NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 2
Issue 1 *Symposium - The Rights of Children*

Article 8

1984

Employer Liability for Sexual Harassment in the Work Place Under Title VII of the Civil Rights Act of 1964

Helen D. Rosen

EMPLOYER LIABILITY FOR SEXUAL HARASSMENT IN THE WORK PLACE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

I. INTRODUCTION

Sexual harassment is a form of sex discrimination.[1] Its prevalence is due largely to women's lack of economic power in society.[2] This is illustrated by the observation that, in most fields, women have a lower job status than men.[3] This renders women particularly vulnerable to sexual harassment.[4] The economic and psychological costs of sexual harassment are borne by the victims, by the employers, and by society as a whole.[5]

Common to most reported incidents of sexual harassment "the perpetrators are male, the victims, female. Few women are in a position to harass men sexually, since they do not control men's employment destinies at work . . . ."[6] Surveys indicate that there are many reported incidents of sexual harassment on the job.[7] Many more incidents go unreported.[8] According to a

---

1. Rossein, *Sex Discrimination and the Sexually Charged Work Environment*, 9 N.Y.U. REV. L. & SOC. CHANGE 271 (1979-80). Rossein notes that "[t]he origins of sexual abuse in the work place and the reasons for its tacit acceptance must be viewed in light of women's subordinate position in the labor force and the traditional relationship of women to men in American society." *Id.* at 271. *See also* U.S. COMMISSION ON HUMAN RIGHTS, SEXUAL HARASSMENT ON THE JOB: A GUIDE FOR EMPLOYERS 8 (1982) [hereinafter cited as COMMISSION].

2. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). *See also* Rossein, *supra* note 1.

3. C. MACKINNON, *supra* note 2.

4. *Id.*

5. *See, e.g.*, Allegretti, *Sexual Harassment of Female Employees by Non-Supervisory Co-Workers: A Theory of Liability*, 15 CREIGHTON L. REV. 437, 438 (1982); Wacks & Starr, *The Sexual Shakedown in Perspective: Sexual Harassment in its Social & Legal Context*, 7 EMPL. REL. L.J. 567, 568-71 (1981). *See also* Bureau of National Affairs, *Sexual Harassment and Labor Relations: A BNA Special Report* 28 (1981) [hereinafter cited as *BNA Report*]. "The cost of sexual harassment to the Federal Government between May 1978 and May 1980 is conservatively estimated to have been $189 million." *Id.*

6. C. MACKINNON, *supra* note 2, at 31.

7. *See, e.g.*, "Widespread Sexual Harassment Found at Harvard," N.Y. Times, Oct. 28, 1983, at A7, col. 1; C. MACKINNON, *supra* note 2, at 25-55; M. MEYER, I. BERCHTOLD, J. OESTRIECH & F. COLLINS, SEXUAL HARRASSMENT 4-16 (1981) [hereinafter cited as M. MEYER]; COMMISSION, *supra* note 1, at 9; Baxter, *Judicial and Administrative Protections Against Sexual Harassment in the Workplace*, 7 EMPL. REL. L.J. 586 (1981).

8. *See supra* note 7.

survey which was completed in 1981, about 42% of all female federal employees have reported some incident of sexual harassment.[9] Another study found that 59% of the 1,495 women responding to a questionnaire experienced one or more incidents of sexual harassment in their present place of employment.[10] These incidents have ranged from suggestive looks to coerced sex.[11] In a survey conducted by the Chicago Sun Times,[12] eighty-two out of a total of eighty-four respondents reported that they had been subjected to some form of sexual harassment.[13] In this survey, 56% of the respondents who reported that they had been subjected to some form of sexual harassment ignored the harasser.[14] These respondents reported that they did nothing because taking action was not the thing to do.[15] Others reported that they were too embarrassed to complain,[16] or that they did not complain out of fear of reprisals.[17] Twenty-one percent of the individuals who did not complain left the organization.[18] Of those respondents who did experience some form of sexual har-

---

9. COMMISSION, *supra* note 1, at 9. *See also* Baxter, *supra* note 7. The study also notes that 15% of male federal workers report experiencing some form of sexual harassment. *Id.* at 587.

10. M. MEYER, *supra* note 7, at 7-8. This study was conducted by the Sangamon State University and the Illinois Task Force on Sexual Harassment in the Work Place. In the study, a scientifically selected sample was used. Sixty-three percent of the respondents agreed with the statement that "sexual harassment is a serious problem for many working women." Seventy-two percent agreed with the statement that "unwelcome male attentions on the job are offensive." *Id.* at 7.

11. *Id.* Respondents were asked to report only those incidents of unwanted sexual attention that made them feel humiliated or threatened. Fifty-two percent had been subjected to sexual remarks or teasing, 41% had been the target of suggestive looks or leers, 26% had experienced subtle sexual hints and pressure, 25% had been physically touched or grabbed, 20% had been sexually propositioned, 14% had been repeatedly pressured to engage in personal relationships, 9% reported other miscellaneous forms of unwanted sexual attention, and 2% experienced some form of coercive sex. These figures total more than 100% because most women reported several kinds of harassing experiences." *Id.*

12. *Id.* at 193-98.

13. *Id.* Of those responding that they had experienced some form of sexual harassment in the office, 4 were male, 19 were female, and 59 were unidentified. *Id.* at 195.

14. *Id.*

15. *Id.* at 196.

