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DAMAGES IN SEX HARASSMENT CASES:
A COMPARATIVE STUDY OF
AMERICAN, CANADIAN, AND BRITISH LAW

Joseph M. Kelly* & Bob Watt**

I. INTRODUCTION

Great Britain, Canada, and the United States have all experienced an explosion in sexual harassment litigation. All countries now have administrative agencies that adjudicate allegations of sexual harassment in the workplace and which may award damages beyond back or front pay. While sex discrimination has long been prohibited in most countries, providing a legal remedy for sexual harassment is a relatively recent development.¹ In this article, the authors survey sexual harassment

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1. Author Bob Watt has argued elsewhere that sexual harassment should not be viewed

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litigation in Great Britain, Canada, and the United States, paying particular attention to the levels of compensation or damages that have been awarded to successful litigants in each country. A number of conclusions are then drawn from this survey.

While most sexual harassment is by men against women, not all sexual harassment cases involve complaints by female workers against their male superiors. In one case, a male manager of a California manufacturing plant who sued his former female boss and employer for sexual harassment received a record $1.017 million in damages. The jury of ten women and two men included $375,000 for emotional distress and $550,000 in punitive damages in its award against the company. The male victim in this case delayed reporting the incident for four years and, ironically, had "a history of sexually harassing his own employees." The victim's attorney understandably viewed the verdict "as a vindication of the rights of 'all persons, including men, ... to a workplace free of ... sexual harassment.'" Some women's rights activists, however, believe the verdict "reflects deep-rooted prejudice against powerful women in business positions," and that the jury was biased against the female supervisor because of her business success. In perhaps the most bizarre case as a form of discrimination. See Janet Dine & Bob Watt, Sexual Harassment: Moving Away from Discrimination, 58 MOD. L. REV. 343 (1995).


3. Man Wins $1 Million Sex Harassment Suit, supra note 2.


5. Only in America, supra note 2.

6. Id.

7. Id. The trial judge offered reduced damages of $350,000 or a new trial for damages. Gutierrez requested a new trial. Marjorie Murray, Sex Discrimination: Judges v. Juries, WORKING WOMAN, Mar. 1, 1994, at 11. In another harassment case filed by a former used car salesman against his manager, the complainant alleged offensive touching and sexually suggestive remarks which resulted in a hostile work environment causing extreme "emotional distress." Former Salesman Files Sex Harassment Suit, AUTOMOTIVE NEWS, Oct. 11, 1993, at 23. Plaintiff later discovered the alleged harasser was a transsexual. Id.; Mark Shaffer, Harassment Suit Filed Against Transsexual Boss, ARIZ. REPUBLIC, Sept. 9, 1993, at B2.

Some cases settle out of court. An aide to a St. Paul, Minnesota City Councilwoman received $105,000 in October 1993 for alleged harassment occurring from January 1990 until August 1991 which included an invitation to join her harem. Julia Lawlor, Women
case yet reported, two male jewelry workers were forced to engage in sexual acts with their male boss’s secretary. Specifically, “[one] was ordered to have sex with [the secretary] during an after-hours striptease at work.” The other male employee was forced to have sex with the same secretary. The judge in this case awarded the second plaintiff damages of $1737 in back pay and the first only $1 for sexual harassment, both were awarded litigation costs.

One recent study found that an average of three percent of New York males have been harassed by their female bosses, while two percent of New York males have been harassed by gay male bosses. The same study indicated that females are two to three times more likely to be harassed by their male bosses than a male employee is likely to be harassed by his female supervisor. In fact, one federal judge commented that “[a]ccording to a May 21, 1993 article in the New York Times, EEOC [Equal Employment Opportunity Commission] records show that in 1992,

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8. Templin, supra note 7.
9. Id.
10. Id. Harassment claims made by men are no longer uncommon. See, e.g., Barbara Carton, Muscled Out? At Jenny Craig, Men Are the Ones Who Claim Sex Discrimination, WALL ST. J., Nov. 29, 1994, at A1. Eight males, all former Jenny Craig employees, filed sex harassment complaints with the Massachusetts Commission Against Discrimination, alleging comments such as “tight buns” had been made and the necessity of a sex change or wearing a bra as a requirement for promotion. Id. Three of the men have been informed that the Commission has determined their complaints have probable cause for “gender bias.” Id. See also David Kipen, Disclosure Discourse Disheartens: Women Remain Outraged at the Portrayal of Sexual Harassment in the Workplace, TAMPA TRIB., Jan. 7, 1995, at 1; John Carlin, “Harassed” American Men Sue the Pants Off One Another, THE INDEPENDENT (London), Mar. 5, 1995, at 18; cf. Smith v. Velcro Laminates, Inc., 3:94-CV-556RP, 1995 U.S. Dist. LEXIS 12654 (N.D. Ind.) (summary judgment granted to the defendant notwithstanding, arguendo, that female supervisor’s actions to a male were unwelcome sexual harassment and the male employee failed to present evidence to rebut the defendant’s claims that the plaintiff was terminated for poor work performance).

12. Id. During the past 12 years, approximately 10 percent of the 450 to 600 complaints filed annually at the New York Office of Sexual Harassment were filed by men. Alfred Lubrano, Turning the Tables Men-as-Victim Stories Start to Percolate in the Workplace, OTTAWA CITIZEN, Dec. 10, 1994, at D3.
968 sexual harassment claims [out of 10,577¹³] were filed by men, "¹⁴ compared with 514 out of 6886 complaints filed in 1991.¹⁵

Canadian authorities also agree that female harassment of males is rare.¹⁶ One Canadian employment law specialist could not "confirm that the sexual harassment of men is as common as the media seem to think. The problem is still far more likely to affect women. However, [female harassment of males] does happen."¹⁷ In the United Kingdom, as in the U.S. and Canada, men have been sexually harassed. In one English case, a male security guard received $4450 in general compensatory damages and $2250 in moral damages for "hurt feelings" when he was sexually harassed by his male boss.¹⁸

Same-sex sexual harassment is estimated at approximately five percent of all harassment cases.¹⁹ The number may increase as gays become increasingly vocal about their rights as employees;²⁰ however, "[w]hether same-gender sexual harassment is actionable is a vigorously debated issue."²¹ Some jurisdictions in the United States have concluded that an employee has a cause of action for same-sex sexual harassment. In Mogilefsky v. Superior Court,²² a California appellate court reversed a trial court's finding that a sexual harassment suit filed against an individual of

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15. Man Wins $1 Million Sex Harassment Suit, supra note 2.
18. Harassment Case in Britain, WALL ST. J., June 22, 1993, at A11. In Britain and in each Canadian province except Quebec, hurt feelings is the equivalent of pain and suffering in the U.S. In Quebec, moral damages are awarded for hurt feelings.
20. Id.
the same sex as the plaintiff was "not a sex harassment case. . . ."23 The complainant in Mogilefsky alleged that his supervisor had told him that he would receive more compensation if he joined him in his hotel suite,24 and that the supervisor had created a sexually-harassing environment.25 In rejecting an earlier California appellate decision,26 the Mogilefsky court stated,

[w]e find no basis of support in the statutory language for the contention that the Legislature intended to limit protection from sexual harassment to male-female harassment. Although the statute does not specify whether it prohibits "same gender" harassment or "other gender" harassment, no ambiguity is created by this omission. Common usage indicates that in the absence of a modifying adjective, the Legislature intended to prohibit sexual harassment in all cases.27

The Mogilefsky court also criticized Goluszek v. Smith,28 in which an Illinois court concluded that same-sex sexual harassment was "not the type of conduct Congress intended to sanction when it enacted Title VII [of the 1964 Civil Rights Act]."29 In contrast, the Mogilefsky court stressed that "the weight of federal authority" does allow a remedy for same-sex harassment and cited, inter alia, Polly v. Houston Lighting & Power30 as one example. In Polly, the court concluded that "Title VII was intended to apply to claims of harassment based on sex, without regard to the

23. Id. at 117 (quoting the minute order issued by the trial court in Mogilefsky v. Silver Pictures, No. SC 016436, min. order (Super. Ct. L.A. Nov. 16, 1992)). The case settled out of court for an undisclosed sum. An attorney for the motion picture studio utilized a unique argument. "As a feminist, I object to men taking advantage of a law meant to give women equal footing at the workplace." Christian, supra note 19. In August 1995, a federal jury concluded that a male employee was sexually harassed by his male supervisor. The case settled for an undisclosed sum before the jury could determine damages. Man Wins Harassment Suit Against Man, N.Y. TIMES, Aug. 13, 1995, at 15.

24. Mogilefsky, 26 Cal. Rptr. 2d at 117.
25. Id.
27. Mogilefsky, 26 Cal. Rptr. 2d at 119.
29. Mogilefsky, 26 Cal. Rptr. 2d at 120 (quoting Goluszek, 697 F. Supp. at 1456).
gender of the complainant or the harassing party." 31 The court went on to quote from the EEOC’s Compliance Manual: “The victim does not have to be of the opposite sex from the harasser.” 32

If same-sex sexual harassment is actionable, the logical extension would, of course, be to allow a cause of action against a gay or lesbian harasser if his or her actions were responsible for the creation of a hostile work environment. In Smith v. Brimfield Precision, Inc., 33 the plaintiff quit his job after several weeks because a male coworker had grabbed the plaintiff’s nipple, pulled the hair on his arm, and suggested oral sex. 34 When the plaintiff complained, the Massachusetts Commission Against Discrimination awarded him $25,000 for emotional distress notwithstanding the fact that the plaintiff was unemployed for only two weeks. 35 In another case, a heterosexual forty-six year-old female stage director at the New York Metropolitan Opera accused her employer and two gay employees of creating a hostile work environment and alleged she had been fired because she had “complained about ‘numerous objectional pictures of young males in various stages of nudity’ plastered up on the opera house walls in areas where she worked.” 36

What if the victim is being harassed by a bisexual? In some instances, a supervisor may be liable if his or her verbal harassment is directed at both male and female employees. The analysis may hinge upon whether the person is a bisexual harasser or an equal opportunity harasser. In Chiapuzio v. BLT Operating Corp., 37 a supervisor was alleged to have subjected a husband and wife to “an incessant series of sexually abusive remarks...” 38 The court, in denying the defendant’s motion for

31. Id. at 137.

32. Id. (quoting the EEOC Man. [CCH] § 615.2[2][b][3])). Although the plaintiff’s sexual harassment claim failed in Polly, the court concluded that Title VII was applicable to same-sex sexual harassment. Id.


34. Carlin, supra note 10.

35. Id. Smith v. Brimfield “has no precedent either in [Massachusetts], in the rest of the United States or, in all likelihood, anywhere on the planet.” Id.


38. Id. at 1335. See Kopyk v. Canadian Empl. & Immigration Comm’n, 5 Can. Hum. Rts. Rep. D/1895 (Feb.-Mar. 1984). “The central problem in all of these situations is that a specific employee (whether male or female [or] heterosexual or homosexual) is the subject of harassment and therefore has had imposed on him or her, conditions of employment which were not inflicted upon employees of the opposite gender. The target
summary judgment, concluded that the supervisor was not really "a bisexual harasser, but [rather] an 'equal-opportunity' harasser whose remarks were gender-driven." The law on bisexual sexual harassment is, however, still uncertain. In Ryczek v. Guest Services Inc., the

of the harassment suffers disparate treatment based on sex. As was noted in Bundy v. Jackson: Id. ¶ 16284. 

In each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender? Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike.  

Id. (quoting Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (emphasis added) (citations omitted)).

As the court in Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 636 (1995), explained, abusive comments that relate to gender constitute harassment. "It is one thing to call a woman 'worthless,' and another to call her a 'worthless broad.'" Id. at 1464. "[Race-based and gender-based] language differs fundamentally [from] terms like 'jerk' or 'asshole.'" Id. Cf. Johnson v. Tower Air, Inc., 149 F.R.D. 461 (S.D.N.Y. 1993) (no cause of action notwithstanding male supervisor's obscene gestures such as grabbing his crotch since he was unpleasant to both sexes and his actions appeared "far more hostile and angry than they [did] sexual." Id. at 469.)


