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RECENT DEVELOPMENTS IN SEXUAL HARASSMENT LAW

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I. INTRODUCTION

Sexual harassment is often perceived as a feminist issue.[1] Although it is true that women are victimized disproportionately,[2] it would be wrong to categorize sexual harassment as one of the vulnerabilities of the "fairer, gentler sex" because sexual harassment, like rape, is not about sex but about gender and power.[3] It is not a woman's sexual attractiveness which makes her vulnerable to physical and verbal sexual abuse; it is society's stereotypical view of her as a powerless and subordinate sex object.[4] Before sexual harassment became generally accepted as denoting sex discrimination, courts refused to recognize that such conduct violated sex discrimination laws because they failed to give credence to the above distinction. Women who refused to grant sexual favors and who thus suffered retaliation, it was argued, were discriminated against not because of their gender but because

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1. Most commentators on the subject have been women, and excluding legal periodicals, most articles have appeared in magazines published for female subscribers. *See, e.g., infra* note 2. At the University of Mississippi School of Law, only twenty-eight pages of the casebook presently being used to teach constitutional law address sex-based discrimination. GERALD GUNTHER, CONSTITUTIONAL LAW 642-69 (11th ed. 1985). Only one case is discussed in detail, and of the ten cases mentioned, five were brought by male plaintiffs challenging the constitutionality of statutes granting preferential treatment to women. *Id.*

2. An informal study conducted by a women's magazine concluded that 88% of the 9,000 women surveyed reported having been sexually harassed on the job. Claire Safran, *What Men do to Women on the Job,* REDBOOK, Nov. 1976, at 149. Of course, women who had suffered such abuse would be more likely to respond, and therefore the self-selective nature of the survey undermines the integrity of its results. Nonetheless, the fact that 8,100 American women experienced sexual harassment at work is significant, especially since before 1976, it was literally an unspeakable term. The phrase became a term of art through the efforts of the Working Women's Institute, a resource center for sexually abused women in New York City, New York. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION xiv (1979) [hereinafter MACKINNON].

In a more recent and more rigorous study, the Merit System Protection Board, an independent agency that oversees the hiring and firing of federal employees, conducted a survey at the behest of Congress in 1980 to determine the extent of sexual harassment in the federal work place. U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 6 (1981). Of the 23,000 federal employees, 42% of all female employees reported being harassed. Surprisingly, 15% of male employees were also included among the ranks of the sexually harassed. *Id.* at 35; *see also* 1988 Empl. Prac. Guide (CCH) ¶ 5139, at 6365 (reprint of text of Executive Summary of a follow-up survey conducted in 1987).

This paper will address almost exclusively the sexual harassment of women, and therefore, female pronouns will be used more extensively than male. However, the authors recognize that men also can be and have been victimized as shown by the above survey results. The rarity of these occurrences is due to the fact that few women are in a position of power to harass men sexually, and the infrequency is comparable to the freakish occurrence of male rape. *See* MACKINNON, *supra* at 31, 202.

3. *See* LOREENE M. G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY 167 (1977).

4. Indeed, it is a woman's defenselessness and vulnerability which can make her sexually irresistible. *See* MACKINNON, *supra* note 2, at 218-19.

of their sexuality.[5] This same misguided view of sexual harassment, although long since refuted by the judiciary, is still held by many. The most public display occurred during the confirmation hearings of Supreme Court Justice Clarence Thomas in which Anita Hill had accused Justice Thomas of sexual harassment while he was her supervisor at the United States Department of Education and at the Equal Employment Opportunity Commission. Some of the Senators questioned Hill about her sexual attraction to Justice Thomas and her private sexual fantasies, as if implying that his sexual advances, assuming they occurred, were somehow motivated only by her sexuality.[6] In doing so, these Senators appeared to be adopting the view that the occurrence of sexually harassing conduct, no matter how unwelcome, should be excused whenever there is the possibility of a sexual attraction between the harasser and his victim.[7] Implicit in this view is the misconception that sexual harassment occurs because of the sexual attractiveness of the harasser's victim. To the contrary, sexual harassment occurs because of an abuse of power and is defined in general as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power."[8] In the workplace, this power is usually wielded by the harasser through economic coercion.[9] This

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5. *See* Williams v. Saxbee, 413 F. Supp. 654, 657 (1976). One commentator argued, "[i]f someone were to kill another person with a rolling pin, we would not consider it cooking." Verta A. Taylor, *How to Avoid Taking Sexual Harassment Seriously: A New Book That Perpetuates Old Myths*, 10 CAP. U. L. REV. 673, 675 (1981).

6. *See* Symposium, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas hearings*, 65 S. CAL. L. REV. 1279 (1992).

7. "Nowhere is a woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she should pay for her right to exist, to keep a position in whatever line, with sex favors." EMMA GOLDMAN, THE TRAFFIC IN WOMEN 20 (1970).

8. MACKINNON, *supra* note 2, at 1. Studies by the Working Women's Institute indicate that 75% of harassers have direct authority over their victims. *See* Donna Lenhoff, *Sexual Harassment: No More Business As Usual*, TRIAL, July 1981, at 42. Based on the data from the Merit Systems study, *see supra* note 2, researchers concluded that sexual harassment is based on the personal power of gender where males are dominant. *See* Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 J. SOC. ISSUES 33, 50 (1982). Notably, this conclusion contradicted the commonly held perception that workplace sexual harassment is an extension of human sexuality. *Id.* For that perception to hold true, female victims of harassment would have to be similar to the harasser in age and race, a finding which was not supported by the data. *Id.* at 44.

9. "[W]omen consistently occupy the lowest-status, lowest-paying jobs, much lower than men of the same education and experience." MACKINNON, *supra* note 2, at 38; *see also infra* note 22 (noting similarity in use of economic deprivation by employer and by battering husband).

same power struggle is also apparent in racial harassment cases: both scenarios involve one group's attempt to dominate another.[10]

Although sexual harassment is a newly-exposed problem, it is itself an old phenomena. The first written reports date back to the nineteenth century when women began entering the labor markets in greater numbers and in more varied positions.[11] Nonetheless, women who worked outside the home were still the exception at the close of the century. In general, they were forced into employment by poverty,[12] and, thus, were drawn from the least powerful classes. Moreover, they were invariably the product of a dysfunctional family, dysfunctional because of the singular absence of a male provider, who was either dead or disabled.[13] So-

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10. Judy Trent Ellis, *Sexual Harassment and Race: A Legal Analysis of Discrimination*, 8 J. LEGIS. 30, 30-32 (1981). The Equal Employment Opportunity Commission (EEOC) Guidelines on sexual harassment include a footnote stating: "The principles involved here continue to apply to race, color, religion or national origin." 29 C.F.R. § 1604.11(a) (1980). Furthermore, when Title VII of the Civil Rights Act of 1964 was being considered for amendment in 1972, a Senate Committee reported that "recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics." S. REP. No. 415, 92d Cong., 1st Sess. 7 (1971). For further discussion of the debate surrounding the proposed amendments, see *infra* notes 48-49 and accompanying text.

A perfect analogy between race and sex discrimination does not exist. Although courts have often averted to racial harassment cases for legal precedent, many have found the causes of action clearly distinguishable. One of the main differences stems from the historic and social perceptions of race and sex classifications. Race classifications are inherently suspect under the equal protection clauses of the 5th and 14th Amendments of the United States Constitution, the latter having been enacted for the specific purpose of eradicating racial discrimination. *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (first racial discrimination case under 14th Amendment; invalidated state law excluding blacks from jury duty under heightened scrutiny of judicial review).

On the other hand, classifications based on sex are only quasi-suspect for the purpose of an equal protection analysis and must meet only an intermediate level of judicial review. *See* Bakke v. Board of Regents, 438 U.S. 265, 303 (1978) (refusing to view gender discrimination as comparable to racial classification).

11. Untrained and unskilled in most gainful occupations, women maintained a precarious economic position in which the threat of dismissal was usually all that was necessary for the employer to solicit sexual favors. Jill Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 CAP. U. L. REV. 445, 448-50 (1981). Most of the historic records documenting the existence of sexual abuse in the eighteenth and nineteenth centuries come from interviews and early court records. *See* Eleanor K. Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M. L. REV. 91, 95 (1987).

12. ROBERT W. SMUTS, WOMEN AND WORK IN AMERICA 17-23 (1959).

13. *Id.* at 38, 87-88, 112. In this century, the growing trend of poor women, often described as the "feminization of poverty," was likewise created by a substantial increase in the number of female-headed households. *See* Diana Pearce, *Welfare Is Not for Women: Toward a Model of Advocacy To Meet the Needs of Women in Poverty*, 19 CLEARINGHOUSE REV. 412, 412 (1985). Of the net increase of 129,000 poor families in 1983, the Bureau of Census reports that 95% were headed by women. *Id.* at 413. Sociologists attribute the cause to two culprits: unequal treatment in the labor market and divorce, both of which explains the adage, "every woman is a man away from welfare." *See id.* at 412. Statistically, the labor force participation of these women is substantially higher than their female counterparts. MACKINNON, *supra* note 2, at 15. Thus, even today, women's employment is not generally by choice but by economic necessity.

ciety regarded these women with the same degree of respect as prostitutes and branded them, not with a scarlet letter,[14] but with a badge of slavery.[15]

The earliest popular accounts of sexual harassment in the workplace appeared in 1908 when *Harper's Bazaar* solicited and published stories from women readers who in the past ten years had migrated to the cities.[16] Unfortunately, much of what was described then is still true today. The following incident recounted by Ruth, a sixteen-year old Russian immigrant, whose first words learned and spoken in English were "keep your hands off please," illustrates how a working woman in the early 1900s was viewed and treated by her male supervisor.

> [My boss] greeted me in the middle of the room, touched my hair with his fingers, and then went and sat down. . . . After a moment or so he said quite abruptly, "Come, Ruth, sit down here." He motioned to his knee. I felt my face flush. I backed away towards the door and stood staring at him. He too sat quite still looking at me. Then he rose with his usual slowness and quietness[,] put his hand into his pocket, took out a roll of bills, counted off three dollars, and brought it over to me at the door. "Tell your father," he said, "to find you a new shop for to-morrow morning."[17]

Incidents of sexual harassment were not limited then, and are still not limited today, to those occupations dominated by female labor. Such incidents occurred, and continue to occur, with the same frequency in traditionally male fields.[18]

Although the history of sexual harassment in employment is well-documented, only recently has it been recognized that both the individual employee and the workplace as a whole suffer equally from such abuse. With regard to the employee, studies show that the victim incurs significant economic as well as psycho-

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14. NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850).

15. Although this term is most often associated with the 13th Amendment's prohibition against slavery, it is also appropriately used whenever one group chooses to oppress another with a badge of inferiority. *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (upholding power of Congress to prohibit racial discrimination in the sale and rental of real property under authority of 13th Amendment which was intended to eradicate all badges and incidents of slavery).

"[Sexual requirements of work are] a reminder, a badge or indicia [sic] of the servile status she suffered . . . and which she is now trying to shake off . . . . To make her advancement on the job depend on her sexual performance is to resurrect her former status as man's property or plaything." Memorandum in Opposition to Defendant's Motion to Dismiss Plaintiff's Title VII Claim at 14-15, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *reprinted in* MACKINNON, supra note 2, at 177.

16. *See The Girl Who Comes to the City: A Symposium*, 42 HARPER'S BAZAR 692, 693 (1908) (saleswomen experienced repeated propositions); 42 HARPER'S BAZAR 394, 398 (1908) (nurse was told to provide sexual favors if she wanted more work); 42 HARPER'S BAZAR 277, 278 (1908) (doctor's stenographer was sexually harassed).

17. ROSE COHEN, OUT OF THE SHADOW 129 (1918).

18. Mary Bularzik, *Sexual Harassment at the Workplace: Historical Notes*, RADICAL AMERICA, July 1978, at 25, 38-39 (first women to enter medical profession as doctors suffered severe harassment). In Broderick v. Ruder, 685 F. Supp. 1269, 1281 (D.D.C. 1988), a female attorney prevailed in her sex discrimination action against her employer, the Securities Exchange Commission (hereinafter "SEC"). She related that during her eight-year sojourn a potpourri of sexual favors were solicited and engaged in by female secretaries seeking preferential treatment. *Id.; see 'Harassed' SEC Lawyer to Get Back Pay, Promotion*, CHI. DAILY L. BULL., June 17, 1988, at 1. The SEC is the enforcement agency for the United States securities law. If sexual harassment can occur among such professionals and at such a pervasive level, then no occupation is immune.

logical[19] burdens (1) such as a decline in work performance caused by a loss of concentration, fear, humiliation and low self-esteem with resulting adverse economic consequences;[20] and (2) psychological symptoms, such as terminal insomnia, depression and nervousness.[21] These symptoms described what some commentators now refer to as "sexual harassment syndrome."[22] What follows below is a psychiatrist's description of a female victim of sexual harassment and is typical of the adjustment disorders experienced by most sexually harassed female employees: "[s]he began to hate her job and she felt alienated from the other purchasing agents (all men). She became irritable, bitter, and developed insomnia and her concentration, appetite, and sexual interest declined. She became prone to unpredictable crying spells in the office and, on one occasion, she fainted."[23] In a study of harassed female employees, the same psychiatrist reported that most of these women felt a compelling desire for revenge and vindication against their employer and that their continued employment, even after successful litigation, usually perpetuated their psychiatric problems.[24]

With regard to the employer, these reactions result in diminished productivity, increased absenteeism, and higher employee turnover. Indeed, according to a 1988 survey of 160 "Fortune 500" companies, an average business lost $6.7 million every year because of sexual harassment.[25] These costs, of course, are in addition to the legal costs in defending and settling lawsuits, which in many cases rise to the level of millions of dollars.[26]

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19. *See* Ben Bursten, *Psychiatric Injury in the Women's Workplace*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 399, 403 (1985).

20. Some courts have held, and logically so, that deficiency in work performance, when it is the direct result of sexual harassment, cannot be relied upon by the employer as a legitimate reason for her termination or for any other adverse employment decision. *See* Broderick v. Ruder, 685 F. Supp. 1269, 1280 n.10 (D.D.C. 1988) (employee's alleged deficiencies were attributed to abusive work environment and could not be used to justify employer's reprimands).

21. Bursten, *supra* note 19, at 403.

22. Bursten, *supra* note 19, at 404. This term is borrowed from a similar disorder known as "battered wife syndrome." Indeed, Catharine MacKinnon finds an analogy between beating one's wife and harassing one's female employees: both are systematically tolerated. MACKINNON, *supra* note 2, at 160. It should also be noted that both the husband and employer use similar threats of economic deprivation as a form of control. *See* LENORE E. WALKER, THE BATTERED WOMAN 129 (1979).

23. Bursten, *supra* note 19, at 404. Much of the emotional effect parallels that felt by women who are raped. MACKINNON, *supra* note 2, at 47.

24. Bursten, *supra* note 19, at 404-05.

25. James G. Frierson, *Only One Way to Deal with It: Sexual Harassment in the Workplace Costly in Production, Absenteeism, Turnover*, PREVENTIVE L. REP., June 1989, at 3, 3.

26. *Id.* The employer may also be statutorily liable for attorney's fees which often can exceed the amount of actual damages to the employee. *See* EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981) (court awarded victim of sexual harassment $33,000 in backpay and over $90,000 in attorney's fees); *see also* Jay W. Waks & Michael G. Starr, *The "Sexual Shakedown" in Perspective: Sexual Harassment in Its Social and Legal Contexts*, 7 EMPLOYEE REL. L.J. 567, 570 (1982).

Sexual harassment does not occur solely in the workplace. It is no less an infestation in prisons,[27] in housing,[28] and in the armed forces.[29] Nevertheless, this article will continue to focus primarily on harassment in employment, if only because it represents the main area in which Congress has taken legislative action. The paper will begin with a discussion of Title VII of the Civil Rights Act of 1964,[30] including the guidelines promulgated by the Equal Employment Opportunity Commission[31] and any statutory or judicially-created employer defenses. This discussion will include an analysis of the amendments to Title VII enacted pursuant to the Civil Rights Act of 1991[32] and of the "Reasonable Woman" standard now being applied in a limited number of federal circuit courts.[33] Although the paper analyzes decisions primarily from the Fifth Circuit Court of Appeals and the federal district courts of Mississippi, decisions from other jurisdictions which demonstrate a growing trend in the law or which are otherwise notable will also be discussed.

II. WHAT BEHAVIOR CONSTITUTES SEXUAL HARASSMENT?

"The problem [with sexual harassment law] comes in trying to establish legal remedies for . . . boorish behavior. My point . . . is simply that not every offensive act is capable of legal redress, that sometimes the intrusion of the law can create more problems than it solves."[34]

The difficulty with determining what behavior should constitute sexual harassment in the workplace is that there is a wide divergence of opinion as to the boundaries of socially acceptable conduct between the sexes. It is firmly settled that not all "boorish" behavior will result in legal liability[35] but the existing legal standards

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27. The imbalance of power between a male guard and his female prisoner is more severe than male dominance over women in the workplace, and thus sexual coercion in prison is an even greater temptation for the man and an even harder incident for the woman to report. *See* Laurie A. Hanson, Comment, *Women Prisoners: Freedom from Sexual Harassment—A Constitutional Analysis*, 13 GOLDEN GATE U. L. REV. 667, 667 n.3 (1983). The real basis for causes of action filed by female prisoners alleging sexual harassment has been the constitutional right of privacy under the penumbra of the 4th Amendment. *See, e.g.*, United States v. Lilly, 576 F.2d 1240, 1246-47 (5th Cir. 1978).

28. Most of the victims of sexual harassment in housing are tenants who are sexually exploited by property owners, property managers or real estate agents. Regina Cahan, Comment, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1061 & n.2. In the landmark case, Shellhammer v. Lewallen, 1 Fair Housing - Fair Lending Rptr. ¶ 15,472, at 135 (W.D. Ohio 1983), *aff'd*, 770 F.2d 167 (6th Cir. 1985), a federal district court held for the first time that sexual harassment in housing violates the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1982 & Supp. 1989).

29. According to a survey conducted by the United States Army, 50% of the women soldiers in Germany complained of male sexual harassment. *Army Survey Finds Sexual Harassment of Military Women Overseas*, BALTIMORE SUN, Mar. 26, 1980, at A7.

