Differing Standards of Employer Liability for Sexual Harassment of Working Women

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The twentieth century has brought substantial changes in the legal and socioeconomic status of women. Women have entered the labor market and gained the legal means, under Section 703 of Title VII of the Civil Rights Act,[1] to fight sex-based employment discrimination. Presumably, women are to receive recognition as persons in their own right, based on their individual capabilities and achievements in their chosen realms of endeavor.[2]

A darker aspect of the twentieth century is sexual harassment of women[3] in the workplace.[4] Sexual harassment denies women recognition for their individual capabilities and achievements and makes a woman's advancement or continued employment dependent upon her status as a man's property or plaything.[5] Sexual harassment of women in employment suggests that a female employee is valued only in terms of her gender and implies that she is not entitled to equal employment opportunity.[6]

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1. The key provision of Title VII of the Civil Rights Act of 1964 [hereinafter referred to as Title VII] states: "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 . . . sex . . . ." 42 U.S.C. § 2000e-2 (1982). Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1984). The section of the statute which refers to federal employers, 42 U.S.C. § 2000e-(16)(a) (1984), is slightly less aggressive in its wording, but courts have not rendered a different interpretation. *See generally* Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) (female employee in the D.C. Department of Corrections); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (female employee of the Environmental Protection Agency); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) (female employee in the Justice Department).

2. Taub, *Keeping Women in Their Place: Stereotyping Per Se As a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 348 (1980).

3. It is possible that both men and women are subjected to sexual harassment, but given the fact that the vast majority of managers, foremen, supervisors, and bosses are males, sexual harassment is almost overwhelmingly practiced by men on women. *See infra* note 20. The common denominator in the results of studies and surveys on sexual harassment is that the perpetrators tend to be men, the victims women. *See infra* note 19. Most of the perpetrators are superiors, although as the sections of this Note on coworker and nonemployee harassment make clear, nonsupervisory males can also be perpetrators. This Note concentrates on women as the victims of sexual harassment in employment.

4. As more women enter the workplace, especially in traditionally male jobs and careers, more women are likely to be sexually harassed (although the rate of harassment may not actually increase over the rate which has always existed) simply because there are more potential victims. *See infra* note 19 and statistics cited therein.

5. Taub, *supra* note 2, at 369.

6. *Id.*

Sexual harassment is actionable under Title VII of the Civil Rights Act for two reasons. First, when only one sex is harassed, it is differential treatment based on sex. Sexually harassed employees face different employment demands and conditions than do non-harassed employees. Second, an employer's demands for sexual favors in exchange for promotions, favorable evaluations, or continued employment directly affect the employee's terms and conditions of employment.[7]

The developing case law in this area has reduced the stigma of victimization and, therefore, has helped many woman speak out against sexual harassment. Many courts, however, remain uneasy with a cause of action which arises from "personal" incidents or "natural" expressions, or both.[8] To label something "personal" is to make it too small, too unique, too infinitely varied, and too private to warrant a legal remedy. "Similarily, but at the other end of the scale, to [label] something natural or biological . . . is to render it too big, too immutable, too invariant, too universal and thus, too presocial to be within the law's reach."[9] The courts' uneasiness with sexual harassment is most evident in the various and conflicting conclusions they have drawn concerning the proper standard for employer liability under Title VII.[10]

This Note first discusses sexual harassment in general and briefly examines its socioeconomic background. It then explores employer liability under Title VII for sexual harassment of female employees. The existing standards of employer liability for sexual harassment by supervisors, coworkers, and

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7. The relevant portion of Title VII is quoted *supra* note 1. A cause of action under Title VII requires a plaintiff to show that (1) a term or condition of employment had been imposed, (2) because of sex, (3) by the employer. 42 U.S.C. § 2000e-2(a). In the early cases holding sexual harassment to be employment discrimination, clear-cut tangible job effects resulted from the harassment. Thus, the courts were not required to define the contours of the phrase "terms and conditions of employment" in the sexual harassment context. *See, e.g.*, Miller v. Bank of Am., 600 F.2d 211, 212 (9th Cir. 1979) (plaintiff dismissed when she refused to cooperate with her male supervisor's sexual propositions); *Barnes v. Costle*, 561 F.2d at 985 (plaintiff relieved of her job duties and job eventually abolished for refusing her supervisor's sexual advances); *Williams v. Saxbe*, 413 F. Supp. at 655 (plaintiff intimidated, harassed, threatened, and eventually terminated for refusing her supervisor's sexual advances and demands).

While sexual harassment is a violation of Title VII, it may also be grounds for recovery under tort theories of assault, battery, intentional infliction of emotional distress, and wrongful discharge. Under Title VII an employee may only recover actual damages such as lost wages, while under tort theories the employee may recover punitive as well as actual damages. Thus, it may be advantageous for the plaintiff to join her Title VII claim with available tort actions in order to increase her recovery. Also, statutes of limitations are usually two years for tort claims, while Title VII's statute of limitation ranges from 180 days (in nondeferral states) to 300 days (in deferral states) for filing of the charge. After the EEOC issues a right to sue letter, the statute of limitations in both deferral and nondeferral states is 90 days for filing a lawsuit. 42 U.S.C. §§ 2000e-5(e) and 2000e-5(f)(1).

A pure tort cause of action has been criticized as conceptually inadequate for sexual harassment to the extent that it separates women's injuries from their social and economic circumstances. The tort approach misses the nexus between women's sexuality and women's employment. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 171 (1979).