40. The following recent cases have found liability or indicated in dicta they would find Title VII liability for same-sex sexual harassment:


The following recent cases have found NO liability under Title VII for same-sex sexual harassment:

plaintiff worked as a student employee for a culinary arts employer.42 The plaintiff alleged that she had been subjected to unwelcome sexual comments from her female supervisor, including an inquiry about her breast size.43 The court, while granting the defendant's motion for summary judgment, opined that if the pattern of harassment had been sufficiently pervasive, the plaintiff might have had a viable cause of action if her supervisor was a lesbian, but not if her supervisor was bisexual.44 The Ryczek court further suggested that "any defendant could avoid Title VII liability for sexual harassment by claiming to be a bisexual or by harassing members of both sexes. This would appear to produce an anomalous result: a victim of sexual harassment . . . would have a Title VII remedy in all situations except those in which the victim is harassed by a particularly unspeakable cad who harasses both men and women."45 The court noted that, at the very least, this "would lead to bizarre results and some rather provocative trial testimony."46

II. THE UNITED STATES

During the early 1980s, numerous federal appellate decisions concluded that a sexually hostile work environment was actionable.47 These decisions were reached under the parameters of sexual harassment litigation established in two United States Supreme Court cases: Meritor Savings Bank v. Vinson48 and Harris v. Forklift Systems, Inc.49 In Meritor, the Supreme Court explained that sexual harassment generally has

42. Id. at 756.
43. Id. at 759 n.4.
44. Id. at 761.
45. Id. at 762.
46. Id. at 761 n.6.
49. 114 S. Ct. 367 (1993). By September 1994, the plaintiff was "one step closer" to receiving damages of $151,435 in back pay and interest as recommended by a federal magistrate. Harris, One Step Closer to Collecting Damages for Sexual Harassment, WASH. INSIDER (BNA), Sept. 23, 1994.
two recognized forms. The first is "quid pro quo" harassment, where an employee's continued employment or benefits are contingent upon his or her acceptance of an unwelcome sexual advance.50 The employer is always strictly liable for quid pro quo harassment.51 The second form of harassment is the creation of a hostile or abusive workplace environment, where an employee is subjected to offensive sexual activity or innuendos at the workplace.52 In cases of hostile workplace environment harassment, an employer may be held liable if it should have known about the workplace harassment.53 In either form, however, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"54 While the Supreme Court has not yet decided what standard should be applied by the courts in determining what constitutes unwelcome or offensive sexual behavior,55 many federal appellate courts have applied the standard of a "reasonable woman" under similar circumstances.56

50. Meritor, 477 U.S. at 64-65.
52. Meritor, 477 U.S. at 64-65.
53. Id. at 71.
54. Id. at 68. "Welcome sexual harassment" is an oxymoron. Cf. Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991).
55. Meritor, 477 U.S. at 72.

As the Andrews court explained in adopting the reasonable woman standard for workplace liability, "Obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse.' Although men may find these actions harmless and innocent, it is highly possible that women may feel otherwise." Andrews, 895 F.2d at 1485-86 (citations omitted). State supreme courts, however, are split on this issue. See Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445 (N.J. 1993), which accepted a gender-conscious standard, id. at 453-54, and Radike v. Everett, 501 N.W.2d 155 (Mich. 1993), which rejected a gender-conscious standard for various reasons including the observation that "a gender-conscious standard could reintrench the very sexist attitudes it is attempting to counter. The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace." Id. at 167.
In *Harris*, the Supreme Court eased the plaintiff's burden of proof by concluding that a sexual harassment victim is not required to prove psychological damage. The Court stated that "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." Federal appellate courts began to ease the complainant's burden of proof almost immediately after this standard was established. For example, in *Burns v. McGregor Electronic Industries, Inc.*, a female employee alleged she was sexually harassed at work but the trial court denied judicial relief because she had posed nude "in a lewd magazine called *Easyriders*." The trial court found for the defendant; however, its decision was reversed by the appellate court which stated that the trial court's finding "that the conduct was unwelcome but not offensive was internally inconsistent as a matter of law. Whether the behavior is unwelcomed is to be determined by weighing whether the conduct was uninvited and offensive."6

Sexual harassment litigation has been stimulated in the United States by the Civil Rights Act of 1991, which for the first time made the same remedies available to victims of discrimination based on age, race, sex, or disability. This Act permits a jury to award exemplary and other damages on a sliding scale ranging from $50,000 (where the employer employs fifteen to 100 individuals) to a cap of $300,000 (where more than 500 individuals are employed), excluding racial discrimination, where there is no cap. Prior to the passage of this Act, an individual who wished to take legal action against an employer that permitted or engaged in any form of prohibited discrimination had to file a complaint with the

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58. *Id.* at 371 (citation omitted).
59. 989 F.2d 959.
60. *See id.* at 962.
62. *Burns*, 989 F.2d at 962.
Equal Employment Opportunity Commission (EEOC). This condition precedent to litigation was often seen as a waste of time since the EEOC rarely took any action.\(^6\) Often a complainant would timely file the complaint, wait the required 180 days, and then receive a “right to sue” letter which allowed him or her to litigate in federal court within ninety days of receipt of the letter.\(^7\) Furthermore, the only remedy then available under Title VII was back pay and reinstatement.\(^8\) Consequently, the plaintiff’s lawyer would often file common law tort claims such as the intentional infliction of emotional distress or battery.

Now, as a result of the 1991 Civil Rights Act, the plaintiff not only may seek up to $300,000 in damages for sexual harassment,\(^9\) but may also file pendant common law causes of action for intentional torts or, simultaneously, a cause of action pursuant to a state human rights act.\(^70\)

\(^{66}\) K. Bruce Stickler, *For Job-Bias Suits, Ballooning Costs*, N.Y. Times, July 17, 1994, at 11. In 1991, 6883 sex harassment complaints were filed with the EEOC. In 1992, 10,501 sex harassment complaints were filed, and in fiscal 1993, 11,983 sex harassment complaints were filed. The awards from 1992 to 1993 increased by 98%. *Id.*

For information on the EEOC and the resolution of complaints, see *Cost of Sexual Harassment to Employers Up Sharply*, Women in Pub. Serv. (SUNY/Ctr. for Women in Gov’t, Albany, N.Y.), Spring 1994. The EEOC has rejected 73% (34,471) of filed sex harassment cases (54,908) for insufficient cause over the six years prior to 1995. “Another 7,899 have been left adrift . . . [and 991 have been pushed] to the threshold of a lawsuit.” Peter T. Kilborn, *A Sexual Harassment Case Draws Swift Action from an Agency*, N.Y. Times, Jan. 10, 1995, at A16. When a union steward exposed himself to two female workers, they filed complaints but were subjected to retaliatory abuse and eventually quit. The supervisor was convicted of public indecency and the EEOC “finished most of its [investigatory] work in nine months—‘lightning speed,’” *id.*, according to the plaintiff’s lawyer. The EEOC conciliation process resulted in suggested “payments to the women totaling at least several hundred thousand dollars each.” *Id.*


\(^{68}\) Stickler, *supra* note 66.


Damages pursuant to the 1991 Act may not be assessed against the harassing supervisor.\(^7\) Because Congress decided not to include small entities under the Act, many federal courts have concluded that “it is inconceivable that Congress intended to allow civil liability to run against individual employees.”\(^7\)

A plaintiff may, of course, bring both racial and sexual harassment claims in a single action. In *Johnson v. Indopco, Inc.*,\(^7\) an African-American employee claimed in her amended complaint that she was racially discriminated against and sexually harassed when her personnel manager, commenting on her marriage at a young age, stated that she should not “settle for second best when [she] could have the best with [him].”\(^7\) The court denied the defendant’s motion to dismiss the racial discrimination claim, but allowed his motion to dismiss the plaintiff’s sexual harassment claim because it found the pleaded actions were neither sufficiently severe nor sufficient to state a quid pro quo cause for

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Rights Act specifically permits punitive damages up to $5000. 18 PA. CONS. STAT. § 3213(D) (1995).


72. *Id.* at 587. For a list of appellate decisions denying relief to employees suing employers in their individual capacity, see Stefanski v. Zehetner & Assocs., 855 F. Supp. 1030, 1032-34 (E.D. Wis. 1994). *But see* Johnson v. University Surgical Group, 871 F. Supp. 979 (W.D. Oh. 1994) (rejecting Miller, 991 F.2d 583, and finding that a co-employee supervisor may be personally liable for intentional sexual harassment if the liability is based on the individual’s own acts, as opposed to acts in compliance with company policy); Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989) (allowing facts to be presented as to whether a supervisor may be considered an “employer” and thus held liable). A supervisor may be held personally liable for terminating a disabled employee. Frances A. McMorris, *Boss May Be Personally Liable if Firing Violates Disability Law*, WALL ST. J., May 2, 1995, at B1. A state statute may be interpreted to allow a supervisor to be held personally liable for sexual harassment. *See, e.g.*, Page v. Superior Ct., 31 Cal.App. 4th 1206 (1995) (supervisor personally liable pursuant to California Fair Employment and Housing Act).

A CEO in a closely held corporation who is found liable for the tort of sexual harassment may not be covered by insurance. Northern Ins. Co. of N.Y. v. Morgan, Nos. 1 CA-CV 92-0220 & 1 CA-CV 92-0553 (consolidated) 1995 Ariz. App. LEXIS 214 (Sept. 26, 1995) (no coverage for $2.5 million judgment because the harassment was an intentional act that precluded the duty to defend). The Arizona insurance statute, ARIZ. REV. STAT. ANN. § 41-621 (1995), has been held not to indemnify state employees for sexual harassment when the acts are beyond the course and scope of employment. Arizona v. Schallock, No. CA-CV 92-0410, 1995 Ariz. App. LEXIS 177 (Ariz. Ct. App. Aug. 10, 1995).


74. *Id.* at 1045 (quoting from plaintiff’s amended complaint at p.34).
Predictably, the plaintiff filed an amended complaint to include additional facts; e.g., that her employer had also stated that he "could 'do a lot' for [her]," a comment made when he was criticizing Anita Hill's testimony in the Clarence Thomas confirmation hearings. The court found that the plaintiff had alleged sufficient facts under the quid pro quo theory in her amended complaint and denied defendant's motion to dismiss.

Litigation will undoubtedly be stimulated by the creation of sexual harassment class actions. In December 1991, a federal judge approved "the first ever sexual harassment class action." The judge permitted approximately 100 female mine workers of Eveleth Taconite Company to sue pursuant to the reasonable woman standard. The plaintiffs produced "a book of about [sixty] photographs of nude photos, amateur cartoons and graffiti [that were displayed] at the Eveleth facility and in supervisors' offices. . . ." "There was [also] testimony that during the class period, visual references to sex and to woman as sexual objects were found throughout Eveleth Mines. . . ." The trial court's decision "focused on male employees' language, finding that men consistently referred to women in terms of body parts and commented on specific women's sex lives." The court found that Eveleth Mines was "male dominated in terms of the sexualized nature of the workplace." The court concluded that each woman must show how the defendants' practices of "exposing women to acts of sexual harassment [were] sufficient to alter the terms or conditions of the reasonable woman’s employment."
Although numerous sexual harassment claims have been made on the basis of sexually-hostile work environments, there is a limit to the type of evidence that is admissible to demonstrate the existence of such an environment. In *In re Stroh Litigation*, a Minnesota court refused to allow the plaintiffs to submit a television commercial featuring a fictitious Swedish bikini team descending on an all-male campsite as evidence of a hostile work environment. The court concluded that introduction of this non-workplace material would be "wasteful and cumulative" and that any probative value would be "substantially outweighed by the danger of turning an already complex trial into a forensic enigma."

Other examples of harassment claims based on a sexually-hostile work environment include suits brought by a number of waitresses against their former employer, Hooters Restaurant, in Minneapolis. The women alleged that the sexually provocative uniforms they were ordered by their employer to wear resulted in sexual harassment by customers. Had the cases not settled out of court, they could have shed light on the issue of whether an employer may be held liable for sexual harassment by customers in the workplace. Employer liability for sexual harassment has been established in a case where cocktail waitresses at a Ramada Inn were required to flirt with customers and wear revealing attire on certain theme nights (e.g., "Whips and Chains Night" and "Bikini Night").

These incidents ranged from a male pretending to perform oral sex on a sleeping woman co-worker to a man touching a woman in an objectionable manner, to women being presented with various dildos, one of which was named 'Big Red.' However, this conduct was less common than either visual materials or verbal statements. In fact, few women raised experiences involving offensive physical conduct." *Id.* at 880.

86. *Id.*; see Christi Harlan, *Ad Can't Be Evidence*, WALL ST. J., Nov. 9, 1993, at B3.
87. 63 Fair Empl. Prac. Cas. (BNA) at 259.
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employer was also held responsible for customer harassment when it required a female employee to wear a patriotic and "sexually provocative red, white and blue [Bicentennial] theme costume" and then terminated her in retaliation after she complained about customer sexual harassment. Many sexual harassment cases, whether filed in federal or state court, are settled prior to trial. In August 1995, the EEOC negotiated a $1.2 million settlement with Del Laboratories of Farmingdale, New York, on behalf of fifteen female employees who claimed they were subjected to obscene and sexually abusive behavior by their executive superior. "The complaint alleged [that the supervisor had] grabbed one woman's left breast, touched two women on their buttocks, and frequently addressed female employees with his fly open." In February 1995, four female employees settled their sexual harassment case against the Chevron Corporation for $2.2 million plus legal fees. The four plaintiffs, as well as twenty-four of their female co-workers, had written to Chevron to complain about both sexual harassment and sex discrimination in the workplace. Two of the plaintiffs claimed to have been singled out and subject to retaliatory management actions; one, who received $1.3 million in the settlement, "had received through inter-office mail pornography showing sexual torture and bondage." The women also claimed they "would boot their computers and find a graphic of a man masturbating, or [e-mail] lists of reasons why beer is better than women." In April 1991, twenty-two female correction officers settled their claims, which included sexual harassment, against New York City.