30. *See supra* and *infra* notes 8-310 and accompanying text.

31. *See infra* notes 73, 188 and accompanying text.

32. *See infra* notes 252-307 and accompanying text.

33. *See infra* notes 124-65 and accompanying text.

34. William Raspberry, *The Right Remedy for Harassment*, WASHINGTON POST, Apr. 27, 1981, at 19.

35. *Compare* Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986) (co-workers' crude language and dirty jokes were not sufficient to prove sexual harassment claim) *with* Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987) (statements to female employee such as "O.K., babe[,]" and "Listen here[,] woman," as well as other similar behavior were sufficient to constitute sexual harassment).

imposed by federal legislation, as discussed below, fail to offer any precise definition.[36] Moreover, except for the most aggravated instances, there is no general consensus among the courts.[37] Indeed, the definition is constantly being reformulated on a case by case basis, and, unfortunately, is likely to remain contingent on the particular facts of each case.[38]

The absence of a social or legal definition of sexual harassment makes attempts to eradicate such behavior all the more difficult: How can one advise and encourage employers to prevent conduct which remains undefinable? Even the male harasser is often himself genuinely surprised when others identify his actions as purposeful harassment.[39]

As a possible solution, one commentator suggests that courts regularly examine the following four factors when determining the rubrics of sexually harassing behavior:

(1) [T]he extent to which the conduct affected the employee terms and conditions of employment;
(2) [W]hether the conduct was repeated or isolated;
(3) [W]hether the conduct was intended or perceived seriously or in jest; and
(4) [T]he degree to which the conduct is contrary to community standards.[40]

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36. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982), upon which most other legislation in this area is based, makes no specific reference to sexual harassment, and its designated enforcement agency, the Equal Employment Opportunity Agency (EEOC), has promulgated guidelines which are so broadly based that they too offer little guidance. *See* 29 C.F.R. § 1604.11 (1982); *infra* text accompanying note 76.

37. The most egregious form of sexual harassment is, of course, rape. *See* Gilardi v. Schroeder, 833 F.2d 1226, 1228-29 (7th Cir. 1987) (female employee drugged, raped and fired by company owner awarded $113,000 in damages); *see also* Seth Kaberon, *$113,000 Award Affirmed for Woman Fired After Rape,* CHI. DAILY L. BULL., Nov. 4, 1987, at 1. Sexual harassment is also easily recognized in its more traditional form, that is, when submission to request for sexual favors is made a prerequisite for certain tangible benefits.

38. Cases are fact sensitive because the standard used in determining whether conduct is offensive is sometimes based on the subjective perceptions of the victim. *See* Patricia Linenberger, *What Behavior Constitutes Sexual Harassment?,* 34 LAB. L.J. 238, 244 & n.39 (1983).

39. For example, following charges of sexual harassment by eleven female employees, Dean Geoffrey W. Peters of the William Mitchell College of Law resigned in November, 1983. The comptroller of the school, Michael Carlson, was also charged with sexual harassment and placed on probation. In a subsequent letter of apology to the board of trustees, Carlson wrote the following: "I do not dispute that during the course of my employment at William Mitchell I have done some things and said some things which I should not have done and said." Mr. Carlson went on to say that he had not intended to harass anyone sexually but that "several people have indicated that they were offended by my behavior." Austin C. Wehrwein, *Law School Dean Quits in Scandal,* NAT'L L.J., Nov. 21, 1983, at 3. The forms of harassment that the employees complained of included over forty "incidents of sexually-motivated touching and fondling, derogatory and suggestive comments, and propositioning . . . involving Dean Peters or Mr. Carlson." *Id.* at 36. Because of the severity of these allegations, it is difficult to surmise how the dean could have explained his conduct as being misinterpreted flirtations. What is even more surprising is the response of the Minnesota Lawyers Professional Responsibility Board, which declined to discipline Dean Peters and which concluded: "Assuming the complainants' allegations to be true, there is serious doubt whether such conduct . . . is disciplinable . . . ." David A. Kaplan, *Ethics Rules Held Not to Cover Complaints of Sexual Harassment,* NAT'L L.J., Nov. 19, 1984, at 4. Compare this ruling with the decision by the Illinois Courts Commission to reprimand Cook County Circuit Judge Arthur J. Cieslik for the following remarks: "Ladies should not be lawyers"; "If your husband had kept his hands in his pocket, you [a pregnant female attorney] would not be in the condition you are in"; "I [will] never allow a pregnant woman to try a case before [me] again"; "Ladies should be at home raising a family." Katherine Schweit, *Judge Reprimanded for Sexist Comments,* CHI. DAILY L. BULL., July 31, 1987, at 1, 16.

40. Ralph H. Baxter, Jr., *Judicial and Administrative Protecting Against Sexual Harassment in the Work Place,* 7 EMPLOYEE REL. L.J. 587, 589 (1981-82).

Another commentator suggests that a workable definition of sexual harassment requires a list of examples of such behavior, such as the following:

> [S]taring, ogling, any kind of unsolicited touching (including "accidental" brushing), verbal and nonverbal criticizing and commenting upon an individual's body, unsolicited grabbing, kissing, squeezing, smacking, pinching, and pulling part of an individual's body (including hair), unsolicited propositions, suggestions and demands for dates and/or involvement in sexual activity, posting or placing near an individual's work environment an obscene picture (excluding recognized artwork), derogatory jokes and pictures, and forced sexual activity (including rape).[41]

Unfortunately, despite the above definitions, the simple truth is that, with the exception of the most blatant instances of sexual harassment, both employers and employees alike cannot be sure about what conduct in the workplace is permissible.[42]

One matter, however, is now certain: sexual harassment constitutes a form of sex-based discrimination which will expose the employer to liability under Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII").[43] Understanding how sexual harassment violates Title VII is instructive, not only in understanding the current status of the law, but also in determining, to the extent possible, what conduct may or will constitute such behavior.

III. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

As originally proposed, the Civil Rights Act of 1964 (hereinafter "the Act") provided equal employment opportunities, under Title VII, to individuals who would otherwise be discriminated against because of their race, religion, or national origin.[44] Congress did not intend to eradicate all unfair treatment in the workplace but to excuse only those discriminatory practices directed against members of a protected class.[45] The legislation was considered and debated with no mention of gender-based discrimination until the eleventh hour when Senator Rus-

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41. Suzanne E. Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. CENT. L.J. 113, 119 (1983).

42. *See* Gary R. Siniscalco, *Sexual Harassment and Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPLOYEE REL. L.J. 277, 286 (1980).

43. 42 U.S.C. § 2000e to 2000e-17 (1982).

44. 42 U.S.C. § 2000e-2 (1964).

45. [Title VII] does not command that any person
> be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group . . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of [an] impermissible classification.

Griggs v. Duke Power Co., 401 U.S. 424, 430-431 (1971).

Although Title VII covers narrowly defined classifications, discrimination itself is defined broadly. *See* Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (holding that Congress intended to define discrimination in the broadest possible terms), *cert. denied*, 406 U.S. 957 (1972).

It should also be noted that Title VII does not cover all employers but only those "engaged in an industry affecting commerce who [have] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent . . . ." 42 U.S.C. § 2000e(b) (1982). Congress did not intend to eradicate all discrimination in employment.

sell added "sex" by a floor amendment as an attempt to defeat the bill.[46] Because of the peculiar manner of its inclusion, there is little legislative history as to this particular amendment.[47] It was made clear, however, in the legislative history of the 1972 amendments to the Act[48] that Congress considered discrimination against women to be "no less serious than other forms of prohibited employment practices."[49]

Section 703(a)(1) of Title VII contains the substantive provision of the Act which, in pertinent part, reads as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[50]

In order to understand an employer's exposure to liability under the Act, it is important to understand the manner in which claimants prove their discrimination claims under Title VII.[51] Under the dictates of the Act, overt discrimination against applicants and employees is easily attacked and remedied.[52] For example, a job advertisement stating "No Blacks Need Apply," would violate the Act and would constitute direct evidence of intentional discrimination.[53] Eventually, however, the effectiveness of the Act was jeopardized as job applicants and employees began encountering problems of proof.[54] Employers had become more savvy and had begun engaging in subtler forms of discrimination in order to make litigation under the Act more difficult.[55] For example, employers replaced office signs stating "No Blacks Need Apply" with signs stating "All Employee Applicants Must

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46. 110 CONG. REC. 2577-82 (1964). On February 8, 1964, Rep. Smith added the amendment which was adopted by the House of Representatives without a hearing. *Id.* at 2582, 2584.

47. *Id.* at 2582, 2584. There was some debate in the House of Representatives and no reference to sexual harassment. *Id.*

48. 42 U.S.C. § 2000e-16(a) (1982). The Equal Employment Opportunity Act of 1972 extended coverage of Title VII to federal, state and local employees and stated, as follows: "All personnel actions affecting employees . . . in executive agencies [of the United States] . . . shall be made free from any discrimination based on . . . sex." *Id.*

49. H.R. REP. No. 238, 92d Cong., 1st Sess. 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2141. "Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less renumerative positions on the basis of their sex alone." *Id.* at 2140. The 1972 amendments do not mention sexual harassment. *Id.*

50. 42 U.S.C. § 2000e-2(a) (1982).

51. In order to prevail under Title VII, an aggrieved employee must prove (1) that the employer is covered by Title VII; (2) that the employer's acts were premised on an impermissible basis, such as race, color, religion, sex or national origin; (3) that the act was on an issue cognizable under Title VII; and (4) that there was a causal connection between the basis and the issue. *See* BARBARA LINDEMANN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1-2 (2d ed. 1983). Without direct evidence of an employer's intent, such as an oral admission or written memorandum, it is difficult to prove the required nexus between an adverse employment decision and the classification.

52. *See supra* note 51 and accompanying text.

53. *Id.*

54. *Id.*

55. *Id.*

Have High School Diplomas."[56] By implementing such requirements, employers achieved the same result, assuming that the number of blacks with high school diplomas in the workforce was considerably lower than whites.[57] The discriminatory effect of such a policy is not as obvious or easy to prove in the second case scenario. Two new theories, the disparate impact theory and the disparate treatment theory, were eventually adopted by the courts to assist claimants in establishing a prima facie case of discrimination when the only form of proof available to the applicant or employee was circumstantial evidence.

The first theory, disparate impact, is most often utilized in cases where an employer's policy or practice, although neutral on its face, has an adverse impact on a protected class which the employer cannot justify by business necessity.[58] For example, an employer who adopts a high school diploma requirement for his work force violates Title VII if the requirement disproportionately excludes blacks unless the employer can justify its existence as a business necessity. It should be noted that it is not necessary that the employee or applicant prove that the employment practice was implemented for a discriminatory purpose but only that it has a discriminatory effect.[59]

The second theory, disparate treatment, is met whenever an employer's treatment of an employee differs from that accorded to similarly situated individuals

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56. This example is loosely based on the fact situation presented in Griggs v. Duke Power Co., 401 U.S. 424, 425-26 (1971). In *Griggs*, the employer's high school diploma requirement was implemented on July 2, 1964, the date on which Title VII became effective. *Id.* at 427. Prior to that date, the company had followed a policy of overt racial discrimination. *Id.* at 426-27. Needless to say, the requirement excluded a greater portion of black job applicants. *Id.* at 426.

57. *See, e.g., supra* note 56 and accompanying text.

58. *See Griggs*, 401 U.S. at 425. More specifically, there is a tripartite order of proof in the disparate impact case. First, the plaintiff must show that an employment policy or practice has a substantially disproportionate exclusionary impact on a protected class. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-30 (1977). In Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), the Supreme Court held that the employee must identify the "specific" policy or practice responsible for the disproportionate impact. However, the Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2(k)(1)(B)(i) slightly changed that holding. Under the Act, an employee need not identify the specific employment practice when the elements of an employer's decision-making process are not capable of separation for analysis. *Id.* The defendant employer can attack plaintiff's case at this stage of proof by demonstrating a deficiency in the statistical evidence or by showing that the disparity is not statistically significant. *See, e.g.*, Bauer v. Bailar, 647 F.2d 1037, 1042-43 (10th Cir. 1981) (disparity in percentages insufficient to establish prima facie case); Craig v. County of Los Angeles, 626 F.2d 659, 664-65 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

Second, if plaintiff establishes impact, then the defendant employer must show that the practice serves a business necessity. *Griggs*, 401 U.S. at 432. Under the recently enacted Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A), the burden of persuasion is shifted to the employer to demonstrate business necessity.

Third, the plaintiff can show that other employment practices serve the employer's legitimate interests with lesser adverse impact. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Under the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A), (C), it is not necessary that the plaintiff prove that the alternative employment practices were equally effective in achieving the employer's interests. For a discussion of the impact of the Civil Rights Act of 1991 on sexual harassment law, see *infra* notes 254-310 and accompanying text.

59. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

outside the employee's protected class.[60] Thus, in the example set out above, a black applicant without a high school diploma could prove discrimination under the disparate treatment theory by showing that the employer refused to hire him for this reason but hired white non-graduates. Such evidence indicates that the employment practice was used as a pretext for intentional discrimination.

A. Sexual Harassment as a Form of Sex-Based Discrimination

Title VII does not directly prohibit sexual harassment, but sexual harassment nevertheless violates the Act because it is a form of sex-based discrimination. For at least a decade before the United States Supreme Court's first pronouncement on the issue in 1986,[61] the federal appellate courts had unanimously concluded that sexual harassment violates Title VII for this reason.[62] The Supreme Court was in agreement in its later decision.[63] However, there was an initial reluctance in the early trial court cases to find a connection between sexual harassment and sex discrimination.[64] These judges considered sexual harassment to be a personal injury that was not exclusive to one gender and that could be visited upon either gender,

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60. The disparate treatment theory was set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and requires that plaintiff prove four elements in establishing a prima facie case: (1) that she is a member of a protected group; (2) that she is qualified for a job for which the employer was seeking applicants; (3) that she was denied the position; and (4) that after her rejection, the position remained open. *Id.* The burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the rejection. *Id.* The plaintiff employee is then afforded an opportunity to attack the employer's reason as a pretext for illicit discrimination. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 570-71 (1978).

61. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). For a full discussion of the Supreme Court's *Vinson* decision, see *infra* notes 111-18 and accompanying text.

62. Women had to wait until the mid-1970s, 10 years after Title VII was in effect, for the first successful sexual harassment claim. William L. Kandel, *Current Developments in Employment Litigation: Sexual Harassment: Persistent, Prevalent, but Preventable,* 14 EMPLOYEE REL. L.J. 439, 439 (1988). The delay "[was] more of a problem of social attitude than a legal problem of proof." Russell W. Whittenberg, Comment, *Sexual Harassment: A Jurisprudential Analysis,* 10 CAP. U. L. REV. 607, 608 & n.10.

63. *Vinson,* 477 U.S. at 63-64.

64. *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *rev'd on procedural grounds,* 562 F.2d 55 (9th Cir. 1977); Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd,* 568 F.2d 1044 (3d Cir. 1977).

or even the same gender.[65] Thus, since the word "sex" in Title VII was interpreted, and continues to be interpreted, to mean "gender," rather than its more titillating connotation, sexual harassment at first was deemed to fall outside the prohibition of the Act.[66]

It was the Circuit Court for the District of Columbia in *Barnes v. Costle*[67] that, on reversal of the district court's decision, produced the most explicit treatment of the issue. In holding that sexual harassment is sex discrimination, the *Barnes* court established a trend that other courts have since followed.[68] In *Barnes*, the employer had argued that the female plaintiff had been discriminated against, not because of her sex, but because of her failure to comply with her supervisor's sexual demands.[69] In rejecting this argument, the *Barnes* court explained:

> But for her womanhood . . . her participation in sexual activity would never have been solicited. To say, then, that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman, subordinate to the inviter in the hierarchy of agency personnel. Put another way, she became the target of her superior's sexual desires because she was a woman and was asked to bow to his demands as the price for holding her job. The circumstance imparting high visibility to the role of gender in the

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65. MACKINNON, *supra* note 2, at 57-58. In the first reported adjudication of a sexual harassment claim, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd on procedural grounds*, 562 F.2d 55 (9th Cir. 1977), the trial judge denied relief to two clerical workers who had allegedly been subjected to repeated physical sexual advances and propositions because in his view "an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually[-]oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual." *Id.* at 163-64.

Using similar reasoning, the trial court judge in Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977), found that sexual harassment, as a matter of law, was not gender-based discrimination:

> In this instance the supervisor was male, the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.

Id. An opposite result, the judge feared, would lead to liability for social dialogues of any kind in the workplace, such as invitations to dinner or excesses at office Christmas parties. *Id.* at 557; *see* MACKINNON, *supra* note 2, at 69-72, 147. The natural legal conclusion to draw from these two cases would be that only a bisexual supervisor can not discriminate because only a bisexual has an equal sexual preference. MACKINNON, *supra* note 2, at 203.

66. Title VII does not protect employees from discrimination because of their sexual preference, sexuality, or sexual behavior. Just because a discriminatory practice involves something sexual does not mean that it is prohibited under Title VII. Thus, for example, an employer may fire a homosexual employee because of the employee's sexual preference. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (Congress never intended for Title VII to protect individual's sexual orientation). *But see* Lynn McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?*, 10 U. BALT. L. REV. 275, 290 (1981) (claiming that when EEOC enacted regulations prohibiting sexual harassment, it substituted the word "sexual" for "sex"). As of yet, no sexual preference discrimination case has been tried under the theory that an employer's policy disproportionately excludes males because more males than females are homosexual. *See* McLain, *supra*, at 285 n.56.

67. 561 F.2d 983 (D.C. Cir. 1977).

68. MACKINNON, *supra* note 2, at 65-68; Goodman, *supra* note 11, at 460. Although Judge Richey in Williams v. Saxbe, 413 F. Supp. 654, 655-56 (D.D.C. 1976), has been credited with making the first connection between sexual harassment and sex discrimination, he did not explore the matter fully but merely held that a policy of harassment applied to one gender was sufficient to create a cause of action under Title VII even though such behavior could have been applied to both sexes. *Id.*

69. *Barnes*, 561 F.2d at 990.