Advantages to pursuing a claim under Title VII include: its explicit protection against retaliation for bringing a suit; the earliest possible court date; and the EEOC's power to bring the suit in its own name on behalf of the injured party, thereby preserving her financial resources and adding the EEOC's expertise.

8. C. MACKINNON, *supra* note 7, at 83.

9. *Id.*

10. *See infra* note 36 and cases cited therein for the varying standards of employer knowledge. *But cf. infra* notes 51 and 52 and accompanying text for cases holding employers strictly liable.

nonemployees are discussed and suggestions for the proper standard of liability in each circumstance are made.

Socioeconomic Background

The Equal Employment Opportunity Commission's (EEOC) Guidelines on Sexual Harassment define it as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which are made either explicitly or implicitly a term or condition of an individual's employment. The definition also includes employment decisions which are based on an individual's submission to or rejection of such conduct, and conduct which is aimed at or has the effect of unreasonably interfering with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.[11] Sexual harassment can place a sexual condition upon employment opportunities of hiring, retention, or advancement;[12] or it can occur as a pervasive and continuous condition of the work environment.[13] Sexual harassment may occur as a single encounter or as a series of incidents.[14] It can be looks, touches, jokes, innuendos, gestures, epithets, or direct propositions.[15] In the extreme case, sexual harassment can be a direct demand for sexual compliance coupled with the threat of firing or demotion if the woman refuses.[16] Sexual harassment is always coercive when it occurs in the employment context because it is unwanted and unsolicited and threatens the woman's job satisfaction, performance, and security.[17]

Sexual harassment is an assertion of male power that undermines the autonomy and personhood of female workers.[18] Its impact upon women's economic status and job opportunities, and upon their mental health and sense of self-worth, is finally being explored, documented, and resisted, primarily through the courts. Recent studies show that sexual harassment is alarmingly widespread.[19] Its high rate of occurrence suggests that women

11. 29 C.F.R. § 1604.11(a) (1984).

12. Miller v. Bank of Am., 600 F.2d at 212 (advancement); Barnes v. Costle, 561 F.2d at 983 (advancement and retention); Garber v. Saxon Business Products, 552 F.2d 1032, 1032 (4th Cir. 1977) (retention); Williams v. Saxbe, 413 F. Supp. at 656 (retention).

13. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980).

14. Miller v. Bank of Am., 600 F.2d at 212 (single incident); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 460 (E.D. Mich. 1977) (series of incidents).

15. Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 934 (D. N.J. 1978) (loud sexual remarks and obscene cartoon); *Continental Can*, 297 N.W.2d at 244 (offensive remarks and touching).

16. Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Col. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. at 460.

17. Vermuelen, *Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1604.11, Sexual Harassment, to Its Guidelines on Sex Discrimination*, 6 WOMEN'S RIGHTS LAW REP. 285, 286 (1980).

18. L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 36 (1978).

19. In 1975, the Women's Section of the Human Affairs Program at Cornell University distributed one of the first questionnaires devoted to the topic of sexual harassment. Although the women questioned did not represent a random sample of the population, the results were shocking: 92% of the respondents listed sexual harassment as a serious problem. Seventy percent had personally experienced some form of harassment. Fifty-six percent of those who had experienced sexual harassment indicated that it was physical harassment. L. FARLEY, *supra* note 18, at 39. The questionnaire referred to sexual harassment as "any repeated and unwanted sexual comments, looks, suggestions

are extremely vulnerable in the work environment. Their vulnerability is due in part to their low position in the economic hierarchy and also to preconceived sex roles or sex role stereotyping.[20] Sexual harassment reinforces these preconceived notions and is dysfunctional for female workers in several respects. First, sexual harassment challenges a woman's right to function as a worker by reminding her of the socially imposed incongruity between her roles as worker and woman.[21] The role conflict created by sexual harassment causes tension and stress which may interfere with the vic-

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or physical contact that you find objectionable or offensive and causes you discomfort on your job." *Id.* The women questioned included women who had attended a speakout on sexual harassment in Ithaca, New York and women in the Civil Service Employees Association in Binghamton, New York. The latter group was composed of women who, unlike the first group, were not overly familiar with sexual harassment on the job.

In January, 1976, REDBOOK magazine published a questionnaire on sexual harassment to which more than 9000 women responded. Safran, *What Men do to Women on the Job: A Shocking Look at Sexual Harassment*, 148 REDBOOK (Nov. 1976) 149, 217-24. More than 92% reported sexual harassment as a problem and more than 50% described it as serious. Nine out of ten of the respondents reported that they had personally experienced one or more forms of unwanted sexual attention on the job. Seventy-five percent of the women stated that they found the unwelcome attention "embarassing," "demeaning," or "intimidating." *Id.* at 217.

Also in 1976, the Ad Hoc Group on Equal Rights for Women at the United Nations conducted a study among members of the United Nations Secretariat. Survey of Staff Attitudes on Sex Discrimination in the United Nation Secretariat: Analysis and Recommendations for Action, *quoted in* L. FARLEY, *supra* note 18, at 40. The questionnaire included a question about "sexual pressures overt or subtle." There were rumors that the administration's eventual confiscation of the questionnaire was because of the question on sexual harassment. *Id.* Before the confiscation of the questionnaire, 875 United Nations staff members had responded; 73% of them were women and more than half of the women reported that they had personally experienced or were aware of the existence of sexual pressures in the United Nations. *Id.*

In 1980 the U.S. Merit Systems Protection Board surveyed more than 23,000 federal workers. Forty-two percent of the female and 15% of the male respondents reported being sexually harassed. The sexual harassment occurred repeatedly and was of a relatively long duration. U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 3, 5 (March 1981).