93. Shearer, supra note 92, at 78.
94. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 607 (S.D.N.Y. 1981); see Shearer, supra note 92, at 78. The author opines, there have been few reported cases of employer liability for third-party sexual harassment notwithstanding the EEOC guidelines of 1980 (Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604 (1995)) that established liability for this kind of activity. Id. at 75.
96. Id.
98. Id.
99. Id. The legal fees of the plaintiffs may be as much as $1 million. Jorge Aquino, Chevron's Road to Settlement, RECORDER (American Lawyer Media, L.P.), Mar. 15, 1995, at 1. The plaintiffs were denied class action certification for their claim of sexual harassment. Id.
Each plaintiff will receive between $55,000 and $160,000 in the settlement.\textsuperscript{100}

In March 1993, former Minnesota Stars owner Norm Green was sued by his former executive assistant who claimed she had been sexually harassed by Green.\textsuperscript{101} Although Green insisted he never pressured the plaintiff to have sex and filed a motion to dismiss, the plaintiff’s lawyer insisted that the question of whether Green had pressured the plaintiff to have sex was irrelevant and that she had an actionable claim because Green had made frequent comments about her appearance and had kissed her.\textsuperscript{102} The case was settled in February 1994; Green is believed to have agreed to pay $500,000 on settlement and another $250,000 each year for six years thereafter.\textsuperscript{103}

Sometimes an employer’s settlement of a sexual harassment claim will encourage, rather than end, the filing of sexual harassment complaints by its other employees. In 1992, Geffen Records paid a estimated $500,000 settlement to end a suit by a former female secretary who alleged sexual harassment, assault, and battery.\textsuperscript{104} Almost immediately thereafter, a former Geffen promotions director announced she would file a $5 million suit for sexual harassment against the company.\textsuperscript{105} The plaintiff in the second case claimed that she had been subjected to verbal and physical abuse and that her supervisor had, on one occasion, “unzipped his trousers and displayed his penis.”\textsuperscript{106}

Notwithstanding the risk of opening the door to disgruntled employees, it is often easier to settle a sexual harassment case than to
pursue litigation. In a different entertainment industry sexual harassment case, a former Hollywood tour employee claimed her two bosses had pinched and fondled her, and accused one boss of “masturbating in front of her.”

Although the plaintiff sued for $10 million, she settled for $600,000 after fifteen hours of mediation. Finally, in another sexual harassment suit, The Santa Cruz Operation, a software firm, settled out of court with four plaintiffs for $1.25 million.

If settlement fails, and assuming the defendant’s motion to dismiss or for summary judgment is not granted, the next step is a trial. A typical plaintiff may allege state and federal statutory harassment, as well as assault, battery, emotional distress, and other causes of action. A plaintiff seeking to bring his or her case to trial may experience considerable delays. In Currie v. Kowalewski, for example, the plaintiff alleged her employer sexually harassed her at work from August 1989 until she was constructively discharged in August 1990. After receiving a right to sue letter from the EEOC in 1991, she commenced litigation against her employer. Specifically, she claimed, without any corroborating witnesses, that her employer had asked her and other female employees to have his baby, gave her twenty to thirty “full-body hugs” (over half of which were seen by other employees) and made other objectionable gestures. Her employer had not, however, made “any work-related promises . . . for the exchange of sexual favors.”


Recently, after Paula Coughlin was awarded $6.7 million against the Hilton Hotel for negligent supervision during the Tailhook Association convention, two other complainants subsequently settled their suits for “undisclosed sums.” 2 Women Settle Their Tailhook Lawsuits, N.Y. Times, Nov. 6, 1994, at A46.

110. 810 F. Supp. 31 (N.D.N.Y. 1993), vacated, 14 F.3d 590 (2d Cir. 1993), 842 F. Supp. 57 (N.D.N.Y. 1994), aff’d without op., 40 F.3d 1236 (2d Cir. 1994).

111. Currie, 810 F. Supp. at 33-34.

112. Id. at 33.

113. Id.

114. Currie, 842 F. Supp. at 60.
The trial court first held that the plaintiff failed to prove that a reasonable person in the plaintiff's position would have found the conditions offensive or repulsive and also held that the plaintiff failed to prove that she was constructively discharged. However, the appellate court vacated the dismissal and remanded the case. On remand, the trial court rejected the plaintiff’s testimony that the defendant had touched her sexually, but accepted as credible her testimony that she was sexually harassed. In 1994, the court finally awarded the plaintiff a total of $13,419 in back pay (unemployment and salary payments), prejudgment interest of $3011, and suggested she apply for an award of attorney fees and costs. A plaintiff may also experience considerable trauma resulting from exposure of intimate personal activities. In Martin v. Cavalier Hotel Corp., a plaintiff who alleged she was raped several times at the workplace was asked to testify about whether she watched x-rated films or engaged in premarital sex. Although the jury rejected her claims of sexual harassment, intentional infliction of emotional distress, and wrongful termination, the plaintiff succeeded in her claims of assault, battery, and constructive discharge.

In Frederick v. Shaw, the jury concluded that the plaintiff had proven the existence of a hostile work environment and had made out claims for sexual harassment and defamation against her former employer and lover, but rejected allegations of sex discrimination, quid pro quo sexual harassment, intentional infliction of emotional distress, and battery. The plaintiff began working as an associate attorney for the

116. Id.
117. Currie, 14 F.3d at 590.
119. Id. at 60.
120. Id. at 64.
121. 48 F.3d 1343 (4th Cir. 1995). The jury assessed the corporation $80,000 (including $50,000 punitive damages), and the supervisor was assessed $22,000 (including $15,000 punitive damages). See id. at 1348. The judge awarded the plaintiff $22,320 in back pay and approximately $100,000 in attorney fees. See id.
123. See Martin, 48 F.3d at 1348.
125. Id. at *7. The defamation claim consisted of the defendant Glanton stating that the plaintiff was disturbed, under psychiatric care, an extortionist for filing the lawsuit,
defendant's law firm in 1987,\textsuperscript{126} and in 1989 began a sexual relationship with her superior in order "to stay in [the superior's] good graces."\textsuperscript{127} In 1990, when she ended the relationship, she was terminated.\textsuperscript{128} While agreeing that the defendant's unwelcome sexual advances had created a hostile work environment, the jury declined to award any damages on that cause of action.\textsuperscript{129} However, on the defamation claim, the jury awarded the plaintiff $100,000 in compensatory damages and $25,000 in punitive damages because it found that at least one of the defendant's comments after the filing of the complaint, but before the commencement of the trial, were defamatory.\textsuperscript{130}

More typical would be the case of Sandra Huffman against the Pepsi-Cola Company and two of its employees,\textsuperscript{131} in which Ms. Huffman received an award of approximately $740,879 (including $212,000 in punitive damages) against Pepsi, $24,500 against the two employees, and $756,341 in attorney fees against Pepsi.\textsuperscript{132} Pepsi was also ordered to pay a civil penalty of $100,000 to the State of Minnesota.\textsuperscript{133} Huffman had claimed she was subjected to nude photos, cat calls, and unwelcome touching in the workplace, as well as retaliation after she complained to supervisors about offensive behavior.\textsuperscript{134} Furthermore, she also claimed to have been threatened with a knife by an employee who had a prior record of assaulting other employees.\textsuperscript{135} The trial court concluded that the harassment was so severe that the plaintiff was constructively discharged.\textsuperscript{136} Also typical would be the sexual harassment claims brought

\begin{itemize}
\item[126.] \textit{Id.} at *6.
\item[127.] \textit{Id.} at *7.
\item[128.] \textit{Id.} at *8-9.
\item[129.] \textit{Id.} at *4.
\item[132.] Huffman, C7-94-2404, 1995 Minn. App. LEXIS 943, at *12.
\item[133.] \textit{Id.}
\item[134.] \textit{Id.} at *2-3.
\item[135.] \textit{Id.} at *10.
\item[136.] \textit{See id.} at *7. The appellate court reduced the legal fees to $400,000. \textit{Id.} at *27.
\end{itemize}
by two female employees who alleged their employer used “vulgarities, talked about sex acts, grabbed a worker’s buttocks and asked for a goodbye kiss.” The employees were awarded $26,500 (including in $9000 punitive damages) and $65,000 (including in $25,000 punitive damages) respectively.

In 1991, two female officers with the Long Beach Police Department won a $3.1 million award after showing that male officers called one vulgar names, exposed the other to graphic sexual language, and had placed both female officers in physical danger. In 1989, a billing clerk won a $625,000 jury verdict against her employer based on her assertion that her supervisor had made “daily comments on the breasts, buttocks, and physical appearance of individual women; suggestions to women that they show [him] ‘a good time’;” and had enacted “job standards for women employees that included the wearing of dresses or skirts, nylons and heels specifically so that he could admire women employees’ legs.” When the plaintiff complained, she was subjected to retaliatory measures.

Sexual harassment litigation has yielded widely varying damage awards. In Weeks v. Baker & McKenzie, a legal secretary claimed that the world’s largest law firm condoned a partner’s bawdy remarks and clumsy gropings. The partner’s offensive conduct consisted of placing

The court also opined that deference to a trial court finding “is especially strong in employment discrimination cases.” Id. at *5 (quoting Kay v. Peter Motor Co., 483 N.W.2d 481, 483 (Minn. App. 1992)).


138. Id.

139. Roxana Kopetman, Two Ex-Long Beach Policewomen Settle Sex Harassment Lawsuit; Courts: City Will Pay Nearly $3 Million, L.A. TIMES, Oct. 14, 1993, at B3. Rather than pursue an appeal, the city settled the case more than two years after the jury award by paying one plaintiff $906,300 and the other $803,700 (the lawyer received $1.14 million). Id. The story was the basis for a movie entitled With Hostile Intent. Id.


141. Id.

142. Id. The plaintiff received $125,000 in general damages and $500,000 in punitive damages for intentional infliction of emotional distress and wrongful discharge for protesting sexual harassment. Id. at 1373. See also Tamar Lewin, The Thomas Nomination: A Case Study of Sexual Harassment, N.Y. TIMES, Oct. 11, 1991, at A18.

143. Dias, 919 F.2d at 1373.


candy in the plaintiff's dress pocket, placing the plaintiff in immediate fear of his touching her breast, having repeatedly asked her "what's the wildest thing you've ever done?"146 and having "grabbed her butt."147 Although the plaintiff worked at the firm less than ninety days,148 suffered no wage loss,149 and was subjected to the abusive partner for only two weeks,150 evidence at trial indicated that other female employees had complained of that particular partner's actions for six years.151 It was only after Ms. Weeks's litigation and the pre-trial proceedings that the firm discharged him.152 The jury awarded the plaintiff $50,000 (out of a requested $600,000153) for emotional distress154 and, in the second phase of the trial, punitive damages of $6.9 million against the firm155 (she requested $3.5 million156) and $225,000 against the lawyer personally.157

In 1993, a jury awarded $81,750 to a female sheriff's deputy in her sexual harassment suit against Los Angeles County.158 The jury heard the plaintiff's testimony that she had been

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146. See Hartstein, supra note 145, at 658.
147. See id.
148. See id. at 662.
150. See Hartstein, supra note 145, at 658.
151. See Gross, supra note 149.
152. See id.
153. See id.
154. See Hartstein, supra note 145, at 661.
155. See id. at 657.
156. Id. at 662.
“subjected . . . to an environment where sexually abusive and degrading language in referring to all women was commonplace,” where male officers would grab their crotches and make suggestive comments, where she was given “bad shift assignments” after filing grievances, was routinely made the object of posters with sexual themes, and was placed in dangerous situations.\textsuperscript{159}

The judge reduced the award to $20,000, which was particularly disappointing to the plaintiff who had earlier rejected a $40,000 settlement offer.\textsuperscript{160}

In \textit{Stafford v. Missouri},\textsuperscript{161} the plaintiff, an investigator at a Missouri state prison, accused various supervisors of violating her civil rights, sexual harassment, and sex discrimination.\textsuperscript{162} Certain defendants and causes of action were dismissed, but the jury found one defendant’s sexually harassing conduct had violated the plaintiff’s civil rights and assessed $43,500 in damages,\textsuperscript{163} plus $1 in punitive damages, against him.\textsuperscript{164} The jury also found a second defendant liable and assessed $101,500\textsuperscript{165} ($65,800 of which was for constructive discharge\textsuperscript{166}) and an additional $1 in punitive damages against him.\textsuperscript{167} However, the trial judge, in a post-trial motion, concluded that as a matter of law there was insufficient evidence to find liability on the part of the first defendant\textsuperscript{168} and that “[defendant’s] [m]otion for a [n]ew [t]rial [would] be granted if for any reason his [j]udgment [a]s a [m]atter of [l]aw is vacated.”\textsuperscript{169} The court also reversed $65,800 of the amount assessed against the second defendant because it concluded that there was no evidence for the jury to

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{See id.}
\textsuperscript{161} 835 F. Supp. 1136 (W.D. Mo. 1993).
\textsuperscript{162} \textit{See id.} at 1139. If the defendant is a state or state subdivision, a plaintiff may sue the offending supervisor. 42 U.S.C. § 1983. \textit{See Williams v. Dunning}, 816 F. Supp. 418 (E.D. Va. 1993).
\textsuperscript{163} \textit{Stafford}, 835 F. Supp. at 1139.
\textsuperscript{164} \textit{Id.} at 1140.
\textsuperscript{165} \textit{Id.} at 1139.
\textsuperscript{166} \textit{Id.} at 1139-40.
\textsuperscript{167} \textit{Id.} at 1140.
\textsuperscript{168} \textit{Id.} at 1143.
\textsuperscript{169} \textit{Id.} at 1144.
award damages against him for constructive discharge. Thus, the plaintiff received a total of $35,700 and an additional $1 for punitive damages.

