Preventing and Responding to Workplace Sexual Harassment

Chris McNeil
PREVENTING AND RESPONDING TO WORKPLACE SEXUAL HARASSMENT

Christopher B. McNeil
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adopted by a Committee of the American Bar
Association and a Committee of Publishers
and Associations.
To Camille, Amanda, Caitlin and Ian
with all my love.
Acknowledgments

This book is very much the product of two minds that don’t always think quite alike. Like its subject matter, the question of whether to write a manager’s guide to dealing with sexual harassment claims and the countercharges that now accompany such claims warrants careful consideration. As a lawyer who spent many years representing governmental agency clients in the defense of their personnel decisions, my perspective was that such a book was needed. The playing field, that in recent years seemed to have skewed to make it nearly impossible to take effective management steps to purge the workplace of puerile and abusive behavior, needed to be leveled. My experiences in the trenches of civil service litigation led me to conclude there was a need to equip managers (in both the public and the private sectors) with more information than had been readily available on how to resolve disputes between men and women who bring their personal problems to the workplace.

Concern over the plight of managers, however, was not what led to the writing of this book. The impetus, at least at inception, was more academic in nature. This perspective was not mine, for my credentials were as an advocate for public sector managers and not as an academic. Instead, the need for a treatise on preventing the disruptions caused by sexual harassment in the workplace was seen first by L. Camille Hébert, Professor of Law at The Ohio State University. Professor Hébert is a well-known national authority on labor law issues and has published extensively on issues of worker privacy and sexual harassment. Having known Professor Hébert for many years and being cognizant of her own experiences in the “trenches” of private sector labor litigation before she joined the legal academia, I knew that if she saw the need for a more accessible treatment of the topic then there must indeed be a need for one, and not just to serve the interests of managers.

As fate would have it, Professor Hébert was committed to other pursuits when LRP’s acquisitions editor, Gail Richman, sought her out for these purposes. Gail’s effort, begun shortly after the Supreme Court issued its decision in Harris v. Forklift Systems, Inc., led me to offer to build from the ideas first advanced by Professor Hébert. Drawing from Harris, we knew that Title VII remained a potent tool in protecting workers from the abuse of sexual harassment in the workplace. At the same time, cases were beginning to show signs of a backlash, where suits were being filed and in some cases substantial judgments were being entered, against those who filed questionable claims of harassment against their supervisors. My offer was to bring together materials that would assist both managers and employees, those suffering from the effects of harassment and those wrongly accused. With Professor Hébert’s gracious permission and with Gail’s encouragement (for which I am truly grateful), work was begun on what would become this treatise.

I also must acknowledge contributions from several authors whose collective work has been invaluable in this effort. At the top of the list are two excellent treatments of
the complex issues of sexual harassment: Sexual Harassment in the Workplace: How to Prevent, Investigate, and Resolve Problems in Your Organization (Creative Solutions, Inc. 1992) by Ellen J. Wagner and Sexual Harassment: Know Your Rights by Martin Eskewazi and David Gallen (Carrol & Graf 1992). Also of importance is Alba Conte’s Sexual Harassment in the Workplace: Law and Practice (Wiley 1994). Perhaps more than any single treatment, Conte’s work pulls together national trends, linking the claims of targets of harassment with the responses of those accused. Together, these works offer virtually all the tools needed to effectively combat harassment in the workplace, and many of the personnel policies found in this work were crafted on the suggestions and insights of those authors. In a similar way, I drew much from the thorough and up-to-date compilation of workplace tort theories in Employment Law Checklists and Forms, by Andrew Ruzicho and Louis A. Jacobs.

My thanks go also to six of Ohio’s preeminent labor lawyers with whom I consulted while preparing this work. I am grateful to David Blaugrund and Jon Gabel, both of Dublin, Ohio, whose many years of experience in advising management labor law clients proved invaluable as I crafted the policy manual found within. For guidance on the rights of employees, I am indebted to attorneys Marc Myers and John Jones, experts in the representation of the interests of employees in both the private and public sector. Employment law litigator John Herbert and his colleague, civil rights litigator Keith Mesirov, rounded out my support group, providing essential insight into the complexities of litigating employment claims and employment-related tort claims in federal and state courts. Collectively, the firm of Blaugrund, Gabel, Herbert & Mesirov offered technical and professional support for this effort, and to the members and staff of the firm I offer my thanks. Thanks as well to my friend and colleague at Capital University Law School, Professor Don Hughes, whose support in my efforts to keep this work on schedule is very much appreciated.

And finally, on a personal note, I wish to express my thanks and appreciation to my wife, Camille (the aforementioned Professor), and our children, Amanda, Caitlin and Ian, whose love and support made the writing of this book both possible and a pleasure.

Chris McNeil
Dublin, Ohio, April 1996
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McNeil taught at The Ohio State University School of Business Finance, *The Legal Environment of Business*; and was the MBA Program Producer and Lecturer for *Hiring, Firing, and Sexual Harassment*, Ashland (Ohio) University. He has addressed state and national audiences on *Bankruptcy Issues and the Section 457 Plan Administrator*, National Association of Government Deferred Compensation Administrators; *Ethical Duties of Retirement Board Members*, Public Employees Retirement System, Police and Firemen's Disability and Pension Fund, Ohio State Highway Patrol System; *The Law and the Ohio Professional Surveyor*, 1993 Annual Conference of the Professional Land Surveyors of Ohio; and *The Law and the Ohio Professional Engineer*, School of Civil Engineering, College of Engineering, University of Toledo.

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Introduction

I. The Employer's Balancing Act

Risk managers and personnel officers share a common interest in developing the strengths of workers and reducing the sources of conflict among those workers. There are several reasons for such a collaboration. Productivity in the workplace depends on the collective efforts of a diverse workforce, and the human resources manager must understand the dynamics of such a workforce to best utilize these resources. The risk manager must be familiar with regulations in the workplace that control the way workers behave in order to guide the employer through an increasingly complex weaving of statutory, regulatory and constitutional burdens.

Recent and not-so-recent developments in the law make it essential that those who monitor the workplace to ensure compliance with legal responsibilities understand how the law in its many different forms helps shape the workplace. Men and women work together in many new settings and bring to the workplace an amazing variety of preconceptions about how to best get along on the job. Developments in the law, particularly in how these preconceptions affect the work environment, make it an inescapable duty of all employers to ensure that workers are, indeed, getting along harmoniously.

The task is not easy, and it is dangerous to underestimate the need for active inquiry into the workplace environment. To better understand the legal requirements imposed on employers, the risk manager and human resources director need to consider the competing interests of workers in their relationships with one another and with their employers. These competing interests are given definition and focus by statutes (like Title VII of the Civil Rights Act of 1964\(^1\)), cases that interpret the statutes, and the collective efforts of managers, employee representatives, arbitrators, academicians and other observers and commentators.

To preserve the smooth operation of the work environment, management needs to be able to identify the sources of sex- and gender-based discrimination, establish policies aimed at preventing such discrimination and use tools created to lessen the impact of such discrimination where it exists. Human resources officers and risk managers long have been familiar with Title VII in the context of racial and ethnic discrimination. The impact of that law on sexual harassment claims is discussed in detail in chapter 2. Amendments to Title VII enacted in the Civil Rights Act of 1991 and the role of the EEOC in enforcing these regulations are discussed in chapter 3.

Separate from Title VII and increasingly more important to employers are the antidiscrimination acts of the states and the tort claims that both the alleged harasser

and alleged victim may invoke. Public sector employers also are affected by the Reconstruction Era statutes,\(^2\) as well as state and federal executive orders and case law applications of the protections based on claims of due process and equal protection in the context of "state action." These laws are considered in chapter 3.

II. Legal Restrictions on the Workplace

Setting aside any debate about what is the "proper" role for an employer as mediator between the sexes, employers need to have information that will help them predict how courts will respond to claims of harassment or false accusations of harassment. Recent court cases applying antidiscrimination laws at the local, state and federal levels give the best guidance to employers. A review of the cases in chapter 3 reveals patterns in the decisions of the courts, highlighting some of the significant differences that arise when different federal appellate circuits and the several state courts confront claims of sexual harassment and counterclaims of those accused of harassment. The emerging body of law reflecting the rights of those accused of harassment is discussed in chapter 4.

III. Investigating Complaints

Even in the workplace that has effective antiharassment policies in place, the risk remains that sexual harassment claims will be made and in some cases will be substantiated. The employer's reaction to these claims will make a critical difference in the exposure created by the claims and by the harassing conduct. Chapter 5 considers the investigation of claims and counterclaims and provides an outline of elements relevant to these investigations.

In the job site not presently threatened by claims of harassment, active management policies can prevent claims of harassment from becoming real threats to the employer. The components of effective antiharassment policies for use in personnel manuals, collective bargaining agreements and public sector executive orders are discussed in chapter 6.

In chapter 7, the workplace audit is offered as a management tool to identify potential sources of harassment and suggest approaches to avoid the damage that can be caused by such harassment. Finally, chapter 8 contains a sample sexual harassment policy that employers can use as a starting point for developing their own policy.

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IV. Realities of the Workplace

The information offered in this work is intended to reflect the current state of the law, so that employers can apply to the workplace the lessons being taught by the courts. The purpose here is not to offer an ideal, but rather to set forth what is required both by the law and by sound and fair business practice. In a perfect world we all would be judged on the merits of our work and would find it within ourselves to work harmoniously with one another. That ideal has not been, nor can it reasonably be, legislated into existence. Instead, workers look to their employers and, on occasion, to the courts for help in maintaining minimum levels of peaceful coexistence. The cases reported in this work reflect judicial interpretation of what an employer must do in the workplace to meet these expectations. By applying the teachings of the courts and using pro-active management tools to reduce tension between workers of both sexes, employers can do their part in maintaining productive work environments for all employees.

This book is not intended to be an instrument of social change. Instead, it offers practical management tools to employers, risk managers, human resources directors, employees—and the lawyers they rely on for guidance. It is intended to take the view of a shareholder whose equity interest in the business justifies a dispassionate attitude toward the way the business is run. If behavior threatens the success of the business, then the shareholder reasonably expects management to take effective measures to reduce the threat of harassment-based lawsuits and suits based on false claims of harassment. The evidence is in—a hostile work environment hurts productivity and cuts short human potential. This book is intended as a guide to help management better understand the nature of the problem and take effective measures to reduce the risks posed by harassment and false harassment claims.
Chapter 1

Overview of Sexual Harassment Issues

I. Historical Perspective

June 19, 1996 marks the anniversary of an event significant to businesses throughout the United States. On that date ten years earlier, Justice Rehnquist announced in *Meritor Savings Bank, FSB v. Vinson* the Supreme Court's decision that a claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII of the Civil Rights Act of 1964. With this announcement, the Court made it plain that Title VII requires employers to guard against maintaining a sexually charged or gender-based hostile work environment. *Meritor put employers on notice that courts, from that point forward, would require the active involvement of management in what had been regarded, in many instances, as a private matter between consenting adults in the workplace.*

In the wake of *Meritor*, employers, employees, unions, legislators and courts now are confronted with data demonstrating the damage that can be inflicted when an employment setting becomes a sexually charged battlefield. In study after study, book after book, the point has been made that sexual harassment is not about sex, but rather about power and the abuse of power by those in positions of authority. Commentators

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1 477 U.S. 51 (1986).
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and courts also note that the attitudes held by men and women regarding sexual harassment can be distinguished by gender, that men simply do not see the issue in the same way as women, and that this divergence of vision has worked to the prejudice of victims of harassment, even after Meritor. The point of these analyses is that until sexual harassment is regarded as an invidious and truly disabling form of discrimination, victims of harassment will continue to suffer severe and long-term economic and emotional dislocation. The results of this dislocation can include career disruption, loss of security, disruption in training, and the emotional trauma that accompanies such deprivation. This will in turn diminish the vitality of the victim (whether male or female), and members of the workplace will not enjoy the full measure of the protections granted by Title VII and kindred state civil rights laws.

It may be, however, that employers now "get the point" and that they understand the need to protect against harassment in its many forms, if only to preserve the business against what can be ruinous damage awards won by victims of sexual harassment. Few labor lawyers, for example, will miss the point made in 1991 when a jury awarded $6.9 million in punitive damages to a legal secretary in response to her claim of sexual harassment against a prominent national law firm. Whether or not the award is affirmed on appeal, this case and others like it have had an undeniable effect on risk managers and human resources staff throughout our nation's business community.

For better or worse, change in the legal environment of business is slow, and ten years is only a fraction of the time typically required to accomplish real change. Even simple business litigation can take three or four years just to reach closure in the discovery of documents prior to a trial. Therefore, it is not surprising for the better part of a decade to come and go before lawyers, judges, business leaders and employees finally "get the point" and make the changes due when law as substantial as that announced in Meritor is brought forward. National events like the Senate confirmation

_Taking Sexual Harassment Seriously: A New Book That Perpetuates Old Myths, 10 CAP. U. L. REV. 673, 675 (1981) (book review) ("Sexual harassment, then, is not about sex. If someone were to kill another person with a rolling pin, we would not consider it cooking."); quoted in Hébert, supra, at 48 n.82.

4 See, e.g., Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) ("conduct that many men may consider unobjectionable may offend many women"); L. Camille Hébert, Sexual Harassment is Gender Harassment, 43 KAN. L. REV., 565, 592-606; Bonnie B. Westman, The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace, 18 WM. MITCHELL L. REV. 795 (1992).

5 See Mark V. Boennighausen, The $7.2 Million Secretary, AMERICAN LAWYER Oct. 1994 at 77 ("Baker & McKenzie’s staggering loss in its sexual harassment case stunned the legal community. But a sophisticated and independent jury was more shocked at how a law firm could ignore so many employees’ complaints.").

6 On January 6, 1995 it was reported that Baker & McKenzie filed notice of appeal of a $3.7 million verdict against it and an ex-partner. The trial court had reduced the jury’s $6.9 million punitive judgment against Baker & McKenzie to $3.5 million, but left intact a punitive award of $225,000 against a former partner. BNA DAILY LABOR REP. Jan. 6, 1995 (1995 DLR 4 d27).
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hearings of Clarence Thomas may spur this evolution, as will highly visible examples of the problem, like the Tailhook incident involving members of the armed forces.

When the evolution reaches a certain stage, however, the focus of inquiry must be redirected. The ground that has been covered must be left behind and new structures must be built to help businesses deal with the new realities. With the Supreme Court’s recent affirmation of Meritor in Harris v. Forklift Systems, Inc., management is assured that the hostile environment claim is now a fact of business life—one that management must consider when reacting to claims of sexual harassment in the workplace.

The premise of this book is that business managers, risk managers, human resources managers and employees now accept that sexual harassment is a real and serious problem. For this purpose, at least, ten years of study suffices; if employers “don’t get it” now, chances are they are not going to get it until one of their employees successfully sues. Businesses need the tools to prevent the problem, to address the problem and to reduce the risk of exposure to liability if the problem already exists in the workplace.

The problem of sexual harassment has taken a new shape over the years since Meritor. If the Supreme Court’s goal in that case was to firmly establish a remedy under Title VII for victims of sexual harassment, that goal appears in large measure to have been accomplished. With that goal reached, however, those who have been disciplined because of their harassing conduct have not gone quietly away. Management has found itself squarely in the crossfire between those who claim to be the victims of sexual harassment and those who claim to be the victims of unwarranted and false accusations. As Title VII plaintiffs aggressively pursue their right to a harassment-free workplace, those accused of tainting the workplace have occasionally struck back with vigor, invoking well established tort remedies against any and all accusers.

II. Managing Employees’ Interactions

Successful management of the modern workforce calls for the manager to make some basic assumptions. One assumption is that the workforce will likely be culturally diverse and in most cases composed of workers of each sex. Management also will likely assume that workers will, from time to time, experience friendships, sexual intimacy and interpersonal conflicts that have less to do with the work at hand than with the personalities of those performing the work or managing the workers. These assumptions lead to a realization that conflicts between workers, based on the workers’ personalities, will on occasion require active management of human resources if the organization is to accomplish its goals. In plain English, from time to time managers and personnel officers will have to work with employees when problems arise involving workers getting along with other workers, supervisors and customers.

Not all such conflicts are a source of concern to management. In most workplaces, workers experience individual and group rivalries that lead to lively debates on topics such as sports or politics, and most managers either ignore these exchanges or find ways to channel those rivalries to the benefit of the organizational community. Some conflicts, however, are of such a nature that managers recognize the need to take an active role, either as mediator or regulator, to stop inappropriate behavior and to ensure the continued smooth operation of the work environment.

For more than 30 years, employers have been expected to ensure for workers work environments that are free from racial and ethnic harassment. It would be patently offensive to our collective sense of propriety to have a work environment where African-American workers have to confront white co-workers proselytizing on company time for the Ku Klux Klan or where neo-Nazis use the workplace to advance the cause of religious bigotry against Jewish members of the workforce. Managers who become aware of deep differences of opinion among members of the workforce should actively prevent the workplace from becoming a forum for airing these differences. This response may come from the knowledge that courts will not tolerate a working environment poisoned by ethnic or racial intimidation. This response also may stem from common sense that tells employers productivity is threatened by the antisocial behavior of those who judge co-workers by the color of their skin, their faith or their birthplace.

III. Employer’s Duties under Title VII and Meritor Savings Bank v. Vinson

Can the same now be said of issues arising from the differences between the sexes? Does the workplace need a referee for disputes arising between men and women where the issues appear to turn on matters of sex and gender? If this is so, it is a relatively recent phenomenon. Twenty years ago, if a male supervisor sought out the sexual attention of a female subordinate, it would likely have been said that he was “satisfying a personal urge” and not implicating his employer nor exposing the employer to risk of a successful discrimination claim. From the beginning Title VII prohibited

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8 Title VII affords employees the right to work in an environment that is free from discriminatory intimidation, ridicule and insult. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (“[The] phrase ‘terms, conditions or privileges of employment’ in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.”) (citations omitted).

9 Corne v. Bausch Lomb, Inc. 390 F. Supp. 161, 163-64 (D. Ariz. 1975) In an action filed under Title VII where plaintiffs were repeatedly subjected to verbal and physical sexual advances from defendant Price, the court found “Mr. Price’s conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge. Certainly, no employer policy is here involved. . . . It would be ludicrous to hold that the sort of activity
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discrimination based on sex along with race, color, religion and national origin. However, its inclusion in Title VII was said to be “in the spirit of satire” and had only limited impact on changing employer attitudes about maintaining a sexist workplace. Sixteen years after the passage of Title VII, employers still could avoid liability for acts of sexual harassment by a supervisor if the supervisor was not acting in furtherance of a company policy. In Vinson v. Taylor, the superior suggested to his female subordinate that they have sexual relations. Although the subordinate initially refused, she eventually agreed out of fear she would lose her job if she continued to refuse. The trial court could and did find that the woman was not a victim of sexual discrimination under Title VII.

The duties of the employer have changed since the 1980 trial court decision in Vinson v. Taylor. That case went on to become Meritor Savings Bank, FSB v. Vinson, and it stands as the cornerstone for the principle that Title VII will penalize an employer who maintains a hostile work environment where that hostility reflects discrimination based on sex. Sexual harassment is “unwelcome . . . verbal or physical conduct of a sexual nature.” Title VII, according to Meritor, affords employees the right to work in an environment free from sex-based discriminatory intimidation, ridicule and insult.

involved here was contemplated by [the Civil Rights Act of 1964] because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.”


12 Id.

13 Id.

14 In Vinson v. Taylor, the trial court heard evidence that the plaintiff, a bank employee, had been constantly subjected to sexual harassment. After hearing that the harasser, a bank vice president, made repeated demands upon plaintiff for sexual favors and hearing his denials, the court held that if the plaintiff did engage in a sexual relationship with the vice president, the relationship had nothing to do with her continued employment at the bank and she was not the victim of sexual discrimination while employed at the bank. 23 Fair Empl. Prac. Cas. (BNA) 57 (D.C. 1980) at 42-3. The court also decided that because the bank was without notice of the alleged harassment it could not be held liable for the vice president’s actions. Id. at 42.

This decision was reversed by the Court of Appeals for the District of Columbia in Vinson v. Taylor, 753 F.2d 141 (1985). Finding that Vinson’s grievance clearly fit within the confines of “hostile environment” sexual harassment and that the District Court did not consider whether such a violation had occurred, the appeals court remanded the case to the trial court. Under the name Meritor Savings Bank v. Vinson, 477 U.S. 51 (1986), the Supreme Court affirmed the decision of the court of appeals in a decision that described two forms of sexual harassment: harassment that involves the conditioning of employment benefits upon sexual favors and harassment that creates a hostile or offensive working environment. Id. at 57-63.


16 Meritor, 477 U.S. at 65.
Preventing and Responding to Workplace Sexual Harassment

Sexual harassment can take place in many different ways. A female worker need not be propositioned, touched offensively or harassed by sexual innuendo. Gender-based intimidation and hostility toward women because they are women also can result in a violation of Title VII. But if "unwelcome" conduct of a sexual nature is the threshold, is an employer left to speculate whether particular conduct would be welcome in one department, office or job site but unwelcome in another? Should an employer make an educated guess that certain behavior will offend women generally, and act upon that guess by imposing policies restricting speech and conduct to ensure the smooth operation of the whole unit? Should the guess be one that takes the perspective of the "squeaky wheel" victim, or that of a reasonable man or a reasonable woman or a reasonable person?

In the years since Meritor, the courts have given some concrete direction in answer to these and other related questions. There remain, however, few "safe harbors" for employers who seek to avoid or reduce the risk of claims of discrimination based on either hostile work environment or quid pro quo sexual harassment. Years after Meritor, the law is still developing at a "brisk pace" and has yet to provide employers with completely clear mandates on how to maintain a workplace that complies with Title VII.

IV. Guarding Against False Claims of Harassment

Complicating matters is the increased risk that persons accused of participating in sexual harassment will themselves claim to be victims and seek redress, not only against their accusers but also against employers who discipline them. An employer confronted with a claim that a supervisor has sexually harassed a subordinate of the opposite sex also is likely to be confronted with counterclaims by the supervisor alleging defamation, interference with the business relationship, breach of contract and related claims of tortious conduct. The public employer can expect the same, along with

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17 Claims of sexual harassment may be made by persons of either gender. To avoid the cumbersome use of both male and female terms and pronouns, this work generally refers to accused harassers as males and the charging parties as females. This convention recognizes that males statistically are more frequently the alleged offenders and females are more frequently the complainants.

18 Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988); see also L. Camille Hébert, Sexual Harassment is Gender Harassment, 43 U. Kan. L. Rev. 565, 576 (harassing conduct that is sexual in nature is harassment on the basis of gender and should be included in the definition of gender harassment).

19 Karibian v. Columbia University, 14 F.3d 773 (2nd Cir. 1994).

Overview of Sexual Harassment Issues

claims that any proposed action by the employer would threaten a constitutional right under the First, Fifth or Fourteenth Amendment.21

If the strength or weakness of the claims made by the subordinate turn on whether she did or did not welcome the advances of the supervisor and the supervisor’s claims against the employer and accuser depend on the subordinate’s subjective reaction to the supervisor’s conduct, then clearly the employer has to assume an active role in mediating between these parties. Willingly or otherwise, the employer will have to confront the problems created when sex or gender issues create friction in the workplace.

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Chapter 2

Federal and State Regulation of the Workplace

I. Overview

Legal controls over the workplace can be categorized into three separate but interconnected types: (1) statutory or codified law, (2) judge-made or common law and (3) duties arising under contract. An employer needs to be aware of duties imposed by federal, state and local laws, such as constitutional limitations, statutes, administrative rules and ordinances. An employer must also consider statutes such as Title VII of the Civil Rights Act, state antidiscrimination laws and local ordinances affecting workplace activities.

Court interpretations of laws (referred to here as common law limitations) also impose limits on the management of the workplace. Courts apply precedent from other cases to the facts of disputes presented to them for resolution. Included in the common law is the doctrine of "employment at will" and judge-made limitations on that doctrine. Employment is "at will" if the employment relationship is not founded on a contract between the employer and employee which states conditions that must be met before the employee can be discharged. Either the employee or employer can terminate the relationship with or without cause.

Also included in the common law are the duties imposed by society through our system of tort laws. Tort laws are available to both the person claiming to be the victim

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1 See, e.g., Cafeteria & Restaurant Workers Union v. McElroy, 284 F.2d 173 (D.C. Cir. 1960) (no employed person has an inherent or natural right, that is, a right apart from statute, regulation or contract, to any sort of process in respect to removal from his particular job); Anglemyer v. Hamilton County Hosp., 58 F.3d 533 (10th Cir. 1995) (Kansas follows the common-law doctrine of employment at will, that employees are considered to be at will in the absence of an express or implied contract) (citing Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (Kan. 1976)).

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of harassment and the person charged with the harassing. In applying tort law principles, courts consider the competing interests of the individuals and of society as a whole when deciding how best to apportion fault and liability for injuries suffered in the workplace and beyond.

In addition to statutory law and common law, the workplace is subject to limitations defined in contractual obligations. These obligations can arise from an exchange of oral or written promises and can be expressly stated or implied as a matter of law (much to the surprise and regret of many employers). Express written contracts found in the workplace include personal services contracts and collective bargaining agreements. Implied contracts typically found in the workplace include those created by an employee policy manual.

When disputes arise following some form of employment action (such as a termination with or without cause), it is not unusual for the employee to claim that a contract existed between the employee and the employer. The terminated employee will assert that the personnel handbook created job security or other terms that were inconsistent with the adverse action taken by the employer. The court will attempt to determine whether a contract existed between the parties, and, if so, what terms were expressly agreed upon or should be implied from the course of conduct between the parties.

II. Federal Statutes—Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”2 Under this federal statute, employers subject to its provisions are prohibited from making employment decisions based on the sex of the employee. If a tangible job benefit is granted or withheld based on submission to or rejection of unwelcome sexual requests or conduct that is related to sex, then the employer has “discriminated” by making a job-related decision based on the sex of the employee.

A. The EEOC and Public and Private Employers

Workplace protections created by Title VII are enforced by the Equal Employment Opportunity Commission (EEOC). This federal body carries out its mission through investigations of allegations of sexual harassment and other forms of employment-related discrimination. It also provides an informal resolution service and can initiate an administrative review that can lead to an order directing the employer to take

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measures aimed at ending the harassment. The EEOC can seek to reinstate employees who have been terminated for resisting sexual harassment, and it can further assist the victim of harassment by seeking back pay, interest and attorneys' fees. Under the Civil Rights Act of 1991, the EEOC can seek an order for the employer to compensate the victim of sexual harassment for the victim's pain and suffering (known as compensatory damages)—up to $50,000 for employers with 15 to 100 employees, up to $100,000 for employers with 101 to 200 employees, up to $200,000 for employers with 201 to 500 employees, and up to $300,000 for employers with more than 500 employees.\(^3\)

The EEOC also issues policy statements intended to give guidance to employers on issues of discrimination. These statements, and the more formal regulations contained in the Code of Federal Regulations, answer some of the many questions that arise regarding an employer's duties under Title VII. One such policy statement, included in Appendix F, addresses the EEOC position on sexual favoritism in the workplace. Issued in 1990 by now-Supreme Court Justice Clarence Thomas when he served as Chairman of the EEOC, this policy guidance identifies the source of the law controlling issues of sexual favoritism in the workplace, discusses the leading cases and important statutes that affect the employer facing claims of sexual favoritism, and explains the views of the EEOC when it confronts complaints based on favoritism in the workplace.\(^4\)

**B. Stating a Valid Claim under Title VII**

**1. Quid Pro Quo Harassment**

The employee establishes all of the essential elements of a violation of Title VII (that is, she states a *prima facie* case of sexual harassment) when she shows each of the following:

- she belongs to a protected group (in this case the group is female employees);
- she was subject to unlawful harassment based on sex;
- the harassment affected tangible aspects of the terms of her employment; and
- submitting to the conduct was either made a term of employment or used by the employer as a basis for making an employment decision affecting the employee.

If these elements are present, the employee has demonstrated she is the victim of "quid pro quo" harassment, which is also known as "tangible job benefit" harassment.\(^5\)


Preventing and Responding to Workplace Sexual Harassment

2. Hostile Environment Harassment

Harassment will not always take the form of a supervisor requiring sexual favors in exchange for some job-related benefit. Title VII also recognizes harassment where workers are subjected to a work environment that is so tainted with sex- or gender-based discrimination that the "terms, conditions, or privileges of employment" are adversely affected. This is known as "hostile work environment" harassment. A violation of Title VII is established when the complainant shows there is a pervasive atmosphere of discriminatory and unwelcome working conditions that have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. A hostile work environment claim is proved where the employee shows:

- she was subjected to unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and that

- except for the fact of her gender she would not have been subjected to the harassment, and harassment affected a term or condition of employment by either unreasonably interfering with the work environment or creating an intimidating, hostile or offensive work environment.

C. What Makes Sexually Oriented Behavior Improper under Title VII?

1. Unwelcome Behavior Versus Acquiescence

Not all conduct of a sexual nature is prohibited in the workplace. Title VII proscribes only unwelcome sexual behavior that affects a term or condition of employment. Conduct is "unwelcome" when the target did not solicit or incite the conduct and regarded the conduct as undesirable or offensive. The question, however, is not whether the target voluntarily submitted to sexual conduct; instead, the question is whether her conduct the employee indicated to the accused harasser that the alleged sexual advances were unwelcome.

Acquiescence to sexual conduct in the workplace does not compel the conclusion that the conduct is welcome. A dating relationship in the workplace may begin as a

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7 Id.


9 EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, No. N-915-050 (March 19, 1990) (citing Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)); see Appendix E.


11 EEOC Decisions, No. 84-1, 1983 WL 22487 (EEOC Nov. 28, 1983).
mutually agreed upon affair without offending Title VII. In the case where a relationship begins as consensual but the target ceases to welcome the sexual attention, the employee must clearly notify the alleged harasser that his conduct is no longer welcome.\textsuperscript{12} Upon such notice, the other party has a duty to act in a manner that is consistent with the expressed intentions of the party who called off the relationship, at least in matters relating to the terms and conditions of the target employee’s employment.

D. What Gives Rise to Employer Liability?

Treating men and women differently is a form of discrimination. However, not all discriminatory conduct in the workplace results in employer liability. The discriminatory conduct must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”\textsuperscript{13} Courts will consider the following factors when determining the impact on an employee’s work environment:

- whether the complained-of conduct was verbal, physical or both;
- the frequency of the conduct;
- whether the conduct was hostile and obviously offensive;
- whether the harasser was a supervisor (in which case there is a closer link between the conduct and liability for the employer than if the harasser was a co-worker);
- whether others joined in the harassing behavior; and
- whether the harasser targeted one employee or focused on more than one worker.

Sexual flirtation alone, innuendo, even vulgar sexist language probably will not establish a hostile environment actionable under Title VII.\textsuperscript{14}

The discriminatory conduct need not occur at the work site and need not be perpetrated by an employee. It can be the result of actions taken off-premises by employees or third parties if there is an adequate link between the conduct and the employer.\textsuperscript{15} In both quid pro quo and hostile environment cases, courts will apply

\textsuperscript{12} EEOC Policy Guidance on Sexual Harassment, supra note 9, at n.12 and surrounding text; see, e.g., Shrouth v. Black Clawson Co., 46 Fair Empl. Prac. Cas. 1339 (D. Ohio 1988) (employee ended voluntary sexual relationship with her supervisor in 1981; both quid pro quo and hostile environment harassment were shown when supervisor thereafter attempted to force employee to continue the relationship by withholding performance evaluations and salary reviews).

\textsuperscript{13} Meritor, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

\textsuperscript{14} 29 C.F.R. § 1604.11(a)(2) (1994); EEOC Policy Guidance on Sexual Harassment, supra note 9.

\textsuperscript{15} 29 C.F.R. § 1604.11(e) (1994).
principles of agency law to determine whether the employer should be held responsible for the conduct of co-workers, supervisors or outsiders (such as clients or customers).

Under agency principles, an employer may be held liable for acts of its employees when those employees act in the employer's behalf. Because it is implausible to suggest any employer would direct, or admit to directing, an employee to engage in sexually harassing behavior as a component of the duties of employment, problems arise when courts attempt to apply agency principles. The notable problem is the employer's response that the harassment of an employee was beyond the scope of the official duties of the harasser, and thus cannot be attributable to the employer.

Traditional agency concepts, in particular the doctrine of "respondeat superior," embody this aspect of agency law. To establish respondeat superior liability against an employer a court generally must find: (i) the existence of an employer/employee relationship; (2) negligence or a tortious act on the part of an employee; and that (3) the act complained of was committed in the course and scope of employment. One court applied the doctrine in finding the employer, a life insurance company, could not be held liable when a female employee went into the men's restroom after work hours and found between 10 and 20 cartoons on the walls. Three of these cartoons were labeled with her name and depicted her engaged in crude and deviant sexual activities. Dismissing the employee's claims under Title VII, the court applied the doctrine of respondeat superior and found that the employee failed to show that employees who committed the alleged offensive conduct were acting in the course and scope of their employment.

The case law suggests, however, that there is more than one way to view agency principles in Title VII actions. One court expressly rejected the doctrine of respondeat superior, finding instead that doctrine does not apply when determining whether an employer can be held liable for sexual harassment in the workplace.

Unfortunately, some of the cases have created potential confusion by calling the standard of employer liability that they endorse a form of respondeat superior. The truth is that respondeat superior is, from the employee's standpoint, a doctrine of strict liability. It makes the employer liable, regardless of what he knew or should have known or did or should have done, for the torts that his employees commit in the course of, or (in the case of intentional torts) in the furtherance of, their employment. But it is clear from the Meritor decision, as well as from the EEOC's regulation and the cases that we have cited, that an employer's liability for sexual harassment by the plaintiff's co-worker is not strict.

The problem is merely a semantic one; the standard has been mislabeled. It is not respondeat superior. It is a negligence standard that closely resembles the "fellow

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17 Id. at 1246 (any liability on the part of the defendants must be based upon the doctrine of respondeat superior; only in the capacity of "employer" can defendant corporation and its supervisory personnel be held responsible for the cartoon posting).
servant” rule, from the era when industrial accidents were governed by negligence rather than workers’ compensation law. Under that rule . . . as under Title VII, the employer, provided it has used due care in hiring the offending employee in the first place, is liable for that employee’s torts against a coworker only if, knowing or having reason to know of the misconduct, the employer unreasonably fails to take appropriate corrective action. The employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring.\textsuperscript{18}

The EEOC regulations that are referred to in the court’s opinion distinguish between the employer’s duties with respect to quid pro quo harassment and those with respect to harassment that creates a hostile environment. In quid pro quo cases, the supervisor acquires his power (as a supervisor) by virtue of the employment relationship. Thus, in all cases of quid pro quo harassment (for example, where the supervisor requires sexual conduct in exchange for the employee realizing a job-related benefit), the courts will hold the employer responsible for such improper conduct.\textsuperscript{19} In the case of hostile environment claims, if the employer “knew, or upon reasonably diligent inquiry should have known”\textsuperscript{20} of harassment, even by third parties such as clients or customers, then the employer has a duty to take immediate and appropriate corrective action.

\textbf{E. Who Is Covered by Title VII?}

\textbf{1. Qualifying Employers}

Not all employers are subject to Title VII. Sole proprietors (unincorporated entities run by one or more individuals), labor unions, partnerships, associations, corporations, legal representatives, mutual companies,\textsuperscript{21} joint stock companies, trusts, unincorporated organizations and trustees all are employers covered by Title VII,\textsuperscript{22} but only if they employ the required number of employees and those employees work a specified minimum number of hours. Private employers must employ at least 15 employees to be covered by Title VII,\textsuperscript{23} and the employees must work (either on a part-time or full-

\textsuperscript{18} Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464-65 (7th Cir. 1990) (citations omitted).


\textsuperscript{20} Yates v. AVCO Corp., 819 F.2d 630, 636 (6th Cir. 1987).

\textsuperscript{21} \textit{See}, e.g., companies formed under N.J. REV. STAT. § 17:17-2 (1994) (insurance “mutual plan”) or under GA. CODE ANN. § 33-14-44 (1995) (domestic stock insurer may become a domestic mutual insurer pursuant to plan approved by the Commissioner).

\textsuperscript{22} 42 U.S.C.A. § 2000e(a) (1994).

\textsuperscript{23} 42 U.S.C.A. § 2000e(b) (1994).
time basis)\textsuperscript{24} 20 or more weeks in the year in which the alleged discrimination took place or the prior year.\textsuperscript{25}

Labor organizations are included in Title VII's definition of "employer,"\textsuperscript{26} but only if they are "engaged in an industry affecting commerce."\textsuperscript{27} Where a covered union deals with an employer not covered by Title VII, the EEOC has held the protections of Title VII apply to the labor organization,\textsuperscript{28} although not all courts agree with this assessment.\textsuperscript{29} Employment agencies are covered by Title VII, whether or not the agency receives compensation for its services.\textsuperscript{30}

2. Qualifying Employees

An employee will be included in this headcount if the employer maintains the employee on the payroll during any given week, even if the employee does not report to work every day of that week,\textsuperscript{31} and even if the employee is on an unpaid leave of absence.\textsuperscript{32} Loaned employees, as under a personnel leasing program, are likewise included in the headcount for purposes of Title VII.\textsuperscript{33}

3. Public Sector Employers

Most, but not all, public sector employers are covered by Title VII. Uniformed members of the armed services are excluded, but civilian employees of military departments are included in the protections of the act.\textsuperscript{34} Title VII itself directly controls the practices of state governments and their political subdivisions,\textsuperscript{35} with the exception of uniformed, full-time, state national guard members on military duty.\textsuperscript{36}

\begin{itemize}
  \item \textsuperscript{24} 42 U.S.C. § 2000e(f) (1994); Armbruster v. Quinn, 711 F.2d 1332 (6th Cir. 1983); Lynn v. JER Corp., 572 F. Supp. 17 (M.D. Tex. 1982).
  \item \textsuperscript{25} 42 U.S.C.A. § 2000e(b) (1994); EEOC Decisions 76-10 (CCH) (1975).
  \item \textsuperscript{26} 42 U.S.C.A. § 2000e(d) (1994).
  \item \textsuperscript{27} 42 U.S.C. § 2000e(e) (1994).
  \item \textsuperscript{28} EEOC Policy Statement No. 915.030 (July 11, 1988).
  \item \textsuperscript{29} Renfro v. Office & Professional Employers Int'l Union, 545 F.2d 509 (5th Cir. 1977).
  \item \textsuperscript{30} 42 U.S.C.A. § 2000e(c) (1994).
  \item \textsuperscript{31} Thubair v. Jack Reilly's, Inc., 717 F.2d 633 (1st Cir. 1983).
  \item \textsuperscript{33} Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 611 F. Supp. 344, aff'd, 770 F.2d 157 (2d Cir. 1984).
  \item \textsuperscript{34} 42 U.S.C.A. § 2000e(b) (1994); Bledsoe v. Webb, 839 F.2d 1357 (9th Cir. 1988).
  \item \textsuperscript{35} 42 U.S.C.A. § 2000e(a) (1994).
  \item \textsuperscript{36} Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987).
\end{itemize}
4. Federal Government Employees

For employees of the executive branch of the federal government, discrimination prohibited under Title VII is prohibited under the Government Employee Rights Act of 1991. This Act, and not Title VII, is the controlling authority. The Act also controls personnel actions affecting employees of the United States Senate and, at the state level, the employment practices of any person elected to public office in any state or political subdivision of any state. The Civil Rights Act of 1991 controls the employment practices of employers acting under the authority of the United States House of Representatives. Certain contractors with the federal government are required under Executive Order 11,246 to maintain a nondiscriminatory workplace, and this order extends to state and local governments that contract with the federal government.

III. State Action

Workplace actions and decisions made by governmental employers are subject to limitations that go beyond those imposed on private employers. The main reason is that the federal constitution imposes limits on powers of the government, and a public employer is subject to those limitations when acting as a workplace manager. When an employer or defendant in an employment action exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," the analysis takes on an added dimension because the alleged wrong involves "state action." For example, a police officer's actions committed while on duty and in uniform are not committed "under color of state law" unless those actions are related to the performance of police duties.

This added dimension of liability has its roots in the protections of the Bill of Rights and subsequent amendments, in particular the First, Fifth and Fourteenth Amendments to the United States Constitution. Public sector employers whose employees act under color of state law will be held liable for action that violates those

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41 See 41 C.F.R. § 60-1.40(a), § 60-4.1 (1980).
42 41 C.F.R. § 60-1.5(a)(4) (1980).
44 Gibson v. Chicago, 910 F.2d 1510, 1516 (7th Cir. 1990).
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constitutional guarantees, notably the right to speech and association under the First Amendment, to be free from unreasonable searches and seizures under the Fourth Amendment, and to due process under the Fifth and Fourteenth Amendments.

For example, consider the case of a female applicant looking to a state employment service for assistance in finding a job. The applicant is directed to a male case worker, who assists her in the application process and offers to drive her to a place where she could study for her driver’s license exam. In the course of that trip, the case worker allegedly made a side trip to a motel where he raped the applicant. The case worker claimed his conduct was outside the scope of his employment, such that he did not act under color of state law.

The court rejected the case worker’s claim, finding that it was clear he “used his position in the state government to deprive [the applicant of her] constitutional right to be free from sexual assault.” The court found that misuse of power, possessed by virtue of state law and possible only because the wrongdoer is clothed with the authority of state law, is “action taken ‘under color of state law.’”

It is not always easy to determine whether misconduct by a public employee is state action. If the wrongful act is “not in any way related to the performance of the duties of the state employee,” then the pretense of some governmental authority is missing and there will be no application of the “state action” doctrine. Consider the case of a female desk clerk employed by a police department. The clerk alleged that a male police sergeant targeted her with insults, obscenities and propositions for sexual activity for several months and that this activity was tolerated by the department’s supervisory personnel. On one occasion, the clerk was in a police car when she was harassed. She told the sergeant to leave her alone and struggled to escape. The sergeant held the clerk’s face, kissed her with his tongue, opened her uniform shirt, grabbed her breasts, grabbed between her legs, and tried to stick his hands inside her pants. The clerk reported this to her desk sergeant, but the incident and others that followed were tolerated by the department. Finding that the sergeant’s sexual harassment and sexual assaults were not “actions related to his police duties,” the court found no deprivation of constitutional protections.

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41 Dang v. Vang, 994 F.2d 476 (9th Cir. 1991).
46 Id. at 477-78.
41 Id.
46 Id.
IV. Constitutional Protections and the Reconstruction Acts

The constitutional protections found in the United States Bill of Rights, standing alone, do not provide a means by which a public employee can bring a lawsuit. The means for such a suit is found in a collection of federal statutes known as the Reconstruction Acts. Persons who suffer constitutional deprivations at the hands of one acting under color of law may resort to one such act known as Section 1983.51 For example, an employee who believes her constitutional rights have been violated through the actions of her public employer may petition the federal court under Section 1983 for remedies from any "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" where the wrongdoer acts "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."52

The public sector employer must be aware that its employment practices will be subjected to court review whenever an alleged wrongdoer uses his or her public employment in a way that deprives another (whether co-worker or otherwise) of rights protected by the constitution. This duty applies not only to those who claim to be victims of harassment; it applies with equal force to the claims of those who stand accused of engaging in sexual harassment. In one case, an officer of a public fire department sued the department under Section 1983, alleging that the department's sexual harassment policy violated his right to free speech.53 The policy prohibited sexually oriented magazines, particularly those containing nude pictures, from all work locations, including dormitories, rest rooms and lockers. The court balanced the captain's First Amendment right to engage in an "expression relating to matters of public concern" against the interests of other employees working at the department to be free from a hostile work environment protected under Title VII. Finding that the employees were unable to produce evidence which established the quiet reading of Playboy contributed to a sexually harassing atmosphere and that the policy posed a "severe burden on [the captain's] First Amendment rights" the court struck the policy.54

Given these competing interests, the public sector employer may find itself defending against a charge of sexual harassment, sharing in the claim of an accused harasser that the complained of conduct is protected under the harasser's First Amendment free speech rights.55 The same could be said of the private sector employer who attempts

52 Id.
54 Id. at 1442.
to coerce employees into voting against a union's organizational efforts. Congress, however, has imposed limitations on the plenary power of employers to control speech in the workplace, as it did in the National Labor Relations Act (NLRA) provisions that restrict employer's speech during an organizational campaign.\(^5^6\) As one commentator observed, Title VII and the NLRA "have traditionally provided courts with the justification for imposing regulations that infringe on speech, when such regulations are necessary to correct statutory violations."\(^5^7\)

Similarly, public sector workers are entitled to constitutional protections found in the Fifth Amendment, and those protections are enforced through Section 1983. Contained within the scope of Fifth Amendment protections are the protections guarding against depriving a public sector employee of "life, liberty, or property" without due process of law. Whereas an at-will private sector employee has no constitutional protection ensuring continued employment, non-probationary public sector employees have an interest in continued employment. The interest is one protected by the due process clause of the Fifth Amendment, and it can be vindicated through an action under Section 1983.\(^6^6\) The public sector employee is entitled to notice of the charges and an opportunity to respond before being removed from employment.