20. Vermuelen, *supra* note 17, at 286. "Women are overwhelmingly employed in low-status, low-paying, dead-end jobs, in the clerical and service areas." WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 FACTS ON WOMEN WORKERS 3 (1984). More than one third of all women workers are employed in clerical occupations. The clerical field is 80.5% female. Twenty percent of all women workers are employed as service workers. Women comprise 96.5% of all private household workers. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN 298, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 52 (1983). Women constitute less than 7% of the engineers, 10% of health diagnosing occupations, 20% of scientists, and perhaps most significantly with respect to the issue of sexual harassment, the percentage of women representing all salaried managers, executives, and administrators is less than 32%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 27 (Nov. 1984). Thus, women are extremely susceptible to the assertion of power in the form of sexual harassment. Women occupy the low notch on the totem pole of job power and authority and are perceived to be vulnerable with respect to male authority.

Women are also paid less than men, both on the average and for the same work. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 2-6 (1979). *See also* WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 FACTS ON WOMEN WORKERS 3 (1984). Stereotypical perceptions are that women are less suited than men to many jobs; women do not stay with their jobs; women lack education and experience; women are absent from work more often than men; women are unable to travel; women would not be accepted in positions of authority, and women are incapable of making decisions based on fact and logic. The factual basis of some of these stereotypes are often the very results of sexual harassment. For example, sexually harassed women more often than not leave their jobs, thereby not "staying with their jobs." If they stay and try to cope with the sexual harassment, they will probably be absent more often and their productivity may understandably decrease. *See* CRULL, THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN (Working Women's Institute, Research Series, Report No. 3, 1979).

21. Vermuelen, *supra* note 17, at 287.

tim's job performance. To the extent this role conflict is internalized by a woman, her motivation and belief that she can advance in her job or career are likely to decrease. Consequently, she may lack the confidence to apply for promotions or openings that are perceived to be men's jobs. Further, when the importance of her sexual identity is reinforced in front of her male colleagues, they may view her as incapable of handling demanding work or projects.[22] Finally, to the extent a woman succeeds in such an atmosphere, her male coworkers may attribute her success to sexual manipulation and not to her ability as a worker.[23] Increased use of sick leave, unexplained absenteeism, frequent job turnover, and high unemployment rates among sexually harassed women[24] tend to exacerbate job segregation and sex role stereotyping.

Sexual harassment is costly, not only to the victim, but also to society and the employer. The victim's skill as a worker is greatly undermined, resulting in decreased efficiency and production. If she is forced to leave her job because of harassment, the employer loses her talents completely. Sexual harassment is costly to society in terms of society's progression toward a discrimination-free world and in monetary terms. In a two-year period, sexual harassment of federal workers alone cost taxpayers 189 million dollars in health costs, productivity loss, and job turnover.[25]

Sexual Harassment is Discrimination Based on Sex

The federal district court in Arizona has the dubious distinction of having rejected the first reported sexual harassment claim. In *Corne v. Bausch and Lomb, Inc.*[26] the district court ruled that a supervisor's sexual harassment of a female employee was not employment related because it did not arise out of a company policy or produce an advantage or benefit for the employer. Therefore, it did not constitute sex discrimination.[27] The court characterized the supervisor's constant verbal and physical sexual advances as "nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, [the supervisor] was satisfying a personal urge . . . ."[28]

One year later, in 1976, a federal district court recognized sexual harassment as sex discrimination prohibited by Title VII. In *Williams v.*

22. *Id.*

23. *Id. See generally* C. MACKINNON, *supra* note 7, at 25-55 and L. FARLEY, *supra* note 18, at 30-48.

24. L. FARLEY, *supra* note 18, at 42-48; Vermuelen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, CAP. U.L. REV. 499, 502 (1981); *see generally* CRULL, *supra* note 20.

25. The two year period was May, 1978 through May, 1980. U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 14 (March 1981).

26. 390 F. Supp. 161 (D. Ariz. 1979), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977) (settled in plaintiffs' favor before new trial).

27. *Id.* at 163.

28. *Id. See supra* notes 8-9 and accompanying text. In *Corne* the court "personalized" the supervisor's actions and thereby made his conduct too small, too unique, and too private (non-employment related) to be considered an appropriate legal claim.

Saxbe,[29] a female employee was discharged for rejecting her male supervisor's sexual advances. The district court held that when submission to an employer's sexual advances is made a term or condition of employment, Title VII is violated.[30]

Williams v. Saxbe laid a foundation for judicial recognition of sexual harassment as sex discrimination. During the following year, three federal courts of appeals reversed lower court decisions which had refused to recognize that sexual harassment was within the scope of Title VII.[31] In *Barnes v. Costle* [32] the district court found that sexual harassment was not sex discrimination because it was not sex-based treatment. "The substance of the plaintiff's complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."[33] The district court failed to realize that but for the plaintiff's gender she would not have been sexually propositioned and then retaliated against when she refused to engage in sexual relations with her supervisor. The D.C. Circuit Court of Appeals recognized, however, that the plaintiff's gender was an indispensable factor in the job-retention condition imposed on her.[34] Today, courts unanimously accept the general proposition that sexual harassment is discrimination on the basis of sex.[35]

Employer Liability for Supervisory Harassment

The basic conflict in the case law with respect to employer liability for sexual harassment by its supervisors or agents is whether employer knowledge of the harassment is a necessary prerequisite for liability. Most courts follow a moderate approach: either actual or constructive employer knowledge or ratification of the harassment must be established to hold the employer liable for harassment by supervisors.[36] Constructive knowledge is

29. 413 F. Supp. 654 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *decided on remand sub nom.* Williams v. Civiletti, 487 F. Supp. 1387 (D. D.C. 1980).