In Thoresen v. Penthouse International, Ltd., the plaintiff, a former Penthouse "Pet of the Year," was awarded $60,000 in compensatory damages and $4 million in punitive damages. The court reviewed the sexual harassment allegations under New York's Human Rights Law and concluded that the plaintiff had been pressured into having sex with various associates of Penthouse's owner and found that such "[s]exual slavery was not a part of her job description." The court found that sexual favors were an implied condition of her continued employment and specifically found that she had had an eighteen-month relationship with a British financial advisor and a single liaison with an Italian furniture manufacturer. The court concluded that she was terminated because she refused to engage in a sexual relationship with a Japanese businessman. The amount of punitive damages was based on a stipulation between the parties that, should they be awarded to the plaintiff, Penthouse had a market value of $200 million and its owner was worth $150 million.

On appeal, at least ten amici curiae briefs were filed on Ms. Thoresen's behalf, including those of the National Organization for Women, the National Women's Party, Women Against Pornography, and Feminists Against Pornography. A majority of the Appellate Division court affirmed the compensatory damages award, but reversed the $4 million punitive damage award because they concluded it was not authorized under the New York Human Rights Law. In a bitter dissent,

170. Id. at 1146-47.
173. Id. at 977.
175. Thoresen, 563 N.Y.S.2d at 976.
176. Id. at 972.
177. Id.
178. Id. at 971.
179. Id. at 977.
180. 583 N.Y.S.2d at 214.
181. Id. at 218. It is conceivable that there might be a cause of action under federal law but not state law. For example, in Champion v. Nationwide Security, Inc., 517
Justice Wallach argued that the entire case should have been dismissed. He placed significant emphasis on the plaintiff's past criminal record and sexual promiscuity: namely, that she had been convicted of felonies, had a prior history of prostitution, and had performed lesbian love scenes and another sexually explicit act in a *Penthouse* film, *Caligula*. The dissenting view, perhaps, would have made it permissible for courts to examine and either reduce or eliminate a damage award on the basis of a claimant's lifestyle.

An award might also be reversed on appeal because of a mistake made by the trial judge. Christine Gierlinger, a former New York State Trooper, claimed that her constitutional rights were violated when she was terminated in retaliation for filing sexual harassment complaints. The jury returned a $340,000 verdict against only one of the plaintiff's supervisors. The award was set aside on appeal because the court concluded that the jury was uncertain as to which legal principle it should apply as a result of its factual finding. In *Baskerville v. Culligan International Co.*, the Seventh Circuit Court of Appeals reversed a $25,000 judgment for the plaintiff because it found the offending comments at issue (e.g. "pretty girls run around naked" and "um um um") were insufficient to establish an action for sexual harassment. According to the court, even if the remarks were actionable, the employer would not be liable for sexual harassment because it "took all reasonable steps to protect [the plaintiff] from [the harasser]."

A plaintiff claiming to have been sexually harassed will often dually plead an action for the intentional infliction of emotional distress or, occasionally, negligent infliction of emotional distress. The latter, however, may be barred by the exclusivity of the state workers'
compensation statute. To succeed on a claim of intentional infliction of emotional distress, the complainant must prove that the defendant's actions were outrageous and intentional. Absent a finding of outrageousness, many courts are reluctant to allow such a cause of action. In *Obendorfer v. Gitano Group, Inc.*, the plaintiff's supervisor allegedly made degrading comments about her and women in general, but a New Jersey court found that the comments did not reach the requisite level of outrageousness and the employer, at most, was negligent in failing to supervise the employee. In *Piech v. Arthur Andersen & Co., S.C.*, the court denied relief to a complainant notwithstanding her claims of being subjected to offensive and tasteless humor of a sexual nature, being made the subject of rumors of misconduct, and of having been made to undertake demeaning work assignments. Applying Illinois law, which requires more than sexual harassment to state a cause of action for the intentional infliction of emotional distress, the court concluded that "in the employment setting, the conduct complained of must be particularly outrageous. The work setting contemplates a degree of teasing and

190. See, for example, *Kelly v. First Virginia Bank-S.W.*, 404 S.E.2d 723 (Va. 1991), where plaintiff alleged her immediate supervisor consistently harassed her sexually and that management's only reaction was to further intimidate her. Irrespective of her allegations of emotional distress and constructive discharge, the Virginia Supreme Court restricted her remedy to workers' compensation. But, see *Kerans v. Porter Paint Co.*, 61 Ohio St. 3d 486 (1991), where the Ohio Supreme Court refused to allow the workers' compensation statute to be the exclusive remedy for claims of sexual harassment.


192. *Id.* at 955.

193. *Id.*


195. *Id.* at 831. In *Garcia v. Andrews*, 867 S.W.2d 409 (Tex. Ct. App. 1993), a Texas appellate court granted summary judgment for the defendant on the intentional infliction of emotional distress claim when complainant alleged the following three instances: (1) her supervisor observed "her from top to bottom" which made her feel uncomfortable and naked; (2) he flicked the lights and asked her if she did her best work in the dark; and (3) he told her his wife's magazine discussed "the different sizes and shapes of men and what they did right or wrong 'in the sack.'" *Id.* at 410. But see *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994), cert. denied, 130 L. Ed. 2d 636 (1995). The court stated that it was "unprepared to hold as a matter of law that public humiliation of an employee by her employer, accomplished through rude, crude sexually explicit remarks and actions, cannot constitute intentional infliction of emotional distress." *Id.* at 1466-67.

taunting that in other circumstances might be considered cruel and outrageous."\(^{197}\)

It must be emphasized, however, that absent a federal or state statute, the majority rule is still that an employer is liable for the sexual harassment of its supervisor against an employee only if the supervisor either acts within the scope of his or her employment or the employer either knew or should have known of the supervisor’s harassment. In *Smith v. American Express Travel Related Services Co., Inc.*,\(^{198}\) the plaintiff alleged that her supervisor had

grabbed or touched [her] breasts, rubbed up against her, touched her leg under her dress, threw a condom on her desk, and tossed candy down the front of her blouse, all in the view of other employees. . . . On at least four occasions, he forced her to have sex with him at various locations in [the employer’s] building. Smith submitted to [her supervisor’s] sexual advances because she felt physically threatened by him.\(^{199}\)

The plaintiff never informed the corporation of her supervisor’s behavior even though American Express had a policy that dealt with sexual harassment and a procedure providing for reporting such harassment.\(^{200}\) When American Express finally learned of the harassment, it immediately began an investigation.\(^{201}\) As *American Express* demonstrates, a court will often award summary judgment to an employer if the employer responds promptly and adequately to a hostile work environment claim.

Attorneys’ fees are generally only awarded if the plaintiff has been at least partly successful in litigation. For example, in *Parton v. GTE North, Inc.*,\(^{202}\) although the plaintiff only received damages of $1 on her sexual harassment claim,\(^{203}\) she was awarded $26,292.63 out of a requested

\(^{197}\) *Id.* (citation omitted).


\(^{199}\) *Id.* at 1169; *accord Doe v. R.R. Donnelley & Sons, Co.*, 843 F. Supp. 1278, 1284 (S.D. Ind. 1994) (plaintiff may have been a victim of hostile work environment but failed to file a complaint regarding the abuses she allegedly suffered).

\(^{200}\) *Smith*, 876 P.2d at 1169.

\(^{201}\) *Id.*


\(^{203}\) *Parton*, 802 F. Supp. at 255.
$92,858.21 for legal fees and expenses.\(^{204}\) In *Walker v. Anderson Electrical Connectors*,\(^{205}\) the circuit court relied on the fact that the jury found the defendant "had committed acts of sexual harassment"\(^{206}\) but did not award any damages to the plaintiff because it found she had "sustained no monetary damage."\(^{207}\) The court noted that the plaintiff had not requested nominal damages and presumed that she had not done so because, as the appellee's brief stated, "the jury might have given it, and that was a risk to be avoided by the plaintiff since she was after substantial money."\(^{208}\) Thus, the court refused to award attorneys' fees.\(^{209}\)

The trial judge has considerable discretion in awarding attorneys' fees should the plaintiff be partly successful.\(^{210}\) In *Stewart v. Weis Markets*,\(^{211}\) the plaintiff, who was subject to a sexually hostile work environment, was awarded $27,478\(^{212}\) instead of the advisory jury award of $139,125.\(^{213}\) The plaintiff's lawyer requested the court to award legal fees of $34,347.\(^{214}\) The court granted the plaintiff's request but reduced the amount by twenty percent to more accurately reflect the fees charged by attorneys and paralegals who have abilities and experience similar to that of the plaintiff's counsel\(^{215}\) and to account for the fact that the plaintiff was unsuccessful in some of her causes of action, such as one for the intentional infliction of emotional distress.\(^{216}\)

\(^{204}\) *Id.* at 256, 257-58.

\(^{205}\) 944 F.2d 841 (11th Cir. 1992).

\(^{206}\) *Id.* at 843.

\(^{207}\) *Id.*

\(^{208}\) *Id.* at 845 n.7.

\(^{209}\) *Id.* at 843.


\(^{212}\) *Id.* at 400.

\(^{213}\) *Id.* at 385. The plaintiff was originally granted a jury trial based on the court's ruling that the Civil Rights Act of 1991 applied retroactively to claims arising before the Act's November 21, 1991 effective date. *Id.* However, the Supreme Court subsequently ruled in *Langraf v. USI Film Production*, 114 S. Ct. 1483 (1994), that the Act did not apply retroactively. Thus, the court reversed itself and decided to consider the jury award an advisory verdict. *Stewart*, 890 F. Supp. at 385.

\(^{214}\) *Stewart*, 890 F. Supp. at 397.

\(^{215}\) *Id.* at 400.

\(^{216}\) *Id.*
Sexual workplace litigation has led to certain unpredictable results. In one highly unusual case, a male supervisor received a jury award of $251,000 when he claimed he was fired for reporting the sexual harassment of a female co-worker to management. In this case, the male supervisor alleged that he was fired after reporting the sexual harassment of a female co-worker to management. Several months after he reported the complaint, the same woman accused the plaintiff of making unwelcome sexual advances toward her. Upon completion of the investigation of the accusation, the company concluded that there was no sexual harassment, but terminated the plaintiff for having made false statements in his sexual harassment report. Perhaps the most bizarre result occurred in Snyder v. Helena Laboratory, Inc., where a Texas appellate court concluded that respective spouses of adulterous employees could sue the employer on a theory of negligent interference with familial relations for allowing the liaison and failing to take action to prevent the affair. The appellate court opined that the workplace should be a place where "spouses should be secure in the knowledge that employers will not condone [this] type [of] activity," and that if employers breach their duty, "courts will provide a remedy." The dissent queried that "[i]f the business sector is legally and morally responsible and obligated to monitor the personal lives of its employees, then should not government do likewise for all its citizenry?" It should be noted, however, that an employer's "no dating" policy might violate either a state statute or otherwise result in litigation. Approximately twenty states prohibit an employer from enforcing such a policy on the basis of off-duty contact.