The public sector employer thus must be alert to the threat of legal action from the alleged victim of harassment and from the accused harasser, with Section 1983 offering a legal forum to both parties with the employer as the likely defendant. Private sector employers, too, may be subject to an action under Section 1983 if there is a "sufficiently close nexus between the state and the challenged action ... so that the latter may be fairly treated as that of the state itself."\(^5^9\)

\textbf{A. Distinguishing Claims under Section 1983 and Title VII}

\textbf{1. Remedies}

An action brought under Section 1983 carries some important distinctions from one brought under Title VII. Both actions permit the charging party to obtain preliminary and permanent injunctive relief, to stop the harassment and to require the employer to end harassment in the workplace.\(^6^0\) Both Section 1983 and Title VII permit awards of


\(^{5^7}\) Horton, supra note 55 at 408-09.


backpay, front pay, costs and attorneys’ fees. Compensatory damages, (damages to compensate the victim against losses realized from the discrimination) and punitive damages (money damages beyond that needed to compensate for losses, imposed to deter future noncompliance) are available to claimants under Title VII only for intentional discrimination, and are not available against a “government, government agency or political subdivision.” Under Section 1983 a victim need not show the misconduct was a product of intentional discrimination in order to recover compensatory damages, and there is no exclusion for government entities. In a Title VII action punitive damages are not recoverable against “a government, government agency or political subdivision,” but are otherwise recoverable with some limitations in an action under Title VII, and without such limitations in an action under Section 1983, if it is demonstrated that the public (or private) defendant’s conduct “is motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.”

2. Limitations of Actions

Another important difference between Title VII claims and Section 1983 claims is that the length of time that may pass before a charging party seeks judicial relief under Title VII is limited by a federally set scheme of deadlines. These deadlines are fairly short. A complaint against a private employer under Title VII, for example, needs to be filed within 90 days from the time the charging party receives a “right-to-sue”


letter from the EEOC. The time period allowed for filing civil lawsuits against federal, state and local governmental employers is similarly limited.

Actions taken under Section 1983, on the other hand, must be filed within the time permitted by the state statute of limitations that is most analogous to the claims being made. For example, in an action against a state agency-employer for intentional infliction of emotional distress in the context of a sexual harassment claim, the court would apply to the Section 1983 claim the state tort statute of limitations for the tort of intentional infliction of emotional distress.

V. Title IX of the Education Amendments

In the educational setting, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in the administration of educational programs. Institutions covered by this act include any public or private preschool, elementary or secondary school, or any institution of vocational, professional or higher education where the institution receives federal funding, including funding for students who receive federal scholarship grants. For example, in Lipsett v. University of Puerto Rico, the court extended the Title VII standard of what constitutes an unlawful employment practice to a mixed employment-educational context. The plaintiff, a medical student, was an employee as well as a student of the residency program. She was sexually harassed by her supervisors and fellow students. The court held that the school officials’ failure to stop the harassment could amount to deliberate indifference to the student’s right to be free from discrimination under Title IX and the equal protection clause.

For violations of Title IX outside of the employment setting, students may seek injunctive relief and monetary damages. Although ultimately found the defendant, a high school guidance counselor, was entitled to qualified immunity, the court in one case considered the protections afforded by Title IX in protecting against peer-to-peer

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72 In federal employer actions, for example, a federal employee who alleges discrimination prohibited by Title VII does so to the Merit Systems Protection Board, and any appeal from the Board’s decision must be taken within 20 days after the effective date of the adverse action. 5 C.F.R. § 1201.154(c) (1995).
75 20 U.S.C.A. § 1681(c) (1990), exceptions noted at § 1681(a)(1)-(9).
76 864 F.2d 881 (1st Cir. 1988).
77 Id. at 897.
sexual harassment in a high school setting. The student complained to the counselor that she was being subjected to sexual comments and lewd writings on restroom walls. The counselor, according to the student, never told school officials about the harassment, and told the student that “boys would be boys” and that girls could not sexually harass other girls.

When the matter was brought to the attention of the Office of Civil Rights of the United States Department of Education (OCR) the school was notified that the failure to stop the type of harassment to which the plaintiff was subjected violates Title IX, because the taunts were sexual in nature and interfered with the plaintiff’s ability to benefit from her education and created an intimidating, hostile and offensive environment. Also significant were the facts that several teachers knew about the harassment, the principal’s response failed to address the problem, and a prior victim managed to escape the harassment only by transferring out of the school. For violations of Title IX outside of the employment setting, students and others entitled to the Act’s protections may seek injunctive relief and monetary damages.

VI. State Antidiscrimination Statutes

In addition to the federal protections against workplace harassment, many states have enacted statutes that address sexual harassment on the job. These laws share some common features, but vary substantially in such details as the scope of coverage and the nature of relief available. Two states, Alabama and Arkansas, have no laws directed at preventing sexual harassment in employment.

A. Covered Employers

Most states have antidiscrimination laws that apply to public and private employers, employment agencies and labor organizations. Some states limit the laws to public

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79 Doe v. Petaluma City Sch. Dist., 54 F.3d 1447 (9th Cir. 1995).

80 Id. at 1457.


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employers, while others have slight variations in coverage. Of these covered employers, most state schemes have provisions to exclude employers of only small numbers of employees and most excuse domestic service performed in the home of the employer and service by family members.

B. Covered Topics

Some state schemes plainly provide that the state's antidiscrimination laws do not take the place of common-law tort claims that arise when a worker is sexually harassed.


Exclude employers with fewer than 15 employees: Arizona, Florida, Georgia (applies only to public employers), Illinois, Louisiana, Maryland, Nebraska, Nevada, North Carolina, Oklahoma, South Carolina, Texas, and Utah.

Exclude employers of fewer than 12 employees: West Virginia.

Exclude employers of fewer than 10 employees: North Dakota.

Exclude employers of fewer than 8 employees: Kentucky, Tennessee, and Washington.

Exclude employers of fewer than 6 employees: Indiana, Massachusetts, Missouri, and New Hampshire.

Exclude employers of fewer than 5 employees: Idaho.

Exclude employers of fewer than 4 employees: Delaware, Iowa, Kansas, New Mexico, New York, Ohio, Pennsylvania, and Rhode Island.

Exclude employers of fewer than 3 employees: Connecticut.

Exclude employers of fewer than 2 employees: Wyoming.

Exclude certain social clubs, religious, fraternal, charitable or educational organizations (varies from state to state): Alaska, Arizona, California, Colorado, Delaware, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Utah, Washington, West Virginia, and Wyoming.


Exclude employment of certain family members: Connecticut, Delaware, District of Columbia, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Nebraska, New Hampshire, New York,
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Others provide that the existence of the state scheme preempts related forms of relief that arise in the context of the employer’s performance of job functions. Some statutes provide for the right to a jury to consider claims of discrimination. Alaska requires that the charging party give notice to the state’s civil rights office before suing on a harassment claim, and others require the charging party to completely exhaust the

North Dakota, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Washington, West Virginia and Wisconsin,

Exclude certain public officials and staff of public officials: Arizona, Georgia, Illinois, Maryland, North Dakota, Oklahoma, South Carolina and Texas.

Exclude the United States: Arizona, Hawaii, Nebraska and Nevada.

Miscellaneous exclusions: native American tribes (Arizona, Nebraska, Nevada, Oklahoma and South Carolina); agricultural workers and workers residing in the employer’s residence as part of the employment (Delaware and Pennsylvania); persons in federally certified vocational rehabilitation facilities who have been designated as employees, trainees or work activity clients (Illinois); employment to render personal services (Iowa); Nevada employers with respect to employment outside Nevada (Nevada); participants in the United States Department of Labor-approved statewide home plan (Texas).

See generally Alba Conte, Sexual Harassment in the Workplace; Law and Practice chapters 9 and 10 (1994).


Jury trial provided on harassment claims: Alaska, Loomis Electronic Protection, Inc. v. Schaefer, 549 P.2d 1341 (Alaska 1976) (in action on claim of refusal to hire female plaintiff because of her sex, parties were entitled to a jury trial on issues of compensatory and punitive damages); Florida, Broward County v. LaRosa, 505 So.2d 422 (Fla. 1987) (county ordinance empowering local administrative agency to award actual damages, including compensation for humiliation and embarrassment, to victims of race discrimination violated constitutional provisions mandating separation of power and securing right to jury trial); Kansas, Wagher v. Guy’s Foods, 885 P.2d 1197 (Kan. 1994) (construing Kan. Stat. Ann. § 44-1011(b)(3) (1994) to be a “statute of the state” within meaning of statute governing right of trial by jury, and thus gave right of trial by jury where demand was made); Kentucky, Chapman Printing Co., Inc. v. Meyers, 840 S.W.2d 814 (Ky. 1992) (both plaintiff and defendant entitled to seek jury trial of issues related to employment discrimination charge); Massachusetts, Dalis v. Buyer Advertising, 636 N.E.2d 212 (Mass. 1994) (denied employer’s motion to strike demand for trial by jury holding sex discrimination action fell within state constitutional right to jury trial); Michigan, Schafke v. Chrysler, 383 N.W.2d 141 (Mich. 1985) (under Michigan law, employee has a right to jury trial under Elliott-Larsen Civil Rights Act, alleging discrimination in employer’s hiring and job assignment practices); Montana, DiGesu v. Steel Mountain Enterprises, Inc., 716 P.2d 214 (Mont. 1980) (right to jury trial encompassed claims under Human Rights Act as well as legal claims for damages); Ohio, Taylor v. National Group of Cos., Inc., N.E.2d 45 (Ohio 1992) (plaintiff may demand jury trial for claim of discrimination based on sex); New York, Vega v. Metropolitan Life Ins. Co., 536 N.Y.S.2d 451 (N.Y. 1989) (employment discrimination plaintiff who sought only monetary damages was entitled to jury trial); North Dakota, Moses v. Burleigh County, 438 N.W.2d 186 (N.D. 1989) (facing employment discrimination charges, sheriff and county were entitled to jury trial); West Virginia, Perelli v. Board of Educ. Monongalia Co., 397 S.E.2d 315 (W. Va. 1989) (finding teacher had a right to jury trial on personal injury claims in sex discrimination action, as did defendant facing substantial damages claim).


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administrative remedy provided for by the statute before asking a court to consider the claim.\textsuperscript{90} Many expressly prohibit retaliation against an employee who uses the statute to protect against harassment.\textsuperscript{90}

Several state laws also expressly allow attorneys’ fees to be paid to the prevailing party,\textsuperscript{92} although some such laws limit fee recovery to private parties and do not permit the governmental employer to be awarded attorneys’ fees.\textsuperscript{92} One state, Texas, has made it a criminal offense for a person acting under color of public office or employment


Attorneys’ fees available, but not to governmental parties: Alaska, Connecticut, Georgia (if action goes to court), Hawaii and Iowa (prevailing plaintiffs only), Illinois, Iowa, Massachusetts, Michigan (to the prevailing complainant only), and Texas (the state may be liable for fees and costs, to the same extent as a private person).
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to intentionally subject another to sexual harassment.94 In at least one jurisdiction, the state's equal rights amendment has been construed to prohibit sexual harassment in the workplace.95

VII. Responding to a Claim

To an employer used to hiring and firing employees at-will, the presence of governmental regulators, investigators and adjudicators is likely to be more than a little unsettling. Once a claim of sexual harassment has been raised, however, an employer is bound by good management practices to anticipate the questions that are likely to be asked by the regulators and to provide answers that show the employer's compliance with state and federal anti-harassment laws.

A. Equal Employment Opportunity Commission

In most states there is a sharing of work between the state fair employment regulator and the federal Equal Employment Opportunity Commission (EEOC) investigator. When a claim is filed with the federal EEOC involving an employer in a state that has a comparable statutory scheme protecting against sexual harassment, the EEOC typically will forward the complaint to the state agency. EEOC rules provide that a complaint that is filed with the EEOC in a state that has a fair employment agency will be forwarded to the state agency. State and local fair employment practices agencies which qualify under Title VII are called "FEP Agencies."96

If the state FEP agency has been evaluated for at least four years and found to have produced acceptable work according to EEOC standards, then it may qualify to certification as a "Certified Designated FEP Agency." The EEOC will accept the decisions made by the certified designated agency.97 If the state or local agency does not meet the standards set by the EEOC, it will be considered a "notice" agency, and the EEOC will provide it with notice of the EEOC's intentions with respect to cases the EEOC undertakes, but the EEOC will not defer to the agency.98

If the state has no investigatory agency or if the state law does not prohibit the activity that is the subject of the complaint and the activity falls within the authority of the EEOC, the EEOC will consider the complaint. For example, in one case Texas

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law prohibited an employer from discriminating on the basis of sex, but had no prohibition against retaliation against the employee for seeking to enforce her rights. Finding that Title VII protected an employee against retaliation for the employee's attempts to alleviate the discrimination against her and that state law would not protect the employee, the court found the EEOC was authorized to assume the duty of the investigation of the retaliation charge. When there is no deferral to the state fair employment practices agency and the EEOC assumes responsibility for the initial review of a complaint, that review will begin with an examination of the actions described in the complaint. The EEOC does not require precision in the complaint. In its rules, it states it will accept a "written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." The complaint is called a "charge," and EEOC rules require that the charge be served on the employer within 10 days of receipt by the EEOC. Charges must be in writing and must be signed and verified. The EEOC will review claims to determine the scope of its jurisdiction, that is, whether it has authority over the matters raised by the charge and over the persons named in the complaint. It then begins an investigation to determine whether there are reasons to believe the charge is true and, if so, whether the conduct is prohibited. In the course of this investigation, the EEOC likely will ask for written statements from the charging party and the person or persons charged. The investigators are not limited to those events reported in the charge. They are permitted to "investigate broadly and examine and copy documents related to dates of hire, job placements, promotions, seniority, wage rates and the like" but cannot go on "fishing expeditions" that go beyond the scope of the charge. The EEOC's investigation carries with it some important legal authority. In the scope of an investigation, the EEOC may direct that the charging party and those whose conduct is being complained about submit to "fact-finding" conferences, including face-to-face conferences. These conferences can identify areas where the facts are not in dispute, sort out issues likely to be involved in any formal proceeding, and probe the

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99 Nueces County Hosp. Dist. v. EEOC, 518 F.2d 895 (5th Cir. 1975).
100 Id. at 897-98; see Lee Modjeska, Handling Employment Discrimination Cases § 2.3 & n.30 (1980).
105 Id.
parties for the possibility of settlement. The investigators also have the authority to compel (by subpoena) the attendance of witnesses and the production of documents.

Even before the Commission has completed its investigation and before it concludes that there is cause to believe an unlawful employment practice has occurred or is occurring, the EEOC is permitted to encourage the parties to settle their differences through negotiations. Here, alternative dispute resolution (ADR) through confidential mediation may offer a cost-effective and private means to conclude the matter. If these efforts are rejected and the EEOC determines a reasonable basis exists to believe the charge is true, it may offer to conciliate the matter. Such conciliation effort is a requirement under the EEOC procedural rules.

If the negotiations and efforts at conciliation are not sufficient to resolve the disputes and if at least 180 days have passed since the charging party filed the complaint with the EEOC, the Commission will upon request issue a "right to sue" letter, provided the Commission determines it is probable it will not be able to complete its administrative processing of the complaint in a timely fashion. If the charged party is a government, governmental agency or political subdivision and the Commission has been unable to obtain voluntary compliance of the party, then the EEOC notifies the Attorney General and provides a recommendation to initiate action against the party or join in a suit filed on behalf of the charging party.

B. State Fair Employment Practices Laws

Although the procedures vary between the EEOC and state deferral agencies and from one state agency to the next, governmental responses to claims of sexual harassment will follow some common themes. In a deferral jurisdiction, an employee must seek a review of any sexual harassment complaint with the FEPR deferral agency before seeking relief on a claim under Title VII in state or federal court. If the complaint is filed with the federal EEOC and the state having jurisdiction over the complaint has its own


109 "Where the Commission determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion." 29 C.F.R. § 1601.24 (1995); see also CCH Employment Practices ¶ 1966 (1993).


112 See Appendix E for a compilation of these agencies. This step is not required if the agency is a "notice" agency. See 42 U.S.C. § 2000e-5 (1994); 29 C.F.R. § 1601.70 (1995).
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Equally comprehensive sexual harassment laws, the EEOC will defer its work pending review by the state or local FEP agency. The EEOC will forward the complaint to the appropriate state or local FEP agency.\textsuperscript{113}

C. Filing a Complaint

In addition to using the employer’s reporting procedures, the charging party reports her complaint to either the state fair employment practices agency or the federal EEOC. The complaint should be on the agency’s form. If that form is not available, the complaint should contain enough information to permit the investigation to begin—name(s) of the harasser or harassers, the nature of harassment, time and place of harassment, and the identities of witnesses to the harassing behavior. If the complaint filed with the EEOC and the employer is in a “deferral” state, then the EEOC will forward the complaint to the deferral state agency.

The complaint has to be filed with the EEOC within 180 days of the date the charging party experiences the discriminatory behavior or learns about it (not necessarily from the date the consequences of the behavior are felt). This time limit is 300 days for those jurisdictions that have state deferral agencies.\textsuperscript{114}

D. EEOC or State Agency Investigation

Agency staff will likely visit the employer’s facility. The employer should respond with care and within given timeframes to any written request for information or secure authorization for extensions to file written responses. The employer’s oral and written responses to the EEOC or state investigator may be used by the agency and may prove damaging to the employer if the responses are “off the cuff” or uninformed comments by those not trained to properly respond to the inquiries made by government regulators.

The employer should apprise legal counsel of the investigation and seek help in crafting responses to agency inquiries. Hyperbole aimed at discrediting the complainant (such as “she complains about everything!”) and attempts to minimize or rationalize the complained-of behavior may end up being shown to a jury if the case proceeds to litigation. This could impair the employer’s claim that it took the complaint seriously.

The employer should provide the agency with copies of the employer’s policies regarding sexual harassment and with evidence showing that the policies have been communicated to employees through orientation and training.


E. Informal Efforts To Resolve Complaints

There may be informal attempts by the agency, through a pre-investigation conference, an exchange of letters, or other informal action, to see if the employer can effectively resolve the complained-of behavior. EEOC-sponsored conciliation may be offered if the EEOC handles the investigation and finds the complaint to be well-founded. State agencies may also offer conciliation. Because Title VII is oriented toward ending discrimination, the EEOC may find that effective curative action by the employer negates an otherwise valid charge of discrimination. Thus, it may be to the employer’s advantage to seriously consider working with the agency toward a conciliated resolution.

The complainant can ask the EEOC for a “right to sue” letter. Once the complainant files a complaint with the EEOC, she cannot file a private lawsuit without first receiving the “right to sue” letter. If the EEOC has found that no harassment has been shown or if it has not completed its investigation within 180 days after receiving the complaint, then the complainant will be authorized to take her own steps toward privately seeking redress. While the EEOC itself has the power to sue an employer on behalf of a complainant, that power is rarely used. Instead, the complainant will likely turn to a private attorney to press her complaint in court (either under state law or Title VII or both, if the circumstances permit it). Once the matter leaves the agency or the EEOC and becomes a matter for the courts, the employer should anticipate that costs will mount rapidly.
Chapter 3

Sexual Harassment Claims Management

I. Introduction

One element that sets claims of sexual harassment apart from other allegations of civil rights violations is the *subjective* reaction of the alleged victim. A violation of Title VII is proved only if the conduct being complained of would offend a reasonable person *and* if it actually was perceived as offensive by the complaining worker.

For example, a female worker who joins in and enjoys sexual banter in the workplace may be subjected to conduct many others in her position would find extremely offensive. However, there would be no violation of Title VII because the worker was not offended by the behavior. In one case, the female employee was subjected to jokes centered around oral sex, had her head forcibly placed in the crotch of co-workers, was tickled, had a cattle prod with an electrical shock placed between her legs, was handcuffed to a toilet with her face pushed in the water and maced.¹

While the court found this behavior to be “repulsive,” no violation of Title VII was established. The complainant’s “enthusiastic receptiveness to sexually suggestive jokes and activities” led the court to conclude that “the language and sexually explicit jokes were used around plaintiff because of her personality rather than her sex.”²

The court’s ruling in this case however, may be the exception rather than the rule. As courts review cases involving a variety of forms of workplace misconduct, they are becoming increasingly aware of the damage that can be inflicted through such behavior and are alert to Title VII’s potential to protect against such damage. A recent decision from the same appellate court, *Carr v. Allison Gas Turbine Div., General*

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¹ Reed v. Shepard, 939 F.2d 484, 486 (7th Cir. 1991).
² Id. 491-92.
Motor Corp.,\textsuperscript{3} suggests that earlier uncertainty by courts no longer shields "good old boys" whose boorish sexual pranks create a hostile work environment for women.

In Curt, a female drill operator became apprenticed to work at a formerly all-male tinsmith shop. The men in the shop targeted the operator with derogatory sexual jokes, referred to her in pejorative sexist terms, hung nude pin-ups around the workshop and exposed their genitals to her at the worksite. General Motor's defense was that the operator used vulgar language and was therefore "just as responsible for any hostile sexual environment that consequently arose."	extsuperscript{4}

The court, rejecting General Motor's claims, found it hard to believe General Motors could argue the operator created the environment. "We have trouble imagining," wrote the court, "a situation in which male factory workers sexually harass a lone woman in self-defense as it were; yet that at root is General Motor's characterization of what happened here. It is incredible on the admitted facts."	extsuperscript{5} The court gave substantial weight to the fact that (unlike in the earlier case) this claimant made plain her dislike for the sexual banter and delinquency of her male co-workers. The environment plainly was tainted, and the court had little difficulty finding a violation of Title VII. The court was mindful of the challenges facing an employer when responding to sexual harassment claims, but unforgiving in its reaction to General Motor's indifference:

It is difficult for an employer to sort out charges and countercharges of harassment among feuding employees, but we are dealing here with a situation in which for years one of the nation's largest enterprises found itself helpless to respond effectively to an egregious campaign of sexual harassment directed at one woman. No reasonable person could imagine that General Motors was genuinely helpless, that it did all it reasonably could have done. The evidence is plain that it (or at least its gas turbine division) was unprepared to deal with problems of sexual harassment even when those problems were rubbed in its face, and also incapable of improvising a solution. Its efforts at investigation were lackluster, its disciplinary efforts nonexistent, its remedial efforts perfunctory. The U.S. Navy has been able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop.\textsuperscript{6}

The problem is a substantial one. An employer must be capable of monitoring the workplace, on its own initiative, to determine whether the work environment is impermissibly hostile. There is, as the court noted, a need to determine how workers perceive their environment.

Conduct that could be regarded as non-threatening and not hostile in one part of a worksite may be undeniably illegal in another similarly situated worksite. The critical

\textsuperscript{3} 32 F.2d 1007 (7th Cir. 1994).

\textsuperscript{4} Id. at 1011.

\textsuperscript{5} Id.

\textsuperscript{6} Id. at 1012.
Sexual Harassment Claims Management

difference between the two would be the presence of a worker who finds certain conduct offensive.

One court made this observation:

Accordingly, a proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her co-workers, and supervisors, the totality of the physical environment of the plaintiff’s work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff’s introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment. Thus, the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work environment and must be considered and evaluated on an ad hoc basis.7

If the “personality of the plaintiff” and the “prevailing work environment” are to be considered when deciding whether the environment is hostile under Title VII, then the employer is required to know its workplace well enough to be able to describe the environment to an outsider (like the EEOC investigator). The employer will need to be prepared to defend against claims that it is insensitive to the “personality” of the worker whose complaint brought the EEOC to the workplace.

The employer also must consider possible counterclaims that may be raised by the accused harasser. If the accuser has a personal grievance against the accused and acts in furtherance of the grievance, bringing animosity to the workplace that is unrelated to sexual harassment, the apparent victim may in fact be a wrong-doer in pursuit of an unlawful advantage. The employer needs to guard against the potential of creating or joining in the complainant’s tortuous conduct toward the accused harasser.

II. Employer Duties Owed to Alleged Target of Harassment

Title VII imposes a duty on employers both to guard against harassment and to take effective steps to “make the victim whole” when a violation of the Act has been shown.8 This obligation includes the duty to have policies (written or otherwise) that guard against a sexually hostile workplace and the duty to enforce those policies. Policies must provide for a remedy that is “reasonably calculated to end the harassment.”9 Courts will measure the adequacy of the employer’s response to claims of harassment

7 Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (emphasis added).
8 EEOC Policy Guidance on Issues of Sexual Harassment (Mar. 10, 1990), text accompanying n.38.
9 Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991).
by examining the employer’s ability to stop the harassment. Courts also will consider whether the employer’s policies will persuade other potential harassers not to engage in harassment.\textsuperscript{10}

III. Employer Duties Owed to Alleged Harasser

Any employer reaction to a claim of harassment must be met with sufficient awareness of the civil and private rights of the accused to protect the employer against claims of breaches of duties owed to the accused. Even though the employer is motivated only by concerns inspired by Title VII, the imprudent or poorly executed reaction to an employee’s untested claim against a co-worker or supervisor under Title VII poses a risk to the employer. If the employer rushes to judgment and concludes without investigation that the harassment charges are well-founded and the facts prove otherwise, the adverse consequences include the likelihood that the falsely accused employee will bitterly renounce and probably sue the employer. At a minimum, the employer has a duty to fairly investigate claims that would form the basis to discipline or terminate an employee.

IV. Civil Rights Act of 1991

Section 102 of the Civil Rights Act of 1991\textsuperscript{11} made some important changes in the remedies available to a worker who demonstrates a violation of Title VII. Like the Civil Rights Act of 1964 (which contains Title VII as we knew it until 1991), the latest act gives employers a set of rules under which the employer must operate. It offers no true “safe harbors,” where an employer can be sure it can escape liability from claims under Title VII. In some ways it significantly increases employer risk. Before the 1991 Act, successful Title VII claimants could not be paid for their pain and suffering (compensatory damages) nor could they pursue punitive damages (money over and above compensatory damages, assessed to deter future violations by the offender and to serve as an example to others not to violate the Act). Persons with Title VII claims could not present their claims to a jury because the relief available under Title VII was deemed “equitable,” not “legal” relief, and equitable relief is traditionally granted not by juries but by courts.\textsuperscript{12}

\textsuperscript{10} Id.


Under the 1991 Act, Title VII claimants may now present their claims to a jury and may recover punitive damages against the employer. Up to certain statutory thresholds, the employee also may recover money for her emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life. These remedies are prospective—they do not apply retroactively to cover pre-1991 violations of Title VII. Hostile environment harassment, however, generally is a single claim, rather than a number of separate and distinct causes of action; it typically spans weeks, months or years. As a result, harassment that began before the 1991 Act and continued after the passage of the Act would be subject to the 1991 provisions. Courts will permit a victim of both pre- and post-1991 Act harassment to recover compensatory or punitive damages only for post-enactment conduct that constitutes sexual harassment under Title VII.

A. Maximum Exposure under the Act

Risk managers should note that Title VII exposes the "negligent" employer-violator of Title VII to lower levels of financial liability than the employer found guilty of "conscious, purposeful discrimination" or one that acts with "malice, an evil motive, recklessness, or callous indifference" to federally protected rights. In addition, compensatory damages are not available to all victims of sexual harassment under Title VII, but only to those who can show intentional rather than merely negligent discrimination. Sound management practices, like those described in this work (including creating a written harassment policy and carrying out the terms of the policy) help demonstrate an employer's commitment to complying with Title VII. Common sense and the practical realities of running a business mandate that an employer take effective and swift remedial action once harassment is uncovered or run the risk that its inaction will be taken as intentional disregard for the protections of Title VII.

B. Compensatory Damages

Estimating an employer's exposure under Title VII is, unfortunately, more of an art than a science. There are some markers, however, that bear mentioning. In 1992


14 Landgraf v. UGI Film Prods., 114 S.Ct. 1403 (1994).

15 Mills (citing Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (11th Cir. 1989).

16 Id. at 985; Johnson v. Indepco, Inc., 846 F Supp. 670 (N.D. Ill 1994).


the Office of EEOC Legal Counsel issued its “Enforcement Guidance” of the changes to compensatory and punitive damages under the 1991 Civil Rights Act, giving some indication of what the EEOC expects significant in its assessment of employer exposure.\textsuperscript{10} The highlights of this Guidance include:

- The “caps” that limit how much a victim of harassment can recover for compensatory damages\textsuperscript{20} do not include front pay compensation for economic injury realized between the time of the judgment and the time when the plaintiff is likely to be able to secure employment having comparable pay and responsibilities to that lost as a result of the harassment), back pay, fringe benefits, and past out-of-pocket expenses (for example, moving expenses, job search expenses, physical therapy expenses and other quantifiable costs associated with the harassment). As a result, the risk to the employer is that it will pay both the compensatory cap and “make whole” remedies, such as back pay, out-of-pocket expenses and pre-judgment interest.\textsuperscript{21}

- The caps apply to each complaining party. If an employer has 1,000 employees, putting it in the category to the $300,000 cap for “future pecuniary losses” authorized under section 1981a(b), and a class action results in judgments in favor of ten complaining parties, the risk of future pecuniary losses is $3,000,000.\textsuperscript{22}

- The EEOC takes the position that front pay is not part of the cap. In a case where it is unlikely the employee will be able to return to gainful employment, the exposure substantially exceeds the statutory ceiling for compensatory damages\textsuperscript{23}

- There is no presumption of emotional harm. If a case goes to trial, the complainant must come forward with some manifestation of harm, although Harris v. Forklift Systems, Inc. makes it plain that Title VII does not require a showing that the harassing behavior seriously affected the plaintiff’s psychological well-being. The plaintiff who presents credible evidence of sleeplessness, anxiety, post-traumatic stress, humiliation, loss of self-esteem, ulcers, head-

\textsuperscript{10} EEOC Enforcement Guidance: Compensatory and Punitive Damages, supra note 17.

\textsuperscript{20} $50,000 for employers with 15 to 100 employees; $100,000 for employers with 101 to 200 employees; $200,000 for employers with 201 to 500 employees; and $300,000 for employers of more than 500 employees, where the employer is employed “in each of 20 or more calendar weeks in the current year or preceding calendar year” under 42 U.S.C. § 1981a(b)(3).


\textsuperscript{22} 42 U.S.C. § 1981a(b)(3); EEOC Enforcement Guidance: Compensatory and Punitive Damages, supra note 17.

\textsuperscript{23} EEOC Enforcement Guidance: Compensatory and Punitive Damages, supra note 17.

\textsuperscript{24} 114 S.Ct. 367 (1993)
aches and similar maladies like will meet her burden under this element of Title VII.\textsuperscript{25}

C. Punitive Damages

There is no presumption that punitive damages are appropriate, even where an employee proves sexual harassment took place. In order to command punitive damages a victim must demonstrate the employer acted with malice or "recklessness or callous indifference" to federally protected rights. The EEOC looks for several factors when determining whether punitive damages should be assessed:

- conduct that is "shocking or offends the conscience";\textsuperscript{26}
- the nature, extent and severity of harm to the victim(s),\textsuperscript{27} whether other conduct similar to that complained of has occurred and, if so, with what frequency;
- whether the employer tried to conceal the conduct or tried to retaliate against the complainant;\textsuperscript{28} and
- the attitudes of top management (as demonstrated in management’s interest in conducting a prompt and effective investigation of the complaint) and its efforts at disciplining those who violated Title VII.\textsuperscript{29}

When assessing the risks involved in litigating a Title VII claim (or a related claim under state fair employment laws or tort claims), employers with "deep pockets" must be particularly alert. For example, in 1993 a sexual harassment claim was proved against the California law firm of Baker & McKenzie, and punitive damages in excess of $3 million were awarded to a legal secretary who had worked there fewer than three months.\textsuperscript{30} According to jurors who sat on the panel, the wealth of the law firm played

\textsuperscript{25} EEOC ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES, supra note 17.

\textsuperscript{26} EEOC ENFORCEMENT GUIDANCE: COMPENSATORY AND PUNITIVE DAMAGES, supra note 17 (citing EEOC v. Gaddis, 733 F.2d 1313, 1380 (10th Cir. 1984)).


\textsuperscript{29} Id. citing Yarbrough v. Tower Oldsmobile, 789 F.2d 508, 514-15 (7th Cir. 1986) and Hunter v. Allis-Chalmers, 797 F.2d 1417, 1425 (7th Cir. 1986).

\textsuperscript{30} Weeks v. Baker & McKenzie, 66 Fair Empl. Prac. Cas. (BNA) 501, 1994 WL 774633 *4, *7 (Cal. Super. Ct. Nov. 28, 1994) (court ordered reduction of jury award to the sum of $3.5 million, "large by almost any standard and it is a full five percent of Baker’s net worth" plus plaintiff’s attorneys’ fees, after noting that “[a]fter the events which gave rise to this lawsuit, and before the commencement of trial, Baker substantially improved its approach to sexual harassment and introduced throughout its offices in California a program designed to prevent repetition of the kinds of events which occurred in this case").
a direct role in the size of the verdict. On the other hand, courts may reduce the judgment assessed against an employer if it is shown that the judgment, if paid, could threaten the stability of employee retirement funding.\textsuperscript{21}

In its assessment of employer liability for punitive damages, the EEOC will consider:

- the employer's assets and liabilities;
- the liquidity of the company's resources;
- the employer's ability to borrow;
- the employer's projected earnings;
- the resale value of the business, and
- any affiliation the company may have with a larger company.\textsuperscript{32}

The following cases illustrate other factors that may contribute to granting or rejecting a claim for punitive damages. In \textit{Smith v. Wade},\textsuperscript{33} even though the employer did not know about the hostile environment or quid pro quo harassment in the workplace—but should have, in the minds of the jury—punitive damages were assessed. In a California case, knowledge imputed to the employer that there were “significant problems with the under-representation of women in management, its failure to implement the recommendation of the Human Resources Director to promulgate formal job descriptions and promotion criteria . . . and its abandonment of two affirmative action programs despite continued evidence of a gross gender imbalance” were sufficient to permit a jury to consider punitive damages.\textsuperscript{34} Proof of post-traumatic stress syndrome associated with sexual harassment supported an award of compensatory damages where the court observed that “many damages are difficult to quantify and should be left to the jury’s discretion.”\textsuperscript{35} These cases are a warning to employers that the valuation of damages under Title VII is in large measure subjective and does not lend itself to precise quantification or measurement.\textsuperscript{36}

\textsuperscript{21} Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).
\textsuperscript{32} \textit{Id.; see also} Seymour, \textit{supra} note 28 at 48-49.
\textsuperscript{36} In the suit against Baker & McKenzie, the firm stipulated its net profits in 1993 were $65 million and there was $68 million in contributed capital. The jury’s punitive damage award was, as one juror put it, a “tithing,” taken from the firm’s capital base.
D. Attorneys’ Fees and Expert Witness Fees

Title VII allows for the prevailing plaintiff in a sexual harassment action to be reimbursed for expert witness’ fees and attorneys’ fees. If the prevailing party is the defendant, he may recover his fees only if the court makes a finding that the claim was “frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so . . . [or] if a plaintiff is found to have brought or continued such a claim in bad faith.”

A complainant can raise several issues, lose on some, and still be a “prevailing party.” The complainant need succeed only “on any significant issue in litigation which achieves some of the benefit sought in bringing the suit.”

E. Damages Against the Harasser

Title VII is directed to preventing workplace harassment; therefore, its sanctions are specifically directed not at employees, but at employers. Title VII does not explicitly permit courts to impose liability on individual supervisors or co-workers unless they meet the definition of “employer” in Title VII. Title VII includes “agents” in the definition of “employer,” permitting suit against employees only in their official capacity as agents for the employer. Until recently, most courts have held that supervisors are merely representatives of their employers, and as a result a Title VII action “creates a liability for the entity, and not for the individual.”

Harassers may face increased exposure under Title VII as amended by the Civil Rights Act of 1991. Personal liability of harassers who intentionally discriminate may be within the expanded rights of recovery found in the 1991 Act, leading more courts to permit damage awards against the individual harasser(s) under Title VII.

There is at least one reported case where, under a state fair employment practices law, the supervisor who sexually harassed a subordinate was held personally liable.

40 42 U.S.C. § 2000e(b), see, e.g., Grant v. Lone Star Steel Co. BL, 21 F.3d 649, 653 (3rd Cir. 1994).
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(that is, not as an employee but as a “person” under the FEP law). Should this reflect a trend, employers should be rethinking whether they can and should continue to provide legal representation for employees accused of harassment, if to do so might produce a conflict of interests of the employer and the accused employee. Employers also may wish to consider notifying employees of the possibility of personal liability under Title VII for those who engage in harassing behavior.

There is less ambiguity regarding personal liability for claims brought under Title IX (the Educational Amendments of 1972) and Section 1983. For example, when a university employee asked a female college student if she would sleep with him, the court held that an action could be raised against the official both in his official capacity under Title IX and in his personal capacity under Section 1983.

V. Remedies Beyond Title VII

Because sexual harassment includes a wide range of antisocial behavior, there is an equally wide array of legal responses to which a victim may turn for relief. As states develop criminal laws to more precisely define the crime of stalking, it is likely that the harasser will face increased criminal sanctions arising out of harassing behavior. Stalking joins an already crowded field of criminally punishable and antisocial behavioral that includes criminal assault (threatening unwelcome contact), battery (making unwelcome contact), sexual imposition, sexual battery and rape. To the extent an employer aids or is complicit in the harasser’s criminal behavior, it runs the risk of indictment for its criminal liability as accessory or co-conspirator. On the other hand, the false accuser runs the risk that by knowingly filing a false claim with public officials, she too may inspire the filing of criminal charges for intentionally misreporting the harassment. She also may face perjury charges if false statements were made in the course of a judicial proceeding.

Tort claims, discussed in greater detail in chapter 4, may be raised against the employer, the accused harasser and the party making the accusation of harassment. Generally there are no caps or maximum amounts an injured party may recover under tort claim theories, and claims made under Title VII can co-exist with those made under a tort claim, increasing the employer’s exposure. However, there is generally no provision under tort claims laws for injunctive relief (such as requiring the employer to reinstate the wrongfully terminated employee).

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Sexual Harassment Claims Management

Tort claims litigation is an area that has caught the attention of federal and state legislators who may perceive the tort claim system as little more than a form of legalized blackmail. Thus, employers should pay attention to legislative reforms that propose limits on compensatory or punitive damages that can be paid under existing tort claims.

In addition to seeking tort claim remedies and remedies under Title VII and the other civil rights sections (42 U.S.C. §§ 1983, 1985 and 1988), victims of harassment have pursued interesting and not widely known avenues, including at least one prosecution under the federal Racketeer Influenced and Corrupt Organizations Act (RICO).

A female union member alleged she was sexually harassed, coerced by her union to buy raffle tickets, threatened by union workers, and then forced out of her job and blacklisted by her employer. The court found the concerted activity of the union and the employer, coupled with gender-based discrimination, was sufficient to support a claim under RICO against both the employer and the union.

More recently, however, efforts by victims of harassment to use RICO against employers have been unsuccessful. In one case, the court considered the requirement in RICO prosecutions that the misconduct be of a continuing nature. The plaintiff complained of having been forced to sexually gratify her supervisor through means she characterized as “extortionate” to meet the requirement in RICO that there be a “pattern of racketeering activity.” The court found that even though the evidence demonstrated the supervisor engaged in a course of sexually abusive behavior over a nine-month period, the conduct “presumably ended when plaintiff was discharged” so that the plaintiff could not show a “pattern” of racketeering activity.

Both union and non-union workers can invoke certain parts of the National Labor Relations Act (NLRA) as protection against sexual harassment. It would be considered protected “concerted employee activity” for workers to collectively protest sexual harassment by a manager. Protection under the NLRA carries with it remedies including restraint against continuing the unlawful activity and affirmative action including reinstatement and backpay.


52 Id. at 865.


VI. Limiting Employer Damages

As mentioned above, Title VII and most tort claim theories permit a worker who has been injured by sexual harassment in the workplace to seek compensation for back pay and in appropriate cases for prospective loss of earning potential (front pay). Title VII limits the accrual of back pay to not more than two years prior to the filing of a charge with the EEOC.\textsuperscript{56} The following factors may limit an employer’s liability to pay damages.

A. Backpay and Other ‘Make Whole’ Remedies

The employer (perhaps through counsel in pre-trial discovery) should determine whether the accusing employee left the workplace for reasons having nothing to do with the harassing conduct. A routine exit interview may serve these purposes. When an accusing employee leaves, he or she may be interested in expressing the reasons for the departure. An exit interview may bring out other reasons for leaving, such as the desire to return to school, start a career and other reasons having nothing to do with job dissatisfaction or hostile work conditions.

It may be that the employer can show that the accusing employee would have been laid off or fired for cause not related to any discriminatory conduct by the employer. An accusing employee whose “for cause” termination is unsuccessfully contested at an unemployment compensation hearing may find herself barred from seeking reinstatement or recovering back pay under Title VII. Even though the employee can still raise the claim that the firing was discriminatory, her remedies may be limited by an adverse finding in the unemployment hearing.\textsuperscript{57}

B. Employee Unable To Do Job for Reasons Not Related to Harassment

Consider the case of the complaining employee who quits, claiming to have been “constructively fired” as a result of having to endure sexual harassment. If the employer offers the employee her job back and demonstrates it has taken measures likely to cure the complained-of environment, what is the result if the employee refuses to return? First, the threat of having to pay back pay from the time the position is offered should abate.\textsuperscript{58} The same result should follow if the employee fails to use “reasonable diligence” to minimize (or mitigate) the damage she suffers from the harassing behavior.\textsuperscript{59}

\textsuperscript{56} 42 U.S.C. § 2000e(5)(g) (1994).
\textsuperscript{57} Harper v. Godfrey Co., 66 Fair Empl. Prac. Cas. (BNA) 1258 (7th Cir. 1995).
\textsuperscript{58} Ford Motor Co. v. EEOC, 458 U.S. 219 (1982).
\textsuperscript{59} 42 U.S.C. § 2000e(5)(g); EEOC ENFORCEMENT GUIDANCE; COMPENSATORY AND PUNITIVE DAMAGES, supra note 17.
Sexual Harassment Claims Management

What about the employer who has legitimate reasons for firing an employee, and the employee learns of this and decides to quit before being fired, claiming the work environment was impermissibly hostile so that she was "constructively discharged." Courts have held that the back-pay component of a Title VII claim (that amount payable as compensation from the time of the loss of earnings to the time of redress in court or through settlement) is properly charged to the employer, even if the employer acted in "good faith" or had both legitimate and illegitimate reasons for the firing. If the employer can show it had grounds to support firing the employee, it can demonstrate it should not have to reinstate the employee nor pay front pay. This is true even when the employer learns about the grounds after it fired the employee.

C. Compensatory Damages

Recovery for "nonpecuniary losses" such as emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional reputation, injury to character and reputation, injury to credit standing, and loss of health, collectively, should not be presumed. To recover for such losses, the victim must bring forward evidence of the losses and be prepared to show the harassing behavior caused the losses.

D. Punitive Damages

Title VII does not permit punitive damages against government agencies, but it has been construed to permit punitive damages against public officials acting in their personal capacities. The argument also has been made that to the extent some federal agencies already have permitted themselves to "sue and be sued," they too may be amenable to punitive damage awards.