16. *Id.*

17. *Id.*

18. *Id.*

assment, 73% stated that they had been harassed by their supervisor.[19]

A study conducted by the Harvard Business Review and Redbook Magazine found that "[t]he perceived seriousness of workplace sexual harassment is related to the employment status of the person making the advance."[20] This survey also found that sexual harassment on the job is generally perceived to be a power issue.[21]

Although some of these studies lack scientific reliability, sexual harassment in the work place clearly is a serious problem. MacKinnon has noted that "the sexual harassment of working women presents a closed system of social predation in which powerlessness builds powerlessness. Feelings are a material reality of it. Working women are defined, and survive by defining themselves, as sexually accessible and economically exploitable."[22] Rossein, in his article *Sex Discrimination and the Sexually Charged Work Environment*,[23] has reached a similar conclusion:

> Sexual harassment is thus both an occupational health hazard and an economic barrier for women. It has operated to confine women to the traditionally "female" jobs. Nevertheless, harassment is deeply rooted in our popular culture, and the resistance to treating it seriously as a substantive employment barrier for women remains strong. This is so even though sexual harassment has a pronounced impact on women workers' job effectiveness and productivity, and thus deprives society of the additional contributions that women workers could provide.[24]

---

19. *Id.* at 197. Thirty-three percent reported that they were harassed by a superior unrelated to them at work, 41% reported that the harassment came from a peer or colleague, 28% reported that it came from an agent of another organization, 37% stated that the harassment came from someone in the company but not in the same department and not a supervisor. *Id.* at 197-98.

20. *BNA Report*, *supra* note 5, at 29.

21. *Id.*

22. C. MACKINNON, *supra* note 2, at 55. MacKinnon also notes that "[o]bjections to sexual harassment at work is not a neopuritan moral protest against signs of attraction, displays of affection, compliments, flirtation or touching on the job. . . . Women who protest sexual harassment at work are resisting economically enforced sexual exploitation." *Id.* at 25.

23. Rossein, *supra* note 1.

24. *Id.* at 278.

Pepper and Kennedy have described the problem of sexual harassment in the work place in a more radical manner:

> [S]exual harassment of female employees must be viewed as yet one more manifestation of a social system in which the women have been kept sexually subservient to men, and at the bottom of the labor pool. The complementing reality of dominant male sexuality and the employer's control over the work lives of his employees have throughout history operated to compel women to exchange sexual services for material advancement, or perhaps even subsistence. . . . In fact, such treatment of women at work is an integral part of the social context in which women control a vastly disproportionately small share of wealth and power when compared with their male counterparts.[25]

Sexual harassment is unlike other areas of employment discrimination because it is emotional in nature.[26] Sexual harassment is also unlike other areas of employment discrimination because it is "basically a moral issue and therefore the overall responsibility for its elimination lies with the individual rather than with the law."[27] This idea is important because the legal system can compensate victims of sexual harassment only after the injuries have been sustained. To eliminate sexual harassment on the job, harassment must be dealt with in its larger socio-economic context.

This note traces the evolution of employer liability for sexual harassment in the work place under Title VII of the Civil Rights Act of 1964.

II. The Problem of Definition

To determine the scope of employer liability for sexual harassment under Title VII of the Civil Rights Act, one must begin by determining what types of conduct constitute sexual harassment.

Several comprehensive definitions of sexual harassment

---

25. W. Pepper and F. Kennedy, Sex Discrimination in Employment 36 (1981).
26. *BNA Report*, *supra* note 5, at 21.
27. M. Meyer, *supra* note 7, at 79.

have been expounded. MacKinnon defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[28] MacKinnon also states that "[s]exual harassment may occur as a single encounter or a series of incidents at work. It may place a sexual condition upon employment . . . or advancement; or it may occur as a pervasive or continuing condition of the work environment."[29] The United States Commission on Human Rights defines sexual harassment as "any unwanted attention of a sexual nature that occurs in the process of working or seeking work and jeopardizes a person's ability to earn a living. . . . Harassment ranges from annoying and distracting comments to intimidation, threats and demands to physical acts involving sexual conduct."[30]

Despite these attempts to define sexual harassment, determining what conduct actually constitutes sexual harassment often must be done on a case-by-case basis.[31] Sexual harassment is subjective in nature. What constitutes sexual harassment to one individual may be considered an innocent flirtation to another. Meyer notes that:

> Women appear to be quicker to expand the definition of sexual harassment from the most obvious, job threatening harassment, to harassment in its other, frequently more subtle forms. . . . Men, on the other hand, have not thought a great deal about sexual harassment because society—males and females—has supported their system of interacting with women.[32]

Meyer also notes that many women object to "being touched by the boss, addressed as 'honey' or dearie, being complimented about their clothing after he's looked them carefully up and down, being put in the position where they must listen to talk about a wife who does not understand him"[33] and categorize such conduct as sexual harassment.

---

28. C. MacKinnon, *supra* note 2, at 1.
29. *Id.* at 2.
30. Commission, *supra* note 1, at 7.
31. *See, e.g.*, M. Meyer, *supra* note 7.
32. *Id.* at 38.
33. *Id.*

The E.E.O.C. Guidelines[34] provide a comprehensive definition of sexual harassment. The Guidelines state that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[35]

The Guidelines require that the totality of circumstances be examined before determining whether specific conduct constitutes sexual harassment. Such circumstances include "the nature of the sexual advances and the context in which the alleged incidents occurred."[36]

III. Sexual Harassment and Title VII: The Case Law

Title VII of the Civil Rights Act of 1964, in pertinent part, provides that "[i]t shall be 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 . . . sex."[37]

The case law today has clearly established that most forms of sexual harassment are actionable under Title VII as a variety of sex-based discrimination.[38] In several early decisions, how-

---

34. 29 C.F.R. § 1604.11 (1984).

35. 29 C.F.R. § 1604.11(a) (1984).

36. 29 C.F.R. § 1604.11(b) (1984). Courts are bound to give deference to these Guidelines. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Robson v. Eva's Super Market, 538 F. Supp. 857, 860 (N.D. Ohio 1982). *Cf.* Ferguson v. DuPont, 560 F. Supp. 1172, 1197 (D. Del. 1983).

37. 42 U.S.C. § 2000e-2(a)(1) (1982).

