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## The Legal and Economic Implications of Sexual Harassment

Suzanne E. Andrews

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## THE LEGAL AND ECONOMIC IMPLICATIONS OF SEXUAL HARASSMENT

SUZANNE E. ANDREWS\*

I.	INTRODUCTION.....	114
II.	SEXUAL HARASSMENT: BACKGROUND .....	117
	A. <i>Definitions of Sexual Harassment</i> .....	117
	B. <i>Title VII and the EEOC Guidelines</i> .....	122
	C. <i>Proof Necessary Under Title VII</i> .....	125
III.	PRESENT STATE OF THE LAW.....	126
	A. <i>Sexually Harassing Acts</i> .....	126
	B. <i>Limited Employer Liability</i> .....	132
	C. <i>Inadequate and Incomplete Damages</i> .....	141
	D. <i>Problems with Recovery Under Title VII</i> .....	143
	1. Title VII as an Incomplete Remedy .....	143
	2. Faults with the EEOC Guidelines .....	149
	E. <i>Tort Remedies for Sexual Harassment</i> .....	152
	1. Battery.....	152
	2. Assault .....	153
	3. Intentional Infliction of Emotional Distress .....	155
IV.	ECONOMIC IMPACT OF SEXUAL HARASSMENT .....	156
	A. <i>Application of Economic Models</i> .....	156
	B. <i>Twofold Economic Impact</i> .....	162
	1. Sexual Harassment as a Form of Sex Discrimination .....	162
	2. Economic Consequences of Sexual Harassment ...	166
V.	AMENDMENT TO TITLE VII .....	169
VI.	CONCLUSION .....	170

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## I. INTRODUCTION

Legal recognition that sexual harassment is sex discrimination in employment would help women break the bond between material survival and sexual exploitation. It would support and legitimize women's economic equality and sexual self-determination at a point at which the two are linked.<sup>1</sup>

Both legal and economic analyses support recognition of on-the-job sexual harassment<sup>2</sup> as a form of sex discrimination in employment. Many sexually harassed women are left legally remediless. Economic equality for women workers would be promoted if sexual harassment were recognized as sex discrimination. Moreover, the recognition of sexual harassment as a form of sex discrimination in employment would alter the subordinate and economically powerless role which most women workers traditionally represent and which facilitates a setting for sexual harassment.

In addition to legal recognition of employment discrimination based upon sexual harassment, courts should provide complete remedies for sexual harassment victims. Presently, many sexually harassed victims are pursuing legal redress through Title VII of the Civil Rights Act of 1964,<sup>3</sup> which prohibits sex discrimination in employment. Remedies under Title VII are limited, however, because in many instances Title VII fails to provide adequate and complete relief to sexually harassed victims.<sup>4</sup> Examination of both the language and judicial interpretations of Title VII, and the Equal Employment Opportunity Commission's [EEOC's] recently promulgated guidelines incorporating sexual harassment into Title VII's prohibitions, discloses three areas where Title VII falls short. First, specific acts or conduct which arguably constitute sexual harassment are not encompassed in the case law of the EEOC's definition of sexual harassment.<sup>5</sup> Second, an employer's liability is limited for the sexually harassing acts of employees and customers.<sup>6</sup> Third, Title VII does not allow an award of compensatory and punitive damages.<sup>7</sup> These three deficiencies collectively work against a sexually-harassed victim, preventing complete and adequate relief in some instances, and any relief in others.

Inadequate remedies for sexual harassment also reinforce the economically inferior employment positions of women in two ways. First,

1 C. MAC KINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 7 (1979).

2 For discussion of several definitions and types of sexual harassment, see *infra* notes 26-36 and accompanying text.

3 Civil Rights Act of 1964, § 701, 42 U.S.C. § 2000e (1976 & Supp. V 1981).

4 See *infra* notes 210-58 and accompanying text.

5 See *infra* notes 87-135 and accompanying text.

6 See *infra* notes 136-204 and accompanying text.

7 See *infra* notes 210-52 and accompanying text.

## SEXUAL HARASSMENT

115

inadequate legal recognition of all acts and conduct which constitute sexual harassment, limited employer liability, and inadequate, ineffective damage awards perpetuate the traditional dominant male employment position.<sup>8</sup> Second, employment related economic consequences, such as decreases in productivity, increases in absenteeism and unemployment, and barriers to employment opportunities, are also perpetuated.<sup>9</sup>

The pervasiveness of sexual harassment in the employment context calls for immediate action. Several studies indicate that on-the-job sexual harassment is more widespread than officially reported. Results of a 1975 survey conducted by the Working Women's Institute indicated that of the 165 women sampled, seventy percent had experienced on-the-job sexual harassment at least once.<sup>10</sup> In 1976, Redbook Magazine conducted a survey on sexual harassment to which 9,000 women replied.<sup>11</sup> The Redbook survey discovered that eighty-eight percent of the women had experienced sexual harassment on the job.<sup>12</sup> A Merit Systems Protection Board study on federal government employment revealed that forty-two percent of the women and 15.3 percent of the men surveyed had experienced sexual harassment.<sup>13</sup>

The prevalence of sexual harassment at the workplace leads to serious psychological, physical and economic side effects. Other studies conducted by the Working Women's Institute have indicated that ninety percent of sexual harassment victims surveyed experience nervousness, fear, and anger; sixty-three percent experience nausea, head-

8 See *infra* notes 312-74 and accompanying text.

9 See *infra* notes 375-98 and accompanying text.

10 Working Women's Institute, *Sexual Harassment on the Job—Results of Preliminary Survey*, Research Series Report No. 1 (1975). In this survey, the Working Women's Institute defined sexual harassment as "any repeated, unwanted sexual comments, suggestions or physical contact that you find objectionable or offensive and causes you discomfort on the job." (Publications of the Working Women's Institute can be obtained from 593 Park Avenue, New York City, New York.)

11. Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment* REDBOOK Nov. 1976, at 149. [hereinafter cited as Redbook Study].

12. The Redbook Survey explained that:

nearly 9 out of 10 women report that they have experienced one or more forms of unwanted attention on the job. This can be visual (leering and ogling) or verbal (sexual remarks and teasing). It can escalate to pinching, grabbing and touching, to subtle hints and pressures, to overt requests for dates and sexual favors—with the implied threat that it will go against the woman if she refuses.

*Id.*

13. U.S. MERIT SYSTEMS PROTECTION BOARD, *Sexual Harassment in the Federal Workplace: Is It a Problem?* (1981), reprinted in 107 LAB. REL. REP. (BNA) No. 23 (News and Background Information Part II: Sexual Harassment and Labor Relations) 28 (July 20, 1981) [hereinafter cited as Merit Systems Protection Board Study]. The Merit Systems Protection Board Study did not explicitly define sexual harassment, but it did explain that of those surveyed, the respondents stated they had experienced sexual harassment in "some form." *Id.*

Moreover, while it is also important to study the sexual harassment of men, that subject is beyond the scope of this paper.

## 116 NORTH CAROLINA CENTRAL LAW JOURNAL

aches and tiredness; seventy-five percent state that sexual harassment interferes with their job performance; and sixty-six percent are either fired or pressured into resigning.<sup>14</sup> Moreover, sexual harassment is not dependent upon a woman's economic class,<sup>15</sup> race,<sup>16</sup> occupation,<sup>17</sup> marital status,<sup>18</sup> or age.<sup>19</sup> For example, the Working Women's Institute determined that sexual harassment victims include teachers, factory workers, professionals, waitresses, clerical workers, executives, and domestics.<sup>20</sup>

Sexual harassment is not a new employment problem; women have experienced sexual harassment ever since they entered the labor force.<sup>21</sup> However, it is only a recently litigated issue because women were too embarrassed or too afraid to speak out.<sup>22</sup> Sexual harassment cases are usually brought under Title VII of the 1964 Civil Rights Act, though occasionally under tort law.<sup>23</sup> Sexual harassment cases have presented the courts with novel opportunities to decide the extent to which Title VII will provide remedies to sexually harassed victims. As a result, standards for a meritorious claim under Title VII have been inconsistent.<sup>24</sup> Given this inconsistency and confusion, a sexual harassment case under Title VII is ripe for Supreme Court review.

The economic impact of sexual harassment also needs review. Al-

14 Working Women's Institute, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 42 Women*, Research Series Report No. 3 (1979); P. Crull, *The Stress Effects of Sexual Harassment*, AM. J. ORTHOPSYCHIATRY (unpublished manuscript) [hereinafter cited as Crull Stress Effects Study]. The Crull Stress Effects Study may be obtained from the Working Women's Institute.

15 See C. MACKINNON, *supra* note 1, at 28-29 (footnotes omitted); Redbook Study, *supra* note 11, at 217, 219.

16 See, e.g., *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (black female employee sexually harassed by white male supervisor); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977) (black female employee sexually harassed by white male supervisor); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (black female employee sexually harassed by black male supervisor). See also C. MACKINNON, *supra* note 1, at 28-31 (footnotes omitted); Crull Stress Effects Study, *supra* note 14 (about twenty per cent of the sample consisted of minority women).

17 See Redbook Study, *supra* note 11, at 217, 219 (respondents included women from professional, managerial, white- and blue-collar jobs); Crull Stress Effects Study, *supra* note 14 (respondents included women working in sales, managerial, administrative, professional, technical, service, clerical, craft, operative, transport equipment operatives, non-farm laborer, farm, and private household positions).

18 See Redbook Study, *supra* note 11, at 217, 219 (respondents included single, married, and divorced women); Working Women's Institute, Research Series Report No. 3, *supra* note 14 (respondents included single, separated, divorced, and widowed women).

19 See Redbook Study, *supra* note 11, at 217, 219 (respondents' ages ranged from teens to sixties); Crull Stress Effects Study, *supra* note 14 (respondents' ages ranged from sixteen to sixty-five).

20 Working Women's Institute, Research Report Series No. 1, *supra* note 10. See also *supra* note 17.

21 See L. FARLEY, *SEXUAL SHAKEDOWN* 28-44 (1978).

22 *Id.* at 26; C. MACKINNON, *supra* note 1, at 27-28.

23 See *infra* notes 283-311 and accompanying text.

24 See *infra* notes 195-209 and accompanying text.

## SEXUAL HARASSMENT

117

though many non-economists have considered the economic consequences a sexually harassed victim experiences,<sup>25</sup> economists have neither analyzed sexual harassment as sex discrimination using economic models nor considered the overall economic results of sexual harassment.

This article proposes that sexual harassment at the workplace is a form of sex discrimination on both legal and economic bases. The article discusses the definitions and types of sexual harassment. Title VII and the recently promulgated EEOC guidelines on sexual harassment are reviewed. The present state of sexual harassment case law is then thoroughly discussed in terms of the three problems with recovery under Title VII: sexually harassing acts not included in Title VII; limited employer liability; and inadequate and incomplete damages. As an alternative form of recovery, possible tort remedies are briefly reviewed.

The second part of the article concerns the economic impact of sexual harassment. First, economic models are briefly considered. Second, the "twofold" economic impact of sexual harassment is discussed. The twofold economic impact provides that sexual harassment is a form of sex discrimination because both sexually harassing and other sex discriminatory acts achieve and reinforce the same purpose: the "superior" sex exerting power and dominance over the "inferior" sex. The second economic impact concerns overall economic results of sexual harassment which are in the nature of a consequence of discrimination.

The article concludes with a presentation of a model statute prohibiting sexual harassment at the workplace. Taking account of the economic and legal implications, this model statute provides an adequate and complete remedy for sexually harassed victims.

## II. SEXUAL HARASSMENT: BACKGROUND

A. *Definitions of Sexual harassment*

Sexual harassment may be defined in several ways. Catherine MacKinnon broadly defined sexual harassment as "including the unwanted imposition of sexual requirements in the context of a relationship of unequal power."<sup>26</sup> The inclusion of "power" or "dominance" in the description of sexual harassment is meaningful and many definitions of on the job sexual harassment include these descriptive terms. Social psychologists Harriet Connolly and Judith Greenwald describe sexual harassment as follows:

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25. See *infra* notes 375-98 and accompanying text.

26. C. MacKinnon, *supra* note 1, at 1.

## 118 NORTH CAROLINA CENTRAL LAW JOURNAL

Structurally, both types of actions [unsolicited sexual demands as a condition of working or unsolicited sexual intimidation] usually are initiated by someone with power against someone with lesser power, not the other way around. In a word, they are nonreciprocal. The second structural similarity is the element of coercion, that is, it is either stated or implied there will be negative consequences if the women refuses to acquiesce and/or comply. These actions function to assert superior power.<sup>27</sup>

The power issue does not relate only to female employees who are sexually harassed by their male supervisors. It also includes female employees who are sexually harassed by their co-workers and their employer's customers or clients. Sex-role conditioning explains why women workers "have been socialized to powerlessness"<sup>28</sup> and men workers, including co-workers, clients and customers, have been socialized to assert dominance.<sup>29</sup> Male employees and male customers may believe they have, and even exercise, "greater power" over female employees, although in the actual hierarchial employment structure, the males hold the same rank, or lower rank, than the females.

Lin Farley's definition of sexual harassment includes "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as worker."<sup>30</sup> She then narrowed the issue: "the name of the game is *dominance*."<sup>31</sup>

Understanding sexual harassment would not be complete without a definition by the Working Women's Institute. The Working Women's Institute defines sexual harassment as "any attention of a sexual nature in the context of the work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work or interfering with her employment opportunities."<sup>32</sup> The Working Women's Institute explained "[w]hether it takes place in the office or the factory, sexual harassment is the assertion of power by men over women who are perceived to be in a vulnerable position with respect to male authority."<sup>33</sup>

27. L. FARLEY, *supra* note 21, at 17. Farley quotes the statements of Connolly and Greenwald but she does not cite any specific source.

28. *Id.* at 16.

29. *Id.* at 16-17. See also Rossein, *Sex Discrimination and the Sexually Charged Work Environment*, 9 N.Y.U. REV. L. & SOC. CHANGE 271, 273-74 n.12 (1979-80) (sexual harassment expresses a stereotypic view that men are the sexual initiators exercising control over the weaker, vulnerable sex).

30. L. FARLEY, *supra* note 21, at 14-15.

31. *Id.* at 15 (emphasis added).

32. Vermuelen, *Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1604.11, Sexual Harassment to its Guidelines on Sexual Discrimination*, 6 WOMEN'S RTS. L. REV. 285, 286 (1980) (Joan Vermuelen is the Director of the Working Women's Institute, National Sexual Harassment Legal Back-up Center. The goal of the Institute is to combat the problem of sexual harassment in the employment context).

33. *Id.*

## SEXUAL HARASSMENT

119

Although several other commentators have defined sexual harassment,<sup>34</sup> the foregoing definitions, given by four of the earliest and most prominent advocates involved in the problems associated with sexual harassment, will suffice for a general social definition of sexual harassment. A technical legal definition, however, is different from those given above.

One of the most recent legal definitions of sexual harassment is given in the EEOC's guidelines on sexual harassment.<sup>35</sup> The EEOC's guidelines define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of sexual nature . . . ."<sup>36</sup> A detailed discussion of the EEOC's guidelines and sexual harassment as a violation of Title VII is given in section II-B of this article.

Types of sexual harassment vary in degree and should be considered broadly. Examples of sexual harassment include, but are not limited to, the following: staring, 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).<sup>37</sup>

Upon examining both the social and legal definitions of sexual harassment and the several types of sexually harassing acts articulated above, an exhaustive definition encompassing all possible types of sexually harassing behavior is not achieved. Several questions are left open concerning what other types of behavior may also constitute sexual harassment.

Although some types of sexual harassment might appear to be in a "complimentary" form (through the eyes of the complimentor), sexual harassment also includes derogatory and humiliating remarks, criticisms, and jokes about an individual's body, attire, weight, general appearance and mannerisms.<sup>38</sup> This disparaging type of sexual

34 See, e.g., Rossein, *supra* note 29, at 272. Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE 879, 879-80 (1980) [hereinafter cited as *Guide to Tort Actions*]; Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1007 n.2 (1978) [hereinafter cited as *Sexual Harassment and Title VII*].

35 29 C.F.R. § 1604.11 (1980).

36 *Id.*

37 See C. MACKINNON, *supra* note 1, at 2; L. FARLEY, *supra* note 21, at 15.

38 See *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978).



harassment is not addressed specifically in the EEOC's definition of sexual harassment. A more thorough definition should include this type of behavior because it is directed at a person's sex for the purpose of harassing him or her. Sexually derogatory harassment is also another way of fulfilling the harasser's purpose of exerting dominance over more vulnerable person. As Farley pointed out, "[s]exual harassment is nevertheless an act of aggression at any stage of its expression and in all forms, it contributes to the ultimate goal of keeping women subordinate at work."<sup>39</sup>

The EEOC's definition of sexual harassment is incomplete for yet another reason. The guidelines fail to include nonverbal sexually harassing acts. Sexual jokes, cartoons, other printed matter, and sexual and other nonverbal gestures are sources of nonverbal sexual harassment which may be used to humiliate, degrade, and possibly endanger a person.<sup>40</sup> This criticism of the guidelines is outlined more fully in section III-D-2.

Another issue not clarified by the social and the EEOC's definitions of sexual harassment concerns whether the victim must affirmatively reject or resist the sexual harassment. This issue can be broken down into two types of situations: where the victim tolerates sexual harassment but does not submit to sexual advances; and where the victim acquiesces or submits to sexual harassment. The former situation involves victims who fear losing their jobs if they affirmatively resist sexual harassment by requesting the harasser to stop or reporting the harasser's conduct to a supervisor. These victims would tolerate the offensive but subtle forms of sexual harassment, like "accidental" brushings or verbal sexual remarks. In this instance, resistance or rejection is not necessary because it is apparent that a sexually harassing act occurred.<sup>41</sup> The sexually harassing act was unwelcome, unsolicited and intimidating.

The latter situation also involves victims who fear retaliatory dismissals if they do not acquiesce in the sexual advances.<sup>42</sup> In this instance,

39. L. FARLEY, *supra* note 21, at 15.

40. See, e.g., *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978) (defendants placed obscene cartoons on plaintiff's desk), *Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521 (D.N.J. 1981) (defendants physically endangered plaintiffs by placing hazardous chemicals in the plants above their desks).