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60 See e.g., Cortes v. Maxus Exploration Co., 977 F.2d 195 (5th Cir. 1992) (constructive discharge based on sexual harassment warranted back-pay award).


64 Gore v. Turner, 553 F.2d 159, 164 (5th Cir. 1977); EEOC ENFORCEMENT GUIDANCE COMPENSATORY AND PUNITIVE DAMAGES, supra, note 17.


Preventing and Responding to Workplace Sexual Harassment

A poor defendant may well be required to pay less than a rich one who committed the same wrong, because, as the EEOC puts it, the amount of punitive damages should "sting" but not "destroy" the defendant.62

A long-term, broadly felt discriminatory practice "suggests an official policy of discrimination as opposed to the work of a renegade supervisor,"63 and thus is evidence of malice or reckless indifference justifying punitive damages. Conversely, an employer may avoid punitive damages altogether if it marshals a swift and effective response ending the harassment and deterring future harassment.64

E. Effective Risk Reduction

With the foregoing exception noted, it is generally true that employers can reduce their risks of punitive damages (and can in some cases avoid a finding of violation of Title VII entirely) by taking appropriate action after the harassment has occurred. Responses that have exonerated employers include:

- commencing an investigation into the complaint immediately after notice of the complaint and completing the investigation within one week;70
- insulating the victim from further contact with the alleged harasser, even during the investigation period;71 and
- producing for the EEOC investigators a pre-existing written policy against sexual harassment;72

In addition, if the harassing behavior actually does end, it may suffice to reprimand the harasser,73 at least if the harasser is a co-worker and not a supervisor and his harassing behavior could not be considered to be carrying out the policies of the employer.74

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63 EEOC Enforcement Guidance: Compensatory and Punitive Damages, supra note 17 (quoting Williamson v. Handy Button Mach. Co., 817 F.2d 1290, 1296 (7th Cir. 1987)).
64 See e.g., Bouton v. BMW of N. Am., 29 F.3d 103, 110 (3d Cir. 1994) (in a hostile environment case, "an employer's effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment").
70 Nash v. Electropace Sys., 9 F.3d 401 (5th Cir. 1993).
71 Id.
72 Id.
73 Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989).
74 Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).
Chapter 4

Protections Against False Claims of Harassment

I. Introduction

When an employer is presented with a claim of harassment, it is obliged to investigate the claim. The scope of the investigation will vary depending on whether the accused harasser is a supervisor, co-worker or third party (such as a customer or vendor). An employer needs to be cautious in its response, however, because missteps in the investigation of a harassment claim pose significant risks to the employer, whether or not the accusations are well founded.

Given the nature of sexual harassment claims, there is always the danger that an employer will be drawn into preexisting disputes between the accuser and accused—disputes with no business justification but which are the product of interpersonal animosity not connected to the workplace. An employer must therefore craft its inquiry to ferret out any factual basis supporting (or rebutting) the accuser’s claims and to protect itself from claims made by the accused against the employer for breaches of duties owed to the accused.

The claim most likely to arise upon a showing that harassment took place is one made by the accused harasser in reaction to discipline imposed against him. When the accused is fired, demoted, transferred or given corrective counseling that adversely affects his employment, the employer can anticipate angry and aggressive protests.

When disciplining an employee upon a charge of sexual harassment, an employer will likely have to abide by pre-existing procedural rules found in collective bargaining.

agreements, public employment statutes or employee policy manuals. Further, there has been sufficient erosion to the employment at will doctrine to suggest that even in the absence of statutes, contract clauses or express written rules, courts will impose on employers a minimum duty to fairly investigate a claim of harassment before accepting the claim as true and disciplining an employee based on the claim.\(^2\)

II. Just Cause for Discipline

When the accused is either a supervisor or an employee (and not a third party), the duties owed by the employer are likely to be expressly articulated in rules known by all involved. The employee covered by a collective bargaining agreement will likely be protected by language in the agreement providing that he will not be disciplined without "just cause" or "good cause."\(^3\) Even the rare collective bargaining agreement that does not expressly contain such a clause will likely be construed to imply a term of good cause, particularly when the sanction imposed is termination of the accused harasser.\(^4\)

One often-cited arbitrator offers these seven steps to describe the duty owed under a just cause determination.\(^5\) He advises that a "no" answer to any of the questions suggests that just cause for discipline does not exist:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operations of the company's business and (b) the performance that the company might properly expect of the employee?

3. Did the company, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

\(^2\) Note: The Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It, 44 HASTINGS L.J. 399 (1993).

\(^3\) LOUIS V. IMUNDO, EMPLOYEE DISCIPLINE: HOW TO DO IT RIGHT, ch. 3 (1985).

\(^4\) See FOOD & COMMERCIAL WORKERS LOCAL 634 v. GOLD STAR SAUSAGE CO., 487 F. Supp. 596, 600 (D. Colo. 1980) ("If the [employer] had the power to fire employees at will, the seniority provisions and other benefits under the contract would be meaningless. Job security, a fundamental aspect of collective bargaining agreements, would be non-existent. By adhering to these principles, the arbitrator could reasonably infer that a just cause restriction was enmeshed in the fabric of the Agreement.").

6. Has the company applied its rules, orders and penalties to all employees even-handedly and without discrimination?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?6

A. Just Cause in the Sexual Harassment Context

In an investigation into alleged sexual harassment by a supervisor against an employee, where the supervisor has the protection of a collective bargaining agreement and its just cause provision, the investigation would include having management’s investigative team question the accuser and the accused. The investigation must produce and confirm sufficient details to warrant pursuing the accused for harassment or the accuser for filing a false claim, or some variant course of action based on the strength of the evidence brought forward.

When an investigation is complete and produces a disciplinary charge against an employee based on a sexual harassment claim, an arbitrator examining the course of an employee’s discipline and applying the seven factors would look to see if the discipline in question was founded on sound business principles. To this end, the arbitrator would first examine whether the company has a clear policy prohibiting sexual harassment and has expressed that policy to employees and to the accused in particular. Either by the nature of the conduct or by the actions of the charging party, there must be some showing that the accused knew or should have known his conduct was offensive or unwelcome and violated company rules. Second, keeping in mind that Title VII and most state fair employment practices laws prohibit sexual harassment, the arbitrator would reasonably conclude that a well-developed anti-harassment policy is “reasonably related to the orderly, efficient and safe operations of the company’s business.” Third, the arbitrator, like the EEOC, would have an interest in discovering how the employer conducted the investigation that led to the discipline,7 and fourth, whether that process was fair to the accused. Fifth, discipline that is based on uncorroborated evidence might well satisfy the EEOC,8 but may nonetheless fail to constitute “substantial evidence or proof” of wrongdoing, jeopardizing the employer’s disciplinary action. Sixth, if harassment claims are a relatively recent phenomenon in the workplace, the arbitrator will look for employer efforts to enforce anti-harassment policies equally

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7 EEOC POLICY GUIDANCE ON ISSUES OF SEXUAL HARASSMENT, § 4(B) (Mar. 19, 1990).

8 See id. at n. 18 (overruling Commission Decision No. 82-13 EEOC Dec (CCH) (1983), which held the “bare assertion” of sexual harassment “cannot stand without some factual support” and replaces that holding with a finding that the Commission may make a cause finding based solely on a reasoned decision to credit the charging party’s testimony).
and fairly. Finally, when violations are proved, the arbitrator would expect some demonstration that the discipline imposed is rationally related to the offense charged.

III. Public Employees and Due Process Laws

The public employee accused of harassment has rights that are distinctly different from those afforded to the employee protected exclusively by a collective bargaining agreement or one subject to employment at will. Public sector employers must afford their employees due process rights under the Fourteenth Amendment of the United States Constitution. In the absence of some recognized form of state action, private sector employees are not entitled to these protections (because the constitutional powers are limits not on private power but on actions of the state). 9

A. Cleveland Board of Education v. Loudermill

The tenured public sector employee 10 thus is entitled to due process prior to deprivation of what has come to be recognized as a property right in continued employment enjoyed by the public employee. The standard is set forth in Cleveland Board of Education v. Loudermill:

[An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity for hearing appropriate to the nature of the case. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story. . . . To require more than this prior to termination would intrude to an unwarranted extent on the government’s interest in quickly removing an unsatisfactory employee. 11

Widely recognized as articulating a due process right to continued employment, Loudermill and cases following it have imposed constitutional burdens on the public sector employer not matched in the private sector. 12

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9 “State action” in this context generally means action by any level of government, from local to national. See generally Lawrence H. Tribe, American Constitutional Law ch. 18 (2d ed. 1988).

10 In this context, “tenured” public service is service beyond the probationary period. See Pirola v. Coleman, 25 F.3d 1098 (U.S. App. D.C. 1995) (finding probationary employee has no legitimate claim of entitlement to continued employment).


12 See Lowell D. Howard, Jr., Case Comment, Cleveland Board of Education v. Loudermill: Procedural Due Process Protection for Public Employees, 47 Ohio St. L.J. 1115 (1986); Robert F. Maslan, Jr., Note, Bias and the Loudermill Hearing: Due Process or Lip Service to Federal Law?, 57 Fordham L. Rev. 1093 (1989); Clements v. Airport Auth. of Washoe County, 69 F.3d 321, 331-32 (1995) (“It is well settled that the ‘root requirement’ of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.”) (citing Loudermill v. Cleveland Bd. of Educ., 470 U.S. 532 (1985)).
Under the Loudermilk standard, the employer satisfies its duty when it incorporates into the investigation process an opportunity for the accused harasser to respond to charges before discipline is imposed.\textsuperscript{13}

\section*{B. Civil Service Reform Act of 1978}

The Civil Service Reform Act of 1978\textsuperscript{14} permits removal of a federal civil servant "only for such cause as will promote the efficiency of the service."\textsuperscript{15} When called upon to describe the protections afforded by these provisions, courts have held that in every case of adverse action against a federal civil servant the agency must establish (1) that employee misconduct has, in fact, occurred, and (2) that disciplinary reaction taken against the employee will promote efficiency of service.\textsuperscript{16}

\section*{C. Liberty and Privacy Rights of the Accused}

Public employers must act so as not to deprive employees of rights associated with the liberty interests protected under the Fourteenth Amendment.\textsuperscript{17} Action that forecloses an employee's other employment opportunities and that is based on both false and stigmatizing information may be challenged by the public sector employee.\textsuperscript{18}

\subsection*{1. Off-Duty Behavior}

One noteworthy application of the Fourteenth Amendment interest in liberty is the right to privacy.\textsuperscript{19} The accused harasser may raise a claim that any investigation into his sexual affairs constitutes an invasion of his Constitutionally protected right to privacy.\textsuperscript{20} Disciplining public sector employees for off duty behavior, including consensual sexual relationships between employees that sour but do not otherwise give rise to valid sexual harassment claims, exposes the public employer to a claim that the

\begin{footnotesize}
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\item\textsuperscript{13} McDaniels v. Delaware County Community College, 1994 U.S. Dist. LEXIS 4916 (E.D. Pa. 1994).
\item\textsuperscript{14} 5 U.S.C. §§ 7501-43 (1982 & Supp. IV).
\item\textsuperscript{15} 5 U.S.C. § 7513(a) (1994).
\item\textsuperscript{17} Meyer v. Nebraska, 262 U.S. 390 (1923).
\item\textsuperscript{19} Roe v. Wade, 410 U.S. 113, 152-53 (1973).
\item\textsuperscript{20} Kurt H. Decker, Privacy Rights in the Workplace, 7:30-7:32 (1994).
\end{itemize}
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employee’s interests in sexually pursuing a co-worker are within the “zone of privacy” that the Supreme Court has deemed “a fundamental right” under the First, Fourth, Fifth, Ninth and Fourteenth Amendments.21

D. First Amendment Protections

Also distinguishing public from private employees are the protections afforded to the former under the First Amendment rights to free speech and association.22 Title VII clearly establishes the employer’s duty to provide a workplace free from harassment, including sexist comments from co-workers and supervisors. Is an employee who expresses sexist attitudes protected from “state action” by an employer under the guise that the lewd comments, Penthouse pinups or scatological graffiti is protected speech?

A public employer will be expected to proceed with great care when taking disciplinary action in response to conduct that falls within the ambit of the First Amendment.23 One court held that content-based policies prohibiting possession and private reading of sexually oriented magazines such as Playboy and Penthouse violated First Amendment protections to which firefighters were entitled.24

Consider the balancing act a public sector employer must perform when an employee expresses an opinion about sexual harassment issues and gender-related issues in an office newsletter. In one reported case, the writer was a male police officer writing under the name “R.U. Withmi,” and he wrote a column in a police association newsletter.25 His misogynistic columns baited females on the police force by berating all women for perceived shortcomings, from their appearance (“I was surprised to think they were also training some good lookin’ K 9s up there but I was told those were the female recruits!”) to their slight stature (“We had a helluva BS session at the shift meeting . . . regarding women in combat . . . Physically, the police broads just don’t get it.”)26 Finding insufficient evidence of a resulting hostile work environment, the court avoided balancing the parties’ competing interest:

Because we have concluded that insufficient evidence supports DeAngelis’ claim of a sexually harassing work environment, we do not reach the difficult question


23 Waters v. Churchill, 114 S. Ct. 1878 (1994) (in an action under 42 U.S.C. § 1983, not a sexual harassment case, employee alleges she was fired for engaging in protected speech on a matter of public concern, summary judgment for the employer was reversed in part because plaintiff had produced enough evidence to create fact issue as to what motivated the employer to fire the employee).


25 DeAngelis v. El Paso Municipal Police Officers Ass’n, 51 F.3d 591 (5th Cir. 1995).

26 Id. at 596.
whether Title VII may be violated by expressions of opinion published in R.U. Within columns in the Association’s newsletter. Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech. Whether such applications of Title VII are necessarily unconstitutional has not yet been fully explored.  

The court’s suggestion is that Title VII’s restrictions on “pure expression” must yield to the freedoms required under the First Amendment. This interpretation takes issue with the Supreme Court’s decision in R.A.V. v. City of St. Paul, Minnesota, 28 where the court found that sexually derogatory “fighting words,” among other words, may produce a violation of Title VII’s general prohibition against sexual discrimination in employment practices. “Where the government does not target conduct on the basis of its expressive content,” the Court wrote, “acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.” 29

Not all speech having sexual connotations will fall within the scope of Title VII. In one case involving the postal service, the court considered the plight of a male who was taunted, ostracized and beaten by his co-workers because of their belief that he was a homosexual. 30 In denying relief under Title VII, the court held that “[e]mployers or co-workers can still make the workplace unpleasant based on political belief . . ., college attended . . ., eating practices . . ., or rooting for particular sports teams . . .” 31 Finding that homosexuality is “not an impermissible criteria on which to discriminate with regard to terms and conditions of employment,” the court denied relief under Title VII. 32

E. The Academic Forum and Title VII

In a case arising in the context of higher education, a public university’s policy against sexual harassment was not violated by a professor’s use of sexually suggestive definitions and metaphors in class lectures. The court balanced the students’ rights to be free of such harassment against the professor’s First Amendment rights, and found in favor of the professor. 33 The interests in preserving academic freedom were balanced

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27 Id. (citations omitted).
29 Id. at 389.
30 Dillon v. Frank, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992) (not designated for publication, reported as Table case, 952 F.2d 403 (6th Cir. 1992)).
31 Id. at *23.
32 Id. at *22.
against interests protecting students against hearing harassing or offensive speech and found to be superior, justifying a preliminary injunction in favor of the professor’s use of such speech.\textsuperscript{34}

\section*{F. First Amendment Rights to Association Versus No Dating Rules}

Anti-harassment provisions of a public employer’s work rules may include prohibitions against fraternization between members of the same uniformed departments, such as a “no dating” rule. Under the First Amendment,\textsuperscript{35} courts have required that such restrictions “must withstand exacting scrutiny and may not be justified on a showing of a mere legitimate state interest.”\textsuperscript{36} It is reasonable, however, to expect courts to uphold restrictions against fraternization when these restrictions are shown to be needed to ensure high morale and internal discipline. In police departments, for example, the nature of relations between members of the workforce and safety concerns support the restrictions on association among the ranks. Limitations on First Amendment rights to association and to privacy in off-duty dating within the ranks have been upheld over Constitutional challenges.\textsuperscript{37}

In one case, a couple working in a police department challenged the department’s rule prohibiting relatives of city employees in supervisory positions from working in the same department.\textsuperscript{38} The two were told that if they married, the less-senior of the two would have to leave the police department. Rather than lose her job, the less-senior employee brought suit (and remained engaged but unmarried for the four years required for the suit to run its course).\textsuperscript{39}

The court found no constitutional violation, holding that the rule was a reasonable attempt to achieve a legitimate government interest. The rule prevented supervisory employees from having to exercise their discretionary workplace powers over relatives. The court found this was rationally related to the city’s goal of avoiding conflicts between work and family obligations, reducing favoritism and, by reducing interoffice dating, decreasing the likelihood of sexual harassment.\textsuperscript{40}

\begin{flushleft}
\textsuperscript{34} \textit{Id.}
\textsuperscript{37} McMullen v. Carson, 754 F.2d 936, 939-40 (D.C. Cir. 1984).
\textsuperscript{38} Parks v. City of Warner Robins, Ga., 43 F.3d 609 (11th Cir. 1995).
\textsuperscript{39} \textit{Id.} at 613-14.
\textsuperscript{40} \textit{Id.} at 615.
\end{flushleft}
Along the same lines, the privacy interests associated with sexual orientation issues continue to be pressed, particularly in the military. The “don’t ask, don’t tell” policies restricting the First Amendment rights of military personnel continue to serve as the basis for litigation.\textsuperscript{41}

IV. Rights of the At-Will Employee

In its simplest form, the modern American employment relationship is one that can be dissolved at any time by either the employee or the employer, with or without cause for the termination. Management rights under such at-will employment permit an employer to swiftly react to disruptions in the workforce by removing the source of the disruption, with or without cause having been shown justifying the removal.

Employers have the grave responsibility to guard against employees engaging in harassing behavior that would create a hostile work environment. The power to promptly remove a known or suspected harasser is one of management’s more important tools. Take the example of the employee who is not hired under an employment contract or covered by a collective bargaining agreement and is not in the public sector. In a jurisdiction recognizing the presumption that such an employee is an at-will employee, an employer should be able to summarily fire the employee for good cause or no cause at all.

For better or worse, however, the range of circumstances in which an employer may wholly rely on the powers attendant to an at-will relationship are significantly limited both by statutes and the judge based decisions found in each state’s common law.\textsuperscript{42} Even where there is no employment contract and even where an employment contract expressly provides that the relationship shall be terminable at the discretion of the employer or the employee, the workplace is subject to federal, state and local laws limiting an employer’s ability to maintain a proper workforce.

V. Considering the Totality of the Accused’s Circumstances Before Imposing Discipline

Given the demands imposed upon employers by Title VII and most state fair employment practices laws, substantiated complaints of harassment should justify an employer’s summary decision to fire the accused employee. The employer, however, cannot safely take such summary action without first considering the totality of circumstances pertinent to the accused employee’s employment. If the circumstances would

\textsuperscript{41} Able v. United States, 44 F.3d 128 (2d Cir. 1995).

\textsuperscript{42} Marvin Hill, Jr. & Anthony V. Sinicrope, Management Rights, ch. 4 (1986).
permit the accused harasser to assert rights arising under statutes protecting certain employee behavior or rights recognized in prior court decisions or judge-made law recognizing certain employment protections, then the employer's powers are limited.

A. Competing Statutory Protections

Federal labor laws protect the accused if his taunting of a female supervisor, though sexist in nature, was not sexual harassment but was instead part of the harasser's right to engage in the organizational or bargaining activities that are a part of the collective bargaining process. The employer's task is to examine the conduct being complained of and determine whether it fits within the scope of activities protected under state and federal collective bargaining laws.

Suppose the accused was employed in a workforce that has long been all-male, and he has been uniting representation to keep women out of the workforce. The employee has been harassing the female manager and the manager has actively disparaged the union and tried to prevent the employee from organizing a union. The employer, in attempting to terminate the employee, risks a charge that disciplining the at-will employee constitutes a violation of Section 8(a)(1) of the Labor Management Relations Act of 1947. That provision protects the employee's right "to self-organization, to form, join, or assist labor organizations, to bargaining collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It applies to employees not presently covered by a collective bargaining agreement (even at-will employees).

In another hypothetical situation, the employer routinely ignores complaints of harassment, with the exception of cases where the complainant is a white female and the accused is a black male. There is no at-will authority justifying termination when the employer swiftly removes an accused employee but does so only when such employee is a member of a class protected by Title VII. Rather, if the employer's policies have a "disparate impact" on minorities and those policies operate discriminatorily against, for example, African-Americans, then the employer's harassment prevention policies will not protect the employer against claims of discrimination raised by the accused harasser.


44 29 U.S.C. § 157 (1980), Wilson Trophy Co v. NLRB, 989 F.2d 1502 (8th Cir.1993) (non-union employees as well as union employees share the right to engage in concerted activity under § 7 of the Taft-Hartley Act)

B. Common-Law Considerations Applicable to Federal Law Protections

Beyond the defined scope of state and federal employment statutes, employers must be mindful of the interpretations given by courts of their jurisdiction to common law (or judge-made law) concepts controlling the workplace. For example, in one case a plaintiff filed a complaint that she was sexually harassed and had been asked to trade sexual favors for preferential job treatment. Having raised her complaint after the time permitted for doing so under Title VII, she relied on a decision of the Arkansas Supreme Court which recognized an exception to the at-will rule that otherwise controls the work relationships in that state.\textsuperscript{46} The state supreme court was willing to find "an implied term of every employment contract that neither party be required to do what the law forbids."\textsuperscript{47} In effect, the employer was obliged to provide the employee with protections co-extensive with Title VII, even though the employee did not conform to the time standards imposed by that Act and was barred from suing under Title VII. Under this judge-made law, an employer's failure to abide by Title VII's federally mandated protections would fully expose the employer to state-law remedies, even though the employee was time-barred from using federal law to redress the wrongs.

VI. Tort Claims Raised by the Falsely Accused

All legal duties have to do with expectations. Contracts help clarify the expectations of two or more parties. If a party acts in a way that does not conform to the expectations then the contract typically will serve as a basis for courts to grant some form of relief. Torts are similar to contracts in two ways: they reflect the expectations of parties and provide a means for courts to grant some form of relief. The difference is that society (sometimes the legislatures and sometimes the courts) announces what the social expectation is in a given relationship.

For example, if a supervisor deliberately strikes a subordinate, society's rules of civil behavior grant to the employee a way of seeking redress for the injuries inflicted by the supervisor. There also may be further ramifications, as where criminal sanctions may be imposed for behavior society finds unacceptable. Tort remedies exist to compensate the injured party for losses suffered by the wrongdoer, and create a financial incentive for those accused of harassment to sue their accuser and their employer for injuries sustained from the false claim of harassment.

It is hard to conceive of a set of circumstances more complicated for an employer than that arising when one employee accuses a supervisor or co-worker of sexual

\textsuperscript{46} Lucas v. Brown & Root, Inc, 736 F.2d 1202 (8th Cir.1984).

\textsuperscript{47} Id. at 1205.
harassment. If the accusations are true, the employer is obligated to effectively end the harassment and preserve the workplace against such hostility. If the accusations are false, the employer may unintentionally bring ruin to the good name of the accused and may unwittingly advance the improper agenda of the charging party.

In addition to being placed in this awkward position, the employer faces almost certain litigation by the falsely accused harasser, who may try to hold the employer liable for its role in publishing and broadcasting the false charges. Beyond the rights and protections afforded the wrongly accused employee in statutes and under contract law, courts are recognizing a broad array of tort claims against an employer that are available to the person accused of sexual harassment.

In a 1995 case, one state supreme court affirmed a jury’s award of more than $150,000 in damages against the subordinate who claimed her supervisor sexually harassed her.\(^a\) It is a remarkable case, if for no reason other than its apparent effort to make a point of principle rather than to recover money.

The human resources director of a Virginia prison wrote a memorandum to the warden accusing him of sexually harassing her in the course of his job evaluations and critiques of her work. After the memorandum reached the warden, he followed institutional procedure and reported the claim to the director of prisons. Upon investigation the warden was fired and later permitted to return at a lower paying position. Saying that he refused to be “blackmailed” by the accusations, the warden sued the human resources director, claiming she had intentionally inflicted emotional distress upon him and had defamed him.\(^b\)

The factual basis for the defendant’s claim that the warden had sexually harassed her included claims that the warden’s criticism of her work performance was contrived and retaliatory. To prove defamation, the warden offered evidence that the defendant’s job performance was substandard and that she abused her leave time and workers’ compensation time. The jury was instructed that for the warden to prevail, he must prove that the contents of the memo were false, and that the defendant knew the statements were false or that, believing them to be true she either lacked reasonable grounds for such a belief or negligently failed to ascertain the truth of the facts upon which her statement was based. By its verdict, the court concluded, the jury resolved these issues in favor of the warden, and the court found evidence in the record to support these findings.\(^c\)

On appeal the court also rejected defendant’s claim that injuries such as the warden received had to be brought before the state’s workers’ compensation system, not the civil courts. Finding that workers’ compensation remedies were available only for “injury by accident,” the court held that the warden’s pain and suffering, humiliation,

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\(^b\) Id. at 213.

\(^c\) Id. at 216.
embarrassment and mental distress were not injury by accident and thus were not covered by workers' compensation and could be pursued in a civil lawsuit.\textsuperscript{51}

**A. Harassment Claims and the Changing Nature of Tort Law**

Until the 1970s, society (through its courts and legislatures) judged that its interests and expectations were best served by the strict application of the employment-at-will rule. This meant that claims against employers for the social misconduct inflicting harm on workers would be remedied in courts only if the employer engaged in conduct reaching well beyond the limits of decision-making about the employment itself. If the negligence or intentional harm was work-related, courts would not grant a tort remedy, but would defer to existing remedies, such as workers' compensation.

The focus of tort reform shifted in the late 1970s in trends that may now be in transition once more. Between the 1970s and the late 1980s courts were granting greater access to tort remedies and this lead to the erosion of the employment-at-will doctrine. As courts and legislatures became increasingly uneasy with the common law employment-at-will doctrine, society's rules changed, and the decision to fire an employee became subject to much more judicial scrutiny. Tort law reflects the change, recognizing greater employee rights to challenge the employer's decision to fire. That trend may be changing now, though, as legislatures set limits on punitive damages and make statutory “safe harbors” for employer decisions regarding hiring, firing and communicating about employee actions. An example of such limiting legislation can be found in the bills that impose ceilings on the amount of damages that can be assessed in professional negligence cases, particularly in actions based on medical malpractice.

**B. Distinguishing Negligent from Intentional Misconduct**

Torts frequently are classified by whether or not there has been intentional conduct. There are also torts that involve only negligent conduct, generally focusing on whether the employer has a particular duty to an employee, has breached that duty, whether damages were incurred and whether the breach of duty was the cause of the damages. There need be no contract at all between the employer and the employee if the claim is based on negligence or intentional breaches of duties in the workplace.

\textsuperscript{51} Id.
VII. Tort-Based Challenges to Termination by the Accused

A. Intentional Interference with Contractual Relations

The accused harasser will likely find his employment opportunity threatened by the claim of harassment. Even if the claim is not well founded, the accused harasser may nonetheless find himself engulfed by a cloud of distrust, cutting short employment and promotion opportunities. If the circumstances are such that the accused has contractual rights, either arising formally (for example, through a collective bargaining agreement or a written or oral employment contract) or informally (as when an employer’s personnel manual bestows contractual rights that are implied by operation of law), then the accusations that injured him may have interfered with those contract rights.

When accused of harassment, the employee may in turn sue his accuser upon a charge of intentional interference with the employee’s contract rights and join the employer as a co-conspirator. Practically speaking, the reason for joining the employer is that it, rather than the accusing co-worker, has the resources to pay damages arising from the tortious conduct.

Elements the accused harasser must show in order to prove the employer interfered with the employment contract or employment interests include:

- the existence of a valid contract or economic relationship or business expectancy;
- knowledge of the relationship or expectancy on the part of the charging party;
- intentional interference inducing or causing a breach or termination of the relationship or expectancy; and
- resultant damage to the party whose relationship or expectancy has been disrupted.

B. Outrage, or Intentional Infliction of Emotional Distress

Particularly in the area of office romances that sour, there is a risk that the party more aggrieved by the demise of the relationship will complain that the other party has behaved in an outrageous fashion and has intentionally embarrassed or emotionally injured the other. The tort of outrage may be invoked where the charging party seeks to damage the reputation of the accused harasser after such a relationship is unilaterally

ended. The charging party does so by publicly humiliating the accused harasser in the workplace.

Elements of outrage include:

- the conduct of the accuser (or the employer, if applicable) is so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community;
- the accuser intended the suffering or acted in reckless disregard of the employee's potential for suffering;
- the distress was severe; and
- the distress was caused by the accuser's actions.

Traditionally, malice alone has not been enough, and the threshold for what is truly outrageous has been very high. Until recently, it was rare that an accused employee would succeed in a claim of outrage against an employer for its complicity in the charging party's misconduct. Cases like Williams v. Garraghty, discussed above, prove how volatile this area of tort law can be. Such a tort claim is likely to be considered by an accused harasser (or his lawyer) as he evaluates his options in responding to accusations of sexual harassment. The risks to the accuser and her employer are very real indeed.

C. Defamation Actions

Whenever a word is spoken or written that would cause an employee to be held in contempt, the risk exists that the employee has been defamed. In the context of a sexual harassment claim, the charging party may defame her alleged harasser if the claims being made are not true. The employer, too, may defame the alleged harasser if it unnecessarily relays false claims against him. An employer has a limited privilege to investigate claims of misconduct and to disclose related information to others on a need-to-know basis. The employer loses the privilege if it publishes private information (whether it be information gathered in the course of investigation or the results of the investigation) that exceeds what is needed to get the message across to the workplace.

Elements of defamation include:

- a false and derogatory statement of fact concerning the employee;

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64 Restatement (Second) of Torts § 46 (1965).

65 Prosser & Keeton, Torts § 773 (5th ed. 1984); Ruizcho & Jacobs, supra note 53, § 9-4.8, at 20-25.


• an unprivileged publication to a third party;
• the employer's fault, amounting to at least negligence;
• inherently damaging statements or special harm caused by their publication.\(^\text{58}\)

Examples of activity that always will be considered "inherently damaging" include:

• allegations of criminality
• allegations harmful to trade, business, profession or office;
• allegations of loathsome disease;
• serious sexual misconduct; and
• imputation of unchastity.\(^\text{59}\)

1. Employer's Defense of Privilege

Tort liability can be determined only after considering, first, whether the breach of a duty has occurred and, second, whether the conduct is permitted due to some privilege. Generally two forms of privilege exist, absolute privilege and qualified privilege. When thinking of privileges, it helps to recognize that lawyers and judges rely on policies that at times may appear to be conflicting. Society calls upon courts to resolve disputes, and one of the tools used in this effort is a set of priorities that courts and legislatures adhere to in order to resolve these conflicts.

One well-known example is the privilege of the confessional. A person seeking to disclose that he committed past criminal acts can speak freely to a priest in confession, and society will not invade that relationship because of the importance society attaches to the act of confessing (and the implied rehabilitative effect of such an act). There are, however, degrees of protection society is willing to give by its privileges, and those degrees are shown in the contrast between absolute and qualified privilege.

Absolute privilege bars a defamation action even though the individual uttered the statement knowing it to be false and uttered it with malice.\(^\text{60}\) It protects the employer and those acting on behalf of the employer, but it is available only in limited circumstances. The absolute privilege applies, for example, to statements made by anyone acting on behalf of the employer in the course of judicial proceedings and in investigations by the EEOC. It also applies in cases where the employee consents to the communication (as when an employee asks that the circumstances of his discharge be disclosed to

\(^\text{58}\) RESTATEMENT (SECOND) OF TORTS § 558 (1965); 30 AM. JUR. 2D LIBEL AND SLANDER §§ 6, 21 (1995).

\(^\text{59}\) RESTATEMENT (SECOND) OF TORTS § 574 (1965).

another employer). It is important to note that a privilege protects against civil actions, not against criminal charges arising out of the interest society has in preserving the sanctity of the courtroom. Thus, the employee who takes the witness stand and falsely testifies that another has sexually harassed her, knowing her statement to be false, is shielded from an action in defamation by the person she falsely testifies about, but is not protected against charges of perjury.

A qualified privilege gives less protection. If the disclosure is within limits needed to preserve society’s interest in the flow of information with legitimate business purposes, then the defamatory statement is not going to be actionable—unless the employer acts with malice.

Qualified privileges exist to protect communications made:

- to protect the employer’s legitimate business interests;
- to protect the recipient’s or a third party’s legitimate interests,
- where the parties have a common interest in the subject matter; and
- where the communication is to a public official on a matter of public interest.

The risk of a defamation claim being made against an employer increases when the factual basis for a fired employee’s termination is discussed with employees who do not need to know the details. An employer may counter this with a showing that all employees need to be apprised of security measures or that disclosure was necessary for the employer to respond to matters or employee morale. Where an employer offers an honest evaluation of a former employee at the request of a prospective employer, the report is privileged even if inaccurate, as long as it is made in good faith.

The Garraghty case, discussed above, teaches that there are two separate theories upon which an individual may be found to have defamed another: (1) the speaker knew the statement was false or (2) the speaker lacked reasonable ground for such belief or acted negligently in failing to ascertain the facts upon which the statements were made.

**D. Invasion of Privacy**

There are four common law torts based on privacy: (1) appropriation of the use of the name or likeness of another; (2) unreasonable intrusion by the employer into

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the seclusion of the employee; (3) public disclosure of private facts; and (4) placing an employee in a false light. Common to these torts is that society offers some measure of redress against unwarranted invasions into a person's private affairs if such invasions would offend a person of ordinary or reasonable sensibilities.  

1. Appropriation of the use of the name or likeness of another, without consent, for the user's advantage may be an invasion of privacy. One example is where the employer covertly videotapes an employee and then uses the tape as part of its training program.

2. Unreasonable intrusion by the employer into the seclusion of the employee, where the employer intentionally interferes with the employee's private affairs in a manner that would be highly offensive to a reasonable person may be an invasion of privacy. It would be an unreasonable intrusion for a supervisor to make unwelcome sexual demands on an employee and prompt a retaliatory discharge for her noncompliance with his demands because it would be an unprivileged intrusion upon the employee's psychological well being and an invasion of her privacy. Conversely, an employer faced with the claim that a supervisor or co-worker harassed the charging party would assert a privilege to inquire into the alleged harasser's personal and private life, based on Title VII's mandate that employers maintain a work environment free from sexual harassment.

3. Public disclosure of private facts occurs when the employer publishes private facts with no business justification for their disclosure. Here the risk is that an employer will over-publish the fact of an employee's misconduct, typically in the context of training the workforce and using the disciplined employee's case as an example.

4. Another privacy-based tort is based on an employer placing an employee in a false light. While closely akin to the tort of defamation, which protects a party's interest in a good reputation, false light actions protect an interest in being let alone from adverse publicity. In false light actions, the person injured needs to show he has been given unreasonable and highly objectionable publicity which attributes to him characteristics, conduct or beliefs which are false. Suppose, for example, a supervisor persuaded a subordinate known for his strong liberal political views to sign a petition for a conservative candidate by misrepresenting the candidate's positions. When the subordinate discovers the truth he insists his name be taken off the petition. If the supervisor refuses and widely circulates copies of the petition intending to injure the

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67 Restatement (Second) of Torts § 652A(2)(b) (1965).

68 Restatement (Second) of Torts § 652A(2)(a) (1965).

69 Restatement (Second) of Torts § 652A(2)(c) (1965).
subordinate, no defamation has occurred but the subordinate has been placed in a false light.\textsuperscript{70}

Not all jurisdictions recognize a common law right to privacy. In those jurisdictions, individuals who have been falsely accused of harassment might instead be able to make a claim under the tort of intentional infliction of emotional distress.

\textbf{E. False Imprisonment}

Where the employer holds or restrains the employee against the employee’s will, either by using physical force, barriers or threats of force, and the restraint is without legal justification, then the employer may be held liable for the tort of false imprisonment. Thus, where an accused harasser is told to gather his personal effects and leave the building under escort, declines to do so, and insists on being allowed to talk to someone from the personnel office, the employer may have engaged in tortious false imprisonment if its investigators or supervisors restrict the movement of the accused harasser.

\textsuperscript{70} \textit{Restatement (Second) of Torts} § 652E(b) cmt. b; (1965); 62A Am. Jur. 2d Privacy §§ 120-126 (1990).
Chapter 5

Investigating Harassment Claims

I. Introduction

An employer will be expected to thoroughly and promptly investigate claims of sexual harassment in the workplace. It does so protected by a limited privilege against claims made by the target of the investigation: the accused may object to the employer's intrusion into his privacy and claim he has been defamed by the charging party, the employer in the course of the investigation or both.

An employer conducting an appropriate investigation may in turn rely upon a qualified privilege to fully investigate the claims. The charging party may enjoy some protection against the claim she has defamed the accused party. The privilege reflects society's interest in protecting rights afforded by Title VII and other fair employment practice laws. These rights are limited, however, and either the employer or the accusing party risk civil liability if through their respective conduct incorrect and damaging allegations about an individual are maliciously broadcast to the workforce.

II. Appropriate Employer Responses

The Equal Employment Opportunity Commission (EEOC) and courts applying Title VII have held that even where a hostile work environment exists, an employer's liability for violation of Title VII can be limited or entirely abated if it is shown that the employer took "immediate and appropriate" measures¹ to rid the work environment of the harassment. In one case, the court held that an employer properly remedied

¹ 29 C.F.R. § 1604.11(f); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Steele v. Offshore Shipbuilding Inc., 867 F.2d 1311 (11th Cir. 1989).
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sexual harassment by fully investigating the allegations, issuing written warnings to the accused to refrain from discriminatory conduct, and warning the offender that a subsequent infraction would result in suspension.\(^2\) Another court held that an employer properly remedied a hostile working environment by fully investigating the allegations, reprimanding the harasser for grossly inappropriate conduct, placing the offender on probation for 90 days, and warning the offender that any further misconduct would result in discharge.\(^3\)

The courts however, have not been uniform in their reaction to an employer’s efforts to investigate and cure harassment. The fact that the harassing behavior ends does not, by itself, compel a court to conclude there was no violation of Title VII. Once an employer knows or should know of harassment, it is required to remedy the situation.\(^4\)

Employers should investigate all complaints of sexual harassment and should impose discipline that is warranted, whether it be against the accused harasser or the false claimant. The employer’s intention to do so must be thoroughly communicated to all employees, on a routine and regular basis.

III. Practical Pointers for Handling Complaints and Investigations

In many ways, investigating complaints of work-related sexual harassment is no different than investigating any other workplace problem. Skilled investigators know to be familiar with the legal and factual issues that are likely to surface during an investigation; they know it is important to gather information about the personalities of those participating in the investigation; and they know to avoid being the source of information—that they should listen much and say little when conducting interviews.

In some respects, however, sexual harassment cases present a different set of challenges to an investigator. Sexual harassment can be exceptionally damaging to the target of the harassment, leaving the worker emotionally fractured, angry and suspicious. An investigator must be trained to understand the damage that sexual harassment does to the psyche and to be alert to steps he or she can take when conducting interviews of the target and the accused harasser. There are practical measures the investigator may want to consider as he or she (or preferably he and she) prepare for an investigation.

Make sure the employee has more than one way to initiate an investigation. If an investigation can begin only by an employee making a formal complaint to a single.

\(^2\) Swentick v. USAIR, 830 F.2d 552 (8th Cir. 1987).

\(^3\) Baisch v. Omaha Nat’l Bank, 726 F.2d 424, 427 (9th Cir. 1984).

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officer, the claim can be made that the employer discourages use of the complaint procedure. Consider, for example, a case in which the employee is required to first file her complaint with her supervisor, and it is her claim that her supervisor has been harassing her.

Consider using paired investigators, one male and one female. This may help minimize the risk that employees of either sex will be intimidated when discussing extremely private and sensitive matters. Use private facilities when conducting the investigation. Take particular pains to keep the nature of the complaint and the work product of the investigators private to counter any claim by the accused harasser that the employer has unnecessarily broadcast false claims against him.

Use only trained investigators. Investigators must be familiar with both the applicable state and federal antidiscrimination laws and the decisions of courts in the employer’s jurisdiction. Investigators may be called upon to support the employer in its defense if the complaint develops into a lawsuit. Using experienced investigators, possibly from outside the employer’s ranks, can make a critical difference in a close case. The employer must ensure, however, that investigators understand the importance of restricting access to the information obtained in the course of the investigation, to minimize the risk of making defamatory statements. If the charges are lodged against the chief operating officer or other senior staff members, having an independent team investigate the company becomes particularly important. The higher the rank of the accused harasser, the more appropriate is the use of an outside investigator.

Interview the complainant, the accused and persons identified by either as having been witnesses to the events. Prepare for the interview by reviewing the personnel files of those to be questioned. Questions should probe the nature of the relationship between the accused and the charging party, what each party did and said, whether there were prior incidents between these parties or between others and these parties, whether there have been prior complaints raised by the charging party (as to this harasser or others) and prior complaints about the alleged harasser (by this complainant or others). The investigative report should clearly separate the information that comes as first-hand (direct) evidence and that which arrives through filtered sources, like hearsay, second-hand knowledge, gossip and rumor. Not all reported material must be based on first-hand knowledge, but the report should fairly disclose the source of information contained in it.

Have clear deadlines that meet state and federal timeframes. Keep in mind any contractual obligations arising under any collective bargaining agreements when crafting investigative procedures. A collective bargaining agreement may well require the presence of an employee’s representative from the union in the course of any investigation that may lead to criminal or disciplinary charges being filed.

Guard against overzealous interrogation. The goal is to gather information, not to coerce employees into making statements. When interviewing the charging party,

the interviewers should invite a narrative answer by asking open-ended questions such as: "Tell me what prompted your complaint," and "how did this person's behavior affect you?" When interviewing the accused, explain that no judgment has been made simply because a complaint has been filed, but that the company investigates all complaints and will treat this one as it does all others. Invite his reaction to open-ended questions regarding the company's policy on sexual harassment, and identify with some degree of precision who made the complaint and the nature of it.

Depending on the circumstances of the harassment, the accused need not be told of the exact identity of the charging party at this stage. However, the accused must be given sufficient information to effectively respond to the accusation. Unless the circumstances warrant it, the investigators should not disclose the identity of the parties to the complaint when questioning third-party witnesses. Interviews of others who might have information regarding the accusation should begin with questions that probe for the witnesses' knowledge of harassment in the workplace generally. Discretion at this point will minimize the employer's exposure to claims by the wrongfully accused employee that the employer unduly broadcast defamatory information about the employee.

Know ahead of time what kind of promise you can make regarding confidentiality. It is extremely unlikely that a complaint against an accused will not result in the accused learning the identity of his accuser. In the public sector, many states have open-records laws that compel the disclosure of records, even investigatory records, once the accused has requested a public hearing.⁵

Identify early on what kind of relief the charging party is seeking. If possible, commit this to writing early in the investigation.

Consider conducting a survey of the workplace. The investigation may need to include a formal or informal polling of the nature of the workplace, the prevalence of behavior that might be considered offensive to an employee, and employee attitudes about this behavior. An employer with existing documentary evidence of employee experiences, such as exit interviews and periodic surveys regarding the prevalence of harassment, will be in a position to support the investigation.

Investigate with the intention of solving any problems that are discovered. Courts applying Title VII favor employers that implement prompt and effective cures. Investigators often are the first to be able to recommend measures that will end the harassment under investigation.

The report of investigation results should offer a chronological history reflecting the claims of the charging party, the involvement of the accused harasser and the role played by others who may have witnessed or participated in the harassment. It should include an assessment of the credibility of each of the essential witnesses and the reasons for arriving at those assessments.

