the goal of anti-discrimination policies and Title VII is to eliminate discrimination from the work environment, workplace harassment cannot be eradicated unless all instances of harassing behavior are reported so that measures can be taken to eliminate such

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141. *Id.* at 1177.

142. *Id.*

143. See *Gan*, 28 FEP Cases 639 (E.D. Mo. 1982) and *Evans*, 32 FEP Cases 634 (D. D.C. 1983).

144. See *supra* note 1.

behavior. By remedying offensive behavior, no matter how isolated or trivial, both the interests of the employer and employee are furthered. The interests of the employee are furthered when steps are taken to eliminate the reported abuses from the work environment. An investigation would take place, and if abusive conduct did occur, measures would be taken to prevent any further occurrences. Thus, an abuse-free environment would be available in which to work. The interest of the employer is furthered in that an abuse-free work environment makes for happier employees, and happier employees are more productive than disgruntled employees. In addition to a higher efficiency in work product, the employer is spared from Title VII lawsuits or liability.

The responsibilities of the female employee are twofold. First, the female employee must utilize company grievance procedures as long as the procedure is confidential and the female has a person other than the harasser to direct complaints. As discussed earlier, it is highly suggested that employers appoint either a female manager or employ a female counselor to hear such grievances. This way it cannot be argued that the grievance procedure is biased or sexist. Secondly, women have a responsibility not to encourage males to make sexual advances. This can be done by refraining from acting in a flirtatious or sexually inviting manner, dressing in a sexually provocative manner or talking in a manner that would welcome sexual advances. The Supreme Court has implied that where a woman, by her conduct, indicates that sexual advances are welcome a cause of action under Title VII will not lie.<sup>145</sup> Furthermore, the Supreme Court has held there is no rule against admitting evidence of a woman's dress or sexually provocative speech in order to determine whether or not sexual advances were unwelcome.<sup>146</sup> It would not be unreasonable to conclude that where a woman clad herself in sexually provocative clothing, acted and spoke in a provocative manner, or otherwise indicated she may have been interested in a sexual relationship, sexual advances were not unwelcome.<sup>147</sup>

It should be emphasized that women have a fundamental responsibility to notify the employer of instances of sexual harassment, insult or abuse. Before claims of sexual harassment can be actionable, women should notify the employer in order to give that employer an

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145. *Meritor Savings Bank*, 106 S. Ct. at 2406.

146. *Id.* at 2407.

147. *Id.* at 2406.



opportunity to remedy the situation. Although it has been held that no liability will be incurred by an employer in a hostile environment case where knowledge or constructive knowledge is absent,<sup>148</sup> the expense of lengthy litigation could be saved if the notion were expanded to deny a cause of action where the proper procedures were not followed. A court could merely determine whether a complaint was filed internally. If the victim did follow the proper procedures, but no remedial action was taken, then a trial on the merits could ensue. However, if the proper internal procedures were not exhausted, then the victim should be deemed to have waived her right to sue.

### III. A SUGGESTED FRAMEWORK FOR ELIMINATING SEXUAL HARASSMENT

In addition to implementing a company policy, an investigation procedure, a complaint procedure and training program, employers should treat all employees equally and require that all employees, including management, adhere to company policy. If such a requirement is instituted, and an employee fails to adhere to it, then that person can probably be discharged for violating company policy.<sup>149</sup> Also, employers should be consistent in the application of company policies. Once a policy is adopted and procedures are outlined, the employer should not vary from the policy or procedures. Thus, employees and management personnel will be informed as to what to expect in a harassment situation. It is important that management create an atmosphere that discourages discrimination and sexual harassment in order to eliminate such forces of abusive behavior and avoid liability under Title VII.

*P.J. Murray*

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148. See *supra* note 122.

149. See Cope, at 119.