218. Fired Salesman, supra note 217.

219. Id. The plaintiff received $201,000 for the defendant's violation of Minnesota's Whistle Blower Act, Minn. Stat. § 181.932 (1994), and $50,000 for defamation, see 831 F. Supp. at 716, and $119,752 in attorney fees and costs. Id. at 722.


221. Id. at 37.

222. Id.

223. Id.

224. Id. at 39. The Texas Supreme Court reversed, 886 S.W.2d 767 (1994), because the cause of action was essentially an alienation of affection action barred by Texas law. Id. at 768. The Texas Supreme Court also stated that Texas law "never recognized an independent cause of action for negligent interference with the familial relationship." Id. See also Tessie Borden, Definition Has Changed as Litigants Push Limits, Houston Post, Sept. 4, 1994, at A1.
between employees.\textsuperscript{225} A former manager received a $375,000 jury award against IBM, and two former employees of Rohr, Inc., an aerospace company, were awarded $4 million for being terminated because one, a supervisor, had dated the other, a subordinate.\textsuperscript{226}

One company faced with sexual harassment allegations made a prompt investigation and fired the man it concluded had harassed female employees with lewd gestures and language.\textsuperscript{227} When the firm received a $282,000 settlement demand letter from the employee’s lawyer, it immediately filed suit seeking declaratory relief that it had done nothing wrong.\textsuperscript{228} Predictably, the terminated male employee has sued the company for libel and for wrongful discharge.\textsuperscript{229}

In Texas, a deputy was accused by a female supervisor of sexual harassment. When the supervisor publicized the alleged activities in television and press interviews, the defendant, in a countersuit, alleged defamation and was awarded $3 million in November 1994 by a federal jury.\textsuperscript{230} Similarly, a Continental Airlines pilot, cleared of sex harassment allegations concerning stewardesses, sued the airline for $1 million for various causes of action, including defamation.\textsuperscript{231} He claimed that in order to litigate he had been forced to discuss highly intimate details of his personal life.\textsuperscript{232} The Colorado Supreme Court, for example, had ordered him to respond to Continental’s discovery requests which required him to list the names of all individuals with whom he had had an intimate relationship or even a date within the prior five years.\textsuperscript{233}

\begin{itemize}
\item \textsuperscript{226} Id.
\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Kathleen Murray, A Backlash on Harassment Cases, \textit{N.Y. TIMES}, Sept. 18, 1994, at 23. “I may never see a cent, but at least I got my name cleared.” \textit{Id.} (the deputy’s comment after the $3 million verdict).
\item \textsuperscript{231} Kathleen Murray, A Backlash on Harassment Cases, \textit{N.Y. TIMES}, Sept. 18, 1994, (Late ed.) at 23.
\item \textsuperscript{232} Id.
\item \textsuperscript{233} Id. According to plaintiff’s attorney in \textit{Weeks v. Baker & McKenzie}, corporate attorneys “want to show that the plaintiff is a nut or a slut.” Schultz & Woo, \textit{supra} note 122. Rule 412 of the Federal Rules of Evidence has been amended by the recent Crime Bill so as to restrict significantly inquiries into an alleged victim’s sexual predisposition and sexual behavior. \textit{See} Sec. 40141(b) of the Violent Crime Control and Law Enforcement
Should an employee's complaint be frivolous or brought in bad faith, an employer may be successful in obtaining attorneys' fees and costs. In *Pope v. MCI Telecommunications Corp.*, the plaintiff alleged both sexual and racial harassment. Two months before termination, the plaintiff filed a worker's compensation claim that stated harassment as the reason for her termination. In rejecting the plaintiff's harassment claims, the court wondered "[h]ow something which has not yet occurred can be asserted as evidence of an earlier discriminatory act was never explained." The court also disregarded her lawyer's request that the shorter state statute upon which he based the plaintiff's case be disregarded since it time-barred any relief and that the federal court apply the federal statute instead. "We do not make the federal statutory laws, much less legislate state statutes of limitations. We have no prerogative to ignore a precise Texas time limitation."

III. CANADA

Since the late 1980s, following the Supreme Court of Canada's decisions in *Robichaud v. Canada (Treasury Board)* and *Janzen v. Platy Enterprises Ltd.*, Canadian courts have recognized sexual harassment "as being discrimination on the basis of sex or gender." Sexual harassment, as a form of sex discrimination, is prohibited under the Canadian Human Rights Act and the human rights legislation of each


235. *Id.*

236. *Id.* at 260; she never timely contested the attorney's fee award of $78,768.99. *Id.* at 262.

237. *Id.* at 260.

238. *Id.* at 265.

239. *Id.* at 263-64.

240. *Id.* at 264.


Canadian province. Unlike the United States, where victims of sexual harassment may sue under statutory and common law causes of action, a claimant in Canada may only seek relief for sexual harassment under a human rights statute. Canadian human rights tribunals have relied on a variety of sources to establish a "definition or description of sexual harassment," including United States court decisions recognizing two forms of sexual harassment. Although the Supreme Court of Canada, in Janzen v. Platy Enterprises Ltd., cited the U.S. Supreme Court case of Meritor Savings Bank v. Vinson with approval, it rejected the distinction the Court made between quid pro quo and hostile workplace environment sexual harassment:

The American courts have tended to divide sexual harassment into two categories: the 'quid pro quo' variety in which tangible employment-related benefits are made contingent upon participation in sexual activity, and conduct which creates a 'hostile environment' by requiring employees to endure sexual gestures and posturing in the workplace. . . . I do not find this categorization particularly helpful. While the distinction may have been important to illustrate forcefully the range of behaviour that constitutes harassment at a time before sexual harassment


245. Aggarwal, supra note 244, at 237. Aggarwal also suggests that the equality rights clause of the Canadian Charter of Rights and Freedoms might create a right of civil action for sexual harassment. Id. at 240.


was widely viewed as actionable, in my view there is no longer any need to characterize harassment as one of these forms. The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.\textsuperscript{250}

The Janzen Court went on to define sexual harassment broadly as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”\textsuperscript{251}

Robichaud v. Canada (Treasury Board),\textsuperscript{252} which preceded Janzen v. Platy Enterprises Ltd.,\textsuperscript{253} is also a landmark sexual harassment case. Robichaud is significant because it was the first case in which the Supreme Court of Canada found sexual harassment under the Canadian Human Rights Act and concluded that sexual harassment in the course of employment constitutes prohibited discrimination on the basis of sex.\textsuperscript{254} The Court’s decision in Robichaud is also significant because the Court concluded that an employer may be held liable for the sexually harassing acts of its employees if such acts occurred in the course of employment and the employer failed to take remedial action.\textsuperscript{255} The Robichaud court noted that although “the conduct of the employer is theoretically irrelevant to the imposition of liability [on the employer for the actions of its employee,] its conduct may preclude or render redundant many of the contemplated remedies [under the Human Rights Act].”\textsuperscript{256} The Court stated that


\textsuperscript{251} Janzen, [1989] 1 S.C.R. at 1283.

\textsuperscript{252} [1987] 2 S.C.R. 84.

\textsuperscript{253} [1989] 1 S.C.R. 1252.


\textsuperscript{255} Robichaud, [1987] 2 S.C.R. at 95-96.

\textsuperscript{256} Id. at 96.
an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.257

Canadian human rights tribunals have held, under Robichaud, that an employer may be held liable for the harassment of an employee whether the harassing employee is a supervisor or a coworker of the victim. In Karlenzig v. Chris' Holdings Ltd.,258 for example, the Saskatchewan Board of Inquiry concluded that Robichaud was "not intended merely to be confined to situations of a 'supervisory' nature."259 In Karlenzig, a waitress alleged that the restaurant's cook had hugged her, grabbed her, and rubbed his body against hers in a sexual manner.260 The Board found the cook's behavior constituted sexual harassment and, notwithstanding the cook's position as a nonsupervisory coworker, held the employer liable for failing to take appropriate measures to protect the plaintiff from further harassment.261

Like U.S. courts, Canadian tribunals have found liability in cases involving same-sex harassment. For example, a British Columbia human rights tribunal held a male supervisor liable for sexually harassing a male deckhand.262 The complainant, who claimed that his genitals had been frequently grabbed by his supervisor, received $2000 in general damages for hurt feelings and $1760 for lost wages.263 One recent study indicates that fourteen percent of the 1263 sex discrimination cases filed in Ontario since 1994 were bought by males.264

257. Id. (emphasis added). As a result of Janzen and Robichaud, "the Canadian Supreme Court clearly defined employer liability as absolute." Chotalia, supra note 243, at 157. Robichaud received $5000 and other benefits estimated at $80,000. With legal fees, the cost to the Canadian taxpayer was estimated at $500,000. David Pugliese, Mounting Harassment Cases Costing Taxpayers Millions, VANc. SUN, Oct. 11, 1994, at A6.

259. Id. at D/9.
260. Id. at D/6.
261. Id. at D/10.
263. Id. at D/2315.
264. Lubrano, supra note 12. Spokespersons for the Canadian and Ontario Human Rights Commissions are unaware of female complaints against female supervisors. Id.
In Canada, as in the U.S., the liability of an employer who harasses individuals of both sexes is unclear. In *Bailey v. Anmore (Village)*, the complainant sued her employer for sexual harassment based on the actions of a supervisor who had referred to men "as 'idiot,' 'arsehole,' or 'twit,'" and had referred to the complainant as "the girl." Since the supervisor treated females and males equally badly, the British Columbia Human Rights Council found that the evidence was insufficient to establish that the abuse was gender-based and therefore concluded that the complainant had failed to prove her allegations of sexual harassment.

Even if a tribunal concludes that a complainant employee was not sexually harassed, an employer might still be held liable if the employee has been terminated and the filing of a harassment complaint is found to have been one reason for the termination. For example, although the Council found in *Bailey* that the complainant had not been sexually harassed, it concluded that the supervisor had abused his power and that the complainant had been terminated after the company was informed about the possibility that she would file a human rights complaint. In holding the employer liable for a violation of the Human Rights Act, the Council stated that

[i]t is not necessary that a [termination] decision be based solely on a prohibited ground to constitute a violation of the Human Rights Act. It is merely necessary that the prohibited basis be one of the reasons for the decision. [The Council is] satisfied that the threat of a sexual harassment complaint was a significant factor in deciding to terminate the complainant.

The complainant was ultimately awarded $2000 in lost wages.

A Canadian employer may also be liable to a supervisor who is improperly terminated on the basis of a sexual harassment complaint. In November 1994, an Ontario court awarded $119,000 in back pay and

265. See id.; see also Chotalia, supra note 243, at 161-62.
267. Id. at D/371.
268. Id.
269. Id. at D/376.
270. Id. at D/378.
271. Id.
$10,000 in general damages to a former General Motors manager who was terminated after being accused of harassing female employees. The plaintiff, who had asked or attempted to kiss female employees, asked one female employee to sit on his knee and suggested to another that she take off her clothes, conceded that General Motors had the right to terminate him. However, the plaintiff claimed and the court agreed that he had been wrongfully dismissed because General Motors failed to implement or comply with its sexual harassment policy.

Like U.S. courts, Canadian human rights tribunals will always find some sexual harassment complaints insufficient to form the basis of a sexual harassment claim. In Cohen v. British Columbia Council of Human Rights, for example, a complainant who was fired after being employed for only two days alleged that she had been terminated because she complained to a coworker that she had been sexually harassed by a company salesman. In brief, the complainant alleged the salesman had made her uneasy because "he grinned at her" and "appeared to be 'looking her up and down.'" The complainant also alleged the salesman had caressed her upper thigh. The British Columbia Council of Human Rights discontinued the complainant's proceedings against her former employer, finding that the salesman's touching had been accidental and that his conduct did not constitute sexual harassment since it was not "gender based and unwelcome in an objective sense."

The complainant sought review of the Council's decision in the British Columbia Supreme Court. The Supreme Court rejected the plaintiff's application for


274. Van Alphen, supra note 273.

275. Bannister, No. 25,399/90, 1994 Ont. C.J. LEXIS 4169 at *8. Although the plaintiff did not contest the allegations of sexual harassment, the court found that the plaintiff's behavior "was no more and no less than that of the majority of the employees in [his] department" and that he did not persist "in unwanted social and intimate conduct when it was made clear to him that any such conduct was not wanted." Id. at *41.

276. Id. at *38.


278. Id. at 308.

279. Id. at 311.

280. Id.

281. Id. at 312.

282. Id. at 307.
review, finding that she had failed to establish that the Council had either exceeded its jurisdiction under the British Columbia Human Rights Act or had made an error in law by discontinuing her proceedings.  