> affair is that no male employee was susceptible to such an approach by appellant's supervisor. Thus, gender cannot be eliminated from the formulation which appellant advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII.[70]

The *Barnes* court further determined in dicta that the same result would be reached if a similar condition was imposed by a homosexual supervisor against a member of the same sex,[71] but not if by a bisexual against a member of either sex.[72] A bisexual supervisor, by abusing both men and women, discriminates against neither sex.

Subsequent to the recognition that sexual harassment was sex discrimination, three types of cases emerged as cognizable causes of action under Title VII: (1) quid pro quo harassment, (2) hostile environment harassment and (3) sexual favoritism.[73] All three categories are included in the definition of sexual harassment provided by the Equal Employment Opportunity Commission (hereinafter "EEOC").[74] The EEOC is the independent regulatory agency charged with enforcing the Civil Rights Act of 1964, and as part of that obligation, issued guidelines in 1980 which defined the following harassing acts as sex discrimination:

> 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 the basis for employment decisions affecting such individual, or
>
> (3) such conduct has the purpose or effect of unreasonably[75] interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[76]

Although the EEOC Guidelines are merely an administrative interpretation of Title VII and do not have the force of law, federal courts have relied heavily upon them. Indeed, the United States Supreme Court in its only decision on the issue of sexual harassment cited the above Guidelines with approval, stating that they "drew upon a substantial body of judicial decisions and EEOC precedent"[77] and

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70. *Id.* (footnotes omitted).

71. *Id.* at 990 n.55; *see, e.g.*, Wright v. Methodist Youth Servs., 511 F. Supp. 307 (N.D. Ill. 1981).

72. *Barnes*, 561 F.2d at 990 n.55; *see* Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982) ("Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex.").

73. 29 C.F.R. § 1604.11 (1982).

74. *Id.*

75. The word "unreasonably" replaced the word "substantially." The substitution was cryptically explained as "more accurately stat[ing] the intent of the Commission . . . ." 45 Fed. Reg. 74,676 (1980).

76. 29 C.F.R. § 1604.11(a) (1982).

77. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

constituted "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[78]

The first two definitions in the Guidelines refer to quid pro quo harassment, and the last refers to hostile work environment harassment.[79] The Guidelines are more fully discussed in the following sections.

1. Quid Pro Quo Harassment

Literally, "quid pro quo" is a latin phrase meaning "something for something,"[80] and of the three types of sexual harassment claims, the quid pro quo claim is the easiest to identify: an employee is denied a tangible job benefit, such as a promotion or salary increase, because she refuses to grant her employer's requests for sexual favors.[81] Catharine MacKinnon is credited with being the first to identify such sexual harassment claims.[82] MacKinnon envisions four possible scenarios after an employee requests sexual favors: (1) the employee refuses and thereby forfeits an employment opportunity; (2) the employee refuses and receives completely fair treatment;[83] (3) the employee complies and does not receive a job benefit; and (4) the employee complies and does receive a job benefit.[84] Only the first and third case scenarios are examples of quid pro quo harassment.

Courts normally treat quid pro quo cases under a disparate treatment analysis.[85] The proper allocation of proof under this analysis becomes, as follows:

> 1. The employee establishes a prima facie case by showing that she was subjected to unwelcome sexual harassment and that she was denied some tangible aspect of the terms of her employment for which she had a reasonable expectation.[86]
> 2. The burden of production shifts to the employer to prove that its decision was based on legitimate, nondiscriminatory grounds.[87]

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78. *Id.* (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))). The Supreme Court has not always felt compelled to give EEOC Guidelines such favorable review and has rejected those which it has found to be ill-reasoned and inconsistent with prior case law. *See, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 92 (1973) (rejecting EEOC Guidelines holding that discrimination because of citizenship was always discrimination based on national origin). One of the reasons these particular Guidelines were so well-received by the Supreme Court is because they follow the initial court rulings on sexual harassment. *Id.* at 94.

79. 29 C.F.R. § 1604.11(a) (1982).

80. BLACK'S LAW DICTIONARY 1123 (5th ed. 1979).

81. *See* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 619 (6th Cir. 1986) (noting that quid pro quo claims have given rise to greatest proliferation of sexual harassment cases), *cert. denied*, 481 U.S. 1041 (1987).

82. *See* MACKINNON, *supra* note 2, at 32-33.

83. *See* Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1239 (7th Cir. 1989) (dispatcher subjected to sexual harassment but suffered no adverse job consequences), *cert. denied*, 493 U.S. 1036 (1990).

84. *See* MACKINNON, *supra* note 2, at 32-33.

85. For a thorough discussion of the disparate treatment analysis as first set out under Title VII in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1971), see *supra* note 60. It should be noted that this analysis has required minor alterations to fit sexual harassment claims. *See* Rabidue v. Osceola Ref. Co. 805 F.2d 611, 619-20 (6th Cir. 1986) (setting out elements of sexual harassment claim), *cert. denied*, 481 U.S. 1041 (1987).

86. *See* Stephen Allred, *Sexual Harassment: New Grounds for Employer Liability*, 1987-1988 CURRENT MUN. PROBLEMS 503, 505-06.

87. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

3. The employee then may attempt to prove that the employer's stated reasons were pretextual.[88]

Usually, in order to establish a violation of Title VII, a claimant must first present evidence that he or she is a member of a protected group.[89] This step is unnecessary in sexual harassment claims because Title VII prohibits discrimination against either sex.[90] Frequently, however, an employee will fail to establish a prima facie case of quid pro quo harassment because of an inability to prove causation, that is, an inability to prove that her rejection of her employer's sexual advances was indeed the reason she suffered an adverse employment decision.[91]

Problems may also arise, although not as frequently, in proving that the harassment was sex-based.[92] This is normally done by showing that the offending supervisor harassed only females or only males.[93] Thus, for example, a heterosexual male supervisor who sexually harasses only his female subordinates and a homosexual male supervisor who sexually harasses only his male subordinates both commit gender-based discrimination. However, problems in proving that harassment is sex-based arise when the victim is shown to have engaged in a prior consensual intimate relationship with her harasser.

Specifically, a victim who suffers an adverse employment decision because of her refusal to continue an ongoing sexual relationship with her employer must show that the decision was made because of her gender and not because she was his former lover.

To address this situation, the Federal District Court for the Northern District of Illinois in *Keppler v. Hinsdale Township High School District*[94] developed a subcategory to the standard quid pro quo claim that the court referred to as "sexual retaliation."[95] The court began by distinguishing those cases in which an employer expressly or impliedly demanded sexual favors in return for job benefits (the standard quid pro quo claim) from those in which the employer made sexual advances without either expressing or implying that the job benefit would be denied but later did deny the benefit (the sexual retaliation quid pro quo claim).[96] Both scenarios constituted sex discrimination, but the distinction became important

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88. *Id.*

89. *Id.; see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

90. 42 U.S.C. § 2000e-2(a) (1982).

91. *See* Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1239 (7th Cir. 1989) (holding that plaintiff's discharge was result of excessive absenteeism and not because of sexual harassment), *cert. denied*, 493 U.S. 1036 (1990).

92. *See supra* notes 61-72 and accompanying text.

93. *See* Allred, *supra* note 80, at 506. On the other hand, a bisexual male supervisor does not engage in sex discrimination because he harasses both male and female subordinates alike. *Id.*

94. 715 F. Supp. 862 (N.D. Ill. 1989).

95. *Keppler*, 715 F. Supp. at 868.

96. *Id.*

when there was a prior consensual relationship.[97] In such cases, the court concluded, the employee must overcome the presumption that the employment decision was the result of sexual retaliation because of a failed relationship.[98] In order to prevail, the employee must show at a minimum that the supervisor threatened reprisal if she refused to continue the sexual relationship.[99]

2. Hostile Work Environment Harassment

Whereas a quid pro quo harassment claim can arise from one isolated incident and revolves around the denial of a specific employment benefit, the hostile work environment harassment claim usually requires a pattern of offensive conduct, in part because it survives absent any direct effect on the employee's terms and conditions of employment.[100] Simply put, the claim exists whenever an employer creates or condones a substantially discriminatory work environment that unreasonably interferes with the employee's work performance.[101] Plaintiffs, however, generally posit both quid pro quo and hostile work environment claims in Title VII litigation, because the failure to prove one assists, rather than defeats, evidence supporting the existence of the other.

This cause of action was first recognized by the Court of Appeals for the District of Columbia in *Bundy v. Jackson*,[102] a landmark case which relied extensively on the legal precedent set by cases involving racially discriminatory environ-

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97. *Id.* The court developed this distinction in order to explain the result reached by the Seventh Circuit Court of Appeals in Huebeschen v. Department of Health & Social Servs., 716 F.2d 1167 (7th Cir. 1983). In *Huebeschen*, a male employee became involved in a consensual relationship with his supervisor, but when the romance soured, she retaliated by recommending his termination. *Id.* at 1169. The Seventh Circuit reasoned that the discrimination was directed at the employee, not because he was a man, but because he was the supervisor's former lover. *Id.* at 1172. Thus, this did not constitute sex discrimination. *Id.*

98. *Keppler*, 715 F. Supp. at 869. The court summarily rejected the argument that an employee who engaged in consensual sex forever forfeited any right to legal protection from sexual harassment. *Id.* at 868.

99. *Id.* at 869. Although the federal district court in Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988), did not directly address this issue, the court concluded that the evidence was sufficient to support plaintiff's sexual harassment claim where plaintiff's supervisor, with whom plaintiff had a previous consensual relationship, withheld job performance and appraisals and told her that "it doesn't have to be this way." *Id.* at 777.

100. *See* MACKINNON, *supra* note 2, at 40-47 (discussion of work-condition sexual harassment).

101. The constitutionality of hostile work environment claims was called into question by Justice White in his concurring opinion in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). In *R.A.V.*, the Supreme Court held that a city's "hate-crimes" ordinance which made it a misdemeanor to engage in conduct or speech that tended to incite immediate violence "on the basis of race, color, creed, religion, or gender" was facially invalid under the First Amendment. According to the majority opinion, prohibiting speech on the basis of its subject matter, even when the speech would not otherwise be constitutionally protected, violates the First Amendment. The Court, however, carved out exceptions to this general rule, which, as Justice White explained in his concurring opinion, were deemed necessary in order to insulate Title VII hostile work environment claims from constitutional challenges under the Court's new holding. *Id.* at 2557-58. Justice White, however, disagreed with the majority's view that the exception adequately protected such claims. *Id.*

102. 641 F.2d 934 (D.C. Cir. 1981).

ments.[103] In particular, the *Bundy* court quoted Judge Goldberg's opinion in *Rogers v. Equal Employment Opportunity Commission*,[104] a case in which Judge Goldberg determined that the plaintiff's employer had created an offensive work environment for its Hispanic employees by giving discriminatory service to Hispanic clients.[105]

> [T]he phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .[106]

After examining other cases chronicling similar discriminatory practices,[107] the *Bundy* court asked: "How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?"[108]

Although the disparate treatment analysis has been used to establish a prima facie case under this claim, the elements seem ill-equipped. Under a modified version of the analysis, a claimant must show: (1) that the employee is a member of a protected group; (2) that the employee was subjected to unwelcome sexual advances; (3) that the harassment was sex-based; and (4) that the harassment affected or unreasonably interfered with a condition of employment.[109] The

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103. *Bundy*, 641 F.2d at 944; *see* Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (pattern of offensive ethnic slurs violates Title VII rights); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (segregated employee eating clubs violates Title VII); United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (black employees entitled to work environment free of racial abuse and insult); Steadman v. Handley, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (racial slurs may violate Title VII); *see also* EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 385 (D. Minn. 1980) (racial graffiti in restrooms, racial epithets on chalkboards, racial hostility in lunchroom created discriminatory work environment). *But see* Winfrey v. Metropolitan Util. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (isolated incident of foreman calling black plaintiff "boy" did not violate Title VII).

104. 454 F.2d 234 (5th Cir. 1971).

105. *Rogers*, 454 F.2d at 236.

106. *Id.* at 238.

107. *Bundy*, 641 F.2d at 944-45; *see* Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032-33 & n.13 (7th Cir. 1979) (forcing female bank employees to wear uniforms while allowing males to wear suits violates Title VII), *cert. denied*, 445 U.S. 929 (1980); Harrington v. Vandalia-Butler Bd. of Educ., 585 F.2d 192, 194 n.3 (6th Cir. 1978) (giving female physical education teachers inferior locker and shower facilities violates Title VII), *cert. denied*, 441 U.S. 932 (1979). *But see* Halpert v. Wertheim & Co., 24 Emp. Prac. Dec. (CCH) 31, 243 (S.D.N.Y. 1980) (frequent use of sexually explicit language by male security traders not sexual harassment since this was normal language of marketplace).

108. *Bundy*, 641 F.2d at 945.

109. Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982). The Fifth Circuit Court of Appeals in Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190, 196 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 968 (1992), noted that a prima facie case under the hostile environment theory is essentially the same as that under a quid pro quo theory except for the fourth element, which involves job benefits conditioned on the acceptance of equal favors. *Id.* In an earlier decision, Jones v. Flagship Int'l, 793 F.2d 714, 720 n.5 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987), the Fifth Circuit refused to apply the elements of a prima facie case in a hostile environment claim, preferring instead to employ normal principles of proof allocation.

disparate impact case has not yet been tried under this type of claim but arguably might succeed if the employee could show: (1) that the employer tolerated a working environment in which lower echelon employees were subjected to sexual advances, and (2) that most of the lower echelon employees were female and most of the superior employees, male.[110]

The United States Supreme Court in *Meritor Savings Bank v. Vinson*,[111] in its first decision concerning sexual harassment, unanimously sanctioned the view that a hostile work environment violates Title VII.[112] In *Vinson*, a female bank employee alleged that the bank's vice-president had fondled her, exposed himself to her, assaulted her, forcibly raped her several times and had sex with her about forty or fifty times during and after business hours.[113] The employee had not suffered any economic or tangible discrimination, but, nonetheless, the Supreme Court held that the evidence supported a claim of sexual harassment.[114] More specifically, the Court held that pervasive sexual harassment which alters a victim's employment, including his or her psychological well-being, by creating an abusive work environment, is actionable under Title VII.[115]

A central issue in the *Vinson* case was the employer's defense that the plaintiff consented to her supervisor's demands for sexual favors.[116] In support of its argument, the employer pointed to evidence that the plaintiff had voluntarily engaged in sexual relations with her supervisor.[117] However, the *Vinson* Court rejected this argument, holding that sexual conduct need not be forced upon an employee to be unwelcome, only offensive or undesirable.[118]

Whether the employee viewed sexual conduct as unwelcome continues to be a source of controversy in hostile work environment cases. In making this determination, courts will often focus upon the conduct of the alleged victim, because her conduct in many circumstances will suggest whether the sexual comments were welcome. A plaintiff who helps create a hostile work environment by making vulgar comments, for example, may not complain of sexual harassment because it is not then deemed to have been offensive to her.[119] On the other hand, a few sporadic sexual comments by the plaintiff will not bar her claim. For example, in *Wyerick v. Bayou Steel Corp.*,[120] the Fifth Circuit Court of Appeals reversed a summary judgment award granted to the employer by the district court on the ground

110. MACKINNON, *supra* note 2, at 206-07; *see supra* notes 58-59 and accompanying text (discussing traditional disparate impact analysis).

111. 477 U.S. 57 (1986).

112. *Vinson*, 477 U.S. at 63-66.

113. *Id.* at 60.

114. *Id.* at 65.

115. *Id.* at 67.

116. *Id.* at 68.

117. *Id.*

118. *Id.* at 68. Apparently, there was very little evidence supporting claimant's allegations of repeated forcible rapes. *Id.*

119. *See, e.g.*, Weinsheimer v. Rockwell Int'l Corp., 754 F. Supp. 1559 (M.D. Fla. 1990) (no hostile environment claim where plaintiff herself was participant in sexual innuendo and vulgar storytelling).

120. 887 F.2d 1271 (5th Cir. 1989).

that the plaintiff had participated in the alleged harassment by making sexual comments.[121] The Fifth Circuit determined that the plaintiff's limited remarks made on three separate occasions and in response to an onslaught of sexual comments and gestures were insufficient to establish her consent to the harassing work environment.[122] Even if plaintiff's participation had been established, other court decisions indicate that she could still have asserted a sexual harassment claim if she could have shown with some precision a point at which she conveyed to the harasser that she considered his conduct to be offensive.[123]

a. Reasonable Woman Standard

The most controversial and most litigated element of hostile work environment claims is the requirement that the harasser's conduct be sufficiently severe and pervasive to alter the conditions of his victim's employment.[124] In evaluating the harasser's conduct, courts have applied both an objective standard and a combined objective and subjective standard.[125] Adopting the objective perspective of a reasonable person's reaction to a similar work environment has been deemed necessary in order to protect employers from liability for claims brought by overly sensitive plaintiffs.

Recently, however, some courts have rejected the "reasonable person" standard and opted instead for an objective standard that views the conduct from the perspective of a person of the same sex as the victim, that is, from the perspective of

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121. *Wyerick*, 887 F.2d at 1275. Plaintiff admitted that she called a co-worker a "mother fucker" and "whoremongler" [sic] but only in response to his abusive statements. *Id.* at 1273 n.4.

122. *Id.* at 1275.

123. Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323 (S.D. Miss. 1986), *cert. denied*, 484 U.S. 1063 (1988).

124. Generally, isolated instances of abusive conduct in the workplace are insufficient to establish a violation. *See, e.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (occasional use of obscenity and presence of posters are not enough to affect psyches of female employees), *cert. denied*, 481 U.S. 1041 (1987); Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986) (one request to join supervisor at a restaurant after work and his comments concerning desire to date plaintiff not sufficient to state a cause of action); Sapp v. City of Warner Robins, 655 F. Supp. 1043 (M.D. Ga. 1987) (single request for date not actionable sexual harassment); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1388 (D. Colo. 1978) ("cause of action does not arise from an isolated incident or a mere flirtation . . . . [M]ore properly characterized as an attempt to establish personal relationships").