⁵ See, e.g., OHIO REV. CODE ANN. § 149.43 (Anderson 1995) (Ohio's public records law, which deems as public records the personnel files of all public employees).
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The report should address whether the conduct complained of actually took place and, if so, whether from the circumstances as a whole it was "unwelcome." The report should remain a confidential document to the extent permitted by law. The results of the investigation however, should be made available to both the charging party and the accused harasser, with restrictions against the disclosure of the contents of the report to persons not entitled to see it (such as an attorney for either party).
Chapter 6

Creating a Plan of Action

The purpose of this book is to offer constructive suggestions to help employers prevent sexual harassment and reduce the risk of loss from valid or false claims of harassment. The suggestions are not offered in a vacuum: for the employer to craft a plan that reduces the employer’s liability, it must create a comprehensive plan. There is not one standard policy that will work in all employment settings. If such a policy could be created, it’s safe to assume the EEOC would have done so by now.

There are, however, common components to a successful plan to prevent workplace sexual harassment and to deal with workers’ valid and false claims of harassment. The following case study illustrates the essential elements of a workplace harassment prevention plan. In this case, a large industrial employer was confronted with complaints of sexual harassment yet failed to take timely and effective measures to stop the harassment. Given the facts of this case, consider how an employer can craft a comprehensive plan that will prevent harassment from occurring and contain the damage done by the individual whose predisposition to sexual escapades puts the company and its stockholders at risk.

1. Case Study: Carr v. Allison Gas Turbine

Mary Carr was a drill operator in General Motors’ gas turbine division.1 In 1984, she entered the skilled trades in the division as a tinsmith apprentice. Her male co-workers were unhappy about working with a woman, and Carr was the first woman so employed. This is how the court described the work environment:

[Her co-workers] made derogatory comments of a sexual character to her on a daily basis (such as, “I won’t work with any of ’em”), continually referred to her in her

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1 Carr v. Allison Gas Turbine Div. of General Motors, 32 F.3d 1007 (7th Cir. 1994).
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presence by such terms as "whore," "c[ ]," and "split tail," painted "c[ ]" on her toolbox, and played various sex- or gender-related pranks on her, such as painting her toolbox pink and (without her knowledge) cutting out the seat of her coveralls. They festooned her tool box and work area with signs, pictures, and graffiti of an offensive sexual character, hid and stole her tools, hid her toolbox, hung nude pin-ups around the shop, and would strip to their underwear in front of her when changing into and out of their work clothes. One of them placed an obscene Valentine Day's card, addressed to "C[ ]," on her toolbox. The card shows a man carrying a naked woman upside down, and the text explains that the man has finally discovered why a woman has two holes—so that she can be carried like a six-pack. A worker named Beckham twice exhibited his penis. . . . Carr's male co-workers urinated from the roof of the shop in her presence, and, in her hearing, one of them accused a black employee who was only intermittently hostile to Carr of being "after that white p[ ], that is why you want a woman here, you want some of that." A number of racist remarks and practical jokes of a racial nature were directed against this, the only black employee among the tinsmiths. A frequent remark heard around the shop was, "I'll never retire from this tinsmith position because it would make an opening for a nigger or a woman."²

How did management respond? This is how the court puts it:

At first [Carr] disregarded the harassment but beginning in 1985 and continuing until 1989, when she quit—constructively discharge[d], she contends, the situation having become unbearable—she complained about the harassment repeatedly to her immediate supervisor, Jim Routh. To no avail. He testified that even though some of the offensive statements were made in his presence, not being a woman himself he was not sure that the statements would be considered offensive by a woman. His perplexity was such that when he heard the statements he would just chuckle and bite down harder on his pipe.³

It may be of some interest to note that the trial court that heard this case rejected Carr's claim and found in favor of the employer.⁴ The judge hearing the case, which was filed under Title VII and did not involve the use of a jury, concluded that Carr hadn't proved she was sexually harassed to a degree that it could be said to affect adversely the conditions under which she worked. Perhaps the point of this case is: that was then; this is now.

The court of appeals,⁵ applying Harris v. Forklift Systems, Inc. and other cases⁶ reflecting increased awareness of the damage done by sexual harassment in the work-

² Id. at 1008.
³ Id. at 1010.
⁴ Id. at 1008-09.
⁵ Id.
⁶ 114 S. Ct. 367, 371 (1993) (Title VII is not directed at unpleasantness per se but only against discrimination in the conditions of employment); Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 536-36 (7th Cir. 1993); Juarez v. Ameritech Mobile Communications, Inc. 957 F.2d 317, 320-21 (7th Cir. 1992); Guess v. Bethlehem Steel Corp., 913 F.2d 463 (7th Cir. 1990). While it would be "unrealistic"
Creating a Plan of Action

place, reversed the trial judge. The court sent the case back with instructions to determine Carr's remedies under Title VII. In reaching its decision, the court set out what it looks for when considering a worker's hostile environment claim. It concentrated on GM's reaction to Carr's complaints, with these observations:

[After Carr maintained legitimate, active complaints, the employer's] responses were limited to several meetings that the company arranged between Carr and her tormentors, at one of which she and Beckham were asked to apologize to each other. No disciplinary action was undertaken against any of Carr's coworkers; no one was even reprimanded for the harassment. General Motors was astonishingly unprepared to deal with problems of sexual harassment, foreseeable though they are when a woman is introduced into a formerly all male workplace. Supervisor Routh testified that if he encountered a problem of sexual harassment he would have to ask the personnel department what to do. His supervisor's recipe for solving problems of sexual harassment was to recommend that the woman work harder than the men to prove she could do the job. The personnel director of the gas turbine division acknowledged that the distribution of policies and posters dealing with problems of sexual harassment was "uncertain," and he could not remember having read any of them himself until shortly before he testified. At one of the meetings with Carr, management agreed to order a videotape on sexual harassment, to show to the workforce, but it was never shown, a failure that Routh's supervisor blamed on the personnel department.

It is difficult for an employer to sort out charges and countercharges of sexual harassment among feuding employees, but we are dealing here with a situation in which for years one of the nation's largest enterprises found itself helpless to respond effectively to an egregious campaign of sexual harassment directed at one woman. No reasonable person could imagine that General Motors was genuinely helpless, that it did all it reasonably could have done. The evidence is plain that it (or at least its gas turbine division) was unprepared to deal with problems of sexual harassment even when those problems were rubbed in its face, and also incapable of improvising a solution. Its efforts at investigation werelacuster, its disciplinary efforts nonexistent, its remedial efforts perfunctory. The U.S. Navy has been able to integrate women into the crews of warships; General Motors should have been able to integrate one woman into a tinsmith shop.7

II. Planning To Limit Employer’s Risk

The existing cases show that risk reduction requires having and using a sexual harassment policy that (1) actively responds to complaints; (2) proves effective in
to expect management to be aware of every impropriety committed by every low-level employee, it it knows or should have known that one of its female employees is being harassed, it is culpable if it responds ineffectually. "The two questions, harassment of the employee and negligence of the employer, are linked as a practical matter because the greater the harassment—the more protracted or egregious, as distinct from isolated or ambiguous, it is—the likelier is the employer to know about it or to be blameworthy for failing to discover it." Carr v. Allison Gas Turbine Div. of General Motors, 33 F.3d 1007, 1009 (7th Cir. 1994).

7 32 F.2d at 1009.
stopping the harassment; (3) punishes the offenders; and (4) creates an historical record of the affirmative steps taken to end harassment in the workplace. Courts will no longer tolerate managers who "just chuckle and bite down harder" on their respective pipes when confronted with complaints. But any action taken to stop harassment in the workplace needs to guard against claims by the accused harasser that the employer's response illegally infringes on his rights.

Because of these competing interests, sexual harassment policies must take into account the nature of the specific workplace. From the Curr case, it should be obvious that management cannot simply sit back and let the employee's complaints go unan-
swered. It is also possible, however, that the alleged harasser is protected by the terms of a collective bargaining agreement, so if any discipline is imposed the terms of that agreement must be considered and followed.

The following sections bring together planning points that employers should con-
sider when establishing policies for response to workplace sexual harassment. It is drawn from guidance provided by the EEOC, from the lessons learned in the cases cited by the court in Curr, and from practical experience in the workplace.

A. Preventing Sexual Harassment

Applied in a common-sense chronology, the duties of an employer begin with (1) the creation of policies directed towards maintaining a harassment free workplace followed by (2) establishing and then following effective investigation channels that encourage employees to report inappropriate behavior and discourage filing deliberately false claims of harassment; and concluding with (3) a disciplinary scheme by which those who engage in harassment and those who falsely accuse persons of harassment face appropriate discipline.

EEOC guidelines provide that an employer should take all steps necessary to prevent sexual harassment from occurring, such as:

- affirmatively raising the subject with all employees;
- expressing strong disapproval of harassment;

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8 The employer must actively respond. See, e.g., Bouton v. BMW of N. Am., 39 F.3d 103, 110 (3d Cir. 1994) (employee's "effective grievance procedure—one that is known to the victim and that timely stops the harassment—shields the employer from Title VII liability for a hostile environment" where "there is no negligence if the procedure is effective" and where the "policy known to potential victims also eradicates apparent authority the harasser might otherwise process.") ) The response must prove effective in stopping the harassment. See, e.g., Ellison v. Brady, 924 F.2d 881, 882 (9th Cir. 1991) ("The reasonableness of the employer's remedy will depend upon its ability to stop harassment by the person engaged in the harassment."). The response must punishe the offender. See, e.g., Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) (verbal reprimand will suffice).

9 29 C.F.R. § 1604.11(f).

10 Id.
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- developing appropriate sanctions for misconduct;
- informing employees of their right to raise and how to raise the issue; and
- developing methods to sensitize all concerned.

B. Planning To Reduce Risk of Countersuit

The employer's policies must anticipate that the employee accused of harassment will require fair treatment. What is fair in any given case will depend on whether the accused employee is protected by a collective bargaining agreement, public sector civil service, an employment contract or the like, or is instead an at-will employee.

The public sector worker, for example, will be entitled to due process rights as set forth in Cleveland Board of Education v. Loudermilk.\(^\text{11}\) The worker protected by the terms of a collective bargaining agreement will likely have the benefit of a scheme calling for progressive discipline. The at-will employee accused of harassment will enjoy no such protection, but if a personnel policy manual provides for progressive discipline then the employee will likely attempt to hold the employer to those provisions under a claim that the manual created implied terms of fair dealing or due process.

C. Specific Policy Elements

The anti-harassment policy must be directed toward maintaining an environment “free from discriminatory intimidation, ridicule and insult.”\(^\text{12}\) The balancing act surfaces when the policy actively advances the hostility-free workplace while protecting against the employer's exposure arising out of any false claim of sexual harassment. The following outline of a policy identifies the elements that an employer should consider when drafting a plan.\(^\text{13}\)

*Begin with the obvious: The policy should prohibit sexual harassment.* The employer should implement an explicit policy against sexual harassment that is clearly and regularly communicated to employees. The planning of such a communication process should be bilateral—employees should provide the employer with information about how best to convey the policy, and the employer should explain what it expects of its employees in compliance with the policy. The message should be conveyed that harassment by co-workers, supervisory or management personnel, clients, customers or independent contractors will not be tolerated.

*Know what duties the law imposes on the workplace.* An employer should know if its workplace is covered by Title VII\(^\text{14}\) and, if so, should become familiar with the

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\(^{11}\) 470 U.S. 532 (1985).


\(^{13}\) See chapter 8 for a sample policy.

\(^{14}\) See chapter 2.
rules the EEOC follows when investigating harassment claims. The EEOC has given
guidance to employees explaining the standards it follows when investigating complaints
and prosecuting violations based on civil rights laws. When an employer crafts its
anti-harassment policy, it should follow the EEOC's guidance. Highlights of the Guidance include:

- Prevention is the best tool for the elimination of sexual harassment.
- Policies should be proactive, and the workforce should be trained as to their duties to one another. Employer efforts to this end should be documented.\textsuperscript{15}
- If discipline is warranted it should be imposed. It is not enough for an employer to tell a harasser his behavior is unacceptable. Sanctions geared to ensuring the conduct will not be repeated must be imposed.
- The employer should be prepared to prove that steps taken in response to complaints of harassment not only stopped the harasser, but also prevented harassment from surfacing later (or at least were reasonably calculated to do so).

If the workplace is covered by a state fair employment practices law, the employer should obtain a copy of the law and consult an attorney familiar with it. Actions taken to comply with these duties should be conducted by someone equally familiar with the duties to the alleged victim and the alleged harasser. If employed by a public employer, the accused will have rights to due process and other constitutional protections. If the employee is protected by the terms of a collective bargaining agreement, the contract administrator must be informed of the complaint so that contractual language regarding investigations and discipline is honored.

It should be management's goal to create a policy that acknowledges the employer's duties to both the charging party and the accused harasser. To be effective, a policy must make reference to the sometimes competing laws to which the employer is subject when responding to claims of harassment. A sample policy is set out in chapter 8, but employers should tailor the policy to fit the workplace. An attorney who is familiar with the federal, state and local fair employment laws should be consulted early in this process. The laws controlling workplace activities change frequently, making it essential for an employer to discuss these policies with a professional trained in interpreting the law of the workplace. The employer should consider the following outline when creating a sexual harassment policy:

\textsuperscript{15} EEOC POLICY GUIDANCE ON ISSUES OF SEXUAL HARASSMENT (Mar. 19, 1990), text accompanying n.8-9 of Policy Guidance.

\textsuperscript{16} See, FEDERAL LAW: REPORTS AND RECORDS (BNA) 441:1 (1995) (Every employer subject to Title VII "must make and keep sufficient records to show whether unlawful employment practices are being committed.") (citation omitted).

6 : 6
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Part 1: The policy should begin with a statement of the employer’s intention to maintain a workplace that recognizes the rights of management to effectively carry out its business objectives and the rights of employees to be part of a work environment that is run in accordance with the law.

Part 2: The procedures for raising complaints should be explained in clear and simple language. The employer should create procedures to ensure the employer is promptly advised of any problems in the workplace.

Part 3: Investigation procedures must match or exceed the requirements of any government regulator. The employer must make a substantial commitment to keep investigative records, to surveying workers and to vigorously pursuing any claim of misconduct. This is true whether or not the person bringing the claim desires an investigation or wishes to see the harasser punished. An employer must guide its investigative staff so that the results of the investigation will survive intense scrutiny if the issues under investigation are presented to the EEOC or a court.

Part 4: Staff and management must be trained, and reasonable measures must be made to guard against misconduct from persons outside of the company. The EEOC expects all employers will take the proactive step of training before a claim of Title VII violation is made. Training should inform employees of the standards set by Title VII and the state’s fair employment practices laws, and the standards set by the company with respect to those laws. Training must make employees aware of the complaint procedures and of the dangers of engaging in sexual harassment or reporting a false claim of sexual harassment.

Along with training, discipline must be addressed in the company policy. If there is a collective bargaining agreement, it should include terms that set forth the prohibitions of the employer’s policy and the procedures to be followed when reporting harassment, investigating complaints of harassment and disciplining those guilty of harassment or of falsely reporting harassment. If there is a personnel policy manual setting forth a scheme for progressive discipline, the employer should follow it unless the circumstances justify summary proceedings. In this context it is equally important to take appropriate steps to ensure those having legitimate complaints of harassment are not intimidated by threats that they will be sued if they make their complaint.

Part 5: The employer should maintain an archive of its efforts. The best employer efforts will be of only marginal value if no one knows about them. An archive generally is not a public document (unless the employer is a public employer, in which case public records laws may hold otherwise). That is not to say that the records will always remain closed to the public. Records submitted in the course of litigation frequently become open to public inspection.

The archive will be of immeasurable value if it records the employer’s quick and effective response to stop the harassment. It also will be the “smoking gun” showing the employer’s failure to act, if that is the case. The EEOC, however, places the burden squarely on employers to maintain “sufficient records to show whether unlawful
employment practices are being committed." Good business practice dictates that the employer maintain its archive as though the contents will be paraded before a jury. In these highly litigious times, if an employer fires an employee or an employee quits and later claims he or she was "constructively discharged" because of poor working conditions, it is more likely than not the employee will turn to a lawyer and the courts for help.

1. Effect of Applying These Measures

Consider the experiences reported in the Carr case. The employer knew its only female member of the tinsmith shop was being verbally and physically abused and that she was targeted because she was a woman. The employer had little or no clear policy prohibiting the harassment, and management's actions through its floor supervisors paid no heed to whatever policy might have existed.

If the employer had taken a step back and looked at its worksite with the five components above in mind, perhaps it would have seen that its posters and handouts on sexual harassment were not having their intended or required effect. Even the personnel manager was unfamiliar with the policy, and it was plain that the rank-and-file workers had no reason to believe management was serious about the policy. The complaint process likewise did not work and left the employee so frustrated she was able to convince the court she had been constructively discharged. If the employer had put itself in the shoes of a corporate stockholder who learned that corporate resources were being used in such an irresponsible fashion, there is little doubt that changes would have been implemented long before Carr finally lost her patience and sued the company.

Consider the different and better outcome that is likely if each complaint is treated with even-handed respect and investigated by skilled outside risk managers or other qualified experts in the field of detecting, preventing and ending workplace sexual harassment. An employer can reduce or eliminate the threat of a successful Title VII claim while at the same time giving no basis for the accused to claim breach of employment rights or tortious behavior. Any organization, large or small, should be able to keep a record of its policies, the results of investigations, training, and disciplinary actions to placate the ubiquitous government investigators who show up after a complaint is filed with the state FEP agency or the EEOC.

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17 Id.

Chapter 7

Internal Audits To Detect, Prevent and Resolve Harassment Claims

I. Introduction

Effective management of sexual harassment claims involves a three-part process: (1) structuring a plan, (2) matching the plan to the workplace through an audit of the workplace, and (3) writing a policy that meets the needs identified in the audit. Chapter 6 describes components of a structured plan: stating a policy prohibiting sexual harassment, having an effective complaint process, structuring investigations, training and disciplining those affected by the policy, and keeping records. Chapter 8 is a sample policy that incorporates these components and can serve as a starting point for any company or agency when it crafts or reviews its sexual harassment policy. Before attempting an audit of an existing plan or creating a new plan it is helpful to consider what the policy is intended to accomplish, why such a policy is necessary, and how to create an effective policy.

The audit proposed by this chapter reflects the realities of the workplace and the demands placed on employers by the EEOC and fair employment practice regulators. The policies created through this audit process should address the concerns of these regulators and meet the demands of the laws that affect the workplace. The reason such an audit is necessary is that sexual harassment laws compel an employer to monitor and police the workplace environment to keep it free from unlawful gender-based hostility. Just as an employer will implement loss-reduction measures to guard against theft or abuse of leave policies, the prudent employer will conduct an audit of the workplace to actively search for a source of liability based on claims of sexual harassment.

Sexual harassment is difficult to guard against because it surfaces in ways that can be difficult to predict and control. No matter how comprehensive a workplace
policy might be or how thorough an employer’s anti-harassment training program might be, workers will still be attracted to one another or be disposed to pursue one another, whether it be for power or affection. The superior-subordinate relationship will always present the potential for abuse, and the employer’s policies have to be written to both guard against such abuses and deal with any abuses that arise. The audit that follows is intended to provide the employer with the tools needed to preserve a harassment-free workplace.

II. Identifying Relevant Issues

Before crafting a harassment policy, the employer must identify those areas to be addressed by the policy. By examining the following issues and their role in the particular workplace, the employer can identify its needs and create a policy that meets these needs.

A. Know Which Laws Apply

Is the employer subject to Title VII (15 or more qualified employees)? What about state fair employment practices laws? If the workplace is subject to Title VII or state or local workplace regulations, the employer should craft policies known to be acceptable to the agencies. For example, the Equal Employment Opportunity Commission (EEOC) has a written policy that states: “An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.”

In the public sector or in the private sector where the work performed is on behalf of (“under color of”) the state or local government, does the employee have the protection of the constitutional rights of the First, Fourth, Fifth, Ninth and Fourteenth Amendments and the statutory protections of 42 U.S.C. 1983, 1985 and 1988? Determining whether workplace activity is “under color of law” is by no means an easy or straightforward task. One does not have to be an officer of the state to fall within the “color of law” provisions of Section 1983. At the audit stage the prudent employer will examine the nature of the work performed to see if it is or may be work done under color of law. The function of the work, not the title given to it, determines whether the employer will be subject to suit under Section 1983. If the employer is a willing participant in

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1 See chapter 2.
2 29 C.F.R. § 1604.11 (1980).
Internal Audits To Detect, Prevent and Resolve Harassment Claims

joint activity with the state or its agents, it is acting under color of law. Risk managers therefore need to examine workplace activities when advising the employer of its duties under the federal statutes.

B. Identify Applicable Contracts

Is there a collective bargaining agreement covering all or part of the employees of the workforce? If so, the terms of that agreement need to be incorporated into any policy.

C. Identify Special Circumstances

Are there pre-existing concerns that need to be addressed in the policy? For example, are there threatened or pending lawsuits, consent orders or agency investigations that suggest the presence of harassment? Has the workplace traditionally had a workforce of only men or women and is now opening to both? If so, the employer should customize the policy to meet the demands of the workplace. The EEOC will look at the “totality of the circumstances” when it determines whether a hostile work environment exists, and it will take into account the context in which alleged incidents of harassment occur.

D. Preserve Management Rights

Is there a presumption that the employment relationship is at will (that is, there is no right to continued employment)? This varies from state to state and is determined by the courts. If the law of the state recognizes an employer’s right to preserve the at-will relationship, the employer should create an anti-harassment policy that preserves the relationship and does not create a contractual right of continued employment. Disclaimers are used to accomplish this.

A disclaimer may already appear in the employer’s personnel policy manual, with words to the effect that nothing in the manual creates a contractual right to continued employment. A disclaimer preserving the at-will relationship should be part of the sexual harassment policy in jurisdictions allowing them. By putting the employee on notice that the employer intends to preserve the at-will work relationship, the employer may be able to avoid any misunderstandings by an employee who might mistakenly believe that the anti-harassment policy gives an employee the right to remain employed indefinitely.

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III. Evaluating Complaint Procedures

The employer should encourage employees to come forward with all complaints and assure employees that all complaints will be taken seriously and investigated.

To this end, the employer must implement more than one way for complaints to be made. The Human Resources or Personnel Department should be designated as the principal place to file complaints, but should not be the only place where complaints can be effectively brought forward. This will ensure that no matter who has committed the harassing behavior, the employee can go to someone other than the harasser to make her complaint. If the company’s size permits, the employer may create an ombudsman’s position or permit complaints to be filed through a referral outside of the company (such as through a prearranged contact with the National Organization of Women or grassroots support networks).

A. Timelines for Filing Complaints

The policy has to urge prompt reporting but still permit reporting after the fact. In the case of governmental employers, it may be possible to craft a requirement that complaints be brought to the attention of management within such time as would permit the employer to take timely and effective action to prevent or end the harassing behavior. The same is true between parties negotiating a collective bargaining agreement.

B. Informal Complaints

Potential neutrals include supervisory staff outside the employee’s chain of command, an ombudsman or personnel officer. The process could terminate with no formal complaint being filed, but there should be documentation of the informal complaint and the steps taken to address the complaint. The documentation should demonstrate that the measures taken were actually effective in stopping the harassment and preventing its return.

C. Anonymous Complaints

The employer should create a procedure for dealing with anonymous complaints. This procedure must recognize both the duty to go forward with investigations and the limits imposed by the unwillingness of the victim to publicly face the harasser. When a complaining party refuses to come forward the employer cannot fully investigate the claim, because a full investigation should include questioning the victim. The employer can and should confront the accused harasser, but it will not be in a position to evaluate factual disagreements unless the accuser is willing to be confronted by the person being accused.
IV. Creating Effective Investigation Protocols

This message should be conveyed in the policy and in training. The investigations can be initiated based on rumor, on a random or routine basis, or following events that trigger debate in the workplace (such as the national attention focused on the Senate confirmation hearings of Judge Clarence Thomas for the Supreme Court). The investigations can be formal or informal, and can take the form of oral or written surveys taken during staff meetings. The employer should make a private written record of the results of the investigation and should act on any problems identified in the course of the investigation.

Investigators must be trained in the field of sexual harassment. They need to understand the risks of invasion of privacy, false imprisonment and defamation actions being raised during or as a result of investigations. With this knowledge, investigators can conform their behavior during the investigations to the social expectations imposed by tort laws (by not unduly broadcasting private facts, unreasonably detaining persons being questioned, or maliciously spreading false rumors).

The investigators should be easy to approach and talk with. To this end, circumstances may suggest male/female pairs of investigators. Using two investigators has the added benefit that if either the victim or the perpetrator sues the company, the corroborated testimony of two investigators will likely be more persuasive to a judge and jury, and having two persons present makes it easier for one to ask questions while the other takes notes.⁵

The public sector employer need not bow to a request (or a demand) by the accused that he be allowed to have his lawyer present or tape record the investigation.⁶ A union member, however, may insist that a union representative accompany him during the investigative interview.⁷

An outside consultant could be retained, such as a widely recognized and respected law professor who teaches employment discrimination and is familiar with the requirements of Title VII and the state’s fair employment practices law. Law firms that concentrate in employment discrimination issues also may be suitable for such consultation, as may authors of treatises on preventing workplace sexual harassment. Copies

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⁶ Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (requiring a pre-disciplinary forum to serve as initial check against mistaken decisions, essentially constituting a determination of whether there are reasonable grounds to believe that charges against employee are true and support proposed action); see also Duchesne v. Williams, 849 F.2d 1004 (6th Cir. 1988). If the employee has been given time which allowed him to determine what facts, if any, within his knowledge may be presented in mitigation or denial of the charges, the Loudermill test is satisfied. Gniotek v. City of Phila., 808 F.2d 241 (3d Cir. 1986).

⁷ See NLRB v. Weingarten, 420 U.S. 251 (1975) (protects the rights of a union member to have a union representative present during investigative interview).
of EEOC complaints are routinely provided to the accused harasser, and the name of the alleged victim is generally given to the accused harasser. In the public sector, open records and the Freedom of Information Act may expressly provide for the disclosure of complaints to third parties and to the accused. These laws will vary from state to state and from employer to employer. At the same time, each interviewee should be prohibited, in writing if need be, from disclosing the substance of the investigation and the questions or answers they provided, except as required by law.

Finally, the employer should inform the charging party of the results of the investigation once it is completed and provide accurate information about where an outside complaint can be filed (with the EEOC, the state’s fair employment practices agency or similar agency).

The investigation should adhere to established disciplinary structures. If the employees have rights under existing disciplinary rules, the employer should conform the harassment policy to those same rules. The employer should not be afraid to impose discipline when an investigation shows it to be an appropriate response. The false claimant should be disciplined as would any person falsely reporting a violation of company policy.

**V. Training**

All members of the workforce need to understand the nature of the laws prohibiting sexual harassment. The employer needs to convey the importance of maintaining a work environment that is not charged with sexually oriented hostility and of preserving proper relationships between supervisors and subordinates. Training must be from the “top down,” with senior managers, corporate board members and chief executive/operating officers included. The goals of such training are to make sure employees are aware of their rights under Title VII and other federal and state anti-harassment laws, to give notice about what behavior is prohibited, to show how complaints can be initiated, and to communicate to the workforce and the public the employer’s commitment to preventing sexual harassment in the work setting.

The employer should distribute any anti-harassment policy at the recruiting stage, during orientation and during periodic inservice training. The employer should retain documentation showing the delivery of training materials and policies. One effective form of such documentation is the “tear-sheet,” a perforated receipt page attached to the policy handbook or training material that is signed by the employee and returned to the employer. It is maintained in the employee’s personnel file.

Supervisors should be trained in how to control the workplace environment. This includes training in the limits an employer places on posters and reading materials.

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calendars, bulletin board material and the like. Supervisors should know who is responsible for reporting graffiti, harassing E-mail and other anonymous forms of harassment. They also should be informed of their personal liability for tort claims from the victims of harassment and of the particular problems an employer faces when a supervisor has a social or sexual relationship with a subordinate and the relationship sours while both are still on the job.

If the investigators are employees, they should be given frequent reviews of the changes in the law, of cases that have been decided that help interpret regulations and of laws affecting the employer's anti-harassment efforts. They need to be trained in the questioning skills needed when interviewing persons who are emotionally upset or fearful. The investigators should be familiar with the demands that will be made by EEOC and state FEP investigators, so that the in-house investigation can answer questions by government investigators. The training of investigators needs to be documented, because courts and juries frequently consider the quality of the employer's investigative efforts when deciding whether the employer has been negligent in responding to the threat of sexual harassment. Investigators should attend seminars on the management of sexual harassment claims not less than once each year and should retain the course materials for their own reference and to demonstrate the employer's continued commitment to effective investigations of harassment claims.

VI. Maintaining an Archive of Anti-Harassment Measures

Over time personnel files become the final resting home for a wide assortment of odds and ends. With constant turnover of employees and supervisors it is particularly important that the employer have an archiving system that is redundant, that makes a record in more than one place of the employer's efforts to train and discipline employees. These records should document all forms of complaints, how they were investigated, how they were resolved and whether the resolution ended the hostility in the workplace.

One form of archiving is to preserve records of all training in which an employee participates in both the employee's records and in the records maintained by the trainer. A third source, one kept specifically in anticipation of the demands of government regulators, may also be needed if the employer has any reason to believe it may be the target of regulatory investigations.

Exit interviews and peer reviews should include reports on the workplace environment, with specific and probing questions regarding sexual harassment or non-harassing but sexually oriented behavior present in the workplace. The employer may consider using an anonymous suggestion box or ask questions of persons seeking transfers ("Do you find anything offensive about your present position?" or "Were you harassed while employed here?"). Even if the responses are anonymous, an employer must take available
measures to follow through with any complaints it receives through these avenues. The purpose of such a measure is to offer to governmental regulators evidence of the employer's efforts to ensure that all forms of harassing behavior are brought to its attention and addressed promptly and effectively.

Peer reporting through performance evaluations and surveys that monitor the workplace as part of the annual or periodic training on harassment prevention should be sufficiently formal and thorough to reveal whether measures taken in response to complaints effectively ended the hostile environment or other workplace harassment. Reporting and monitoring must be broad enough to report on harassment coming from outside the workplace as well (by vendors, shareholders or customers).

A committee may be useful to meet these archiving needs. Drawing from each level of the work force (including ownership interests, such as shareholders in publicly held companies), the committee should maintain a record of the collective efforts of the employer to spot and stop sexual harassment in the workplace. The committee members should divide the reporting responsibilities, so that collectively they cover the entire workplace. Individuals should be assigned to monitor workplace bulletin boards and bathroom walls (for graffiti), cyberspace (for harassing E-mail practices), office parties and gatherings (like the Christmas party, softball league or summer picnic), and vendor or customer misconduct (like the bar patrons who grab or demean staff). The task of the committee is to identify present or potential sites for harassment.

The records of this committee's work also would be the appropriate place to maintain documents showing the nature of the industry in relation to sexual harassment issues. Examples of relevant documents include news articles describing how the industry deals with harassment, whether it is a recognized problem, or whether some level of sexually oriented behavior is accepted and generally welcomed in the industry.

VII. Coordinating Related Policies

A. Discipline Pending Investigation

A company's general policy on discipline and the policy toward sexual harassment must be jointly considered if the charging party is already potentially the subject of discipline. For example, if the woman claiming to be a victim of harassment also is under investigation for violations of company policy that might lead to her being fired, the employer must accommodate both procedures. It must properly investigate the sexual harassment claim and perform whatever prerequisites exist for disciplining her for cause. The same is true if the person accused of harassment is also the subject of an independent disciplinary action or investigation. The employer should not abandon its existing procedures and wait until a sexual harassment charge is investigated before proceeding on the other investigation. Alternatively, it should not forego a sexual harassment investigation simply because other charges are pending.
Federal law regarding retaliation is clear on this point: if the accusing employee is fired in the course of a sexual harassment investigation and the harassment investigation is brought to a close because the employee is gone, the employer faces liability for retaliation. This is true even if the underlying charge of harassment is wholly unfounded. The EEOC will presume the employer acted in retaliation against the charging employee. The only way to overcome that presumption is to complete the investigation into the sexual harassment charge. One solution for the prudent employer is to place the charging employee on paid administrative leave while it completes both the harassment investigation and any pre-disciplinary process applicable to the employee.

B. Dress Code

If there is a dress code (and there probably should be), is it defensible against claims that it discriminates against one gender or the other; that it is appropriate to the work environment; and that it is uniformly enforced and not discriminatory in application? Dress codes may provide for different dress requirements for men and women. For example, men can be required to wear a tie without there being the same requirement for women.9 While a dress code may distinguish what constitutes proper attire between the sexes, Title VII must be considered when crafting a dress code. A dress code requiring sexually provocative attire, for example, which is imposed as a condition of employment and which subjected the wearer to sexual harassment could violate Title VII.10

C. The ‘Company Party’

If the company sponsors parties and alcohol is likely to be consumed, the employer should remind employees of the anti-harassment policies before the party. The employer must make the connection for the employees: if their conduct at company parties would violate the harassment policies at the workplace, it will violate the company policy even though it occurs off the employer’s premises.

D. Nepotism and Fraternization

If there is a policy against employees dating, marrying or being related to one another, are the policies uniformly applied and reasonably related to accomplishing legitimate workplace objectives? If the policy is facially neutral, is it being applied so

9 Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977).
as not to adversely affect a disproportionate number of employees based on the sex of the employees?

### E. Ethics and Conflicts of Interest

The policies prohibiting quid pro quo harassment (that is, bartering sex in exchange for continued employment, raises or work-related opportunities) also can state that it is a conflict of interest for such an exchange to be offered or accepted by consenting parties. Such a policy could make it a violation of company policy to willingly engage in sex with one capable of and interested in bestowing employment opportunities, or for one in a position of such authority to engage in such activity.

### F. Workers’ Compensation

The employer should review its state’s workers’ compensation statutes and regulations to confirm coverage for the physical and mental health risks associated with sexual harassment, such as post-traumatic stress syndrome and injuries arising from sexual assault.\(^{11}\) It should also note the potential reduction in its exposure to tort claims where the victim of harassment pursues a civil action against the employer for intentional infliction of emotional distress. Workers’ compensation statutes typically preempt a broad range of civil actions based on employment-related emotional injury,\(^{12}\) and a policy may be established requiring such injuries to be treated through the employer’s workers’ compensation plan.

### G. Records Retention

Public sector employers already may be subject to laws that by default mandate the retention of records indefinitely unless there is a retention and destruction policy. In the private sector, records should be maintained long enough to meet any need that could arise during statutes of limitation for any tort-based claims or claims under state FEP laws and provisions of Title VII and Title IX where applicable.

### H. Privacy of Employee Records

Employees’ access to their own records and restrictions against unnecessary publication of records to others must be addressed in policies. This will help the employer avoid invading the privacy of both the charging party and the accused harasser.

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\(^{11}\) See, e.g., Hirase-Doi v. U.S. West Communications, Inc., 61 F.3d 777 (10th Cir. 1995) (anguish and suffering plaintiff suffered from sexual harassment was not compensated through workers’ compensation benefits so as to justify pursuit of other remedies under Title VII).

\(^{12}\) See, e.g., Clark v. Kentucky Fried Chicken, 57 F.3d 21, 27 (1st Cir. 1995) (Massachusetts workers’ compensation statute construed to preempt tort actions at common law to include emotional injuries suffered by victim of sexual harassment).
I. Chain of Command

Most employers have in place a formal procedure for employees to make any workplace complaint. If the sexual harassment policy is at odds with that procedure (because the sexual harassment complaint can be filed with someone outside the standard chain of command), the two policies should be reconciled. The chain of command must recognize exceptions where sexual harassment complaints are involved and where the circumstances warrant using an outside complaint vehicle.

J. Mentoring

The employer must exercise some caution when matching senior employees as mentors to junior employees of the opposite sex. A mentoring program which involves social activities beyond the workplace may provide an unusual opportunity for close social interaction. If the program tends over time to lead the participants into intimate relationships, the employer may be creating an increased risk of either quid pro quo or hostile environment harassment.

K. Employee Assistance Programs

An effective Employee Assistance Program (EAP) may be the first resource used by persons suffering from the emotional consequences created by hostile environment or quid pro quo harassment. If the EAP is closely connected to the employer (for example, if the employer is a hospital and uses a clinic within the hospital to provide counseling in its EAP plan), the employer may be held to have knowledge of harassment even before the employee discloses it to her supervisor. Care should be taken to consult with the EAP administrators to either secure the victim’s consent for disclosing her condition and its cause to the employer or maintaining proof of an absolute wall blocking communication between the EAP and the employer (including a barrier to disclosing billing information that might show the employee’s visits to the EAP facility).

L. Alternative Dispute Resolution

The American Arbitration Association has a process specifically designed for resolving sexual harassment claims. The employer should consider using it or suggesting that the involved parties use it. If it is cost-effective to do so, the employer should pay the costs of such fact-finding or arbitration.

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M. Advising the Company Lawyer

The employer may already have in place policies that trigger a notice to counsel. If so, the policy for sexual harassment claims should be crafted to alert the attorney at the stage no later than when a charge is filed with the state’s FEP agency or the EEOC.  

N. Public Relations

If the employer has a communications office or director, the staff should be trained on issues relating to worker privacy and defamation. The same is true with the human resources staff that responds to inquiries by prospective employers of former employees and the press. Disclosure generally should be limited to a need-to-know basis if the information is not a public record. One commentator suggests a five-step approach to dealing with those who inquire about a harassment claim or claimant: (1) channel all requests for information to a central source; (2) require all such requests to be in writing; (3) keep in mind the distinction between fact and opinion when forming an answer that is objective and accurate; (4) get the word out to supervisors of the former employer that they are to relay the inquiries to the central office; and (5) secure a written release from the employee authorizing the disclosure of the information requested. Permission for release of information can be secured as early as the time an individual applies for employment, rather than wait for securing a signature at the time of separation from employment.

VIII. Summary

Risk managers and human resources directors in both the public and private sectors must be adept at adjusting policies to meet the changes imposed on the workplace by courts and the legislature. The audit process helps in this endeavor if it is linked to the obligations employers face when a claim of sexual harassment is made.

The sexual harassment policies created as a result of the audit process will be effective if they are written in plain English and use examples that reflect the realities of the workplace. The policies need to extend to all individuals who affect the workplace, including directors of the business and those who do business with employees and owners. The policies need to give full and fair warning that those who sexually harass others will be disciplined and that if the circumstances warrant they will be fired. There should be an equally forceful statement of the penalty that will be imposed on one who deliberately makes a false claim of harassment.

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15 Id.
Sexual harassment policies do not need to be limited to prohibiting only harassment that would violate Title VII, and in fact probably should go beyond the Title VII minimums. For example, repeated use of sexist language may in a given office never create a hostile environment that is actionable under Title VII (because it may be that none of the employees is offended by the language). Just the same, an employer may wish to uniformly prohibit the use of such language to convey to employees that the conduct simply is not welcome or permitted in the workplace. A policy going the distance required by Title VII and then some can demonstrate the commitment of an employer to freeing the workplace of all forms of discriminatory conduct.\textsuperscript{16}

\textsuperscript{16} See, e.g., Carfrey v. Franklin Pre-Release Ctr., 1993 WL 382279, *3 (Ohio App. 4th 1993) (prison guard fired for jokes of a sexual nature in presence of female workers/prisoners; removal affirmed on grounds that the conduct was "immoral" even though not sexual harassment).
Chapter 8

Sexual Harassment Policy Manual

The following is a sample sexual harassment personnel policy manual. It is offered not as a complete solution, but as a guide that reflects concerns of the EEOC, state fair employment practice agencies and representatives of the rights of persons accused of harassment. Each workplace is different and the body of law affecting the workplace changes constantly; therefore this model should be a starting point, not the end result, of one part of an employer’s overall policy and procedure manual.1

This sample features selected policies of importance to employers as they address issues relating to sexual harassment in the workplace. It is not intended to be a comprehensive policy manual, for its scope is limited to legal and practical considerations involving sexual harassment. The author has assumed the workplace is in the private, not public sector, with one exception: To illustrate an important phase of discipline, the author has included procedures allowing for a pre-disciplinary hearing that would

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1 In creating this sample policy the author has drawn from many sources, including personal experience in drafting such policies and litigating cases that involved claims of sexual harassment. While no one source served as the basis for the sample, much of the logic and format is found in the sexual harassment policy published by The Ohio State University, Office of Human Resources (1994). In addition, the following were consulted in the course of drafting this sample policy: MODEL SEXUAL HARASSMENT CLAIMS RESOLUTION PROCESS AMERICAN ARBITRATION ASSOCIATION, (1994); EEOC, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (Jan. 1990); 6 CAUSES OF ACTION SEXUAL HARASSMENT IN EMPLOYMENT § 255 (1985 & Supp. 1995); EEOC, POLICY GUIDANCE ON ISSUES OF SEXUAL HARASSMENT (Mar. 19, 1990); EEOC GUIDELINES ON SEXUAL HARASSMENT, 29 C.F.R. § 1604.11(e) (1980); EEOC ENFORCEMENT GUIDANCE ON Harris v. Forklift Sys. Inc. (Approved Mar. 8, 1994); ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE (1990); MARTIN ESKENAZI & DAVID GALLEN, SEXUAL HARASSMENT: KNOW YOUR RIGHTS (1992); BARBARA LINDEMANN & DAVID D. KADUE, PRIMER ON SEXUAL HARASSMENT (1992); DAVID J. MIRAMONTES, HOW TO DEAL WITH SEXUAL HARASSMENT (1994); Michael B. Reuben & Isaac M. Zucker, REMEDYING SEXUAL HARASSMENT: A PRIMER 21 (1995); ELLEN J. WAGNER, SEXUAL HARASSMENT IN THE WORKPLACE (1992). I also gratefully acknowledge the comments and guidance provided to me by my colleagues in the Dublin, Ohio law firm of Blaugrund, Gabel, Herbert & Mesirow, particularly David S. Blaugrund and Jon Gabel.
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meet the standards of due process for public employees (applying the *Loudermill* test described in chapter 4). The policy further assumes that there is no collective bargaining agreement in effect and that the jurisdiction is one that recognizes at-will employment and allows an employer to disclaim the formation of a contract by proper notice in the personnel policy manual. Finally, it assumes this is a jurisdiction in which claims alleging a violation of Title VII, if filed with the EEOC, will be deferred to the state's fair employment practices regulatory agency.

**Personnel Policy Manual: Sexual Harassment Policy**

1. **Authorship**

   This Personnel Policy Manual (PPM) was written by members of the Company's personnel and human resources staff, with the input of workers in all departments of the Company. It was written in ______, and from time to time will be reviewed and, where appropriate, changed. Pages of the PPM that have been changed will have a date designation in the lower left corner showing the date that policy page was changed.

2. **Changes to the Policies of the PPM**

   The purpose of the PPM is to provide general instructions to all employees about what is expected of them and what, in return, the employees may expect of the Company. These expectations may, and probably will, change from time to time. The Company reserves the right, of course, to change the policies set forth in this PPM. While these changes will usually appear in these pages, there may be circumstances that require changes to the policies not reflected in the PPM. In those cases and whenever the Company's chief operating officer (COO) finds it necessary to protect the interests of the Company and its shareholders, changes to the policies in this manual will be made in writing in the Original PPM maintained in the office of the Director of Human Resources. Once reduced to writing and approved by the COO, changes to the Original PPM have the same effect as if originally written in the PPM and circulated for insertion in all employee copies of the PPM.

3. **This Is Not a Contract**

   When an employee joins this Company, he or she does so with the understanding that the employee and the Company have reserved some basic and important rights. One such right reserved by both the Company and the employee is that the employment relationship, while intended to continue over time, is one that can be ended at any time, for any reason (or for no reason at all), by the Company or the employee. THIS PPM IS NOT A CONTRACT and nothing in the PPM shall be construed to alter the at-will
employment relationship existing between the Company and employees. From time to
time, the Company may desire to enter into an employment contract with certain
employees, and in those cases a separate contract, labeled "Employment Services
Contract," will be prepared to reflect the terms of such an agreement. This PPM is not
an Employment Services Contract, and nothing in this PPM is intended to give an
employee the right to be employed or remain employed by the Company.