30. *Id.* at 659.

31. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prods. Inc., 552 F.2d 1032 (4th Cir. 1977).

32. Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D. D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

33. *Id.* at 124.

34. 561 F.2d at 990.

35. *See, e.g.*, Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Miller v. Bank of Am., 600 F.2d 211 (D.C. Cir. 1979); *Tomkins*, 568 F.2d 1044; *Garber*, 552 F.2d 1032; Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D. N.J. 1978); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); Continental Can v. Minnesota, 297 N.W.2d 241 (Minn. 1980). *See also* Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 440 (1982).

36. *E.g.*, Katz v. Dole, 709 F.2d at 255 (actual or constructive knowledge necessary for offensive work environment claim); *Tomkins*, 568 F.2d at 1048 (actual or constructive knowledge required); *Garber*, 552 F.2d at 1032 (ratification of harassment implied by employer knowledge and failure to remedy situation); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D. D.C. 1980) (employer knowledge as well as supervisor's authority to fire required), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985); Price v. John F. Lawhon Furniture Co., 24 Fair Empl. Prac. Cas. (BNA) 1506, 1507 (N.D. Ala. 1978) (employer knowledge required where employer has firm policy against "sexual fraternization"); Neeley v. Am. Fidelity Assurance Co., 17 Fair Empl. Prac. Cas. (BNA) 482, 485 (W.D. Okla. 1978) (employer knowledge and/or company policy or benefit required); Munford v. James T. Barnes and Co., 441 F. Supp. at 466 (knowledge and/or ratification required).

used in its common and usual sense and refers to facts that a reasonable person would have known. An example of the moderate approach is the Third Circuit's holding in *Tomkins v. Public Service Electric and Gas Co.*[37] The *Tomkins* court distinguished between complaints alleging sexual advances of a personal nature and those alleging direct employment consequences. Under *Tomkins*, when direct employment consequences flow from the sexual advances, two elements are necessary to find a Title VII violation: first, a term or condition of employment must be imposed, and second, the employer, either directly or vicariously, must impose the condition in a sexually discriminatory fashion.[38] The court found that the second requirement is met if the employer has actual or constructive knowledge of the supervisor's sexual advances and the employer does not take prompt remedial action after acquiring such knowledge.[39]

In *Vinson v. Taylor*[40] the D.C. District Court went beyond *Tomkins* and required, as a third element, that the supervisor have the authority to fire the plaintiff. The court stated:

> Taylor did not have the authority to hire or fire or promote, but he did have the authority to make recommendations . . . . [It] seems reasonable that an employer should not be liable in these unusual cases of sexual harassment where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice.[41]

The courts that require employer knowledge or ratification do not discuss why notice is necessary to hold the employer liable for a Title VII violation. Those courts fail to provide a cogent rationale for applying a standard of liability that is different from that generally utilized in other areas of Title VII discrimination law.[42]

Two cases in general Title VII law support the proposition that employer knowledge should not be a prerequisite to liability for a supervisor's discriminatory conduct.[43] *Young v. Southwestern Savings & Loan Association*[44] was a religious discrimination case. In *Young*, the plaintiff, an atheist, was constructively discharged when she was told by her supervisor that her attendance at staff meetings that began with religious services was mandatory. Even though the employer's company policy excused employees from the devotional portion of the meetings and the supervisor did not have the authority to fire the plaintiff, the employer was held responsible for the supervisor's actions.[45] In *EEOC v. University of New Mexico*,[46] a national

37. 568 F.2d at 1044.
38. *Id.* at 1048-49.
39. *Id.*
40. 23 Fair Empl. Prac. Cas. (BNA) 37, *rev'd*, 753 F.2d 141 (D.C. Cir. 1985).
41. *Id.* at 42.
42. *See supra* note 36 and accompanying text.
43. In addition to the cases discussed in the text, see Anderson v. Methodist Evangelical Hosp., 464 F.2d 723 (6th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Gay v. Board of Trustees, 23 Fair Empl. Prac. Cas. (BNA) 1569 (5th Cir. 1979); Walthall v. Blue Shield, 12 Fair Empl. Prac. Cas. (BNA) 933 (N.D. Cal. 1976).
44. 509 F.2d 140 (5th Cir. 1975).
45. *Id.* at 144.
46. 504 F.2d 1296 (10th Cir. 1974).

origin discrimination case, the Tenth Circuit stated that "the broad sweep of the Act is directed to the elimination of employment discrimination, whether practiced knowingly *or unconsciously*."[47]

A strict liability standard has generally been imposed on employers for racial, religious, and sexual discrimination.[48] Many courts, however, have abandoned this standard merely because the supervisor's discriminatory conduct is sexual harassment rather than sexually discriminatory hiring or promotional standards. Courts that require employer knowledge or ratification[49] are thus unjustifiably treating sexual harassment as a unique species of employment discrimination which warrants the suspension of general Title VII principles.[50]

Two leading sexual harassment cases have held employers strictly liable for their supervisors' actions: *Miller v. Bank of America*[51] and *Williams v. Saxbe*[52]. In *Miller*, the plaintiff's supervisors rated her job performance "superior" and gave her a salary raise. The plaintiff claimed that she was soon afterward fired because she had refused her supervisor's demand for sexual favors from, in his words, a "black chick." The D.C. Circuit Court reasoned that respondeat superior is a proper basis of liability since Title VII prohibits tort-like wrongs. Because the supervisor was authorized to hire, fire, discipline, or promote, or at least to participate in or recommend such actions, the respondeat superior theory allowed the *Miller* court to hold the employer liable for its supervisor's actions, even though his actions violated company policy.[53]

In *Williams*, the plaintiff alleged that she had had a good working relationship with her supervisor until she refused his sexual advance. She asserted that he then continually harassed and humiliated her with

47. *Id.* at 1302 (emphasis added).