However, if sufficiently severe, one incident can constitute a violation. The EEOC, in its "Policy Guidance on Current Issues of Sexual Harassment," states that a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation. According to the EEOC, "the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical." *EEOC Policy Guidance on Current Issues of Sexual Harassment*, EEOC Compl. Man. (CCH) ¶ 3112, at 3243 (Oct. 25, 1988); *see* Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984) (harasser talked about sex and committed offensive touching in a car from which plaintiff could not escape); Gilardi v. Schroeder, 672 F. Supp. 1043 (N.D. Ill. 1986) (plaintiff drugged and raped), *aff'd*, 833 F.2d 1226 (7th Cir. 1987).

125. For example, the Fifth Circuit Court of Appeals in Waltman v. International Paper Co., 875 F.2d 468, 477 n.3 (5th Cir. 1989), reversed an employer's summary judgment award, noting that the alleged harassment would have been highly offensive to any "reasonable person." On the other hand, the Sixth Circuit Court of Appeals in Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), affirmed a lower court's judgment in favor of the employer, holding that in hostile environment cases a plaintiff must show not only that the harasser's actions would have interfered with a reasonable person's work performance but that such conduct actually offended the particular plaintiff and the plaintiff "suffered some degree of injury as a result." *Id.*

either a "reasonable woman" or a "reasonable man." Of course, evaluating conduct from the victim's gender perspective will almost always require application of a reasonable woman standard, since victims of sexual harassment are disproportionately female.[126]

The first decision to advocate acceptance of the reasonable woman standard is Circuit Judge Damon Keith's dissenting opinion in *Rabidue v. Osceola Refining Co.*[127] In *Rabidue*, the majority held that a male co-worker's frequent obscenities and sexually oriented poster displays did not create a hostile work environment.[128] Judge Keith disagreed with the majority's holding, and, in particular, disagreed with the majority's adoption of the reasonable person standard in considering and rejecting plaintiff's claim of sexual harassment.[129] In his dissent, Judge Keith argued that "the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."[130] On the other hand, adopting the perspective of the reasonable victim or, in this case, the perspective of the reasonable woman would "simultaneously allow[] courts to consider salient sociological differences as well as shield employers from the neurotic complainant."[131] Otherwise, according to Judge Keith, "courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case men."[132]

The Ninth Circuit Court of Appeals in *Ellison v. Brady*,[133] was the first court explicitly to adopt the reasonable woman standard in determining the existence of

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126. Since the primary reason for rejecting the reasonable person standard is because it is inherently male biased, there is probably little, if any, difference between that standard and the reasonable man standard. *See infra* note 162. Viewing conduct from the victim's perspective is primarily an accommodation to female victims of sexual harassment. Thus, the new trend is appropriately referred to solely as the "reasonable woman" standard.

127. 805 F.2d 611, 626 (6th Cir. 1986), *cert. denied*, 481 U. S. 1041 (1987).

128. *Rabidue*, 805 F.2d at 622. The co-worker, Doug Henry, routinely referred to women as "whores," "cunt[s]," "pussy," and "tits." *Id.* at 624. Henry specifically called plaintiff "fat ass" and on one occasion said, "All that bitch needs is a good lay." *Id.* One of the sexually oriented posters displayed in a common area showed a "prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.' " *Id.*

129. *Id.* at 626.

130. *Id. See also* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451 (1984).

131. *Id.*

132. *Id.*

133. 924 F.2d 872 (9th Cir. 1991).

a hostile work environment.[134] In *Ellison*, the plaintiff, Kerry Ellison, and Sterling Gray worked for the Internal Revenue Service (hereinafter "IRS") in San Mateo, California.[135] Ellison and Gray were not friends and did not work closely together.[136] In June 1986, Gray asked Ellison to lunch, and she accepted.[137] From that date forward, Gray started pestering Ellison with unnecessary questions and hanging around her desk.[138] In October, Gray handed Ellison a note that read: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day."[139]

Ellison contacted their supervisor, Bonnie Miller, who said that the note was "sexual harassment," but Miller took no action because Ellison told her she wanted to handle the situation herself.[140] Ellison then asked a fellow male employee to tell Gray to leave her alone.[141]

Thereafter, Ellison left California for a four-week training program in St. Louis.[142] Shortly after she left, Gray sent a three-page letter to her in St. Louis that she described as " 'twenty times, a hundred times weirder' " than his note.[143] Gray wrote, in part, "I know that you are worth knowing with or without sex . . . . I have enjoyed you so much over these past few months. Watching you. Experiencing you from o [sic] so far away."[144]

Ellison was frightened by the letter and thought Gray was "crazy."[145] She immediately telephoned Miller and requested that either she or Gray be transferred because she felt uncomfortable working in the same office with him.[146] That same

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134. *Ellison*, 924 F.2d at 878. The Sixth Circuit Court of Appeals in Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987), retreated from its earlier position in *Rabidue* by advocating the reasonable woman standard in a constructive discharge case arising out of a supervisor's sexual harassment. *Id.* Citing the dissenting opinion in *Rabidue*, the *Yates* court applied the reasonable woman standard in determining whether working conditions were so intolerable that the plaintiff was reasonable in resigning her position. *Id.* For a full discussion of constructive discharge claims, see *infra* notes 166-87 and accompanying text.

Before the *Ellison* court rendered its decision, courts from other jurisdictions had adopted the reasonable woman standard although none had done so with any meaningful discussion of the issue. *See* Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (to bring a successful sexual harassment claim for hostile work environment, plaintiff must establish, among other things, that discrimination would affect a reasonable person of the same sex in that position); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 852 n.7 (Cal. Ct. App. 1989) (holding that in evaluating a sexual harassment claim, a reasonable employee is one of the same sex as the complainant). Nevertheless, the *Ellison* court was still the first to discuss the issue extensively and to apply the reasonable woman standard to determine the existence of a viable hostile work environment claim.

135. *Ellison*, 924 F.2d at 873.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 874. Ellison "became shocked and frightened and left the room." *Id.* Gray followed Ellison into the hallway and demanded that she speak to him, but she left the building. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

day, Miller met with Gray and ordered him to leave Ellison alone.[147] Shortly before Ellison returned to San Mateo, Gray was transferred to the IRS's San Francisco office.[148]

After three weeks in San Francisco, Gray filed a union grievance requesting a return to San Mateo.[149] The IRS and the union settled the grievance in Gray's favor, and he was allowed to transfer back to San Mateo so long as he agreed not to bother Ellison.[150] Miller informed Ellison in a letter that Gray would return to the San Mateo office and that management had resolved her problem by requiring that Gray be separated from her for six months.[151]

Ellison filed suit against the IRS for sexual harassment.[152] The district court granted the IRS's motion for summary judgment and Ellison appealed.[153] In determining whether Gray's conduct created a hostile work environment, the Ninth Circuit Court of Appeals disagreed with decisions from other circuit courts that rejected such claims because of a lack of psychological injury to the plaintiffs.[154] The appropriate inquiry, according to the Ninth Circuit, focused not upon the effect of the harassing conduct on the victim, but upon the conduct itself.[155] More importantly, the conduct should be analyzed from the *victim's* perspective.[156] In the instant case, for example, Gray's conduct, when viewed from his perspective, could be considered isolated and trivial.[157] The court characterized Gray as a "modern-day Cyrano de Bergerac," wooing Ellison with his words.[158] On the other hand, the court recognized that Ellison found Gray's conduct to be shocking and frightening.[159] Viewed from her perspective as a reasonable woman, the court agreed that Gray's actions created a hostile work environment.[160]

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147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* The letter promised that management would take additional action if the problem recurred. *Id.* Ellison was 'frantic' upon being notified of Gray's pending return to San Mateo. *Id.* She filed a formal complaint of sexual harassment with the IRS and obtained permission to transfer to San Francisco temporarily when Gray returned to San Mateo. *Id.* While she was in San Francisco, Gray sent her another letter, although it is not clear whether Ellison ever received it. *Id.* at 874-75.

152. *Id.* at 875.

153. *Id.*

154. *Id.* at 877-78. Specifically, the *Ellison* court disagreed with the standards set forth by the Sixth and Seventh Circuit Courts of Appeals in Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) and Scott v. Sears Roebuck & Co., 798 F.2d 210 (7th Cir. 1986). In *Rabidue*, the Sixth Circuit refused to find a hostile environment where the conduct was "not so startling as to have affected seriously the psyches of the plaintiff or other female employees." *Rabidue*, 805 F.2d at 622. Similarly, the Seventh Circuit in *Scott* rejected the plaintiff's sexual harassment claim because the conduct did not cause such "anxiety and debilitation" to the plaintiff sufficient to " 'poison[]' " her working environment. *Scott*, 798 F.2d at 213.

155. *Ellison*, 924 F.2d at 878.

156. *Id.*

157. *Id.* at 880.

158. *Id.*

159. *Id.*

160. *Id.*

In adopting the reasonable woman standard, the court noted that women are disproportionately victims of rape and sexual assault, have a stronger incentive to be concerned with sexual behavior, and understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault.[161] The court further noted:

> [A] sex-blind reasonable person tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the work place on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."[162]

Several recent decisions from other jurisdictions have adopted *Ellison's* standard for analyzing hostile environment claims.[163] The Fifth Circuit Court of Appeals, however, has not squarely addressed the issue, but in its most recent decision on the matter, applied the traditional reasonable person test.[164]

The implications of *Ellison* and other decisions adopting the reasonable woman standard is that, at least in those jurisdictions, employers may no longer ignore or excuse sexual conduct in the work place simply because it is inoffensive from a male perspective. Instead, employers must consider whether such conduct would be offensive from the perspective of a reasonable woman. If so, the employer should take immediate remedial action to avoid liability under Title VII.[165]

b. Constructive Discharge

The victim of a hostile work environment generally suffers no loss of compensation as a result of sexual harassment.[166] To the contrary, the victim in a quid pro quo case suffers the loss of a tangible job benefit, such as a merit raise in salary.[167] Only the victim of quid pro quo harassment is, therefore, entitled to an award of monetary damages for lost wages under Title VII.[168] The hostile environment claimant, before the enactment of the Civil Rights Act of 1991,[169] could obtain only injunctive relief since there was no other equitable relief available under Title

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161. *Id.* at 879.

162. *Id.* at 879-80 (citations omitted).

163. *See, e.g.*, Radtke v. Everett, 471 N.W.2d 660, 664 (Mich. Ct. App. 1991) (citing *Ellison* as support for adopting reasonable woman's standard).

164. Landgraf v. USI Film Prods., 968 F.2d 427 (5th Cir. 1992).

165. An employer's options upon being confronted with a potential claim of sexual harassment are discussed below. *See infra* notes 379-91 and accompanying text.

166. For a full discussion of hostile environment harassment, *see supra* notes 100-23 and accompanying text.

167. For a full discussion of quid pro quo harassment, *see supra* notes 80-99 and accompanying text.

168. 42 U.S.C. § 2000e-5(g) (1982) (authorizing court to order whatever affirmative action may be appropriate, including "reinstatement or hiring of employees, with or without backpay").

169. Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a (Supp. 1992). The 1991 Civil Rights Act is discussed at length below. *See infra* notes 155-310 and accompanying text.

VII.[170] However, if such a claimant could prove that she was constructively discharged, that is, that she was forced to quit her job because of intolerable working conditions, then she could seek damages in the form of backpay.[171]

The doctrine of constructive discharge is not as important as it once was in sexual harassment cases because Title VII was amended by the 1991 Civil Rights Act to allow claimants to seek compensatory and punitive damages unrelated to lost wages.[172] Nevertheless, the doctrine is still significant for two reasons: first, the 1991 Civil Rights Act limits the amount of compensatory and punitive damages that claimants may recover;[173] and second, most of the federal appellate courts that have considered the issue have refused to apply the Civil Rights Act retroactively.[174] It is thus likely that the new damages provision will apply only to conduct occurring after November 21, 1991, the date of the Act's enactment.[175]

There are two lines of authorities with regard to the proof necessary to establish a constructive discharge. Under the first, the employer must render the working condition intolerable for the specific purpose of forcing the employee to resign.[176] Under the second, the working conditions must be so unpleasant that a reasonable employee would have felt compelled to resign.[177] Under both lines of cases, however, it is generally agreed that a constructive discharge does not occur simply because an employee is required to work under discriminatory conditions.[178] Therefore, in order for a sexual harassment claimant to prove constructive discharge, she must demonstrate a greater severity or pervasiveness of harassment than the minimum required to establish a hostile working environment.[179]

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170. 42 U.S.C. § 2000e-5(g). However, several federal circuit courts have held that nominal damages are available under Title VII. *See* Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990); Huddleston v. Roger Dean Chevrolet, 845 F.2d 900, 905 (11th Cir. 1988); Katz v. Dole, 709 F.2d 251, 253 n.1 (4th Cir. 1983); T&F Serv. Assocs. v. Crenson, 666 F.2d 722, 728 n.8 (1st Cir. 1981). Other circuit courts have rejected the award of nominal damages as relief in Title VII cases. *See* Landgraf v. USI Film Prods., 968 F.2d 427, 428 (5th Cir. 1992); Bohen v. City of East Chicago, 799 F.2d 1180, 1184 (7th Cir. 1986). Nominal damages are important because of accompanying attorney's fees. 42 U.S.C. § 2000e-5(k) (1982).

171. *See, e.g.*, Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975) (unless employee was constructively discharged, he would not be entitled to backpay).

172. Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981A(a)(1) (Supp. 1992).

173. Civil Rights Act of 1991, § 102(a)(3), 42 U.S.C. 1981A(a)(3) (Supp. 1992).

174. For a full discussion of the retroactivity issue, see *infra* notes 278-310 and accompanying text.

175. Civil Rights Act of 1991, § 402(a), 42 U.S.C. § 1981A (Supp. 1992).

176. *See* Hervey v. City of Little Rock, 787 F.2d 1223 (8th Cir. 1986) (plaintiff must show that employer deliberately rendered working condition intolerable to force him to quit); Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975) (proof of constructive discharge requires proof of employer's intent to render job so unattractive so as to force employee's resignation).

177. Garner v. Wal-Mart Stores, 807 F.2d 1536 (11th Cir. 1987) (rejecting constructive discharge claim where employee resigned one day after returning to work from pregnancy leave because she was demoted); Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980) (considering issue of constructive discharge from perspective of reasonable employee).

178. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge" (quoting Clark v. Marsh, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981))); *Bourque*, 617 F.2d at 65 ("discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge").

179. *See Landgraf*, 968 F.2d at 430.

In addition, a constructive discharge is generally not shown, notwithstanding the severity of the harassment, where an employer has taken immediate action to alleviate the harassment.[180] For example, in *Dornhecker v. Malibu Grand Prix Corp.*,[181] the Fifth Circuit Court of Appeals rejected the constructive discharge claim of an employee who, twelve hours after she complained about a co-worker's sexual harassment, was told by the company president that she would not have to continue working with the alleged harasser except for the next two days.[182] The district court found the company's action to be insufficient and ruled that the employee's resignation effected a constructive discharge.[183] The Fifth Circuit Court disagreed, stating that the company's remedy must be assessed proportionately to the seriousness of the offense, which, in the instant case, was not as aggressive or coercive as conduct that had occurred in other unsuccessful hostile environment claims.[184] Concluding that the employer's remedy was prompt and, consequently, that the claimant failed to act reasonably under the circumstances by refusing to give her employer any opportunity to demonstrate its efforts to end the harassment, the Fifth Circuit rejected plaintiff's claim for damages.[185]

3. Sexual Favoritism

Unlike quid pro quo and hostile environment claims, in the typical sexual favoritism case, the aggrieved employee is not herself subjected to sexual harassment, but instead, a co-worker is granted a tangible job benefit in exchange for sexual favors.[186] According to the EEOC, such conduct violates Title VII.[187] Specifically, the EEOC Guidelines state:

> Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advance or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[188]

These Guidelines, at first blush, appear to encompass any and all sexual favoritism in the workplace. In a recent policy statement, however, the EEOC has clarified

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180. *Id.*

181. 828 F.2d 307 (5th Cir. 1987).

182. *Dornhecker*, 828 F.2d at 308. The plaintiff and her male co-worker were attending a series of out-of-town presentations. *Id.* During the business trip, the co-worker put his hands on plaintiff's hips in an airport ticket line and dropped his pants in front of other passengers; he touched plaintiff's breasts; playfully choked her at a business dinner when she complained about his putting his stocking feet on the table; and on more than one occasion, told plaintiff and others, "let's get naked and go to my room." *Id.* at 308 & n.2.

183. *Id.* at 310.

184. *Id.* at 309. For purposes of its decision, the court assumed, without deciding, that plaintiff was the victim of a hostile work environment. *Id.* at 308.

185. *Id.* at 310.

186. *See, e.g.*, Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C 1988); Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991).

187. *See infra* note 188 and accompanying text.

188. 29 C.F.R. § 1604.11(g) (1982).

its position on the matter, stating that it does not adopt such a broad view.[189] Instead, it regards sexual favoritism in the workplace as constituting a viable cause of action for the disgruntled employee only when it manifests itself as either implicit "quid pro quo" harassment or "hostile work environment" harassment.[190]

The federal district court's decision in *Broderick v. Ruder,*[191] provides the best illustration of both types of harassment in preferential treatment cases. In *Broderick,* the female plaintiff had been employed by the Securities and Exchange Commission (SEC) as a staff attorney for more than eight years.[192] During the entire period of her employment, she had received only one promotion, although she had been eligible for more.[193] Broderick introduced evidence at trial showing a pervasive atmosphere of sexual harassment by persons in positions of management, but failed to prove that any significant acts had been specifically directed at her.[194] Instead, she was able to show only two isolated incidents of sexual harassment, neither of which resulted in an explicit quid pro quo denial of employment benefits: (1) that an office branch chief continually offered to drive her home during her initial week on the job, and (2) that the regional administrator untied her sweater and kissed her at an office party.[195] However, she was able to prove that two secretaries in the office had engaged in sexual affairs with their supervisors and had received an inordinate number of promotions and cash awards.[196] In addition, a staff attorney who socialized extensively with another of Broderick's supervisors had likewise received undue assistance in obtaining promotions.[197] These consensual sexual relations, although not creating a cause of action for the two secretaries and the staff attorney who did not view the sexual advances as unwelcome, nevertheless, were deemed by the court to create a sexually hostile working environment, thereby substantiating Broderick's cause of action.[198]

Although the *Broderick* court did not entertain the suggestion that the same set of facts could also support an implicit "quid pro quo" harassment claim, the EEOC insists in its policy statement that the court could have rested its holding on this alternate theory of liability.[199] According to the EEOC, Broderick could have prevailed on a quid pro quo claim because her supervisors demonstrated, by their conduct, that job benefits would be awarded only to those female employees who acquiesced to their sexual requests.[200] Implicit in this message was the understand-

189. EEOC Policy Statement, N-915.048 (Jan. 12, 1990), *reprinted in* [1989-1991 Transfer Binder] Emp. Prac. Guide (CCH) ¶ 5248, at 6893.