41. *Contra Fletcher v. Greiner*, 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (1980) where the court dismissed plaintiff's sexual harassment claim explaining that sexual suggestions must be unwelcome and rejected for a successful cause of action. *Id.* at 571, 435 N.Y.S.2d at 1010.

42. This is not only a fear of many sexually harassed women but actual dismissals are one of the effects of sexual harassment. See Working Women's Institute, Research Series Report No. 3, *supra* note 14 (of the 92 women in the sample, 24 percent were fired and 42 percent were pressured into resigning). See also *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979) (plaintiff dismissed for refusal to comply with supervisor's sexual advances).

*SEXUAL HARASSMENT*

121

economic coercion takes the place of physical coercion and these victims believe they must choose between submission to sexual advances or dismissal from employment. If the sexual advances are unsolicited, unwelcome and hostile or intimidating, an affirmative rejection of these acts would clearly constitute sexual harassment.<sup>43</sup> Why, then, would reluctant acquiescence to these same unsolicited, unwelcome and intimidating sexual advances not constitute sexual harassment? It is suggested that a complete definition of sexual harassment would include unsolicited and unwelcome sexual advances to which a victim reluctantly submits.

A related issue should also be considered at this point. Sexual harassment may occur where a previously mutual relationship has ended and the "spurned lover" is presently in an employment situation to sexually harass the former lover. The existence of a previously mutual relationship does not foreclose the possibility of sexual harassment occurring in the future. If the spurned lover makes an unsolicited and unwelcome sexual advance toward the former lover, then the spurned lover's acts constitute sexual harassment.

In summary, the necessary elements for an exhaustive definition of sexual harassment are outlined below. First, sexual harassment is any type of behavior, acts, or conduct which has the effect of expressing sexual attention toward another person. Second, the sexual attention is unsolicited and unwelcome although not necessarily rejected. Third, sexual attention includes, but is not limited to, sexual advances, requests for sexual favors, any other written, printed, verbal, nonverbal, or physical conduct of a sexual nature, whether expressed in a "complimentary" or derogatory nature. Fourth, the unsolicited and unwelcome sexual attention occurs within the employment context and submission to or tolerance of such attention is expressly or impliedly a condition of employment, or submission to or refusal of such attention is taken account of when determining employment opportunities, benefits, promotions, transfers, or demotions pertaining to the sexually harassed employee, or such attention affects the harassed employee by creating a demeaning, offensive, uncomfortable, hostile, or intimidating employment atmosphere.

The suggested elements of a sexual harassment definition set forth above are proposed as an exhaustive review encompassing all situations which might constitute sexual harassment in the employment context. This definition is broad enough to be considered as both a legal and social definition of sexual harassment. Furthermore, the power and dominance issue, underlying several of the social definitions, is di-

43. See *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979).

122      *NORTH CAROLINA CENTRAL LAW JOURNAL*

rected specifically toward explaining why sexual harassment occurs. This issue is more relevant when considering the scope of an employer's liability and adequate and complete remedial measures for sexually harassed victims.

### B. *Title VII and the EEOC Guidelines*

For a better understanding of sexual harassment claims under Title VII, a review of the EEOC's functions, the newly enacted guidelines, Title VII's legislative history, and the statutory requirements and limitations is helpful. Title VII of the 1964 Civil Rights Act states that "[i]t 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 . . . sex . . . ."<sup>44</sup>

The EEOC's duties include upholding the spirit of and preventing any violations of Title VII.<sup>45</sup> The EEOC may uphold Title VII by suing the violating employer<sup>46</sup> when the employer's status is covered under Title VII<sup>47</sup> and the charge filed by the "aggrieved" employee was not first resolved informally by the EEOC.<sup>48</sup> An aggrieved employee may not sue an employer directly under Title VII without first filing a complaint with the EEOC.<sup>49</sup>

The EEOC has authority to issue procedural regulations aiding in the administration and enforcement of Title VII.<sup>50</sup> The EEOC does not, however, have authority to issue substantive regulations.<sup>51</sup> Nevertheless, the EEOC issues guidelines to determine whether a violation of Title VII has occurred and to make a public statement concerning its interpretation of Title VII.<sup>52</sup> Although the guidelines are only regulations, many courts, including the United States Supreme Court, have

44. Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1976).

45. *Id.* § 706.

46. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-5 (1976).

47. An employer's status is covered under Title VII when he or she is engaged in an industry affecting commerce and has at least fifteen employees or when the employer is the government. Civil Rights Act of 1964, § 701(b), 42 U.S.C. § 2000e(b) (1976); § 717(a), 42 U.S.C. § 2000e-16(a) (Supp. V 1981).

48. Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5 (1976). The EEOC conducts an investigation, and if it discovers no "reasonable cause to believe that the charge is true," it may dismiss the charge. *Id.* If reasonable cause exists, then informal methods of conference, conciliation, and persuasion are used in an attempt to eliminate the discrimination. *Id.*

49. *Id.* See also *Wright v. Methodist Youth Servs., Inc.*, 511 F. Supp. 307, 310 (N.D. Ill. 1981).

50. Civil Rights Act of 1964, § 713(a), 42 U.S.C. § 2000e-12(a) (1976).

51. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

52. See McLain, *The EEOC Sexual Harassment Guidelines: Welcome Advances Under Title VII?* 10 U. BALT. L. REV. 275, 286-88 (1981).

## SEXUAL HARASSMENT

123

given "great deference"<sup>53</sup> to EEOC guidelines unless a court deems the guidelines as inconsistent with former guidelines or a misinterpretation of the statute.<sup>54</sup>

When determining whether guidelines "express the will of Congress," the court should consider the act itself and its legislative history.<sup>55</sup> Determining the relevance of Title VII to sexual harassment is difficult. The legislative history of Title VII's inclusion of sex within its provisions is scant.<sup>56</sup> In fact, several commentators have suggested that sex was added to the prohibition of Title VII in an attempt to block passage of the Act.<sup>57</sup> The actual implications of including sex in Title VII were never discussed nor considered in Congress prior to its enactment.<sup>58</sup>

Responding to the lack of history, the EEOC promulgated the following guidelines on discrimination based on sex:

## SEXUAL HARASSMENT

- (a) Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.<sup>59</sup>

When determining whether a violation of Title VII has occurred, the EEOC will consider "the record as a whole and . . . the totality of the circumstances . . . on a case by case basis."<sup>60</sup> The guidelines emphasize that an employer is strictly liable for sexual harassment of employees by the employer's agents and supervisory personnel despite the

53. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (citations omitted).

54. See McLain, *supra* note 52, at 287-88.

55. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

56. See Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 441-42 (1966). Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1027 (1977). See also *Corne v. Bausch and Lomb Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (quoting *Diaz v. Pan Am. Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971)).

57. See Vaas, *supra* note 56; Freed & Polsby, *Privacy Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RESEARCH J. 583; McLain, *supra* note 52, at 282.

58. See Vaas, *supra* note 56, at 439-42. Vaas explained that Representative Smith "offered his amendment [adding sex to Title VII] in a spirit of satire and ironic cajolery." *Id.* at 441. The House debate was brief and no hearings were held but the amendment passed 168 to 133. *Id.* at 442.

59. 29 C.F.R. § 1604.11 (1982).

60. *Id.*

## 124 NORTH CAROLINA CENTRAL LAW JOURNAL

employer's lack of knowledge.<sup>61</sup> On the other hand, the employer is only liable for sexually harassing actions by co-workers "where the employer (or its agents or supervisory employees) knows or should have known the conduct, unless it can show that it took immediate and appropriate corrective action."<sup>62</sup> The same rule applies to "nonemployees" (e.g., customers, clients) taking account of the employer's "control and any other legal responsibility" that the employer has in relation to the conduct of such nonemployee.<sup>63</sup>

The guidelines clearly show that the best way to end sexual harassment is to prevent it.<sup>64</sup> Preventive measures include explaining to employees their right to be free from sexual harassment and their rights and remedies under Title VII, employment policies against sexual harassment, and an internal complaint procedure and punishment for violators.<sup>65</sup>

The guidelines conclude that an employer *may* be liable for an individual's submission to sexual advances in return for enhanced employment opportunities.<sup>66</sup> The employer could be charged with discriminating against employees who were qualified for the employment advancement but were denied.<sup>67</sup> This concluding subsection of the guidelines has created controversy among commentators.<sup>68</sup> Invocation of this subsection has not yet reached the courts for interpretation and enforcement.

Although not mentioned in the guidelines, damages are recoverable under Title VII by victims of sexual harassment.<sup>69</sup> Another salient issue of concern to many commentators<sup>70</sup> involves the limited scope of

61 *Id.* See generally Vermuelen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U.L. REV. 499 (1981); Desmarais & Desmarais, *Advances & Advancements Employer Liability for Sexual Advances Under Equal Employment Opportunity Commission Guidelines*, 17 GONZ. L. REV. 1 (1981). But see Waks & Starr, *Sexual Harassment in the Work Place: The Scope of Employer Liability*, 7 EMPLOY. R.L.J. 369, 371-77, 386 (1981-82).

62 29 C.F.R. § 1604.11 (1982).

63 *Id.*

64 *Id.*

65 See *id.* See also Waks & Starr, *supra* note 61, at 384-86.

66 29 C.F.R. § 1604.11 (1982) (emphasis added).

67 *Id.*

68 Compare Leventer, *Sexual Harassment and Title VII: EEOC Guidelines, Conditions Litigation, and the United States Supreme Court*, 10 CAP. U.L. REV. 481, 485 & n 20 (1981) (subsection of guideline assumes women "sleep their way to the top" which reinforces sexist stereotype) with Waks & Starr, *supra* note 61, at 382 (in light of media attention to "sex-related appointments" time will tell whether this subsection will be enforced; subsection will do more harm than good for women's equality in employment). See also *infra* notes 243-48 and accompanying text.

69 See Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(g) (1976).

70. See Vermuelen, *Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1601.11 Sexual Harassment to its Guidelines on Sexual Discrimination*, 6 WOMEN'S RTS. L. RLP. 285, 294 (1980); Oneglia & Cornelius, *Sexual Harassment in the Work-place: The Equal Employment Opportunity Commission's New Guidelines*, 26 ST. LOUIS U.L.J. 39, 58 (1981); Note, Kyriazi v. Western Elec. Co.: *Damages for Sexual Harassment and State Tort*

## SEXUAL HARASSMENT

125

damages recoverable under Title VII. The remedies available under Title VII include an injunction, reinstatement or hiring, back pay, and attorney's fees.<sup>71</sup> An award of punitive or compensatory damages is not allowed.<sup>72</sup> The growing concern for adequate recovery for victims of sexual harassment is further outlined in Section III-D.

### C. Necessary Proof Under Title VII

Some knowledge of the court requirements regarding the allocation of the burden of proof to plaintiffs and defendants in Title VII sexual harassment cases is necessary before any analysis of those harassment cases can be made.

Generally, under Title VII the plaintiff shoulders the initial burden of proof. The plaintiff must prove "by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."<sup>73</sup> Such proof gives rise to a *prima facie* case of sexual harassment under Title VII. A presumption is created that the employer unlawfully discriminated against the employee.<sup>74</sup> The burden then shifts to the defendant to submit evidence to rebut this presumption.<sup>75</sup> Defendant sufficiently rebuts this presumption when he or she "raises a genuine issue of fact as to whether it discriminated against the plaintiff"<sup>76</sup> by submitting a legitimate, nondiscriminatory reason explaining his or her conduct.<sup>77</sup> If the defendant rebuts the presumption of discrimination, plaintiff must "demonstrate that the proffered reason was not the true reason for the employment decision."<sup>78</sup>

Nevertheless, the standard for a *prima facie* case under Title VII is flexible.<sup>79</sup> The United States Supreme Court has noted that "[t]he facts necessarily will vary in Title VII cases, and the specifications above of the *prima facie* proof required from respondent is not necessarily appli-

Law, 10 CAP. U.L. REV. 657, 662-66 (1981) [hereinafter cited as *Damages for Sexual Harassment*].  
Comment, *Sexual Harassment: A Jurisprudential Analysis*, 10 CAP. U.L. REV. 607, 609 (1981).

71 Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5(g) (1970), as amended by 42 U.S.C. § 2003-5(g) (Supp. V 1981).

72 See *Reid v. Memphis Publishing Co.*, 369 F. Supp. 684, 690 (D.C. Tenn. 1973), *aff'd in part on other grounds and rev'd in part on other grounds*, 521 F.2d 512 (6th Cir. 1975), *cert. denied* 429 U.S. 964 (1976) (where the district court stated that for a violation of Title VII, the monetary award is not punitive, but equitable in nature and intended to restore plaintiff to the rightful economic position absent the effects of discrimination).

73 Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (footnote omitted). See also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

74 450 U.S. at 254.

75 *Id.*

76 *Id.* at 254-55 (footnote omitted).

77 See *id.* at 255.

78 *Id.* at 256.

79 *Id.* at 253 n.6.

## 126 NORTH CAROLINA CENTRAL LAW JOURNAL

cable in every respect to differing factual situations."<sup>80</sup>

The Court of Appeals for the District of Columbia in *Bundy v. Jackson* applied the standard for a *prima facie* case under Title VII to a "differing factual situation" of sexual harassment.<sup>81</sup> The *Bundy* court explained "the plaintiff must show (1) that she was a victim of a pattern or practice of sexual harassment attributable to her employer . . . and (2) that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation."<sup>82</sup> The standard articulated above applied to the specific factual situation in *Bundy*; the standard may still differ under another type of sexual harassment. Other standards are reviewed below in section III-B.

### III. PRESENT STATE OF THE LAW

A majority of the jurisdictions presented with sexual harassment cases recognize a sex discrimination claim under Title VII.<sup>83</sup> However, they do not agree on what constitutes sexual harassment<sup>84</sup> or the extent of employer liability.<sup>85</sup> Furthermore, once a sexual harassment claim is recognized, damages are limited to the remedies available under Title VII.<sup>86</sup> A general overview of the case law is set forth below to serve two purposes: to provide a general understanding of the types of sexual harassment cases currently litigated, and to focus attention on the three areas where Title VII does not provide adequate and complete relief.

#### A. Sexually Harassing Acts

In *Fletcher v. Greiner*,<sup>87</sup> plaintiff asserted that the defendant, her employer, had violated her rights under Title VII and New York's Human Rights Law<sup>88</sup> by making submission to sexual intercourse a condition of employment. The New York Supreme Court stated that if plaintiff's allegations were true, she had stated a good cause of action pursuant to

80 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973).

81 *See Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981).

82 *Id.* at 953. The court indicated that the remaining allocation of burdens of proof remained the same. *Id.*

83 *See* *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978); *Kyrnazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981); *Garber v. Saxon Business Prods.*, 552 F.2d 1033 (4th Cir. 1977); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); *Morgan v. Hertz Corp.*, 542 F. Supp. 123 (W.D. Tenn. 1981); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

84 *See infra* notes 87-135 and accompanying text.

85 *See infra* notes 136-209 and accompanying text.

86 *See infra* notes 210-17 and accompanying text.

87 106 Misc.2d 564, 435 N.Y.S.2d 1005 (1980). Plaintiff also alleged the tort claim of abusive discharge. *Id.* at 565-66, 435 N.Y.S.2d at 1006.

88 *See* N.Y. EXEC. LAW § 296 (McKinney 1982).

## SEXUAL HARASSMENT

127

New York's Human Rights Law and Title VII.<sup>89</sup> The court determined, however, that the facts did not support a claim of sex discrimination and sexual harassment.<sup>90</sup> A review of the papers indicated that plaintiff and defendant were actually lovers for several years and had contemplated a future life together.<sup>91</sup> The court emphasized that a sexual harassment claim would not lie unless the sexual suggestions were unwelcome and rejected.<sup>92</sup> The court refused to consider the less obvious sexually harassing type of conduct here. Plaintiff stated that she decided to end a mutual and intimate relationship with the defendant. The defendant terminated their employment relationship.<sup>93</sup> In effect, plaintiff claimed that based upon her refusal to have sexual relations with defendant, adverse employment consequences resulted. The court responded by suggesting that initially plaintiff had the choice whether to submit to sexual relations. Once plaintiff submitted to sexual relations, she no longer had the right to assert a future sexual harassment claim.

In 1981 the North Dakota District Court in *Walter v. KFGO Radio* held that plaintiff, an employee at the radio station, failed to prove her sexual harassment claim under Title VII.<sup>94</sup> The court did, however, recognize that a cause of action based on sexual harassment existed under Title VII.<sup>95</sup> Plaintiff claimed that she was sexually harassed by her supervisor when he patted her on the bottom, touched her breast area, and propositioned an affair while they were attending a business convention.<sup>96</sup> The court responded by explaining that even if all these acts occurred, they did not rise to the level of sexual harassment under Title VII because they were not a "term or condition" of employment, nor did they create "an intimidating, hostile or offensive working environment."<sup>97</sup> The court failed to explain what types of acts or conduct would constitute sexual harassment. But the court mentioned that plaintiff received a raise in 1976, loved her job, and seized this opportunity to be reinstated after her position had been abolished.<sup>98</sup> With this evidence and applying the "totality of the circumstances" test, the court concluded that plaintiff's position was not retaliatorily abolished and

89. *Id.* at 567-71, 435 N.Y.S.2d at 1008-09. The court states the allegations in the plaintiff's complaint and then explains: "If true, they are violative of the public policy of this state . . . which . . . prohibits discrimination because of sex." *Id.* at 567, 435 N.Y.S.2d at 1008.

90. *Id.* at 568-69, 435 N.Y.S.2d at 1008.

91. *Id.* at 565-68, 435 N.Y.S.2d at 1006-08.

92. *Id.* at 571; 435 N.Y.S.2d at 1010.

93. *See id.* at 565, 435 N.Y.S.2d at 1006-07.

94. 518 F. Supp. 1309 (D.N.D. 1981).

95. *Id.* at 1315.

96. *Id.* at 1314.

97. *Id.* at 1314-16. The court cited the EEOC's guidelines on sexual harassment and stated that "they are entitled to great deference." *Id.* at 1315 (citations omitted).

98. *Id.* at 1312, 1315-16.