48. *See infra* notes 51-54 and accompanying text.

49. *See* cases cited *supra* note 36.

50. Vermuelen, *supra* note 24, at 525, gives two reasons for the courts' "special" treatment of sexual harassment claims. The first reason is that many courts persist in seeing the supervisor's harassment as personally motivated and unrelated to the employer's business. The extremely high incidence of sexual harassment has made it a characteristic risk in the workplace, not something unrelated to the employer's business. *See supra* note 19. Also, sexual harassment is not innocent and personally motivated flirting; sexual harassment is the exploitation of one employee's power over another employee. *See supra* notes 18-19 and accompanying text. Therefore, it is intrinsically related to the workplace and is within the employer's responsibility. The second reason that courts treat sexual harassment claims as a special type of discrimination is that courts perceive the supervisor's conduct as inoffensive or not hostile and are therefore reluctant to hold employers liable for what is considered natural or universal. *See also supra* notes 8-11 and accompanying text. The courts are too often influenced by a dual concept of fairness. On the one hand, the court may feel it is unfair that a woman should lose her job just because she won't comply with the sexual demands of her supervisor. On the other hand, the court may view it as unfair to hold an employer liable for the conduct of a supervisor that is considered both personal and supposedly natural to the relation between sexes. Vermuelen, *supra* note 24, at 530.

51. 600 F.2d 211 (D.C. Cir. 1979). The facts of *Miller* are set forth 600 F.2d at 212. *See also* Cummings v. Walsh Const. Co., 561 F. Supp. 872 (D. Ga. 1983). In *Cummings*, the court cited *Miller* for its use of respondeat superior to arrive at a strict liability standard. 561 F. Supp. at 878.

52. 413 F. Supp. 654 (D. D.C. 1976), *rev'd and rem'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *decided on remand sub nom.* Williams v. Civiletti, 487 F. Supp. 1387 (D. D.C. 1980). The facts of *Williams* are set forth 413 F. Supp. at 655-56.

53. 600 F.2d at 213. For a discussion of theoretical underpinnings associated with the use of tort law theories of liability such as respondeat superior or agency theory to derive a strict liability standard in Title VII discrimination cases see Vermuelen, *supra* note 24, at 507-08, 514-18.

unwarranted reprimands and refused to give her information necessary for the performance of her responsibilities. Further, he refused to consider her proposals and refused to recognize her competence. The defendant's alleged basis for terminating the plaintiff was her poor work performance during the same period. The D.C. District Court rejected the defendant's argument that the case was an isolated personal incident that should not concern the court. The court reasoned that if the harassment was a policy or practice of the supervisor then it was also the employer's policy or practice and the employer had thereby violated Title VII.[54]

The language and legislative history of Title VII suggest that Title VII was intended to be broadly remedial with a goal of ridding the workplace of all forms of discrimination.[55] The statute emphasizes correction and prevention of violations. The EEOC guidelines and decisions have translated the legislative intent into an implied affirmative duty of employers to establish and maintain a workplace free of all forms of discrimination.[56] In order to effectively enforce Title VII and to enact its broad remedies, the courts should hold employers strictly liable for supervisory harassment.[57] The employer is best able to insure compliance, take preventive action, and induce care on the part of its management and supervisors. The employer is also best able to bear the financial costs of discrimination. Strict liability insures an economically fair distribution of discrimination costs.[58]

Employers need not fear exhorbitantly high damages under a strict liability standard. Title VII provides only for equitable relief such as an injunction, reinstatement, or back pay. Punitive damages are not recoverable under Title VII.[59] Additionally, strict liability does not leave an employer defenseless against claims of sexual harassment. Once the plaintiff has established the existence of sexual harassment, the employer must prove by clear and convincing evidence that the plaintiff's alleged employment-related harms were not the result of sexual harassment.[60]

A final argument supporting strict liability for supervisory harassment is that the EEOC's guidelines on sexual harassment set forth a strict liability

54. 413 F. Supp. at 660.

55. *See Barnes*, 561 F.2d at 990. *See also Tomkins*, 568 F.2d at 1046 n.2; Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971); Culpepper v. Reynolds Metals, 421 F.2d 888, 891 (5th Cir. 1970); Vermuelen, *supra* note 24, at 507.

56. 29 C.F.R. § 1604.11(f) (1984). *See* the EEOC decisions cited *infra* note 68.

57. Vermuelen, *supra* note 17, at 290.

58. Strict liability is economically fair because presumably the employer benefits from its delegation of authority and the existence of supervisory personnel under the employer's direction. In return for such benefits, the employer is capable of paying the costs incurred by its supervisor's misconduct, regardless of whether the employer was aware of the sexual harassment. Note, *Burden of Persuasion Shifts in Remedial Claim After Finding of Sexual Harassment in Work Environment*, 11 SETON HALL L. REV. 825, 837 (1981). "Just as strict liability is now seen as an appropriate way of acknowledging and distributing the costs of industrial accidents, so too strict liability ultimately may be viewed as an appropriate way of acknowledging and distributing the costs of discrimination." Taub, *supra* note 2, at 386-87.