In Canada, sexual harassment victims may only seek administrative relief. Most provinces have administrative human rights commissions or the equivalent which "operate on a complaint-driven basis." A Commission's officer, upon the filing of a complaint, will investigate and attempt to resolve the matter through settlement. Of the 218 sexual harassment claims filed in Ontario in 1993, for example, fifty-three percent were settled, thirty percent were withdrawn by the complainant, seven percent were dismissed, and only three percent were brought to an administrative or judicial tribunal. If attempts to reach a settlement are unsuccessful, the Commission will review the complaint and may refer the matter "to a quasi-judicial administrative body for determination." The Commission, as a party to complaints it directs to a board or tribunal for resolution, will also provide specialized legal counsel for the complainant. Although administrative remedies are available, research has shown that only four out of ten Canadian women who believe they are victims of workplace sexual harassment take any formal action, and only one of every two women believe a sexual harassment complaint would be "taken seriously in the workplace."

Under Canadian human rights statutes, a successful sexual harassment complainant is entitled to receive a general damage award of lost wages or other remedial measures. Such damages are usually awarded in low amounts, unless the tribunal finds that the defendant wilfully or recklessly engaged in the discriminatory practice or the complainant suffered hurt feelings as a result of a wilful or reckless discriminatory practice. The maximum amount of damages that can be awarded under the Canadian Human Rights Act for hurt feelings resulting from willful or

283. Id. at 316.
284. Chotalia, supra note 243, at 160.
285. Id.
286. Lubrano, supra note 12.
287. Chotalia, supra note 243, at 160.
288. Id.
290. Chotalia, supra note 243, at 161.
291. Id.
reckless discriminatory behavior is $5000. Most Canadian provinces also impose specific statutory limits on the amount of exemplary damages or damages for hurt feelings that may be awarded. In the absence conduct constituting a sexual assault, Canadian human rights tribunals ordinarily award between $2000 and $3000 as compensation for hurt feelings.

Given the high amount of punitive damages or damages for pain and suffering that have been awarded to sexual harassment victims in the U.S., the most striking difference between U.S. and Canadian sexual harassment law is the low amount of damages that may be awarded in Canada for hurt feelings or mental anguish. In Ontario, for example, where humiliation or exemplary damage awards are limited to $10,000 under the Human Rights Code, a successful sexual harassment complainant was awarded only $2000 for the mental anguish she experienced during a "short but intense period of harassment."

Although the complainant in that case

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295. In Dupis v. British Columbia (Ministry of Forests), [1993] 20 C.H.R.R. D/87 (B.C. Council of Hum. Rts.), the British Columbia Council of Human Rights noted that even cases where "there was physical and verbal harassment," and no statutory limit placed on damage awards, human rights tribunals have not awarded damages equivalent to the higher amounts awarded in sexual assault cases. Id. at 98. The Council stated that in determining the appropriate amount of damages to award for emotional injury, "it is generally more appropriate to consider damages in other human rights cases than to consider damages in sexual assault cases." Id. Although the plaintiff in Dupis filed her sexual harassment complaint before the limit on general damages in British Columbia was raised from $2000 to $5000, the Council, finding the harassment "at the higher end of the spectrum," awarded her $5000 in damages for "emotional injury." Id. The ceiling on general damage awards in sexual harassment cases was raised in 1992 from $2000 to $5000. Id. at 96. See also Doug Ward, Rise Expected in Complaints, VANC. SUN, Apr. 8, 1995, at B3.


297. Waroway v. Joan and Brian's Upholstering & Interior Decorating Ltd., [1990]
was terminated after only three days of employment, she had been forced by her employer to listen to dirty jokes and to watch a video of lesbian lovemaking in the workplace. The complainant had also been asked about her sex life and subjected to other unwelcome remarks. The complainant’s allegations were supported by the testimony of other former female employees who had experienced similar types of sexual harassment by the employer.

In 1993, Christine Broadfield Watson, the first female supervisor at the De Haviland/Boeing of Canada aircraft company, alleged she experienced “a year of daily nastiness by male workers,” ranging from obscene phone calls to finding “a putty model of a penis . . . on her desk with obscene messages and newspaper cut-outs about the murder of a child named Christine.” The Ontario Board of Inquiry, finding that “[Watson] gave as good as she got” in obscene language, awarded her $1000 for mental anguish due to the corporation’s failure to take action.

16 C.H.R.R. D/311, D/315 (Ont. Bd. Inquiry). It should be noted that the plaintiff had only requested $3000 for emotional anguish. Denise Davy, Woman Seeks $3000 in Sex Harassment Case Against Ex-Boss, GAZETTE (Montreal), Dec. 21, 1991, at G5.

299. Id. at D/312.
300. Id. at D/313.
303. Id. at D/363, D/368. In a similar case, brought by the first woman to work in the tinsmith shop of a General Motors division, the Seventh Circuit reached the opposite conclusion. The plaintiff in that case alleged that her male coworkers made derogatory comments of a sexual nature to her on a daily basis. Carr v. Allison Gas Turbine Div., General Motors Corp., 32 F.3d 1007, 1009 (7th Cir. 1994). The circuit court of appeals reversed the district court’s finding that because the plaintiff had “‘contributed just as much abusive language and crude behavior as did the male tinners,’ . . . ‘[t]he male tinners’ conduct, to the extent it may have constituted sexual harassment, was not unwelcome.’” Id. at 1010-11 (quoting the district court). The district court had concluded that the coworkers’ behavior “was not actionable, because it had been ‘invited’” by the plaintiff, who had been “‘the recipient of crude behavior and crude language . . . [and had] also dished it out.’” Id. at 1010 (quoting the district court). The Seventh Circuit also criticized General Motors’ failure to respond to the plaintiff’s complaints and its attempts to justify the behavior of the male workers: “[w]e have trouble imagining a situation in which male factory workers sexually harass a lone woman in self-defense, as it were; yet that at root is General Motors’ characterization of what happened here.” Id. at 1011. On remand, the district court awarded the plaintiff what her attorney requested in damages: $65,501 in back pay, $37,440 for front pay in lieu of reinstatement, and over $153,000 in attorneys’ fees. Carr v. Allison Gas Turbine Div., General Motors Corp.,
Watson characterized the amount as "hardly a slap on the wrist," and concluded that "the whole thing was a farce." 304
Manitoba permits exemplary damages of up to $2000 to be awarded against an individual and up to $10,000 against a corporation. 305 In one case, the provincial Board of Adjudication awarded a receptionist $2000 in exemplary damages, $1000 for hurt feelings, and $6400 in lost wages as a result of the harassment she experienced during her twelve-day employment. 306 The receptionist's claim that she had been subjected to unwelcome sexual touching and remarks were corroborated as the employer's practice by another former employee. 307 The Board concluded that the plaintiff had been sexually harassed and found the employer to be "a person who has mistaken employment for slavery and female employees for concubines. [W]e can hardly imagine a more blatant example of sexual harassment in the workplace." 308 An award of exemplary damages was permitted because the Board found that the employer's actions were malicious. 309
In Quebec, damages for hurt feelings have been awarded in amounts somewhat higher than those awarded in other provinces. In Quebec Human Rights Tribunal v. Habachi, 310 for example, a teacher was ordered to pay two female student employees $3000 each in damages for hurt feelings as well as compensation for lost wages. 311 In this case, as in others, the Quebec Human Rights Tribunal relied heavily on United States authorities. 312 The court, relying on Catherine MacKinnon's arguments, analyzed the professor-student imposition of sexual conditions to that of an employer-employee and concluded that both females were victims of unwanted verbal harassment. 313


304. Harassment Victory 'a Farce', GAZETTE (Montreal), supra note 301.
307. Id. at D/144.
308. Id. at D/145.
309. Id.
311. Id. at D/497.
313. Id. at D/491-92, D/496 (citing MACKINNON, SEXUAL HARASSMENT OF WORKING
In *Gervais v. Vaillancourt*, the Quebec Human Rights Tribunal concluded that the complainant was a victim of unwelcome and embarrassing sexual remarks and gestures and awarded her $3000 in moral damages. Exemplary damages were denied because the tribunal concluded that the perpetrator did not intend the harmful consequences of his actions. In *Quebec Human Rights Tribunal v. Larouche*, the complainant, a secretary, who had resigned because of her employer's sexual advances, was awarded $6000 in moral damages and for violation of her privacy rights, as well as $2700 in lost wages. The high amount of moral damages might have been the result of her employer's attempt not only to force her into his bedroom, but also his comments that he might rape her.

The British Columbia Council of Human Rights, in *Burton v. Chalifour Brothers Construction Ltd.*, awarded $4500, one of the highest damage awards ever for hurt feelings, to the only female member of a carpenters union. The plaintiff was discharged for a bona-fide reason after eleven years of employment. In *Burton*, the harassment continued for several months and consisted of sexual comments and gestures by male coworkers, obscene phone calls, and the display of obscene drawings and a poster depicting a nude female. In awarding the plaintiff a high amount of damages for hurt feelings, the court specifically noted the psychological impact of the harassment, the Company's "ineffectual response to [the plaintiff's] complaints" of harassment and its failure to provide customary private notice and an explanation of the plaintiff's termination, and the vulnerability of the plaintiff as "the only female tradesperson employed by the Company." The hurt feelings award, and

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**Women: A Case of Sex Discrimination** 7, 235, 238 (1979)).


315. *Id.* at D/14. The Ontario Board of Inquiry, commenting on *Gervais*, opined it "would have reservations about an award as high as $3000." Crozier v. Asselstine, [1994] 22 C.H.R.R. D/244, D/249 (Ont. Bd. Inq.).


318. *Id.* at D/6.

319. *Id.* at D/5-6.


321. *Id.* at D/508, D/504.

322. *Id.* at D/506, D/507, D/504.

323. *Id.* at D/504.

324. *Id.* at D/507.
an additional $14,173 plus interest in lost wages, were assessed jointly and severally against the corporation and its sole director and owner.\(^{325}\)

The Alberta Individual’s Rights Protection Act does not specifically provide compensation for hurt feelings;\(^{326}\) however, this has not stopped the Alberta Board of Inquiry from awarding such damages. In Contenti \textit{v. Gold Seats, Inc.},\(^{327}\) a woman alleged that she had been verbally sexually harassed at work and sexually assaulted off-the-workplace by her supervisor.\(^{328}\) The plaintiff received $1000 in general damages for the employer’s failure to take timely corrective action, $440 for loss of wages due to constructive discharge, and $1000 to defray the costs of appearing before the provincial Human Rights Commission.\(^{329}\)

Even the Royal Canadian Mounted Police (RCMP) did not escape liability when it was sued for sexual harassment by a former Albertan female mountie. Alice Clark alleged that her male coworkers had made sexist comments, that she had been grabbed and kissed by one coworker, and that someone had “put a pair of plastic breasts on her desk.”\(^{330}\) In 1986, after three years of harassment,\(^{331}\) Clark filed an internal complaint and was informed by letter that although her “complaints were ‘unsubstantiated’ . . . certain ‘improprieties’ by some members had been noted and appropriate action taken.”\(^{332}\) Clark quit and filed suit against the RCMP in 1988 and, in April 1994, was awarded $93,000 plus attorney fees for lost wages and pain and suffering.\(^{333}\) The federal judge concluded that her harassment was extreme, deliberate, and designed to inflict nervous shock.\(^{334}\)

\(^{325}\) \textit{Id.} at D/510.


\(^{328}\) \textit{Id.} at D/78. The supervisor, who lured the plaintiff to his apartment on "false business pretences" and assaulted her, was convicted of sexual assault before the plaintiff’s sexual harassment claims were decided by the Board. \textit{Id.}

\(^{329}\) \textit{Id.} at D/78.

\(^{330}\) \textit{Ex-Mountie Gets $93,000 for Sexual Harassment}, \textit{TORONTO STAR}, April 28, 1994, at A2.

\(^{331}\) \textit{Id.} Clark was first subject to harassing comments in 1993. \textit{Id.}

\(^{332}\) Adrienne Tanner, \textit{Sexual Harassment Case to be Reviewed: Examination Ordered Into RCMP’s Handling of Seven-Year-Old Complaint Made by Former Alberta Officer}, \textit{VANC. SUN}, April 29, 1994, at A8.

