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**Legal aspects of sexual harassment: Implications for educational
administrators**

VanderLinden, Lana Jean, Ed.D.

The University of North Carolina at Greensboro, 1993

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LEGAL ASPECTS OF SEXUAL HARASSMENT:
IMPLICATIONS FOR EDUCATIONAL
ADMINISTRATORS

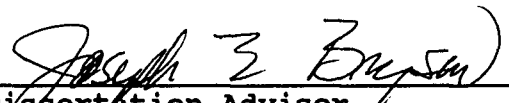
by

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Sexual harassment has become a prominent issue in American politics and American life. Victims of sexual harassment are also showing an increased willingness to take their cases to court. In addition, educational institutions and their students now realize that sexual harassment also occurs at school and can be subject to legal action. In this study, these issues were framed in a legal context and researched through federal and state legislative statutes and court cases in an effort to clarify the elements surrounding sexual harassment and to provide guidelines for school administrators. Key questions raised during this study include how the judicial process defines sexual harassment; how history and the current literature have addressed sexual harassment; what the analysis of federal and state statutes, as researched through court cases, reveals regarding sexual harassment; what discernable patterns and trends can be gleaned from analysis of judicial decisions in sexual harassment cases; and what legal guidelines can be established to aid school administrators and board members in administrative decisions and policy making.

Based upon an analysis of the data, the following

conclusions were drawn: Sexual harassment is clearly illegal and protected under both Title VII and Title IX; a written proactive policy for both employees and students is necessary to protect school systems and officials from liability; clear communication of the written policy with appropriate training should be repeated at set intervals; men and women see sexual harassment differently; simple procedures for reporting sexual harassment need to be outlined; a prompt, adequate, and confidential investigation of complaint must be undertaken; complete documentation and a prompt and adequate response to the findings of the investigation is imperative; and school officials should refuse to give recommendations to employees who have been removed from employment due to sexual harassment.

School officials who have a proactive, publicized policy in place, complete with clear reporting procedures, and prompt and adequate responses to complaints make their chances of avoiding or successfully defending a sexual harassment suit much better.

APPROVAL PAGE

This dissertation has been approved by the following committee of the Faculty of the Graduate School at the University of North Carolina at Greensboro.

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CHAPTER I
INTRODUCTION

The risk of sexual harassment lawsuits has skyrocketed in the 1990s due to wide media attention and because ever-increasing verdicts have encouraged plaintiffs to sue over conduct which once would have gone unchallenged.

The United States Senate confirmation of Judge Clarence Thomas to the Supreme Court moved the subject of sexual harassment into the day-to-day lives and conversations of Americans in a way no prior media treatment or court cases have. In addition, headlines concerning the Navy's "Tailhook" scandal and changes in the law have further intensified the challenge for employers. The Civil Rights Act of 1991¹ has allowed compensatory damages up to \$300,000 and provided for jury trials where favorable outcomes for plaintiffs are much more likely. Moreover, the United States Supreme Court ruled in Franklin during February of 1992,² that compensatory damages were available to students suing school systems under Title IX of the Education Amendments of 1972.³

¹ 42 U.S.C. 1981.

² Franklin v. Gwinnett Public Schools, 911 F.2d 617 (11th Cir.1990) 112 S.Ct 1028 (U.S. 1992).

³ 20 U.S.C. 1681.

What is sexual harassment?⁴ When are employers responsible for the conduct of their employees? Are students protected from sexual harassment by teachers and by other students? The answers to these and other questions are revealed in this study of the legal aspects of sexual harassment and the subsequent implications for educational administrators.

Many people assume that sexual harassment is an expression of sexuality, but most experts view it as an expression of unequal power. It is not a battle of the sexes, it is about change.⁵ Linda Chevez, staff director of the U.S. Civil Rights Commission during the Reagan administration, says many men still are confused about what is not acceptable behavior around female co-workers.⁶ The rules for appropriate behavior are not fixed. As society seeks to establish such rules, several issues are likely to surface. Three of these issues are discussed in this chapter.

⁴ Because the vast majority of reported cases involve males harassing females, this study focuses only on sexual harassment that involves male perpetrators and female victims.

⁵ Charles Clark, "Sexual Harassment," CQ Researcher 1 (9 August 1991): 539.

⁶ Ibid.