59. 42 U.S.C. § 2000e-5(g) and (k) (1984). *See also* EEOC v. Detroit Edison Co., 51 F.2d 301 (6th Cir. 1975); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063 (D. Maine 1977); Whitney v. Greater New York Corp. of Seventh Day Adventists, 401 F. Supp. 1363 (S.D. N.Y. 1975).

60. *Bundy*, 641 F.2d at 951.

standard.[61] The guidelines state:

> *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 employer knew or should have known of their occurrence* . . . .[62]

The EEOC's guidelines are not binding on the courts, but they usually carry considerable weight.[63]

Employer Liability for Harassment by Coworkers

Unlike the situation of supervisory harassment, a coworker[64] probably does not have the power or influence to enforce negative employment consequences[65] as retaliation for a female coworker's refusal to submit to sexual demands. However, the impact of a coworker's harassment can be as harmful as that of supervisory personnel because a woman must often rely on the cooperation and support of coworkers to effectively perform her job.

The "working conditions theory" of discrimination, first established in the racial discrimination context, is a crucial mechanism for bringing coworker harassment, as well as supervisory harassment where no tangible job effects are lost, within Title VII.[66] Under the working conditions theory, an

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61. 29 C.F.R. § 1604.11 (1984). The guidelines specifically apply to harassment in the workplace.

62. *Id.* at § 1604.11(c) (emphasis added).

63. In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court stated that the administrative interpretation of the Civil Rights Act by the enforcing agency is entitled to "great deference." *Id.* at 933-34. In Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), the court relied on *Griggs* in giving the EEOC's guidelines on sexual harassment great weight. *Id.* at 945 n.10.

64. In comparison to the amount of cases and commentaries on the subject of harassment by supervisors there is very little material on sexual harassment of female employees by male coworkers. "Coworkers" are nonsupervisory employees. According to the terms of Title VII, only "employers" can violate the statute. 42 U.S.C. § 2000e-2 (1984). Clues as to the proper standard of employer liability for coworker harassment are again provided by Title VII case law in areas such as racial or ethnic discrimination and in the EEOC's guidelines on sexual harassment. Examples of coworker harassment include physical assault, verbal provocations and slurs, propositions, exclusion from communication channels, and being given incorrect or insufficient information. *See* New York Times, Nov. 11, 1979, § 1, at 30; U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION, WOMEN IN TRADITIONALLY MALE JOBS: THE EXPERIENCE OF TEN PUBLIC UTILITY COMPANIES 14, 42 (R & D Monograph No. 65, 1978).

65. Negative employment consequences include loss of job, demotion, decrease in earnings, less responsibility or authority, and less appealing or challenging assignments.

66. Where the sexual harassment stops short of tangible job effects such as demotion or discharge, the plaintiff must base her Title VII claim on the statute's prohibition of discriminatory "conditions of employment." In the context of racial discrimination, several court decisions are directed at psychologically debilitating work environments. *See infra* note 75. EEOC decisions finding a violation of Title VII in an offensive work environment are: EEOC DEC. (CCH) ¶ 6354 (April 12, 1972) (unlawful to require workers to work in an area covered with racially discriminatory graffitti); EEOC DEC. (CCH) ¶ 6321 (Dec. 30, 1971) (supervisor called employee "nigger"); EEOC DEC. (CCH) ¶ 6289 (April 12, 1971) (ridicule of Polish employee by coworkers unlawful); EEOC Dec. (CCH) ¶ 6179 (Dec. 17, 1970) (foreman calling black employee "little black sambo" discriminatory).

The leading authority for the "working conditions theory of discrimination" is Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971). *Rogers* was in the forefront of establishing the working conditions theory of discrimination. The Fifth Circuit held that if an employee is forced to work in an atmosphere rife with intimidation, insult, and harassment, a term or condition of the employee's employment has been affected. 454 F.2d at 238-39. In that case the court read the phrase "terms,

atmosphere permeated by coworker harassment, insult, or intimidation is an adverse term or condition of employment and within Title VII's protection.[67]

As the EEOC has stated in numerous rulings and in its guidelines on sexual harassment, there is a general employer duty to maintain a workplace free of employee insult, intimidation, and harassment and to take any reasonable steps necessary to maintain an uncontaminated work environment.[68] An employer is not immediately liable upon the occurrence of coworker harassment; the employer is liable only when its response, or lack of response to the occurrence reveals a willingness to condone or tolerate the harassment. The employer's failure to take reasonable steps necessary to maintain a workplace free of harassment, after it becomes aware of the harassment, creates liability under Title VII.[69] The employer's failure to remedy the mistreatment is considered the equivalent of actively imposing a discriminatory condition of employment.[70]

Bundy v. Jackson[71] was one of the first sexual harassment cases to use the working conditions theory of discrimination. Prior to *Bundy*, courts had recognized sexual harassment as a Title VII cause of action only when it resulted in some tangible economic injury such as demotion, decrease in pay or responsibility, firing, or constructive discharge.[72] Bundy's first and second level supervisors continually asked her to engage in sexual relations. She complained to their supervisor who casually dismissed her complaints and told her that "any man in his right mind would want to rape you." Bundy did not lose her job, although a promotion was delayed until after she filed a complaint with the EEOC.[73] The D.C. Circuit Court ruled that the existence of sexual harassment in and of itself constitutes a discriminatory condition of employment and the plaintiff need not lose tangible job benefits in order to state a cause of action.[74] The court suggested that the work

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conditions, or privileges of employment" as "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Id.* at 238. Only a few courts have recognized that sexual harassment by itself may be discriminatory if it creates an offensive and hostile work environment within the meaning of the working conditions theory of discrimination. *See infra* notes 71-84 and accompanying text.