38. *See, e.g.*, Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981); Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1981); Tompkins v. Public Service Elec. & Gas Co., 568 F.2d 1044, 1046-49 (3rd Cir. 1977); Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977); Coley v. Consol. Rail Corp., 561 F. Supp. 645, 646 (E.D. Mich. 1982); Robson v. Eva's Super Market, 538 F. Supp. 857, 860 (N.D. Ohio 1982); Rimedio v. Rev-

ever, many courts were reluctant to deem sexual harassment actionable under Title VII as a form of sex-based discrimination.[39] These courts stated that incidents of a sexual nature were not actionable under Title VII because they were an individual or personal phenomenon.[40] This view, as MacKinnon aptly notes, is inherently discriminatory:

> The ideological and legal function of considering these matters "personal," as opposed to "sex-based," "reasonable," or "employment-related," is to isolate, individuate, invalidate and stigmatize women's experience in order to maintain sexual oppression on the job beyond the reach of the law. . . . The "personal" life here protected, and the "natural" law vindicated, is nothing other than men's traditional prerogative of keeping sexual incursions on women beyond scrutiny or change.[41]

In *Corne v. Bausch and Lomb*,[42] the District Court for the District of Arizona refused to uphold a claim of sexual harassment under Title VII. By so doing, the court helped to maintain sexual oppression on the job. In this case, the plaintiff alleged that she was subjected to numerous physical and verbal sexual advances by a supervisor.[43] The plaintiff claimed that she was forced to resign because of these advances. The court granted the employer's motion to dismiss the Title VII action, stating that "there is nothing in the Act which could reasonably be construed to have it apply to 'verbal and physical sexual advances' by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment."[44] The court also stated:

---

lon, Inc., 30 Fair Empl. Prac. Cas. (BNA) 1205 (S.D. Ohio 1982); Kyriazi v. Western Elec. Co., 476 F. Supp. 335, 336 (D. N.J. 1979). *See also* EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1984) [hereinafter cited as Regs].

39. *See, e.g.*, Fisher v. Flynn, 598 F.2d 663, 665-66 (1st Cir. 1979); Corne v. Bausch and Lomb, 390 F. Supp. 161, 162-64 (D. Ariz. 1975) *vacated and remanded mem.*, 562 F.2d 55 (9th Cir. 1977).

40. *See supra* note 39.

41. C. MACKINNON, *supra* note 2, at 90.

42. 390 F. Supp. 161 (D. Ariz. 1975) *vacated and remanded mem.*, 562 F.2d 55 (9th Cir. 1977).

43. *Id.* at 162.

44. *Id.* at 163.

> It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act 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.[45]

Fortunately, the courts have recognized the absurdity of this view.[46] In *Barnes v. Costle*,[47] the Court of Appeals for the District of Columbia Circuit held that sexual harassment was actionable under Title VII as a form of sex-based discrimination. The court stated that "[i]t is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way."[48]

The *Barnes* court effectively refuted arguments that a cause of action under Title VII for sexual harassment cannot be maintained because it is personal in nature. The court stated that, under Title VII, the employer properly may be held liable for "the discriminatory practices of supervisory personnel."[49] This is so even if only one employee is victimized. The court noted that "[a] sex-founded impediment to equal employment opportunity succumbs to Title VII even though less than all employees of the claimant's gender are affected. The protections afforded by Title VII against sex discrimination are extended to the individ-

---

45. *Id.* at 163-64.

46. *See* Niedhart v. D.H. Holmes Co., 21 Fair Empl. Prac. Cas. (BNA) 452, 469-70 (E.D. La. 1979) *aff'd mem.*, 624 F.2d 1097 (5th Cir. 1980); Stringer v. Commonwealth, 446 F. Supp. 704 (M.D. Pa. 1978). *Cf.* Friend v. Ledinger, 588 F.2d 61, 68 (4th Cir. 1978). In *Niedhart*, the court stated that "sexual harassment is a deeply rooted form of sex discrimination which does operate systematically to deny women equal job opportunity and equal terms and conditions of employment . . . ." 21 Fair Empl. Prac. Cas. at 469-70.

47. 561 F.2d 983 (D.C. Cir. 1977).

48. *Id.* at 990.

49. *Id.* at 993. This is not so where the employer rectifies the conduct once discovered.

ual. . . ."[50] The *Barnes* court also noted that it did not "encounter anything to support the notion that employment conditions summoning sexual relations between employees and superiors are somehow exempted from the coverage of Title VII."[51]

In *Barnes,* the court was presented with a common factual situation. The plaintiff was subjected to numerous sexual advances by her supervisor.[52] To retaliate for her refusal to accede to his demands, the supervisor "[b]egan a conscious campaign to belittle [her], to harass [her], and to strip her of her job duties, all culminating in the decision . . . to abolish [her] job in retaliation for [her] refusal to grant him sexual favors."[53]

In *Tomkins v. Public Service Electric and Gas Co.,*[54] the Court of Appeals for the Third Circuit was presented with a similar issue. In *Tomkins,* the question presented to the court was "[w]hether appellant Adrienne Tomkins, in alleging that her continued employment with appellee Public Service Electric and Gas Co. was conditioned on her submitting to the sexual advances of a male supervisor, stated a cause of action under Title VII of the Civil Rights Act of 1964."[55] The court held that a cognizable claim was indeed stated.[56] To establish the Title VII claim for sexual harassment, the plaintiff must establish that "her employer either knowingly or constructively, made acquiescence in her supervisor's sexual demands a necessary prerequisite to the continuation of or advancement in, her job."[57] In an

---

50. *Id.*

51. *Id.* at 994.

52. *See also* Garber v. Saxon Business Prods., 552 F.2d 1032 (4th Cir. 1977) (female who alleges she was discharged because she rebuffed the sexual advances of a male supervisor states a cause of action under Title VII); Wright v. Methodist Youth Services, 511 F. Supp. 307, 309-10 (N.D. Ill. 1981) (male employee states a cause of action for sexual harassment when he is fired after rebuffing the sexual advances of a male supervisor).

53. Barnes v. Costle, 561 F.2d 983, 985 (D.C. Cir. 1977).

54. 568 F.2d 1044 (3rd Cir. 1977).

55. *Id.* at 1045.

56. *Id.* at 1046.