## 128 NORTH CAROLINA CENTRAL LAW JOURNAL

her claim of discrimination via sexual harassment was "untenable."<sup>99</sup>

The District Court for the Eastern District of Michigan, in *Munford v. James T. Barnes & Company*,<sup>100</sup> upheld plaintiff's claim of sex discrimination in violation of Title VII. Plaintiff, a female employee, charged her male supervisor and their employer with sexual harassment because her supervisor consistently made sexual suggestions.<sup>101</sup> Plaintiff's supervisor informed her that her job might depend upon whether she complied with his advances. When plaintiff refused and threatened to report him to his supervisor, he claimed that she would be fired.<sup>102</sup> Plaintiff's supervisor demanded that she accompany him on a business trip and have sexual intercourse with him; plaintiff refused and she was fired.<sup>103</sup> The *Munford* court revealed that "sex discrimination is not limited to sexual stereotyping and that the Act [Title VII] prohibits any impediment to employment which affects one gender but not the other."<sup>104</sup> According to the *Munford* court's rationale, sexual suggestions are not sexually harassing if made to both genders. Therefore, the plaintiff in *Munford* would have been denied relief if the same supervisor had made sexual suggestions toward a male employee.

*Kyriazi v. Western Electric Company*,<sup>105</sup> was the first case in which a court found sex discrimination in violation of Title VII where the employee was sexually harassed by co-workers. Kyriazi, a female employee of Western Electric, charged her employer with sex discrimination when she was fired in retaliation for lodging a complaint that her male co-workers sexually harassed her.<sup>106</sup> In *Kyriazi* the sexual harassment included verbal sexual abuse, physical blocking of her path while working in the office, and placing obscene cartoons on her desk.<sup>107</sup> The New Jersey District Court, in *Kyriazi*, recognized derogatory, embarrassing, and hostile acts as constituting sexual harassment. Three years later in *Guyette v. Stauffer Chemical Company*,<sup>108</sup> the same court recognized a cause of action against defendant Stauffer Chemical Company based upon plaintiff's sexual harassment claims of physical endangerment and verbal abuse. Arguably, these two cases

99. *Id.* at 1316. Plaintiff also alleged claims based on age discrimination and sex discrimination because of unequal pay; both of these claims were also dismissed. *Id.* at 1318.

100. 441 F. Supp. 459 (E.D. Mich. 1977). The trial court had denied the defendant's motion for summary judgment and the district court affirmed this decision.

101. *Id.* at 460.

102. *Id.* When plaintiff did report her supervisor to his supervisor, he told her that he supported her supervisor and that she would not be reinstated. *Id.*

103. 441 F. Supp. at 460.

104. *Id.* at 465.

105. 461 F. Supp. 894 (D.N.J. 1978).

106. *Id.* at 899.

107. *Id.* at 934. Kyriazi also involved other claims such as tortious interference with employment contract and conspiracy to harass in violation of 42 U.S.C. § 1985(3).

108. 518 F. Supp. 521 (D.N.J. 1981).

## SEXUAL HARASSMENT

129

show that the New Jersey District Court will recognize derogatory acts directed at one's sex as sexual harassment. Although this issue has been resolved in New Jersey, other state and federal courts are not bound by New Jersey law and many have not judicially addressed this issue.

*EEOC v. Sage Realty Corporation*<sup>109</sup> involved another issue related to the type of acts that constitute sexual harassment. Plaintiff, a female employed as a lobby attendant in an office building, was required to wear a sexually revealing uniform. Because of the revealing uniform, she was subjected to verbal sexual harassment by the public.<sup>110</sup> The employer knew she was sexually harassed because of the uniform. Nevertheless, plaintiff's refusal to wear the uniform resulted in her discharge.<sup>111</sup> The District Court for the Southern District of New York stated that plaintiff had established a *prima facie* case of sex discrimination by showing that she was required to wear the uniform as a condition of employment, the condition was imposed by the employer, and plaintiff was required to wear the uniform because she was a woman.<sup>112</sup> The court concluded that the uniform requirement, which subjected her to sexual harassment, constituted sex discrimination under Title VII if the employer did not have any legitimate and nondiscriminatory reason for the requirement.<sup>113</sup>

Two points become apparent when reviewing *Sage Realty*. First, a federal court in New York held that verbal abuse by itself constituted sexual harassment. Second, an employer may be held liable for the sexually harassing acts of nonemployees. This second point will be addressed in section III-B of this article.

A holding similar to *Sage Realty* was rendered in *Morgan v. Hertz Corporation*.<sup>114</sup> The District Court for the Western District of Tennessee held that sexual questions and remarks directed toward female employees constituted sexual harassment and thus violated Title VII.<sup>115</sup> Plaintiffs, female rental representatives at Hertz, claimed they were denied promotions and supervisors subjected them to verbal sexual harassment consisting of "suggestive and indecent comments and direct

109. 507 F. Supp. 599 (S.D. N.Y. 1981).

110. *Id.* at 605. The sexual harassment included sexual propositions and indecent comments and gestures.

111. *Id.* at 605-07.

112. *Id.* at 607-08.

113. *Id.* at 611. The court also noted that wearing the sexually revealing uniform did not fall under Title VII's exception in being a "bona fide occupational qualification" (BFOQ). *Id.* The BFOQ exception states that "it shall not be unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those instances where sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." Civil Rights Act of 1964, § 703, 42 U.S.C. § 2000e-2 (1976).

114. 542 F. Supp. 123 (W.D. Tenn. 1981).

115. *Id.*

## 130 NORTH CAROLINA CENTRAL LAW JOURNAL

questions of a sexual nature."<sup>116</sup> Although it was unclear whether higher management knew of this sexual harassment, the court noted that despite some of the women participating in the sexual comments "*plaintiffs did not appreciate the remarks and that many of the other women did not either.*"<sup>117</sup> The court concluded by enjoining the employer and its employees from continuing this verbal sexual harassment.<sup>118</sup> Thus, this Tennessee federal court recognized sexual harassment in the form of an offensive, uncomfortable, and demeaning working environment.

In *Tomkins v. Public Service Electric & Gas Company*,<sup>119</sup> the Court of Appeals for the Third Circuit upheld plaintiff's sexual harassment claim, but indirectly limited the types of conduct recognized as sexual harassment. The *Tomkins* court failed to consider or recognize the offensive environment type of sexual harassment recognized in *Morgan* and *Sage Realty* by concluding that a violation of Title VII occurs when:

a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward subordinate employees and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.<sup>120</sup>

Although the above statement recognized that some acts constitute sexual harassment, the court did not consider other less obvious acts or conduct that would constitute sexual harassment.

Despite being one of the earlier sexual harassment cases, *Barnes v. Costle*<sup>121</sup> involved similar issues. In *Barnes* the United States Court of Appeals for the District of Columbia upheld plaintiff's complaint alleging that her supervisor's conduct violated the Equal Employment Opportunity Act of 1972.<sup>122</sup> *Barnes* involved a female employee (appellant) at the Environmental Protection Agency whose supervisor repeatedly made sexual advances toward her.<sup>123</sup> Appellant's supervisor (appellee), a male director of the Agency, continually asked her if she would join him after work, made sexual comments, and suggested that

116. *Id.* at 125.

117. *Id.* at 128 (emphasis in original).

118. *Id.* The court also found that Hertz engaged in sex discrimination by failing to promote women and ordered a new hearing conducted by a magistrate to determine the extent of monetary damages to be awarded plaintiffs for defendants' discriminatory acts. *Id.* at 128-29.

119. 568 F.2d 1044 (3d Cir. 1977).

120. *Id.* at 1048-49.

121. 561 F.2d 983 (D.C. Cir. 1977).

122. *Id.* at 984. (The Equal Employment Opportunity Act of 1972 extended Title VII protection to federal employers.)

123. *Id.* at 984-85.

## SEXUAL HARASSMENT

131

her employment status would rise if she would have an affair with him.<sup>124</sup> After appellant's repeated refusals, the director and others at the agency belittled and harassed her. They took away her job duties, which ultimately led to the retaliatory abolition of appellant's job.<sup>125</sup>

Appellant argued that retention of her job depended upon submission to her supervisor's sexual advances, a condition the director did not enforce upon males.<sup>126</sup> The court agreed, observing that "[b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited."<sup>127</sup> The court also explained that sexual activity was solicited only because appellant was a woman in a subordinate position to her supervisor and stated that she "was asked to bow to his demands as a price of holding her job."<sup>128</sup> The employee's gender was important because the director did not make any sexual demands on male employees. The fact that gender was involved in a discriminatory practice, however, is not dispositive. For a successful case of sex discrimination in employment, it is sufficient that gender contributed to the discriminatory practice in a "substantial way."<sup>129</sup> The court observed that appellant's job was conditional upon two factors: her gender and her cooperation in her employer's sexual demands.<sup>130</sup>

The court also emphasized that Title VII should protect one employee even if other employees of the same gender are not confronted with sexual demands by the same supervisor.<sup>131</sup> The court maintained that "[t]he protections afforded by Title VII against sex discrimination are extended to the individual and a 'single instance of discrimination may form the basis of a private suit.'"<sup>132</sup> The court concluded that the protection of Title VII undoubtedly included the discriminatory practice of this case.<sup>133</sup>

*Barnes* is similar to *Morgan*, *Kyriazi*, *Sage Realty*, *Tomkins* and *Guyette* because the sexually harassing acts included a demeaning, belittling work environment. Although other sexually harassing acts were

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124. *Id.* at 985.

125. *Id.* (footnote omitted).

126. *Id.* at 989. Plaintiff had initially attempted to solve this matter informally and then she filed a formal complaint with an appeals examiner. *Id.* at 985. She later obtained an attorney and appealed to the Civil Service Commission. When her out-of-court attempts were to no avail, she filed her case in district court. *Id.* at 986.

127. *Id.* at 990.

128. *Id.*

129. *Id.* (footnote omitted).

130. *Id.* at 992.

131. *Id.* at 993-94. When concluding that single discriminatory incident may give rise to a lawsuit, the *Barnes* court reviewed racial and other sex discrimination cases to support its holding.

132. *Id.* at 993 (footnote omitted) (quoting *King v. Laborers Int'l Union*, 443 F.2d 273, 278 (6th Cir. 1971)).

133. *Id.* at 995 (footnote omitted).

## 132 NORTH CAROLINA CENTRAL LAW JOURNAL

involved, the *Barnes* court considered the belittling work atmosphere as constituting sexual harassment. The court did not, however, determine whether this type of conduct alone would constitute sexual harassment.

Like *Munford*, *Barnes* suggested that if the sexually harassing acts were also directed toward a male employee, neither the female nor the male employee would be able to recover under Title VII. This type of rationale is based upon the language of Title VII: discriminatory acts must be based upon sex in order to be against the law.

Nevertheless, the *Barnes* court did consider the situation where just one employee was harassed by a single sexually harassing act. The court acknowledged two types of situations. First, the sexual harassment of one employee was sufficient in order to state a recognizable claim. Second, a single act may constitute sexual harassment. One court has ruled directly contrary to the *Barnes* holding. In *Williams v. Saxbe*<sup>134</sup> the District Court for the District of Columbia held that a plaintiff must allege in her complaint that the sexual harassment was imposed on women in the same situation as plaintiff and not just one isolated incident.<sup>135</sup> This holding was particularly perplexing because *Barnes* and *Williams* were rendered in the same jurisdiction. *Barnes* by an appellate court and *Williams* by a trial court. Nevertheless, this lack of uniformity within a jurisdiction reveals the need for legislative direction.

Legislative direction is needed to establish an exhaustive definition of what types of acts and conduct constitute sexual harassment. Because Title VII and the EEOC's guidelines have left many questions unanswered concerning which acts constitute sexual harassment, judicial determinations are inconsistent.

### B. Limited Employer Liability

In 1975 an unsuccessful attempt to recognize legal remedies for on the job sexual harassment was made in *Corne v. Bausch and Lomb, Inc.*<sup>136</sup> The plaintiffs in *Corne* were two female employees who were subjected to verbal and physical sexual advances by their male supervisor.<sup>137</sup> When the sexual advances continued, the women quit. The plaintiffs argued that the employer, Bausch and Lomb, was responsible

134. 413 F. Supp. 654 (D.D.C. 1976), *rev'd & remanded on other grounds sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub. nom.* *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980).

135. *Id.* at 660 n.8. The court stated that only policies and practices of the employer, and not "interpersonal disputes between employees," are violations under Title VII. *Id.* at 660-61.

136. 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded*, No. 75-1857 (9th Cir. July 28, 1977).

137. Although the court failed to mention the actual types of sexual advances, it did state that

## SEXUAL HARASSMENT

133

because its administrative personnel knew or should have known of the supervisor's sexual advances toward them.<sup>138</sup> The Arizona District Court failed to state expressly whether the employer, in fact, had knowledge of the supervisor's conduct. Apparently, the court considered this issue irrelevant.

Plaintiffs claimed that their supervisor's conduct violated Title VII of the Civil Rights Act because it constituted a condition of employment that discriminated on the basis of sex.<sup>139</sup> The court rejected this argument by stating that an unlawful employment practice can be discrimination only if initiated by the employer.<sup>140</sup> The court also interpreted Title VII as excluding the supervisor's conduct because it was not related to the nature of the employment and no employer policy existed condoning this type of conduct.<sup>141</sup> The court considered it "ludicrous" to hold the supervisor's conduct illegal under Title VII because there would be no basis for a lawsuit if the supervisor had also made sexual advances toward men.<sup>142</sup>

The *Corne* holding was significant for several reasons. First, it was the only case holding that employers are not liable under Title VII for the sexually harassing acts of their supervisors. According to *Corne*, sexually harassed employees may bring suit under Title VII only when they are harassed by the employer. Second, the court found no employer liability because the same supervisor could have sexually harassed men. Although a possibility, the supervisor had, in fact, only sexually harassed women. The *Corne* court's determination that no basis for a lawsuit existed because the supervisor may sexually harass both male and female employees is particularly disturbing in light of the *Munford* and *Barnes* holdings which require that sexual harassment be directed toward only one sex. Based on *Corne*, legal remedies for on the job sexual harassment would never be provided under Title VII.

Third, the *Corne* court required the existence of an employer policy condoning sexual harassment. Finding such policy would be rare. Determining that an employer policy condoning sexual harassment existed by virtue of the fact that the employer did not investigate sexual harassment complaints would be a more reasonable condition, albeit

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the plaintiffs alleged "the male superior persistently takes unsolicited and unwelcome sexual liberties with the female employees . . ." *Id.* at 162.

138. *Id.* at 162-63.

139. *Id.* at 162.

140. Apparently, the court decided not to rely upon the definition of "employer" under Title VII of the 1964 Civil Rights Act which includes any agent of the employer. See 42 U.S.C. § 2000e(b) (1976).

141. 390 F. Supp. at 163.

142. The judge in *Corne* also pointed out the supervisor's conduct was "nothing more than a personal proclivity" and that to allow this lawsuit under Title VII would give rise to a "federal lawsuit everytime any employee made amorous or sexual oriented advances toward another." *Id.*

## 134 NORTH CAROLINA CENTRAL LAW JOURNAL

not one required by Title VII. This issue may also be viewed from a different angle.

In a terse opinion, the United States Court of Appeals for the Fourth Circuit upheld plaintiff's claim of a Title VII violation in *Garber v. Saxon Business Products*.<sup>143</sup> By alleging in her complaint that her employer's policy condoned the supervisor's practice of sexually harassing female employees, plaintiff made out a good cause of action.<sup>144</sup> The court reversed the lower court's dismissal of the plaintiff's complaint, which claimed that she was fired for refusing her supervisor's sexual advances.<sup>145</sup> What is sufficient to prevent dismissal of a sexual harassment claim in the fourth circuit need not even be proved in Colorado. The Colorado District Court in *Heelan v. Johns-Manville Corporation*<sup>146</sup> ruled that the plaintiff did not have to prove that the employer condoned a policy of sexual harassment. To require this proof, the court said, would be giving relief in one hand while taking relief away with the other.<sup>147</sup> This type of proof is not required in any other area of employment discrimination.<sup>148</sup>

The *Heelan* case involved another disputed issue in the jurisdictions: whether internal company procedures must be exhausted before an employer may be held liable. The facts of *Heelan* involved a plaintiff whose supervisor repeatedly made sexual advances toward her for approximately two years.<sup>149</sup> Despite her excellent work performance record and top management knowledge of her complaints of sexual harassment, plaintiff was fired after refusing to have an affair with her supervisor.<sup>150</sup> If the employer has a policy of discouraging sexual harassment and a grievance department to receive complaints, the employer may not be held liable if the employee failed to take advantage of this procedure according to the *Heelan* court.<sup>151</sup> This was not, however, the situation in the *Heelan* case.

A similar holding was rendered by the District Court for the Eastern District of Michigan in *Munford v. James T. Barnes & Company*.<sup>152</sup> The *Munford* court stressed that an employer has an affirmative duty to investigate and remedy complaints of sexual harassment. The employer may be liable for the conduct of supervisors if it fails to investi-

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143. 552 F.2d 1033 (4th Cir. 1977).

144. *Id.*

145. *Id.*

146. 451 F. Supp. 1382 (D. Colo. 1978).

147. *Id.* at 1389.

148. *Id.*

149. *Id.* at 1387.

150. *Id.* at 1385-87.

151. *Id.* at 1389.

152. 441 F. Supp. 459 (E.D. Mich. 1977).

## SEXUAL HARASSMENT

135

gate.<sup>153</sup> Both cases, however, leave some questions unanswered. What if the employer does not have a grievance procedure? What, then, is the extent of employer liability?

The holdings of the trial and appellate courts in *Miller v. Bank of America*<sup>154</sup> added to the confusion in this area. The trial court in *Miller* rejected plaintiff's claim of sexual harassment.<sup>155</sup> Miller, a female employee, alleged that her male supervisor promised a better job if she would be sexually cooperative.<sup>156</sup> She refused to comply with his sexual advances and, as a result, was dismissed. The *Miller* court first considered the Bank of America's policy of preventing and prohibiting moral misconduct; a policy which included prohibiting sexual advances.<sup>157</sup> According to the court, Miller's claim must fail because she did not file her complaint with the Bank's Employer Relations Department.<sup>158</sup> The Bank had no knowledge of the situation and was not given an opportunity to investigate and remedy the situation. The court observed that the employer cannot be held liable if the employee failed to exhaust the company's remedies.<sup>159</sup>

The Court of Appeals for the Ninth Circuit reversed the lower court decision and remanded the case with instructions for the lower court.<sup>160</sup> The court emphasized that an employer was liable for the acts of a supervisor even if the supervisor's actions had violated company policy.<sup>161</sup> The court also stressed that exhausting the company's internal remedies was not a prerequisite to filing a suit under Title VII.<sup>162</sup> Although settled in the ninth circuit, this issue is muddled in other jurisdictions. For example, the United States Court of Appeals for the District of Columbia in *Barnes* stated that an employer may not be liable under Title VII. If the employer has a policy prohibiting discriminatory practices and a supervisor disobeys the policy without the employer's knowledge, the employer will be given an opportunity to remedy the situation when discovered.<sup>163</sup>

*Barnes* also considered the related issue of whether the employer

153. *Id.* at 466.