\(^{333}\) \textit{Id.}

\(^{334}\) \textit{Id.} Complainant plans to spend the $93,000 on paying off her home and in
IV. THE UNITED KINGDOM

In Britain, sexual harassment is viewed, as are many discrimination issues, as primarily a workplace problem.\(^3\) This view of sexual harassment, although true and at first sight uncontroversial, has until recently provided an effective cap on the amount of damages that may be awarded in sexual harassment cases. In the landmark case of *Strathclyde Regional Council v. Porcelli*,\(^3\) sexual harassment claims were held to be matters of sexual discrimination under the applicable English law and required to be primarily pursued in the industrial tribunal system.\(^3\)

The industrial tribunals were established as specialized industrial relations tribunals and are not, in the strict sense, courts of law.\(^3\) They are staffed by three-member panels: a legally qualified chairman, usually a barrister or solicitor with at least seven years practicing experience, and two wing members.\(^3\) The wing members are appointed by the two sides of industry, the local organizations of the Trade Union Congress and the Confederation of British Industry, from among persons with experience in industrial life.\(^3\) Because these three members are co-equal in status and decisions are reached by a majority, the two wing members may out vote the chairman on a point of law. Industrial tribunals, however, are not courts of record and their decisions have no precedential value.\(^3\)

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337. *See id.* This requirement is imposed by Section 63 of the Sex Discrimination Act of 1975. Sex Discrimination Act, 1975, ch. 7, § 63 (Eng.).

338. Employment Protection (Consolidation) Act 1978, ch. 44, § 128, sched. 9 (Eng.).


341. *See generally id.*
Appeals on points of law may be made from industrial tribunals to the Employment Appeal Tribunal, which is a superior court of record, presided over by a High Court Judge and two wing members.\(^{342}\) While decisions of the Appeal Tribunal normally consist of only one judgment, it is theoretically possible for the two wing members, who are also appointed by industrial organizations, to overrule the judge. An appeal from the Employment Appeal Tribunal may be made on a point of law to the Court of Appeals and similarly to the House of Lords—Britain’s highest court.\(^{343}\)

Typically, damage awards have been between £600 and £5000, with an average figure in 1990 of £2305.\(^{344}\) Damages for sex discrimination have always stood at a very low level: £1764 was the median award in 1990-91; £1725 in 1991-92; and £1146 in 1992-93.\(^{345}\) These amounts are slightly less than the amounts awarded in race discrimination cases: £1749 in 1990-91; £1374 in 1991-92; and £3333 in 1992-93.\(^{346}\)

In comparison to the U.S., the low level of these awards is readily apparent in the case of *Longmore v. Kei Kam Lee*.\(^{347}\) The applicant (also known in the U.S. as a complainant or plaintiff) suffered a severe illness requiring psychiatric treatment due to the defendant’s insistent demands for sexual favors.\(^{348}\) She was, however, only awarded £3000 for injury to her feelings.\(^{349}\)

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\(^{343}\) Employment Protection (Consolidation) Act 1978, ch. 44, § 136, sched. 11 (as amended) (Eng.).

\(^{344}\) See Alice Leonard, *Remedies for Sexual Harassment*, 141 New L.J. 1514 (1991). Leonard reports one award of the order of £15,000. *Id.* This would seem to include some element of unpaid wages.

\(^{345}\) See *id.*

\(^{346}\) *Id.*

\(^{347}\) 1989 C.O.I.T. 21745/88/LN/C (London Indus. Trib.). All cases decided by the industrial tribunals are not published in an official reporter series. To obtain an official copy contact the Central Office of Industrial Tribunals in Britain.

\(^{348}\) *Id.* at 6-11.

\(^{349}\) *Id.* at 16. The term “aggravated damages” is something of a misnomer. It refers to the situation where the level of damages appears rather higher than the amount usually awarded. The level of damages awarded in such exceptional cases reflects the finding that the harassment was particularly severe.
Another example of the low level of damages is the recent case of *Gates v. Security Express Guards*. A twenty year-old man alleged that two male coworkers simulated anal intercourse and masturbation, and then attempted to simulate anal intercourse with him. Mr. Gates resigned in protest, recovered £3000 for the loss of his job, and was awarded £1500 for damage to his employment prospects and injury to his feelings. The £3000 award was quite meager, as it represented just a fraction of Mr. Gates's annual salary. In addition, the court ignored Mr. Gates's future employment record. He worked for another security guard company from November 7 until December 12, 1992, when he was dismissed on the basis of an adverse reference from his former employer. He then remained unemployed at least until the decision of the Industrial Tribunal on June 21, 1993.

In Britain, an action for sexual harassment is often brought with an action for unfair dismissal. In *Darby v. Bracebridge Engineering*, for example, the applicant was awarded £2900 for unfair dismissal and only £150 for sexual harassment after she was subjected to a serious, indecent assault by a senior manager who roughly grabbed her genitals. Even though the Industrial Tribunal and the Employment Appeal Tribunal confirmed that a single act of this nature may constitute sexual harassment, the award for sexual harassment seems remarkably low.

In some sexual harassment cases, the tribunals decided that the harm suffered by the applicant was very slight because of his or her attitude towards sexual matters. This amounts to a somewhat unedifying attempt

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351. *Id.* at 2.
352. *Id.* at 8.
353. *Id.*
354. *Id.*
355. *Id.*
356. Under section 55 2(c) of the Employment Protection (Consolidation) Act 1978, when an employee resigns because of intolerable action by an employer, it will be treated as a constructive dismissal. See Employment Protection (Consolidation) Act 1978, ch. 44, § 55, sched. 3 (Eng.).
357. 1990 I.R.L.R. 3 (Empl. App. Trib.) (Eng.).
358. *Id.*
359. *Id.*
by the tribunals to set themselves up as custodians *bonos mores*. This may stem from the composition of the industrial tribunal panels, which are often staffed by men with traditional attitudes. In both *Snowball v. Gardner Merchant Ltd.* 361 and *Wileman v. Minilec Engineering Ltd.*, 362 evidence regarding the sexual proclivities and attitudes of the applicants was adduced by the defense. In *Wileman*, evidence that the applicant wore provocative clothing to work, for example, "paper toweling around the upper part of her body," 363 was admitted to reflect on her character to determine the level of emotional injury when calculating her award. 364 The Tribunal held that the applicant had suffered little detriment because of her forthright and candid attitude toward sex and awarded her nominal damages of £50. 365 Likewise, the Tribunal in *Snowball* admitted evidence of the applicant's relaxed attitude toward sexual matters in the workplace holding such to be an acceptable gauge in determining the degree of her injury. 366

Furthermore, exemplary (or punitive) damages may not be awarded in sexual harassment cases. 367 Such damages may only be awarded for torts recognized under English law prior to 1964, and the statutory tort of sex discrimination was not created until the passage of the Sex Discrimination Act in 1975. 368 Exemplary damages are awarded in the U.K. to emphasize the egregious nature of the tort and are designed to have a punitive effect; 369 the Law Commission has recently recommended that this law be reformed to allow awards of exemplary damages in sexual harassment and other cases. 370

Although damage awards in sexual harassment cases have historically been very low, a combination of two factors make it more likely that higher levels of damages will be awarded in the future. First, the Recommendation of the European Commission 371 is that conduct of a

363. *Id.* at 148.
364. *Id.*
365. *Id.* at 148-49.
368. *Id.*
369. *Id.* at 13.
370. *Id.* at 132.
371. The Recommendation of the Commission was cited in Wadman v. Carpenter
sexual nature, or other conduct based on sex affecting the dignity of women and men at work, is unacceptable and may, in certain circumstances, be contrary to the principle of equal treatment within the meaning of Articles 3, 4, and 5 of Directive 76/207/EEC. However, the legal status of the Recommendations of the Commission is at best unclear, and they may not grant enforceable rights under European Community law. The most authoritative view of the status of the Recommendations comes from the European Court of Justice's decision in Grimaldi v. Fonds des maladies professionnelles. While the Grimaldi court held that the Recommendations cannot create rights on which individuals may rely before a national court, the Recommendations are not legally impotent. The court decided that domestic courts are bound to consider the Recommendations when they clarify the interpretation of national provisions adopted to implement them or when they are designed to supplement binding European Community measures. This means that the protected right is based in domestic law and the Community Recommendation is to be regarded simply as an interpretive tool.

Arguably, the Recommendation regarding sexual harassment creates a right under European Community law upon which plaintiffs may rely. If a court were to find that a right guaranteed by European Community law is infringed when a person is sexually harassed, the rules recently expounded by the Court of Justice of the European Community in Marshall v. Southampton and South West Hampshire Health Authority (No. 2) would be brought into effect. In Marshall (No. 2), the court held that national laws, such as the relevant provisions of the Sex Discrimination Act of 1975, which restrict remedies for the infringement of rights guaranteed under the Treaty of Rome, are unlawful as a matter

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372. Id.


374. 1989 E.C.R. 4407 (Belg.).

375. Id. at 4421; see Dine & Watt, supra note 373, at 109.


377. One of the present authors has argued that the European Community courts ought, as a matter of urgency, to clarify the legal status of the Recommendations. Such a discussion, however, is beyond the scope of this present article. See Dine & Watt, supra note 373, at 109.

of European Community law. The court further held that the remedy granted must compensate the plaintiff for the entire loss suffered. 

Marshall (No. 2) concerned inequalities in retirement age as enforced by a Health Authority (which is viewed as an institution controlled by the state). In the first Marshall case, the court found that such inequitable enforcement was a clear infringement of European Community law.

While the Marshall rules only apply to employees of a state institution and to rights guaranteed under European Community law, the British Government has taken a very wide view of the Marshall (No. 2) judgment. Ann Widdecombe, on behalf of the Secretary of State for Employment, stated that the Government would use its powers under section 2(2) of the European Communities Act of 1972 to amend the Sex Discrimination Act of 1975 to remove the statutory damages cap. This statement evidences an intent to meet and perhaps move beyond the requirement imposed by the European Court of Justice; indeed, the Government has now eliminated the cap under laws other than the Sex Discrimination Act. Primary legislation has now amended the Race Relations Act of 1976 and the Fair Employment (Northern Ireland) Acts of 1976 and 1989 to remove similar restrictions on remedies in racial and, in the case of the Northern Ireland Acts, religious discrimination cases. Moreover, as promised by Ms. Widdecombe, a statutory instrument amending the Sex Discrimination Act of 1975 was published on November 11 and came into effect on November 22, 1993. Section 2 of the Regulations simply abolishes the limit on damages included in the 1975 Act.

Since the judgment in Marshall (No. 2), there have been a number of decisions by industrial tribunals in which applicants received awards above the previous statutory limit. Although these awards were made in

379. Id. at 161.
380. Id.
381. Id.
382. See id. at 153.
385. The Government moved so slowly in this matter that they were, rather embarrassingly, beaten to the post by a private member's bill, see Race Relations (Remedies) Act 1994, ch. 10 (Eng.), introduced by an Opposition (Labor) backbencher.
386. The Sex Discrimination and Equal Pay (Remedies) Regulations, S.I. 1993, No. 2789 (Eng.).
pregnancy discrimination cases, the damages in such cases are analyzed under the same sex discrimination legislation. In October 1993, the London (South) Tribunal awarded £33,000 to a former servicewoman who had been dismissed from the Royal Air Force ("R.A.F.") after she became pregnant. Because the R.A.F. is a state institution and the right protected is one clearly recognized under European Community law, this case fell squarely within the rules set out in the Marshall cases. The application of the Marshall rules in this case clearly enhanced the damages awarded to the applicant, who had turned down a £3500 offer made by the R.A.F. for full and final settlement of her claim.

There are a number of other pregnancy-related dismissal cases concerning servicewomen in which substantial damages have been awarded. In Howell v. Ministry of Defence, for example, an Army captain was awarded slightly more than £24,000. In Cannock v. Ministry of Defence, a senior engineering officer in the R.A.F. was awarded a record sum of £172,939 with interest for the loss of career prospects and pension rights, as a resettlement grant, and for injury to feelings. Sixteen other cases heard to date in the industrial tribunals have led to awards averaging £52,738, and there is speculation that the Ministry of Defence will eventually pay damages totalling £200 million.

The Employment Appeal Tribunal has now heard a consolidated appeal involving the amount of the award granted in Cannock. The Tribunal held this amount to be wrong in principle because it was quite out of proportion to the harm suffered by the applicant as a result of her dismissal. The Tribunal reasoned that pregnancy would only keep

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389. See, e.g., id.

390. See id.


392. See Record Pay-out Follows Marshall, supra note 388.


394. Id.


396. Id.


398. Id.

women out of the labor market for a relatively short time and, therefore, any long term financial loss suffered could not be directly attributable to their dismissals.

Notwithstanding the Employment Appeal Tribunal's decision, there is clear evidence that this new statutory regime is having a significant effect upon damages awarded in sexual harassment cases. Two press reports, in particular, have documented this effect. The first involves a case of racial and sexual harassment within the (London) Metropolitan Police. P.C. Sarah Locker alleged that she was given a sham request for special training made out in her name that contained derogatory references to her sex and race. Furthermore, she alleged that she was presented with pornographic magazines and subjected to relatively petty physical assaults, none of which were offenses subject to disciplinary action under the police disciplinary procedures. It was reported that the police behaved in an oppressive fashion in investigating Locker's complaint. In an out-of-court settlement, Locker agreed to accept £32,500, retraining for a more attractive section of the police service, an apology from one of the male officers responsible for her mistreatment, and an apology from the Metropolitan Police Commissioner.