4. Authority To Change the Terms of Employment

The Company has trained its managers and members of the Human Resources
Department to administer the provisions of the PPM on a day-to-day basis. It does not,
however, authorize those who administer the provisions of the PPM to also change
these provisions and expressly denies such authority to any person except as provided
in this section. Oral agreements relating to any provision of this PPM or to the terms
or conditions of employment entered into between employees and any member of the
management of this Company shall not be binding unless and until approved in writing
by the COO.

5. Controlling Law

This Company intends to comply with all applicable laws of the United States of
America, this State and its political subdivisions. It is an equal opportunity employer
and intends to maintain a diverse workforce. It does not discriminate and prohibits
discrimination based on race, color, religion, sex, national origin, disability, age or
ancestry.

6. Disciplinary Procedures—Generally

Although the employment of any employee may end at any time and without
cause, the Company has an interest in investigating claims that an employee has violated
Company policies. The Company also has an interest in considering the views of an
employee believed to have violated Company policies. In furtherance of these interests,
the Company may, where circumstances warrant, extend to an employee the opportunity
to respond to claims that the employee violated Company policies. Where appropriate,
such an opportunity will be provided during or at the conclusion of any investigation
into the claimed violation of Company policy.

7. Progressive Discipline—Generally

While reserving the right to terminate the employment of an employee at any
time, the Company generally will apply principles of progressive discipline in those
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instances which, in its exclusive discretion, warrant such application. In the exercise of its discretion, the Company may be required to balance competing interests among its employees or competing interests reflected in the laws applicable to workplace activity. In the exercise of its discretion, the Company shall act in a manner consistent with the best interest of the Company, after considering the competing interests involved.

8. Policy Prohibiting Sexual Harassment

It is the responsibility of all persons working at the Company to maintain an environment that is free from sexual harassment. Sexual harassment is unlawful and contrary to the best interest of the Company and its employees. It exposes the harasser to discipline in the workplace and the risk of personal liability for his or her misconduct. The Company seeks to eliminate sexual harassment through education and by encouraging all employees and those with whom our employees do business to report concerns or complaints. The Company will not knowingly tolerate sexual harassment, will investigate all claims of sexual harassment, and will take prompt corrective measures designed to stop sexual harassment whenever it occurs.

9. Definitions

What is sexual harassment? According to guidelines put forward by the Equal Employment Opportunity Commission in 1980, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(1) submission to such conduct is made a term or condition of the individual’s employment, or
(2) submission to or rejection of the conduct is used as the basis for employment decisions affecting the individual; or
(3) the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

In plain English, if your conduct is of a sexual nature, is not welcomed by the person observing your conduct, and either interferes with the working environment or is used by you to make employment-related decisions, you may be guilty of sexual harassment. If you have any doubt about whether conduct is harassment, you may discuss your concerns with your supervisor, any member of the Human Resources Office or the Chief Operating Officer at any time.

10. Examples of Prohibited Conduct

The Company’s policy prohibiting sexual harassment is designed to comply with state and federal anti-harassment laws. It is intended to meet every requirement of those
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laws and may exceed those laws where conduct of a sexual nature is contrary to the best interest of the Company. The prohibitions apply to all employees and extend to conduct among co-workers; between employees and supervisors, officers, and directors; and between employees and third parties, such as customers, clients, vendors and independent contractors doing business with the Company.

Without setting forth all possible forms of sexual harassment, these are some examples of job-related conduct prohibited under this policy:

- Sexual jokes, innuendoes and gestures;
- Unwelcome sexual advances, including unwanted flirtation, advances, propositions, suggestions, and direct or subtle pressure for sexual activity which is unwanted and unreasonably interferes with a person’s work environment;
- Using spoken or written words, drawings, E-mail or other means to discuss sexual activities or engage in sexual gossip or to make graphic or degrading comments about someone’s appearance, dress, body, sexual prowess, sexual deficiencies, sexual orientation or sexual activities;
- Any pattern of conduct relating to sex that is not legitimately related to the course of business and that causes discomfort or embarrassment, such as comments of a sexual nature; sexually explicit statements, questions or anecdotes; and repeated or unwanted staring at a person’s body (or any part of the body);
- Physical contact of a sexual nature that is not clearly requested and freely consented to in advance, including kissing, touching, rubbing, hugging, pinching, patting or squeezing;
- Using familiar terms such as “honey,” “girl,” “baby,” “stud,” “hunk,” “chick,” “dear” and the like when referring to or speaking with another individual in a job-related context;
- Regularly making unreciprocated offers of personal gifts such as flowers and candy;
- Coerced sexual acts;
- Stalking, assault or rape; and
- Any display of inappropriate sexually oriented materials in a location where others can see it when such materials unreasonably interfere with a person’s work environment.

11. Who or What Determines If Conduct Is ‘Unwelcome’?

Sexual harassment occurs when an employee is confronted by “unwelcome” behavior of a sexual nature. While the harasser may not intend this result, it is the duty of all individuals to take the initiative to learn whether his or her actions, comments or invitations are regarded as welcome. The following factors may help an individual determine whether the behavior is welcome.
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- Is there an equal level of initiation and participation in the behavior? For example, has an individual declined an invitation to socialize once, only to find that the requester continues to request dates?
- Is the behavior such that the actor would behave the same way toward a person who is not in the class of people to which he or she is sexually attracted?
- Can it fairly be said that there is equal economic power between the people involved, or does one party have a superior economic position over the other?
- Is the behavior such that the actor would not object to it becoming public knowledge or known to the shareholders or stockholders of the Company or, in appropriate cases, the actor’s spouse or domestic partner?

12. Consensual Relationships

Because of the risk of creating a hostile working environment, consensual romantic and sexual relationships between supervisors and employees are strongly discouraged. Relationships that begin as consensual affairs and end while both parties remain in the workplace can threaten the workplace environment and jeopardize the continued employment of both parties to the relationship.

13. Who Is Covered by This Policy?

All employees of the Company are expected to comply with the Company’s sexual harassment policy. The policy also covers the course of business with vendors, customers, clients and the general public with whom our employees have contact. Shareholders, directors and officers of the Company also are subject to this policy.

14. Retaliation

One who raises a claim or inquiry concerning sexual harassment shall be protected against any form of retaliation. Retaliation against an individual for reporting sexual harassment or for participating in an investigation is prohibited by this policy and by state and federal law. Retaliation is a serious violation, and one engaging in retaliation may be held personally liable for his or her conduct, even if the underlying claim of harassment proves to be unfounded.

15. False Claims

Making a formal or informal claim that someone has engaged in sexual harassment, knowing the claim is false, is expressly prohibited. One who, by rumor or suggestion or by using the complaint procedures outlined in this policy, deliberately communicates false allegations of harassment claimed to have occurred against the employee or against
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a third party, violates this policy and may be subject to personal liability to those injured by the communication.

Given the nature of sexual harassment, the fact that an investigation fails to produce proof that the alleged conduct took place DOES NOT MEAN THERE WAS A FALSE CLAIM. Harassment can occur even in the absence of witnesses and without corroboration. As a result, a claim may be made which the complainant believes to be well-founded but for which there is no corroboration. Such a case is not a “false claim” as that term is used here. Depending on the circumstances, a claim of harassment might be established even without corroboration, or it might be established that no harassment occurred. As used here, a false claim means a claim made or repeated by an individual with malicious intent and knowing the allegations are unfounded (or making the statement with reckless disregard for whether the allegations are true).

16. Misconduct Not Meeting the Definition of ‘Sexual Harassment’

Not all conduct of a sexual nature is “sexual harassment” as used in this policy or as used in Title VII (42 U.S.C. § 2000e). The use of sexually oriented words, references or expressions may not violate state or federal anti-harassment laws but nonetheless may constitute a violation of the policies of this Company. Depending on the circumstances, conduct in the workplace or in work-related settings that is of a sexual nature generally is inappropriate and may subject the actor (whether employee, officer, shareholder or outside third party) to curative action or, in appropriate cases, discipline or discharge.

17. Complaints

All complaints that reach the attention of the Company will be investigated. A complaint should be in writing, and a form attached that will ensure prompt action if it is filled out properly and signed by the complainant. However, even oral complaints, and those submitted in writing but anonymously will be investigated. Even in the absence of formal or informal complaints, the Company may initiate an investigation into possible sexual harassment in or relating to the workplace. For the purposes shown here, a “formal complaint” is one signed by the person filing the complaint and on the form provided by the Company. All other complaints are “informal” complaints.

18. Authority To Accept Complaints

The Human Resources Department of the Company is authorized to accept formal or informal complaints involving claims of sexual harassment. Informal complaints also may be communicated to any manager or supervisor, the COO or any member of
the Board of Directors of the Company. A complaint also may be filed (formally or informally) with the State Fair Employment Practices Commission, located at ________________ (telephone no. ( ) ________________), subject to the rules of the Commission and using the forms and procedures required by the Commission.

19. Information Needed To Process the Complaint

While the following information need not be provided, it will be useful to the Company in its efforts to respond to a formal or informal complaint.
• a description of the conduct that is the subject of the complaint, including the date or dates and place or places involved;
• the identity of the person or persons who engaged in the conduct;
• the identity of any witnesses to the conduct,
• if there have been efforts to stop the conduct, a description of those efforts and the identity of witnesses to those efforts, as well as the response (if any) by the alleged harasser(s);
• if you would prefer to have a particular individual assist in the investigation, or that a particular individual not be part of the investigation of your complaint, please state your preference and briefly explain your reasons. Note that prior to an investigation, the Company can not in all cases abide by such requests but will make an effort early in the response to the complaint to consider such requests, and
• a statement describing what remedy is being sought.

20. Time Limits for Filing Complaints

The Company has an interest in taking prompt and effective action to prevent and stop sexual harassment. To accomplish this, complaints about harassment should be filed promptly after the employee has reason to believe harassment has occurred, is occurring, or will occur. Delays of even one week hamper the ability of the Company to protect against sexual harassment. Prevention is the goal, and the Company will consider complaints for conduct the complainant believes will happen but which has not yet taken place. The Company will investigate any claim of harassment, regardless of when the conduct is alleged to have taken place. Its ability to effectively remedy harassment may be limited, however, if the claim is not brought to the attention of the Company promptly after the complainant has cause to believe the harassment has occurred or will occur.

21. Remedies Available Through the Complaint Process

After it responds to an informal complaint of sexual harassment, the Company may offer to serve as a liaison between the complainant and the person alleged to be
the harasser, retaining (at the request of the complainant) the informal nature of the complaint process; or the Company may elect, at its option, to convert the complaint to a formal proceeding. Notice need not be given to the complainant that such a conversion is warranted or will take place.

In the resolution of complaints where harassment has been established, every effort will be extended to offer a full remedy to the person who suffered from the harassment. If the complaint results in a finding that the alleged harasser is guilty of harassment or any other violation of Company policies, action appropriate under the circumstances will be taken to punish the harasser. Further action will be taken to effectively reduce the risk that the harassment will recur. To this end, the Company will consider the suggestions of the person or persons who were subjected to the harassment and will act only after considering what is in the best interests of the Company as a whole.

At any time, the complainant or the accused harasser may express his or her interest in resolving the complaint by procedures set forth in the Model Sexual Harassment Claims Resolution Process, promulgated and administered by the American Arbitration Association (effective August 1994 or as may be subsequently amended). Copies of the Process may be obtained by writing to the American Arbitration Association, 140 West 51st Street, New York, N.Y. 10020-1203 or by calling (212) 484-4000 (fax: (212) 765-4874). Upon an expression of intent by one party, the other party will be given the opportunity to consider the same resolution process. The Company expressly reserves the right, however, to decline the use of alternative dispute resolution or to agree to such resolution but under terms different than those appearing in the AAA Process.

22. Confidentiality of the Complaint Process

If the laws to which the Company is subject require disclosure of records or other information obtained in the complaint process, the Company will comply with those laws. As a result, some of the information provided to the Company in the course of its investigation into complaints of sexual harassment will be disclosed. The Company will always provide access to and copies of records to authorized governmental agencies, as provided for by law. Generally, however, the information provided in a complaint and investigation into claims of sexual harassment will be disclosed only to those who need to know the information in order to perform the investigation and judge its merits. Where sufficient information is provided to permit it to do so, the Company will disclose the complaint, either as it was filed or in a summary form, to the person or persons accused of harassment.

23. Recordkeeping

Records of complaints, including informal complaints and memoranda of orally communicated complaints, shall be maintained by the Company in the Human Resources
Department in a file separate from personnel records and shall not be considered public records unless so designated by law. Records of investigations shall likewise be stored in files controlled by the Human Resources Department, cross-referenced with records of complaints. Records of discipline imposed as a result of harassment shall be maintained in the personnel file of those persons who are subjected to such discipline. Records reflecting the unfounded claim of sexual harassment shall be maintained with the investigation files and in the files of the claimant. Records showing discipline following the filing of a false claim of harassment shall be maintained in the personnel file of the claimant and the victim of the false claim.

24. Investigations

Within 24 hours of receipt of sufficient information for it to do so, the Company shall begin an investigation of all complaints it receives indicating that sexual harassment has taken place, is taking place or will take place in the foreseeable future. Where appropriate, the investigation may be performed by persons retained by the Company who are not employees of the Company and who will report directly to the Board of Directors.

The investigation will be comprehensive enough to provide a reasonable sense of certainty that the merits of the complaint were fully examined. An investigative report will be filed in response to each complaint within 30 days of the date the complaint was first received. If circumstances warrant additional time for completing the report, the report will provide a statement describing the circumstances causing the delay, and an interim report will be filed in place of the final report. Any report prepared under this provision shall be filed with the COO unless the COO is the subject of the investigation, in which case the report shall be filed with the Secretary of the Board of Directors. A copy of the report or a summary of the report prepared for this purpose will at this time be sent to the complainant and the accused party.

25. Corrective Action

Except in the instance where the harasser is the COO, all final orders issued in response to investigations into allegations of sexual harassment, the filing of false claims of harassment, or retaliation for filing claims of sexual harassment (or participating in claims investigations) shall be issued by the COO. In its sole discretion and acting through the COO or its designee, the Company shall take whatever corrective action it deems appropriate upon receipt of the interim or final report of the investigation into claims of sexual harassment. Consistent with applicable law (including Title VII and state fair employment practices laws), corrective action will be directed both to end the complained-of harassment and prevent the return of harassment under similar circumstances. All persons subject to the rules violated by the harasser may be informed about the violation in order to assure the misconduct does not continue.
Corrective action may include terminating the person shown to have engaged in harassment, the person who knowingly and with malice filed a false complaint or the person who retaliated against any person for involvement in the complaint or investigation. Corrective action also may include summary termination of any existing independent contractual relationship with any vendor, agent or the like and other action appropriate under the circumstances. These sanctions, although severe, may be imposed even on a showing that the complained-of conduct was the first incident of its kind by the harasser.

26. Appeals

Once the Company has issued an order imposing discipline or other corrective action, the order is final and is not subject to appeal under this policy.

27. Resources

Office of Human Resources Management, Director
Phone
Chief Operating Officer
Phone
Board of Directors, Secretary
Phone
State Fair Employment Practices Agency
Address
Phone

Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507
(202) 663-4900

28. Discipline Pending an Investigation of a Sexual Harassment Complaint

It is the policy of the Company to prohibit retaliation against persons filing a complaint alleging sexual harassment or other forms of discrimination in the workplace. It is also the policy of the Company to impose prompt discipline for infractions of the policies of the Company, even if the person guilty of the infractions may also have filed a formal or informal complaint alleging some form of discrimination in the workplace. In order to assure that its conduct will not be retaliatory in nature or perceived as retaliatory in nature, the Company may place on paid administrative leave a person
who has filed a formal or informal complaint alleging to be the victim of sexual harassment while the Company conducts its investigation into the claims of harassment. Should circumstances prove that discipline is warranted on grounds not related to the complaint of sexual harassment or the investigation into the claim of harassment, then discipline may be imposed and, in appropriate cases, the effect or penalty of such discipline may be suspended pending the outcome of the investigation into the claim of sexual harassment.

29. Dress and Grooming Standards

The Company expects its employees to report to work dressed and groomed appropriately for the job function being performed. Where the job duties are primarily performed in the office, suits and casual dressware appropriate for the business setting is expected of all employees. Shorts, sandals, tee-shirts and attire exposing the midriff are examples of clothing not appropriate to this environment. Where duties involve meeting with clients, vendors, customers or the general public, clothing should reflect a greater concern for formal appearances. Where the duties include work out of doors, workers are expected to dress and groom to meet the needs of the job, giving due consideration for safety and weather factors.

30. Nepotism, Fraternization and Conflicts of Interest

The Company is committed to offering its employees equal employment opportunities. If equality of opportunity is threatened or if there is a perception that equality of opportunity is threatened because of family ties, personal relationships not related to the workplace, or other social reasons not related to the workplace, the Company will take steps it deems appropriate to restore equality of opportunity based on work-related factors. These steps may include, but are not limited to, terminating the employment of those involved in the relationship, affording reasonable opportunities to one or both members of the relationship to transfer to another position to eliminate any impediment to equal employment opportunities, or making other accommodations as will serve the best interests of the Company.

Any person having supervisory duties or acting in a position having supervisory duties shall disclose to the Human Resources Director the existence of family ties, personal relationships not related to the workplace, or other social ties existing between the supervisor and any person under his or her supervision. This disclosure shall be made at the earliest possible opportunity. If the relationship exists at the time the individual is being considered for the supervisory duties, the supervisor must disclose the fact of the relationship during the initial application or interview process. If the relationship arises while the individual is serving as supervisor, the fact of the relationship must be disclosed prior to the supervisor taking any action that might impair equal
opportunities for others, such as during evaluation or performance review processes. Under no circumstances may a supervisor process or approve an evaluation or performance review of an employee with whom the supervisor has family ties, a personal relationship not related to the workplace or other substantial social ties.

Family ties as used in this policy means the relationship of spouse, domestic partner, former spouse, former domestic partner, present fiancée, former fiancé child, parent, sibling, grandparent, grandchild, aunt or uncle, or nephew or niece.
Appendix A

Answers to Common Questions

Question: Is it a violation of Title VII to promote someone because they’ve engaged in an intimate relationship with the supervisor who decides the promotion?

Answer: In one case a subordinate and her superior were engaged in a consensual relationship. When others in the office were denied a promotion that the subordinate was given, the court rejected the other workers' claim that Title VII was violated. However, if sexual favoritism was widespread so that the only way to advance in position is to engage in “consensual” sexual relationships, then a hostile environment is shown.

Question: In order for there to be harassment, does the victim have to tell the harasser his conduct is unwelcome? Does she have to tell her supervisor or other representative of the employer?

Answer: According to the EEOC, there is no obligation to tell a harasser the conduct is unwelcome, unless there are facts which would have led others to conclude the conduct was welcome. “While a complaint or protest is helpful to charging party’s case, it is not a necessary element of the claim. Indeed, the [Equal Employment Opportunity] Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct.” If an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims she finds the work environment to be hostile, the employee has to clearly notify the alleged harasser that his conduct is no longer welcome.

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1 Drinkwater v. Union Carbide, 904 F.2d 853 (3d Cir. 1990).
2 Id.; see also EEOC Policy Statement on Sexual Favoritism in Appendix F.
3 EEOC Policy Guidance on Issues of Sexual Harassment (Mar. 19, 1990), text accompanying n.9.
Failure to confront the harasser, however, may be considered as evidence on the question of whether the conduct was truly unwelcome.\textsuperscript{4}

Further, according to the EEOC, there is no requirement in Title VII that the victim report sexual harassment to her employer or supervisor. If she does make a report, then of course the employer is on notice that the employee believes the conduct is harassment. "Therefore, a showing that the conduct was reported is one means of evidencing employer knowledge in such cases; but a showing that the conduct was not reported does not automatically preclude a finding that the employer knew or had reason to know of the sexual harassment."\textsuperscript{5}

**Question:** A vendor or repairman who works on-site routinely makes suggestive comments to our younger female employees. Can we be sued for his behavior?

**Answer:** Yes. The EEOC has stated that an employer may be liable if it has knowledge of harassing behavior by third parties (for example, vendors, customers, clients) and fails to take remedial action. If the conduct of the repairman creates a hostile environment and the employer knows about it (or circumstances are such that it should have known about it) and does nothing to remedy the situation, the employer violates Title VII.\textsuperscript{6}

**Question:** A gay employee has complained that his male supervisor is harassing him. What's the employer's responsibility?

**Answer:** If the supervisor has been making advances toward the gay employee, seeking sexual favors and the like, then Title VII affords the same protection to the gay employee that it does the heterosexual employee. The disparate treatment is based on the male employee's sex, and the EEOC has stated this constitutes a violation of Title VII. The same is not true, however, if the harassment is in the form of abuse regarding the gay male's sexual preference. Ridiculing someone because of their homosexuality is not covered by Title VII, but it may be actionable under state sexual orientation laws or common law tort claims of invasion of privacy, assault (if contact is threatened) or battery (if contact is made).\textsuperscript{7}

**Question:** What if an employer has an employee whose work performance is marginal and the employer is considering firing her? After she receives her annual performance

\textsuperscript{4} Id.

\textsuperscript{5} EEOC Compliance Manual No. 103, Harassment, §§ 615, 615.3(d) (June 1987) (construing 29 C.F.R. § 1604.11(d) (1995)).

\textsuperscript{6} EEOC Compliance Manual No. 103, Harassment, §§ 615, 615.3(e) (Jan. 1982) (construing 29 C.F.R. § 1604.11(e) (1995)).

\textsuperscript{7} EEOC Compliance Manual No. 103, Harassment, §§ 615, 615.3(b) (June 1987); see also, Dillon v. Frank, 58 Fair Empl. Prac. Cas. (BNA) 144 (6th Cir. 1992) (employee beaten by male co-workers because they believed him to be gay was not entitled to Title VII remedies but may have remedies under state tort claims).
evaluation she complains that her reviewer has been giving her unsatisfactory evaluations because she won’t have an affair with him. Can the employer proceed to fire her without addressing her complaint?

Answer: Probably not. Section 107 of the Civil Rights Act of 1991 amended Title VII so that if the employee can show that retaliation for making her complaint was one reason for her being fired, then she has shown a violation of Title VII. The fact that the employer might have other legitimate motives for firing the employee does not excuse the employer’s liability. However, it will be a factor when considering the remedies available to the fired employee. The employee who would be fired for cause would lose her prospective remedies (front pay, reinstatement and possibly compensatory damages for prospective injury), but may still be entitled to seek “make whole” remedies from past discrimination that adversely affected tangible job benefits. The better course of action for the employer may be to place the employee on a paid leave of absence while a proper investigation into the allegations of harassment is conducted.⁸

Question: After concluding our investigation we determined harassment had occurred and that it has been effectively resolved. Do we need to fire the harasser?

Answer: No, but the actions taken by the employer have to be “reasonably calculated to end the harassment.”⁹ Employers should impose sufficient penalties to assure a workplace free from sexual harassment. “In essence, then, we think that the reasonableness of an employer’s remedy will depend on its ability to stop harassment by the person who engaged in harassment... In evaluating the adequacy of the remedy, the court may also take into account the remedy’s ability to persuade potential harassers to refrain from unlawful conduct.”¹⁰

Question: Can someone who falsely reports sexual harassment be sued for defamation?

Answer: Yes. In a case reported in 1995,¹¹ the defendant prepared a memorandum accusing her supervisor of sexually harassing her, and the note was seen by co-workers. While opinions stated in the note (including the defendant’s opinion that she had been sexually harassed) were not actionable, the facts she alleged in describing what led to her conclusion were facts which, because they were false and made “with actual malice,” formed the basis for a judgment of compensatory damages in excess of $150,000.

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⁹ Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).

¹⁰ Id.

Appendix B

Sample Forms

Sexual Harassment Complaint

Name ______________________ Position __________________________

Department ______________________ Shift __________________________

Immediate Supervisor ____________________________________________

Have you been provided a copy of the Company’s Sexual Harassment Policy and its Procedures Regarding Claims of Sexual Harassment? ______________________________

What is the behavior that prompted your complaint? (Please provide, to the extent possible, dates, times and places in your description of this behavior.)

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

If you haven’t already done so in answering the question above, please identify (if you can) the person or persons who engaged in the harassing behavior.

________________________________________________________________________
Preventing and Responding to Workplace Sexual Harassment

Other than those already identified, please identify others who may have witnessed any of the harassing behavior.


If you have tried to end the harassment, please describe what steps you have taken (for example, by informing your supervisor where appropriate, confronting the harasser, requesting assistance from your union steward or friends in the Company).


Signature


Date

If you submit a complaint without disclosing your identity, [Company Name] is committed to providing its employees with a work environment that is free of sexual harassment and hostility. If you do not sign the complaint the Company will still investigate the charges made in it. In all appropriate cases the person accused of harassment will be told about this complaint and may be shown a copy of the complaint.

App. B : 2
Letter of Employment—Employment at Will

Dear [ ],

On behalf of [company name], I am pleased to extend to you an offer of employment at [company name], in the position of [ ]. Your compensation will be [ ] per [ ]. We hope that you will give this offer serious consideration and agree to join us shortly.

Although this offer does not create a contract of employment or a specific term of employment, it is our hope and desire that your acceptance of our offer will be the beginning of a long and successful relationship.

If you have any questions regarding your position or our company, please feel free to contact me.

Again, I am pleased to make this offer to you, and look forward to having you start with us soon. Should we not hear from you by the close of business on Friday, [month and date], we will conclude that you wish to withdraw your application and we will fill the position by other means.

Sincerely,

------------------------------------------------------------------------

Human Resources Director (or Chief Operating Officer)
Preventing and Responding to Workplace Sexual Harassment

Acknowledgment of Receipt of PPM and Tear Sheet for Retention in Employee’s Personnel File

Name of Employee

Position Being Filled

Dates of Orientation

Lead Orientation Trainer

In the course of being trained for the position described above, I was given a copy of the Company’s Personnel Policy Manual (PPM). I know that from time to time changes may be made in the PPM and that copies of those changes will not always be sent to me. I know that I can see a copy of the Original PPM, with all changes, by going to the Human Resources Office and asking to do so.

I state that I have read the PPM, am familiar with the policies of the Company, and understand that the policies are not a contract of any kind. It is my understanding that nothing in the PPM or in any statements made to me during recruitment or the application process creates any contract for employment or any expectation on my part that the employment will be subject to any terms of any contract (including any of the terms in the PPM). I understand a copy of this acknowledgement will be mine to keep, along with the PPM itself, and that the original receipt will be retained by the Company, showing that I have both read the PPM and signed this acknowledgment.

__________________________
Employee

__________________________
Date

App. B : 4
Release Authorizing Disclosure of Information

Name of Employee

Date

From time to time, the Company may need to discuss my work habits, performance or attitude with others. By signing this written authorization, I grant permission to the Company to disclose such information as, in its sole discretion, the Company deems appropriate under the circumstances then pending. This permission shall remain in effect until I provide a written withdrawal of the permission by delivering the same to the Company’s Director of Human Resources.

Signature

Date

Witness
Complaint Protocol—Sexual Harassment

Receipt of Complaints. Complaint may come from any individual, whether or not employed by the Company, and may pertain to any individual, whether or not employed by the Company.

Form. Whenever possible, the details of the complaint shall be recorded on the Sexual Harassment Complaint Form created for this purpose. This form may be filed without identifying the complainant, but the complainant should be advised that there may be disclosure of the terms of the complaint and that the alleged harasser will be told of the complaint in appropriate cases. Such disclosure shall not take place where the alleged harasser has been charged with criminal violations of law, unless such disclosure is first approved by the appropriate prosecuting authorities.

Routing. Complaints received outside of the Human Resources Office shall be routed as appropriate, in the judgment of the recipient of the complaint, consistent with the goal of commencing an investigation within 24 hours of receipt of the formal or informal complaint.

Processing of Complaints. The complaint will be examined to determine whether the ordinary course of review should be altered, as it might be where the person being complained about is in the Human Resources Office or otherwise involved with the review process. In cases where an alternative reviewer needs to be assigned, the person first processing the complaint shall bring the complaint directly to the Chief Operating Officer or the Corporate Legal Counsel.

Disclosure of Information. Only persons having a need to know about the complaint should be apprised of its existence or its contents. The written complaint shall be stored in a locked storage cabinet secured by the person responsible for processing the complaint. If the complaint is maintained as E-mail or other electronic media, the file shall be kept secured by appropriate encryption or password controlled by the person responsible for processing the complaint.

Time for Processing Complaint. An investigation evaluation shall be completed within 24 hours of receipt of the complaint. The evaluation shall accompany the complaint or memorandum of oral complaint and be delivered to the Director of the Human Resources Office within 24 hours of the receipt of the complaint. If the complaint concerns or implicates the Director of Human Resources, delivery shall be to the Chief Operating Officer.
Investigation Protocol—Sexual Harassment

Subjects Covered by the Investigation. The investigation shall include a review of each of the matters to be investigated by the EEOC, as set forth in the EEOC Compliance Manual, Section 615.4, and any parallel investigation scheme published by the State Fair Employment Practices Act. A copy of the investigation topics shown in the EEOC Compliance Manual can be obtained by contacting the Chief Legal Officer.

Notice to Corporate Legal Counsel. Notice of the existence of the complaint and the course of investigation shall be provided to the Chief Legal Counsel prior to the conclusion of the investigation, unless the Chief Legal Counsel is implicated in the complaint.

Credentials of Persons Conducting the Investigation. In all cases, the investigation shall be conducted only by persons having substantial knowledge of laws and procedures applicable to resolving complaints of sexual harassment and trained in gathering information in confidential legal proceedings.

Investigations to be Private. The investigations are to be held in closed and private session. The investigator has the discretion to permit or use recording devises during such session. If a session is recorded by electronic means, notice of the recording must be given to the person being questioned. Should the subject of questioning insist on recording and in the judgment of the investigator such a recording would not be in the best interest of the Company, the investigator may deny the request to record.

Refusal To Participate in Investigation. Should any person refuse to answer questions or insist on conditions not acceptable to the investigator, the investigator shall make a note of the refusal or condition and continue the investigation without detaining the person.

Time for Delivery of Investigation Report. The investigator shall, within 21 days of receiving the notice of complaint, prepare and deliver a report to the Chief Operating Officer (COO) (unless the COO is implicated in the report). That report shall describe the nature of the allegations; the facts as they were found by the investigator; a report on the merits of the complaint; a report on the remedies sought by the complainant and the opinion of the investigator as to the merits of the requested remedies; and a recommendation for action. The report also shall include recommendations for review of the work environment implicated by the complaint, to be conducted at such time in the future as will permit the investigator to determine whether any proposed and implemented remedies were effective in ending any harassment, and if not, to determine what measures are needed to end the harassment and prevent its return.
Orientation and Continuing Education/Training Protocol

Training Required. The Human Resources Office and its Training Officers shall be responsible for providing training regarding sexual harassment in the workplace. Such training will take place during initial employee orientation and during the process of applying for a position of management or increased levels of supervision, and in any case not less than annually.

Training Subject. The curricula of these courses shall cover, in detail that is appropriate to the level of authority attributed to the audience: the Company policy; what behavior might qualify as sexual harassment; how a determination of "unwelcome" behavior is made; how complaints are processed; how investigations are handled; the risks of personal liability to the person who sexually harasses another; and the risk of personal liability to the person who files a complaint he or she knows to be false.

Environmental Monitoring. At each course, employees shall be given the opportunity to register, anonymously if desired, any complaint or claim that sexual harassment exists in the workplace. The telephone number of state and federal antidiscrimination authorities shall be provided to the employees during this training, along with any other information believed useful in communicating the Company's policy against sexual harassment.

Separate Training for Investigators. Training for those designated as investigators shall be separate from that given to sensitize workers about harassment generally. In investigator training, the curriculum shall include: a detailed program on legal and practical considerations of harassment investigation; questioning techniques; record-keeping in anticipation of litigation; credibility assessment training; knowledge of alternative means to resolve disputes (for example, mediation or arbitration); and techniques for communicating with third parties, the press, prior employers and successor potential employers.
Audit/Survey Protocol—Sexual Harassment

Audit and Survey Required. Not less than annually, and preferably whenever sexual harassment training takes place, an audit and survey shall be prepared and distributed to each employee. Whether or not it is filled out, the form will be recovered from each attendee at such training at the conclusion of the training, and thereafter retained by the Human Resources Office.

Topics Studied by Survey. The survey shall inquire into the following:

- Attitudes about sexual harassment: whether the employee knew prior to training what behavior constitutes harassment and whether the employee has experienced harassment or knows of employees who have;
- Opinions about the Company’s response to complaints of harassment: whether the employee is aware of any complaints and responses; whether the responses appear to have been prompt and effective; and whether the complained of behavior has returned;
- Suggestions for addressing any problems or improving any programs aimed at preventing or remedying sexual harassment.

Peer Review and Audit Committee. The survey will permit the respondent to indicate whether he or she is willing to serve on a peer review and audit committee. The committee will be comprised of a cross-section of the employees of the company and will have a membership that experiences complete turnover every four to five years, in staggered increments. The purpose of the committee is to report generally on the workplace environment. Its work product will be minutes reflecting whether the environment of the workplace is meeting the requirements of Title VII and the state fair employment laws, along with an annual report to the Chief Operating Officer describing the committee’s findings and recommendations for the Company.
### CHARGE OF DISCRIMINATION

*This form is affected by the Privacy Act of 1974; see Privacy Act Statement before completing this form.*

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*State or local Agency, if any*

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**NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (if more than one list below):**

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<th>NAME</th>
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**CAUSE OF DISCRIMINATION BASED ON (Check appropriate boxes):**

- [ ] RACE
- [ ] COLOR
- [ ] SEX
- [ ] RELIGION
- [ ] NATIONAL ORIGIN
- [ ] RETALIATION
- [ ] AGE
- [ ] DISABILITY
- [ ] OTHER (specify)

**DATE DISCRIMINATION TOOK PLACE**

- [ ] EARLIEST
- [ ] LATEST

**THE PARTICULARS ARE** (If additional space is needed, attach extra sheet(s));

**I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.**

**SIGNATURE OF COMPLAINANT**

**NOTARY** - (When necessary for State and Local Requirements)

**Date**

**CHARGING PARTY COPY**

---

**App. B : 10**
Equal Employment Opportunity is THE LAW

Employers
Holding Federal
Contracts or
Subcontracts

Applicants to and employees of companies, with a Federal govern-
ment contract or subcontract are protected under the following
federal authorities:

RACE, COLOR, RELIGION,
SEX, NATIONAL ORIGIN
Executive Order 11246, as amended,
prohibits job discrimination on the
basis of race, color, religion, sex or
national origin, and requires affirma-
tive action to ensure equality of
opportunity in all aspects of employ-
ment.

INDIVIDUALS WITH
HANDICAPS
Section 503 of the Rehabilitation
Act of 1973, as amended, prohibits
job discrimination because of handicap
and requires affirmative action to
employ and advance in employment
qualified individuals with handicaps
who, with reasonable accommoda-
tion, can perform the essential func-
tions of a job.

VIETNAM ERA AND
SPECIAL DISABLED
VETERANS
38 U.S.C. 4212 of the Vietnam Era
Veterans Readjustment Assistance
Act of 1974 prohibits job discrimina-
tion and requires affirmative action to
employ and advance in employ-
ment qualified Vietnam era veterans
and qualified special disabled veter-
ans.

Any person who authorizes a con-
tactor to violate the nondiscrimina-
tion or affirmative action obligations
under the authorities above should
contact immediately:
The Office of Federal Contract
Compliance Programs (OFCCP),
Employment Standards Administra-
tion, U.S. Department of Labor,
200 Constitution Avenue, N.W.,
Washington, D.C. 20210 or call
(202) 514-8300, or an OFCCP
regional or district office, listed in
most telephone directories under
U.S. Government, Department of
Labor.

Private Employment,
State and Local
Governments,
Educational Institutions

Applicants to and employees of most private employers,
State and local governments, educational institutions,
employment agencies and labor organizations are protected
under the following Federal laws:

RACE, COLOR, RELIGION, SEX, NATIONAL
ORIGIN
Title VII of the Civil Rights Act of 1964, as amended,
prohibits discrimination in hiring, promotion, discharge, pay,
fringe benefits, job training, classification, referral, and other
aspects of employment, on the basis of race, color, religion,
sex or national origin.

DISABILITY
The Americans with Disabilities Act of 1990, as amended,
prohibits qualified applicants and employees with disabilities
from discrimination in hiring, promotion, discharge, pay, job
training, fringe benefits, classification, referral, and other
aspects of employment on the basis of disability. The law
also requires that covered entities provide qualified appli-
cants and employees with disabilities with reasonable accom-
mmodations that do not impose undue hardship.

AGE
The Age Discrimination in Employment Act of 1967, as
amended, protects applicants and employees 40 years of age
or older from discrimination on the basis of age in hiring,
promotion, discharge, compensation terms, conditions or
privileges of employment.

SEX (WAGES)
In addition to sex discrimination prohibited by Title VII of
the Civil Rights Act (see above), the Equal Pay Act of 1963,
as amended, prohibits wage discrimination in payments of
wages to women and men performing substantially equal
work in the same establishment.

Retaliation against a person who files a charge of discrimina-
tion, participates in an investigation, or opposes an unlawful
employment practice is prohibited by all of these Federal
laws.

If you believe that you have been discriminated against under
any of the above laws, you immediately should contact:
The U.S. Equal Employment Opportunity
Commission (EEOC), 1801 L Street, N.W.,
Washington, D.C. 20507 or call
(202) 660-4651, an EEOC field office by
calling toll free (800) 669-4000, or an
individual with hearing impairment, EEOC's toll free TDD
number is (800) 852-1152.

Programs or
Activities Receiving
Federal Financial
Assistance

RACE, COLOR, NATIONAL
ORIGIN, SEX
In addition to the protection of Title
VI of the Civil Rights Act, Title
VI of the Civil Rights Act of 1964, as
amended, prohibits discrimination on the basis
of race, color or national origin in pro-
grams or activities receiving Federal
financial assistance. Employment
discrimination is covered by Title VI.

If the primary objective of the financial
assistance is provision of employment,
or where employment discrimination
causes or may cause substantial
harm, denial of aid under such programs,
Title IX of the Education Amendments of
1972 prohibits employment discrimina-
tion on the basis of sex in educational
programs or activities which receive
Federal assistance.

INDIVIDUALS WITH
HANDICAPS
Section 504 of the Rehabilitation
Act of 1973, as amended, prohibits
employment discrimination on the basis
of handicap in any program or
activity which receives Federal finan-
cial assistance. Discrimination is
prohibited in all aspects of employ-
ment against handicapped persons
who, with reasonable accommoda-
tion, can perform the essential func-
tions of a job.

If you believe that you have been discriminated against in a-
program of any institution which receives
Federal assistance, you should
contact immediately the Federal
agency providing such assistance.

App. B : 11
Appendix C
Selected Sections of Federal Statutes
CIVIL RIGHTS ACT OF 1964

Sec. 2000e Title VII. Nondiscrimination in employment

For the purposes of this subchapter—

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning finances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if

(1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or

(2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization)

(A) twenty-five or more during the first year after March 24, 1972, or

(B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended section 45 U.S.C. 151 et seq.;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce;

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization, or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff or as an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States, or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: PROVIDED, That nothing herein shall

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preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(1) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

(m) The term 'demonstrates' means meets the burdens of production and persuasion.

(a) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.


Sec. 2000e-2 Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer

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

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

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or to otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to refuse to refer to, or exclude from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

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

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subsection

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(2) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subsection, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management commit- tee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) National security

Notwithstanding any other provision of this subsection, it shall not be an unlawful employment practice for an employer to hire and employ any individual, for an employment agency to refer an individual for employment, or for an employment agency to refuse to transfer any individual for employment in any position, or for a labor organization to refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subsection, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this subsection for any employer to differ- eniate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if
such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group or account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice was job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that such particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law: shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.
RECONSTRUCTION-ERA CIVIL RIGHTS ACT

Sec. 1981a Damages In cases of intentional discrimination in employment

(a) Right of recovery
(1) Civil rights

In an action brought by a complaining party under Sec. 2000e-5 or 2000e-16 of this title against a defendant who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under Sec. 2000e-2, 2000e-3, or 2000e-16 of this title, and provided that the complaining party cannot recover under Sec. 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by Sec. 2000e-5(g) of this title, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in Sec. 2000e-5 or 2000e-16 of this title (as provided in Sec. 12117(a) of this title, and Sec. 794(a)(1) of title 29, respectively) against a defendant who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under Sec. 791 of title 29 and the regulations implementing Sec. 791 of title 29, or who violated the requirements of Sec. 791 of title 29 or the regulations implementing Sec. 791 of title 29 concerning the provision of reasonable accommodation, or Sec. 12112 of this title, or committed a violation of Sec. 12112(b)(5) of this title, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by Sec. 2000e-5(g) of this title, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to Sec. 12112(b)(5) of this title or regulations implementing Sec. 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government or governmental agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under Sec. 2000e-5(g) of this title.

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 101 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $500,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, Sec. 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term “complaining party” means—(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under chapter VI of title 42 of the United States Code; or (B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under Sec. 794a(a)(1) of title 29, or a person who may bring an action or proceeding under chapter VI of title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

(2) Discriminatory practice

The term “discriminatory practice” means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

(G.S. Sec. 1077A, as added Pub. L. 100-144, Tit. I, Sec. 102, Nov. 21, 1989, 100 Stat. 1072.)

* * *

Ges. 1080 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(G.S. Sec. 1079, Pub. L. 46 170, Sec. 1, Dec. 20, 1970, 84 Stat. 1284.)

* * *

Sec. 1985 Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, place, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or

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place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) **Obstructing justice; intimidating party, witness, or juror**

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enacting, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) **Depriving persons of rights or privileges**

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. Sec. 1950.)
ATTORNEY’S FEES AWARD ACT OF 1977

Sec. 1988 Proceedings in vindication of civil rights; attorney’s fees

(a) The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are applicable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it be of a criminal nature, in the infliction of punishment on the party found guilty.


(c) In awarding an attorney’s fee under subsection (b) of this section in any action or proceeding to enforce a provision of sections 1981 or 1981a of this title, the court, in its discretion, may include expert fees in the attorney’s fee.

Appendix D

Guidelines on Discrimination Because of Sex
29 CFR Sec. 1601.

Sec. 1601.6 Submission of information

(a) The Commission shall receive information concerning alleged violations of Title VII or the ADA from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office shall render assistance in the filing of a charge. Any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systemic discrimination. Such request, with any pertinent information, should be submitted to the nearest field office.

(b) A person who submits data or evidence to the Commission may retain or, on payment of lawfully prescribed costs, procure a copy of transcript thereof, except that a witness may for good cause be limited to inspection of the official transcript of his or her testimony.


Sec. 1601.7 Charges by or on behalf of persons claiming to be aggrieved

(a) A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of Title VII or the ADA may be made by or on behalf of any person claiming to be aggrieved. A charge on behalf of a person claiming to be aggrieved may be made by any person, agency, or organization. The written charge need not identify by name the person on whose behalf it is made. The person making the charge, however, must provide the Commission with the name, address, and telephone number of the person on whose behalf the charge is made. During the Commission investigation, Commission personnel shall verify the authorization of such charge by the person on whose behalf the charge is made. Any such person may request that the Commission keep its file identity confidential. However, such request for confidentiality shall not prevent the Commission from disclosing the identity to Federal, State or local agencies that have agreed to keep such information confidential. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests for such information.

(b) The person claiming to be aggrieved has the responsibility to provide the Commission with notice of any change in address and with notice of any prolonged absence from that current address so that he or she can be located when necessary during the Commission's consideration of the charge.


Sec. 1601.8 Where to make a charge

A charge may be made in person or by mail at the offices of the Commission in Washington, D.C., or any of its field offices or with any designated representative of the Commission. The addresses of the Commission's field offices appear in Sec. 1610.4.


Sec. 1601.12 Contents of charge; amendment of charge

(a) Each charge shall contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in Sec. 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See Sec. 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practices have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be refiled.

* * *

Sec. 1601.16 Access to and production of evidence; testimony of witnesses; procedure and authority

(a) To effectuate the purposes of Title VII and the ADA, any member of the Commission shall have the authority to sign and issue a subpoena requiring:

(1) the attendance and testimony of witnesses;

(2) the production or evidence including, but not limited to, books, records, correspondence, or documents, in the possession or under the control of the person subpoenaed; and

(3) access to evidence for the purposes of examination and the right to copy.