154. 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979).

155. 418 F. Supp. at 233.

156. *Id.* at 234.

157. *Id.* at 235.

158. The *Miller* court, like the *Corne* court, was reluctant to hold the employer liable for "isolated and unauthorized sex misconduct" of which he or she had no knowledge. *Id.* at 234.

159. *Id.* at 235-34. Although the court stated that exhausting company remedies is not a prerequisite to recovery under Title VII, its decision appeared to suggest otherwise. *Id.* at 236 n.2.

160. *Miller v. Bank of America*, 600 F.2d 211, 214 (9th Cir. 1979).

161. *Id.* at 213.

162. *Id.* at 214. The court did note, however, that a lawsuit could be avoided if a company remedies the situation by working with the EEOC when initially contacted by them during their "conciliation period." *Id.*

163. 561 F.2d 983, 993 (D.C. Cir. 1977) (footnote omitted).



## 136 NORTH CAROLINA CENTRAL LAW JOURNAL

must have knowledge of the sexually harassing acts of supervisors before it may be held liable. The various jurisdictions have ruled differently regarding employer knowledge. In *Walter v. KFGO Radio* the North Dakota District Court acknowledged that the supervisor's pats on plaintiff's buttock were embarrassing but denied recovery because plaintiff never expressed her discomfort to her employer.<sup>164</sup> The United States Court of Appeals for the Third Circuit in *Tomkins v. Public Service Electric & Gas Company* held that an employer must have actual or constructive knowledge of the supervisor's sexual harassment before liability is found.<sup>165</sup>

In *Henson v. City of Dundee* the United States Court of Appeals for the Eleventh Circuit made a distinction between claims in sexual harassment cases that allege an offensive working environment and those that allege loss of a tangible job benefit when considering the requirement of employer knowledge.<sup>166</sup> Where the sexual harassment results in an offensive and hostile working environment, the court held that the employer must know or should have known of this harassment.<sup>167</sup> On the other hand, where the sexual harassment resulted in the employee's loss of a tangible job benefit, the employer is strictly liable if this loss was caused by a supervisor.<sup>168</sup> The court justified this distinction by explaining that when a supervisor creates an offensive and hostile working environment, the supervisor is acting outside the scope of employment authority. However, when the supervisor causes the employee's loss of a tangible job benefit, then the supervisor is acting within the scope of employment authority and the employer would be liable.<sup>169</sup> The justification for this distinction appears to be neither legally nor logically sound.

Employer liability for sexual harassment by co-workers has also given rise to different standards. In *Guyette v. Stauffer Chemical Company* the New Jersey District Court held that a nonsupervisory em-

164 581 F. Supp. 1309, 1316 (D.N.D. 1981).

165 568 F.2d 1044, 1048-49 (3d Cir. 1977). *Tomkins* involved a female employee at the Public Service Electric & Gas Co. who was sexually harassed by her supervisor during a discussion (over lunch) concerning her upcoming evaluation and possible promotion. Her supervisor said it would be necessary to have sexual relations with him if they were to have a satisfactory working relationship, and as Tomkins attempted to leave the restaurant, he physically restrained her. Although she claimed that her employer knew or should have known of this incident, Tomkins was eventually fired in retaliation for refusal of her supervisor's sexual advances. Before she was fired, she had been transferred to an inferior position and harassed by other employees. She suffered physical and emotional distress which caused her to be absent from work on several occasions. *Id.* at 1044-46.

166 682 F.2d 897, 905 & n.10, 909-10 (11th Cir. 1982). The facts of *Henson* will be discussed *infra* text accompanying notes 186-190.

167. *Id.* at 905.

168. *Id.* at 909.

169. *Id.* at 910.

## SEXUAL HARASSMENT

137

ployee may not be held liable for sexual harassment under Title VII.<sup>170</sup> The court did not explain whether it meant that a nonsupervisory employee may not be personally liable or whether the employer may not be held liable for the sexually harassing acts of nonsupervisory employees. The same court, three years earlier in *Kyriazi*, had determined that an employer may be found liable for the sexually harassing acts of co-workers.<sup>171</sup> The *Kyriazi* court, however, found that Kyriazi's supervisors were aware of the sexual harassment but refused to investigate her complaint.<sup>172</sup> In *Guyette* supervisors were involved in the sexually harassing acts. The *Guyette* court failed to state whether other higher ranked supervisors had knowledge and whether this would have affected employer liability for a co-worker's sexual harassment.

In *Sage Realty* a New York federal court held the employer liable for the sexually harassing acts of the public.<sup>173</sup> The employer knew that plaintiff was harassed because his policy required that the plaintiff wear a sexually revealing uniform.<sup>174</sup> The vague holdings set forth in *Guyette*, *Kyriazi*, and *Sage Realty* do not give a clear answer concerning an employer's liability for the sexually harassing acts of co-workers and nonemployees. They do not resolve the issue of employer knowledge either.

Another recently litigated issue concerning employer liability is whether the sexually harassed employee must be deprived of a tangible job benefit (i.e., retaliatory dismissal, demotion, or promotion) in order to have a successful claim under Title VII. *Bundy v. Jackson*<sup>175</sup> was the first case where this issue arose. Plaintiff Bundy's initial experience with sexual harassment began in 1972 when a co-employee, now director of Department of Corrections, sexually propositioned her.<sup>176</sup> Two years later she received sexual propositions from two other supervisors.<sup>177</sup> Bundy complained of these sexual advances to her supervisor's supervisor, who responded that "any man in his right mind would want to rape you" and he proceeded to sexually proposition Bundy.<sup>178</sup>

Bundy argued that her refusal of several supervisors' unsolicited sexual advances resulted in those supervisors denying her promotions to

170. 518 F. Supp. 521, 526 (D.N.J. 1981).

171. 461 F. Supp. 894, 894 (D.N.J. 1978).

172. *Id.* at 935-36.

173. 507 F. Supp. 599, 611 (S.D.N.Y. 1981).

174. *Id.* at 605-07.

175. 641 F.2d 934 (D.C. Cir. 1981).

176. *Id.* at 939.

177. *Id.* at 939-40. Most of the sexual harassment included propositions to engage in sexual intercourse and intimate sexual questions. After Bundy complained, one supervisor "began to derogate her for alleged malingering and poor work performance, though she had not previously received any such criticism." *Id.* at 940.

178. *Id.*

## 138 NORTH CAROLINA CENTRAL LAW JOURNAL

which she was entitled.<sup>179</sup> In a novel approach, Bundy contended that her employer violated Title VII by allowing female employees to be subjected to sexual harassment even though the employees' refusal of sexual advances did not result in a deprivation of tangible job benefit.<sup>180</sup> Although appellant also requested declaratory and injunctive relief, the lower court refused to grant Bundy any relief reasoning that sexual harassment in this case does not constitute sex discrimination pursuant to Title VII.<sup>181</sup>

The United States Court of Appeals for the Third Circuit reversed the lower court's decision emphasizing that "sex discrimination within the meaning of Title VII is not limited to disparate treatment founded solely or categorically on gender. Rather, discrimination is *sex* discrimination whenever sex is for no legitimate reason a substantial factor in the discrimination."<sup>182</sup> Reviewing the requirements set forth in *Barnes*, the court of appeals determined that Bundy proved that her employer discriminated against her on the basis of sex.<sup>183</sup> The court of appeals held the sex discrimination violated Title VII because it related to the "terms, conditions, or privileges of employment," reasoning that an employer could legally sexually harass an employee as long as the employee was not dismissed unless the *Barnes* holding was extended.<sup>184</sup> If an employee has proved that she was discriminated against because of her sex and the discrimination related to "terms, conditions, or privileges of employment," she can successfully show a Title VII violation even though there has been no loss of a tangible benefit.<sup>185</sup>

The *Bundy* holding was followed by the eleventh circuit in *Henson v. City of Dundee*.<sup>186</sup> Plaintiff, a female dispatcher in the Dundee police department, and a female co-worker were sexually harassed by the male chief of the police department by his "demeaning sexual inquiries and vulgarities" and his repeated sexual propositions.<sup>187</sup> Plaintiff com-

179. *Id.* at 940-41.

180. *Id.* at 943-44. The court noted that there was evidence that Bundy was not the only woman sexually harassed by the same supervisors. *Id.* at 940.

181. *Id.* at 941-42.

182. *Id.* at 942 (emphasis in original).

183. *Id.* at 943. The court stated "[w]e thus readily conclude that Bundy's employer discriminated against her on the basis of sex." *Id.*

184. *Id.* at 945.

185. *Id.* at 943-46. The court explained that the Title VII violations involved in *Bundy* can be considered as resulting in a "discriminatory work environment." *Id.* at 943 (emphasis in original). The court considered racial and ethnic discrimination cases where a "poisoning [of] the atmosphere of employment" was found to be in violation of Title VII. *Id.* at 944-45. The court then rhetorically asked "[h]ow 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?" *Id.* at 945.

186. 682 F.2d 897 (11th Cir. 1982).

187. *Id.* at 899. The district court refused to allow the presentation of evidence showing that the chief of police also made sexual propositions to plaintiff's co-worker. *Id.*

## SEXUAL HARASSMENT

139

plained to the City Manager of Dundee, but no remedial action was taken.<sup>188</sup> She claimed that she was constructively discharged because the sexual harassment "created a hostile and offensive working environment for women at the police station." She ultimately resigned fearing retaliatory dismissal for not complying with the chief's sexual demands.<sup>189</sup> Plaintiff also claimed that the chief prevented her from entering the police academy because she declined his sexual propositions.<sup>190</sup>

The district court entered judgment in favor of the city and plaintiff appealed.<sup>191</sup> The court of appeals reversed part of the lower court's decision explaining "that under certain circumstances, the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment."<sup>192</sup> The court reviewed race and ethnic discrimination cases under Title VII and determined that the same principles applied to sex discrimination cases under Title VII. When sexual harassment creates a hostile or offensive working environment, the employer may be liable under Title VII even if the employee does not lose a tangible job benefit.<sup>193</sup> Applying Title VII terminology and analysis, the court stated "[a] pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment."<sup>194</sup>

Thus, both the District of Columbia and the eleventh circuit recognized employer liability for a sexual harassment claim under Title VII despite no loss of a tangible employment benefit. Nevertheless, other jurisdictions are not bound by these holdings. Although the *Bundy* and *Henson* courts' reasoning was legally and logically sound and agreed with the standards set forth in the EEOC's guidelines, the extent of employer liability under Title VII has not been defined explicitly.

An employer's liability may also be limited by the applicable standard for a *prima facie* case of sexual harassment under Title VII. As

188. *Id.*

189. *Id.* at 899-900.

190. *Id.* at 900. Plaintiff presented the testimony of the City Manager that plaintiff was qualified and would have been able to attend the police academy had the chief notified her of plaintiff's interest. *Id.*

191. *Id.* at 899.

192. *Id.* at 901. The court of appeals remanded this claim to the lower court. *Id.*

193. *Id.* at 901-02.

194. *Id.* at 902. Nevertheless, the *Henson* court held that plaintiff sufficiently alleged the necessary elements of her third sexual harassment claim involving the chief's preventing her entrance into the police academy. She was entitled to a new trial on this issue. The dismissal of plaintiff's second sexual harassment claim involving constructive discharge was, however, upheld because the evidence suggested that she voluntarily quit. *Id.* at 908-13. Appellate courts are reluctant to overturn a lower court's "findings of fact" unless they are deemed "clearly erroneous." *Id.* at 907.

## 140 NORTH CAROLINA CENTRAL LAW JOURNAL

previously set forth in section II-C, the court in *Bundy v. Jackson*<sup>195</sup> outlined the necessary elements for a successful sexual harassment claim. Several other courts have also outlined the elements necessary for a sexual harassment claim. In *Tomkins v. Public Service Electric & Gas Company* the court explained that a claimant must establish that the sexual advances constituted a condition of employment and the employer imposed this condition because of one's sex for a cognizable claim under Title VII.<sup>196</sup>

In *Heelan v. Johns-Manville Corporation* the court maintained that a successful claim of sexual harassment based upon sex discrimination prohibited under Title VII "must plead and prove that (1) submission to sexual advances of supervisor was a term or condition of employment, (2) that this fact substantially affected plaintiff's employment and (3) employees of the opposite sex were not affected in the same way by these actions."<sup>197</sup> The court in *Henson v. City of Dundee* explained that plaintiff must submit similar proof. The plaintiff must prove that she belonged to a protected group; she was subject to unwelcome sexual harassment; the harassment was based on sex; the harassment affected a "term, condition, or privilege" of employment; and the employer knew or should have known of the harassment.<sup>198</sup> The court defined belonging to a protected group as showing that plaintiff was a woman and unwelcome sexual harassment as conduct that was unsolicited.<sup>199</sup> The court used a "but for" test to determine if plaintiff was discriminated against based on sex. "But for" her sex, she would not have been sexually harassed.<sup>200</sup> Considering this last qualification, however, male and female employees who are sexually harassed by a bi-sexual supervisor would not be eligible for recovery under Title VII.<sup>201</sup>

Sexual harassment affects a term, condition or privilege of employment when it "is sufficiently severe and persistent to affect seriously the psychological well beings of employees."<sup>202</sup> Finally, the *Henson* court explained that the employer was liable for sexual harassment when it knew or should have known of the harassment; "constructive knowledge" will suffice for the latter.<sup>203</sup> The employer may be absolved of

195. 641 F.2d 934, 953 (D.C. Cir. 1981).

196. 568 F.2d 1044, 1046 (3d Cir. 1977).

197. 451 F. Supp. 1382, 1389 (D. Colo. 1978).

198. 682 F.2d 897, 903-05 (11th Cir. 1982).

199. *Id.* at 903.

200. *Id.* at 903-04.

201. *Id.* at 904. *Accord* *Bundy v. Jackson*, 641 F.2d 934, 943 & n.7 (1981) (sexual harassment would not be sex discrimination where a bisexual supervisor harasses both male and female employees).

202. 682 F.2d at 904. This element of the *prima facie* case is to be determined by the totality of the circumstances. *Id.*, (citing 20 C.F.R. § 1604.11(b) (1981)).

203. 682 F.2d at 905 (citing *Taylor v. Jones*, 653 F.2d 1199 (8th Cir. 1981)). Constructive knowledge occurs when the harassment is so pervasive that knowledge is inferred.

## SEXUAL HARASSMENT

141

liability if the employer remedies the situation.<sup>204</sup>

A review of the standards for a *prima facie* case of sexual harassment articulated by the third, eleventh, and District of Columbia circuits and the Colorado District Court indicated further inconsistencies among the jurisdictions. Some require a stronger showing; others require a weaker showing. Thus, employer liability for sexual harassment claims will not be uniform among the jurisdictions. Different standards are being applied to sexual harassment cases based on violations of Title VII. The courts in pre-and post-*Bundy* cases appear understandably confused regarding whether employer knowledge was required,<sup>205</sup> whether loss of a tangible employment benefit must result,<sup>206</sup> whether an employer can be found liable for co-workers' or customers' sexual harassment and, if so, under what circumstances and to what extent would the employer be liable,<sup>207</sup> what the plaintiff must prove for a *prima facie* case and what the defendant must show to rebut this,<sup>208</sup> and finally, whether plaintiff must exhaust company remedies before recovering under Title VII.<sup>209</sup> Based upon the confusion and differing answers to the above questions among the jurisdictions, the Supreme Court should decide a Title VII sexual harassment case soon.

### C. Inadequate and Incomplete Damages

In several of the cases discussed above, plaintiffs were awarded some form of damages. Those awards varied from one case to another because each plaintiff's injury also varied. For example, in *EEOC v. Sage Realty Corporation* plaintiff was awarded damages which included back pay, pension contributions, other employment benefits, and attorney's fees.<sup>210</sup> This award compensated plaintiff for wrongful termination. The plaintiff in *Heelan v. Johns-Manville Corporation* was awarded back pay, lost employment benefits, and attorney's fees for

204. 682 F.2d at 905.

205. See *Bundy v. Jackson*, 641 F.2d 934, 953 (D.C. Cir. 1981); *Walter v. KFGO Radio*, 518 F. Supp. 1309, 1316 (D.N.D. 1981); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Business Prods.*, 552 F.2d 1033, 1033 (4th Cir. 1977).

206. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982).

207. See *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 941 (D.N.J. 1978); *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981); *Williams v. Saxbe*, 413 F. Supp. 654, 659 (D.D.C. 1976); *Guyette v. Stauffer Chem. Co.*, 418 F. Supp. 521, 526 (D.N.J. 1981).

208. See *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1389 (D. Colo. 1978).

209. See *Miller v. Bank of America*, 600 F.2d 211, 214 (9th Cir. 1979); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1979); *Heelan v. Johns Manville Corp.*, 451 F. Supp. 1382, 1389 (D. Colo. 1978).

210. 507 F. Supp. 599, 613 (S.D.N.Y. 1981). Plaintiff's award amounted to \$33,141.75 which included interest. *Id.*

## 142 NORTH CAROLINA CENTRAL LAW JOURNAL

wrongful dismissal.<sup>211</sup> In *Kyriazi v. Western Electric Company* plaintiff was awarded injunctive relief, back pay, and attorney's fees for being fired after Western Electric discovered that a sex discrimination claim had been filed.<sup>212</sup> The court in *Morgan v. Hertz Corporation* issued an injunction enjoining the employer, Hertz, and its employees, from continuing the verbal sexual harassment.<sup>213</sup> In *Williams v. Saxbe* plaintiff did not include a request for specific relief so the court ordered the parties to submit memoranda on this issue.<sup>214</sup> In *Bundy v. Jackson* the court of appeals remanded the case to the lower court to determine appropriate injunctive relief and to conduct evidentiary hearings concerning Bundy's claims of back pay and lost promotions.<sup>215</sup>

Most of the damage awards above address the injury that resulted from the discrimination. It is questionable, however, whether plaintiffs were compensated fully for the harm done. Although monetary awards for back pay, lost employment benefits, and attorney's fees cover some of the money lost or spent vindicating the sexually harassed victims' rights, additional costs are borne by the victim. Such costs might involve seeking other employment, psychological help, as well as other medical assistance. Although the need for compensatory damages is discussed later, a related question, however, involves whether Title VII damages adequately remedy the types of sexual harassment presented in the above cases.