190. *Id.*

191. 685 F. Supp. 1269 (D.D.C. 1988).

192. *Broderick,* 685 F. Supp. at 1270.

193. *Id.* at 1271.

194. *Id.* at 1273-75.

195. *Id.* at 1272-73.

196. *Id.* at 1274-75.

197. *Id.* at 1274.

198. *Id.* at 1277-78.

199. EEOC Policy Statement, N-915-048 (Jan. 12, 1990), *reprinted in* [1989-1991 Transfer Binder] Emp. Prac. Guide (CCH) ¶ 5248, at 6897.

200. *Id.* at 6897.

ing that females who did not respond favorably would not receive the same treatment as those who did.[201]

Recently, the Fifth Circuit Court of Appeals recognized the existence of a quid pro quo claim when more favorable job benefits are handed out to employees who acquiesce to sexual conduct.[202] In *Collins v. Baptist Memorial Geriatric Center,*[203] the executive director of a geriatric center regularly hugged his female employees and gave them back rubs.[204] Many of these employees expressed concern to the executive vice-president that their response to the executive director's physical contacts might adversely affect their employment.[205] There was no evidence, however, that female employees who responded negatively to his conduct received reductions in salary or any other loss of tangible job benefits.[206]

On the other hand, there was evidence that the executive director and his secretary shared a special relationship and that because of their relationship, he promoted her to retirement administrator with a substantial raise in salary.[207] In addition, a comparison of yearly raises suggested that employees receptive to the executive director's conduct received preferential treatment in the form of higher raises.[208] Citing the inadequacy of the record, the Fifth Circuit remanded the case to the trial court for further findings on plaintiff's quid pro quo claim.[209] In doing so, the court implicitly recognized that plaintiff's allegation of sexual favoritism, if true, could constitute a viable cause of action.

The impact of sexual favoritism claims, given the number of office affairs, is tempered by the EEOC's recognition that an employer's isolated instances of preferential treatment does not violate Title VII[210] because, as stated previously, Title VII does not protect employees from discrimination because of their sexual behavior.[211] Sexual harassment violates Title VII only when it constitutes gender-

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201. *Id.*

202. Collins v. Baptist Memorial Geriatric Ctr., 937 F.2d 190 (5th Cir. 1991).

203. *Id.*

204. *Collins,* 937 F.2d at 195. Not all the employees found this conduct objectionable, but, nevertheless, the executive director's hugs were controversial and were frequently the subject of conversation among the employees at the center. *Id.*

205. *Id.* at 196.

206. *Id.*

207. *Id.* at 195-96. Witnesses testified at trial that they had observed the executive director and his secretary in questionable circumstances. *Id.* at 195. There was evidence that the secretary's duties did not change after the promotion. *Id.* at 196.

208. *Id.* at 196. In order to substantiate her claim that she, and other employees like her, would have received higher raises had they been more receptive to the executive director, plaintiff questioned the center's personnel director about the yearly raises of various employees. *Id.* The district court disregarded this evidence, implying that plaintiff's comparison of salaries was inappropriate because the employees were not on the same departmental level. *Id.* The Fifth Circuit concluded that the district court erred because it focused on the employees' yearly income rather than on their yearly raises. *Id.* at 197 n.19.

209. *Id.* at 197.

210. Moreover, according to the EEOC, because sexual harassment need not be directed at the aggrieved employee to state a cause of action under either type of harassment claim, both men and women have standing to challenge sexual favoritism in the workplace, notwithstanding the gender of the employee submitting to the employer's requests for sexual favors. *Id.*

211. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).

based discrimination. Therefore, the EEOC contends, and it is generally agreed, that an employer's favoritism toward his paramour, however unfair, does not violate Title VII when it is not sex discrimination.[212] For example, where favoritism is granted to one individual and is based upon a consensual romantic relationship with that individual, any employee disadvantaged by the denial of benefits given instead to the employer's paramour is discriminated against not because of his or her gender but because of the employer's personal preference for his paramour.[213]

Embracing this view, the district court in *Miller v. Aluminum Co. of America,*[214] refused to regard as sexual harassment plaintiff's allegation that her supervisor treated her less favorably than her co-worker because the supervisor knew that her co-worker had a romantic relationship with the plant manager.[215] The court regarded the plaintiff's disadvantage in the workplace under those circumstances as being shared by all male and female employees alike, that is, none could claim the affections of the plant manager.[216] Thus, there was no gender-based discrimination and, consequently, no Title VII violation.[217]

Likewise, the Second Circuit Court of Appeals in *DeCintio v. Westchester County Medical Center,*[218] rejected similar claims by seven male respiratory therapists alleging sexual harassment because they were denied a promotion granted to the female paramour of the department administrator.[219] Preferring a paramour for job benefits did not fall within the purview of Title VII, because the preference was not based on gender but on personal involvement.[220]

B. Liability of Employer for Sexual Harassment

Clearly, the employer cannot be held liable for all discriminatory acts encountered in the employment setting, but it is not always clear what the employer's responsibilities are. In this regard, courts and the EEOC Guidelines distinguish between employer liability for acts of supervisors, nonsupervisory employees and nonemployees. The distinction is necessary only in hostile environment harassment cases since only supervisors are clothed with the authority to deny tangible job benefits, a necessary element of quid pro quo harassment. The discussion that follows focuses upon the liability of "employers" in the narrowest sense of that

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212. EEOC Policy Statement, N-915.048 (Jan. 12, 1990), *reprinted in* [1989-1991 Transfer Binder] Emp. Prac. Guide (CCH) ¶ 5248, at 6894.

213. *Id.*

214. 679 F. Supp. 495 (W.D. Pa. 1988).

215. *Miller,* 679 F. Supp. at 501.

216. *Id.*

217. *Id.*

218. 807 F.2d 304 (2d Cir. 1986).

219. *DeCintio,* 807 F.2d at 305-06.

220. *Id.* at 308.

term, although it should be noted that Title VII defines the term "employers" to include management and supervisory personnel.[221]

1. Quid Pro Quo Harassment by Supervisor

The 1980 EEOC Guidelines adopted a standard of strict liability for sexual harassment by an employer's agents and supervisory employees in both quid pro quo and hostile work environment situations.[222] In *Meritor Savings Bank v. Vinson*,[223] the Supreme Court rejected this per se standard of liability for hostile work environment harassment,[224] but apparently accepted the view that employers are vicariously liable for quid pro quo harassment.[225] Thus, this form of harassment is the most potentially damaging to employers. The EEOC issued new guidelines in 1988 that conform to the Supreme Court's decision in *Vinson* on employer liability, and maintain the position, as do most courts, that an employer is strictly liable for its supervisor's quid pro quo harassment.[226]

2. Hostile Work Environment Created by Supervisor

Traditional agency principles are difficult to apply in hostile work environment cases. In the aftermath of the Supreme Court's decision in *Vinson*, most courts have held that an employer becomes liable at the point when it either had actual or

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221. 42 U.S.C. § 2000e(b) (1982) (term "employer" includes agents of employer). For this reason, an employer and its harassing supervisor will often both be sued in the same action. *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1521 (M.D. Fla. 1991). Plaintiffs will be more likely to sue supervisors in view of the recently enacted Civil Rights Act of 1991, which provides for compensatory and punitive damages.

222. 29 C.F.R. § 1604.11(c) (1989).

> Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization . . . 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. This Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

Id.

223. 477 U.S. 57 (1986).

224. *Vinson*, 477 U.S. at 69-71. In *Vinson*, a hostile environment sexual harassment case, the defendant bank claimed it should not be held liable because the acts of the purported harasser, an officer of the bank, were unknown to the bank and done without its authorization. *Id.* The Supreme Court rejected the court of appeals' decision holding the bank strictly liable but in doing so, offered no definitive guidance except to agree that agency principles should apply. *Id.* at 69-70, 72; *see* Dawn D. Bennett-Alexander, *The Supreme Court Finally Speaks on the Issue of Sexual Harassment – What Did It Say?*, 10 WOMEN'S RTS. L. REP. 65 (1987). For a full discussion of the *Vinson* decision, see *supra* notes 111-118 and accompanying text.

225. *Vinson*, 477 U.S. at 72. In a quid pro quo case, the supervisor exercises the authority delegated to him by his employer to fire or otherwise adversely affect the employment status of the harassed employee. *Id.* at 70. In exercising this authority, the supervisor acts as his employer's agent for which the employer may be held vicariously liable. *Id.*; *see* Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258, 1270 (1987); *see also* Highlander v. K.F.C. Nat'l Management Co., 805 F.2d 644, 648 (6th Cir. 1986) (employer is strictly liable for quid pro quo harassment).

226. *EEOC Policy Guidance Memorandum on Current Issues of Sexual Harassment*, EEOC Compl. Man. (CCH) ¶ 3112, at 3253 (Oct. 1988). "[N]o matter what the employer's policy, the employer is always liable for any supervisory actions that affect the victim's employment status . . . ." *Id.* at n.32.

constructive knowledge of the harassment but failed to take appropriate corrective action.[227]

A claimant can show actual notice, for example, by proving that she complained to higher management.[228] It is not necessary, however, that such notice be provided through the employer's grievance procedures. A claimant can demonstrate constructive notice by showing the pervasiveness of the harassment.[229] In either case, when a harassing work environment is created by an employer's supervisor, rather than by an employee or non-employee, it is generally easier for the claimant to prove that the employer had knowledge of the abusive conduct.[230]

Once knowledge is shown, an employer may avoid liability only if it can prove that it took prompt and adequate steps to remedy the situation. Courts differ on what action is sufficient and it seems likely that the answer will vary with the factual circumstances.

Generally, where the evidence shows that a supervisor has harassed his employees for several years with impunity, it is likely that the employer will be held liable for not providing a *prompt* remedy even if the supervisor was later appropriately disciplined for his conduct.[231]

The Fifth Circuit Court of Appeals has not always been consistent in determining whether an employer's action is sufficiently prompt to avoid liability. For example, in *Bennett v. Corroon & Black Corp.*,[232] the Fifth Circuit held the company liable for sexual harassment because its chief executive officer failed to have sexual graffiti removed from the public men's room of a company's office building until the day after he saw it when he learned that plaintiff had quit her job because of it.[233] On the other hand, in *Dornhecker v. Malibu Grand Prix Corp.*,[234] the Fifth

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227. *See* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (rejecting strict liability theory in pure hostile environment cases).

228. Waltman v. Int'l Paper Co., 875 F.2d 468, 478 (5th Cir. 1989).

229. *Id.* at 478. In *Waltman*, the majority held that sexual graffiti throughout the workplace constituted constructive notice of a hostile work environment. *Id.* Judge Jones, in her dissent, disagreed, arguing that the graffiti was not directed specifically at the claimant and, moreover, that Title VII does not require employers to remove all sexual graffiti from their establishments. *Id.* at 486.

The significance of constructive notice is that it allows employers to be held liable for sexual harassment in the absence of actual notice. *Vinson*, 477 U.S. at 72. It thus places a burden on employers to regularly audit their workplace to detect and eradicate sexual harassment. *See infra* notes 380-91 and accompanying text (discussing policies and procedures employers may take to mitigate potential liability).

230. *See* Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987) (holding that it is easier to impute harassing supervisor's knowledge to management).

231. *Id.* at 633. In *Yates*, the claimants' supervisor, Edwin Sanders, made frequent lewd jokes and comments, regularly propositioned them, and invited them out to lunch, dinner and drinks. *Id.* at 632. The claimants' complained to management in 1983, and after an internal investigation, the company drastically demoted Sanders. *Id.* at 632-33. There was evidence, however, that Sanders had harassed other females employees as early as 1980, although the company failed to take any action. *Id.* at 635; *cf.* Sapp v. City of Warner Robins, 655 F. Supp. 1043, 1049-50 (M.D. Ga. 1987) (employer's prompt action to investigate allegations insulated it from liability even if harassment was pervasive).

232. 845 F.2d 104 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989).

233. *Bennett*, 845 F.2d at 105. The graffiti consisted of obscene cartoons bearing plaintiff's name which depicted her in "crude and deviant sexual activities." *Id.* Shortly after the incident, the company removed the chief executive officer from his position. *Id.* at 106.

234. 828 F.2d 307 (5th Cir. 1987).

Circuit characterized as prompt an employer's response to complaints of sexual harassment that required the victim to continue working closely with her harasser for the next two days until the end of her business trip.[235] It is difficult to envision why the facts of these two cases differ so significantly as to merit different outcomes.

Even if an employer proves that it took prompt action in response to a complaint of sexual harassment, it may still be held liable if the steps it took were inadequate to resolve the situation. In this regard, an employer's anti-harassment policies and procedures are relevant, but not conclusive, as to its liability.[236] An employer's policies and procedures, no matter how commendable, will be insufficient to insulate an employer from liability if they are not properly implemented or if they function ineffectively, because the reasonableness of an employer's chosen remedy will likely always depend upon its ultimate ability to end the harassment.[237] The importance of an effective complaint procedure cannot be overstated. As the EEOC stated in its 1988 Guidelines, "an employer can divest its supervisors of this apparent authority [to commit hostile work environment harassment] by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure."[238] There are no concrete rules regarding the effectiveness of an employer's procedures, but there are some general guidelines gleaned from court decisions, which are discussed at length in the last section of this article.[239]

3. Hostile Work Environment Created by Nonsupervisory Employee

The discussion above applies equally well to the nonsupervisory employee whose offensive conduct, like the conduct of a supervisory employee, cannot be imputed to the employer unless the employer had actual or constructive knowledge and failed to take corrective action.[240] The EEOC Guidelines also adopt this posi-

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235. *Dornhecker*, 828 F.2d at 308. Judge Jones, in her majority opinion, concluded that the company addressed plaintiff's complaint promptly by assuring her twelve hours after she notified her immediate supervisor that it would take action to remedy the situation. *Id.* at 309. Judge Jones further concluded that the length of time in which the company proposed to resolve plaintiff's complaint was likewise prompt. *Id.*

236. *Vinson*, 477 U.S. at 72-73. In *Vinson*, the Supreme Court rejected the idea that an employee's failure to use an established grievance procedure precluded liability from attaching, especially since under the facts of that case, the proper person to complain to was the accused harasser. *Id.*

237. Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991). In *Ellison*, the Ninth Circuit concluded that it was more appropriate to inquire as to the reasonableness of the remedy to stop the harassment, rather than as to what a reasonable employer would do to remedy the harassment under similar circumstances. *Id.* at 882 & n.17.

238. *EEOC Policy Guidance Memorandum on Current Issues of Sexual Harassment*, EEOC Compl. Man. (CCH) ¶ 3112, at 3253 (Oct. 25, 1988). "When employees know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer." *Id.*

239. *See supra* notes 380-91 and accompanying text.

240. The federal district court in Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978) was the first to hold an employer liable because of co-worker harassment. *Id.* at 949-50. The employer's supervisor had ignored plaintiff's complaints, thereby exacerbating the situation. *Id.* at 935.

tion and allow an employer to escape liability if he can prove that immediate and appropriate action was taken to rectify the situation.[241]

Unlike situations where the hostile environment is created by a supervisor, however, the aggrieved employee does not have a cause of action against the harasser who, as a co-employee, is not a proper respondent under Title VII.[242]

4. Hostile Work Environment Created by Non-Employee

The same principles of liability governing acts of nonsupervisory employees equally apply to acts of nonemployees. Thus, the conduct of nonemployees cannot be imputed to the employer unless the employer had actual or constructive knowledge and failed to take corrective action. The EEOC Guidelines adopt this position:

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.[243]

That the EEOC Guidelines expressly impose liability on the employer for the acts of nonemployees indicates the seriousness with which the EEOC views sexual harassment in the workplace.

In the seminal case on harassment by nonemployees, *EEOC v. Sage Realty,*[244] a female lobby attendant was fired because she refused to wear a revealing uniform.[245] The uniform, apparently designed in celebration of the Bicentennial, resembled an American flag draped as a poncho.[246] Underneath the poncho, the lobby attendants wore only blue short pants and sheer stockings.[247] During the two days she wore the costume, the plaintiff was subjected to repeated sexual harassment from the general public.[248] Specifically, the plaintiff was propositioned, whistled at, and barraged with comments such as " 'I'll run it up the flag pole any

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241. 29 C.F.R. § 1604.11(d) (1982).

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer . . . knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Id; see Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (employer liable for co-worker harassment since harassment brought to its attention but failed to take steps to end harassment); *see also* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (to avoid liability, employer must do more than indicate existence of anti-harassment policy).

242. *See* 42 U.S.C. § 2000e(b) (1982). A non-supervisory employee is neither an employer nor an agent of the employer.

243. 29 C.F.R. § 1604.11(e) (1982).

244. 507 F. Supp. 599 (S.D.N.Y. 1981).

245. *Sage Realty,* 507 F. Supp. at 605, 607.

246. *Id.* at 604.

247. *Id.*

248. *Id.* at 605.

time you want to.' "[249] The court determined that by making her wear the sexually provocative uniform, the employer forced her to acquiesce to the offensive behavior and violated Title VII.[250]

Many decisions holding an employer liable for sexual harassment based upon the conduct of nonemployees involve an employer's dress requirements. Of course, it is commonsensical that an employer would not be held liable for sexual harassment by nonemployees *outside* the workplace.[251]

IV. SEXUAL HARASSMENT CLAIMS IN THE AFTERMATH OF THE CIVIL RIGHTS ACT OF 1991

On November 21, 1991, President George Bush signed the 1991 Civil Rights Act into law. Acclaimed by many to be the most extensive legislation concerning employment discrimination since the enactment of Title VII of the Civil Rights Act of 1964,[252] the new Act contains a far-reaching set of amendments to Title VII, as well as to the Civil Rights Act of 1866,[253] the Americans with Disabilities Act[254] and the Age Discrimination in Employment Act.[255] These amendments also

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249. *Id.* at 605 & n.11. Arguably, if the attendants were not required to wear such revealing costumes and the public still engaged in such sexual harassment, the employer would still be held liable under the EEOC Guidelines. One commentator suggests that the EEOC Guidelines thus go beyond the *Sage Realty* case and should hold the employer responsible only where he ratifies the harassment or otherwise encourages or promotes it. *See* McLain, *supra* note 65, at 327-28.