Any District Director, the Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations, or any representatives designated by the Commission, may sign and issue a subpoena on behalf of the Commission. The subpoena shall state the name and address of its issuer, the person or evidence subpoenaed, the person to whom and the place, date, and time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested. A subpoena shall be returnable to a duly authorized investigator or other representative of the Commission. Neither the person claiming to be aggrieved, the person filing a charge on behalf of such person nor the respondent shall have the right to demand that a subpoena be issued.

(b)(1) Any person served with a subpoena who intends not to comply shall petition the issuing Director or petition the General Counsel, if the subpoena is issued by a Commissioner, to seek its revocation or modification. Petitions must be mailed to the Director or General Counsel, as appropriate, within five days (excluding Saturdays, Sundays and Federal legal holidays) after service of the subpoena. Petitions to the General Counsel shall be mailed to 1801 L Street,

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Preventing and Responding to Workplace Sexual harassment

NW., Washington, DC 20507. A copy of the petition shall also be served upon the issuing official.

(2) The petition shall separately identify each portion of the subpoena with which the petitioner does not intend to comply and shall state, with respect to each such portion, the basis for noncompliance with the subpoena. A copy of the subpoena shall be attached to the petition and shall be designated "Attachment A." Within eight calendar days after receipt or as soon as practicable, the General Counsel or Director, as appropriate, shall either grant the petition to revoke or modify in its entirety or make a proposed determination on the petition, stating reasons, and submit the petition and proposed determination to the Commission for its review and final determination. A Commissioner who has issued a subpoena shall abstain from reviewing a petition concerning that subpoena. The Commission shall serve a copy of the final determination on the petitioner.

(c) Upon the failure of any person to comply with a subpoena issued under this section, the Commission may utilize the procedures of Sec. 11(2) of the National Labor Relations Act, as amended, 29 U.S.C. 161(2), to compel enforcement of the subpoena.

(d) If a person who is served with a subpoena does not comply with the subpoena and does not petition for its revocation or modification pursuant to paragraph (b) of this section, the General Counsel or his or her designee may institute proceedings to enforce the subpoena in accordance with the provisions of paragraph (c) of this section. Likewise, if a person who is served with a subpoena petitions for revocation or modification of the subpoena pursuant to paragraph (b), and the Commission issues a final determination upholding all or part of the subpoena, and the person does not comply with the subpoena, the General Counsel or his or her designee may institute proceedings to enforce the subpoena in accordance with paragraph (c).

(e) Witnesses who are subpoenaed pursuant to Sec. 1601.16(a) shall be permitted to live and work in the same area and village that they are paid witness in the courts of the United States.


* * *

Sec. 1601.26 Confidentiality of endeavors

(a) Nothing that is said or done during and as part of the informal endeavors of the Commission to eliminate unlawful employment practices by informal methods of conference, conciliation, and persuasion may be a matter of public information by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the person concerned. This provision does not apply to such disclosures to representatives of Federal, State, or local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under Title VII or the ADA. Provided, however, that the Commission may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosure will not serve the purposes of the effective enforcement of Title VII or the ADA.

(b) Factual information obtained by the Commission during such informal endeavors, if such information is otherwise obtainable by the Commission under Sec. 709 of Title VII, for disclosure purposes will be considered by the Commission as obtained during the investigatory process.


* * *

Sec. 1601.30 Notices to be posted

(a) Every employer, employment agency, labor organization, and joint labor-management committee controlling an apprenticeship or other training program which has an obligation under title VII or the ADA shall post and keep posted in conspicuous places upon its premises notices in an accessible format, to be prepared or approved by the Commission, describing the applicable provisions of Title VII and the ADA.

Such notice must be posted in prominent and accessible places where notices to employees, applicants and members are customarily maintained.

(b) Sec. 711(b) of Title VII makes failure to comply with this section punishable by a fine of not more than $100 for each separate offense.


* * *

Sec. 1601.44 Designated and notice agencies

(a) The designated FEP agencies are:

Alaska Commission for Human Rights

Anchorage (Alaska) Equal Rights Commission

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Anderson (IN) Human Relations Commission
Arizona Civil Rights Division
Arlington County (Va.) Human Rights Commission
Austin (Tex.) Human Relations Commission
Baltimore (Md.) Community Relations Commission
Bloomington (IN) Human Rights Commission
Bloomington (Ind.) Human Rights Commission
Broward County (Fla.) Human Relations Commission
California Department of Fair Employment and Housing
Charleston (W. Va.) Human Rights Commission
City of Salina (Kansas) Human Relations Commission and Department
Clearwater (Fla.) Office of Community Relations
Colorado Civil Rights Commission
Colorado State Personnel Board
Commonwealth of Puerto Rico Department of Labor
Connecticut Commission on Human Rights and Opportunity
Corpus Christi (Tex.) Human Relations Commission
Dade County (Fla.) Fair Housing and Employment Commission
Delaware Department of Labor
District of Columbia Office of Human Rights
East Chicago (Ind.) Human Rights Commission
Evansville (Ind.) Human Relations Commission
Fairfax County (Va.) Human Rights Commission
Florida Commission on Human Relations
Fort Lauderdale—Webster County (Iowa) Human Rights Commission
Fort Wayne (Ind.) Metropolitan Human Relations Commission
Fort Worth (Tex.) Human Relations Commission
Gary (Ind.) Human Relations Commission
Georgia Office of Fair Employment Practices
Hawaii Department of Labor and Industrial Relations
Hillsborough County, Florida Equal Opportunity and Human Relations Department
Howard County (Md.) Human Rights Commission
Huntington (W. Va.) Human Relations Commission
Idaho Human Rights Commission
Illinois Department of Human Rights
Indiana Civil Rights Commission
Iowa Civil Rights Commission
Jacksonville (Fla.) Equal Employment Opportunity Commission
Kansas City (KS) Human Relations Department
Kansas City (MO) Human Relations Department
Kansas Human Rights Commission
Kentucky Commission on Human Rights
Lee County (Florida) Department of Equal Opportunity
Lexington-Fayette (Ky.) Urban County Human Rights Commission
Lincoln (Neb.) Commission on Human Rights
Louisiana (La.) Commission on Human Rights
Louisville and Jefferson County (Ky.) Human Relations Commission
Madison (WI) Equal Opportunities Commission
Maine Human Rights Commission
Maryland Commission on Human Relations
Mason City Iowa Human Rights Commission
Massachusetts Commission Against Discrimination
Michigan City (IN) Human Rights Commission
Michigan Department of Civil Rights
Minneapolis (Minn.) Department of Civil Rights
Minnesota Department of Human Rights
Missouri Commission on Human Rights
Montana Human Rights Division
Montgomery County (Md.) Human Relations Commission
Nebraska Equal Opportunity Commission
Nevada Commission on Equal Rights of Citizens
New Hampshire Commission for Human Rights
New Haven (Conn.) Commission on Equal Opportunity
New Jersey Division of Civil Rights, Department of Law and Public Safety
New Mexico Human Rights Commission
New York City (N.Y.) Commission on Human Rights
New York State Division on Human Rights
North Carolina State Office of Administrative Hearings
North Dakota Department of Labor Ohio Civil Rights Commission
Oklahoma Human Rights Commission
Omaha (Neb.) Human Relations Department
Oregon Bureau of Labor
Orlando (Fla.) Human Relations Department
Paducah, Kentucky Human Rights Commission
Pennsylvania Human Relations Commission
Philadelphia (Pa.) Commission on Human Relations
Pinellas County, Florida Affirmative Action Office
Pittsburgh (Pa.) Commission on Human Rights
Prince George's County (Md.) Human Relations Commission
Prince William County (VA) Human Rights Commission
Puerto Rico Commission on Human Rights
Richmond County (GA) Human Rights Commission
Rockville (Md.) Human Rights Commission
St. Louis (Mo.) Civil Rights Enforcement Agency
St. Paul (Minn.) Department of Human Rights
St. Petersburg (Fla.) Human Relations Division
Seattle (Wash.) Human Rights Commission
Sioux Falls (S.D.) Human Relations Commission
South Bend (Ind.) Human Rights Commission
South Carolina Human Affairs Commission
South Dakota Division of Human Rights
Springfield (Ohio) Human Rights Commission
Tacoma (Wash.) Human Relations Commission
Tampa, Florida Office of Community Relations
Tennessee Commission for Human Development
Texas Commission on Human Rights
Topeka, Kansas Human Relations Commission
Utah Industrial Commission, Anti-Discrimination Division
Vermont Attorney General's Office, Civil Rights Division
Vermont Human Rights Commission
Virgin Islands Department of Labor
Virginia Council on Human Rights
Washington Human Rights Commission
West Virginia Human Rights Commission

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Preventing and Responding to Workplace Sexual Harassment

Wheeling (W.Va.) Human Rights Commission
Wichita Falls, Texas Human Relations Commission
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations
Wisconsin State Fair Personnel Commission
Wyoming Fair Employment Practices Commission
York (Pa.) Human Relations Commission
Youngstown (OH) Human Relations Commission
(b) The designated Notice Agencies are: Arkansas Governor’s Committee on Human Resources, Ohio Director of Industrial Relations, Raleigh (N.C.) Human Resources Department, Civil Rights Unit.


Accordingly, “for retaliation charges” it was deemed a “Notice Agency,” pursuant to 29 CFR § 1601.71(b).
Appendix E

EEOC Policy Guidance Materials

EEOC Guidelines on Sexual Harassment

5 C.F.R 1604.11

Sec. 1604.11 Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of title VII.1 Unwelcome sexual advance, 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 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.

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

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

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

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

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

1 The principles involved here continue to apply to race, color, religion or national origin.

[45 FR 74577, Nov. 10, 1980]
EEOC Policy Guidance on Issues of Sexual Harassment

On March 19, 1990, the Commission issued the following document to provide "guidance on defining sexual harassment and establishing employer liability in light of recent cases."

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e(2)(a) provides:

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

In 1980 the Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment. See Section 1604.11 of the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 ("Guidelines"). The Commission has applied the Guidelines in its enforcement litigation, and many lower courts have relied on the Guidelines.

The issue of whether sexual harassment violates Title VII reached the Supreme Court in 1986 in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 40 EPD ¶ 36,159 (1986). The Court affirmed the basic premises of the Guidelines as well as the Commission's definition.

The purpose of this document is to provide guidance on the following issues in light of the developing law after Vinson:

determining whether sexual conduct is "unwelcome";
evaluating evidence of harassment;
determining whether a work environment is sexually "hostile";
holding employers liable for sexual harassment by supervisors; and

evaluating preventive and remedial action taken in response to claims of sexual harassment.

BACKGROUND

A. Definition

Title VII does not prescribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment; only unwelcome sexual conduct that is a term or condition of employment constitutes a violation. 29 C.F.R. § 1604.11(a). The EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment." The Guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," 29 C.F.R. § 1604.11(a)(1). "Quid pro quo harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R. § 1604.11(a)(2). The EEOC's Guidelines also recognize that unwelcome sexual conduct that "unreasonably interferes with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment" can constitute sex discrimination, even if it leads to no tangible or economic job consequences. 29 C.F.R. § 1604.11(a)(3). The Supreme Court's decision in Vinson established that both types of sexual harassment are actionable under section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(2)(a), as forms of sex discrimination.

Although "quid pro quo" and "hostile environment" harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a sexual hostile work environment results in her constructive discharge. Similarly, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply. "Hostile environment" harassment may acquire characteristics of "quid pro quo" harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct. Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of section 704(a) of Title VII have occurred.

Distinguishing between the two types of harassment is necessary when determining the employer's liability (see infra Section D). But while categorizing sexual harassment as "quid pro quo," "hostile environment," or both is useful analytically, these distinctions should not limit the Commission's investigations, which generally should consider all available evidence and testimony under all possible applicable theories.

B. Supreme Court's Decision in Vinson

Meritor Savings Bank v. Vinson posed three questions for the Supreme Court:

1) Does unwelcome sexual behavior that creates a hostile working environment constitute employment discrimination on the basis of sex?
2) Can a Title VII violation be shown when the district court found that any sexual relationship that existed between the plaintiff and her supervisor was a "voluntary one"?
3) Is an employer's abusive or offensive working environment created by a supervisor's sexual advances when the employer does not know of, and could not reasonably have known of, the supervisor's misconduct?

1) FACTS

The plaintiff had alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours, on and off the employer's premises; she alleged that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women's rest room and exposed himself to her, and even raped her on several occasions. She alleged that she submitted for fear of jeopardizing her employment. She testified, however, that this conduct had ceased almost a year before she first complained in any way, by filing a Title VII suit; her EEOC charge was filed later (see infra at n.34). The supervisor and the employer denied all of her allegations and claimed they were fabricated in response to a work dispute.

2) LOWER COURTS' DECISIONS

After trial, the district court found the plaintiff was not the victim of sexual harassment and was not required to grant sexual favors as a condition of employment or promotion. Vinson v. Taylor, 22 EPD ¶ 20,704 (E.D.C. 1980). Without resolving the conflicting testimony, the district court found that if a sexual relationship had existed between plaintiff and her supervisor, it was a "voluntary one . . . having nothing
to do with her continued employment." The district court nonetheless went on to hold that the employer was not liable for its supervisor’s actions because it had no notice of the alleged sexual harassment; although the employer had a policy against discrimination and an internal grievance procedure, the plaintiff had never lodged a complaint.

The court of appeals reversed and remanded, holding the lower court should have considered whether the evidence established a violation under the "hostile environment" theory. Vinson v. Taylor, 753 F.2d 141, 36 EPD ¶ 34,949, denial of rehearing en banc, 760 F.2d 1330, 37 EPD ¶ 35,232 (D.C. Cir. 1985). The court ruled that a victim of abuse has no "materiality whatsoever" to the proper inquiry; whether "toleration of sexual harassment was a condition of her employment." The court further held that an employer is absolutely liable for sexual harassment committed by a supervisory employee, regardless of whether the employee actually knew or reasonably could have known of the misconduct, or would have disapproved of and stopped the misconduct if aware of it.

3) SUPREME COURT’S OPINION

The Supreme Court agreed that the case should be remanded for consideration under the "hostile environment" theory and held that the proper inquiry focuses on the "hostile environment" of the conduct rather than the "voluntariness" of the victim’s participation. But the Court held that the court of appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisory employees.

a) "Hostile Environment" Violates Title VII

The Court rejected the employer’s contention that Title VII prohibits only discrimination that causes "economic" or "tangible" injury; "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," whether based on sex, race, religion, or national origin. 106 S. Ct. at 2405. Relying on the EEOC’s Guidelines’ definition of harassment, the Court held that a plaintiff may establish a violation of Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment." Id. The Court quoted the Eleventh Circuit’s decision in Henson v. City of Dundee, 682 F.2d 897, 902, 29 EPD ¶ 32,993 (11th Cir. 1982):

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

106 S. Ct. at 2406. The Court further held that for harassment to violate Title VII, it must be "sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive abuse working environment." Id. (quoting Henson, 682 F.2d at 904).

b) Conduct Must Be "Unwelcome"

Citing the EEOC’s Guidelines, the Court said the gravamen of the alleged sexual advances were "unwelcome." 106 S. Ct. at 2406. Therefore, "the fact that sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." Id. Evidence of a complainant’s sexually provocative speech or dress may be relevant in determining whether she found particular advances unwelcome, but should be admitted with caution in light of the potential for unfair prejudice, the Court held.

c) Employer Liability Established Under Agency Principles

On the question of employer liability in "hostile environment" cases, the Court agreed with EEOC’s position that agency principles should be used for guidance. While declining to issue a "definitive rule on employer liability," the Court did reject both the court of appeals’ rule of automatic liability for the action of supervisors and the employer’s position that notice is always required. 106 S. Ct. at 2408-09.

The following, sections of this document provide guidance on the issues addressed in Vinson and subsequent cases.

GUIDANCE

A. Determining Whether Sexual Conduct Is Unwelcome

Sexual harassment is "unwelcome . . . verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11a(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected sexual advances may well be difficult to discern." Barnes v. Costle, 561 F.2d 983, 999. 14 EPD ¶ 7775 (D.C. Cir. 1977), MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general definition of "unwelcome conduct" in Henson v. City of Dundee, 682 F.2d at 903; the challenged conduct must be unwelcome "in the sense that the employee did not solicit or invite it, and in the sense that the employer regarded the conduct as undesirable or offensive."

When confronted with conflicting evidence as to welcoming the Commission looks "at the record as a whole and at the totality of circumstances. . . ." 29 C.F.R. § 1604.11(b), evaluating each situation on a case-by-case basis. When there is some indication of welcoming or on the credibility of the parties is at issue, the charging party’s claim will be considerably strengthened if she made a contemporaneous complaint or protest. Particularly when the alleged harasser may have some reason (e.g., a prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome. Generally, victims are well-advised to assert their right to a workplace free from sexual harassment. This may stop the harassment before it becomes more severe.

A contemporaneous complaint or protest may provide persuasive evidence that the sexual harassment in fact occurred as alleged (see infra Section B). Thus, in investigating sexual harassment charges, it is important to develop detailed evidence of the circumstances and nature of any such complaints or protests, whether to the alleged harasser, higher management, co-workers or others.

While a complaint or protest is helpful to charging party’s case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. If the victim failed to complain or delayed in complaining, the investigation must ascertain why. The relevance of whether the victim has complained varies depending upon the nature of the sexual advances and the context in which the alleged incidents occurred.

29 C.F.R. § 1604.11(b).

Example—Charging Party (CP) alleges that her supervisor subjected her to unwelcome sexual advances that created a hostile work environment. The investigation into her charge discloses that her supervisor began making intermittent sexual advances to her in June, 1987, but she did not complain to management about the harassment. After the harassment continued and worsened, she
filed a charge with EEOC in June, 1988. There is no evidence CP welcomed the advances. CP states that she feared that complaining about the harassment would cause her to lose her job. She also states that she initially believed she could resolve the situation herself, but as the harassment became more frequent and severe, she said she realized that intervention by EEOC was necessary.

The investigator determines CP's complaint is credible and concludes that the delay in complaining does not undercut CP's claim.

When welcomeMiami is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct was unwelcome. 15

In Vinson, the Supreme Court made clear that voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, whether her actual participation in sexual intercourse was voluntary." 146 S. Ct. at 2266 (emphasis added). See also Commission Decision No. 64-1 ("acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual").

In some cases the courts and the Commission have considered whether the complainant welcomed the sexual conduct by engaging in a sexually aggressive manner, usually sexually oriented language, or soliciting the sexual conduct. Thus, in Gun v. Kepro Circuit systems, 27 EPD ¶ 32,379 (E.D. Mo. 1982), the plaintiff regularly used vulgar language, initiated sexually oriented conversations with her co-workers, asked male employees about their marital sex lives and whether they engaged in extramarital affairs, and discussed her own sexual encounters. In rejecting the plaintiff's claim of "hostile environment" harassment, the court found that any propositions or sexual requests by co-workers were "prompted by her own sexual aggressiveness and her own sexually explicit conversations" Id. at 23,648. 16 And in Vinson, the Supreme Court held that testimony about the plaintiff's provocative dress and publicly expressed sexual fantasies is not per se inadmissible, but the trial court should carefully weigh its relevance against the potential for unfair prejudice. 106 S. Ct. at 2400.

Conversely, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Although a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused, nor would "quid pro quo" harassment be allowed.

Any past conduct of the charging party that is offered to show "welcomeMiami" must relate to the alleged harasser. In Swenek v. USNUR, Inc., 850 F.2d 252, 251, 41 EPD ¶ 34,027 (4th Cir. 1988), the Fourth Circuit held the district court wrongly concluded that the plaintiff's own past conduct and use of foul language showed that "she was the kind of person who could not be offended by such comments and therefore welcomed them generally," even though she had told the harasser to leave her alone. Emphasizing that the proper inquiry is whether plaintiff welcomed the particular conduct in question from the alleged harasser," the court of appeals held that "Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment." 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3, [83 FEOR 7029], 32 EPD ¶ 33,639 (4th Cir. 1983). Thus, evidence concerning a charging party's general character and past behavior toward others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward the alleged harasser.

A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome. 17 If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work. 18 In any case, however, her refusal to submit to the sexual conduct cannot be the basis for denying her an employment benefit or opportunity that would constitute a "quid pro quo" violation.

B. Evaluating Evidence of Harassment

The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus the resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the alleged harasser in detail. The Commission's investigation also should search thoroughly for corroborative evidence of any nature. Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.

In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. 19 By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence. 10

Of course, the Commission recognizes that a charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged incident of harassment. Persons with whom she discussed the incident—such as co-workers, a doctor or a counselor—should be interviewed. Other employees should be asked if they noticed changes in charging party's behavior at work or in the alleged harasser's treatment of charging party. As stated earlier, a contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome (see supra Section A). So too is evidence that other employees were sexually harassed by the same person.

The investigator should determine whether the employer was aware of any other instances of harassment and if so what was the response. Where appropriate the Commission will expand the case to include class claims. 17

Example—Charging Party (CP) alleges that her supervisor made unwelcome sexual advances toward her on frequent occasions while they were alone in his office. The supervisor denies this allegation. No one witnessed the alleged advances. CP's inability to produce eyewitnesses to the harassment does not defeat her claim. The resolution will depend on the credibility of her allegations versus that of her supervisor's. Corroboration, credible evidence will establish her claim. For example, three co-workers state that CP looked distraught on several occasions after leaving the supervisor's office, and that she informed them on those occasions that he had sexually propositioned and touched her. In addition, the evidence shows that CP had complained to the general manager of the office about the incidents soon after they occurred. The corroborating witnesses' testimony and her complaint to higher management would be sufficient to establish her claim. Her allegations would be further

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buttressed if other employees testified that the supervisor propositioned them as well.

If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony.18

In a "quid pro quo" case, a finding that the employer's asserted reasons for its adverse action against the charging party are pretextual will usually establish a violation.19 The investigation should determine the validity of the employer's reasons for the charging party's termination. If they are pretextual and if the sexual harassment occurred, then it should be inferred that the charging party was terminated for rejecting the employer's sexual advances, as she claims. Moreover, if the termination occurred because the victim complained, it would be appropriate to find, in addition, a violation of section 704(a).

C. Determining Whether A Work Environment Is "Hostile"

The Supreme Court said in Vernon that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment." 106 S. Ct. at 2406 (quoting Henson v. City of Dundas, 686 F.2d at 934). Since "hostile environment" harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrated the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of title VII, the central inquiry is whether the conduct "unreasonably interferes with an individual's work performance" or creates an "intimidating, hostile, or offensive working environment." 541 U.S.R. § 1001(a)(5). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1) STANDARD FOR EVALUATING HARASSMENT

In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zakowicz v. West Bend Co., 589 F. Supp. 1704, 784, 35 EPD ¶ 34,766 (E.D. Wis. 1984). See also Ross v. Comsat, 54 EPD cases 260, 265 (D. Md. 1984), rev'd on other grounds, 794 F.2d 223 (4th Cir. 1986). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Example: Charging Party alleges that her co-worker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dance after work. The co-worker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

A "reasonable person" standard also should be applied to the more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must "adopt the perspective of a reasonable person's reaction in a similar environment under similar or like circumstances." Highlander v. K.F.C National Management Co., 805 F.2d 644, 650, 41 EPD ¶ 36,675 (6th Cir. 1986).

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. Cf. Robidoux v. Osceola Refining Co., 805 F.2d 611, 626, 41 EPD ¶ 36,643 (6th Cir. 1986) (Keith, C.J., dissenting), cert. denied, 107 S. Ct. 1838, 42 EPD ¶ 36,643 (1987). Lipsett v. University of Puerto Rico, 864 F.2d 881, 898, 46 EPD ¶ 38,393 (1st Cir. 1988).

2) ISOLATED INCIDENTS OF HARASSMENT

Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in Vernon, "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." 106 S. Ct. at 2406 (quoting Rogers v. E.L.U.N.A., 454 F.2d 234, 4 EPD ¶ 37,542 (5th Cir. 1971), cert. denied, 406 U.S. 957, 4 EPD ¶ 7838 (1972)). A "hostile environment" claim generally requires a showing of a pattern of offensive conduct.11 In contrast, in "quid pro quo" cases a single advance may constitute harassment if it is linked to the granting or denial of employment benefits.12

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.13 Thus, in Barrett v. Omaha National Bank, 584 F. Supp. 22, 35 FEP Cases 585 (D. Neb. 1982), aff'd, 726 F.2d 412, 22 EPD ¶ 34,123 (8th Cir. 1984), one incident constituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.14

The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body area is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually teases that employee, the Commission normally would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. Hall v. Gas Construction Co., 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); Jones v. Plantkoh International, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), cert. denied, 107 S. Ct. 924, 41 EPD ¶ 36,708 (1987).
3) NON-PHYSICAL HARASSMENT

When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

- Did the alleged harasser single out the charging party?
- Did the charging party perceive the remarks?
- What was the relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. As the Guidelines emphasize, the Commission will evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language. However, in Rabidue v. Oscena Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1965, 42 EPD ¶ 30,804 (1987), the Sixth Circuit rejected the plaintiff’s claim of harassment in such a situation.25 One of the factors the court found relevant was “the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff’s entry,” and it interpreted the reasonable expectations of the plaintiff upon voluntarily entering that environment.” 805 F.2d at 630. Quoting the district court, the majority noted that in some work environments, “humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and grave magazines may abound. Title VII was not meant to—or can—change this.” Id. at 620-21. The court also considered the sexual remarks and poster at issue to have a “de minimus effect on the plaintiff’s work environment, when considered in the context of a society that condones and perhaps even encourages and commercially exploits open displays of written and pictorial erotica at the newstands, on prime-time television, at the cinema, and in other public places.” Id. at 622.

The Commission believes these factors rarely will be relevant and agrees with the dissent in Rabidue that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. “Title VII’s precise purpose is to prevent such behavior and to protect employees from poisoning the work environment of classes protected under the Act.” 805 F.2d at 626 (Keith, J., dissenting in part and concurring, in part). Thus, in a decision disagreeing with Rabidue, a district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company-sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. Barbeita v. Chemlawn Services Corp., 669 F. Supp. 569, 45 EPD ¶ 37,568 (W.D.N.Y. 1987). The court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive, “may be found to create an atmosphere in which women are viewed as men’s sexual playthings rather than as their equal co-workers.” Barbeita, 669 F. Supp. at 573. The Commission agrees that, depending on the totality of circumstances, such an atmosphere may violate Title VII. See also Walmans v. International Paper Co., 875 F.2d 468, 50 EPD ¶ 39,106 (5th Cir. 1989), in which the Fifth Circuit endorsed the Commission’s position in its amicus brief that evidence of ongoing sexual graffiti in the workplace, not all of which was directed at the plaintiff, was relevant to her claim of harassment. Bennett v. Corron & Black Corp., 845 F.2d 104, 46 EPD ¶ 37,955 (5th Cir. 1988) (the posting of obscene cartoons in an office men’s room hearing the plaintiff’s name and depicting her engaged in crude and debasing sexual activities could create a hostile work environment).

4) SEX-BASED HARASSMENT

Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is “sufficiently patterned or pervasive” and directed at employees because of their sex. Hicks v. Gates Rubber Co., 833 F.2d at 1416; McKinney v. Dole, 765 F.2d 1129, 1138, [85 FEER 70351, 37 EPD ¶ 35,339 (D.C. Cir. 1985).

Acts of physical aggression, intimidation, hostility or severity and unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment. Hall v. Gas Construction Co., 842 F.2d at 1014; Hicks v. Gates Rubber Co., 833 F.2d at 1416.

5) CONSTRUCTIVE DISCHARGE

Claims of “hostile environment” sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of “quid pro quo” harassment.26 It is the position of the Commission that when an employer is liable for constructive discharge when he imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim’s resignation. See Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44, 41 EPD ¶ 36,468 (10th Cir. 1986); Green v. Fron Oil States Co., 747 F.2d 985, 25 EPD ¶ 34,768 (3d Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812-13, 50 EPD ¶ 33,029 (9th Cir. 1982); Held v. Gulf Oil Corp., 684 F.2d 432, 29 EPD ¶ 32,968 (6th Cir. 1982); Clark v. Marsh, 665 F.2d 1165, 1175 n.8, 26 EPD ¶ 37,068 (5th Cir. 1981); Bocsmic v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65, 23 EPD ¶ 30,891 (5th Cir. 1980); Commission Decision 84-1, CCH EEOC Decison ¶ 6839. However, the Fourth Circuit requires proof that the employer imposed intolerable conditions with the intent of forcing the victim to leave. See EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672, 30 EPD ¶ 33,269 (4th Cir. 1983). But this case is not a sexual harassment case and the Commission believes it is distinguishable because if specific intent is not as likely to be present in "hostile environment" cases.

An important factor to consider is whether the employer had an effective internal grievance procedure. (See Section E, Preventive and Remedial Action).

The Commission argued in its Vinson brief that if an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment. As Justice Marshall noted in his opinion in Vinson, "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination . . . ." 106 S. Ct. at 2411 (Marshall, J., concurring in part and dissenting in part). Similarly, the court of appeals in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 44 EPD ¶ 37,557 (5th Cir. 1987), held the plaintiff was not constructively discharged after an incident of harassment by a co-worker because she quit immediately, even though the employer told her she would not have to work with him again, and she did not give the employer a fair opportunity to demonstrate it could curb the harassor’s conduct.

D. Employer Liability for Harassment by Supervisors

In Vinson, the Supreme Court agreed with the Commission’s position that “Congress wanted courts to look to agency principles

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for guidance" in determining an employer's liability for sexual conduct by a supervisor:

while such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000(e)(6), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.

106 S. Ct. at 2408. Thus, while declining, to issue a "definitive rule on employer liability," the Court did make it clear that employers are not "automatically liable" for the acts of their supervisors. For the same reason, the Court said, "absence of notice to an employer does not necessarily insulate that employer from liability." "Id.

As the Commission argued in Vinson, reliance on agency principles is consistent with the Commission Guidelines, which provide in section 1604.11(c) that:

... an employer ... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in the capacity of a supervisor or agency capacity.

Citing the last sentence of this provision, the Court in Vinson indicated that the Guidelines further supported the application of agency principles, 106 S. Ct. at 2409.

1) APPLICATION OF AGENCY PRINCIPLES—"QUID PRO QUO" CASES

An employer will always be held responsible for acts of "quid pro quo" harassment. A supervisor in such circumstances has made or threatened to make a decision affecting the victim's employment status, and he therefore has exercised authority delegated to him by his employer. Although the question of employer liability for "quid pro quo" harassment was not at issue in Vinson, the Court's decision noted with apparent approval the position taken by the Commission in its brief that:

where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them.

106 S. Ct. at 2407-08 (citing Brief for the United States and Equal Employment Opportunity Commission as Amicus Curiae at 22). See also Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 44 EPD ¶ 37,493 (11th Cir. 1987) (adopting EEOC position quoted in Vinson opinion); Lipsett, 864 F.2d at 901 (adoption, for Title IX of the Education Amendments, the Vinson standard that an employer is absolutely liable for acts of quid pro quo harassment "whether [it] knew, should have known, or approved of the supervisor's actions"). Thus, applying agency principles, the court in Schneider v. Schock, 42 FEP Cases 1112 (D. Kan. 1986), held an employer liable for "quid pro quo" harassment by a supervisor who had authority to recommend plaintiff's discharge. The employer maintained the supervisor's acts were beyond the scope of his employment since the sexual advances were made at a restaurant after work hours. The court held that because the supervisor was acting within the scope of his authority when making or recom-
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The victim can of course put the employer on notice by filing a charge of discrimination. As the Commission stated in its Viacom brief, the filing of a charge triggers a duty to investigate and remedy any ongoing illegal activity. It is important to emphasize that an employer can always file an EEOC charge without first utilizing an internal complaint or grievance procedure25 and may wish to pursue both avenues simultaneously because an internal grievance does not prevent the Title VII charge-filing time period from expiring.35 Nor does the filing of an EEOC charge allow an employer to cease action on an internal grievance36 or ignore evidence of ongoing harassment.36 Indeed, employers should take prompt remedial action upon learning of evidence of sexual harassment (or any other form of unlawful discrimination), whether from an EEOC charge or an internal complaint. If the employer takes immediate and appropriate action to correct the harassment and prevent its recurrence, and the Commission determines that no further action is warranted, normally the Commission would administratively close the case.

c) Imputed Liability

The investigation should determine whether the alleged harassing supervisor was acting in an “agency capacity” (29 C.F.R. § 1604.11(c)).34 This requires a determination whether the supervisor was acting within the scope of his employment (see Restatement (Second) of Agency, § 219(1) (1958)), or whether his actions can be imputed to the employer under some exception to the “scope of employment” rule (Id. at § 219(2)). The following principles should be considered, and applied where appropriate in “hostile environment” sexual harassment cases.

1. Scope of Employment

A supervisor’s actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him. It will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment. See Fields v. Horizon House, Inc., No. 86-4343 (E.D. Pa. 1987) (available on Lexis, Genfed Library, Dist. file). Cf. Hunter v. Alla-Chalmers Corp., 797 F.2d 1417, 1421-22, 41 EPD ¶ 36,417 (7th Cir. 1986) (co-worker racial harassment case). However, if the employer becomes aware of work-related sexual misconduct and does nothing to stop it, the employer, by acquiescing, has brought the supervisor’s actions within the scope of his employment.

2. Apparent Authority

An employer is also liable for a supervisor’s actions if these actions represent the exercise of authority that third parties reasonably believe him to possess by virtue of his employer’s conduct. This is called “apparent authority.” See Restatement (Second) of Agency, §§ 78, 219(2)(d) (1958). The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor’s actions will be ignored, tolerated, or even condoned by upper management. This apparent authority of supervisors arises from their power over their employees, including the power to make or substantially influence hiring, firing, promotion and compensation decisions. A supervisor’s capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer, and he may rely upon apparent authority to force an employee to endure a harassing environment for fear of retaliation. If the employer has not provided an effective avenue to complain, then the supervisor has unchecked, final control over the victim and it is reasonable to impute his abuse of this power to the employer.35 The Commission generally will find an employer liable for “hostile environment” sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem. See Section E. See also EEOC v. Hacienda Hotel, 881 F.2d 1504, 51 EPD ¶ 39,250 (9th Cir. 1989) (finding employer liable for sexual harassment despite plaintiff’s failure to pursue internal remedies where the employer’s antidiscrimination policy did not specifically proscribe sexual harassment and its internal procedures required initial resort to the supervisor accused of engaging in or condoning harassment).

But an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employers know that recourse is available, they cannot reasonably believe that a harassing work environment is authorized or condoned by the employer.36 If an employee failed to use an effective, available complaint procedure, the employer may be able to prove the absence of apparent authority and thus the lack of an agency relationship, unless liability attaches under some other theory.37 Thus, even when an employee failed to use an effective grievance procedure, the employer will be liable if it obtained notice through other means (such as the filing of a charge or by the pervasiveness of the harassment) and did not take immediate and appropriate corrective action.

Example—Charging Party (CP) alleges that her supervisor made repeated sexual advances toward her that created a hostile work environment. The investigation into her charge discloses that CP had maintained an intermittent romantic relationship with the supervisor over a period of three years preceding the filing of the charge in September of 1986. CP’s employer was aware of this relationship and its consensual nature. CP asserts, however, that on frequent occasions since January of 1986 she had clearly stated to the supervisor that their relationship was over and his advances were no longer welcome. The supervisor nevertheless persisted in making sexual advances toward CP, berating her for refusing to resume their sexual relationship. His conduct did not put the employer on notice that any unwelcome harassment was occurring. The employer has a well-communicated policy against sexual harassment and a complaint procedure designed to facilitate the resolution of sexual harassment complaints and ensure against retaliation. This procedure has worked well in the past. CP did not use it, however, or otherwise complain to upper management. Even if CP’s allegations are true, the Commission would probably not find her employer liable for the alleged harassment since she failed to use the complaint procedure or inform upper management that the advances had become unwelcome. If CP resigned because of the alleged harassment, she would not be able to establish a constructive discharge since she failed to complain.

In the preceding example, if the employer, upon obtaining notice of the charge, failed to take immediate and appropriate corrective action to stop any ongoing harassment, then the employer will be unable to prove that the supervisor lacked apparent authority for his conduct, and if the allegations of harassment are true, then the employer will be found liable. Or if the supervisor terminated the charging party because she refused to submit to his advances, the employer would be liable for “quasi pro quo” harassment.

3. Other Theories

A closely related theory is agency by estoppel. See Restatement (Second) of Agency at § 88. An employer is liable when he intentionally or carelessly causes an employee to mistakenly believe the supervisor is acting for the employer, or knows of the misapprehension and fails to correct it. For example, an employer who fails to respond appropriately to past known incidents of harassment would cause its employees to reasonably believe that any further incidents are authorized and will be tolerated.
Liability also may be imputed if the employer was "negligent or reckless" in supervising, the alleged harasser. See Restatement (Second) of Agency § 219(2)(d); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418-19, 44 EPD ¶ 37,542 (10th Cir. 1987). "Under this standard, liability would be imposed if the employer had actual or constructive knowledge of the sexual harassment but failed to take remedial action." Fields v. Horizon House, Inc., No. 86-4343 (E.D. Pa. 1987). This is essentially the same as holding the employer directly liable for its failure to act.

An employer cannot avoid liability by delegating to another person a duty imposed by statute. Restatement (Second) of Agency § 492(1) (1985). Introductory Note, p. 482 ("liability follows if the person to whom the performance is delegated acts improperly with respect to it"). An employer who assigns the performance of a non-delegable duty to an employee remains liable for injuries resulting from the failure of the employee to carry out that duty. Restatement, §§ 214 and 219. Title VII imposes on employers a duty to provide their employees with a workplace free of sexual harassment. An employer who entrusts that duty to an employee is liable for injuries caused by the employee’s breach of the duty. See, e.g., Brooms v. Regal Tube Co., 44 FEP Cases 1119 (N.D. Ill. 1987) (employer liable for sexual harassment committed by the management official to whom it had delegated the responsibility to devise and enforce its policy against sexual harassment), aff’d on other ground, 881 F.2d 412, 420-21 (7th Cir. 1989).

Finally, an employer also may be liable if the supervisor "was aided in accomplishing the tort by the existence of the agency relation," Restatement (Second) of Agency § 219(2)(d). See Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 44 EPD ¶ 37,493 (11th Cir. 1987); Hicks v. Gates Rubber Co., 833 F.2d at 1418. For example, in Sparks v. Pilot Freight Carriers, the court found that the supervisor had used his supervisory authority to facilitate his harassment of the plaintiff by "repeatedly reminding [her] that he could fire her should she fail to comply with his advances." 830 F.2d at 1500. This case illustrates how the two types of sexual harassment can merge. When a supervisor creates a hostile environment through the aid of work-related threats or intimidation, the employer is liable under both the "quid pro quo" and "hostile environment" theories.

E. Preventive and Remedial Action

1) PREVENTIVE ACTION

The EEOC’s Guidelines encourage employers to:

- take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented.

The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

2) REMEDIAL ACTION

Since Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" (Vinson, 106 S. Ct. at 2405), an employer is liable for failing to remedy known hostile or offensive work environments. See, e.g., Garziano v. E.L. DuPont De Nemours & Co., 818 F.2d 380, 383, 43 EPD ¶ 37,171 (5th Cir. 1987) (Vinson bolsters employers have an "affirmative duty to eradicate ‘hostile or offensive’ work environments"); Bundy v. Jackson, 641 F.2d 934, 947, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); Tompkins v. Public Service Electric & Gas Co., 508 F.2d 1044, 1049, 15 EPD 7954 (3d Cir. 1977) (same); Benson v. City of Dundee, 682 F.2d 897, 905, 15 EPD ¶ 32,993 (11th Cir. 1982) (same); Manford v. James T. Barnes & Co., 441 F. Supp. 459, 466, 16 EPD ¶ 8233 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel; "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior").

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. See Wallman v. International Paper Co., 613 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps); Dormheker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10, 44 EPD ¶ 37,557 (5th Cir. 1987) (the employer’s remedy may be “assessed proportionately to the seriousness of the offense”). The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Recent court decisions illustrate appropriate and inappropriate responses by employers. In Barrett v. Omaha National Bank, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee, placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim’s behalf or reporting the conduct. The court ruled that the employer’s response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.

In contrast, in Yates v. Avco Corp., 819 F.2d 630, 43 EPD ¶ 37,086 (6th Cir. 1987), the court found the employer’s policy against sexual harassment failed in function effectively. The victim’s first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment. Similarly, in Zubkowicz v. West Bond Co., 590 F. Supp. 700, 35 EPD ¶ 44,766 (W.D. Wis. 1984), co-workers harassed the plaintiff over a period of nearly four years in a manner the court described as “malevolent” and “outrageous.” Despite the plaintiff’s numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company’s policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The court held the employer liable because it failed to take immediate and appropriate corrective action.
When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. The EEOC investigator should, of course, conduct an independent investigation of the harassment claim, and the Commission will reach its own conclusion as to whether the law has been violated. If the Commission finds that the harassment has not stopped despite measures taken, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.

1 See, e.g., Miller v. Bank of America, 600 F.2d 211, 20 E.P.D. ¶ 30,086 (9th Cir. 1979) (plaintiff discharged when she refused to cooperate with her supervisor's sexual advances); banana v. torte, 161 F.2d 848, 14 E.P.D. ¶ 7753 (D.C. Cir. 1977) (plaintiff's job abolished after she refused to submit to her supervisor's sexual advances); Williams v. Ione, 413 F. Supp. 665, 11 E.P.D. 10,840 (D.D.C. 1976), rev'd and remanded on other grounds sub nom. Williams v. Civiletti, 487 F. Supp. 1387, 23 E.P.D. ¶ 30,916 (D.D.C. 1980) (plaintiff reprimanded and eventually terminated for refusing to submit to her supervisor's sexual demands).

2 See, e.g., Kazen v. Dale, 709 F.2d 251, 93 FED. BULL. 7029, 32 E.P.D. ¶ 33,659 (4th Cir. 1983) (plaintiff's warnings ignored with sexual result); P. v. X., 20 E.P.D. ¶ 11,020 (3d Cir. 1981) (plaintiff and infant plaintiffs subjected to verbal sexual harassment and requiring of constantly vulgar and offensive or sexually related epithets); Henson v. City of Dundee, 682 F.2d 897, 39 E.P.D. ¶ 32,993 (11th Cir. 1982) (plaintiff's supervisor subjected her to numerous harassing demands for sexual favors, inquiries and vulgarities and repeated requests that she have sexual relations with him); Bundy v. Jackson, 641 F.2d 934, 24 E.P.D. ¶ 31,459 (D.C. Cir. 1981) (plaintiff subjected to sexual advances, inquiries and sexual advances were "intended spreading procedure" in workplace).

3 To avoid cumbersome use of both masculine and feminine pronouns, this document will refer to harassers as males and victims as females. The Commission recognizes, however, that men may also be victims and women may also be harassers.

4 For a description of the respective roles of the Commission and other federal agencies in investigating complaints of discrimination in the federal sector, see 29 C.F.R. § 1613.216.

5 In a subsection entitled "Other related practices," the Guidelines also provide that where an employment opportunity or benefit is granted because of an individual's "refusal to submit to sexual advances or requests for sexual favors," the employer may be liable for unlawful sex discrimination against others who were qualified for but denied the opportunity or benefit. 29 C.F.R. § 1604.12(g). The law is unclear as to when a Title VII violation can be established in these circumstances. See DeCenzo v. Westchester County Medical Center, 807 F.2d 306, 42 E.P.D. ¶ 36,785 (2d Cir. 1987), cert. denied, 106 S. Ct. 974, 99 L. Ed. 2d 412 (1989); King v. Palmer, 866 F.2d 878, 39 E.P.D. ¶ 35,988 (D.C. Cir. 1989), decision on remand, 641 F. Supp. 185, 40 E.P.D. ¶ 36,245 (D.C. Cir. 1986); Bredereck v. Rider, 88 FED. REG. 35,263 (D.C. Cir. 1983); Baldwin v. Aluminum Co. of America, 579 F. Supp. 495, 500-01 (W.D. Pa.), aff'd mem., 809 F.2d 839 (3d Cir. 1986). However, the Commission recently analyzed the issues in its "Policy Guidance on employer liability under Title VII for Sexual Harassment," dated January 1990.