In *Morgan* an injunction was issued prohibiting the employer and employees from verbally sexually harassing other employees. The effectiveness of this form of remedy is questionable. It is suggested that plaintiffs and defendants are not usually the "best of friends" after a lawsuit. But rather, after the termination of a lawsuit, plaintiffs and defendants express hostility toward one another, or at least, the "loser" is hostile toward the "winner." This type of employment atmosphere would seem to facilitate verbal abuse or possibly some other retaliatory action. Perhaps a monetary award would be better suited to this situation. Monetary damages consisting of back pay awarded to plaintiff until other employment is secured would offer a complete and adequate remedy.

Monetary damages might also address a situation where compensation for injury is difficult to imagine. For instance, in *Guyette v. Stauff-*

211 451 F. Supp. 1382, 1391 (D. Colo. 1978).

212. 461 F. Supp. 894, 950 (D.N.J. 1978).

213 542 F. Supp. 123, 128 (W.D. Tenn. 1981). The court also found that Hertz engaged in sex discrimination by failing to promote women and ordered a new hearing to determine the extent of monetary damages to be awarded plaintiffs. *Id.* at 128-29.

214. 413 F. Supp. 654, 663 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *decision on remand sub nom.* Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980).

215 641 F.2d 934, 950 (D.C. Cir. 1981).

## SEXUAL HARASSMENT

143

*fer Chemical Company* plaintiffs were physically endangered when defendants placed hazardous chemicals in the plants above their desks.<sup>216</sup> Plaintiffs' work product was also stolen or ruined.<sup>217</sup> In this situation, an injunction preventing future harassment would fail to address the harm already done. Although a monetary award could not adequately compensate plaintiffs for the physical endangerment and ruined work product, it could give them an opportunity to secure employment elsewhere by covering transitory expenses.

Compensation for sexual harassment victims should conform to the realities of the situation. It may be unreasonable to expect a sexually harassed victim to return to a job at which she or he experienced sexual harassment. Title VII remedies are limited because they are not adaptable to the needs of sexually harassed victims.

#### D. Problems with Recovery under Title VII

##### 1. Title VII as an Incomplete Remedy

In line with the court's apparent confusion over an employee's recovery for sexual harassment under Title VII, several commentators have expressed their dissatisfaction with either all or part of Title VII statutory requirements for recovery including the EEOC's guidelines interpreting Title VII.<sup>218</sup>

As the previous discussion of the cases indicated, a major drawback of initiating a sexual harassment lawsuit under Title VII would be the limited remedies available. Under Title VII, only reinstatement, lost employment benefits, back pay, attorney's fees and "equitable relief" may be awarded.<sup>219</sup> Equitable relief includes issuing an injunction or ordering specific performance.<sup>220</sup> Most notably, recovery under Title VII fails to include monetary relief in the form of compensatory and punitive damages.<sup>221</sup> This exclusion of punitive damages appears to comport with Title VII's underlying purpose "to make persons whole for injuries suffered on account of unlawful employment

216. 518 F Supp 521, 523 (D.N.J. 1981). The court's decision fails to mention whether any damages were awarded.

217. *Id.*

218. See McLain, *supra* note 52, at 288-336; Vermuelen, *supra* note 32, at 285-94; Note, *Legal Remedies for Employment-Related Sexual Harassment*, 64 MINN. L. REV. 151, 153-67 (1979) [hereinafter cited as *Legal Remedies*].

219. 42 U.S.C. § 2000e-5(g) (1976).

220. Equitable relief is not the equivalent of an award of money damages. See *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975); *Johnson v. Georgia Highway Express Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969).

221. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934, 946-47 (D.C. Cir. 1981); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308 (6th Cir. 1975). Punitive damages are recoverable when Title VII is coupled with a valid § 1981 claim. See *Harris v. Richards Mfg. Co., Inc.*, 675 F.2d 811, 814 (6th Cir. 1982).



## 144 NORTH CAROLINA CENTRAL LAW JOURNAL

discrimination."<sup>222</sup>

Punitive damages represent a monetary award to plaintiff above the amount necessary to compensate fully for his or her injury.<sup>223</sup> Punitive damages are awarded for the purpose of punishing the wrongdoer, instructing the wrongdoer not to repeat the same actions or conduct, and deterring others from doing the same wrongful acts.<sup>224</sup> Punitive damages are usually awarded based upon a defendant's culpable state of mind:

It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct. Thus courts have developed a large vocabulary to describe the kind of mental state required—the defendant must be "malicious," "reckless," "oppressive," "evil," "wicked," or guilty of "wanton misconduct," or "morally culpable" conduct.<sup>225</sup>

Moreover, Professor Dobbs explained that "some courts have viewed punitive damages as compensatory, in the limited sense that they may provide damages for the wounded feelings of the plaintiff."<sup>226</sup> Although some courts will award punitive damages where the defendant exhibits only extreme conduct, such as conscious or criminal indifference to the safety or rights of others, most courts agree that a punitive damages award is based on the defendant's culpable state of mind.<sup>227</sup> At least one exception to this general rule must be noted. Several cases have indicated that where defendant has committed a *serious abuse of a position of privilege or power*, punitive damages could be awarded against a defendant absent the usual requirement of a culpable state of mind.<sup>228</sup> Professor Dobbs provides several examples including insurers refusing to pay policy coverage, utilities cutting off service, dismissal in violation of employment contract, and a bank refusing to honor a customer's check.<sup>229</sup> Professor Dobbs suggests:

Allowance of punitive damages on the basis of this special kind of conduct rather than on the basis of the defendant's mental state, would be entirely consistent with the idea that punitive awards should serve the purpose of encouraging suit by the plaintiff as a "private attorney general" on issues of special importance. All of this gives ground for at

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222. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

223. W. PROSSER, *TORTS* § 2, at 9 (4th ed. 1971).

224. *Id.*

225. D. DOBBS, *REMEDIES* 205 (1973).

226. *Id.* (footnote omitted).

227. *Id.* at 205-06.

228. *Id.* at 206.

229. *Id.* at 206-07 (footnotes omitted). Professor Dobbs explained:

But the pattern of special liability for those who abuse positions of authority and privilege is a strong one, showing up in a similar group of cases where attorneys' fees are assessed against the defendant, as well as in the substantive tort law concerning mental anguish, and in the substantive law of duress, and unconscionability. *Id.* at 207 (footnotes omitted).

## SEXUAL HARASSMENT

145

least a suspicion that in the abuse-of-power cases, a subjective evil motive may not be required.<sup>230</sup>

The abuse-of-power basis for awarding punitive damages should be clearly applicable in sexual harassment cases. Sexual harassment was previously defined as the assertion of power by one sex over the other "more vulnerable" sex. The harasser perceives himself or herself to be in the dominant employment position over the other "inferior" employee in an employment setting which is conducive to an abuse of power. Depending upon the circumstances of a particular case, a punitive damages award against a defendant guilty of sexual harassment may be warranted based on the abuse-of-power rationale.

On the other hand, many defendants liable for sexual harassment have the requisite culpable state of mind. For example, the defendants in *Guyette v. Stauffer Chemical Company* sexually harassed plaintiffs by physically endangering them by placing hazardous chemicals in the plants above plaintiffs' desks.<sup>231</sup> This type of conduct can clearly be termed "malicious," "reckless," "evil," "wanton misconduct," and "morally culpable."

Additionally, some sexual harassment cases brought under state laws have resulted in awards of punitive damages.<sup>232</sup> The cases brought under state laws involved the same or similar factual situations as those cases brought under Title VII.<sup>233</sup> Furthermore, the policy reasons underlying an award of punitive damages, as stated above, support such an award to a victim in a sexual harassment case.<sup>234</sup> Like other acts of sex discrimination, sexual harassment is explained as a means of keeping women in a subordinate and powerless employment position and the oppressive underpinnings of sexual harassment are manifest. In some cases, violent means are used to sexually harass employees.<sup>235</sup> In many cases the sexually harassed victim experiences severe physical and psychological harm due to the stressful working environment.<sup>236</sup>

230. *Id.*

231. 518 F. Supp. 521, 523 (D.N.J. 1981).

232. See *Skousen v. Nidy*, 90 Ariz. 215, 219, 367 P.2d 248, 250 (1961); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 950 (D.N.J. 1978).

233. See *Skousen v. Nidy*, 90 Ariz. at 218, 367 P.2d at 249 (forceful and violent indecent sexual assaults); *Kyriazi v. Western Elec. Co.*, 461 F. Supp. at 950 (same facts that support Title VII claim support tort of malicious interference with employment).

234. See, e.g., *Vermuelen*, *supra* note 32, at 294; *Legal Remedies*, *supra* note 218, at 151-52; C. Mac KINNON, *supra* note 1, at 47 ("sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry"); L. FARLEY, *supra* note 21, at 15 (oppressiveness of sexual harassment is reflected through its aggressive nature and through its attempt to maintain women's subordinate position).

235. See *Skousen v. Nidy*, 90 Ariz. 215, 217, 367 P.2d 248, 249 (1961).

236. Working Women's Institute, Research Series Report No. 1, *supra* note 10 (sexually harassed victims experienced physical symptoms such as nervous stomachs, migraine headaches, loss of appetite; and emotional and psychological feelings such as anger, fright, being upset, and guilt); Working Women's Institute, *Project Statement: Sexual Harassment on the Job* (1975).

An award of punitive damages to a sexually harassed victim would have the same purpose and effect of compensation for mental anguish as an award of punitive damages has in other cases. Similarly, sexual harassers would be punished for their conduct and deterred from repeating it.

The exclusion of compensatory damages from recoverable relief under Title VII, aside from an award of back pay, lost employment benefits, and attorney's fees, is much less excusable than the exclusion of punitive damages. Compensatory damages are the actual damages incurred by the injured party. Compensatory damages include "out-of-pocket, or pecuniary losses, as well as compensation for physical and mental suffering."<sup>237</sup> Courts consider damages for pain and suffering to be compensatory in nature even though the damages are neither pecuniary nor guided by any market value.<sup>238</sup> Pain and suffering "includes any form of conscious suffering, both mental and physical, except that substantive law may exclude recovery for mental pain in limited circumstances."<sup>239</sup> Such limited circumstances concern jurisdictions where a "physical impact" is required before pain and suffering damages are awarded.<sup>240</sup>

Whether a physical impact is involved in a particular sexual harassment situation, a damage award for pain and suffering should be considered on a case-by-case basis. Sexual harassment at the workplace may result in serious psychological and physical suffering. Studies have indicated that sexually harassed victims experience psychological symptoms, such as nervousness, fear, and anger and physical symptoms, such as nausea, headaches, and tiredness.<sup>241</sup> An award of damages for pain and suffering may be particularly suitable for a sexual harassment case because the victim would not have to prove that the defendant *intended* harm.<sup>242</sup> Some employees and supervisors may actually believe that some acts of sexual harassment are innocent or flattering.<sup>243</sup> Others intend to cause suffering by sexually harassing an

(Sexual harassment "creates an intolerable and stressful working condition hazardous to mental health"), L. FARLEY, *supra* note 21, at 17, (quoting social psychologists Harriet Connolly and Judith Greenwald "All sexual harassment is a stressful experience and ego functioning may well be seriously impaired. The victim is violated either physically or psychologically and she experiences a loss of autonomy and control.")

237. Mack v. Johnson, 430 F. Supp. 1139, 1149 (E.D. Pa. 1977), *aff'd* 582 F.2d 1275 (3d Cir. 1978).

238. D. DOBBS, *supra* note 225, at 545.

239. *Id.* at 544-45 (footnotes omitted).

240. *Id.* at 545 n.36 (citing W. PROSSER, TORTS § 54 (4th ed. 1971)).

241. See *supra* note 14 and accompanying text.

242. See D. DOBBS, *supra* note 225, at 136. Professor Dobbs explained that pain and suffering is usually inflicted without intending harm, for example, as in personal injury negligence cases. *Id.*

243. Cf. Fifteen percent of the 9000 women surveyed in the Redbook Study described sexual

## SEXUAL HARASSMENT

147

employee.

If the requisite intent exists, one accused of sexual harassment might be liable for damages for the intentional invasion of an employee's "dignitary rights or interest."<sup>244</sup> Some examples of claims in violation of one's dignitary interest include assault, battery, false imprisonment, malicious prosecution, intentional infliction of emotional distress, intentional interference with voting, and statutory civil rights violations.<sup>245</sup> In these types of cases, the "damages are 'presumed,' or the wrong is said to be damage in and of itself."<sup>246</sup> Professor Dobbs noted that in some cases the tort appears to be a special version of inflicting emotional distress, for example, a battery case where the contact was merely "offensive."<sup>247</sup> A sexual harassment case might involve an offensive contact. For example, in *Tomkins v. Public Service Electric & Gas Company*, when defendant sexually propositioned plaintiff in a restaurant, he also physically restrained her when she attempted to leave.<sup>248</sup>

When considering compensatory damages for invasion of dignitary interest, the defendant's motive and conduct are pertinent because they influence a plaintiff's feelings of outrage and distress.<sup>249</sup> The psychological and physical suffering which a sexually harassed employee experiences would increase if the defendant's acts became more hostile, more persistent, and physical. Moreover, when pecuniary losses are related to an invasion of dignitary interest, "special damages" may be awarded to a plaintiff.<sup>250</sup> Special damages relate to losses such as "loss of time, reputation, emotional tranquility, credit standing and others, and . . . 'all other losses' are likewise recoverable if proximately resulting from the wrong."<sup>251</sup> Many sexual harassment cases include pecuniary losses in terms of back pay and lost employment benefits. An award of special damages would compensate a sexually harassed victim for losses not recoverable under the limited remedies in Title VII.

Sexual harassment claims may be analogous with those for pain and suffering and invasion of dignitary interests. Many sexually harassed victims experience the physical and psychological suffering that forms

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harassment as "flattering," but most considered a sexual pass as a "hollow compliment." Redbook Study, *supra* note 11, at 217.

244. See D. DOBBS, *supra* note 225, at 528.

245. *Id.* at 528-29 (footnotes omitted).

246. *Id.* at 528 (footnotes omitted).

247. *Id.* at 530 (citing *Edminsten v. Dousette*, 334 S.W.2d 746 (Mo. App. 1960)). The *Edminsten* case involved an award of \$250.00 for actual and punitive damages for an indecent assault which involved plaintiff placing his hand on defendant's hip and pushing his lower part of his body against defendant. 334 S.W.2d at 749.

248. 568 F.2d 1044, 1045 (3d Cir. 1977).

249. D. DOBBS, *supra* note 225, at 530-31.

250. *Id.* at 531.

251. *Id.* (footnote omitted).

the basis for a damage award for pain and suffering. Although many sexual harassment claims may not support tort claims of the dignitary interests type, the analysis would show that the underlying rationale of an award of damages is applicable to a sexual harassment case. It is quite conceivable that a sexually harassed victim will not be fully compensated for his or her injury by an award of back pay, lost employment benefits and attorney's fees. Furthermore, an award of compensatory damages may be necessary to make the injured person whole in the employment context, which is an underlying policy of Title VII.<sup>252</sup> The damages recoverable under Title VII are inadequate and incomplete when an employee is discriminated against on the basis of sexual harassment. Title VII does not consider the mental anguish of the victim and the outrageousness of the harasser's conduct.

Another problem, mentioned earlier with the discussion of employer liability, involves the necessary proof a victim must put forth to state a good cause of action for sexual harassment under Title VII.<sup>253</sup> Because the courts have articulated different standards of proof, plaintiffs must prove they were sexually harassed based on their sex<sup>254</sup> and the harassment was a policy or practice of the employer.<sup>255</sup> A victim of sexual harassment may not be able to recover under Title VII if the harassment involved one single incident no matter how despicable the conduct; or male and female employees are sexually harassed by the same employer or co-workers at the same time.<sup>256</sup>

It is conceivable that one single sexually harassing act could be so atrocious that an employee would be forced to quit.<sup>257</sup> It is also conceivable for both male and female employees to be sexually harassed by the same employer at the same time albeit for different reasons. Moreover, it is conceivable that a working environment where one employee is sexually harassed would be equally offensive and degrading to co-employees.<sup>258</sup> Thus, Title VII does not offer complete relief in all sexual harassment situations; some victims will not have a remedy.

252 See *supra* note 222 and accompanying text.

253 See *supra* notes 195-203 and accompanying text.

254. See *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 465 (E.D. Mich. 1977), *Heelan v. Johns-Manville Corp.*, 451 Supp. 1382, 1389 (D. Colo. 1978).

255. See *Bundy v. Jackson*, 641 F.2d 934, 953 (D.C. Cir. 1981), *William v. Saxbe*, 413 F. Supp. 654, 660 (D.D.C. 1976), *rev'd sub nom. on other grounds and remanded Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

256. See *Corne v. Bausch and Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded*, No. 75-1857 (9th Cir. July 28, 1977).

257. See, e.g., *Continental Can Co. v. Minnesota*, 297 N.W. 2d 241 (Minn. 1980) (where the sexual harassment plaintiff experienced while at work included a co-worker approaching plaintiff from behind and grabbing her between the legs while she was bending over working at a machine). *Id.* at 244.

258. See *Woerner v. Brzeczek*, 519 F. Supp. 517 (N.D. Ill. 1981) (where male co-worker was

## SEXUAL HARASSMENT

149

## 2. Faults with the EEOC Guidelines

The EEOC guidelines on sexual harassment are not the law. Thus, they do not have the same legal force and effect as legislatively imposed statutes.<sup>259</sup> Although the EEOC guidelines have been given "great deference" by the courts in interpreting Title VII,<sup>260</sup> courts are not bound to accept the guidelines.<sup>261</sup> In fact, the EEOC guidelines on sexual harassment have not yet been sanctioned by the United States Supreme Court. Without the approval of that Court, some lower courts may be reluctant to use the guidelines when interpreting Title VII in a sexual harassment case.