The first of these issues asks the question, what constitutes sexual harassment? Sexual harassment is a form of discrimination based on sex.⁷ The most frequently cited definition of sexual harassment was established in 1980 by the Equal Employment Opportunity Commission (EEOC) as a violation of Title VII of the Civil Rights Act of 1964.⁸ Title VII makes such discrimination an unlawful employment practice.

It shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.⁹

While Title VII prohibits discrimination based on sex, the regulations adopted by the EEOC in 1980 specifically identify sexual harassment as an actionable form of discrimination under the statute. The regulations state:

Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual

⁷ Jim Walsh, "The Law of Sexual Harassment and Meritor Savings Bank v. Vinson," Sexual Harassment in the Schools: Preventing and Defending Against Claims (Alexandria: National School Boards Association, 1990): 1.

⁸ 42 U.S.C. § 2000e.

⁹ Ibid.

harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁰

The courts have established two basic types of actionable sexual harassment claims. The first claim, quid pro quo, exists when a supervisor demands sexual consideration in exchange for a tangible job benefit such as a salary increase, promotion, or continuance.¹¹ Central to this type of harassment is the concept of power, the existence of an employment reprisal.¹² Directly related to quid pro quo sexual harassment is sexual favoritism. It occurs when a less-qualified applicant receives employment opportunities or benefits as a result of the individual's submission to the employer's sexual advances or requests for sexual favors. This type of sexual harassment has resulted in successful law suits brought on behalf of qualified persons who were denied employment opportunities or

¹⁰ 29 C.F.R. § 1604.11(a) (1987).

¹¹ Stacy J. Garvin, "Employer Liability for Sexual Harassment," HR Magazine 36 (June 1991): 101.

¹² Robert J. Shoop, "The Reasonable Woman in a Hostile Work Environment," West's Education Law Reporter (April 23, 1992): 706.

benefits. However, the courts have required proof of the sexual relationship, not merely rumors or innuendos.¹³

The second claim, hostile environment, exists when a supervisor or co-worker sexually harasses, intimidates, or makes an employee so uncomfortable as to create an offensive work environment. The courts have ruled a hostile work environment harms the employee psychologically and constitutes harm that is as damaging as a denial of a tangible benefit.¹⁴ In judging whether sexual harassment has created a hostile working environment, the courts generally use the 'reasonable woman' standard.¹⁵ A climate that most employees consider harmless may still be judged to be hostile depending on the circumstances.¹⁶ In addition, in Fisher v. San Pedro Peninsula Hospital,¹⁷ a California Supreme Court ruled that an individual doesn't have to be the target of sexual harassment to have a cause of action.

The second issue to be addressed concerns the pervasiveness of sexual harassment. Surveys covering

¹³ Shoop, 707.

¹⁴ Ibid.

¹⁵ Ellison v. Brady, 924 F.2d 872 (9th Cir.1991)

¹⁶ Brenda T. Acken, Kent St. Pierre, Peter Veglahan, "Limiting Sexual Harassment Liability," Journal of Accounting 171 (June 1991): 43.

¹⁷ 262 Cal. Rep.842, 1989.

different sectors of society vary widely. In 1976, Redbook magazine surveyed 9000 women. Eighty-eight percent of those responding said they had been victims of harassment and 52 percent said they had been fired or decided to resign because of the harassment.¹⁸ A survey conducted in 1980 among 20,000 federal workers by the U.S. Merit Systems Protection Board, recorded that 42 percent of the females and 15 percent of the males responding said they had been sexually harassed.¹⁹ Another large scale survey of sexual harassment was released in September of 1990 by the Department of Defense. Of 20,000 United States military respondents around the world, 64 percent of the females reported having been sexually harassed while 17 percent of the males reported being harassed.²⁰ In the corporate world, recent surveys indicate that 15 percent of women responding have been sexually harassed within the last year.²¹ Surveys on college campuses show the number of respondents reportedly having been sexually harassed ranged

¹⁸ Claire Safran, "What Men Do To Women on the Job: A Shocking Look At Sexual Harassment," Redbook (November 1986): 42.

¹⁹ "Sexual Harassment in the Federal Workplace: Is It A Problem?" A report of the U.S. Merit Systems Protection Board (March 1981): 6.

²⁰ Defense Manpower Data Center, Sexual Harassment in the Military: 1988 (September 1990).