57. *Id. See also* Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982) (the court sets out the elements for a prima facie case of sexual harassment, which include "(1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a 'term, condition, or privilege' of employment, and (5) respondeat superior."). *Id.* at 647. *Accord* Hall v. F.O. Thacker Co., 24 Fair Empl. Prac. Cas. (BNA) 1499, 1503 (N.D. Ga. 1980).

action for sexual harassment, the plaintiff must establish a nexus between the supervisor's sexual demands and her continued employment.[58] The *Tomkins* court stated:

> The courts have distinguished between complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category. This distinction recognizes two elements necessary to find a violation of Title VII: first, that a term or condition of employment has been imposed and second, that it has been imposed by the employer either directly or vicariously, in a sexually discriminatory fashion.[59]

The courts have recognized the necessity of establishing a nexus between the harassment and the plaintiff's employment. This is because Title VII was designed to protect against artificial barriers to employment, and sexual harassment perpetrated on female employees by supervisors creates "an artificial barrier to employment . . . placed before one gender and not the other. . . ."[60]

An analysis of the case law teaches that there are several distinct variations on the cause of action for sexual harassment. It is important to note, however, that there are also similarities in each of these variations.

A. Quid Pro Quo Sexual Harassment

Quid pro quo sexual harassment occurs when a supervisor retaliates against an employee for refusing to submit to his sexual demands.[61] In quid pro quo cases, the nexus between the unlawful harassment and the employment detriment is clear. The

---

58. *See id.*

59. 568 F.2d at 1048. *See also* Williams v. Saxbe, 413 F. Supp. 654, 660 (D. D.C. 1976), *motion denied*, 13 Fair Empl. Prac. Cas. (BNA) 969 (D. D.C. 1976), *rev'd in part, vacated in part sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *on remand sub nom.* Williams v. Civiletti, 487 F. Supp. 1387 (D. D.C. 1980); Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 66, 71 (E.D. Mich. 1981), *later proceeding* 547 F. Supp. 348 (E.D. Mich. 1982). *Accord* Regs, *supra* note 38.

60. *Williams*, 413 F. Supp. at 657.

61. *See, e.g.*, C. MACKINNON, *supra* note 2, at 42-47.

courts have uniformly held that "an employer may not exact such consideration from an employee."[62]

In *Miller v. Bank of America*,[63] the Court of Appeals for the Ninth Circuit dealt with quid pro quo sexual harassment. In *Miller*, the plaintiff was fired because she "refused her supervisor's demand for sexual favors from, in his words, 'a black chick.' "[64] The court held that the employer was liable for sexual harassment under the doctrine of respondeat superior.[65] The *Miller* court concluded that "respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates company policy."[66]

In *Henson v. City of Dundee*,[67] the Court of Appeals for the Eleventh Circuit discussed quid pro quo sexual harassment and set out the elements necessary to establish a Title VII claim for this type of harassment. The elements cited by the court are:

(1) The employee belongs to a protected group.
(2) The employee was subject to unwelcome sexual harassment.
(3) The harassment complained of was based upon sex.
(4) The employee's reaction to the harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.[68]

The court also stated that "[t]he acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible liability. . . ."[69]

---

62. Cummings v. Walsh Construction Co., 561 F. Supp. 872, 879 (S.D. Ga. 1983). *See also Williams*, 413 F. Supp. at 661; Wacks & Starr, *Sexual Harassment in the Workplace: The Scope of Employer Liability*, 7 EMPL. REL. L.J. 369, 373-74 (1981).

63. 600 F.2d 211 (9th Cir. 1979).

64. *Id.* at 212.

65. *Id.* at 212-13.

66. *Id.* at 213. The employer argued that respondeat superior did not apply because there was an established company policy against the supervisor's actions.

67. 682 F.2d 897 (11th Cir. 1982).

68. *Id.* at 909. *See also Cummings*, 561 F. Supp. at 879.

69. 682 F.2d at 909.

In quid pro quo cases, the plaintiff must show that her refusal to submit to the supervisor's sexual demands caused the loss of a tangible job benefit. If this can be shown, the employer will be held strictly liable for the discriminatory actions of the supervisor.[70] This strict liability is necessary because there are strong elements of sexual coercion present in quid pro quo cases. The *Henson* court stated that, in quid pro quo cases,

> the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. . . . In that case the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline or promote." Because the supervisor is acting within at least the apparent scope of the authority entrusted to him by the employer when he makes employment decisions, his conduct can be fairly imputed to the source of his authority.[71]

In *Heelan v. Johns-Mansville Corp.*,[72] the District Court for the District of Colorado held that the presentation of the plaintiff's prima facie case of sexual harassment does not terminate the court's inquiry.[73] The court stated that "[u]nder certain circumstances the employer may be relieved from liability."[74] The court noted:

> [w]here the employer has no knowledge of the discrimination, liability may be avoided if the employer has a policy or history of discouraging sexual harassment of employees by supervisors and the employee has failed to present the matter to a publicized grievance board. If the employer is aware of the situation and rectifies it, the

---

70. Regs, *supra* note 38.

71. 682 F.2d at 910 (citing Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979) (citations omitted)). *See also* Calcote v. Texas Educ. Found. Inc., 578 F.2d 95, 98 (5th Cir. 1978).

72. 451 F. Supp. 1382 (D. Colo. 1978) (the court stated that to "present a prima facie case of sex discrimination by way of sexual harassment, a plaintiff must plead and prove that (1) submission to sexual advances of a supervisor was a term or condition of employment, (2) this fact substantially affected plaintiff's employment, and (3) employees of the opposite sex were not affected in the same way by these actions.") *Id.* at 1389.