Moreover, there are faults with the guidelines. First, the definition of sexual harassment set forth in the guidelines is not comprehensive; it does not cover fully all incidents of sexual harassment in the workplace.<sup>262</sup> The guidelines fail to include nonverbal sexually harassing conduct. For example, sexual jokes and cartoons directed at an employee for the purpose of harassing him or her are not covered. This type of harassment may be meant to denigrate, humiliate, and torment the worker for invading the harasser's territory.<sup>263</sup> The tone of the guidelines does not show that this type of sexual harassment perpetrated upon the employee is as denigrating to the employee as solicita-

harassed and penalized after complaining to supervisor of female co-worker being subjected to sexual harassment by another supervisor). *Id.* at 519.

Similarly, it is quite possible that male co-workers would be offended by the sexual harassment of female co-workers. See Leventer, *supra* note 68, at 496.

See also *Sexual Harassment and Title VII*, *supra* note 34, at 1024 ("All employees in the office, not just the specific targets, are damaged by the discomfort, degradation, and stigma caused by the discriminatory work environment sexual harassment produces.")

259 See *General Elect Co v Gilbert*, 429 U.S. 125, 141 (1976), *reh'g denied*, 429 U.S. 1079 (1977) (citations omitted)

260 See *Griggs v Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

261 See 429 U.S. at 142-43. See also Comment, *Sexual Harassment in the Work Place: New Rules for an Old and Dirty Game*, 14 U.C.D. L. Rev. 711, 727 (1981) [hereinafter cited as *Sexual Harassment in the Work Place*] (California courts are bound by the state's regulations prohibiting sexual harassment)

262 For an interesting perspective on this issue, see McLain, *supra* note 52, at 288-96.

263 See, e.g., *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 934 (D.N.J. 1978), where the court stated:

It was Kyriazi's testimony that these three young men teased and tormented her. That they made loud remarks concerning her marital status, and trumpeted their speculations and even made wagers concerning her virginity. . . . [T]hey treated her with contempt and ridicule and attempted to denigrate her position as a professional.

[A]s a part of the attempt by these three co-workers to humiliate her, they created an obscene cartoon and that she saw Armstrong [a co-worker] place it on her desk.

*Id.* The court emphasized that "this cartoon was created, disseminated and ultimately thrust upon this plaintiff to humiliate her as a woman." *Id.* (emphasis in original).

This type of denigrating sexual harassment may also result in the employee being physically endangered. See, e.g., *Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521, 523 (D.N.J. 1981) (employees were sexually harassed by coworkers placing dangerous chemicals in the plants above their desks).

## 150 NORTH CAROLINA CENTRAL LAW JOURNAL

tions for sexual relations.<sup>264</sup>

Second, the guidelines' subsection, entitled "other related practices," involves an employee's submission to an employer's sexual advances to gain employment benefits at the expense of other qualified employees. This subsection has been criticized by commentators on two distinct grounds.<sup>265</sup> One line of criticism explains that this subsection supports and recognizes the sexist stereotype that women "sleep their way to the top."<sup>266</sup>

Criticism has also evolved around hypothetical application to possible claims. If a female employee submits to her male employer's sexual advances and receives employment benefits, only male co-workers would be able to put forth a discrimination claim based on sex.<sup>267</sup> Other female co-workers who were qualified for the employment benefits, but were either not given an opportunity to submit to the employer's sexual demands or declined such opportunity, would not have been discriminated against on the basis of sex.<sup>268</sup> The female co-worker would not have a valid claim of sex discrimination because the person who received the employment benefit was another female co-worker.<sup>269</sup> This criticism could not be supported, however, if the female co-worker, who was denied an employment opportunity for her refusal to submit to sexual relations, had a valid claim of being subjected to a discriminatory work environment.<sup>270</sup>

Another controversial issue concerning the guidelines involves the definition and extent of employer liability. An employer is strictly liable for the sexually harassing acts of its supervisors and agents irrespective of the employer's knowledge of this conduct.<sup>271</sup> On the other hand, the employer is liable for the sexually harassing acts of its employees

264. See *Sexual Harassment in the Work Place*, *supra* note 261, at 725-29. Cf. CAL. ADMIN. CODE § 7287.6 (1980) which prohibits "[v]erbal harassment, e.g., epithets, derogatory comments or slurs" and "[v]isual forms of harassment, e.g., derogatory posters, cartoons, or drawings."

265. See McLain, *supra* note 52, at 296-97; Leventer, *supra* note 68, at 485.

266. Leventer, *supra* note 68, at 485. Leventer explained "[t]his is a destructive stereotype which has traditionally victimized women who try to compete in a male-dominated workplace." *Id.* Cf. Waks & Starr, *supra* note 61, at 374-75 (some women employees suffer no direct employment consequences from sexual harassment because they submit to the sexual favors).

267. McLain, *supra* note 52, at 296-97. Cf. Leventer, *supra* note 68, at 496 (other considerations are involved here because "sexual harassment is obscene, involves lewd remarks, gestures, embarrassment and humiliation").

268. McLain, *supra* note 52, at 296-97.

269. *Id.* at 297.

270. In her footnotes, McLain refers to a racial discrimination case where a white had standing to complain of a discriminatory environment. See *id.* at 297 n.125 (citing *Waters v. Heublein, Inc.*, 547 F.2d 466, 469-70 (9th Cir. 1976), *cert. denied*, 433 U.S. 915 (1977)). See also Leventer, *supra* note 68, at 496 ("Because no one would want to be the victim of sexual harassment and because it is possible to imagine oneself as a victim, identification or empathy for the victim could occur and operate as an underlying basis for a finding of discrimination").

271. 29 C.F.R. § 1604.11 (1982).

## SEXUAL HARASSMENT

151

and nonemployees only when the employer, or its agents or supervisors, knows or should have known of this conduct "unless it can show that it took immediate and appropriate corrective action."<sup>272</sup> When considering the employer's liability for the sexually harassing conduct of nonemployees, the employer's control over and legal responsibility for the nonemployee should be reviewed.<sup>273</sup>

When considering the policy underlying strict liability of the employer for the acts of its supervisors and agents, the distinction made regarding the employer's liability for its co-worker's acts is misplaced. An employer is held strictly liable for the acts of its supervisory personnel because the supervisor, acting on behalf of the employer, has the authority to make employment decisions regarding hiring, firing, promotions, work assignments and transfers.<sup>274</sup> Because the supervisor has been authorized to act on behalf of the employer and placed in an influential position regarding employees' employment advancement and status, the employer must bear the responsibility of the supervisor's acts or conduct.<sup>275</sup> Moreover, the employer is benefitted from this delegation of authority.<sup>276</sup>

Although not in a supervisory position, co-workers may also influence others' employment opportunities.<sup>277</sup> In fact, sexually harassing of co-workers provides the main justification for many employees who feel forced into quitting.<sup>278</sup> Moreover, courts have liberally construed "employer" under Title VII to include "any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law."<sup>279</sup>

A representative from the Working Women's Institute has stated: "[t]he impact of co-worker harassment on a woman's job productivity

272 *Id*

273 *Id*

274 See *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Flowers v. Crouch-Walker Corp.* 552 F.2d 1277, 1282 (7th Cir. 1977); *Tidwell v. American Oil Co.*, 332 F. Supp. 424, 436 (D. Utah 1971).

275 See *id*

276 W. PROSSER, *supra* note 223, at 459. See also Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345, 378 (1980); Vermuelen, *supra* note 32, at 290.

277 See *Kyriazi v. Western Elec. Co.* 461 F. Supp. 894, 934-39 (D.N.J. 1978); *Guyette v. Stauffer Chem. Co.*, 418 F. Supp. 521, 523 (D.N.J. 1981).

278. See, e.g., *Guyette v. Stauffer Chem. Co.*, 518 F. Supp. 521 (D.N.J. 1981), where plaintiffs alleged that co-worker (and supervisors) sexually harassed them resulting in constructive discharge. See also Vermuelen, *supra* note 32, at 290-91; "coworkers . . . are perfectly capable of making it difficult, if not impossible, for a woman to do her work and indeed, of forcing her to leave the job."

279. *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 696 (D. Md. 1979). See also *Sibley Memorial Hosp. v. Wilson*, 488 F.2d 1338, 1342 (D.C. Cir. 1973).



152 *NORTH CAROLINA CENTRAL LAW JOURNAL*

is at least as extensive as that of supervisory personnel. It is arguably even greater, as a woman must often rely on the cooperation and support of her co-workers to learn her job and to do it properly."<sup>280</sup> Co-workers, in many instances, have the ability to affect another co-worker's employment opportunities. Through an application of the same rationale underlying the employer's liability for supervisors' actions, employers should be strictly liable for co-workers' conduct.

Employers should also be liable for co-worker's conduct because employers are better able to bear the costs of their employee's sexual harassment of other employees. They are in a better position to "spread the loss" when compared to the employee's position.<sup>281</sup> More importantly, employers profit from the work of their employees; a sense of "equity" suggests that employers should therefore be liable for the wrongs suffered by the employees in the employer's work place. If the employee is harassed in the employment context while the employer is earning profits, the harassed employee should not be left without a remedy when the harassing employee is unable to provide relief.<sup>282</sup>

Another reason justifies the employer's strict liability for employee's sexually harassing conduct. If the employer is held strictly liable, there would be a great incentive for the employer to eliminate all sexually harassing conduct from the workplace. The employer would be strongly encouraged to establish and effectively maintain an anti-sexual harassment policy and an easily accessible complaint procedure, as well as enthusiastic enforcement of appropriate and efficacious sanctions.

### E. *Tort Remedies for Sexual Harassment*

Recognizing the incompleteness of Title VII as a remedy for sexual harassment, tort law has been suggested as being better suited to remedy the harm done to sexually harassed victims.<sup>283</sup> The following torts are discussed to determine whether existing tort law can adequately address a sexual harassment claim: battery, assault, and intentional infliction of emotional distress.

#### 1. Battery

A co-worker or supervisor could be held liable for battery if she or "he acts intending to cause a harmful or offensive contact with the per-

280. Vermuelen, *supra* note 32, at 291. See also Kyriazi, 461 F. Supp. 894 (D.N.J. 1978). A co-worker's tactics may be more subtle than the employer's and, therefore, more difficult to document.

281. See generally *Legal Remedies*, *supra* note 218.

282. *Id.* at 159.

283. See *Guide to Tort Actions*, *supra* note 34. McLain, *supra* note 52, at 330-36; Oneglia & Cornelius, *supra* note 70, at 58-51; *Legal Remedies*, *supra* note 218, at 167-75.

## SEXUAL HARASSMENT

153

son of the other or a third person, or an imminent apprehension of such conduct, and . . . an offensive contact with the person of the other directly or indirectly results."<sup>284</sup> An action for battery would protect the worker's right to be free from any intentional and unpermitted contacts with the worker's person.<sup>285</sup> But not just any contact with a person's body will give rise to a battery action; it must be an "offensive" contact. A contact is considered offensive "if it offends a reasonable sense of dignity."<sup>286</sup> Thus, a sexually harassing employee or supervisor may be liable for contacts that are "offensive and insulting."<sup>287</sup> In fact, even if the worker or supervisor is attempting a benign compliment or joke, he or she may be held liable if a reasonable sense of dignity is offended.<sup>288</sup>

In many instances of sexual harassment where an offensive contact occurs, a harassing worker may be held liable for a battery. *Rogers v. Loews L'Enfant Plaza Hotel*<sup>289</sup> would clearly support this conclusion. In *Rogers* plaintiff, an employee at the hotel, alleged that the supervisor made advances toward her by pulling her hair.<sup>290</sup> The court explained that this allegation was sufficient to state a claim of battery.<sup>291</sup>

In most sexual harassment cases, the sexual abuse is verbal.<sup>292</sup> The necessity of a nonconsensual touching in a battery claim would foreclose the use of this tort for most sexually harassed victims. Obviously, if the sexual harassment consisted of a polluted and offensive working environment, or employment benefits taken away for refusal to submit to a supervisor's sexual advances, the victim would have no remedy under a battery claim.

## 2. Assault

A cause of action for assault is closely related to a cause of action for battery; therefore, the claims are usually brought together. Liability for assault is found if she or "he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and . . . the other is thereby put in such imminent apprehension."<sup>293</sup> An action for assault protects the

284. RESTATEMENT (SECOND) OF TORTS § 18 (1977) [hereinafter cited as RESTATEMENT].

285. W. PROSSER, *supra* note 223, at 34.

286. RESTATEMENT, *supra* note 284, § 19.

287. W. PROSSER, *supra* note 223, at 36.

288. *Id.* Prosser also explained that "[t]aking indecent liberties with a woman without her consent is of course a battery." *Id.* at 36-37 n.85 (citations omitted).

289. 526 F. Supp. 523 (D.D.C. 1981). *See also* Edminsten v. Dousette, 334 S.W.2d 746 (Mo. App. 1960); Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1961).

290. *Id.* at 529.

291. *Id.*

292. *See* Crull Stress Effects Study, *supra* note 14; Merit Systems Protection Board Study, *supra* note 13, at 24.

293. RESTATEMENT, *supra* note 284, § 21.

## 154 NORTH CAROLINA CENTRAL LAW JOURNAL

right to be free from an *apprehension* of a harmful or offensive contact, and not from an actual contact itself.<sup>294</sup> While an actual physical contact is unnecessary, an apprehension of a contact is essential. Furthermore, mere words will not suffice for stating a successful cause of action for assault.<sup>295</sup> Usually force must be threatened and apparent ability and opportunity to carry out the threat immediately must be evident.<sup>296</sup> Assault is considered a mental invasion; therefore, feelings of fright and humiliation resulting from an assault may give rise to a successful cause of action.<sup>297</sup>

In *Rogers* plaintiff also alleged a cause of action for assault by stating that "she was frightened and embarrassed by defendant[s] . . . actions . . . and was put in imminent apprehension of an offensive contact . . ." <sup>298</sup> Defendant's sexually harassing actions included verbal and written sexual advances, comments about plaintiff's sexual life, and physical touchings, including pulling plaintiff's hair.<sup>299</sup> Based upon these allegations, the court stated that plaintiff sufficiently alleged a claim for assault and denied defendant's motion to dismiss the complaint.<sup>300</sup> In *Skousen v. Nidy*<sup>301</sup> plaintiff was awarded actual and punitive damages for defendant's "indecent assaults."<sup>302</sup> The facts of *Skousen* appeared more closely related to battery because the "assaults consisted of the defendant placing his hand upon the private parts of the plaintiff and attempting to seduce her."<sup>303</sup>

Nevertheless, a cause of action for assault, like battery, is an incomplete remedy for most sexual harassment victims. Despite a few successful cases, the requirements necessary for meritorious claims are too stringent. First, a sexually harassing supervisor or co-worker must engage in verbal harassment, including sexual comments and jokes.<sup>304</sup> Second, the harassed worker would have to imminently expect the threat of contact to occur. Most sexually harassing supervisors or co-workers would not first warn victims of their imminent physical sexual contact. The harasser would unlikely say "if you do not submit to my sexual advances right now, I am going to force myself on you", and

294. W. PROSSER, *supra* note 223, at 37.

295. *Id.* at 39.

296. *Id.*

297. *Id.* Prosser notes a case where a cause of action for assault was upheld because the defendant placed plaintiff in fear by leaning over her bed and making an indecent proposal. *Id.* (citing *Newell v. Whitcher*, 53 Vt. 589 (1880)).

298. 526 F. Supp. at 529.

299. *Id.* at 525-26.

300. *Id.* at 535.

301. 90 Ariz. 215, 367 P.2d 248 (1961). *Accord* *Edmisten v. Dousette*, 334 S.W.2d 746 (Mo. App. 1960).

302. *Id.* at 219, 367 P.2d at 250.

303. *Id.* at 218, 367 P.2d at 249.

304. *See* Crull Stress Effects Study, *supra* note 14.

## SEXUAL HARASSMENT

155

then make a move toward the victim. Mere words would not constitute an assault.<sup>305</sup>

### 3. Intentional Infliction of Emotional Distress

A cause of action for intentional infliction of emotional distress may be considered in the developing stage. Although most jurisdictions recognize the claim when there is a showing of physical injury, only a few recognize a cause of action for intentional infliction of emotional distress without a physical injury.<sup>306</sup> The most common test for intentional infliction of emotional distress requires outrageous conduct by the defendant, an intent to cause emotional distress, actual emotional distress and physical harm caused by defendant's conduct.<sup>307</sup>

Although the tort of intentional infliction of emotional distress is a better claim for sexual harassment victims than the torts of assault and battery, its use would still not provide a complete and adequate remedy. Despite the few sexual harassment incidents that would factually comply with the requirements of an intentional infliction of emotional distress claim,<sup>308</sup> many do not, and would not, for the following reasons.

First, although physical harm is experienced by many sexually harassed victims, most suffer from psychological harm.<sup>309</sup> Second, the co-worker's or supervisor's conduct must be "outrageous." Arguably, all sexual harassment is outrageous conduct,<sup>310</sup> but a court would be bound by the legal interpretation of "outrageousness" under the tort of intentional infliction of emotional distress. A defendant will be held liable where the conduct goes "beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community."<sup>311</sup> Considering the conservative nature of most courts, it is highly improbable that most sexual harassment incidents would be considered outrageous, except for the ones that would probably fall under another cause of action (battery). Third, courts may be reluctant to find that the defendant manifested the requisite intent. Many harassers honestly believe they are flattering other employees by paying them sexual attention. Others intend to sexually harass, but may not intend to cause emotional distress.

305 RESTATEMENT, *supra* note 284, § 31 comment a.

306 For example, California recognizes a cause of action for intentional infliction of emotional distress without a showing of physical injury. *See* State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal 2d 330, 338, 240 P.2d 282, 286 (1952); *see generally* MORRIS ON TORTS 191-95 (2d ed. 1980).

307 *See* RESTATEMENT, *supra* note 284, § 46.

308 *See* *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529-31 (D.D.C. 1981).

309 *See* Crull Stress Effects Study, *supra* note 14, at 7.

310 *See* Guide to Tort Actions, *supra* note 34, at 894.

311 RESTATEMENT, *supra* note 284, § 46 comment d.

156      *NORTH CAROLINA CENTRAL LAW JOURNAL*

Based upon the consideration of the assault, battery, and intentional infliction of emotional stress, tort law fails to provide a complete and adequate remedy to sexually harassed victims. Although other areas of tort law, state and federal constitutional law, and union arbitration and representation may provide relief in particular circumstances, a remedy specifically tailored to the sexual harassment situation is needed.