²¹ Ronnie Sandruff, "Sexual Harassment in the Fortune 500," Working Women (December 1988): 8.

from 40-70 percent. Ninety-eight percent of the sexual harassment that occurs on campus happens between male and female students rather than between professors and students.²² The steadiest barometer of sexual harassment is, of course, the complaints filed with the EEOC offices. The number of complaints has risen slightly in recent years, reaching 5,557 in 1990. Women's groups generally claim that the incidence of sexual harassment is severely under reported.²³

The last issue to be addressed is the question of whether men and women view sexual harassment differently. Because women are disproportionately victims of sexual assault, women have a stronger incentive to be concerned with unwanted sexual behavior. Women who are victims of mild forms of sexual harassment may worry about whether this conduct is a prelude to more serious, perhaps violent sexual misconduct.²⁴ Therefore, certain types of sexual behavior may be interpreted differently by women and men. This is the premise upon which the 'reasonable woman' (rather than reasonable person) theory was established in the Ellison v. Brady case.²⁵

²² Clark, 543.

²³ Ibid.

²⁴ Ibid.

²⁵ 924 F.2d 872 (9th Cir.1991).

For example, in a survey of 1200 working men and women in Los Angeles County in 1980-81, 67 percent of the men but only 17 percent of the women said they would be flattered by a proposition from a co-worker. Sixty-three percent of the women but only 15 percent of the men said they would be insulted by it.²⁶ Another survey described a man in an office eyeing a women's body up and down. Twenty-four percent of the women respondents characterized such behavior as harassment while only eight percent of the men did.²⁷ Naturally, the most divergent views of men and women workers concerning sexual harassment occur in the less well defined area of hostile environment.²⁸

Statement of the Problem

If it is true that the law changes as the values of society evolve, then perhaps no area of law is more volatile than the law concerning the relationships between the sexes.²⁹ In the decades since women first entered the

²⁶ Barbara A. Gutlek, Sex and the Workplace: The Impact of Sexual Behavior and Harassment on Women, Men and Organizations (1985): 60

²⁷ B. Blodgett, "Sexual Harassment...Some See It...Some Won't," Harvard Business Review (March-April 1981): 76.

²⁸ Clark, 540.

²⁹ Jim Walsh, "The Law of Sexual Harassment and Meritor Savings Bank v. Vinson" Sexual Harassment in the Schools: Preventing and Defending Against Claims (Alexandria: National School Boards Association, 1990): 1.

American work force, sexual harassment has continued to make disturbing headlines.³⁰ In 1991, the Supreme Court confirmation hearings placed the issue of sexual harassment in the workplace under massive public scrutiny and heightened the concerns of employers regarding their liability.³¹ Since then, the Civil Rights Act of 1991³² not only has justified those concerns, but also has set the stage for a substantial increase in harassment lawsuits.³³

The New York Times³⁴ recently labeled schools the newest arena for sexual harassment. Given that school systems are responsible for both employees and students, school boards, superintendents, and principals are in double jeopardy when facing the possibility of sexual harassment litigation. This study of the legal aspects of sexual harassment and the subsequent implications for educational administrators will attempt to discuss the key issues and court decisions that have dealt with the problem of sexual

³⁰ Clark, 540.

³¹ Susan M. Benton-Powers, "Sexual Harassment: Civil Rights Act Increases Liability," HR Focus 69 (February, 1992): 10.

³² 42 U.S.C. § 1981 (P.L. 102-166).

³³ Benton-Powers, 11.

³⁴ Jane Gross, "Schools Are Newest Arena For Sex-Harassment Cases," The New York Times, March 11, 1992, A1(N), B8(L).

harassment and provide guidelines for possible protective actions.

Purpose of the Study

The purpose of the study was (1) to determine from current literature the critical legal issues in sexual harassment claims; (2) to review and analyze federal and state statutes to determine the status of sexual harassment as grounds for litigation; (3) to review and analyze case law related to sexual harassment claims; and (4) to provide guidelines for policies and procedures for practicing school administrators who must deal with sexual harassment allegations. This study was developed in a factual manner based on the legal issues involved and did not attempt to address the moral values inherent in charges of sexual harassment.

Questions To Be Answered

This study answered the following questions:

1. What is sexual harassment as defined by the judicial process?
2. How does the literature analyze sexual harassment?
3. What does an analysis of federal and state statutes reveal regarding sexual harassment?

4. What are the discernible patterns and trends regarding judicial decisions in sexual harassment cases?
5. What legal guidelines can be established as a result of this research to aid school administrators and board members in administrative decisions and policy making?