73. *Id.*

74. *Id.*

> employer may not be held liable for the acts of its agent.[75]

The mere making of a sexual advance does not constitute the Title VII violation. The adverse employment consequences to the victims "is what makes the conduct legally objectionable."[76]

Where the plaintiff is unable to establish this employment nexus, the employer will not be held liable for the sexual advances of its supervisory personnel.[77] In Title VII actions for sexual harassment, the courts are basically concerned with the adverse employment effects these advances have on the target employee.[78] In *Clark v. World Airways*,[79] the court noted this when it stated that "cases in which sexual harassment has been held to be actionable under Title VII have normally involved specific action by the employer in retaliation for rebuffed advances, usually a termination of employment."[80]

B. Sexual Favors Per Se

A sexual favors per se case is presented when the target employee is subjected to requests for sexual favors by either coworkers or supervisors but no retaliatory action is taken when the employee refuses these advances.[81] Often, there is no retaliation in these cases "because the woman acquiesces in the request for sexual favors . . . or . . . because the person making the advances has no power over the employment status of the female worker."[82] Courts have reached different results in sexual favors per se cases. Some courts have held that the employer is not

---

75. *Id. See also* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979), Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977).

76. *Heelan*, 451 F. Supp. at 1390.

77. *See, e.g.*, Ferguson v. DuPont, 560 F. Supp. 1172 (D. Del. 1983); Walter v. KFGO Radio, 518 F. Supp. 1309 (D. N.D. 1981); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D. D.C. 1980). "When acquiescence in the sexual advance is not related to continuation or conditions of employment, such conduct does not constitute sexual discrimination under Title VII." Reichman v. Bureau of Affirmative Action, 30 Fair Empl. Prac. Cas. (BNA) 1622, 1645 (M.D. Pa. 1982).

78. *Niedhart*, 21 Fair Empl. Prac. Cas. (BNA) at 468.

79. 24 Fair Empl. Prac. Cas. (BNA) 305 (D. D.C. 1980).

80. *Id.* at 307.

81. *See, e.g.*, Wacks & Starr, *supra* note 62, at 375.

82. *Id.*

liable because the employment nexus is insufficient.[83] In other cases, the courts have dismissed the complaints of plaintiffs who cannot show that the employer had either actual or constructive notice of the harassment. The courts generally hold that the employer cannot be held liable "even if the supervisor does impose a condition of employment upon a subordinate in a sexually discriminatory fashion, when the employer neither knew about it, condoned it nor ratified it and, after acquiring knowledge, the implicated personnel are dealt with appropriately. . . ."[84]

In *Bundy v. Jackson*,[85] the Court of Appeals for the District of Columbia Circuit held that there was a Title VII violation "where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."[86] In *Bundy*, the plaintiff had been subjected to harassment by a supervisor. Although other officials in the government agency where Bundy worked had notice of the harassment, they neither investigated the charges of harassment nor attempted to stop it.[87] The *Bundy* court upheld this cause of action for sexual harassment under Title VII. The court highlighted the importance of permitting the plaintiff to maintain this cause of action despite the fact that a less severe employment nexus was presented than would be presented in a quid pro quo case. The court stated:

> [u]nless we extend the *Barnes* holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance "seriously." . . . Indeed, so long as women re-

---

83. *See, e.g.*, Walter v. KFGO Radio, 518 F. Supp. 1309, 1315 (D.N.D. 1981).

84. *Niedhart*, 21 Fair Empl. Prac. Cas. (BNA) at 467. The employer may take actions that will militate against a finding of actual or constructive notice by establishing that it either used an external investigatory process after receiving a complaint of sexual harassment or that company policy expressly condemns sexual misconduct. An honest nondiscriminatory investigation must be made once there is a complaint of sexual harassment. *Id.* at 469.

85. 641 F.2d 934 (D.C. Cir. 1981).

86. *Id.* at 943-44.

87. *Id.* at 943.

> main inferiors in the employment hierarchy, they may have little recourse against harassment beyond the legal recourse Bundy seeks in this case.[88]

In the *Bundy* case, Judge Wright also noted that "[t]he law may allow a woman to prove that her resistance to the harassment cost her her job or some economic benefit. . . . [T]his will do her no good if the employer never takes such tangible actions against her."[89] Quoting from MacKinnon, Judge Wright concluded that "this, in turn, means that so long as the sexual situation is constructed with enough coerciveness, subtlety, suddenness, or one-sidedness to negate the effectiveness of the woman's refusal, or so long as her refusals are simply ignored while her job is formally undisturbed, she is not considered to have been sexually harassed."[90]

Under the standards enunciated in *Bundy,* the employer has an affirmative obligation to take action once informed that sexual harassment has been perpetrated against an employee by a supervisor or by other employees. *Bundy* requires the employer to "investigate complaints of sexual harassment and deal appropriately with the offending personnel."[91] One court has noted that a "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior."[92]

The courts have generally given a narrow reading to *Bundy,* refusing to hold employers vicariously liable for all acts of sexual harassment on the part of supervisors and employees. This narrow reading of *Bundy* is based on the notion that "Title VII is directed at acts of employment discrimination and not at individual acts of discrimination."[93] Particularly in the sexual favors per se case, the plaintiff must establish a clear nexus between these acts of so-called individual discrimination and her employment to avoid a dismissal of the Title VII action.

To avoid liability when confronted with claims of sexual

---

88. *Id.* at 945.

89. *Id.*

90. *Id.* at 945-46. (quoting from C. MACKINNON, SEXUAL HARASSMENT 46-47 (1979).)

91. Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977).

92. *Id.* In this case, the court refused to hold the employer automatically and vicariously liable for all the discriminatory acts of its agents and supervisors. *Id.*

93. Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 483 (E.D. Wis. 1979).

harassment, it behooves the employer to take some type of action.[94] If such action is not taken by the employer, the plaintiff may be able to establish that the harassment was "actively or tacitly, sanctioned by the employer or constitutes an official policy of the employer."[95] The court in *Heelan* discussed the greater burden this places on the employer.

> If employers have a reason to believe that sexual demands are being made on employees they are obligated under Title VII to investigate the matter and correct any violations of law. Moreover, employers must inform employees that management is receptive to such complaints and if proved true, that management will rectify the situation. If the employer fails to respond to a valid complaint, it effectively condones the illegal acts.[96]

C. The Sexually Offensive Work Environment

The E.E.O.C. Regulations address the problem of the sexually offensive work environment.[97] In the sexually offensive work environment, sexual harassment is perpetrated against the target employee by other employees. The Regulations state that "[w]ith 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."[98]

The Court of Appeals for the Eleventh Circuit dealt with the problem of the sexually offensive work environment exhaustively in *Henson v. City of Dundee.*[99] In *Henson,* the court held that "a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title

---

94. *See, e.g.,* Heelan v. Johns-Mansville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978).