IV. ECONOMIC IMPACT OF SEXUAL HARASSMENT

The foregoing discussion considered sexual harassment as a recognized legal cause of action for sex discrimination. Many jurisdictions recognize a sexual harassment claim under Title VII despite the inadequacies of Title VII as a remedial measure. Nevertheless, sexual harassment is sex discrimination in the legal sense because both serve the same purpose or are prompted by the same underlying motive: the "superior" male sex's desire to exert dominance, control, and power over the more "inferior and vulnerable" female sex. For precisely the same reason, sexual harassment should be recognized as sex discrimination in the economic sense. Economic analysis of sexual harassment provides two bases upon which to equate sexual harassment and sex discrimination: sexual harassment is a "form" of sex discrimination, and sexual harassment results in negative economic consequences. These two bases are considered the "twofold economic impact" of sexual harassment.

To support the suggestion that sexual harassment is sex discrimination when analyzed economically, three economic discrimination theories can be applied to a sexual harassment situation. Theories are most useful for explaining certain types of behavior when their conditions or assumptions are closely related to the actual market conditions so that predictions will be valid. Present discrimination theories, however, fail to address sex discrimination in terms of sexual harassment. Nevertheless, the economic models support, in part, the proposition that sexual harassment is an enforcement mechanism or form of sex discrimination.

A. *Application of Economic Models*

Brief summaries of the three most prominent economic discrimination theories are outlined below.

The seminal work in this area was done by Gary Becker, although his analytical emphasis was race discrimination.<sup>312</sup> Becker claims, however, that the analysis is equally applicable to sex discrimina-

312 G. BECKER, *ECONOMICS OF DISCRIMINATION* (2d ed. 1971). Becker's theory was first published in 1957.

## SEXUAL HARASSMENT

157

tion.<sup>313</sup> Becker's theory involves the premise that "if an individual has a 'taste for discrimination,' he must act *as if* he were willing to pay something, either directly or in the form of a reduced income, to be associated with some persons instead of others."<sup>314</sup> He assumes there is a perfectly competitive market and wages are flexible.<sup>315</sup> Becker's theory concludes that men in the labor force will be paid more than women to compensate them for the additional cost involved in their "taste for discrimination."<sup>316</sup>

In addition to the criticism of Becker's theory by women economists,<sup>317</sup> his theory is particularly inadequate when considering sex discrimination in the form of sexual harassment. First, Becker's assumption of a perfectly competitive market is unrealistic and too constrictive. Although sexual harassment may occur in a market that is close to a standard competitive market, if one exists, the pervasiveness of sexual harassment transcends all markets.<sup>318</sup>

Second, Becker's theory is based on the understanding that an employer will discriminate because he or she has a prejudice or a "taste for discrimination." This assumption is better suited for a model concerning race discrimination. Prejudice may not even be a factor in the practice of sex discrimination, especially sexual harassment.<sup>319</sup> In sexual harassment situations the male worker would have to be within physical proximity to the female worker for the male worker to sexually harass the female worker. Although no studies have been conducted regarding the harasser's attitudes, male employees generally do not mind being associated with and working around female employees. Male employees may, however, dislike working with women on an equal level or superior level.

Third, Becker's model considers wage differentials between those discriminated against and those not discriminated against.<sup>320</sup> Although sex discrimination may result in different wage rates because of one's

313. *Id.* at 11.

314. *Id.* at 14.

315. *Id.* at 17.

316. *Id.* at 18.

317. See J. FANNING MADDEN, *THE ECONOMICS OF SEX DISCRIMINATION* (1973); C. LEYD & B. NIEMI, *THE ECONOMICS OF SEX DIFFERENTIALS* (1979).

318. Although several studies indicate the pervasiveness of sexual harassment in different occupations, they do not specifically show that sexual harassment occurs in competitive, monopolistic, oligopolistic or monopsonistic markets. It is assumed, however, that because sexual harassment is "pandemic—an everyday, everywhere occurrence," sexual harassment is not limited to competitive markets. See Redbook Study, *supra* note 11.

319. See generally J. MADDEN, *supra* note 317. Cf. L. THURLOW, *GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 180* (1975) ("[t]he net impact is discrimination against women as a group and as individuals even though there is not a basic taste for discrimination against women").

320. See G. BECKER, *supra* note 312.

## 158 NORTH CAROLINA CENTRAL LAW JOURNAL

sex. sexual harassment is not a direct result of wage differentials. Sexual harassment is, however, related to lower wages and salaries because a raise or promotion may not be forthcoming if a female employee spurned her supervisor's sexual advances.

Another theory of discrimination, proposed by Lester Thurow, is the "queue theory of the labor market."<sup>321</sup> The queue theory suggested that "workers are arrayed along a continuum in order of their desirability to employers."<sup>322</sup> Thurow explained that desirability consisted of objective criteria, a worker's potential marginal productivity, and subjective criteria, prejudice and ignorance.<sup>323</sup> The higher the worker is on the queue, the more desirable the worker is and the better chance for employment.<sup>324</sup> Thus, the people at the lower end of the queue are more susceptible to changes in aggregate demand and may only be employed when aggregate demand is at a very high level.<sup>325</sup>

Thurow applies the model to black employment because blacks may be found at the lower end of the queue due to prejudice, little education and training, and a greater frequency of living in poverty.<sup>326</sup> Thurow concludes that greater education, training and the removal of prejudice, as well as maintaining an "unbalanced" labor market (which forces employers to hire workers at the lower end of the queue because workers at the higher end have already been hired) will facilitate the elimination of discrimination.<sup>327</sup>

Thurow's theory inadequately explains sexual harassment for several reasons. First, the queue theory is directed at racial discrimination and at successful policy instruments to combat both racial discrimination and poverty. Second, although many workers who are sexually harassed are found at the lower end of the queue, many workers at the higher end of the queue are sexually harassed.<sup>328</sup> Sexual harassment transcends all classes of workers, whether they are highly or barely educated.

Third, subjective criteria, such as an employer's desire to work around "attractive" women, may place a woman worker higher in the queue. This type of subjective criteria used in determining a potential worker's "desirability" will have a reverse effect in terms of discrimina-

321 L. THUROW, *POVERTY AND DISCRIMINATION* (1969).

322. *Id.* at 48 (footnote omitted).

323. *Id.* at 48 n.2.

324. *Id.* at 48-49.

325. *Id.* at 49. Thurow does mention the costs associated with a high level of aggregate demand inflation.

326. *Id.* at 53.

327. *Id.* at 64-65.

328 See Crull Stress Effects Study, *supra* note 14 (indicating that of the 262 women in the study population, 30% of the women who held positions as managers, administrators, professional and technical workers experienced sexual harassment on the job).

## SEXUAL HARASSMENT

159

tion because a greater number of attractive women will be hired. This hiring strategy suggests that the employer who partly bases his or her employment decision on an applicant's attractive appearance may also be the same employer who is more prone to sexually harass employees. Thus, a worker may be placed high in the labor queue based upon the employer's subjective criteria but still be subject to sex discrimination in the form of sexual harassment.

The Becker and Thurow models were obviously not intended to address sex discrimination in the form of sexual harassment. In fact, their models do not appear to address sex discrimination in any form. Thurow has acknowledged this weakness since the initial publication of the queue theory of the labor market. He explained that "[t]he motivations that lead to racial or religious discrimination just do not make sense when applied to sex discrimination."<sup>329</sup> Thurow also noted that discrimination is usually explained theoretically as a justification for achieving the ultimate economic goals of increasing consumption privileges.<sup>330</sup> Sex discrimination does not relate to consumption privileges, but rather, it relates to production opportunities.<sup>331</sup> Increasing the wage rates paid to women would lead to higher consumption privileges for her family which means that male employers should have an economic incentive to eliminate sex discrimination.<sup>332</sup> Thus, Thurow concluded that sex discrimination cannot be explained as a technique for increasing male consumption.<sup>333</sup>

In contrast to Becker and Thurow, Janice Fanning Madden directed a discrimination theory analysis specifically toward sex discrimination.<sup>334</sup> Madden proposes a monopsony model explaining a theory of sex discrimination.<sup>335</sup> She assumes that employers' "monopsony-type power" arises from a combination of the following:

1. power which rests with one employer because he is the only employer within the market;
2. power which is shared by several employers who divide a heterogeneous labor market so there is limited number of employees per subdivision of the market;
3. power, which is shared by employers of both sexes and by male laborers, as a standard of a male supremacist society which "exploits" female laborers.<sup>336</sup>

329. L. THUROW, *supra* note 319, at 180-81.

330. *Id.* at 162.

331. *Id.* at 162-63.

332. *Id.* at 163.

333. *Id.*

334. J. MADDEN, *supra* note 317.

335. Madden loosely defines monopsony as "imperfect competition." *Id.* at 69.

336. *Id.* In her monopsony model proposal, Madden considered the previous work done in this area by Robinson, Bronfenbrenner and Thurow.



Madden's general monopsony model requires that:

1. The buyer faces an upward sloping labor supply curve; that is.
  - a. his buying decisions significantly affect the level of market demand, and
  - b. labor is not supplied at constant cost or wages.
2. Labor supply can be separated into different labor pools.
3. The separated labor pools have different wage elasticities of supply.<sup>337</sup>

The first of Madden's three assumptions concerns the existence of monopsony power, defined as the monopsonist's ability to increase employment in his or her firm simply by increasing wages.<sup>338</sup> This definition implies "(a) that the monopsonist must dominate other buyers so that his buying decisions influence aggregate demand for labor, or (b) that labor is not available at a constant supply price so that a significant change in employment would affect factor price."<sup>339</sup> The monopsonist employs laborers by equating the marginal cost of hiring the last worker to that worker's marginal revenue product. Absent any discrimination, the wage rates for male workers and female workers are equal.<sup>340</sup>

The second and third assumptions are necessary because monopsony power alone will not insure the occurrence of discrimination.<sup>341</sup> The workers must be separated into those receiving the lower wage (those discriminated against) and those receiving the higher wage, otherwise the former group would transfer to the latter and discrimination would be ineffective. Similarly, each group must have different supply elasticities for discrimination to bring monetary gains.<sup>342</sup> The monopsonist maximizes profits, with no information costs, by equating the marginal rate of technical substitution between females and males with the ratio of the marginal costs of hiring them.<sup>343</sup> Madden explained that "the group 'discriminated against' in the discriminating monopsony model must have a relatively inelastic labor supply function."<sup>344</sup> She concludes that the level of discrimination is contingent upon the degree of monopsony power.<sup>345</sup>

When applying the general monopsony model to sex discrimination, "monopsony power" is related to "a market in which an implicit or an explicit collusive sexist agreement (gentlemen's agreement?) exists be-

337. *Id.* at 72-73

338. *Id.* at 70.

339. *Id.*

340. *Id.* at 71

341. *Id.*

342. *Id.*

343. *Id.* at 72.

344. *Id.*

345. *Id.* at 76

## SEXUAL HARASSMENT

161

tween employers."<sup>346</sup> Madden explained that it is profitable for all employers to agree tacitly on discriminating against women. It is also profitable for any employer to ignore the tacit agreement and hire many women at the lower wage.<sup>347</sup> However, that "motivation to discriminate must be, or be made, stronger than the profit motivation."<sup>348</sup>

Madden then evaluated the monopsony model in light of three types of discrimination. Wage discrimination shows that differences in wages are not based upon relative differences in productivity. Occupational discrimination relates to the number of a sex employed in a certain occupation due to artificial barriers with no consideration of relative productivity. Cumulative discrimination implies that one worker is less productive than another because of past discrimination and not because of inherent ability.<sup>349</sup> In her monopsony model, Madden explained that wage discrimination occurs because it is profitable. Occupational discrimination depends upon the extent to which employers and male employees exclude female employees. They use this power to separate the labor force by sex, to segregate women into "female" occupations and to earn greater profit. Cumulative discrimination results when the demand for female labor is lessened by concentrating women in the less skilled, lower paying jobs, thereby enforcing monopsony power.<sup>350</sup> Madden suggested that anti-discrimination policies should be directed at impeding occupational discrimination to eliminate wage discrimination and dismantling monopsony power.<sup>351</sup>

Madden's sex discrimination model is an inadequate theoretical explanation of sexual harassment. Her model is primarily focused upon wage differences between men and women and discriminatory hiring practices, instead of the actual discrimination they face on the job. For a general theoretical foundation supporting sexual harassment as sex discrimination, Madden's model and analysis is revealing however. The job segregation pay differentials and the powerless employment position of women are documented economically in Madden's model. The explanation is relevant because it emphasizes an implicit or an explicit collusive sexist agreement between male employers to employ and male employees to work with women only in "women's jobs." This practice reinforces the traditional employment power structure.

346. *Id.* at 82.

347. *Id.*

348. *Id.* Madden noted that discriminatory motivation is strengthened by the government's restricting occupations available to women, cumulative discriminatory effects (a worker is less productive than another worker because of past discrimination and not because of inherent ability), pressure by labor unions, and the family decision-making process. *Id.* at 82-84.

349. *Id.* at 2, 87-90.

350. *Id.* at 87-90.

351. *Id.* at 101.

162      *NORTH CAROLINA CENTRAL LAW JOURNAL*

women in subservient positions and men in supervisory positions, which facilitates the sexual harassment of women employees.

The theoretical economic analysis that employers' behaviors are responsible for sex discrimination supports the legal argument that employers should be strictly liable for damages arising out of sex discrimination. If sexual harassment is considered sex discrimination legally and economically, then employers should be strictly liable for sexual harassment. Madden, however, focuses her analysis of employer responsibility for sex discrimination on an explanation of the employer's hiring practices and pay differentials. The sex discrimination in sexual harassment occurs after a woman is hired. Sexual harassment concerns the internal workings of an employer's practices and the discriminatory treatment the woman faces in the employment context.

B. *Twofold Economic Impact*

An evaluation of the above-described economic discrimination theory and a review of sexual harassment cases and literature reveals that sexual harassment has a twofold sex discriminatory economic impact. First, although economic analysis of sexual harassment as a form of sex discrimination fails to fit neatly into one of the standard analytical models, the models do, in part, support an argument that sexual harassment is a form of, or an enforcement mechanism for, sex discrimination. Second, economic analysis of sexual harassment also supports the argument that sexual harassment is sex discrimination when considering its economic impact in the nature of a "consequence" of discrimination.

1. Sexual Harassment as a "Form" of Sex Discrimination

The models set forth above provide a partial explanation of sexual harassment as sex discrimination in the economic sense. The models provide a foundation upon which to build an understanding of sexual harassment on the job. The economic explanations of sex discrimination recognize employment situations that facilitate sexual harassment. Two such situations are occupational segregation and economically inferior employment positions (i.e., relative subordinate job status). Occupational segregation, or inferior and subservient employment positions, and sexual harassment achieve and reinforce the same sex discriminatory purpose: one self-proclaimed, superior sex, exerting power, control and dominance over the inferior sex.

Despite the foregoing criticism of Becker's model, his theory supports the proposition that sexual harassment is an enforcement mechanism for sex discrimination. Some males' tastes for discrimination are

## SEXUAL HARASSMENT

163

manifested in their great disdain for association on an *equal* level with the opposite sex.<sup>352</sup> Some men are "prejudiced" against women because they consider themselves the traditionally more powerful and superior sex. It is socially acceptable for a woman to be a man's secretary, but not as his equal co-worker. This "taste for discrimination" is reflected in a desire to keep women in an economically inferior position to maintain a dominant employment position. Thus, Becker's theory aids in explaining why women have been occupationally segregated into the low paying jobs with little opportunity for upward mobility.

Thurrow's model also assists in explaining why sexual harassment is another way to enforce sex discrimination. It slightly modifies the queue theory to suggest that employers look at separate job queues depending upon the profession or level of skill required for the job. For example, in an employment situation where nurses, clerical workers, elementary school teachers, and maids are in great demand, women would rank high in the labor queue. On the other hand, in a situation where managers, professionals, assembly line workers, and welders are in great demand, women would rank at the bottom of the labor queue. Decisionmakers are usually males. Thus, they influence the composition of the labor market and have the power to occupationally segregate women into low paying fields or to place women in relatively inferior and powerless positions.<sup>353</sup>

The preceding subsection<sup>354</sup> sets forth how Madden's model lends support to the proposition that sexual harassment is an enforcement mechanism for sex discrimination. Madden deserves credit for her consideration of the attitudes, traditionally held by male employers and workers, that women should be employed in subservient positions. A female worker's powerless employment position is reinforced when she is sexually harassed by her supervisor or co-worker because sexual harassment is an expression of dominance.

Although most noneconomist commentators have not analyzed sexual harassment in terms of the economics of sex discrimination, many have concentrated on,<sup>355</sup> or at least acknowledged,<sup>356</sup> economic power

352 Although it is not clearly apparent that Becker considered this particular situation, it seems to logically follow from his analysis. G. BECKER, *supra* note 312, at 11-49.

353. See Blumrosen, *Wage Discrimination, Job Segregation and Women Workers*, 6 WOMEN'S RTS. L. REP. 19, 25 (1979-80); Note, *Job Related Sexual Harassment and Union Women: What are their Rights?* 10 GOLDEN GATE 929, 930 (1980).

354. See *supra* text accompanying notes 334-51.

355. See generally L. FARLEY, *supra* note 21; C. MACKINNON, *supra* note 1; Vermuelen, *supra* note 32; Goodman, *Sexual Harassment: Some Observations on the Distance Traveled and the Distance Yet to Go*, 10 CAP. U.L. REV. 445 (1981).