6 The Court stated that the Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Vizion, 106 S. Ct. at 2453 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 128 (1976) (quoting in turn Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

7 For a complaint to be "contemplated," it should be made while the harassment is ongoing or shortly after it has ceased. For example, a victim of "hostile environment" harassment who resigns her job because working conditions have become intolerable would not have made a complaint if she notified the employer of the harassment at the time of her departure or shortly thereafter. The employer has a duty to investigate and, if it finds the allegations true, to take remedial action including offering reinstatement (see infra Section E).

8 Under these circumstances, the investigation should develop this evidence in order to aid in making credibility determinations (see infra p. 12).

9 A victim of harassment need not always confront her harasser directly so long as her conduct demonstrates the harasser's behavior is unwelcome. See, e.g., Lipton v. University of Puerto Rico, 864 F.2d 881, 898, 42 E.P.D. ¶ 38,393 (1st Cir. 1988). In some instances a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's behavior is unwelcome." (Commission Decision No. 84-1, 1 E.E.O.C. Decisions ¶ 8409 (although charging parties did not confront their supervisor directly about his sexual remarks and gestures, for fear of losing their jobs; evidence showing that they demonstrated the remarks and gestures and that his conduct was unwelcome was sufficient to support a finding of harassment).

10 Investigators and triers of fact rely on objective evidence, rather than subjective, unverifiable actions. For example, in Bush v. Metropolitan D.C. Prot. & Research Ctr., 684 F.2d 213, 20 E.P.D. ¶ 30,759 (D.C. Cir. 1982), the court rejected the plaintiff's claim that she was sexually harassed by her co-worker's language and gestures. She claimed that her personal
mode on the job... "A pattern of offensive conduct must be proved..."

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single effort to get the plaintiff to go out with him did not create a
abusive working environment; Freeman v. American Standard, 41 FEP Cases 471 (D.N.J. 1986) plaintiff
did not suffer a hostile environment from the reception of an obscene message from her
co-workers and a sexual solicitation from one co-worker; Hollins v. Fleishman, Inc. 44 FEP Cases 1577 (M.D. Tenn. 1987) plaintiff's co-worker's requests, on four occasions over a
four-month period, that she have a sexual affair with him, followed by his
cooer's constant terror and avoidance of her did not constitute a hostile environment; there was no
evidence of coercion, pressured, or showed the plaintiff that he should join her (adverse effects).

See Novikova v. Tep Broadcasting Co., 42 FEP Cases 1314 (W.D.N.Y. 1987) (sexual
advances, rebuffed by plaintiff, may establish a prima facie case of "quid pro quo"
harassment but is not severe enough to create a hostile environment).

The principles for establishing employer liability, set forth in Section D, below, are
to be applied to cases involving physical contact in the same manner that they were in
other cases.

See also Giardina v. Schroeder, 672 F. Supp. 1043, 45 FEP Cases 283 (N.D.Ill. 1986)
plaintiff who was drugged by employer's owner and raped while unconscious, and then
was transferred as insurance of woman's was awarded $113,000 to damages for
harassment and intentional infliction of emotional distress; Commission Decision No.
83-1, CCH EEOC Decisions (1983) § 8384 (violation found where the harasser forcibly
grabbed and kissed charging party while they were alone in a storeroom). Commission
Decision No. 84-3, CCH employment Practice Guide § 6943 (violation found where the
harassor used his authority to effectuate his desire to work with the charging party in
his absence).

The alleged harasser, a supervis oor of another department who did not supervise plaintiff
but worked with her regularly, "was an extremely vulgar and crude individual who
can and did make obscene comments about women generally, and, on occasion, directed
such obscenities at the plaintiff..." 923 F.2d at 515. The plaintiff and other female employees
were exposed daily to displays of nude or partially clad women in posters in male
employers' offices. 805 F.2d at 623-24 (Keith, J., dissenting in part and concurring in part).
Although the employees told management they were disturbed and offended, the
employer did not reprimand the supervis oor.

However, while an employee's failure to utilise effective grievance procedures will
not shield an employer from liability for "quid pro quo" harassment, this failure may
result in a claim of constructive discharge. See discussion of impact of grievance procedures
later in this section, and Section D(2)(C) below.

This well-settled principle is the basis for employer liability for supervisors' discrimina-
tory employment decisions that violate Title VII. "The practical effect of
such a violation is attributable to employer despite upper management's "exemplary"
level management's lack of knowledge irrelevant where supervisor illegally discharged
employee for refusing to disqualify black applicant discriminatorily). Flowers v. Scranton
Walker Corp., 555 F.2d 1277, 1292, 14 FEP 97510 (7th Cir. 1977) ("Defendant is liable as
principal for any violation of Title VII... [by a supervisor] in his authorized
capacity as supervisor.")

The Court observed that the Commission's position was "in some tension" with the
first sentence of section 1001.11(c) of the Guidelines but was consistent with the final
sentence of that section. (See supra at 21).

§ 8384. "[A]n employer who has reason to know that one of his employees is being
harassed in the workplace by others on grounds of race, sex, religion, or national
origin, and does nothing about it, is directly and individually liable to the
wronged employee."

1960. This is the theory under which employers are liable for harassment by co-workers, which
was at issue in Hunter v. Allis-Chalmers Corp. Section 1001.11(c)(1) provides:

With respect to conduct between fellow employees, an employer is re-

sponsible for acts of sexual harassment in the workplace if the employer
(or its agents or supervisory employees) knows or should have
known of the conduct, unless it can be shown that it took immediate and
appropriate corrective action.

Sexual harassment claims are not different from other types of discrimination claims
in this regard. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 52, 7 EPD 1948
(1974).


The Commission has filed suit in such circumstances, alleging that termination of
employment (e.g., the complaint did not describe unlawful retaliation in
violation of § 704(a). See EEOC v. Board of Governors of State Colleges & Universities,
700 F. Supp. 1276, 30 EPD 970, 3 FEP 1949 (D. Md. 1989) (as long as EEOC: "the ultimate
judgment on whether ADA's retaliation provision was not violated if termination of

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EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism

1. **Subject:** Policy Guidance on Employer Liability under Title VII for Sexual Favoritism.
2. **Purpose:** This policy document is intended to provide guidance on the extent to which an employer should be held liable for discriminating against individuals who are qualified for but are denied an employment opportunity or benefit, where the individual who is granted the opportunity or benefit received it because that person submitted to sexual advances or requests.
3. **Effective Date:** On receipt.
4. **Expiration Date:** As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § 6(a), this Notice will remain in effect until rescinded or superseded.
5. **Originating:** Title VII/TEPA Division, Office of Legal Counsel.
6. **Instructions:** File after page 615-10, in Section 615 of Volume II of the Compliance Manual (Harassment).
7. **Subject Matter:**

**BACKGROUND**

The Commission and the courts have declared that sexual harassment is a form of unlawful discrimination under Section 703 of Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 50, 60, 40 EPD ¶ 31,159 (1986); EEOC's Guidelines on Discrimination Because of Sex, 20 C.F.R. § 1604.11(a), EEOC's Guidelines define two kinds of sexual harassment: "quid pro quo," in which "submission to or rejection of [sexual] conduct by an individual is used as the basis for employment decisions affecting such individual," and "hostile environment," in which unwelcome sexual conduct "unreasonably interferes with an individual's job performance" or creates an "intimidating, hostile or offensive work environment." 29 C.F.R. §§ 1604.11(a)(2) and (3).

Subsection (g) of EEOC's Guidelines provides:

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

As discussed below, sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or "hostile work environment" harassment.

**DISCUSSION**

**A. Isolated Instances of Favoritism Towards a "Paramour" Not Prohibited**

Not all types of sexual favoritism violate Title VII. It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman. See Miller v. Aluminum Co., of America, 769 F. Supp. 495, 47, EPD ¶ 38,112 (W.D. Pa.), aff'd mem., 856 F.2d 184 (3d Cir. 1988); DeCirto v. Westchester County Medical Center, 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), cert. denied, 108 S.Ct. 89, 44, EPD ¶ 37,425 (1987). But see King v. Palmer, 778 F.2d 878, 39 EPD ¶ 35,808, rel'd affirmed, 39 EPD ¶ 36,036 (D.C. Cir. 1985).

**B. Favoritism Based Upon Coerced Sexual Conduct May Constitute Quid Pro Quo Harassment**

If a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit. Thus, in order for a woman to have obtained the job benefit in issue, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men. This is substantially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a "quid pro quo" in return for job benefits. For example, in Torrez v. Kimno, 570 F. Supp. 1197, 1199-1201, 32 EPD ¶ 33,848 (D.Del. 1983), the court found a violation of Title VII based on the fact that the granting of sexual favors was a condition for promotion. Although the individual who was granted preferential treatment was engaged in a consensual affair with her supervisor, there was evidence that the supervisor made telephone calls to propose sexual favors to female employees who, in return, were to be promoted.

Many times, a third party female will not be able to establish that sex was generally made a condition for the benefit in question. For example, a supervisor may have been interested in only one woman, and thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced. See EEOC amicus brief (filed Oct. 30, 1988) in Clayton v. White Hall School District, 875 F.2d 676, 50 EPD ¶ 39,048 (8th Cir. 1989), in which the Commission argued that a white employee had standing under Title VII to challenge her employer's decision to deny her an employment benefit pursuant to an employment policy which it allegedly enforced for the purpose of preventing the same type of sexual harassment to a black employee; although the plaintiff was not the object of racial discrimination, she was injured as a result of the race discrimination practiced against the black employee. See also DeCirto v. Westchester County Medical Center, 807 F.2d at 307-08 (by implication) (male plaintiffs' claims of favoritism rejected not because of lack of standing but because the woman who received the favorable treatment was not coerced into submitting to sexual advances). EEOC v. F.I.M.M.E.-D.C. Freight, Inc., 659 F.2d 690, n.2 27 EPD ¶ 32,202 (5th Cir. 1981) (white plaintiffs could challenge discrimination against blacks provided that they could establish a personal injury); Allen v. American Home Foods, Inc., 644 F. Supp. 1553, 42 EPD ¶ 36,911 (N.D. Ind. 1986) (males who lost their jobs due to their employer's discrimination against female coworkers suffered an injury as a result of the discrimination, and therefore had standing to sue under Title VII).

**C. Widespread Favoritism May Constitute Hostile Environment Harassment**

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not
welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is "sufficiently severe or pervasive "to alter the conditions of [their] employment and create an abusive working environment." Vinson, 477 U.S. at 67, quoting Henson v. City of Dundas, 682 F.2d 897, 904, 29 EPD ¶ 32,993 (11th Cir. 1982). An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor "play along" and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicate a bias against protected class members, creates a hostile work environment for them. See Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), cert. denied, 460 U.S. 957, 4 EPD ¶ 7838 (1972) (discriminatory treatment of medical patients created hostile work environment for plaintiff employee); Commission Decision No. 71-969, CCH EEOC Decisions (1973) ¶ 6193 (supervisor's habitual use of racial epithet in referring to Black employees created discriminatory work environment for White Charging Party); Compliance Manual, Volume II, Section 615.5(a)(5) (Examples (1) and (2) (sexual harassment of females may create hostile work environment for other male and female employees). Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit "quid pro quo" harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.

The case of Broderick v. Ruder, 685 F. Supp. 1269, 46 EPD ¶ 37,963 (D.D.C. 1988) illustrates how widespread sexual favoritism can be found to violate Title VII. In Broderick a staff attorney at the Securities and Exchange Commission alleged that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits. Another of her supervisors allegedly promoted the career of a staff attorney with whom he socialized extensively and to whom he was noticeably attracted. In addition, there were isolated instances of sexual harassment directed at the plaintiff herself, including an incident in which her supervisor became drunk at an office party, unveiled the plaintiff's sweater, and kissed her. The court found that the conduct of these supervisors "created an atmosphere of hostile work environment" offensive to the plaintiff and several other witnesses. It further stated that the supervisors' conduct in bestowing preferential treatment upon those who submitted to their sexual advances undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. Broderick, 685 F. Supp. at 1278. While the court in Broderick grounded its ruling on the hostile environment theory, it is the Commission's position that these facts could also support an implicit "quid pro quo" harassment claim since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct. See also Spencer v. General Electric, 697 F. Supp. 204 (E.D. Va. 1988).

Example 1—Charging Party (CP) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. EEOC's investigation discloses that the relationship at issue was consensual and that the supervisor had never subjected CP's co-worker or any other employees to unwelcome sexual advances. The Commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor's conduct for reasons other than their genders. Even if CP is genuinely offended by the supervisor's conduct, she has no Title VII claim.

Example 2—Same as above, except the relationship at issue was not consensual. Instead, CP's supervisor regularly harassed the co-worker in front of other employees, demanded sexual favors as a condition for her promotion, and then audibly boasted about her "conquest." In these circumstances, CP may be able to establish a violation of Title VII by showing that in order to have obtained the promotion, it would have been necessary to grant sexual favors. In addition, she and other qualified men and women who were denied the promotion would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination levied against their co-workers.

Example 3—Same as Example 1, except CP's supervisor and other management personnel regularly solicited sexual favors from subordinate employees and offered job opportunities to those who complied. Some of those employees willingly consented to the sexual requests and in turn received promotions and awards. Others consented because they recognized that their opportunities for advancement would otherwise be limited. CP, who did not welcome this conduct, was not approached for sexual favors. However, she and other female and male co-workers may be able to establish that the conduct created a hostile work environment. She can also claim that by their conduct, the managers communicated to all female employees that they can obtain job benefits only by acquiescing in sexual conduct.

1 The material in § 615 of the Compliance Manual on subheading (g) of the Guidelines (at pp. 29 of this Policy Guidance) indicated that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits. Another of her supervisors allegedly promoted the career of a staff attorney with whom he socialized extensively and to whom he was noticeably attracted. In addition, there were isolated instances of sexual harassment directed at the plaintiff herself, including an incident in which her supervisor became drunk at an office party, unveiled the plaintiff's sweater, and kissed her. The court found that the conduct of these supervisors "created an atmosphere of hostile work environment" offensive to the plaintiff and several other witnesses. It further stated that the supervisors' conduct in bestowing preferential treatment upon those who submitted to their sexual advances undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. Broderick, 685 F. Supp. at 1278. While the court in Broderick grounded its ruling on the hostile environment theory, it is the Commission's position that these facts could also support an implicit "quid pro quo" harassment claim since the managers, by their conduct, communicated a message to all female employees in the office that job benefits would be awarded to those who participated in sexual conduct. See also Spencer v. General Electric, 697 F. Supp. 204 (E.D. Va. 1988).

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9 In King, the plaintiff claimed she had been denied a promotion that went to a less qualified co-worker who was engaged in an intimate relationship with the selecting official. Although the issue of whether Title VII applies to consensual relationships was not raised on appeal, the court stated that it agreed with the lower court's conclusion that the case was within the purview of Title VII. King, 778 F.2d at 880. The court ruled in favor of the plaintiff on the basis of its finding that her co-worker was promoted because of the sexual relationship. Id. at 882. In a concurring opinion to the decision denying a suggestion for rehearing en banc, it was emphasized that the issue of whether Title VII applied to the facts of the case was not raised on appeal or in the petition for rehearing. 39 EPD ¶ 36,036.

10 Although this Policy Guidance uses female pronouns to refer to individuals who are treated favorably because they engage in sexual conduct, it also covers situations in which men are granted favorable treatment based on sexual conduct.

7 The employer would also be liable for "quid pro quo" harassment with regard to the individual who was coerced into submitting to the advances.

8 See Section 164.11(1)(b) of EEOC's Guidelines on Sexual Harassment, which states that a violation will be found when submission to unwelcome sexual conduct is made "either explicitly or implicitly" a term or condition of an individual's employment.

9 See also DeCise v. Westchester County Medical Center, 807 F.2d at 307, in which the court stated that the claim in Toscano was premised on the coercive nature of the employer's act and therefore that the cause had support in the contention that a voluntary amorous involvement may form the basis of a Title VII claim.

10 In Clayborne, the court ruled that the plaintiff did have standing, but it based that standing on her allegation of a hostile work environment. 875 F.2d at 679.

11 See EEOC's Policy Guidance on Current Issues of Sexual Harassment (10/25/88) at 13-18 for standards governing the determination of whether a work environment is "hostile." That Policy Guidance makes clear that the Commission will evaluate the totality of circumstances on a case-by-case basis, employing the objective perspective of a "reasonable person" in the context in which the challenged conduct took place. Some factors that could be considered in determining whether a hostile environment is established are the number of incidents of favoritism, the egregiousness of the incidents, and whether or not other employees in the office were made aware of the conduct.

12 See, e.g., Priest v. Rosary, 634 F. Supp. 719, 39 EPD ¶ 35,897 (N.D. Cal. 1986), in which the defendant gave preferential treatment to his consensual sexual partner and to three female employees who reacted favorably to his sexual advances and whose conduct of a sexual nature, and he disadvantaged those employees, including the plaintiff, who reacted unfavorably to his conduct. The court found that the favoritism itself did not violate Title VII since it was voluntary, and that "[h]ostile behavior that does not bespeak an unlawful motive cannot support a hostile work environment claim." Id. at 702. However, it is the commission's position that had the sexual favoritism been widespread, the fact that it was exclusively voluntary and consensual would not have defeated a claim that it created a hostile work environment for other people in the workplace. As indicated above at 811, the question of whether actions complained of are sufficiently widespread or egregious to constitute a hostile environment must be decided case-by-case.

13 In Spencer, the supervisor of an office engaged in virtually daily horseplay of a sexual nature with female subordinates. This behavior included sitting on their laps, touching them in an intimate manner, and making lewd comments. The subordinates joined in and generally found the horseplay funny and inoffensive. With the exception of one incident (which may have been sexual but was not relied on in the court's decision), none of this horseplay was directed at the plaintiff. The supervisor additionally engaged in consensual relations with at least two of his subordinates. The court found that the supervisor's conduct would have interfered with the work performance and would have seriously affected the psychological well-being of a reasonable employee, and that basis is found a violation of Title VII. 407 F. Supp. at 218. Although Spencer did not involve sexual favoritism, the case supports the proposition that pervasive sexual conduct can create a hostile work environment for those who find it offensive even if the targets of the conduct welcome it and even if no sexual conduct is directed at the persons bringing the claim.


I. RIGHT TO RECOVERY

Section 1981A(a)(1) provides that a complaining party may recover compensatory and punitive damages against a respondent who has engaged in unlawful intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., unless that complaining party can recover under § 1981. Only race discrimination claims can be brought under § 1981.

Damage is available in addition to any relief authorized under § 706(g) of Title VII. Therefore, § 1981A does not affect the right to back pay, front pay, or any type of relief already recoverable under Title VII. Damages are authorized only in cases of intentional discrimination and are therefore not available where the charge alleges that mental or emotional distress has been undergone since an adverse impact. Section 1981A(a)(1).

As indicated above, § 1981A(a) provides for damages under Title VII if the complaining party “cannot recover” under § 1981. For purposes of the Commission’s administrative enforcement process, the question arises as to the precise meaning of the “cannot recover” language. The Commission has no jurisdiction over § 1981, nor will the Commission, during the investigation and conciliation process, be able to determine the scope or universe of a § 1981 action brought by the charging party. Thus, in processing charges, the Commission will seek compensatory and punitive damages, as appropriate, whether or not an individual may have a cause of action under § 1981.

This interpretation is supported by the Sponsor’s Interpretive Memorandum, 137 Cong. Rec. S35, 484 (daily ed. Oct. 30, 1991), which explains that the purpose of the “cannot recover” language was “to assure that a complaining party does not obtain duplicative damage awards against a single respondent under both sections 1981 and section 1981A . . . [and that] the complaining party need not prove that he or she does not have a cause of action under section 1981 in order to recover damages in the section 1981A action.” In addition, the Interpretive Memorandum of Representative Edwards, Co-sponsor of HR-1 (House Bill) and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee which was responsible for HR-1, asserts that “if a party has a potential cause of action under section [1981], but for whatever reason does not bring it, that party ‘cannot recover under section [1981]’ . . .” and hence can recover under § 1981A. “No party is under any obligation to proceed under one or the other statute or to waive any cause of action under either statute as a condition of proceeding.” 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

Therefore, at least for purposes of charge processing, the Commission will seek damages where otherwise appropriate, even if the complaining party has an ongoing § 1981 court action, as long as the complaining party has not recovered under § 1981. Because the Commission has no enforcement authority under § 1981, its decisions concerning appropriate relief cannot rest on contingencies that may, or may not, occur under § 1981. Any other interpretation would prevent the Commission from being able to settle race discrimination claims, to the equal detriment of complaining parties and respondents.

Section 1981A(a)(2) provides the same remedies for intentional violations of the federal employee provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. However, damages are not available in disability discrimination cases which involve reasonable accommodation if the respondent “demonstrate good faith efforts, in consultation with the person with a disability,” to provide a reasonable accommodation. Section 1981A(a)(3). For example, assume that a respondent consulted with a sight impaired applicant to determine whether any reasonable accommodations exist to enable the applicant to perform this particular job. The applicant informs the respondent that a scanner would reasonably accommodate him. The scanner is very expensive and the respondent believes that a magnifier, backed up by the office secretary as a part-time reader, would reasonably accommodate the applicant. The applicant subsequently files a charge and the Commission concludes that, under the particular circumstances of that job, the magnifier plus part-time reader was an effective reasonable accommodation. Thus, the Commission concludes that the respondent failed to provide a reasonable accommodation and is therefore liable for discrimination. While the respondent will be liable for back pay and reinstatement, as appropriate, the Commission will not seek compensatory or punitive damages in this case because the respondent consulted with the complaining party and had a good faith belief that it had provided a reasonable accommodation.

Finally, damages may not be available in certain cases where the employer acts with both negligent and intentional motives (mixed motives). Section 107(b) (to be codified at § 706(g)(2)(B) of Title VII). See EEOC Enforcement Guidance No. _________, “Recent Developments in Disparate Treatment Theory,” 1992, for a full discussion of this issue.

II. TYPES AND EXTENT OF RECOVERY

Section 1981A(b) sets limitations on certain damages that complaining parties may recover. First, it specifies that punitive damages are available only if the complaining party demonstrates that the respondent engaged in discrimination “with malice or reckless indifference to the federally protected rights of an aggrieved individual.” It also provides that punitive damages are not available against a governmental entity or political subdivision. Second, § 1981A(b) reiterates that compensatory damages do not include any relief authorized under § 706(g) of Title VII. Third, it provides a limitation on the sum of punitive damages and compensatory damages for “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” The limitation on the amount of damages (caps) is based on the size (number of employees) of the respondent. The limitations are stated as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Maximum Amount</th>
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<tbody>
<tr>
<td>15 to 100 employees</td>
<td>$50,000</td>
</tr>
<tr>
<td>101 to 200 employees</td>
<td>$100,000</td>
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<tr>
<td>201 to 500 employees</td>
<td>$200,000</td>
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<tr>
<td>501 employees or more</td>
<td>$300,000</td>
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</table>

The limitations do not, on their face, apply to respondents who have fewer than fifteen employees, although labor organizations and employment agencies with fewer than fifteen employees may be subject to Title VII. Thus, a literal interpretation of the provision would potentially subject them to unlimited damages. Such an interpretation would be inconsistent with Congress’ clear intent to spare small respondents from large damage awards. The provision could also be read to mean that labor organizations and employment agencies with fewer than fifteen employees are not subject to any damages. The Commission rejects both interpretations and concludes that all covered employ
ment agencies and labor organizations with 100 or fewer employees are subject to the $50,000 cap on damages.

When the Commission, or an individual, is pursuing a claim on behalf of more than one person, the damage caps are to be applied to each aggrieved individual. For example, where the Commission files suit on behalf of ten complaining parties, against an employer who has 1000 employees, each complaining party may receive (to the extent appropriate) up to $300,000. The respondent's total liability for all ten complaining parties may be up to $3,000,000.8

Because relief recoverable under § 706(g) is not deemed to be compensatory damages, complaining parties may recover full compensation for back pay, interest on backpay, frontpay, or any relief that would have been available under Title VII, § 505 of the Rehabilitation Act, or the ADA, without inclusion in the caps. Although some may contend that frontpay is a "future pecuniary loss" to be included in the caps, the Commission has not included it in the definition of compensatory damages and is not included in the caps.9

Past pecuniary losses are also not included in the caps and are fully compensable where actual out-of-pocket losses can be shown. Section 1981A(3)(D) limits only claims that typically do not lend themselves to precise quantification, i.e., punitive damages, future pecuniary losses, and nonpecuniary losses.

**Example:** Complaining Party is subjected to brutal racial harassment and is subsequently demoted. As a result, she suffers from severe depression. She spends $20,000 in psychiatric and medical bills for treatment of the depression. Her psychiatrist also testifies that CP will require approximately two additional years of therapy. CP may receive $20,000 for the medical bills and full backpay and frontpay awards, all of which are fully compensable and not included in the caps. She may also receive damages for the depression (nonpecuniary loss), damages for future psychiatric bills for the next two years (future pecuniary losses), and punitive damages. The respondent has 35 employees. The sum of the damages for the depression, future psychiatric expenses, and punitive damages cannot exceed the statutory cap of $50,000.

### A. Compensatory Damages

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See Carey v. Piphus 435 U.S. 247, 254 (1978) (purpose of damages is to "compensate persons for injuries caused by the deprivation of constitutional rights"). Compensatory damages "may be had for any proximate consequences which can be established with requisite certainty." 22 Am Jur 2d Damages § 45 (1965). Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). Compensatory damages are allowed against federal, state, and local governments and private sector employers.

The following section sets forth the legal parameters for computing compensatory and punitive damages where appropriate.

#### 1. PECUNIARY LOSSES

Pecuniary losses include, for example, moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct. To recover damages, the complaining party must prove that the employer's discriminatory act or conduct was the cause of his loss. The critical question is whether the complaining party incurred the pecuniary losses as a result of the employer's discriminatory action or conduct.

Section 1981A distinguishes past and future pecuniary losses, in that future pecuniary losses are subject to the caps, while past pecuniary losses are not. The Commission concludes that past pecuniary losses are out-of-pocket losses that occurred prior to the date of the resolution of the damage claim, i.e., conciliation, settlement, or the conclusion of litigation. The amount to be awarded for past pecuniary losses can be determined by receipts, records, bills, canceled checks, confirmation by other individuals, or other proof of actual losses and expenses. Damages for past pecuniary losses will not normally be sought without documentation.

Future pecuniary losses are out-of-pocket expenses that are likely to occur after conciliation, settlement, or the conclusion of litigation.11 As noted previously, future pecuniary losses are subject to the caps and do not include frontpay. Future pecuniary losses include the same expenses listed above, if these losses will continue after settlement, conciliation or litigation.

The complaining party has a duty to mitigate his/her damages. A complaining party may not recover damages for any harm that (s)he could have avoided or minimized with reasonable effort. See Restatement (Second) of Torts, § 910(1). However, the respondent has the burden of showing that the complaining party failed to exercise reasonable diligence to mitigate his/her damages. Cf., e.g., Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1527, 55 EPD ¶ 40,540 (11th Cir. 1991) (employee has the burden of showing that the plaintiff failed to make reasonable efforts to find work to mitigate his damages when seeking backpay); Fleming v. County of Kanpe, 896 F.2d 553, 560 (7th Cir. 1990) (the burden is on the employer to prove, as an affirmative defense, that the employee failed to mitigate damages when seeking lost wages); Woolridge v. Marlene Industries Corp., 875 F.2d 540, 548, 53 EPD ¶ 39,772 (6th Cir. 1989) (defendant has the burden of producing sufficient evidence to establish the amount of intangible earnings or loss of earnings in mitigating damages on the part of the plaintiff). Therefore, if the respondent can prove that the complaining party failed to exercise reasonable diligence to mitigate his/her damages and could have avoided or minimized such damages with reasonable effort, the damages may be reduced accordingly.

**Example:** Complaining Party is a nurse in New York City, which has a critical nursing shortage. CP was fired when she rejected the sexual advances of the hospital administrator. CP has been unemployed for over a year.

She seeks recovery for past pecuniary losses, which include, among other losses, moving expenses to California and job search expenses in California. CP maintains that it was necessary to move to California to find another nursing position. The respondent proves that CP could have found a comparable nursing position in New York City with reasonable diligence within a matter of weeks and that her New York job search expenses would have been minimal. Therefore, CP's recovery of damages for her moving expenses and job search expenses in California may be limited to the amount of the job search expenses she would have incurred in New York City. Backpay and damages sought for the other pecuniary losses incurred during her year-long unemployment may also be reduced, since the respondent has proved that she could have found another job within a few weeks.

#### 2. NONPECUNIARY LOSSES

Damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct.
Nonpecuniary losses for emotional harm are more difficult to prove than pecuniary losses. Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, or a nervous breakdown.

Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches.

An award for emotional harm is warranted only if there is sufficient causal connection between the respondent's illegal actions and the complaining party's injury. See Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977). The discriminatory act or conduct must be the cause of the emotional harm. The claim of emotional harm will be seriously undermined if the onset of symptoms of emotional harm preceded the discrimination. However, if a complaining party had preexisting emotional difficulties and his mental health deteriorates as a result of the discriminatory conduct, the additional harm may be attributed to the respondent. The fact that the complaining party may be unusually emotionally sensitive and incur great emotional harm from discriminatory conduct will not absolve the respondent from responsibility for the greater emotional harm. Williams v. Handy Button Machine Company, 817 F.2d 1590, 1594, 43 EPD ¶ 37,178 (7th Cir. 1987) ("[a] new boss [who] was unusually sensitive, but a teacher takes his victims as it finds them"). For example, suppose the Commission finds that the respondent is liable for sexual harassment against three female employees, one of whom is an incest victim. The incest victim incurred much greater emotional harm from the sexual harassment than she did her two co-workers. The respondent is liable for the greater emotional harm that the incest victim suffered.

For charges alleging emotional harm, consider factors that are directly relevant to whether and to what extent the complaining party was the employee's emotional harm. For example, in Cowan v. Prudential Insurance Co., 822 F.2d 688, 690-91, 47 EPD ¶ 38,167 (2d Cir. 1988), the court found that defendant's failure to promote the plaintiff caused him severe emotional distress, humiliation, loss of self-esteem, marital problems, and heavy drinking. However, the court considered several factors to determine whether and to what extent the emotional harm was caused by the defendant or by other factors. The factors considered were that: 1) the plaintiff had not been subjected to severe or public humiliation; 2) upper management was not aware that race was a factor in the failure to promote the plaintiff, who had been offered other less attractive positions; 3) the plaintiff had caused some of the humiliation and difficulties that he had with his co-workers because he told clients that he would be promoted and he criticized his co-workers in a newspaper article; and 4) the plaintiff had not sought counseling. The court found that these factors justified a lower amount than the plaintiff sought. In Vance v. Southern Bell Telephone and Telegraph Company, 863 F.2d 1503, 1516, 48 EPD ¶ 38,626 (11th Cir. 1989), the court found that an award of $500,000 in compensatory damages for mental distress, emotional harm, or humiliation resulting from racial discrimination was properly reduced excessive where there were other factors which probably contributed to the plaintiff's mental distress. The plaintiff had marital problems because her husband was named in a paternity suit by another woman, financial problems, problems resulting from an ambivalent attitude, dietary problems, and family illnesses and deaths. Therefore, where a complaining party's emotional harm is due in part to personal difficulties, which were not caused or exacerbated by the discriminatory conduct, the employer is liable only for the harm resulting from the discriminatory conduct.

The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations. However, evidence of emotional harm may be established by testimony. Gusby v. Pennsylvania Electric Company, 840 F.2d 1108, 1121-22, 45 EPD ¶ 37,785 (3d Cir. 1988), cert denied, 492 U.S. 905, 50 EPD ¶ 39,201 (1989); Cowan v. Prudential Insurance Co., 822 F.2d at 690-91. The "plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress." Williams v. TransWorld Airlines, Inc., 660 F.2d 1267, 1273, 27 EPD ¶ 32,174 (8th Cir. 1981). For example, a plaintiff was awarded $52,644.80 in damages for mental anguish and emotional distress resulting from losing his house and car, marital harmony, and the respect of his children, after he was discriminatorily discharged. Mullens v. Anheuser-Busch Inc., 778 F.2d 989, 33 EPD ¶ 34,187 (8th Cir. 1984). In Black v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1245, 32 EPD ¶ 33,730 (8th Cir. 1983), the plaintiff was awarded $12,402 for "mental anguish, humiliation, embarrassment and stress." $7,598 in backpay, and $60,000 in punitive damages. The evidence presented was that the supervisor openly manifested racial bias against Blacks by making racially offensive references to the plaintiff, another employee, and customers. On one occasion, the supervisor and plaintiff got into a dispute during which the supervisor berated the plaintiff in street language in front of co-workers and customers, although she never addressed White employees in this manner. The supervisor reported the dispute to management and told them that she wanted plaintiff "out of there." Management discharged the plaintiff without asking for her version of the incident, although they were well aware of the supervisor's racial bias. The plaintiff testified that she "cried and felt angry" with her supervisor after her discharge. Plaintiff further testified that she was unemployed for thirteen months and because of her financial dilemma, she suffered sleeplessness, anxiety, embarrassment, and depression. The jury found this evidence sufficient to award damages for mental distress.

Similarly, in Suttlow v. Shuler, 777 F.2d 1431, 36 EPD ¶ 35,806 (11th Cir. 1985), a case brought under § 1983 and § 1881, the court affirmed an award for $100,000 for humiliation and emotional distress. Over a period of years, the plaintiff was consistently passed over for administrative positions and promotions for racial reasons, while less qualified White persons were promoted. As a result, plaintiff suffered emotional stress, loss of sleep, marital strain, and humiliation. The defendant stated that there was no evidence that plaintiff missed work, received professional help, or suffered harm as a result of his relationships with students or co-workers. Plaintiff countered that he was not careful to give the respondent a reason not to promote him. The court found that plaintiff's evidence was sufficient to award damages. However, for discrimination on the basis of sex, the complaining party may not be sufficient to establish emotional harm. There should be corroborating testimony by the complaining party's co-workers, supervisors, family, friends, or anyone else with knowledge of the emotional harm.

Damage awards for emotional harm vary significantly and there are no definitive rules governing the amounts to be awarded. However, compensatory damage awards must be limited to the sums necessary to compensate the plaintiff for actual harm, even if the harm is intangible. Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225, 33 EPD ¶ 34,187 (D.C. Cir. 1984). In Williamson v. Handy Button Machine Company, 817 F.2d at 1293-95, the court upheld a damage award of $10,000 for the psychological disability of a nervous breakdown after the following sequence of events. Plaintiff was discriminated against for over a decade. She was assigned unskilled work, although she was qualified for, and occasionally performed, skilled work. Plaintiff was passed over for numerous promotions, in favor of less qualified White employees with less seniority. Plaintiff was also demoted to a lower status department despite her protests and the seniority rule in the collective bargaining agreement. Finally, on one occasion, the plaintiff used an upstairs bathroom, where she had been assigned a locker by the company, and was loudly berated in scatological terms by a supervisor for using this particular bathroom. The psychiatrist characterized the bathroom incident as the straw that broke the camel's back. The plaintiff was never able to return to work. In addition to the award for emotional harm, plaintiff received $130,000 for backpay.
and frontpay, $10,000 for medical and psychological expenses, and $100,000 for punitive damages.

In comparison, another case brought under § 1981, the plaintiff received $123,000 for emotional distress. The plaintiff had been under stress continuously for fear of making a mistake on the job, because he was discriminatorily denied proper training which he needed for adequate performance. The plaintiff’s White co-workers, both senior and junior to the plaintiff, regularly received formal training. He was denied pay raises equivalent to those of his White co-workers because of his poor evaluations, which stressed the need for training. When the plaintiff finally received training after numerous requests, it was superficial in nature. Plaintiff’s stressful situation resulted in high absenteeism and he was placed on probation. He filed a complaint and was subsequently discharged. Plaintiff’s psychiatrist testified that the plaintiff was suffering from anxiety, stress, and depression. The court found that this was an adequate basis for the award. Plaintiff also received $176,000 in backpay, and $300,000 in punitive damages. *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 44 EPD ¶ 37,428 (1st Cir. 1987).

The method for computing compensatory damages during consolida-
tion or settlement should typically be based on a consideration of the severity of harm and the time that the complaining party has suffered from the emotional harm. To determine the severity of the harm, consider, for example, whether the harm consisted of occasional sleeplessness, or a nervous breakdown resulting in years of psychother-
apy. The length of time that the complaining party has suffered from the emotional harm is also relevant. Of course, a complaining party who has suffered from severe depression for two months will be awarded less money than a complaining party who has suffered from severe depression for a year. However, different methods of computing damage amounts for emotional harm may be appropriate in certain cases. Since medical evidence is important, a medical release should be obtained from the complaining party whenever emotional or physical harm is alleged.

### B. Punitive Damages

Punitive damages are awarded to punish the respondent and to deter future discriminatory conduct. They are not available against a federal, state, or local government, a government agency, or a political subdivision. Punitive damages are available only where the respondent acted with “malice or with reckless indifference to the federally protected rights of an aggrieved individual.” Section 1981A(b)(1).

This standard is consistent with § 1981 and therefore should be interpreted consistently. The standard for awarding punitive damages under § 1981 is whether the defendant acted with malice, an evil motive, or recklessness or callous indifference to a federally protected right. *Stephens v. South Atlantic Cannery, Inc.*, 848 F.2d 484, 489, 46 EPD ¶ 38,032 (4th Cir. 1988), cert. denied, 488 U.S. 996 (1988). Additionally, under § 1983, plaintiffs may recover punitive damages when “the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Garza v. City of Omaha*, 814 F.2d 553, 556, 43 EPD ¶ 37,072 (8th Cir. 1987) (punitive damages under § 1983 are awarded where the defendant exhibits opprobrium, malice, gross negligence, willful or wanton misconduct, or reckless disregard for the civil rights of the plaintiff).  

1. **DETERMINING MALICE OR RECKLESS DISREGARD**

A “finding of liability does not of itself entitle a plaintiff to an award of punitive damages.” *Yarbrough v. Tower Oldsmobile*, 789 F.2d 508, 514, 40 EPD ¶ 36,216 (7th Cir. 1986). However, conscious, purposeful discrimination may be sufficient to warrant punitive damages. As the First Circuit has observed, “can it really be disputed that intentionally discriminating against a [Black] man on the basis of his skin color is worthy of some outrage?” *Rowlett v. Anheuser-

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A number of factors may be considered to determine whether conduct was committed with malice or reckless indifference to the complaining party’s federally protected rights. This evidence is likely to have already been obtained during the liability phase of the investigation. The list is nonexclusive and other relevant factors may also be considered.

1. The degree of egregiousness and nature of the respondent’s conduct should be considered. See *Restatement (Second) of Torts*, § 908(2). In *EEOC v. Gaddis*, 733 F.2d 1373, 1380, 34 EPD ¶ 34,348 (10th Cir. 1984), the court held that allowance of punitive damages involves an evaluation of the nature of the conduct in question. The respondent had made an out-of-office to the plaintiff, an out-of-state resident, based upon a recommendation by another employee. Plaintiff accepted the position and his name was posted on an assignment board as a new employee. The respondent met the plaintiff for the first time when he reported for work. The respondent was visibly upset when he discovered that the plaintiff was Black and stated that a Black person would never be allowed to work in the office. The plaintiff worked for several days and was fired. The respondent stated that no vacancy existed, although it subsequently hired two White males for the position. The court determined that this conduct warranted punitive damages.

2. Conduct which is shocking or offends the conscience is egregious and warrants punitive damages. For example, CP’s supervisor often asks CP for dates and sometimes makes sexual remarks to her, although CP has repeatedly asked him to leave her alone. The supervisor finally tells CP who is the most qualified person for an upcoming promotion, that if she wants the promotion she must have sex with him. The supervisor’s conduct may be considered “shocking.”


4. The duration of the discriminatory conduct is relevant. For instance, an extended period of discriminatory conduct “suggests an official policy or discrimination as opposed to an innocent discrimination.” *Williamson v. Handy Button Machine Company*, 817 F.2d at 1296. Evidence that the respondent tolerated or condoned the discriminatory conduct over a period of time could constitute malice and/or reckless indifference.

5. Evidence that the respondent planned or attempted to conceal or cover-up the discriminatory practices or conduct is relevant.

6. The employer’s actions after it was informed of discrimination should be considered. An employer who has notice of discriminatory conduct and fails to take action could incur punitive damages. *See Yarbrough v. Tower Oldsmobile*, 789 F.2d at 514-15 (punitive damages warranted under § 1981) where the plaintiff testified that his supervisor reprimanded him in writing, without cause, and transferred him to a less desirable work area after saying “[w]e don’t want no Black guy...
in the front of the shop); the plaintiff brought his complaints of discrimination to management, who failed to respond and was found to be "indifferent to his federally protected right(s)."

7. Proof of threats or deliberate retaliatory action against complaining parties for complaints to management or filing a charge normally will constitute malice. *Hunter v. Allis-Chalmers*, 797 F.2d 1417, 1425 (7th Cir. 1986) (punitive damages warranted where the defendant had deliberately fired a worker for making well-founded complaints with a state FEP agency about persistent acts of racial harassment); *Erbha v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1260, 37 EPD § 35,317 (6th Cir. 1985) (manager’s threat to hurt plaintiff economically for pursuing his complaints of harassment may constitute malice), cert. denied, 475 U.S. 1015 (1986).

**2. CALCULATION OF PUNITIVE DAMAGE AMOUNT**

If malice or reckless disregard of the complaining party’s rights is found, respondents may be liable for punitive damages up to the maximum amount allowed. Congressional intent was to make respondents "liable for the non-wage economic consequences of intentional discrimination up to the full extent of the damaged limitations." *Spongers’ Interpretative Memorandum*, 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991).

Of course, the punitive damage award should "bear some relation to the ‘blameworthiness of the defendant’s act’ along with ‘the nature and extent of the harm to the plaintiff that the defendant caused.’" *Rowlett v. Anheuser-Busch*, 832 F.2d at 207, quoting, Restatement (Second) of Torts, § 908(2). These factors are discussed above [ ].

The financial position of the respondent is also relevant. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (evidence of a tortfeasor’s wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded); *Rowlett v. Anheuser-Busch*, 832 F.2d at 207 (“a rich defendant may well be required to pay more than a poor one who committed the same wrong”).

The award should be considered in the context of the respondent’s monetary resources. The amount of punitive damages should "sting," but not "destroy" the respondent. *Keenan v. City of Philadelphia*, 83 FEP Cases at 944-45. The following factors are relevant in determining a respondent’s financial position. Note, however, that this list is not exclusive and other relevant factors may also be considered.

A. The revenues and liabilities of the business.
B. The fair market value of the respondent’s assets.
C. The amount of liquid assets on hand, which includes amounts that they can reasonably borrow.
D. The respondent’s propensity to generate income in the future—projected earnings.
E. The resale value of the business. This is particularly useful where the business has a unique spot in the market. For instance, large companies may be seeking to buy the business.
F. Consider whether the respondent is affiliated with, subsidiary of, or a larger entity that could provide additional financial resources to the respondent.

In *Bessier v. Precise Tool & Engineering Co., Inc.*, 778 F. Supp. 1509, 57 FEP Cases 1249 (W.D. Mo. 1991), the plaintiff was granted discovery of defendant’s financial records to prepare a case on the issue of punitive damages. The financial records included: 1) financial statements; 2) income tax returns; 3) documents reflecting the defendant’s gross income, net income, and expenditures; 4) bank statements and deposit records; and 5) general ledgers. The defendant was also compelled to answer interrogatories as to its net worth. See also *Heller v. Ebb Auto Co.*, 55 EPD ¶ 40,431, 53 FEP Cases 911 (D. Or. 1990) (Plaintiff may be entitled to defendant’s profit and loss statements and balance statements after making a prima facie showing of entitlement to punitive damages).