95. *Ludington,* 474 F. Supp. at 483.

96. 451 F. Supp. at 1390.

97. 29 C.F.R. § 1604.11(d) (1984).

98. *Id.*

99. 682 F.2d 897 (11th Cir. 1982).

VII. . . ."[100] In *Henson,* the court set out the elements a plaintiff must establish when stating a cause of action under Title VII based on the offensive work environment. These elements are that

(1) The employee belongs to a protected group.
(2) The employee was subject to unwelcome sexual harassment.
(3) The harassment complained of was based upon sex.
(4) The harassment complained of affected a "term, condition or privilege of employment."
(5) Respondeat superior.[101]

In *Henson,* the court clearly recognized that "[r]epeated, unwarranted and unwelcome verbal and physical conduct of a sexual nature, requests for sexual favors and sexually derogatory remarks clearly may impact on the conditions of employment."[102] This is regardless of the source of such conduct.

The notion that there may be a violation of Title VII when the employer permits a sexually offensive environment to be maintained "stems from the broader problem of employment discrimination."[103] In *Rogers v. E.E.O.C.,*[104] the Court of Appeals for the Fifth Circuit stated that "the state of psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII."[105]

D. Employer Liability for Sexual Harassment by Non-Employees

In *E.E.O.C. v. Sage Realty Corp.*[106] and in *Maranette v. Michigan Host, Inc.*[107] employers were held liable under Title VII for the harassing conduct of non-employees. In both cases, female employees were required to wear revealing uniforms. In *Sage Realty,* the plaintiff, Hasselman, was a lobby attendant in

100. *Id.* at 902.
101. *Id.* at 903-05.
102. Rossein, *supra* note 1, at 291.
103. Allegretti, *supra* note 1, at 446.
104. 454 F.2d 234 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972).
105. *Id.* at 238.
106. 507 F. Supp. 599 (S.D.N.Y. 1981).
107. 506 F. Supp. 909 (E.D. Mich. 1980).

an office building. She was required to wear an extremely revealing uniform and "received a number of sexual propositions and endured lewd comments and gestures."[108] Although she complained to management about the fit of the uniform and about the harassment, management refused to take action. Hasselman ultimately was discharged for refusing to wear the uniform.[109] The District Court for the Southern District of New York held that the employer's requirement that the employee wear the uniform "when he knew that the wearing of this uniform on the job subjected her to sexual harassment, constituted sex discrimination. . . ."[110] The court also stated that "[i]n requiring Hasselman to wear the revealing Bicentennial uniform in the lobby of 711 Third Avenue, defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant."[111] In the *Maranette* case, the District Court for the Eastern District of Michigan held that female employees of a cocktail lounge stated a cause of action under Title VII when they alleged that their employer subjected them to sexual harassment from patrons by requiring them to wear sexually provocative uniforms.[112]

These decisions are in accord with the E.E.O.C. Guidelines, which state that "[a]n 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."[113]

In an interesting development, the District Court for the District of Delaware has held that an employer is liable for sex-based discrimination "when sexual favors played a role" in the decision to promote an employee.[114] In this case, the plaintiff did not show that "she refused specific requests by" the supervisor

---

108. *Sage Realty*, 507 F. Supp. at 605.
109. *See id.*
110. *Id.* at 609.
111. *Id.* at 609-10.
112. *Maranette*, 506 F. Supp. at 910.
113. 29 C.F.R. § 1604.11(e) (1984).
114. Toscano v. Nimmo, 570 F. Supp. 1197, 1204 (D. Del. 1983).

for sexual favors and was then denied the position because of her refusal.[115] Rather, she offered proof that the supervisor had been sexually involved with the applicant that was selected for the position.[116] This decision is supported by the E.E.O.C. Guidelines, which provide that "[w]here 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."[117] It is not entirely clear, however, that this situation does in fact constitute sexual harassment.

IV. Maintaining The Cause of Action

Although the case law has established that the target of sexual harassment may maintain an action under Title VII,[118] it is difficult for a plaintiff to prevail in an action for sexual harassment because problems arise in proving a prima facie case.

The plaintiff must first establish that she belongs to a protected group, namely, that she is a member of a group that Title VII was designed to protect.[119] This requirement is reasonably straightforward because Title VII was designed, in part, to protect women from discrimination on the job.[120]

The plaintiff must then establish that she was subjected to unwelcome sexual harassment.[121] In *Gan v. Kepro Circuit Systems, Inc.*,[122] an action for sexual harassment was dismissed by the District Court for the Eastern District of Michigan because

---

115. *Id.* at 1403.

116. *Id.*

117. 29 C.F.R. § 1604.11(g) (1984).

118. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). *See also* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Evans v. National Post Office Mail Handler's Union, 32 Fair Empl. Prac. Cas. (BNA) 634 (D. D.C. 1983); Martin v. Norbar, Inc., 537 F. Supp. 1260 (S.D. Ohio 1982); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (W.D. Okla. 1980).

119. *See Henson*, 682 F.2d 897.

120. In some cases, the courts have permitted sexual harassment actions to be maintained by men. *See* Wright v. Methodist Youth Services, 511 F. Supp. 307 (N.D. Ill. 1981). *Cf.* Heubschen v. Department of Health and Social Services, 716 F.2d 1167 (7th Cir. 1983).

121. *See Henson*, 682 F.2d 897.