67. *See supra* note 66.

68. *See* 29 C.F.R. § 1604.11(c)-(f) and *see, e.g.*, 10 Fair Empl. Prac. Cas. (BNA) 260, 265 (1973); 6 Fair Empl. Prac. Cas. (BNA) 834, 834 (1973); 3 Fair Empl. Prac. Cas. (BNA) 269, 269 (1970); 2 Fair Empl. Prac. Cas. (BNA) 295, 296 (undated); 1 Fair Empl. Prac. Cas. (BNA) 922, 922 (1969); 1 Fair Empl. Prac. Cas. (BNA) 912, 913 (1969); EEOC Dec. (CCH) ¶ 6376 (Oct. 5, 1972); EEOC DEC. (CCH) ¶ 6354 (April 12, 1972); EEOC DEC. (CCH) ¶ 6347 (Feb. 18, 1972); EEOC DEC. (CCH) ¶ 6290 (Aug. 6, 1971); EEOC DEC. (CCH) ¶ 6289 (April 12, 1971); EEOC DEC. (CCH) ¶ 6257 (June 3, 1971).

69. *See, e.g.*, Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D. N.J. 1978); Continental Can v. Minnesota, 297 N.W.2d 241 (Minn. 1980).

70. *Barnes*, 561 F.2d at 993; *Kyriazi*, 461 F. Supp. at 935, 950; *Continental Can*, 297 N.W.2d at 249-50.

71. 641 F.2d 934 (D.C. Cir. 1981). *Bundy* is a supervisory harassment case. However, it is discussed in the coworker harassment section because it utilizes the working conditions theory of discrimination and it thereby provides a valuable theoretical basis for recognizing coworker harassment as actionable discrimination.

72. *Kyriazi*, 461 F. Supp. at 945, decided prior to *Bundy*, allowed recovery where the plaintiff was forced to quit. *See, e.g., supra* note 7 and cases cited therein.

73. 641 F.2d at 941.

74. *Id.* at 945, 946.

environment, including its psychological and emotional aspects, is encompassed by the "terms and conditions of employment" phrase in Title VII sexual harassment cases, just as in other types of discrimination cases.[75] Thus, even though Bundy had not suffered any tangible job loss, her claim was upheld because the offensive and hostile work environment to which she was forced to adapt was a violation of Title VII.[76] In addition, the court found strong practical reasons for not requiring a loss of tangible job benefits as a prerequisite for a Title VII cause of action. Unless an employee has legal recourse against a sexually discriminatory work environment, an employer is free to allow the harassment to continue as long as it refrains from firing her or some other tangible retaliation.[77] *Bundy* made the harassment itself a violation, regardless of whether the harassment leads to tangible job consequences.

In *Kyriazi v. Western Electric Co.*,[78] the plaintiff was teased and tormented by her coworkers. They made loud remarks about her marital status and wagers about her virginity. They created and disseminated an obscene cartoon designed to embarrass and humiliate her as a woman.[79] The plaintiff's supervisors were well aware of the harassment but disregarded her complaints and failed to take any action against her coworkers. The supervisors thereby implicitly encouraged the harassment.[80] The New Jersey District Court held the employer liable for harassment of the female plaintiff by coworkers due to the magnitude of the coworkers's harassment and the failure of the employer to take any remedial action.[81]

Continental Can Co. v. Minnesota[82] also involved coworker harassment. Three male employees repeatedly made sexually derogatory remarks and verbal sexual advances to Ruth Hawkins, a female factory worker. Hawkins complained but Continental took no action. The harassment eventually led to Hawkins being grabbed between the legs from behind. Continental took no immediate action when Hawkins complained of the incident. The Minnesota Supreme Court found sexually discriminatory terms of employment because the job was conditioned upon adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct were directed at the plaintiff by her male coworkers.[83] Discrimination had occurred essentially because male employees, unlike the female plaintiff, were not forced to adapt to a hostile and offensive work environment.[84]

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75. *Id.* at 944-45. There is strong support for considering a hostile and offensive work environment as a discriminatory condition of employment in the history of Title VII race discrimination cases. *See* Cariddi v. Kansas City Chiefs Football Club Inc., 568 F.2d 87, 88 (8th Cir. 1977); Firefighters Inst. for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977); United States v. Buffalo, 457 F. Supp. 612, 631-35 (W.D. N.Y. 1978); *Rogers*, 454 F.2d at 238.

76. 641 F.2d at 946.

77. *Id.* at 945-46.

78. 461 F. Supp. 894 (D. N.J. 1978).

79. *Id.* at 934.

80. *Id.* at 935.

81. *Id.* at 950.

82. 297 N.W.2d 241 (Minn. 1980).

83. *Id.* at 249.

84. *Id.* at 248.

The standard of liability in *Continental Can* and *Kyriazi* complies with the EEOC standard for harassment by coworkers. The EEOC guidelines on sexual harassment by coworkers require: (1) employer knowledge, either actual or constructive, of coworker harassment which is substantial enough to create an offensive work environment; and (2) subsequent failure to take prompt and reasonable steps to remedy the situation.[85] If coworker harassment is sufficient to put the employer fairly on notice of a problem affecting the job conditions of a female employee, the employer must take reasonable and prompt corrective action.[86] This standard of liability is rarely too hard upon the female plaintiff because reporting the coworker harassment is within her control.[87]

Employer Liability for Sexual Harassment by Nonemployees

The implications of holding an employer liable for harassment by nonemployees are controversial. Employer liability for nonemployees's actions stretches the limits of the concept of liability.[88] The major distinction between employer liability for sexual harassment by supervisory personnel or coworkers and liability for harassment by nonemployees is that the employer has greater control over the actions of employees than nonemployees. Thus, the amount of control the employer has over aspects of the workplace with which the nonemployee comes in contact[89] is important when determining employer liability.[90] For example, when a female employee is being harassed by a delivery man or a repair man who regularly visits the business premises, the employer has some control over the nonemployee because the employer is itself a customer of the harasser's employer.