250. *Sage Realty,* 507 F. Supp. at 607-08.

251. Whitaker v. Carney, 778 F.2d 216, 221 (5th Cir. 1985) (Title VII does not confer "obligation on employers to see to it that their employees are free of sexual harassment . . . by nonemployees outside the workplace"), *cert. denied,* 479 U.S. 813 (1986).

252. 42 U.S.C. § 2000e (1991).

253. 42 U.S.C. § 1981 (1870).

254. 42 U.S.C. §§ 12101-213 (1990).

255. 29 U.S.C. §§ 621-34 (1990).

specifically overrule seven fairly recent Supreme Court decisions[256] that the civil rights community had criticized as frustrating efforts to eradicate employment discrimination.[257] The Civil Rights Act of 1991 establishes a more liberal interpretation of discrimination law by greatly expanding the rights and remedies of alleged victims of discrimination. A full analysis of the Act is beyond the scope of this article. What follows below is a brief discussion of only those provisions of the Civil Rights Act that bear directly on sexual harassment law.

Perhaps the most important provision of the 1991 Civil Rights Act to victims of sexual harassment is section 102,[258] which allows plaintiffs to recover both compensatory and punitive damages under Title VII in cases of intentional discrimina-

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256. The holdings of these decisions and the impact of the 1991 Civil Rights Act are briefly, as follows:

In West Virginia University Hospital, Inc. v. Casey, 111 S. Ct. 1138, 1139 (1991), the Supreme Court held that prevailing parties in federal employment discrimination actions are limited to $30 per day in their recovery of expert witness fees. The Court determined that such fees were not part of a litigant's attorney's fees under 42 U.S.C. § 1988. *Id.* The Civil Rights Act of 1991 overrules this decision by providing that the ability to recover attorney's fees includes the fees of experts. Civil Rights Act of 1991, § 113, 42 U.S.C. § 1988(c) (Supp. 1992) (applying only to cases arising under Title VII, the Americans with Disabilities Act and 42 U.S.C. § 1981).

In EEOC v. Arabian American Oil Co., 111 S. Ct. 1227 (1991), the Supreme Court held that Title VII did not apply to employment practices of American businesses occurring outside the United States. The Civil Rights Act of 1991 overrules this decision by extending Title VII to cover discrimination by American employers with businesses in a foreign country but only if compliance would not cause the employer to violate the law of the foreign country. Civil Rights Act of 1991, § 109, 42 U.S.C. § 2000e(f) (Supp. 1992).

The Supreme Court held in Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), that the limitations period in cases involving the application of a facially neutral seniority system starts to run from the time when the system was adopted, rather than from the time the system adversely affects the plaintiff. The Civil Rights Act of 1991 overrules *Lorance* by providing that a challenge to an allegedly discriminatory seniority system may be brought within the limitations period beginning either from the time the system was adopted, the time when the plaintiff became subject to the system or the time when the plaintiff was injured by application of the system. Civil Rights Act of 1991, § 112, 42 U.S.C. § 2000e-5(e)(2) (Supp. 1992).

In Martin v. Wilks, 490 U.S. 755 (1989), the Supreme Court held that individuals adversely affected by the affirmative action provisions of a consent decree entered in a proceeding in which the individuals were not parties or intervenors may challenge that decree in a separate proceeding. The Civil Rights Act of 1991 overrules *Martin* by limiting collateral challenges to current decrees to a narrow group of individuals. Civil Rights Act of 1991, § 108, 42 U.S.C. § 2000e-2(n) (Supp. 1992).

The Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), held that in disparate impact cases (1) plaintiffs must identify the specific employment practice that causes the disparity and (2) in defense of a disparate impact claim, employers need only show that the practice serves legitimate business goals. The Civil Rights Act of 1991 relieves plaintiffs of the burden of identifying the specific employment practice that causes the alleged disparity in cases where the practice is not subject to separation from the overall decision-making process and also requires, once a disparity is established, employers must prove that the practice is job related and consistent with business necessity.

In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), the Court held in cases where discrimination is a motivating factor in an adverse employment action, the employer may escape liability by showing that it would have taken the same action in the absence of discrimination. The Civil Rights Act overrules *Hopkins* by providing that in such cases, otherwise known as mixed-motive cases, the employer may be held liable for the plaintiff's attorney's fees and costs but not for backpay or other monetary damages. Civil Rights Act of 1991, § 107(b), 42 U.S.C. § 2000e-5(g) (Supp. 1992).

In Patterson v. McLean Credit Union, 491 U.S. 164 (1989), the Supreme Court held that discrimination in promotions, discharge and other employment conditions is not actionable under the Civil Rights Act of 1866, 42 U.S.C. § 1981, which applies only to the making and enforcing of private employment contracts. The Civil Rights Act of 1991 overrules this decision by defining the term "make and enforce contracts" so as to include the performance and termination of contracts. The Civil Rights Act of 1991, § 101, 42 U.S.C. § 1981 (b) (Supp. 1992).

257. *See* Thomas J. Piskorski & Michael A. Warner, *The Civil Rights Act of 1991: Overview and Analysis*, 8 LAB. LAW. 9 (1992).

258. Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981A(a)(1) (Supp. 1992).

tion.[259] Before this amendment, a prevailing plaintiff under Title VII could recover only equitable relief, such as lost wages and reinstatement.[260] A major reason for broadening Title VII's remedies was the availability of compensatory and punitive damages in race and ethnic discrimination cases under the Civil Rights Act of 1866.[261] The Civil Rights Act of 1991, however, does not place sexual harassment victims in parity with racial discrimination victims because the Act imposes a limitation on the sum of compensatory and punitive damages based on the number of employees, as follows:

Number of Employees	Maximum Amount of Compensatory and Punitive Damages
15-100	$ 50,000
101-200	$100,000
201-500	$200,000
More than 500	$300,000[262]

On March 11, 1992, the Senate Labor and Human Resources Committee approved legislation introduced by Senator Edward Kennedy that, if enacted, would remove this provision of the 1991 Act.[263]

By allowing Title VII claimants to recover damages unrelated to the loss of compensation, the new damage provision becomes particularly important to victims of a hostile work environment. Previously, in the absence of constructive discharge, the plaintiff could obtain only injunctive relief under Title VII and no compensation for economic losses.[264] Also previously, to recover compensatory and punitive damages, the victim of sexual harassment was forced to combine her employment discrimination claim with state causes of action, such as assault and battery.[265] The 1991 Act now makes joinder of state law claims less important but not obsolete since there are no damage limitations for state law claims.

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259. *Id.*

260. 42 U.S.C. § 2000e-5(g), (k) (1964).

261. 42 U.S.C. § 1981 (1870). Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens . . . .

Id. The Supreme Court held in its landmark decision of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), that section 1981 prohibits discrimination in private employment based on race and that, with a proper showing, compensatory and punitive damages are available for recovery. The Supreme Court noted in another decision in dicta that the same act does not apply to discrimination based upon sex. *See* Runyon v. McCrary, 427 U.S. 160 (1976). The result was that race discrimination plaintiffs brought their claims under 42 U.S.C. § 1981, rather than Title VII, because of the more favorable remedies. Sex discrimination plaintiffs did not have this alternative avenue of legal redress, but were limited to the recovery available under Title VII.

262. Civil Rights Act of 1991, § 102(b)(3), 42 U.S.C. § 1981A(b)(3) (Supp. 1992). Specifically, the limitation applies to damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *Id.* Accordingly, it does not apply to *past* pecuniary losses.

263. Equal Remedies Act of 1991, S. 2062, 102d Cong., 2d Sess. (1992). Sen. Kennedy agreed in legislative negotiations to limit the damages under the 1991 Act but vowed to lift the limitations in separate legislation.

264. *See supra* notes 166-87 and accompanying text (discussing constructive discharge claims).

265. *See infra* notes 308-42 and accompanying text (discussing potential state tort claims).

Under the Act, the standard for punitive damages is that "the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[266] It should be noted that in no event are punitive damages available from a government, government agency or political subdivision.[267] With regard to punitive damages, the conduct of an employer after receiving notice of sexual harassment in his work force becomes particularly important. An employer's failure to adopt or implement an effective sexual harassment policy makes it more vulnerable to punitive damages.[268]

Neither punitive nor compensatory damages are available under the new Act to an individual who can recover under 42 U.S.C. § 1981.[269] Accordingly, the Act states that none of its provisions are to be construed as limiting the scope of, or the relief available, under section 1981.[270] In addition, these damages are available only in intentional discrimination cases, thus excluding disparate impact claimants.[271] Finally, the 1991 Act specifically provides that juries are not to be instructed about the limitations on compensatory and punitive damages.[272] Presumably, courts will reduce jury verdicts in excess of the limitations to conform with the statute.

The provision for jury trials is perhaps the second most important section of the 1991 Act to victims of sexual harassment. Before November 21, 1991, jury trials were not available to claimants seeking relief under Title VII.[273] Under the 1991 Act, if compensatory and punitive damages are requested by the plaintiff, either party may request a trial by jury.[274] The significance of a jury trial to sexual harassment plaintiffs cannot be overstated. Many juries may be more sympathetic to the plight of sexual harassment victims than judges. Finally, the unpredictability of juries places defendants in a much greater dilemma in attempting to evaluate the risk of trying rather than settling cases.

A central issue in litigation involving the 1991 Civil Rights Act is whether it applies to cases pending at the time of its enactment on November 21, 1991, or to cases that arise from conduct committed before that date. The position of the EEOC, at least with regard to the damages provision of the Act, is that the Act

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266. Civil Rights Act of 1991, § 102(b)(1), 42 U.S.C. § 1981A(b)(1) (Supp. 1992).

267. *Id.*

268. *See infra* notes 380-91 and accompanying text for practical suggestions to avoid liability.

269. Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981A(a)(1) (Supp. 1992).

270. Civil Rights Act of 1991, § 102(b)(4), 42 U.S.C. § 1981A(b)(4) (Supp. 1992).

271. Civil Rights Act of 1991, § 102(a)(1), 42 U.S.C. § 1981A(a)(1) (Supp. 1992) (provision does not apply to employment practice that is unlawful because of its disparate impact); *see supra* notes 100-23 and accompanying text.

272. Civil Rights Act of 1991, § 102(c)(2), 42 U.S.C. § 1981A(c)(2) (Supp. 1992).

273. *See* Lorillard v. Pons, 434 U.S. 575 (1978) (suggesting that jury trials are not required under Title VII). Because Title VII provided for equitable, and not legal, relief, the overwhelming weight of authority had held that there was no right to a jury trial. *See, e.g.*, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

274. Civil Rights Act of 1991, § 102(c), 42 U.S.C. § 1981A(c) (Supp. 1992).

does not apply retroactively.[275] In reaching this decision, the EEOC noted that section 402(a)[276] of the Act, which sets forth the effective date of the Act, could be construed in two ways. Section 402(a) states: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."[277] The EEOC interpreted this provision as meaning either (1) that the Act applies to any and all charges or cases pending on or after November 21, 1991 or (2) that the Act applies only to conduct occurring after November 21, 1991.[278]

The EEOC concluded that the above provision was ambiguous despite two other sections of the Act that created specific exemptions for pre-Act conduct.[279] Section 109(c)[280] of the Act, which extends Title VII and the Americans with Disabilities Act[281] coverage to American citizens working in foreign countries for American companies, states that it "shall not apply with respect to conduct occurring before the date of the enactment of this Act."[282] Section 402(b) of the Act provides that "nothing in this Act shall apply to any disparate impact case for which complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."[283] This latter provision was enacted to assure that the employer in *Wards Cove Packing Co. v. Atonio*,[284] would not be subjected to the Act's new standards governing disparate impact cases.[285] Although the EEOC acknowledged that inclusion of the above two sections suggested that the remaining provisions have retroactive application, it nonetheless concluded that any inference so raised was rebutted by the legislative history of the Act which contained divergent views on the subject.[286]

Finally, after reviewing and noting a conflict in Supreme Court precedent on the question of retroactive application of legislation, the EEOC decided it would follow the Supreme Court's most recent holding on the issue, *Bowen v. Georgetown University Hospital*,[287] and not seek damages in charges filed before enactment of

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275. EEOC Policy Guidance N-915.002, Emp. Prac. Guide (CCH) ¶ 5329 (Dec. 27, 1991). The Department of Justice has also taken the position that the Civil Rights Act of 1991 does not apply retroactively. *See, e.g.*, Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991).

276. Civil Rights Act of 1991, § 402(a), 42 U.S.C. § 1981 note (Supp. 1992).

277. *Id.*

278. EEOC Policy Guidance N-915.002, Emp. Prac. Guide (CCH) ¶ 5329, at 6056 (Dec. 27, 1991).

279. *Id.*

280. Civil Rights Act of 1991, § 109(b), 42 U.S.C. § 2000e(f) (Supp. 1992).

281. 42 U.S.C. §§ 12101-213 (1990).

282. Civil Rights Act of 1991, § 19(c), 42 U.S.C. § 2000e note (Supp. 1992).

283. Civil Rights Act of 1991, § 402(b), 42 U.S.C. § 1981 note (Supp. 1992).

284. 490 U.S. 642 (1989).

285. *See* 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth). Legislation was approved by the Senate Labor and Human Resources Committee on March 11, 1992, that would remove this particular ban on retroactivity from the law. *See* Justice for Wards Cove Workers Act, S. 1962, 102d Cong., 2d Sess. (1992).

286. *Compare* 137 CONG. REC. S15,483 (daily ed. Oct. 30, 1991) (statement of Sen. Danforth that Act does not apply to cases before enactment of the Act) *with* 137 CONG. REC. S15,485 (daily ed. Oct. 30, 1991) (statement of Sen. Kennedy that under Supreme Court precedent, courts usually apply newly enacted legislation to pending cases).

287. 488 U.S. 204 (1988).

the Act or in charges filed after the enactment of the Act that challenged pre-Act conduct.[288]

Decisions from the United States Supreme Court uniformly hold that the plain language of a statute and its legislative history determine whether it should be applied retroactively.[289] In the absence of clear congressional intent, however, the question is not easily resolved because the Supreme Court has issued two inconsistent lines of cases on the matter. The earlier decision, *Bradley v. School Board*,[290] holds that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[291] The other decision, *Bowen v. Georgetown University Hospital*[292] holds that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[293] As may be recalled, when the EEOC issued its policy statement concluding that the agency would not apply the Act retroactively, it did so reasoning that *Bowen* was the Supreme Court's most recent pronouncement on the retroactive application of legislation.[294]

Recognizing this irreconcilable conflict in Supreme Court precedent, Justice Scalia, in a concurring opinion in *Kaiser Aluminum & Chemical Co. v. Bonjorno*,[295] urged the Court to resolve the issue.[296] Unfortunately, however, the conflict remains. Predictably this conflict has resulted in inconsistent decisions from federal appellate courts that have grappled with the issue of whether to apply the 1991 Civil Rights Act to conduct occurring before the date of the Act's enactment. As of the time of the writing of this article, the Fifth, Sixth, Seventh, Eighth and District of Columbia Circuit Court of Appeals, relying on *Bowen* and the EEOC's interpretation of the Act, have refused to apply the Act retroactively.[297] The Ninth Circuit Court of Appeals so far has been the only appellate court to rule to the contrary.[298] Notwithstanding this lack of consensus on the issue, the Supreme Court

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288. EEOC Policy Guidance N-915.002, Emp. Prac. Guide (CCH) ¶ 5329, at 6058 (Dec. 27, 1991).

289. Kaiser Aluminum & Chem. Co. v. Bonjorno, 494 U.S. 827, 837 (1990).

290. 416 U.S. 696 (1974).

291. *Bradley*, 416 U.S. at 711.

292. 488 U.S. 204 (1988).

293. *Bowen*, 488 U.S. at 208.

294. EEOC Policy Guidance, N-915.002, Emp. Prac. Guide (CCH) ¶ 5329, at 6058 (Dec. 27, 1991).

295. 494 U.S. 827 (1990).

296. *Bonjorno*, 494 U.S. at 841 (Scalia, J., concurring).

297. Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992); Gersman v. Group Health Ass'n, 975 F.2d 886 (D.C. Cir. 1992). Generally courts that have refused to apply the Act retroactively have followed *Bradley*.

298. Davis v. City & County of San Francisco, 976 F.2d 1536, 1549-56 (9th Cir. 1992). As mentioned previously, two other sections of the Act, §§ 109(c) and 402(b), carve out exceptions for certain parties in actions pending at the time of the Act's enactment.

has declined to grant certiorari on the matter, although it has had numerous opportunities to do so.[299]

In its first decision addressing the issue, the Fifth Circuit Court of Appeals issued a decision refusing to apply section 101 of the 1991 Civil Rights Act,[300] amending 42 U.S.C. § 1981, to a case that, at the time of the Act's enactment, was pending on appeal. In *Johnson v. Uncle Ben's, Inc.*,[301] the court noted as a preliminary matter, as did the EEOC, that the language of the Act offered no guidance on the issue.[302] The court specifically rejected the contention that sections 402(b) and 109(c), because they specifically prohibit retroactive application in certain categories of cases, would be rendered meaningless if the Act were applied prospectively only.[303] Such an analysis, according to the Fifth Circuit, rested too much on negative implication.[304]

The court then described the conflicting lines of authority from the United States Supreme Court and finally concluded that it would "follow the canon that statutes affecting substantive rights 'are ordinarily addressed to the future and are to be given prospective effect only.' "[305] By noting that the amendment affected the *substantive* rights of the parties, the court, by implication, indicated that it may treat procedural provisions of the Act differently. However, in its most recent decision on the matter, *Landgraf v. USI Film Products*,[306] the Fifth Circuit relied almost entirely on its opinion in *Johnson* to reach the conclusion that the jury and damages provisions of the Civil Rights Act do not apply retroactively.[307]

V. Other Potential Causes of Action for Sexual Harassment

Title VII does not supplant state law.[308] Thus, even though employers may escape liability under Title VII, they may still be vulnerable to the risk of large damage awards for the same conduct under state law. State causes of action become particularly important to the aggrieved employee in view of the 180-day time period in which an employee must file a Title VII claim with the EEOC.[309] Thus, in

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299. E.g., Mozee v. American Commercial Marine Serv., 59 Emp. Prac. Dec. ¶41,781 (Oct. 5, 1992). However, in response to petitions for certiorari review, the Supreme Court has vacated appellate court decisions for reconsideration in light of the Civil Rights Act of 1991. *See* Holland v. First Va. Banks, Inc., 58 Emp. Prac. Dec. (CCH) ¶41,301 (1992); Gersman v. Group Health Ass'n, 58 Emp. Prac. Dec. (CCH) ¶41,300 (1992); Hicks v. Brown Group, Inc., 58 Emp. Prac. Dec. (CCH) ¶41,299 (1992).