In a very recent case, a woman was awarded a total of £34,160 in damages by the London (South) Industrial Tribunal. She complained to the police that her employer had "fondled" her and pushed her against a wall while he masturbated and then ejaculated over her. The employer was charged with criminal assault, but while on bail, he dismissed the woman from her job and refused to give her the compensation she was awarded.

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400. The rule established in Marshall (No.2) required that the compensation be awarded for any loss directly attributable to the act of discrimination. Marshall (No. 2), 1994 Q.B. at 151.


402. Id.

403. Id.

404. Id.


407. Id.
owed. The woman proved to the Tribunal that, apart from suffering the indignity of these assaults, she had subsequently suffered from anxiety, insomnia, a stress-related stomach ulcer, and psychological disorders including self-mutilation. Her employer was jailed for eighteen months after being convicted of assault and ordered to pay the woman £11,000 in damages for the harassment. The balance of the damage award was comprised of £12,960 for back pay and lost wages, £5200 for future loss of earnings, and £5000 for the “added insult” of being dismissed. The award based on the insult of dismissal, however, is a novel one and is probably grounds for appeal.

There seems to have been very few attempts to allege common law torts, such as assault, in sexual harassment cases. In such instances, assault actions would lie against harassers and their employers, who may be vicariously liable for actions of their employees. Few details have emerged in such cases because of out-of-court settlements. In one such case, a magazine’s Director of Advertising and Marketing was subjected to a campaign of sexually-charged abuse and debasement by a superior. Few details of the action are available except that the applicant sued in tort and for breach of contract and that an out-of-court settlement of approximately £25,000 was agreed to by the parties. In another poorly reported case, a woman known as “Lynne,” who was one of the first three female firefighters in London, was subjected to a number of assaults. Firemen poured a bucket of urine over her and masturbated openly in her presence. She alleged assault, battery, and false imprisonment. In an

408. Id.
409. Id.
410. Id.
411. Id.

412. See, e.g., Addis v. Gramophone Ltd., 1909 App. Cas. 488, 491 (reversing Eng. Ct. of App.) (developing a doctrine which provides that damages may not be made for injury to feelings in dismissal cases).
416. Id.
417. Id. at 42.
out-of-court settlement, she received £25,000 in compensation from her employer and a total of £2100 by the offending firemen.\textsuperscript{418}

Employers often informally settle discrimination claims arising through the industrial tribunal system because the Advisory Conciliation and Arbitration Service ("A.C.A.S."), an independent government agency, is under a statutory duty to ascertain whether employers and their ex-employees may resolve their differences amicably.\textsuperscript{419} Arbitration often results in a cash offer being made to the former employee. Prior to the introduction of the 1993 Regulations, settlements of between £5000 and £10,000 would be regarded as generous by those working in the field. The counsel for the unnamed female applicant in the case involving criminal assault is reported to have stated that the award of £11,000 for sexual harassment is by far the largest she had seen.\textsuperscript{420}

However, the damages awarded in sexual harassment cases have to be compared to those awarded in cases brought under a cause of action other than statutory sexual harassment. For example, in \textit{Houston v. Smith},\textsuperscript{421} a doctor was accused by another doctor, who worked in the same building, of sexually harassing her and members of her staff.\textsuperscript{422} The accuser complained loudly before a waiting room full of patients that her male colleague had groped her and members of her staff.\textsuperscript{423} The male doctor sued his accuser for defamation and was awarded £150,000 in damages by a jury.\textsuperscript{424} Although this award was found to be excessive and reduced to £50,000 on appeal,\textsuperscript{425} the damages awarded remain much higher than that given even in the extreme case of sexual assault discussed above. It is clearly a matter of some regret that a professional man’s reputation should be more highly valued than a woman’s safety and basic dignity.

\textsuperscript{418} \textit{Id.}
\textsuperscript{420} \textit{See} Butcher, \textit{supra} note 406.
\textsuperscript{422} \textit{Id.}
\textsuperscript{423} \textit{Id.}
\textsuperscript{424} \textit{Id.} Defamation actions are unique in Britain as being the only civil actions tried by juries as to fact and assessment of damages.
\textsuperscript{425} \textit{Id.}
V. CONCLUSION

A number of conclusions may be drawn from this survey. The authors note that there are great differences between the British and North American cases. First, it appears from the court reports that sexual harassment is much more severe in North America. It may be that British men are much more reserved than their American counterparts, although even a cursory reading of British cases of rape and indecent assault would lead to the opposite conclusion.

The second possible explanation is that British courts and tribunals are much less ready to have the often sordid and disturbing details of harassment recorded in their transcripts and that sexual harassment cases in Britain are less easy to trace. There is some evidence that this is the case. In the Snowball case discussed in this article, the court made it plain that it considered some of the facts unsuitable for recital. The British industrial tribunals have used statutory provisions that allow them to hear cases involving sexual misconduct behind a veil of anonymity. This makes it difficult to trace sexual harassment cases through the largely unreported industrial tribunal system.

A likely explanation for this refusal of the British courts to recite the details of the harassment is that, in the absence of exemplary damages, it is legally irrelevant. Because the courts and tribunals are dealing mainly with the loss of earnings occasioned by a statutory tort and not with actions for trespass to the person, the level of the interference with the victim is unimportant. In contrast, in the U.S., where the facts of the harassment are of the essence and affect the computation of damages, the recitation of the facts is central to the case.

The third possible explanation is that British women are less likely to record, report, or litigate sexual harassment. This seems to be a much more likely explanation given that surveys have shown that sexual harassment at work is a serious and non-isolated problem throughout the European Union.

426. See, for example, Marshall v. Nelson Elect., 766 F. Supp. 1018 (D. Okla. 1991) providing vivid details concerning a female worker's allegations of sexual harassment by her male coworker. Moreover, British cases within the industrial tribunals are unreported; thereby making it very difficult to accurately determine the current state of litigated sexual harassment claims.


428. See Employment Protection (Consolidation) Act 1978, ch. 44, § 128, sched. 9 (Eng.).

429. See, e.g., European Commission Report, supra note 335.
A further difference that may be identified between the British and the U.S. approaches to sexual harassment is a greater willingness in Britain to rely solely on the employer or other relevant authority, such as university management or a professional body, to exercise its disciplinary powers over an employee harasser. The victims of harassment view this, in the overwhelming majority of cases, as resolving the matter.\textsuperscript{430} The British practice is to some extent supported by decisions of the courts and tribunals, such as \textit{Balgobin v. London Borough of Tower Hamlets},\textsuperscript{431} which makes it plain that an employer may avoid vicarious liability for the actions of harassers by implementing reasonably practicable steps to prevent the employee from harassing others.\textsuperscript{432} Where the employer has taken these steps and is thus not liable for damages, the harassed employee finds himself (or herself) in the position of having to proceed in tort against a possibly impecunious harasser.

Even where the harasser is financially well-off, it seems from the dearth of cases that sexual harassment victims in Britain are unlikely to proceed against their harassers. In a recent case involving a leading barrister, Mr. Nigel Hamilton, Q.C., a member of the ruling General Bar Council and an Assistant Recorder, was held by the Council of the Inns of Court to have made sexually offensive remarks to a female client.\textsuperscript{433} He is reported to have made sexual innuendos to her about her diary and her sex life, and referred to her boyfriend in a racist fashion.\textsuperscript{434} Furthermore, he was found to have smacked her posterior and that of a solicitor's female clerk, and to have asked indecent questions about both women's sexual experiences.\textsuperscript{435} These events took place in September and October 1992.\textsuperscript{436} The matter apparently was heard by the Disciplinary Tribunal in January 1995 and the Tribunal deprived Mr. Hamilton of the

\textsuperscript{430} See infra note 431.
\textsuperscript{432} Balgobin, 1987 I.R.L.R. at 402.
\textsuperscript{433} Ian MacKinnon, \textit{Three Month Ban for QC Who Sexually Harassed Women}, THE INDEPENDENT (London), Feb. 3, 1995, at 7. The letters Q.C. denote that Mr. Hamilton is a Queen's Counsel, this indicates seniority and success in the profession. An assistant recorder is essentially a part-time judge in criminal cases.
\textsuperscript{434} Id.
\textsuperscript{435} Id.
\textsuperscript{436} Id.
right to practice at the Bar for three months. 437 This clearly amounts to a very substantial financial penalty. The Lord Chancellor’s Department, the body that appoints judges, is reported to be considering withdrawing Mr. Hamilton’s authorization to sit as a part-time judge. 438 However, in marked contrast to the Baker & McKenzie case, 439 there is no indication that the victims have proceeded, or have any intention of proceeding, against Mr. Hamilton for damages. 440

The authors were not surprised to observe that the levels of compensation awarded by the Canadian and British courts are much lower than some of the headline-grabbing U.S. decisions. The British author of this article would advance the comment that he could not imagine a British court ever awarding damages of the level awarded in the U.S. Baker & McKenzie case. 441 While it is theoretically possible for very high levels of awards to be made following the decision of the European Court of Justice in Marshall (No. 2), it is most unlikely that such awards will be acceptable to judges or to the public. The level of the award in the Cannock pregnancy-related dismissal case was the subject of considerable public outcry and drew unfavorable comparison with the levels of damages awarded in fairly severe personal injury claims made in tort and with those awarded by the Criminal Injuries Compensation Board. A woman subjected to sexual harassment which fell well short of a serious sexual assault would, it seems, be viewed by the public as having been grossly overcompensated if she were to receive damages approaching £10,000. While the British author disagrees most emphatically with these sentiments, the attitudes of the public toward sexual harassment litigation explains, at least in part, the differences between the U.S. and Britain. It is necessary to record them because they go some way towards explaining the differences between the U.S. and Britain.

The comparatively low level of British awards may explain the apparent reluctance of British women to litigate sexual harassment cases; however, it is possible that other cultural influences are at work. It will be instructive to observe whether there is a rapid increase in litigation following Marshall (No. 2) and the passage of the statutory instrument 442

437. Id.
438. Id.
440. MacKinnon, supra note 433.
441. See supra notes 153-57 and accompanying text.
442. The Discrimination and Equal Pay (Remedies) Regulation, S.I. 1993, No. 2789 (Eng.).
raising the level of compensation awarded to victims of sexual harassment. A higher level of potential damage awards is likely to encourage women to undertake the often embarrassing and unpleasant litigation.

Male-on-male harassment or female-on-male harassment is rarely reported in Britain, although it is clear that it occurs. All forms of harassment are undoubtedly profoundly disturbing to the victim, but it may be that these types of harassment are particularly embarrassing. Where a woman is harassed, it is likely that she will receive a great deal of support and sympathy from female coworkers; however, where a man is harassed, it is possible that he will be stigmatized by other men. The British public displays a more general antipathy toward gay men than seems to be the case in the U.S., and it may be that a man who is harassed by another man would be viewed as effeminate. Furthermore, a man who is harassed by a woman is likely to be seen, in the popular view, as worthy of envy rather than sympathy. For him to complain might well be seen as an admission of disliking the sexual attentions of women. So long as levels of compensation in Britain remain relatively low, many men may be unwilling to expose themselves to such stereotypical public opinions.

The Canadian system of specific human rights statutes, which is also seen at state level in the U.S., avoids the difficulties inherent in the British system because the violation of a right labeled a "human right" emphasizes the egregious nature of harassing conduct. While the level of compensation seems relatively modest, the Canadian response seems to have been to increase the seriousness of the tort, allowing the victim to attain psychological vindication by being able to show that the harasser has infringed her or his human rights. This may explain why sexual harassment litigation seems more frequent in Canada than in Britain, even though the damages awarded in such litigation are broadly comparable.

It is clear in all three jurisdictions that an employer must have a written policy on sexual harassment. Furthermore, the employer must take prompt remedial action to investigate and, if necessary, rectify a situation where sexual harassment has developed. If an employer does

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443. See supra note 244.

444. See Foster v. Township of Hillside, 780 F. Supp. 1026, 1039 (D. N.J. 1992), aff'd, 977 F.2d 567 (3d Cir. 1992). "Courts that have decided the issue, have placed great weight on whether the harassment ended after remedial steps were taken." Id. Also significant is the type and thoroughness of the investigation and the appointment of an independent arbitrator. The court in Foster granted the defendant's motion for summary judgment notwithstanding the applicant's allegation that a non-supervisory police sergeant masturbated in front of her and wore a brassiere under his shirt. Id. at 1032. "Then, when employees did the same thing two years later, the company fired him. But the judge
this, all three jurisdictions will permit mitigation, if not an elimination, of the damages for sexual harassment.

said the company was wrong because it did not fire him the first time.” Borden, supra note 224.