122. 27 Empl. Prac. Dec. (CCH) ¶ 32,379 (E.D. Mo. 1982).

the evidence presented indicated that "the allegedly harassing conduct was substantially welcomed and encouraged by plaintiff," and that "[s]he actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct."[123] Clearly, the particular facts presented in each case will determine whether the harassment is unwelcome. It has been stated that

> [n]ot every unwelcome sexual advance, however, constitutes a violation of Title VII. For example, a mere flirtation has been held insufficient because such an incident fails to establish the requisite showing that "submission to the sexual suggestion constitutes a term or condition of employment." Furthermore, sexually aggressive conduct and explicit conversation on the part of the Plaintiff may bar a cause of action for sexual harassment.[124]

The third element of the prima facie case is that the harassment complained of is based on the plaintiff's gender.[125] In order to establish this element, the plaintiff must establish that the harassment "was perpetrated because she was a female, as [it was] not directed towards male employees."[126] In *Cummings v. Walsh Construction Co.*,[127] the District Court for the Southern District of Georgia noted that a Title VII action for sexual harassment could not be maintained "if the impugned conduct is directed to both sexes and is equally offensive."[128] The plaintiff must show that, but for her gender, the activity complained of would not have occurred.[129] The case law indicates that a male plaintiff will meet this criterion if he is harassed by female co-workers or supervisors.[130]

---

123. *Id. See also* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D. N.J. 1983); Evans v. National Post Office Mail Handler's Union, 32 Fair Empl. Prac. Cas. (BNA) 634 (D. D.C. 1983).

124. Ferguson v. DuPont, 560 F. Supp. 1172, 1197 (D. Del. 1983) (quoting Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1388 (D. Colo. 1974) (citations omitted)).

125. *Henson*, 682 F.2d 897.

126. Cummings v. Walsh Construction Co., 561 F. Supp. 872, 877 (S.D. Ga. 1983).

127. *Id.*

128. *Id.* at 877. *See also* Regs, *supra* note 38.

129. *See, e.g.*, Regs, *supra* note 38.

130. *See, e.g.*, Wright v. Methodist Youth Services, Inc., 511 F. Supp. 307 (N.D. Ill. 1981). *Cf.* Heubschen v. Dep't. of Health and Social Services, 716 F.2d 1167 (7th Cir. 1983).

The plaintiff must then establish a nexus between the sexual harassment complained of and her employment.[131] To show that a term, condition, or privilege of employment was affected as a result of the sexual harassment, the plaintiff must prove that the activities complained of were "sufficiently pervasive and severe to alter her working conditions by affecting her psychological well-being."[132] The district court will dismiss the Title VII complaint if a nexus between the atmosphere of the work place and the plaintiff's employment cannot be established. For example, if the plaintiff was forced to quit her job, the plaintiff was denied a transfer or promotion, or the psychic atmosphere in the work place was extremely poor, the complaint will not be dismissed.[133]

In *Bundy v. Jackson*,[134] the Court of Appeals for the District of Columbia Circuit noted that the terms, conditions, and privileges of employment include more than the loss of tangible job benefits. The court noted that " 'conditions of employment' include the psychological and emotional work environment—that the sexual stereotypes, insults, and demeaning propositions" may cause "anxiety and debilitation" and "illegally poison . . . the environment."[135] To avoid having her action dismissed, the plaintiff must either have evidence that the conduct alleged to constitute sexual harassment altered the conditions of her employment or that it created an abusive working environment.[136]

The final element to be established by the plaintiff is respondeat superior.[137] The plaintiff must present evidence that "[t]he harassment was either actively or constructively known

131. *Henson*, 682 F.2d 897.

132. *Cummings*, 561 F. Supp. at 877. To establish this element of the Title VII claim the plaintiff must establish that "the working atmosphere is so pervaded by persistent and severe harassment that the complainant's psychological well-being is affected . . . . [P]roof of a tangible job detriment is not required to succeed on a claim." *Id.* at 878.

133. *See, e.g.*, Smith v. Rust Engineering Co., 18 Empl. Prac. Dec. (CCH) ¶ 8698 (N.D. Ala. 1978).

134. 641 F.2d 934 (D.C. Cir. 1981).

135. *Id.* at 943-44. The court relies on Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

136. Evans v. National Post Office Mail Handler's Union, 32 Fair Empl. Prac. Cas. (BNA) 634, 638 (D. D.C. 1983).

137. *Henson*, 682 F.2d at 905, 909.

by the employer who failed to take prompt remedial action."[138] One way to establish the applicability of respondeat superior is to present evidence of harassment so widespread and common among the defendant's personnel that constructive knowledge of the behavior can be inferred.[139] In the *Cummings* case, the District Court for the Southern District of Georgia stated that the "fact that an employer may have a policy prohibiting sexual harassment is of little significance if prompt remedial action is not taken."[140] The E.E.O.C. Guidelines provide that

> [a]n 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.[141]

However salutory, the Guidelines have not met with universal acceptance in this respect by the district courts.[142] In *Ferguson v. DuPont*,[143] the District Court for the District of Delaware refused to follow the Guidelines, and explained:

> I believe the better rule is that of requiring actual or constructive knowledge before liability can be imposed in a hostile environment case on the basis of the fact sub judice. The E.E.O.C. Guidelines [impose] too onerous of a burden and employers should not be liable if they seek to alleviate or dispel hostile environments by methods such as strict and prompt remedial measures and strictly enforced and well-known company policies. Further, when supervisory personnel engage in such activity, they

---

138. *Cummings*, 561 F. Supp. at 877. *See also Henson*, 682 F.2d at 905 (employer was not held liable because it was not aware of the harassment).

139. 561 F. Supp. at 877.

140. *Id.* at 878.

141. 29 C.F.R. § 1604.11(c) (1982).

142. *See, e.g.*, Ferguson v. DuPont, 560 F. Supp. 1172, 1198 (D. Del. 1983) (the court required actual or constructive notice before imposing liability).