In *EEOC v. Sage Realty Corp.*[91] the New York District Court held the employer liable for sexual harassment of its female lobby attendant by customers. The court found that the employer had substantial control over the sexual harassment because it had knowledge that its mandatory bicenntenial uniform was sexually revealing upon the plaintiff and inspired the customers's lewd comments and frequent propositions.[92] The employer may not

85. 29 C.F.R. § 1604.11(d) states:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer, 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.

86. *See generally* Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory of Liability*, 15 CREIGHTON L. REV. 437 (1982). Allegretti discusses the extent of harassment necessary to put the employer on notice of a possible Title VII violation. *Id.* at 462-67.

87. The plaintiff may still realistically fear her supervisor's reaction to her complaints of harassment, or increased and more serious harassment by her coworkers if they should learn of her complaint. Thus, this standard of liability is probably designed to be as reasonable and fair as possible in terms of the employer's interest without necessarily causing a hardship for the plaintiff in bringing her cause of action.

88. Allegretti, *Sexual Harassment by Nonemployees: The Limits of Employer Liability*, 9 EMPL. REL. L.J. 98, 98-99 (1983).

89. Dress code or uniform is one example of an aspect of employment with which nonemployees come in contact and over which the employer has control.

90. 29 C.F.R. § 1604.11(e). *See also* Allegretti, *supra* note 88, at 100-02.

91. 507 F. Supp. 599 (S.D. N.Y. 1980).

92. *Id.* at 609.

have had control over the customers, but it had complete control over the sexually revealing uniform.

The standard of liability endorsed by *Sage Realty*[93] is very similar to the standard of liability for harassment by coworkers recommended in the EEOC guidelines.[94] Employer liability requires actual or constructive knowledge of the nonemployee's harassment and failure to take prompt and reasonable remedial action.[95] An employer who fails to take reasonable remedial action implicitly permits the nonemployee to sexually harass its female employee and thereby commits a discriminatory act.

When a nonemployee sexually harasses a female employee, it may not have tangible job effects.[96] Thus, as in the coworker harassment situation, the working conditions theory of discrimination is instrumental in showing that the employee's terms or condition of employment are adversely affected. If nonemployee harassment creates a hostile and offensive work environment for the employee or causes tangible job effects such as constructive discharge as in *Sage Realty*, and the employer acquiesces in the harassment, there is an actionable Title VII violation.[97]

Conclusion

Employers may be held liable for sexual harassment of female employees in three situations: supervisory harassment, harassment by coworkers, and harassment by nonemployees. The greatest conflict in the standard of liability imposed on employers is in the supervisory harassment situation. The majority of courts do not adhere to general Title VII principles which advocate strict liability. These courts insist on treating sexual harassment as a distinct species of discrimination and yet, do not provide a cogent rationale for their distinction. Currently, most courts require employer knowledge or ratification in order to maintain a cause of action even though they are departing from general Title VII case law and impeding effective enforcement of Title VII.

Thus far in the coworker and nonemployee harassment situations, the courts have followed the EEOC's guidelines. The standard of liability under the guidelines requires employer knowledge or constructive knowledge and

93. *Id.* at 607-09.

94. 29 C.F.R. § 1604.11(e).

95. The guidelines state that in considering what are reasonable remedial actions, the employer's control over the nonemployee should be taken into account. *Id.*

96. This is not to say that there are never any tangible job effects resulting from nonemployee harassment. In *Sage Realty* the customer harassment led to the plaintiff's constructive discharge. 507 F. Supp. at 606. Other employees are fired or not even hired if they refuse to wear sexually revealing uniforms. Cocktail waitresses may lose tips or even their job if they do not submit or "play along" with customer harassment. Thus, nonemployee harassment may have tangible job effects as well as create a hostile and intimidating work environment.

97. *See* EEOC v. Sage Realty, 507 F. Supp. at 609. One court's decision touched upon the subject of requiring cocktail waitresses to wear provocative uniforms. In Marinette v. Michigan Host, 506 F. Supp. 909 (E.D. Mich. 1980), the district court's dicta noted the possibility of a Title VII violation if the employer's dress requirement was so sexually provocative as to subject the female employees to sexual harassment. *Id.* at 912. The district court held that an employer has the right to impose reasonable dress codes and that the specific uniforms required of the cocktail waitresses in that case could have violated the spirit of Title VII but the court did not rule on that issue because of its mootness. 506 F. Supp. at 913. *See also* Allegretti, *supra* note 88, at 105-09.

failure to take prompt, reasonable steps against the harassment. In the case of nonemployee harassment, the higher standard of liability is especially appropriate because the employer has little control over harassers who are not directly within its employment.

The broad remedial nature of Title VII is aimed at abolishing all forms of discrimination in the workplace. Sexual harassment is discrimination on the basis of sex. Whether through legal redress, through a change in public consciousness, or both, women are entitled to take their rightful place in the working world, making equal contributions for equal pay, without fear of harassment, exploitation, or discrimination.