300. Civil Rights Act of 1991, § 101, 42 U.S.C. § 1981 (Supp. 1992).

301. 965 F.2d 1363 (5th Cir. 1992).

302. *Johnson*, 965 F.2d at 1373.

303. *Id.* This argument prevailed in Stender v. Lucky Stores, 780 F. Supp. 1302 (N.D. Cal. 1992).

304. *Johnson*, 965 F.2d at 1373. The Fifth Circuit reasoned that the retroactivity issue proved too controversial for Congress to resolve and that the two provisions precluding retroactive application implied nothing about application of other provisions of the Act. *Id.*

305. *Johnson*, 965 F.2d at 1374.

306. 968 F.2d 427 (5th Cir. 1992).

307. *Landgraf*, 968 F.2d at 432-33; *see* Valdez v. San Antonio Chamber of Commerce, 974 F.2d 592, 595 (5th Cir. 1992) (citing *Johnson* and *Landgraf*).

308. *See* 42 U.S.C. § 2000e-7 (1988).

309. *See* 42 U.S.C. § 2000e-5(e) (1988).

cases where a Title VII claim may be time-barred because of the statute's relatively short limitations period, an employee may still seek damages from her employer using state remedies.[310]

Nevertheless, causes of action for sexual harassment under state law have lost some of their significance because of the Civil Rights Act of 1991, which now provides for broader, although not unlimited, damages and, in addition, a trial by jury.[311] Before the Act, Title VII did not allow litigants to recover compensatory or punitive damages and did not allow trial by jury.[312] Therefore, previously, in order to obtain larger damage awards claimants generally alleged one or more state causes of action in addition to their Title VII claims.[313] State law claims, however, will remain important, unless and until Congress removes limitations on Title VII damage awards.[314]

A. Common Law Tort Claims by Harassed Employee Against Employer

Under Mississippi law, an employer may be held liable for the intentional acts of its employees "if the employer either authorized the act prior to or ratified the act after its commission, or the act was committed within the scope of employment."[315] Although normally an employer would not authorize sexual assaults or other forms of harassment by its employees, an employer may nevertheless ratify such conduct by failing to take appropriate disciplinary action after learning of the harassment. If so, the acts of the employee may be imputed to the employer.[316]

A closer question is whether harassment by an employee can be held to be in the course of, and in furtherance of, his employment. An employee does not necessarily act outside the scope of his employment when he commits an intentional tort or criminal act.[317] Therefore, the answer to this question will depend on the specific factual situation, such as whether the acts occurred in the workplace and during normal working hours, and whether the purpose of the harassment was to further

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310. In Mississippi, a litigant will often have twice as long a period of time to file a state claim as she does a Title VII claim. Section 15-1-35 of the Mississippi Code provides a one-year limitation period for certain intentional torts such as assault and defamation. MISS. CODE ANN. § 15-1-35 (Supp. 1992). According to the Mississippi Supreme Court, the section provides "an inclusive listing of the recognized intentional torts . . . ." Southern Land & Resources Co. v. Dobbs, 467 So. 2d 652, 654 (Miss. 1985) (quoting Dennis v. Travelers Ins. Co., 234 So. 2d 624 (Miss. 1970)). Thus, the list is not exhaustive and will govern many of the state claims discussed in this section.

311. Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a (Supp. 1992). For a full discussion of the impact of the Civil Rights Act of 1991, see *supra* notes 252-307 and accompanying text.

312. *See generally*, 42 U.S.C. § 2000e-2(a) (1982); 42 U.S.C. § 1981a (b)(3) (Supp. 1992).

313. Litigation of state claims in a federal forum requires pendent jurisdiction, which exists so long as the plaintiff can show that the state and Title VII causes of action are so related "that they form part of the same case or controversy." 28 U.S.C. § 1367(a) (Supp. 1991) (providing for supplemental jurisdiction).

314. *See supra* note 263.

315. Thatcher v. Brennan, 657 F. Supp. 6, 8 (S.D. Miss. 1986).

316. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986); Taylor v. Jones, 653 F.2d 1193, 1199 (8th Cir. 1981).

317. Domar Ocean Transp., Ltd. v. Independent Ref. Co., 783 F.2d 1185, 1190 (5th Cir. 1986).

the employer's interest rather than solely to satisfy the employee's own personal objectives.

The purpose of the following discussion is to acquaint employers with common law tort claims that may arise out of incidents of sexual harassment. It is not intended to provide an exhaustive survey of tort law.

1. Assault and Battery

Any unpermitted physical contact by an harasser with his victim that is offensive or insulting, whether it is also physically harmful, may give rise to a cause of action for battery.[318] To be liable, the accused need not intend to cause physical injury, only to bring about the offensive contact.[319] Actions such as hitting an employee across her bottom,[320] fondling her breast,[321] and pulling her hair[322] constitute a battery.

Assault is a tort that protects a person's interest in freedom from apprehension of a harmful or offensive contact with the person.[323] In an assault, no physical contact need occur, but the victim must reasonably believe that such contact is certain.[324] Usually, however, words alone are insufficient to support a cause of action for assault and, thus, verbal acts of sexual harassment, in the absence of a gesture or movement toward the woman, will not give rise to liability.[325] On the other hand, an accused's threats combined with some overt act which frightens the victim of sexual harassment will constitute an assault.[326]

The two torts of assault and battery may be combined in sexual harassment cases involving physical as well as verbal acts by supervisors. Notably, under Mississippi law, in such cases, punitive damages may be awarded if the assault was malicious, and malice may be presumed solely from the manner in which the assault was made.[327]

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318. RESTATEMENT (SECOND) OF TORTS § 18 (1965); *see* Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 529 (D.D.C. 1981).

319. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984).

320. Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524, 1527 (11th Cir. 1983) (affirming award of damages in sexual harassment case for pendent claim of battery where employer locked plaintiff in his office, insisted she engage in oral sex with him at least three times a week and hit her across her bottom as she was leaving his office).

321. Pease v. Alford Photo Indus., Inc., 667 F. Supp. 1188, 1203 (W.D. Tenn. 1987) (employer committed assault and battery when he put his hand under employee's coat and fondled her breast).

322. Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 529 (D.D.C. 1981) (allegations that employer pulled employee's hair while attempting to convince her to spend the night with him were sufficient to survive motion to dismiss on battery claim).

323. W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 10, at 43 (5th ed. 1984).

324. *See id.*

325. RESTATEMENT (SECOND) OF TORTS § 31 (1965); *see* Johnson v. General Motors Acceptance Corp., 228 F.2d 104 (5th Cir. 1955) (abusing, insulting and cursing an individual does not constitute cognizable cause of action).

326. *See* W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 10, at 43 (5th ed. 1984).

327. Roberts v. Pierce, 398 F.2d 954 (5th Cir. 1968).

2. Invasion of Privacy

A harasser's unprivileged intrusion into the sexual concerns of his victim may constitute an invasion of privacy. This tort arises when a person intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another and the intrusion would be highly offensive to a "reasonable person."[328] Generally, however, there must be a pattern of harassment or a communication of an extremely vicious nature.[329]

In *Phillips v. Smalley Maintenance Services, Inc.*,[330] for example, the court found that an employer's continual interrogations about his employee's sex life, which caused the woman to suffer from chronic anxiety, constituted an invasion of privacy.[331] Also, in *Rogers v. Loews L'Enfant Plaza Hotel*,[332] the federal district court concluded that plaintiff's allegations that her supervisor frequently called her at home to make sexual advances and to comment about her sexual life were sufficient to constitute a cause of action for invasion of privacy.[333]

3. Intentional Infliction of Emotional Distress

In Mississippi, as in most other jurisdictions, the tort of intentional infliction of emotional distress requires extreme and outrageous conduct that causes severe emotional distress.[334] This cause of action does not extend, of course, to mere insults, indignities or annoyances.[335]

Sexual harassment in the workplace, because of the threat of economic coercion as a consequence of the victim's employment position, can almost always be viewed as constituting outrageous conduct.[336] In a case where the cause of action was held to exist, the aggrieved manager of a hotel-restaurant alleged that her immediate supervisor made sexually oriented advances toward her, wrote her notes and letters that he placed inside menus or in her purse, used abusive language, belittled her in the presence of other employees, and, finally, advised her that he would do everything in his power to have her fired from her position.[337]

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328. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

329. Burrie v. South Cent. Bell Tel. Co., 540 F. Supp. 905 (S.D. Miss. 1982) (harassment by telephone).

330. 435 So. 2d 705 (Ala. 1983).

331. *Phillips*, 435 So. 2d at 708-09. The employer, *inter alia*, asked his employee how often she and her husband had sex and what positions they used. *Id.* at 707. After certifying the state law claims to the Alabama Supreme Court, the 11th Circuit affirmed the district court jury award of $25,000 in compensatory damages. *Phillips*, 711 F.2d at 1532.

332. 526 F. Supp. 523 (D.D.C. 1981).

333. *Rogers*, 526 F. Supp. at 528. *But see* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989) (11th Circuit rejected invasion of privacy claim where sexual remarks were not sufficiently published).

334. Lyons v. Zale Jewelry Co., 150 So. 2d 154 (Miss. 1963).

335. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

336. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).

> [W]here there is a special relation between the parties . . . there may be recovery for insults not amounting to extreme outrage . . . . The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests.

Id. at cmts. (d) and (e).

337. Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981).

Aside from being held vicariously liable for the acts of its employees, an employer may be held directly liable for the intentional infliction of emotional distress for failing to take appropriate action to end a harasser's conduct. For example, in *Baker v. Weyerhaeuser Co.*,[338] an employee was awarded $45,000 in actual damages and $45,000 in punitive damages because her employer ignored her complaints of harassment.[339] In *Baker,* although the employer disciplined one of its employees for sexually harassing another employee in 1986, it later transferred the accused to a work assignment where the plaintiff was his subordinate and where, from January 1987 until July 1987, the accused subjected the grievant to explicit and repeated sexual harassment.[340] Although plaintiff complained to her supervisor in January 1987, the employer did not take action until July 1987 when it terminated the accused's employment.[341] Nevertheless, because the employer knew that its employee was harassing others between the time the employee should have been fired and was fired and because, therefore, the employer "permitted a known sex maniac to run amok in the workplace," the employer was held directly liable for its outrageous conduct.[342]

B. Common Law Tort Claims by Alleged Harasser Against Employer

As discussed at length above, an employer's failure promptly and adequately to investigate and resolve complaints of sexual harassment may expose it to Title VII liability and to tort liability as a result of actions brought by the harassed employee. In addition, however, the employer may encounter tort liability as a result of claims brought by the accused harasser. Such claims, referred to as "reverse" discrimination claims, arise, if at all, because of the manner in which the employer conducts its investigation. In this regard, a written sexual harassment policy setting forth a specific complaint procedure may mitigate an employer's potential liability.[343]

1. Defamation

An employer who publicly accuses an employee of sexual misconduct during the investigation of the harassed employee's allegations, or in the aftermath of disciplinary proceedings against the alleged harasser, may be sued by the harasser for defamation. Sexual harassment in the workplace provides titillating conversation and employees will naturally be interested in hearing about the plight of a coworker disciplined for such conduct. Indeed, to defend a hostile environment harassment claim, an employer may be required to respond to its employee's concerns by issuing an official anti-harassment policy. In doing so, an employer may feel

338. 903 F.2d 1342 (10th Cir. 1990).
339. *Baker,* 903 F.2d at 1343.
340. *Id.* at 1345.
341. *Id.*
342. *Id.* at 1348.
343. *See infra* notes 378-90 and accompanying text.

obliged to reveal allegations made against its disciplined employees. If it does so, it risks exposure to liability for defamation.

A defamatory communication is one which tends to injure a person's reputation, thereby exposing him to public hatred, contempt, or ridicule.[344] The elements of this tort are: (1) the publication of a falsehood, (2) to a third party, (3) with malice, (4) resulting in damages.[345] Mississippi law, however, recognizes a qualified privilege in the employer-employee context against defamation claims as a matter of public policy.[346] A communication is privileged, that is, will not expose the employer to liability even though it otherwise would be considered defamatory if: (1) it is made in good faith and without malice; (2) it is on a subject-matter in which the person making it has an interest and (3) it is made to a person or person having a corresponding interest or duty.[347] As a matter of law, statements made by employers to employees on issues of common interest are privileged.[348] Because employers and employees share a common interest in eradicating hostile or offensive work environments, statements about the employer's decision to discipline an employer for sexual harassment may fall within this privilege. Indeed, in view of the EEOC Guidelines suggesting that employers raise the subject of sexual harassment with their employees, it can hardly be said that such occasions do not merit the shield of privilege.

Problems in this context nevertheless arise because an employer may abuse the privilege, such as, for example, when the scope of an employer's statements exceed what is necessary to protect its interests or when statements are communicated to persons outside the circle of individuals who have a common interest in the subject matter. In such cases, the privilege is lost.

The Fifth Circuit Court of Appeals in *Garziano v. E.I. Du Pont De Nemours & Co.*,[349] rendered the seminal case on this issue. In *Garziano*, an employer, in response to rumors and questions circulating at its plant after the dismissal of one of its employees for sexual harassment, issued a bulletin referring to the incident as a serious act of employee misconduct.[350] The bulletin was distributed in envelopes to 140 supervisors with instructions to cover the key points in the bulletin with their employees.[351] Some supervisors read it verbatim and others summarized it, but none distributed it to their employees or posted it on a bulletin board.[352] Although the bulletin did not mention the discharged employee's name, his identity

344. Ferguson v. Watkins, 448 So. 2d 271, 275 (Miss. 1984).

345. *Id.* at 277.

346. Louisiana Oil Corp. v. Renno, 157 So. 705 (Miss. 1934) (leading case on existence of qualified privilege in employer-employee context).

347. *Id.* at 708.

348. Bush v. Myelin, 478 So. 2d 313, 314 (Miss. 1985).

349. 818 F.2d 380 (5th Cir. 1987).

350. *Garziano*, 818 F.2d at 383-84.

351. *Id.* at 384.

352. *Id.*

was nevertheless clear.[353] The employee sued his former employer for defamation.[354]

The Fifth Circuit Court of Appeals determined that the bulletin was issued on an occasion of qualified privilege and, moreover, that the language did not exceed the scope of the privilege, in part, because the bulletin neither described the alleged sexual harassment in detail nor attempted to characterize the harasser's conduct other than in terms used in the EEOC Guidelines.[355] However, the court regarded as a factual issue the question of whether the qualified privilege was abused by excessive publication.[356] Even though the employer used the most restrictive means of communication to inform its supervisors of its position on the matter, there was evidence indicating that some supervisors had disseminated the information to nonemployees who clearly would not be covered by the scope of the privilege.[357]

2. Invasion of Privacy

Because the tort of invasion of privacy has been discussed previously, it suffices to say here only that an employer's investigation into allegations of sexual harassment must be so overreaching as to constitute an unreasonable intrusion into the accused's private sexual affairs for a cause of action to exist. In this regard, an employer's written policy stating that all sexual harassment claims will be thoroughly investigated may constitute a legal defense of consent.[358]

3. Intentional Infliction of Emotional Distress

Under the same requisites discussed previously, an accused harasser may assert the tort of intentional infliction of emotional distress as the result of the employer's investigation into a co-worker's allegations of offensive sexual conduct. For example, in *Martin v. Baer,*[359] two female employees accused Robert Martin of sexual harassment, but Martin's employer refused to conduct a formal investigation into the matter despite Martin's repeated demands that it do so.[360] Martin apparently believed that a full investigation would clear him of all charges.[361] The investiga-

353. *Id.*

354. *Id.*

355. *Id.* at 384, 387, 391.

356. *Id.* at 394.

357. *Id.* at 393-94. The privilege was not abused so long as the supervisors did not discuss the contents of the bulletin with anyone other than employees, even if the employees subsequently discussed the bulletin with nonemployees. *Id.* at 395.

358. *See, e.g.*, Simmons v. Southwestern Bell Tel. Co., 452 F. Supp. 392 (W.D. Okla. 1978) (all calls on customer service lines were known to be monitored; therefore, the monitoring of a personal phone call made on the customer service line was not an invasion of privacy), *aff'd,* 611 F.2d 342 (10th Cir. 1979).

359. 928 F.2d 1067 (11th Cir. 1991).

360. *Martin,* 928 F.2d at 1069.