143. *Id.*

act outside the scope of their authority and agency principles, therefore, do not apply.[144]

The view of the *Ferguson* court notwithstanding, strict liability should be applied. Sexual harassment places an onerous burden on the target employee. Furthermore, when supervisory personnel engage in the harassment, they do so under color of authority. Because the burden of this outrageous conduct falls so disproportionately on the target employees, Title VII must be used as a tool to coerce reluctant employers to take affirmative steps to discourage sexual harassment.[145]

Respondeat superior may be applied when the plaintiff establishes that higher authorities were notified that harassment was occurring.[146] Once notified, the employer is placed under an affirmative obligation to make certain that the harassment is stopped.[147] Appropriate action to take would necessarily include investigating the complaint, and if the harassment charge is found to have merit, taking such other steps as are mandated by the circumstances. This would include firing the offending employees or taking other disciplinary action against them.[148]

It is important to note that "no employer can guarantee its employees a work place free of all insult and harassment."[149] Especially in cases of co-worker harassment, the case law merely requires that the employer "do what it can to eliminate harassment when management knows of it."[150] An employer may not

---

144. *Id.* at 1199.

145. *See generally* C. MACKINNON, *supra* note 2.

146. *Henson*, 682 F.2d at 905, 907; *accord* Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D. N.J. 1983) (employer in this case was not notified of harassment, which was one of the reasons given by the court, citing *Henson*, to deny the claim).

147. *Bundy*, 641 F.2d 947; *see also* Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627, 1633 (W.D. Okla. 1980) (employer, police department, held liable under Title VII under a theory of constructive discharge when the Chief of Police failed to investigate the plaintiff's claims of sexual harassment by her immediate supervisor as well as by other employees. This failure on the part of the employer is the crux of its liability in this case).

148. *See e.g.*, Siniscalo, *Sexual Harassment and Employer Liability: The Flirtation that Could Cost a Fortune*, 6 EMPL. REL. L.J. 369, 386 (1981); COMMISSION, *supra* note 1, at 15. Suggestions to employers to avoid liability include "a clear company policy against sexual harassment, and a clear program for combating harassment if it occurs." Wacks & Starr, *supra* note 62, at 386.

149. Allegretti, *supra* note 1, at 454.

150. *Id.*

tolerate sexual harassment perpetrated either by co-workers or by supervisors.[151] A policy against sexual harassment on the part of the employer is not sufficient to escape liability. Once made aware that sexual harassment is occurring, the employer must take affirmative steps to make certain that it is stopped.[152]

V. CONCLUSION

Incidents of sexual harassment do not occur in a vacuum. They are part of a series of interactions between the target employee and the harasser(s). "Risque jokes, double entendres, and graphic sexual descriptions can all be a frequent aspect of some departments and some working relationships."[153] Not all of this will, in every instance, constitute sexual harassment. On one level, sexual harassment is merely a judgment by an employee that the conduct directed towards her is uncalled for and unbearable.[154] One observer has cogently noted that:

> What makes one person angry and insulted may amuse or mildly irritate someone else. One woman may not even notice that the boss constantly calls the women in the office "sweetie" or "cutie," while another will feel the hair on the back of her neck bristle every time he does it. Part of the difference is in the values brought to the judgment of this behavior.[155]

The Title VII action for sexual harassment provides protection "in cases of persistent and severe harassment."[156] Not every incident is persistent and severe. It is up to the employee in many instances to determine whether she is overreacting to an innocent flirtation and, if not, to confront the harasser and let him know that his behavior is not acceptable. Only after this avenue has been exhausted should the target employee pursue more drastic remedies. The courts should be a last resort. In-

---

151. *Id.* at 461. *See also* Regs, *supra* note 38; Martin v. Norbar, Inc., 537 F. Supp. 1260 (S.D. Ohio 1982); Price v. Lawhorn Furniture Co., 16 Empl. Prac. Dec. (CCH) 8342 (N.D. Ala. 1978); Munford v. J.T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).

152. Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).

153. M. MEYER, *supra* note 7, at 69.

154. *Id.* at 72.

155. *Id.*

156. Allegretti, *supra* note 1, at 461.

house remedies such as reporting the incident(s) to a supervisor should be used before any lawsuit is filed. The case law indicates that if the target employee is unable to show actual or constructive knowledge of harassment on the part of the employer the case will be dismissed. The most effective way to establish notice is to complain about the harasser(s) to management.

Daniel Leach, an E.E.O.C. Vice-Chairman, has stated that the Guidelines were promulgated "so that employers can rely on those judgments. And if they choose they can voluntarily comply with the law rather than wait for a government agency to enforce the law against them—which would cost them a lot of money."[157] Leach has also indicated that:

> [t]he guidelines have alerted employers that there are things that they can do on their own to limit their liability in sexual harassment cases. "We've said [to employers:] set up your own in-house machinery . . . make it credible so that when a complaint is filed by a woman who believes she has been sexually harassed, there is an investigation. Then there is a sense among employees that the investigation has integrity and if there is a finding that someone in the line of authority is at fault that there is going to be some kind of disciplinary action taken."[158]

The E.E.O.C. Guidelines and the case law expresses the "outer parameters of Title VII."[159] Generally, behavior that can be categorized as sexual harassment must be relatively obscene. Behavior that is merely obnoxious or flirtatious is usually not defined as constituting sexual harassment by the courts. The target employee may not participate in the harassing behavior nor may she file a Title VII claim before complaining to her employer about the harassment. Once made aware of the harassment, the employer has an affirmative obligation to take reasonable steps to make certain that its employees work in an atmosphere free from harassment. Such steps include firing the offending employees.[160] In *Snipes v. United States Postal Ser-*

157. *BNA Report*, *supra* note 5, at 7.
158. *Id.*
159. *Id.*
160. *Id.*

vice,[161] a foreman was fired for engaging in incidents of sexual harassment. The Court of Appeals for the Fourth Circuit upheld the termination stating that "[t]he agency has an obligation to its employees to create and maintain a work environment free of sexual harassment."[162]

The problem of sexual harassment in the work place is an important one. It transcends the economic and political. Rather, as one commentator has aptly noted, sexual harassment is a basic "indecent, inhuman indignity" which society must refuse to accept.[163]

Helen D. Rosen

161. 677 F.2d 375 (4th Cir. 1982).
162. *Id.* at 1258.
163. *BNA Report*, *supra* note 5, at 32.