**III. CHARGE RESOLUTION**


Damages for past pecuniary losses should be routinely sought. Do not assume emotional harm, or automatically seek damages for such harm. Typically, the Commission will require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations. However, in exceptional cases, the complaining party may establish emotional harm without medical documentation, but the claim should have a reasonable justification for not seeking medical attention for the emotional harm.

If malicious or reckless disregard of the complaining party’s rights is found, the District Director and the Regional Attorney should be consulted, who will, in turn, consult with Headquarters on a case-by-case basis.

1 Section 102 is codified at 42 U.S.C. § 2000e, rather than as part of Title VII. The text of § 2000e is attached as Appendix A.

2 The term “complaining party” means the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII, the Rehabilitation Act, or the Americans with Disabilities Act. *Section 1981a(a)(1).

3 The term “respondent” means an employer, employment agency, labor organization, joint labor-management committee, employment agency concealing the identity of its clients, or labor organization concealing the identity of its members, or any person or joint employment arrangement in which such employers or labor organizations operate. *Section 1981a(b)(2)(A) and (B) of the Act provides that the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and also the enjoyment of any benefits, privileges, terms, and conditions of the contractual relationship.”

4 42 U.S.C. § 2000e provides a cause of action for individuals who are discriminated against on the basis of race in the making and enforcing of contracts. *Civil Rights Act of 1991* amends § 2000e to include all forms of racial bias in employment. *Section 1981a(b)(2)(A) and (B) of the Act provides that the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and also the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship,” Race includes, to some extent, “ethnicity.” See *St. Francis College v. Al-Kazaz*, 481 U.S. 606 (1987) ([1981h prohibits racial discrimination as well as discrimination on the basis of “ancestry or ethnic characteristics”].

5 Relief under § 706(g) of Title VII has traditionally been limited to equitable relief. See, e.g., *Mitchell v. Seaboard System Railroad*, 883 F.2d 451, 452, 51 EPD § 39,254 (6th Cir. 1989) (Title VII plaintiffs are entitled to equitable relief, but not to compensatory damages). Equitable relief under § 706(g) usually means backpay, reinstatement, and/or barfromg. Since benefits and forms of compensation are included in barfromg, *EEOC“Policy Statement on Remedies and Relief for Individual Cases of Unlawful Discrimination*,” February 5, 1985. Injunctions against future discriminatory conduct by the respondent may also be imposed.

6 Part-time employees are included in this count. See *EEOC Policy Guidance No. N-910-624*, “Whether part-time employees are employees within the meaning of § 110(a) of Title VII of the 1964 Civil Rights Act,” April 20, 1990. Two circuits have concluded that part-time employees are not counted as employees for jurisdictional purposes. See, e.g., *EEOC v. Garden and Associates*, 956 F.2d 842 (8th Cir. 1992) (ADEA); *Zimmerman v. North American Signal Corp.*, 708 F.2d 347, 354, 51 EPD § 33,685 (7th Cir. 1983) (ADEA). However, the conclusions in those cases were based on the notion that the requirement that employers have the requisite number of employees “for each working day in each of twenty or more calendar weeks.” Because § 1981a(b)(3) does not contain the “for each working day” requirement for counting employees to determine a respondent’s cap, the rationale for a Garden or Zimmerman type of result appears to have been eliminated.

7 See *EEOC Compliance Manual, Volume II*, § 605, Appendix N. This guidance explains that both labor organizations and employment agencies with fewer than fifteen employees may be covered by Title VII, if they regularly deal with Title VII covered employers. Labor organizations need only exercise a hiring control which prevents employers or an employer or have fifteen members to be covered by Title VII. See 42 U.S.C. § 2000e(5). Basing a union’s damage caps on its number of members, rather than on the number of its members, may have been a drafting error. However, since § 1981a(b)(3) specifically refers to the number of “employees,” and since this is not inconsistent with the provision’s purpose, the Commission interprets the statute to mean that the caps relate to the number of the union’s employees, rather than to the number of its members. *EEOC v. American Pressman’s Local 48*, 882 F.2d 1447, 1450 (6th Cir. 1989). See also *EEOC v. United Airlines*, 910 F.2d 1130, 1134 (7th Cir. 1990). Since each individual who signs a claim under one of these statutes is one who may bring
an action, each is eligible for damages up to the cap. This is true even when their claims are joined either in Commission or private litigation brought on behalf of several individuals, or in a class action brought by a private party.

As a policy matter, any other construction would conflict with Congressional intent to make damages available to fully compensate persons harmed by discrimination and to deter further discrimination. Moreover, a contrary interpretation would be at least unwieldy, if not unworkable. If the Commission cannot seek damages on behalf of each aggrieved person in a single action, it would have to file numerous individual unit suits or reopen

the individual intervenor in Commission actions.

9 The Spencers' Interpretative Memorandum, 137 Cong. Rec. S15,484 (daily ed. Oct. 30, 1991), states that "damages cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII." (Emphasis added.) See also Representative Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991) (frontpay is relief authorized under Title VII and is excluded from damages). Moreover, courts have found that frontpay is an available remedy under Title VII. See, e.g., Carter v. Sedgwick County, 929 F.2d 1501, 1505, 56 EPD ¶ 40,699 (10th Cir. 1991); Weaver v. Cavi Gallarda, Inc., 922 F.2d 1515, 1528, 55 EPD ¶ 40,540 (11th Cir. 1991); Edwards v. Occidental Chemical Corp., 893 F.2d 1442, 1449, 52 EPD ¶ 39,585 (9th Cir. 1990); Fire v. Western Electric Co., 843 F.2d 1262, 1278-79, 46 EPD ¶ 37,882 (10th Cir. 1988). But see Fortino v. Quasar Company, 950 F.2d 389, 37 EPD ¶ 41,117 (7th Cir. 1991) (ADEA case questioning frontpay awards under Title VII because "Title VII authorizes only equitable relief and frontpay resembles common law damages for breach of employment contract.")²

10 Although compensatory damages were not available under Title VII prior to § 1981a, medical expenses have been awarded as part of § 706(g) relief in some circumstances. See, e.g., EEOC v. Service News Co., 895 F.2d 958, 53 EPD ¶ 39,736 (4th Cir. 1990) (court awarded unreimbursed medical expenses, which resulted from plaintiff's loss of health insurance after she was discriminatorily discharged); Weitz v. Parker Hannifin Corp., 757 F. Supp. 1110, 1132, 47 EPD ¶ 40,521 (D.D.C. 1990) (court awarded unreimbursed medical expenses, resulting from plaintiff's loss of health insurance, as part of backpay). In such cases, medical expenses would be excluded from the caps, either as relief authorized by § 706(g) or as past pecuniary losses.

11 Congressional intent for including future pecuniary losses in the caps appears to have been to limit damages on losses that are typically difficult to quantify. If past out-of-pocket losses can be shown, they can be recovered without regard to the limitations on damages. Up to the time of resolution of the complaint, whether at conciliation, settlement, or the conclusion of litigation, actual out-of-pocket losses can be shown with some certainty.

12 By analogy, § 706(g) of Title VII provides that interim earnings or amounts earnable with reasonable diligence by the charging party shall operate to reduce a backpay amount.

13 Cases awarding compensatory and punitive damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under § 1981a. Section 1981a, like Title VII, provides for compensatory and punitive damages; the 1981a provisions are an amendment to § 1981.

14 Complying parties should be informed that if they claim economic harm, respondents may be able to obtain records of medical or psychiatric treatments for conditions relevant to the complained of symptoms. A respondent may also obtain relevant information concerning the complainant's private life.

15 During litigation, the amount of damages will be decided by a jury if either party requests a jury. Jury trials will be available if a plaintiff seeks compensatory or punitive damages. Section 1981a(c).

16 "Punitive damages are available under § 1981a to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." Representative Edwards' Interpretative Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7, 1991).

17 Malice is defined as "a condition of mind which promotes a person to do a wrongful act with ill will . . . that is, on purpose, to the injury of another." Black's Law Dictionary 862 (5th ed. 1979). Thus, discriminatory conduct is "maliciously done if prompted or accompanied by ill will . . . either toward the injured person individually or toward all persons in one or more groups . . . of which the injured person is a member." Soderbeck v. Rose County, 32 F.3d 1580 (9th Cir. 1994), cert. denied, 115 S. Ct. 1157 (1994).

18 The sum of punitive damages, future pecuniary losses, and nonpecuniary losses may not exceed the damage caps set forth in § 1981a(b)(3). Therefore, punitive damage awards under § 1981a typically will not be "grossly excessive" or "shocking." See Bowles v. Ashauer-Buch, 832 F.2d 194, 206, 44 EPD ¶ 32,426 (1st Cir. 1987) (punitive damage awards of $2 million were grossly excessive and reduced to $2.5 million); Vance v. Southern Bell Telephone and Telegraph Company, 863 F.2d 1503, 1516, 48 EPD ¶ 38,626 (11th Cir. 1989) (punitive damage award of $2.5 million is "high and rather shocking").
Appendix F

Leading Cases on Sexual Harassment

Meritor Savings Bank, FSB v. Vinson et al.

477 U.S. 57 (1986)

OCTOBER 26 TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U.S.C. § 2000e et seq.

1

In 1974, respondent Michelle Vinson met Sidney Taylor, a vice president of the now-defunct Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. While Taylor was her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. Respondent testified that during her probationary period as a teller-trainee, Taylor coerced her to a seedy way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of taking her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 to 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after

1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support these charges. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' case. Vinson v. Taylor, 22 FPD § 30,708, p. 14,693, n. 1, 23 FEP Cases 37, 38-39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of her supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

[ij (respondent) and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with the bank. That relationship was voluntary one having nothing to do with her continued employment at the bank or her advancement or promotions at that institution. Id., at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. Ibid., 23 FEP Cases, at 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." Id., at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia reversed. 243 U.S. App. D.C. 323, 753 F.2d 141 (1985). Relying on its earlier holding in Bundy v. Jackson, 205 U.S. App. D.C. 444, 441 F.2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits from sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U.S. App. D.C., at 327, 753 F.2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition
of her employment," her voluntariness "had no materiality whatsoever." Id., at 328, 753 F.2d, at 146. The court then surmised that the District Court’s finding of voluntariness might have been based on "the voluminous testimony regarding respondent’s dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." Id., at 328, n. 36, 753 F.2d, at 146, n. 36.

As to the bank’s liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII’s definition of "employer" to include "any agents of such a person," 42 U.S.C. § 2000e(b), as well as on the FFCIC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U.S. App. D.C. at 332, 753 F.2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting, 245 U.S. App. D.C. 506, 760 F.2d 1390 (1985). We granted certiorari, 474 U.S. 1047 (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See id., at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); id., at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court’s Title VII decision, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner’s view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978), quoting Sprogs v. United Air Lines, Inc., 444 F.2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971), these Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," General Electric Co. v. Gilbert, 429 U.S. 125, 141-142 (1976), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic quid pro quo, where "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." § 1604.11(a)(3).

In concluding that so-called "hostile environment," i.e., non quid pro quo, harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980), Rogers v. EEOC, 45 F.2d 234 (CA9 1971), cert. denied, 406 U.S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In Rogers, the Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employer’s protections under Title VII extend beyond the economic aspects of employment.

[The phrase "terms, conditions, or privileges of employment" in Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers. . . . 454 F.2d, at 238.

Courts applied this principle to harassment based on race, e.g., Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-515 (CA8), cert. denied sub nom. Banta v. United States, 434 U.S. 819 (1977); Gray v. Greyhound Lines, East. 178 U.S. App. D.C. 91, 98, 545 F.2d 169, 176 (1976), religion, e.g., Compston v. Borden, Inc., 424 F. Supp. 157 (SD Ohio 1976), and national origin, e.g., Cardillo v. Kansas City Chiefs Football Club, 568 F.2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from and were fully consistent with, the existing case law.

Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in Henson v. Dundee, 682 F.2d 897, 902 (1982):

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that
racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.


Of course, as the courts in both Rogers and Henson recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See Rogers v. EEOC, supra, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); Henson, 682 F.2d at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." Ibid. Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD § 30.708, at 14,9620-14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie absent an economic effect on the complainant's employment. See ibid. ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . ., that relationship was a voluntary one." Id., at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR § 1604.11(b) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent, by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U.S. App. D.C., at 328, n. 36, 733 F.2d, at 146, n. 36, which the District Court apparently admitted into evidence, "had no place in this litigation." Ibid. The apparent ground for this conclusion was that respondent's voluntariness vel non in submitting to Taylor's advances was inmaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR § 1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U.S. App. D.C., at 328, n. 36, 733 F.2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no per se rule against its admissibility.

III

Though the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not sufficient to put notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged action. The Court of Appeals took the opposite view, holding that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor's conduct which he possesses the authority, directly or indirectly, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and amici suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's nature to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since, in a hostile environment harassment case the employer omen wun have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as amicus curiae, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as Amici Curiae 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. E.g. Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 725, 728 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual...
basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to a rule that asks whether a victim of sexual harassment had reason to avail herself of an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonable responsive to the employee’s complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had reasonably available avenue for making his or complaint known to appropriate management officials.” Brief for United States and EEOC as Amici Curiae 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an “examination of the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual was in either a supervisory or agency capacity.” In re.

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent as an employee; we can only speculate that those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing ... that the employer must have become conscious of [them]." Taylor v. Jones, 693 F.2d 1193, 1197-1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties’ invitation to issue a definitive rule on employer liability, and we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress’ decision to define “employer” to include any “agent” of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. In re.

Finally, we reject petitioner’s view that the mere existence of a grievance procedure, or a policy against discrimination, coupled with respondent’s failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner’s general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer’s interest in correcting that form of discrimination. App. 25. Moreover, the bank’s grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner’s contention that respondent’s failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward. IV.

In sum, we hold that a claim of “hostile environment” sex discrimination is actionable under Title VII, that the District Court’s findings were insufficient to dispose of respondent’s hostile environment claim, and that the District Court did not err in admitting testimony by respondent’s sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court’s opinion and JUSTICE MARSHALL’s opinion. JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court’s conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court’s opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The case before us should turn, in my view, to the degree it is in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966), see also note, at 62. The Guidelines explain:

Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action. 29 CFR §§ 1604.11(c)-(d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was “in keeping with the general standard of employer liability with respect to agents and supervisory employees ... [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor.” 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation’s board of directors. Although an employer may
Leading Cases on Sexual Harassment

sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally
effectuated through the actions of individuals, and often an individual
may take such a step even in defiance of company policy. Nonetheless,
Title VII remedies, such as reinstatement and backpay, generally run
against the employer as an entity. The question thus arises as to the
circumstances under which an employer will be held liable under Title
VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied
by federal labor law, is that the act of a supervisory employee or agent
is imputed to the employer. Thus, for example, when a supervisor
discriminatively fires or refuses to promote a black employee, that act
is, without more, considered the act of the employer. The courts do
not stop to consider whether the employer otherwise had "notice" of
the action, or even whether the supervisor had actual authority to act
as he did. E.g., Flowers v. Crouch-Walker Corp., 332 F.2d 1277, 1282
(CA7 1977); Young v. Southwestern Savings and Loan Ass'n, 309
F.2d 140 (CA5 1975); Anderson v. Methodist Evangelical Hospital,
Inc., 464 F.2d 723 (CA6 1972). Following that approach, every Court
of Appeals that has considered the issue has held that sexual harassmen-
ment by supervisory personnel is automatically imputed to the employer
when the harassment results in tangible job detriment to the subordinate
employee. See Horn v. Duke Homes, Inc., Div. of Windsor Mobile
Homes, 720 F.2d 599, 604-06 (CA7 1983); Crand v. T & T Snacks,
Inc., 721 F.2d 77, 80-81 (CA3 1983); Katz v. Dole, 709 F.2d 251,
255, n.6 (CA4 1983); Henson v. Dundee, 682 F.2d 897, 910 (CA11
1982); Miller v. Bank of America, 600 F.2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of the United States
and the EEOC in this case suggests that a different rule should apply
when a supervisor's harassment "merely" results in a discriminatory
work environment. The Solicitor General concedes that sexual
harassment that affects tangible job benefits is an exercise of authority
delegated to the supervisor by the employer, and thus gives rise to
employer liability. But, departing from the EEOC Guidelines, he ar-

tests that the case of a supervisor merely creating a discriminatory work
environment is different: because the supervisor "is not exercising, or
threatening to exercise, actual or apparent authority to make personnel
decisions affecting the victim." Brief for United States and EEOC as
Amici Curiae 24. In the latter situation, the Solicitor General concludes,
some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's
responsibilities do not begin and end with the power to hire, fire, and
discipline employees, or with the power to recommend such actions.
Rather, a supervisor is charged with the day-to-day supervision of the
work environment and with ensuring a safe, productive workplace.
There is no reason why abuse of the latter authority should have
different consequences than abuse of the former. In both cases it is
the authority vested in the supervisor by the employer that enables
him to commit the wrong: it is precisely because the supervisor is
understood to be clothed with the employer's authority that he is
able to impose unwelcome sexual conduct on subordinates. There is
therefore no justification for a special rule, to be applied only in
"hostile environment" cases, that sexual harassment does not create
the employer liability until the employe suffering the discrimination
files a sexual harassment complaint. No such requirement appears in the
 statute, and no such requirement can coherently be drawn from the law
of the agency.

Agency principles and the goals of Title VII law make appropriate
some limitation on the liability of employers for the acts of supervisors.
Where, for example, a supervisor has no authority over an employee,
because the two work in wholly different parts of the employer's
business, it may be improper to find strict employer liability. See 29
CFR § 1604.11(c) (1985). Those considerations, however, do not jus-
tify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the
"pure" hostile environment case, where an employee files an EEOC
complaint alleging sexual harassment in the workplace, the employee
seeks not money damages but injunctive relief. See Bundy v. Jackson,
Under Title VII, the EEOC must notify an employer of charges made
against it within 10 days after receipt of the complaint. 42 U.S.C.
§ 2000e-5(b). If the charges appear to be based on "reasonable cause,"
the EEOC must attempt to eliminate the offending practice through
"informal methods of conference, conciliation, and persuasion." Ibid.
An employer whose internal procedures assertedly would have re-
duced the discrimination can avoid injunctive relief by employing
these procedures after receiving notice of the complaint or during the
conciliation period. Cf. Brief for United States and EEOC as Amici
Curiae 26. Where a complainant, on the other hand, seeks backpay
on the theory that a hostile work environment effected a constructive
termination, the existence of an internal complaint procedure may be
a factor in determining not the employer's liability but the remedies
available against it. Where a complainant without good reason bypassed
an internal complaint procedure he knew to be effective, a court may
be reluctant to find constructive termination and thus to award
reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply
in this case the same rule as I apply in all other Title VII cases, and
hold that sexual harassment by a supervisor of an employee under his
supervision leading to a discriminatory work environment, should be
imputed to the employer for Title VII purposes regardless of whether
the employee gave "notice" of the offense.

* Like the Court of Appeals, this Court was not provided a complete transcript
of the trial. We therefore rely largely on the District Court's opinion for the summary of
the relevant testimony.

1 The remedial provisions of Title VII were largely modeled on those of the National
Labor Relations Act (NLRA). See Allemande Paper Co. v. Woody, 422 U.S. 405, 419,
and n.11 (1975); see also Franks v. Bowman Transportation Co., 438 U.S. 78, 86-770
(1976).

2 For NLRA cases, see, e.g., Graves Tracing, Inc. v. NLRB, 962 F.2d 470 (CA7 1982);
NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.,
473 F.2d 374, 384 (CA9 1972); Amazonian Clothing Workers of America v. NLRB,
Teresa Harris v. Forklift Systems, Inc.

114 S Ct 307 (1993)

[No. 92-1168]
Argued October 13, 1993. Decided November 9, 1993

Appearances of Counsel
Irwin Venick argued the cause for petitioner.
Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.
Stanley M. Chernau argued the cause for respondent.

OPINION OF THE COURT

Justice O'Connor delivered the opinion of the Court.

In this case we consider the definition of a discriminatorily "abusive work environment" (also known as a "hostile work environment") under Title VII of the Civil Rights Act of 1964, 78 Stat 253, as amended, 42 USC § 2000e et seq. (1988 ed, Supp III) [42 USCS §§ 2000e et seq.]

Teresa Harris worked as a manager at Forklift Systems, Inc., an equipment rental company, from April 1982 until October 1987. Charles Hardy was Forklift's president.

The Magistrate found that, throughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know?" and "We need a man as the rental manager." At least once, he told her she was "a dumb ass woman." App to Pet for Cert A-15. Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Id., at A-14. Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. Ibid. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. Id., at A-14 to A-15. He made sexual innuendos about Harris' and other women's clothing. Id., at A-15.

In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. Id., at A-16. He also promised he would stop, and based on this assurance Harris stayed on the job. Ibid. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy...some [sex] Saturday night?" Id., at A-17. On October 1, Harris collected her paycheck and quit.

Hardy then sued Forklift, claiming that Hardy's conduct had created an abusive work environment for her because of her gender. The United States District Court for the Middle District of Tennessee, adopting the report and recommendation of the Magistrate, found this to be "a close case," id., at A-31, but held that Hardy's conduct did not create an abusive environment. The court found that some of Hardy's comments "offended [Harris], and would offend the reasonable woman" id., at A-31 but that they were not so severe as to be expected to seriously affect [Harris] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

We grant certiorari, 507 US , 122 L Ed 2d 758, 113 S Ct 1382 (1993), to resolve a conflict among the Circuits on whether conduct, to be actionable as "abusive work environment" harassment (uo qui pro quo harassment issue is present here), must seriously affect an employee's psychological well-being or lead the plaintiff to "suffer[ ] injury." Compare Rabbides (requiring serious effect on psychological well-being); Vance v. Southern Bell Telephone Tele graphe Co., 805 F2d 1303, 1310 [4 CAA 1989] (same); and Downes v. FAA, 775 F2d 288, 292 [CA Fed 1985] (same), with Ellison v. Brady, 924 F2d 872, 877-878 [CA9 1991] (rejecting such a requirement).

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)]. As we made clear in Meritor Savings Bank v. Vinson, 477 US 57, 106 S Ct 2399 (1986), this language is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. Id., at 64, 106 S Ct 2399, quoting Los Angeles Dept of Water and Power v. Manhart, 435 US 707, 707, n 1, 93 S Ct 1370 (1973) [some internal quotation marks omitted]. When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 US, at 65, 106 S Ct 2399, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id., at 67, 106 S Ct 2399 (internal brackets and quotation marks omitted), Title VII is violated.

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in Meritor, "mere utterance of an...epithet which engenders offensive feelings in an employee," ibid. (internal quotation marks omitted) does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment— an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the condition of the victim's employment, and there is no Title VII violation.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment,
even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. The appealing conduct alleged in \textit{Meritor}, and the reference in that case to environments "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers," supra at 66, 91 L.Ed.2d 49, 106 S.Ct.2399, quoting \textit{Rogers v. EEOC}, 454 F.2d 234, 238 (CA5 1971), cert. denied, 466 U.S. 957, 32 L.Ed.2d 343, 92 S.Ct.2058 (1972), merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

We therefore believe the District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffer[] injury." Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, so an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, \textit{Meritor}, supra, at 67, 91 L.Ed.2d 49, 106 S.Ct.2399, there is no need for it also to be psychologically injurious.

This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the EEOC's new regulations on this subject, see 25 Fed.Reg.51266 (1993) (proposed 29 CFR §§ 1600.1, 1609.2); see also 29 CFR § 1604.11 (1993). But we can say that whatever an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it is unreasonable interfering with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

III

Forfeit, while conceding that a requirement that the conduct seriously affect psychological well-being is unfounded, argues that the District Court nonetheless correctly applied the \textit{Meritor} standard. We disagree. Though the District Court did conclude that the work environment was not "intimidating or abusive to [Harris]," Aze to Pet for Cert A-35, it did so only after finding that the conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well-being," id., at A-34, and that Harris was not "subjectively so offended that she suffered injury," id. The District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a "close case," id., at A-31.

We therefore reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

So ordered.

\textit{Separate Opinions}

\textbf{JUSTICE SCALIA, concurring.}

\textit{Meritor Savings Bank v. Vinson}, 477 US 57, 91 L.Ed.2d 49, 106 S.Ct.2399 (1986), held that Title VII prohibits sexual harassment that takes the form of a hostile work environment. The court stated that sexual harassment is actionable if it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." Id., at 67, 91 L.Ed.2d 49, 106 S.Ct.2399 (quoting \textit{Henson v. Dundee}, 682 F.2d 836, 904 (CA11 1982)). Today's opinion elaborates that the challenged conduct must be severe or pervasive enough "to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." Ante, at 4, 126 L.Ed.2d 2d, at 302.

"Hostile" or "abusive," which in this context I take to mean the same thing does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb "objectively" or by appealing to a "reasonable person's" notion of what the vague word means. Today's opinion does list a number of factors that contribute to aggressiveness, see ante, at 5, 126 L.Ed.2d 2d, at 302, but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it may add little certitude. As a practical matter, today's holding lets virtually unchallenged juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages. One might say that what constitutes "negligence" (a traditional jury question) is no more clear and certain that what constitutes "abusuiveness." Perhaps so. But the class of plaintiffs seeking to recover for negligence is limited to those who have suffered harm, whereas under this statute "abusuiveness" is to be the test of whether legal harm has been suffered, opening the door to a new species of litigation.

Be that as it may, I know of no alternative to the course the Court today takes. One of the factors mentioned in the Court's nonexhaustive list—whether the conduct unreasonably interferes with an employee's work performance—would, if it made an absolute test, provide greater guidance to juries and employers. But I see no basis for such a limitation in the language of the statute. Accepting \textit{Meritor's} interpretation of the term "conditions of employment" as the plaintiff's loss of time and work loss seems inappropriate because working conditions have been discriminatorily altered. I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For these reasons, I join the opinion of the Court.

\textbf{JUSTICE GINSBURG, concurring.}

Today the Court reaffirms the holding of \textit{Meritor Savings Bank v. Vinson}, 477 US 57, 91 L.Ed.2d 49, 106 S.Ct.2399 (1986). A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. See 42 USC § 2000e-2(a)(1) [42 USC § 2000e-2(a)(1)] (declaring that it is unlawful to discriminate with respect to, \textit{inter alia}, "terms" or "conditions of employment"). As the Equal Employment Opportunity Commission emphasized, see Brief for United States and Equal Employment Opportunity Commission as \textit{Amici Curiae} 9-14, the adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, "the plaintiff need not prove that his or her productivity has declined as a result of the harassment." \textit{Davis v. Monsanto Chemical Co.}, 858 F.2d 345, 349 (CA9 1988). It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to "mak[e] it more difficult to do the job." See \textit{ibid.} Davis concerned race-based discrimination, but that difference does not alter the analysis; except in the rare case in which a bona fide occupational qualification is shown, see \textit{Automobile Workers v. Johnson Controls, Inc.}, 499 US 187, 200-207, 113 L.Ed.2d 158, 113 S.Ct.1196 (1991) (construing 42 USC § 2000e(2)(a)(1) [42 USC § 2000e(2)(a)(1)] Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful.

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The Court's opinion, which I join, seems to me in harmony with the view expressed in this concurring statement.

1 Indeed, even under the Court's equal protection jurisprudence, which requires "an exceedingly persuasive justification" for a gender-based classification, *Kirchberg v. Fie- rman*, 450 US 455, 461, 101 S Ct 1195 (1981) (internal quotation marks omitted), it remains an open question whether "classifications based upon gender are inherently suspect." See *Mississippi Univ. for Women v. Hogan*, 458 US 718, 724, and n 9, 73 L Ed 2d 1090, 102 S Ct 2531 (1982).
Enforcement Guidance on Harris v. Forklift Sys., Inc. Approved by EEOC on March 8, 1994

Notice Number 915.002

2. PURPOSE: This enforcement guidance analyzes the Supreme Court's decision in Harris and its effect on Commission investigations of charges involving harassment.
3. EFFECTIVE DATE: Upon issuance.
4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § 8(a), this notice will remain in effect until rescinded or superseded.
5. ORIGINATOR: Title VII/EPA Division, Office of Legal Counsel.
7. SUBJECT MATTER:

In Harris v. Forklift Sys., Inc., No. 92-1168 slip op. (Nov. 9, 1993), the Supreme Court considered whether a plaintiff was required to prove psychological injury in order to prevail on a cause of action alleging hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. A unanimous Court held that if a workplace is permeated with behavior that is severe or pervasive enough to create a discriminatorily hostile or abusive working environment, Title VII is violated regardless of whether the plaintiff suffered psychological harm. The Court's decision reaffirms Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 EPD ¶ 36,150 (1986), and is consistent with existing Commission policy on hostile environment harassment. Consequently, the Commission will continue to conduct investigations in hostile environment harassment cases in the same manner as it has previously.

Background

In Harris, the plaintiff, Teresa Harris, brought a Title VII action against her former employer, Forklift Systems, Inc. ("Forklift"), an equipment rental company, alleging that Forklift had created a sexually hostile work environment. Harris had worked for Forklift as a manager from April 1985 to October 1987.

The case was heard by a Magistrate who found that during the period of Harris' employment, Forklift's President, Charles Hardy, subjected Harris to numerous offensive remarks and unwanted sexual innuendos. Specifically, the court found that Hardy had, on a number of occasions, asked plaintiff and other female employees to retrieve coins from his front pants pocket, asked plaintiff and other female employees to retrieve objects that he had thrown on the ground in front of them and commented, using sexual innuendo, about plaintiff's and other female employees' attire. On other occasions, he remarked to plaintiff in the presence of other employees, "You're a woman, what do you know?" "You're a dumb ass woman," and "We need a man as the rental manager." In addition, he once remarked in the presence of other employees, as well as a customer, that he and Harris should "go to the Holiday Inn to negotiate [Harris'] raise." Harris, slip op. at 1.

In August 1987, Harris complained to Hardy that she found his behavior offensive. Although Hardy apologized and promised to desist, in September 1987 he suggested in the presence of other employees that plaintiff had promised sexual favors to a customer in order to secure an account. Shortly thereafter, Harris tendered her resignation and filed a Title VII action against Forklift alleging hostile environment sexual harassment.

The district court dismissed the case, concluding that Harris had failed to support her claim of sexual harassment. The court found, however, that "Hardy is a vulgar man [who] demeaned the female employees at his work place..." Harris v. Forklift Sys., Inc., 60 EPD ¶ 42,070 (M.D. Tenn. 1991). Moreover, the court stated that "[a] reasonable woman manager under like circumstances would have been offended by Hardy." Id. Nevertheless, the court concluded that this was not enough to support a claim of sexual harassment. Applying the standard set forth in Rabideau v. Osceola Refining Co., 805 F.2d 611, 620, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), the court asserted that "the test for whether or not sexual harassment rises to the level of a hostile work environment is whether the harassment is `conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances.'" Harris, 60 EPD ¶ 42,070 (quoting Rabideau, 805 F.2d at 620).

The district court concluded that Hardy's comments were not "so severe as to be expected to seriously affect [Harris'] psychological well-being," id., and dismissed the complaint. In the court's view, "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." Id. In a brief per curiam opinion, the Sixth Circuit affirmed the judgment for Forklift upon the Magistrate's reasoning. See Harris v. Forklift Sys., Inc., 60 EPD ¶ 42,071 (6th Cir. 1992)(per curiam).

The Supreme Court granted certiorari, 507 U.S. ___ (1993), to resolve a split among the circuits regarding whether a plaintiff must show psychological injury in order to prevail on a hostile environment sexual harassment claim.

The Opinion

At the outset, Justice O'Connor, writing for a unanimous Court, reaffirmed the standard set forth in Meritor Savings Bank v. Vinson, 477 U.S. 57, 40 EPD ¶ 36,159 (1986), that sexual harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the plaintiff's employment. The Court noted that an "objectively hostile or abusive work environment" is created when "a reasonable person would find [it] hostile or abusive," and the victim subjectively perceives it as such. Harris, slip op. at 4.

Rejecting the Sixth Circuit's psychological injury requirement, the Court noted that even though discriminatory incidents may not seriously affect an employee's psychosocial well-being, a discriminatorily abusive work environment may, among other things, affect an employee's job performance or advancement. The Court concluded that even if harassing conduct produces no "tangible effects," a plaintiff may assert a cause of action if the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin.

Id. According to the Court, "[w]hen the workplace is permeated with `discriminatory intimidation, ridicule, and insult,' that is `sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." Id. (quoting Meritor, 477 U.S. at 65, 67)(citations omitted).

In an attempt to clarify Meritor, the Court noted that Meritor's reference to environments that completely destroy the emotional and psychological stability of members of minority groups was intended to illustrate egregious cases and was not intended to "mark the boundary of what is actionable." Id. at 5. The Court stated: "So long as the environment would reasonably be perceived, and is perceived, as
hostile or abusive, there is no need for it also to be psychologically injurious.” Id. (citation omitted).

Noting that the test for hostile environment is not “mathematically precise,” the Court concluded that in assessing a hostile environment claim, the totality of the circumstances must be examined, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id. While psychological injury may be relevant, it is not required. See id. at 5-6.

Accordingly, the Court remanded the case for consideration of whether a hostile environment had been created. The Court concluded that the district court’s concern with whether Harris suffered psychological injury “may well have influenced its ultimate conclusion, especially given that the court found this to be a ‘close case.’” Id. at 6.

Justice Scalia and Justice Ginsburg issued separate concurrence opinions. In his concurrence, Justice Scalia suggested that although the Court refined the Meritor standard, little certitude has been added. His concurrence noted that even though the Court adopted an objective standard for determining whether a hostile environment has been created and listed factors to be evaluated, it did not suggest how much of each factor is required, nor did it isolate a single factor as determinative. However, Justice Scalia asserted that he knew of “no alternative to the Court’s today has taken. . . . I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.” Harris (Scalia, J., concurring), slip op. at 2.

In her concurring opinion, Justice Ginsburg framed the critical issue in hostile environment cases as “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Harris (Ginsburg, J., concurring), slip op. at 1. Citing the Commission’s Brief, Justice Ginsburg suggested that the major inquiry in hostile environment cases should be “whether the discriminatory conduct has unreasonably interfered with the plaintiff’s work performance.” Id. According to Justice Ginsburg, all the plaintiff need establish is that the harassing conduct “made it more difficult to do the job.” Id. at 1-2.

Analysis

The Court’s decision in Harris reaffirmed Meritor and clarified, rather than altered, the elements necessary for proving hostile environment sexual harassment. The decision is fully consistent with the Commission’s “Guidelines on Discrimination Because of Sex,” 29 C.F.R. § 1604.11 and the Policy Guidance, “Current Issues of Sexual Harassment,” EEOC Policy Guidance No. N-915-080, CCH ¶ 3112 (March 19, 1990). Accordingly, Harris requires no change in Commission policy or in the way the Commission investigates charges.

The Court in Harris adopted the “totality of the circumstances” approach which the Commission had previously set forth in its “Guidelines on Discrimination Because of Sex” and in its Policy Guidance “Current Issues of Sexual Harassment.” Thus, in evaluating welcome and whether conduct was sufficiently severe or pervasive to constitute a violation, investigators should continue to “look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.” 29 C.F.R. § 1604.11(D).

The Court also noted that the factors that indicate a hostile or abusive environment may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee’s work performance. The factors cited by the Court parallel those enumerated in the Commission’s Policy Guidance “Current Issues of Sexual Harassment.” See “Current Issues of Sexual Harassment,” at 14. Moreover, both the Court and the Commission have stressed that an employee is not required to show any single factor in order to succeed on a hostile environment cause of action. See Harris, slip op. at 5-6; “Current Issues of Sexual Harassment,” at 17. Based on the foregoing, investors should continue to evaluate charges by considering the factors listed in Harris as well as any additional factors that may be relevant in the particular case.

The Court’s rejection of the psychological injury requirement is also consistent with the Commission’s policy. The Commission explicitly rejects the notion that in order to prove a violation, the plaintiff must prove not only that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment, but also that his/her psychological well-being was affected. While investigators may consider psychological injury as a factor in assessing whether a hostile environment has been created, they should keep in mind that neither this nor any other single factor is required to state a cause of action for hostile environment harassment. See generally “Current Issues of Sexual Harassment,” at 15, n.20.

The Court in Harris used the “reasonable person” standard for assessing hostile environment claims. Previously, in its Policy Guidance on “Current Issues of Sexual Harassment,” the Commission had adopted a “reasonable person” standard: “[I]n determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a reasonable person.” “Current Issues of Sexual Harassment,” at 14.

In defining the hypothetical “reasonable person,” the Commission has emphasized that “[I]n the reasonable person standard should consider the victim’s perspective and not stereotyped notions of acceptable behavior.” Id. at 15. In Harris, the Court did not elaborate on the definition of “reasonable person.” The Court’s decision is consistent with the Commission’s view that a reasonable person is one with the perspective of the victim. Thus, investigators should continue to consider whether a reasonable person in the victim’s circumstances would have found the alleged behavior to be hostile or abusive.

Example—CP works in a thirty person advertising firm as a copywriter. CP is one of three female employees at the firm. After she had worked at the firm for about eight months, she was promoted to senior copywriter. Following her promotion, two of her supervisors stopped by her office to inform her of her new responsibilities. During this visit, the supervisors intimated that CP was promoted because the firm needed to show potential clients “some good bodies” and “some nice legs” in higher positions. They also asked CP if she had slept with the head of personnel in order to obtain her promotion. Therefore, these supervisors as well as some of CP’s co-workers continued to taunt CP in front of other co-workers and sometimes before clients, suggesting that CP had been promoted because of her looks and because she was willing to succumb to the advances of clients and supervisors. CP complained to management and subsequently filed a charge with the Commission.

An investigator reviewing this charge should consider the behavior from the standpoint of the reasonable person in CP’s position. A reasonable person in CP’s position might take umbrage at the comments about “good bodies,” “nice legs,” or “sleeping one’s way to a promotion” and thus might consider her co-workers’ and supervisors’ behavior to be hostile and offensive.

In Harris the Court stated that to violate Title VII, the challenged conduct must not only be sufficiently severe or pervasive objectively to offend a reasonable person, but also must be subjectively perceived as abusive by the charging party. See Harris, slip op. at 4. The Court noted that “[s]ince as long as the environment would reasonably be perceived, and is perceived, as hostile or abusive,” Title VII would be
violated. *Id.* at 5 (emphasis added). There is nothing novel in the
notion that a charging party must subjectively perceive a hostile envi-
ronment in order to assert a violation of Title VII. It is well-settled
that a charging party's claim will fail if the allegedly offensive conduct
is found to be "welcome." 4

Under the Commission's current policy, an investigator must
consider whether the alleged harassment was "unwelcome ... verbal
or physical conduct of a sexual nature ..." 29 C.F.R. § 1604.11(a); see *Meritor*, 477 U.S. at 2406 (requiring unwelcomeness analysis).
Adopting the Eleventh Circuit's definition of unwelcome conduct,
the Commission has stated that "conduct must be unwelcome 'in the sense
that the employee did not solicit or invite it, and in the sense that the
employee regarded the conduct as undesirable or offensive.' "'Current
Issues of Sexual Harassment,' at 7 (quoting *Henson* v. *City of Dun-
adee*, 682 F.2d 897, 903, 29 EPD ¶ 32,993 (11th Cir. 1982)). This policy
requires investigators to examine whether the victim's conduct is
consistent with an assertion that the alleged harassing behavior was
both unwanted and offensive to the charging party. The second prong
of the unwelcomeness inquiry, whether the employee considered
the conduct offensive, is, in effect, synonymous with "subjectively per-
ceiving the environment to be abusive." *Harris*, slip op. at 4.

In order to establish a subjective perception of abuse, the charging
party must testify that she found the alleged conduct to be hostile or
abusive at the time it occurred. 6 Unless the respondent produces evi-
dence to the contrary, the subjective prong of the analysis will be
satisfied.

Example—CP, a woman, has worked for A Corporation for
three years. When she first began working for A
Corporation, she joined in when her co-workers and
supervisors would have sexual discussions. She herself
would make sexual comments and lend references.
After she had worked for A Corporation for about a year,
she entered a social relation and her co-workers and
supervisors would have sex discussions. She herself
would make sexual comments and lend references.

Based on these facts, an investigator should find that
the conduct was unwelcome, i.e., she that CP subjectively
considered the pornographic pictures to be offensive. Her
willingness to engage in sexual banter is not material to
assessing her perception of the pictures.

Note that an investigator may consider the prevalence
of sexual banter in analyzing whether a hostile environment
was created for other employees.

Finally, the *Harris* decision reinforces the Commission's position
that conduct that constitutes harassment on any of the bases
covered by Title VII is equally unlawful as a discriminatory term, condition
or privilege of employment. *See Harris*, slip op. at 4; *see also id.* at
2 (Ginsburg, J., concurring) (noting that harassment based on race,
national origin, religion and gender is equally unlawful). The Commission
believes that Harris also applies to cases involving hostile environ-
ment harassment on the basis of age or disability. Accordingly,
investigators should consider Harris applicable regardless of the anti-
discrimination statute on which the charge is premised. 7

**Charge Processing**

Investigators should continue to take the following steps when
processing charges involving hostile environment harassment:

1. Consider the totality of the circumstances—Examine, among
other things, the nature of the conduct (i.e., whether it was verbal
or physical), the context in which the alleged incident(s) occurred,
the frequency of the conduct, its severity and pervasiveness, whether it
was physically threatening or humiliating, whether it was unwelcome,
and whether it unreasonably interfered with an employee's work
performance.

2. Consider whether a reasonable person in the same or similar
circumstances would find the challenged conduct sufficiently severe
or pervasive to create an intimidating, hostile or abusive work

3. Consider whether the charging party perceived the
environment to be hostile or abusive, i.e., whether the conduct was unwelcome.
In making this analysis, the investigator should consider the charging
For more detailed guidance, see Policy Guidance on "Current Issues of Sexual Harassment'.

March 8, 1994
Date

*Approval*

Tony E. Gallegos
Chairman

Footnotes:

1. For a similar argument, the respondent committed no psychological injury; no proof
was required in order to support a hostile environment claim of action under Title VII.

2. In order to show that "the alleged conduct unreasonably interferes with ... work
performance," the employer need not show diminished performance but only that the
alleged offensive conduct made it more difficult for him/her to do his/her job. See *Harris*
(Ginsburg, J., concurring), slip op. at 1-2; *see also Harris*, slip op. at 4 ("... without
gard to these tangible effects (such as detracting from employees' job performance),
the very fact that the discriminatory conduct was so severe or pervasive that it created
an environment abusive to employees because of their race, gender, religion, or national
origin offends Title VII's broad rule of work place equality").

3. Psychological injury may also be relevant for purposes of computing damages.

4. For a more detailed discussion of this issue, see "Current Issues of Sexual Harassment',
at 14. As explained therein, although the reasonable person standard must take account
of the victim's perspective, "Title VII does not serve 'as a vehicle for vindicating the petty
sins' suffered by the hyper-sensitive..." *id.* (quoting *Kanawicz* v. *Warren Deni Co.*, 709
F. Supp. 780, 784, 35 EPD ¶ 34,766 (E.D. Wis. 1994)).

5. Note that even if a particular charging party has not been subjectively offended by the
conduct in question, if a reasonable person would find the conduct offensive, the Commis-
sion itself may pursue relief for any other persons identified in the course of the investiga-
tion who subjectively found the environment to be hostile. See *General Telephone Co.

6. It is the Commission's position that "[w]hen there is some indication of welcomece/ness or
when the credibility of the parties is at issue, the charging party's claim will be
considerably strengthened if she [can] show a contemporaneous complaint or protest".
"Current Issues of Sexual Harassment,' at 7. However, while making a complaint or
issuing a protest may be helpful to charging party's case, "it is not a necessary element of
the claim..." *Id.* at 8.

7. If one is subjected to taunts on the basis of race, national origin, etc., there is ordinarily
no question that the comments are perceived as offensive and are therefore unwelcome.
Nevertheless, before and after *Harris*, if the record shows that the comments are not
unwelcome or perceived as hostile or offensive, the charging party will not prevail.
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