361. *Id.*

tion that did ensue resulted in an inconclusive determination.[362] Martin sued his employer for intentional infliction of emotional distress but was unsuccessful because the conduct of his employer was not deemed by the court to be sufficiently outrageous.[363]

C. Mississippi's Workers' Compensation Act as a Defense

Workers' compensation rests on the economic principle that the cost of work-related injuries should be passed along in the cost of the employer's product. Under this scheme of compensation, a disabled employee is compensated for lost wages and medical expenses that arise out of and in the course of employment without regard to fault as to the cause of injury.[364] In exchange, the employee gives up his right to seek tort damages against his employer on account of such injury.[365]

Arguably, workers' compensation is the employee's sole remedy for emotional injuries sustained as a result of sexual harassment arising out of and in the course of employment. If so, all common law tort claims, such as intentional infliction of emotional distress, would be precluded under the exclusivity provisions of the Workers' Compensation statute.[366] The Mississippi Supreme Court has not yet addressed this precise issue, and when brought before the federal district courts, the issue has been evaded altogether by the dismissal of all pendent state law claims.[367] Moreover, courts from other jurisdictions are not in agreement on the matter.[368]

Under Mississippi law, injury to an employee from the intentional acts of a third person is compensable if it is directed against the employee because of his employment and while so employed and working on the job.[369] The Mississippi Supreme Court defines the term "third person" as meaning either a stranger to the employer-employee relationship or a co-employee acting outside the scope and course of his employment.[370] If the result of a personal vendetta, a co-employee's intentional tort has no rational connection to employment and thus is not barred under the exclusivity provisions of workers' compensation. On the other hand, where an em-

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362. *Id.* The extent of the investigation that was conducted was disputed. *Id.* at 1069 n.6. Martin argued that his employer failed to act for five months and did not interview an eyewitness until almost one year after the incident occurred. *Id.*

363. *Id.* at 1073-74.

364. MISS. CODE ANN. § 71-3-7 (Supp. 1992).

365. MISS. CODE ANN. § 71-3-9 (Supp. 1992).

366. *Id.*

367. Fowler v. Burns Int'l Sec. Servs., Inc., 763 F. Supp. 862, 865 (N.D. Miss. 1991).

368. *Compare* Garvey v. Dickinson College, 761 F. Supp. 1175 (M.D. Pa. 1991) (claim for negligent infliction of emotional distress not barred by Pennsylvania's Workmen's Compensation Act); Cremen v. Harrah's Marina Hotel Casino, 680 F. Supp. 150 (D.N.J. 1988) (claims for battery and intentional infliction of emotional distress by victim of sexual assault and harassment did not fall within coverage of workers' compensation scheme) *with* Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1007 (11th Cir. 1986) (pendent state law claims for assault and battery barred by Florida's Workers' Compensation law); Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1465 (D. Haw. 1990) (holding that similar claims for emotional injuries were employment-related and barred by workers' compensation statute).

369. *See* MISS. CODE ANN. § 71-3-3(b) (Supp. 1992); *see also* Watson v. Nat'l Burial Ass'n, 107 So. 2d 739 (Miss. 1958).

370. Miller v. McRae's, Inc., 444 So. 2d 368, 371 (Miss. 1984).

ployee is injured over a disagreement about work-related matters, the injury, although the result of willful conduct, is clearly compensable.[371] The compensability of injuries caused by the intentional acts of co-employees that fall in between these two guideposts is not easy to determine.

Purely emotional, as opposed to physical injury, is recoverable under workers' compensation so long as it results from an unexpected occurrence.[372] This is important because often the victim of sexual harassment will suffer severe emotional distress without any accompanying physical injury. Her mental injury will be compensable if the court views sexual harassment as more than an ordinary incident of employment.

Recently, the Mississippi Supreme Court revisited the issue of the compensability of purely mental injuries. In *Borden, Inc. v. Eskridge*,[373] the employee sought worker's compensation benefits for his mental disability allegedly caused by job-related stress arising out of the mistreatment he suffered at work.[374] Although there was testimony that his wife, who also worked at the same plant was sexually harassed by the plant superintendent and that her rejection of his sexual advances adversely affected her husband's employment, the court did not specifically rely on this evidence in affirming the claimant's compensation award.[375]

The *Borden* decision lends support to the argument that sexual harassment by co-employees is a risk associated with employment and should be compensated under the state's Workers' Compensation Act. In any event, this is the position employers must adopt in order to preclude its employees from obtaining large damage awards under tort claims.[376]

VI. Practical Suggestions for the Employer to Avoid Title VII Liability for Sexual Harassment

The potential liability for employers from sexual harassment in the workplace, and the disruption, disharmony and economic costs that it causes to businesses, mandate that employers educate themselves about the issue and take practical steps to mitigate against it.[377] Only if an employer considers the issue of sexual harassment before it occurs will it be prepared to handle a complaint competently and efficiently when it does finally arise. An effective complaint procedure, when combined with a prompt remedial response, can immunize an employer from Title VII liability in hostile environment cases. It may also assist the employer in avoiding state tort liability.

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371. *See, e.g.*, Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888 (Miss. 1980) (discussing issue in general).

372. Fought v. Stuart C. Irby Co., 523 So. 2d 314, 318 (Miss. 1988).

373. No. 89-CC-0787, slip op. (Miss. Nov. 20, 1991).

374. *Borden*, No. 89-CC-0787, slip op. at 1 (Miss. Nov. 20, 1991).

375. *Id.* at 1, 4.

376. In addition, some jurisdictions have held that an employee is barred from bringing common law action against her employer by accepting workers' compensation benefits even if her claims would not otherwise be precluded. *See* Warner v. State, 53 N.Y.2d 346, 353-55 (1981) (claimant's acceptance of benefits foreclosed claim).

377. *See supra* notes 25-26 and accompanying text (discussing economic burdens on workplace).

A. Sexual Harassment Policy

Initially, an employer should adopt and implement a sexual harassment policy. The Supreme Court in *Meritor Savings Bank v. Vinson*[378] alluded to the fact that a well-drafted sexual harassment policy could help an employer avoid liability in cases of sexual harassment, even though it may not unequivocally protect it.[379] Cases indicate that a well-drafted policy must contain the following elements. First, the policy should be specific with regard to harassment, although it may be combined with a policy prohibiting all manners of harassment, including racial, religious or ethnic harassment.[380] Second, the policy should begin by strongly condemning sexual harassment in the workplace. Third, the policy should contain a comprehensive definition of sexual harassment, such as the definition contained in the EEOC Guidelines. Finally, the policy should be drafted in a way that encourages complainants to come forward with a complaint by setting forth an express grievance procedure for resolving complaints. Indeed, the grievance procedure is probably the most important element of the policy.

The grievance procedure should explain how an employer will handle complaints. In that regard, the policy should designate the individual to whom complaints should be made. If the employer has a large number of employees and has an EEOC officer, that person is often the best person to whom complaints should be funneled. In smaller organizations, the policy can mandate that complaints first be made to the employee's immediate supervisor, as long as an alternative route is provided in the event the supervisor is the alleged harasser or the employee believes the supervisor will not be receptive to the complaint. Several courts have declared a policy ineffective because the initial complaint had to be made to the employee's immediate supervisor.[381]

The procedure should anticipate a mechanism by which the complaints are funneled up to the top management so that no question can be raised regarding proper notice to management. In addition, the procedure should state that the complaint will be kept confidential "to the extent possible." Confidentiality should never be promised, however, as it is often virtually impossible to maintain the matter in complete confidence while still fulfilling the obligation to investigate the complaint adequately. In any event, should a matter proceed to the EEOC for litigation, confidentiality is impossible.

The policy should not contradict other portions of the personnel manual so that no breach of contract claim is possible. For example, if the employer's grievance procedure for claims of sexual harassment varies from the employer's general

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378. 477 U.S. 57 (1986). For a full discussion of the *Vinson* decision, see *supra* notes 111-18 and accompanying text.

379. *Vinson*, 477 U.S. at 63. No matter how well drafted a policy is, if it does not function properly it will not mitigate an employer's exposure to liability. *See* Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987).

380. A vague written policy or an open-door policy may be insufficient.

381. In *Vinson*, the Supreme Court concluded that the employer's sexual harassment policy was ineffective, because it required plaintiff to complain first to her supervisor who was the alleged harasser. *Vinson*, 477 U.S. at 73.

grievance procedure, the handbook should cross-reference the two provisions and explain that the sexual harassment complaint procedure is the sole procedure to be utilized in those instances. Finally, the procedure should not promise any specific kind of discipline because that would restrict the employer's options, and because if it is not meted out, an employee could raise a breach of contract claim.

With regard to technical requirements, the sexual harassment policy should be in writing and included in the employee's personnel handbook or manual. Regardless of the form of publication, the policy should be provided to all employees and periodically redistributed to the workforce. In addition, it should be posted in a prominent area in the workplace available to all employees.

B. Investigation

When an employee raises a complaint of sexual harassment, either through the procedure adopted in a policy[382] or through any other channels, the supervisors or management should not ignore it in the hope that it will resolve itself or go away. The employer's goal should be to discover the problem, return the workplace to harmony, and discourage litigation. The employer should act promptly, carefully, and in a non-hostile manner to address the complaint. If the complaint appears serious, the employer should consider contacting its labor counsel for assistance in resolving the matter.

The employer should never discourage the employee from filing a discrimination charge with the EEOC, as that is his or her legal right.[383] However, the employer's actions in efficiently and professionally handling the grievance should assure the disgruntled employee that it is taking her complaint seriously and doing all that it can to eliminate the offensive behavior, if it exists. By doing this, the employer may by its actions alone, dissuade the employee from utilizing the services of the EEOC. Needless to say, the employer should always show the employee that it is not ratifying the complained of sexual harassment.[384]

The investigation should be handled very carefully and pursuant to company policies. The employer should designate an individual, or possibly a committee, to investigate complaints. It is preferable if the investigator is a superior to the alleged harasser. The investigator should also be trained in how to handle these complaints.

The employer should request the complainant to file a written complaint outlining her factual allegations. If she refuses to make a written complaint, the employer should nonetheless proceed to investigate and resolve the complaint without it. However, a written statement helps greatly with the investigation and possible

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382. An employer's refusal to investigate complaints through the formal grievance procedure may leave it vulnerable to claims by the alleged harasser for breach of contract and intentional infliction of emotional distress. *See* Martin v. Baer, 928 F.2d 1067 (11th Cir. 1991).

383. In Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987), the employers told its complaining employees not to go to the EEOC and by doing so helped prove that its anti-harassment policy was ineffective.

384. *See, e.g.*, Danna v. New York Tel. Co., 752 F. Supp. 594, 609 (S.D.N.Y. 1990) (supervisor's response to sexual harassment complaint was insufficient where he told plaintiff "[y]ou are probably better off not making a stink about it because . . . they will do it even more.").

subsequent litigation by providing the basis for the investigation. The investigator should encourage the complainant to include all pertinent actions or facts, which will discourage the complainant from "manufacturing" facts at a later date. The person to whom the complaint is filed and the investigator should always document the complainant's oral statements in writing. In speaking with the complainant, the supervisor and investigator should be sympathetic but also objective.

If a complaint is submitted anonymously, the employer is still obligated to investigate it. Such complaints place the employer on notice that sexual harassment may exist in its workplace and it proceeds at its peril if it ignores the notice. By ignoring an anonymous complaint, the risk of punitive damages becomes very real when the complaintant later comes forward.

The investigator should solicit the names of witnesses from the complainant who may be able to support or verify her complaint. The investigator should talk to those witnesses in as businesslike a manner as possible, without divulging unnecessary facts. In addition, the investigator should interview the alleged harasser as objectively as possible for his side of the story. Lawsuits initiated by the alleged harasser claiming sex discrimination, or other common law claims, are not uncommon, and the employer must appear professional at all times.

The employer should attempt to decrease the publicity that may result from this matter. Unfortunately, the sensationalism of the story can hurt both the employer and the individual parties involved. The employer is protected from defamation liability by a qualified privilege if the allegedly defamatory statements are made in good faith and without malice.[385] This privilege, however, should not deter an employer from being discreet during the course of the investigation.

The employer should maintain a separate file from the affected employees' personnel files for the sexual harassment complaint and investigation. The record should be thorough because it will form the foundational evidence for the EEOC and the courts in assessing the reasonableness of the employer's responses. All conversations regarding the matter should be fully documented. The investigator should prepare for the record a narrative of the complaint, the investigation, and the ultimate findings. The record should not include extensive opinions by the investigator; it should concentrate on the facts. The record should also include the employer's prescribed remedies and discipline. Access by other employees to these files should be strictly prohibited.

The employer should avoid inserting negative information into the alleged harasser's personnel file unless the employer has made a finding of culpability. Likewise, the employer should not mention the claim to a prospective employer of the alleged harasser unless there has been a finding of guilt. With regard to the victim, if she had to take an extended personal or sick leave because of the harass-

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385. Garziano v. E.I. Du Pont, Nemours & Co., 818 F.2d 380 (5th Cir. 1987). There are two issues with regard to a qualified privilege: (1) "whether the *occasion* for a statement is a matter of qualified privilege" and (2) "whether the *exercise* and *use* of the privilege was improper." *Id.* at 385-86. The privilege may also be lost if the employer acts in bad faith or with malice. *Id.* at 388.

ment, the reason for the leave should be accurately documented so that it will be apparent why she missed work.[386] Records regarding the complaint should be maintained for at least three to five years. Although most of the pertinent statutes of limitations are shorter than five years, the information can assist in any claim of a continuing violation. If the investigation is reopened, the reason should be documented in the file.

If the investigation shows that sexual harassment did exist, the employer should make every reasonable effort to ensure that it stops. Indeed, the employer has an affirmative duty to eradicate sexual harassment from the workplace. Thus, the employer may have to transfer or discharge the harasser. In determining the discipline of the harasser, the employer should consider not only the severity and pervasiveness of the acts but also any prior misconduct. All efforts should be made to make the complainant comfortable with the resolution. Although the employer is not required to terminate a harasser in order to appease his victim, according to the Ninth Circuit Court in *Ellison v. Brady,*[387] the employer should determine the impact of the remedy on the complainant. The employer should discipline offenders in a nondiscriminatory manner; that is, nondiscriminatory on the basis of race, color, sex, religion, national origin, age, or disability.[388]

The complainant should never be perceived as being punished or having to suffer a job detriment in order to resolve the matter. For example, if the day shift supervisor harassed a female employee on that shift, the victim should not be transferred to the less desirable night shift in order to separate the individuals.

It is important that all disputes should be resolved in some concrete, documented manner. Both parties should be informed by letter of the employer's findings and the remedies. If the investigation determines that sexual harassment did not exist, the employer should inform both parties of this fact by letter and state that it is closing the investigation. The most difficult situation concerns instances in which it is impossible to determine the credibility of the parties. In these instances, the employer should act as an arbitrator and attempt to restore harmony in the workplace. Both parties should be informed of the employer's inability to confirm that sexual harassment took place. Also, in the letters, the employer should stress that sexual harassment will not be tolerated in the future. The employer may ask the complainant to sign a statement attesting to the fact that she is satisfied with the results of its investigation and the steps taken by the employer to end the sexual harassment. However, this must be strictly voluntary, and the employer should never pressure the employee or retaliate against an employee because she refuses to do so.

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386. *See* Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987).

387. 924 F.2d 872 (9th Cir. 1991).

388. *See* Pacheco v. Rice, 966 F.2d 904 (5th Cir. 1992) (Hispanic who was forced to resign because of allegations of sexual harassment brought suit against employer for race discrimination because white employee accused of similar conduct was not discharged).

C. General Prophylactic Measures

There are key steps that all employers should take to avoid liability for sexual harassment claims. As discussed fully above, the most important step is to develop a sexual harassment policy. However, employers should also consider performing an internal audit of their workplaces to determine whether sexual jokes or conversation occurs and if sexual pictures or graffiti are exhibited. Employers should follow up on rumors about such activity and should never consider these activities to be acceptable in a typical male environment. Supervisors should counsel employees about the activities and demand that they cease. Because of increased awareness as to employees' rights with regard to sexual harassment, an employee may likely file a complaint, especially in the aftermath of the Clarence Thomas confirmation hearings. An employer's inaction, after notice that sexual harassment exists, may be the factor that causes it substantial liability.

Some employers go to the extent of adopting a "nonfraternization" policy between supervisors and employees that they oversee. However, it is not recommended that the employers break up romantic liaisons between employees that already exist and do not cause a problem.

Employers should educate their workforce about sexual harassment by training supervisors and managers as to the definition of sexual harassment and steps they should take to eradicate it. They must be reminded of the tremendous costs to the business because of sexual harassment, and the fact that the supervisors may be held individually liable for sexual harassment. As a final consideration, employers should never retaliate against an employee for raising a sexual harassment complaint, filing an EEOC charge, filing a lawsuit, or acting as a witness for another employee. An employer only multiplies its legal problems in doing so or in permitting a supervisor or other employee to do so, because it provides the employee with an independent cause of action under Title VII.[389] Employers should also ensure that supervisors are cognizant of the necessity not to retaliate.

VII. CONCLUSION

The law of sexual harassment changes as society's view of permissible conduct in the workplace changes. To be actionable, the complained of conduct must be offensive to a reasonable person (in some jurisdictions, to a reasonable person of the same gender as the victim), and, thus, must be objectionable to society in general. Judge Jones, in her dissenting opinion in *Waltman v. International Paper Co.*,[390] concluded that the sexual mores in our society were such that it would be unfair legally to require employers to eradicate sexual graffiti from their establishment. In *Waltman,* Judge Jones argued that America's children are exposed everyday to vulgarities worse or comparable to the sexual graffiti complained of in that case and, therefore, it would be unreasonable to expect the employer in *Waltman,*

389. *See* 42 U.S.C. § 2000e-3(a) (1988).

390. 875 F.2d 468, 482-87 (5th Cir. 1989) (Jones, J., dissenting).

or any other employer, to provide sexually sterile work environment.[391] What Judge Jones failed to consider, however, is that sexual conduct is not inherently offensive and is perfectly acceptable in many contexts – none of which include the workplace. Just because sexual conduct consumes, for example, the entertainment world does not mean that employees should assume the risk of exposure to an offensive work environment. There is no reason to allow sexual behavior that may occur, for example, in night clubs, to spill over into the workplace where employees are vulnerable to economic coercion.

In addition, strikingly offensive conduct engaged in outside the workplace, such as expressly segregated organizations or racial name-calling, has not generally been declared illegal; yet it is illegal in the context of the workplace. Congress has legislatively determined that certain practices should not and will not be tolerated in the employment context. Thus, a comparison between what occurs in society and the workplace is inappropriate.

Clarence Thomas' confirmation hearings provided a forum for public debate which hopefully will lead to a greater awareness of the problem and to a consensus that such behavior does not belong in the workplace. If so, then the law of sexual harassment will have changed for the better.

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391. *Id.* at 486.