356 See, e.g., Adams, *Sexual Harassment and the Employer—Employment Relationship*, 84 W. VA. L. REV. 789, 790 (1982); Guide to Tort Actions, *supra* note 34, at 880; Comment, *Discrimina-*

and traditional roles when explaining sexual harassment in the workplace. Catharine MacKinnon emphasizes that "[b]eing at the mercy of male superiors adds direct economic clout to male sexual demands."<sup>357</sup> MacKinnon explains that women are sexually harassed primarily because they "occupy inferior job positions and job roles; at the same time, sexual harassment works to keep women in such positions. Sexual harassment, then, uses and helps create women's structurally inferior status."<sup>358</sup> MacKinnon considers sexual harassment at the workplace as a means of reinforcing women's subservient traditional role in the labor force. However, sexual harassment has not been condemned, primarily because women's labor force status has traditionally been inferior. MacKinnon stresses that "[s]exual harassment exemplifies and promotes employment practices which disadvantage women in work (especially occupational segregation) and sexual practices which intimately degrade and objectify women."<sup>359</sup> A woman's equality at work is undermined because her inferior position is used to force sexual compliance, and her sex is exploited to force her compliance because she is economically dependent. MacKinnon reveals that "[w]omen who protest sexual harassment at work are resisting economically enforced sexual exploitation."<sup>360</sup>

MacKinnon explains that the practice of sexual harassment is sex discrimination because of its "disparate impact" upon one sex while claiming to treat both sexes equally.<sup>361</sup> Using the "inequality approach," she argues that prohibiting sex discrimination will facilitate dismantling the traditional inferior role of women in the labor force.<sup>362</sup> This is so, MacKinnon stresses, because "[t]he relationship of sexuality to gender is the critical link in the argument that sexual harassment is sex discrimination."<sup>363</sup> MacKinnon concludes that employment practices reinforcing women's inferior status are sexually discriminatory.<sup>364</sup> Thus, a supervisor's sexual harassment of a female employee is sex dis-

*tion—Sex—Burden of Persuasion Shifts in Remedial Claim after Finding of Sexual Harassment in Work Environment*—Bundy v. Jackson, 11 SETON HALL L. REV. 825, 836 (1981); Rossein, *supra* note 29, at 272-73; Comment, *A Survey of Sexual Harassment: A Wrong Redressable Under Title VII Only When Discrimination is Shown*, 8 N. KY. L. REV. 395, 395 (1981); Note, *Job Related Sexual Harassment and Union Women: What Are Their Rights?*, 10 GOLDEN GATE 929 (1980).

357 C. MACKINNON, *supra* note 1, at 9.

358 *Id.* at 9-10.

359 *Id.* at 7.

360 *Id.* at 25.

361 *Id.* at 206. Under the disparate impact test, one must show "a purportedly evenhanded practice has disproportionately [injured] one sex." *Id.*

362 *Cf. id.* at 174-92. MacKinnon stated that the inequality approach dealt with "[p]ractices which express and reinforce the social inequality of women to men . . ." *Id.* at 174.

363 *Id.* at 151.

364 *Cf. id.* at 215-21.

## SEXUAL HARASSMENT

165

crimination because the harassment is based on the employee's sexuality, her womanhood, and her inferior economic position.

Although most commentators have not focused on the power issue to the extent that MacKinnon has, many recognize that sexual harassment is an assertion of power by men in a superior employment position. Many of these commentators suggest that this assertion of power is another form of sex discrimination because it reinforces a woman's inferior position in the labor market. Sexual harassment impedes a woman's opportunity to achieve economic equality.

Some commentators have also suggested that sexual harassment reinforces women's labor force positions in the low paying and dead-end jobs, the traditional "women's jobs."<sup>365</sup> The motive underlying sexual harassment, men's desire to maintain power and dominance over women, is the same motive underlying sex discrimination in the form of occupational segregation. From childhood, girls and boys are socially conditioned to pattern their lives according to traditional sex roles and lifestyles.<sup>366</sup> Boys are taught to be aggressive and independent, and girls are taught to be noncompetitive and dependent.<sup>367</sup> Women have traditionally been encouraged to enter fields where their positions are subservient and nurturing by nature, with little or no opportunity for advancement.<sup>368</sup> Because women are in these economically and traditionally inferior employment positions, they have a greater likelihood of being sexually harassed. Women are forced to remain in these inferior positions due to sex discrimination manifested as sexual harassment.

It is not suggested that harassers make conscious decisions to oppress women, or that they always intend the full consequences of their purportedly innocent and "flattering" actions. Literary observations of incidents of sexual harassment suggest "that male sexual advances may often derive as much from fear and hatred of women and a desire to keep them in an inferior place as from a genuine positive attraction or affection, although the perpetrator may be unaware of his feelings."<sup>369</sup>

At least one study has found that sexual harassment is considered a

365 See, e.g., Vermuelen, *supra* note 32, at 285-86; Rossein, *supra* note 29, at 278, Note, *Job Related Sexual Harassment and Union Women: What are Their Rights?* 10 GOLDEN GATE 929, 930 (1980), see generally L. FARLEY, *supra* note 21; C. MACKINNON, *supra* note 1; Hooven & McDonald, *The Rule of Capitalism; Understanding Sexual Harassment*, AEGIS Sept./Oct. 1978, at 27.

366 See L. FARLEY, *supra* note 21, at 16-17 (quoting social psychologists Harriet Connolly and Judith Greenwald).

367 *Id.*

368 See Rossein, *supra* note 29, at 274-75, 278; Redbook Study, *supra* note 11.

369 C. MACKINNON, *supra* note 1, at 199. See also Redbook Study, *supra* note 11.

## 166 NORTH CAROLINA CENTRAL LAW JOURNAL

power issue in the employment context.<sup>370</sup> Several studies have concluded that sexual harassment occurs in all types of jobs as well as in all levels of the employment hierarchy.<sup>371</sup> Another study suggests that women in low paying, traditional "women's occupations" are more likely to be harassed.<sup>372</sup> Conversely, it has been suggested that women entering traditionally male-dominated fields experience a greater degree of sexual harassment.<sup>373</sup>

The preceding analysis is applicable to situations in which a female employee is sexually harassed by a male co-worker. This fact is explained, in part, by sex role conditioning, and in part by the male co-worker having an indirectly more powerful position than the female co-worker. For example, the male co-worker may have seniority over the female, he may be more experienced in the field, or he may be more familiar with the supervisors.<sup>374</sup> If a woman enters a traditionally male-dominated occupation, the male co-worker may be responsible for her training.

## 2. Economic Consequences of Sexual Harassment

Sexual harassment does not occur without correlative economic consequences. Although the exact magnitude of the economic harm is difficult to quantify scientifically, the economic impact of sexual harassment has not gone unrecognized. In fact, a few studies have documented some economic effects attributable to sexual harassment,<sup>375</sup> and several commentators have discussed the economic harm experienced by sexually harassed women.<sup>376</sup>

370. See Merit Systems Protection Board Study, *supra* note 13, at 29 (citing the *Harvard Business Review* and Redbook joint study).

371. See Working Women's Institute, Research Series Report No. 1, *supra* note 10; Working Women's Institute, Research Series Report No. 3, *supra* note 14; Crull Stress Effects Study, *supra* note 14; Redbook Study, *supra* note 11.

372. Working Women's Institute, Research Series Report No. 1, *supra* note 10. This study discovered that "women with lower salaries are more likely to experience physical harassment." It also indicated that "clerical workers and waitresses were more likely to be subjected to sexual harassment than women in other job occupations."

373. See Merit Systems Protection Board Study, *supra* note 13, at 29. See also L. FARLEY, *supra* note 21, at 52-60.

374. See Crull Stress Effects Study, *supra* note 14.

375. See Working Women's Institute, Research Series Report No. 1, *supra* note 10; Working Women's Institute, Research Series Report No. 3, *supra* note 14; Crull Stress Effects Study, *supra* note 14; Merit Systems Protection Board Study, *supra* note 13, at 28.

376. See, e.g., Goodman, *supra* note 355, at 456, 466 (Sexual harassment reduced productivity and increases absenteeism); Vermuelen, *Employer Liability under Title VII for Sexual Harassment by Supervisory Employees*, 10 CAP. U.L. REV. 499, 502, 528 (1981) (sexual harassment is a barrier to employment opportunities and it reduces job productivity); *Sexual Harassment in the Work Place*, *supra* note 261, at 712-13, 716 (economic harm in the form of lost job benefits and reduction in productivity); Waks & Starr, *supra* note 61, at 569, 581 (unemployment, lost job seniority, absenteeism and poor performance and overall inefficiency); Vermuelen, *supra* note 32, at 285-88 (reduction in productivity, increases in unemployment and absenteeism, less seniority and barrier

## SEXUAL HARASSMENT

167

The Working Women's Institute recently conducted two studies, one in 1979 involving ninety-two women and another in 1981 involving 262 women.<sup>377</sup> The 1979 study indicated that twenty-four percent of the sexually harassed women surveyed were fired and forty-two percent were pressured into resigning.<sup>378</sup> Combined results of the two surveys reveal that seventy-five to eighty-three percent of these sexually harassed women experienced "interference with job performance" (distraction, avoidance, and loss of motivation),<sup>379</sup> which may be considered a loss in productivity. Both studies also found that ninety to ninety-six percent of the women surveyed experienced emotional or psychological stress symptoms (nervousness, fear, anger, sleeplessness).<sup>380</sup> Physical stress symptoms (headaches, nausea, weight changes, tiredness) were reported by twenty to sixty-three percent of these women.<sup>381</sup> Both the physical and psychological stress symptoms may also be considered as adversely affecting a worker's productivity.

Another study, conducted by the Merit Systems Protection Board, examined government agencies to discover the ramifications of sexual harassment in the federal government workplace.<sup>382</sup> This study determined that the cost of sexual harassment to the federal government was at least 180 million dollars between May 1978 and May 1980.<sup>383</sup> This figure represents the cost of replacing employees who left work because of sexual harassment, the cost of medical insurance benefits and sick leave, and the cost of reduced productivity.<sup>384</sup> This cost has been estimated to represent fifty dollars per employee.<sup>385</sup> The Merit Systems Protection Board Study also indicated that a majority of the employees who had prior work experience considered that the sexual harassment encountered in the federal job was no worse than that encountered in the private industries or in state and local government.<sup>386</sup> This information suggests that the cost to a private industry would be no different.<sup>387</sup>

to employment opportunity), Rossein, *supra* note 34, at 273-74, 277-78, 304 (reduces productivity, increases unemployment, and creates a barrier to employment), *Guide to Tort Actions*, *supra* note 34, at 881 (increases unemployment), *Legal Remedies*, *supra* note 218, at 169 (lost earnings as well as lost earning capacity and lost employment opportunities).

377 Working Women's Institute, Research Series Report No. 3, *supra* note 14; Crull Stress Effects Study, *supra* note 14.

378 Working Women's Institute, Research Series Report No. 3, *supra* note 14, at 5.

379 *Id.*, Crull Stress Effects Study, *supra* note 14, at 7.

380 *Id.*

381 *Id.* The range was noted in the Crull Stress Effects Study when comparing answers from their questionnaire (63%) with those answers from their clients (20%).

382 See Merit Systems Protection Board Study, *supra* note 13.

383 *Id.* at 28.

384 *Id.*

385 Waks & Starr, *supra* note 61, at 571.

386 Merit Systems Protection Board Study, *supra* note 13.

387 Cf. Waks & Starr, *supra* note 61, at 571, stated, when considering the Merit Systems



As previously mentioned, several commentators have discussed the economic consequences sexually harassed victims experience, without setting forth any newly discovered quantifiable evidence. Nevertheless, it is important to note that the economic impact of sexual harassment has not been unnoticed. The observed economic consequences of sexual harassment on the job include a reduction of a worker's productivity,<sup>388</sup> an increase in unemployment due to retaliatory dismissals and worker resignation,<sup>389</sup> a barrier to employment opportunities including promotions, advancement, seniority and other job benefits,<sup>390</sup> an increase in absenteeism,<sup>391</sup> lower income due to lost earnings,<sup>392</sup> and an overall decrease in efficiency.<sup>393</sup>

Other authors have analyzed sex discrimination under another economic concept. Although their analysis was not specifically directed toward sexual harassment, it is, however, applicable to sexual harassment situations. Cynthia Lloyd and Beth Niemi view sex discrimination in terms of free choices and opportunity costs.<sup>394</sup> In economics, it is assumed that employment choices are available. Lloyd and Niemi suggest an examination of a person's choices about participation in the labor force, experience and training acquired, and a selection of an occupation in terms of what the person gives up in order to attain something else.<sup>395</sup> When discrimination occurs, however, a worker's free choices are limited. Lloyd and Niemi contend that employers have preferences concerning the sex composition of their employees. These preferences will be reflected in the employer's hiring and promotion patterns resulting in fewer free choices available for employees.<sup>396</sup> They explain that an employer's preferences may be partially determined by past realities, such as traditional sex roles.<sup>397</sup> Lloyd and Niemi conclude that employment discrimination against women, irre-

Protection Board Study. "[i]t cannot, of course, be assumed that the costs to private industry will correspond to the federal government's experience."

388. See Goodman, *supra* note 355, at 456; Vermuelen, *supra* note 377, at 528; *Sexual Harassment in the Work Place*, *supra* note 261, at 712-13; Waks & Starr, *supra* note 61, at 581; Vermuelen, *supra* note 32, at 285-88; Rossein, *supra* note 34, at 273-74.

389. See Waks & Starr, *supra* note 61, at 569; Vermuelen, *supra* note 32, at 285-88; Rossein, *supra* note 34, at 277-78; *Guide to Tort Actions*, *supra* note 34, at 581.

390. See Vermuelen, *supra* note 377, at 502; *Sexual Harassment in the Work Place*, *supra* note 261, at 712-13; Waks & Starr, *supra* note 61, at 569; Vermuelen, *supra* note 32, at 285-88; Rossein, *supra* note 34, at 304; *Legal Remedies*, *supra* note 218, at 169.

391. See Goodman, *supra* note 218, at 466; Waks & Starr, *supra* note 61, at 567; Vermuelen, *supra* note 32, at 285-88.

392. See *Legal Remedies*, *supra* note 218, at 169.

393. See Waks & Starr, *supra* note 61, at 581.

394. C. LLOYD & B. NIEMI, *supra* note 317.

395. *Id.* at 3.

396. *Id.* at 4.

397. *Id.* at 5. Lloyd and Niemi disagree with the traditional assumption involving the independence of constraints on resources and personal preferences. *Id.*

*SEXUAL HARASSMENT*

169

spective of the cause, results in higher unemployment rates and lower earnings.<sup>398</sup>

In a sexual harassment situation, a worker's "free" choices may be limited if he or she refuses the supervisor's or co-worker's sexual advances. For example, the cost of a promotion may be submission to sexual advances. The decision must be weighed against the freedom to choose one's sex partner. Moreover, this cost is not only unrelated to the necessary qualifications for a promotion, but it is also irrational in the economic sense. If the main criterion required for the promotion is submission to sexual advances, the worker may be unqualified for the actual employment duties and will, therefore, not be very efficient and productive. This choice has no relation to the typical rational employer who makes decisions on a profit motivated basis. Thus, the employer's economic interests are best served through a prohibition of sexual harassment on the job since it may decrease potential profits.

Furthermore, the actual costs of sexual harassment are alarming. Although further study and documentation is necessary for a more accurate revelation of the costs of sexual harassment, employers should be economically motivated into prohibiting all forms of sexual harassment from the workplace.

## V. AMENDMENT TO TITLE VII

The foregoing discussion proves that laws prohibiting sexual harassment at the workplace need to be revised. A model amendment to Title VII must be specifically tailored to the economic impact affecting and the remedial needs of sexually harassed victims. The proposed definition of sexual harassment must include all types of sexually harassing behavior. Employers are held strictly liable for the sexually harassing acts of supervisors and employees and remedies include awards of compensatory and punitive damages. The proposed model's format is similar to that of the EEOC's guidelines on sexual harassment, except for the few significant changes mentioned above.

## Sexual Harassment as a Form of Sex Discrimination:

1. Sexual harassment is a violation of section 703 of Title VII according to the following rules.
2. Sexual harassment is any type of behavior, acts, or conduct which has the effect of expressing sexual attention toward another person.
3. The sexual attention is unsolicited and unwelcome, although not necessarily rejected.
4. Sexual attention includes, but is not limited to, sexual advances, requests for sexual favors, any other written, printed, verbal, non-

verbal, or physical conduct of a sexual nature, whether expressed in a "complimentary" or derogatory nature.

5. The unsolicited and unwelcome sexual attention occurs within the employment context and (1) submission to or tolerance of such attention is expressly or impliedly a condition of employment, or (2) submission to or refusal of such attention is taken into account when determining employment opportunities, benefits, promotions, transfer, or demotions pertaining to the sexually harassed employee, or (3) such attention affects the harassed employee by creating a demeaning, offensive, uncomfortable, hostile, or intimidating employment atmosphere.
6. Employers are held strictly liable for the sexually harassing conduct of their agents, supervisors, and employees.
7. Employers are held liable for the sexually harassing conduct of nonemployees (clients or customers) when the employer knows or should have known of the sexually harassing conduct and if the employer fails to take immediate effective and corrective action. The court will consider the extent of control and responsibility the employer has over the nonemployee.
8. In all sexual harassment cases, courts will consider the totality of the circumstances to determine the gravity of the sexual conduct and grant relief accordingly.
9. All of the remedies previously available under Title VII are still available, as well as an award of compensatory and punitive damages.

## VI. CONCLUSION

Awareness of sexual harassment on the job as a societal evil infecting traditional notions of equality has increased in recent years. Courts have ruled in the past several years that sexual harassment is legally recognized as sex discrimination. The United States Supreme Court has yet to decide this issue. Although sexual harassment is legally recognized as sex discrimination under Title VII, legal and economic analysis discloses three areas where Title VII falls short. First, specific acts which arguably constitute sexual harassment are not encompassed in the Title VII case law or the EEOC's definition of sexual harassment. Second, an employer's liability is limited for the sexually harassing acts of employees. Third, an award of compensatory and punitive damages is not allowed under Title VII. These three deficiencies suggest a need for legislative direction. An amendment to Title VII is proposed.

Economic reasons exist for recognizing sexual harassment as sex discrimination, although most economic scholars have not applied sexual harassment to standard sex discrimination models. Women workers have traditionally been in an economically disadvantaged position. This inferior economic position at work facilitates sexual harassment.

*SEXUAL HARASSMENT*

171

Legal and economic recognition of sexual harassment on the job as sex discrimination is necessary in order to promote women's equality in employment. Although legal and economic recognition of sexual harassment may still be at an early stage of development, realization of the economic and psychological harm experienced by sexually harassed victims is necessary in order to provide adequate and complete remedial measures. Once accomplished, the traditional employment power structure that discriminates against women will be altered and the true potential of women in the labor force will be realized.