Methodology

The methodology used for this study was that of legal research as defined by Hudgins and Vacca.³⁵ This involved an analysis of judicial decisions from which legal principles were derived. The study of case law was supplemented with an analysis of state and federal statutory law.

Legal research begins with framing the problem as a legal issue: the legal aspects of sexual harassment in the workplace. State and federal statutes which control this issue were investigated and a bibliography of court decisions was built. Each decision was read and analyzed around three major areas: the facts of the case; the decision and rationale; and implications of the decision.

³⁵ H. C. Hudgins and Richard S. Vacca. Law and Education (Charlottesville, Va.: The Michie Company, 1985), 23-52.

Primary sources were state and federal court decisions and state and federal statutes. Secondary sources such as legal encyclopedias, law reviews, business and education articles, and books were utilized to provide supplemental information. Included as sources were The Current Index to Journals in Education, The Guide to Periodical Literature, Index to Legal Periodicals, Current Law Index, and American Law Reports.

Legal cases focusing on sexual harassment were gleaned from the literature. The actual cases were then examined via the National Reporter System which includes decisions rendered by the following courts: the United States Supreme Court, the United States District Courts, the United States Courts of Appeals, and state appellate courts. Cases were read and categorized according to the nature of the sexual harassment involved with special emphasis being given to those cases that involve educators.

Legal cases were "shepardized" utilizing Shepard's Citations which provide a history of reported court decisions and a treatment of that decision. This allowed the researcher to rely on the applicable court holding.

Limitations of the Study

This study was limited to analysis of state and federal court cases based on state and federal statutes as applied to sexual harassment using the time frame 1975-1993. Much

has changed in both the attitudes of society and the courts during this time frame. This study was designed to analyze both the literature and the legal cases since the middle 1970s for the purpose of determining the current trends in the legal aspects of sexual harassment.

It was hoped that the "Tailhook" suit brought by four alleged harassment victims against the Tailhook Association, the United States Navy, and the Las Vegas Hilton would have been litigated during this time period, but, at this writing, a decision in that case has not been reached. In addition, the Supreme Court agreed in March 1993 to hear a sexual harassment case from Tennessee to define even more clearly hostile environment sexual harassment. However, the Court was not expected to set forth a ruling until 1994.

Design of the Study

Chapter I included an introduction, the statement of the problem, the purpose of the study, the questions to be answered, the methodology, the limitations of the study, the design of the study, and the definition of terms.

Chapter II examined current articles from legal and educational resources to determine the status of and thoughts concerning sexual harassment. Beginning with the mass entrance of women into the workplace, the development of practices, policies, and legislation to address sexual harassment was traced. Attention was then focused on

current trends in dealing with sexual harassment, as revealed in the literature.

Chapter III examined the legal aspects of sexual harassment as they have been decided in the courts. Although the United States Supreme Court has been instrumental in shaping sexual harassment litigation, many of these cases will be from the United States District Courts and the Appellate Courts. This chapter focused on applicable federal and state statutes.

Chapter IV studied and analyzed the federal appellate court cases from the landmark Supreme Court decision in 1986 through 1992 to discover the common elements in each case which determined the findings of the court, thereby compiling a list of essential elements needed for a successful case.

Chapter V summarized the findings of the research and provided guidelines for administrators and school board members to utilize when faced with sexual harassment allegations. Also included in this chapter were recommendations for further study.

Definition of Terms

The following words and phrases were key terms used in this study. Unless otherwise noted, Black's Law Dictionary³⁶ was the source of these definitions.

Agent - A person authorized by another to act for him, one entrusted with another's business.

Certiorari - A writ from a superior to an inferior court requiring the latter to produce a certified record of a particular case tried therein. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear.

De minimis - The law does not take notice of; very small or trifling.

Gravamen - The material part of a grievance charge. The burden or gist of a charge.

Indecent exposure - Exposure to sight of the private parts of the body in a lewd or indecent manner in a public place.

Indecent liberties - Taking such liberties as the common sense of society would regard as indecent or improper. According to some authorities, it involves an assault or attempt at sexual intercourse, but according to

³⁶ Black's Law Dictionary, 6th ed. (Centennial Edition 1981-1991) (St. Paul, Minn.: West Publishing Company, 1979).

others, it is not necessary that the familiarities should have related to the private parts of a child.

Quid pro quo - What for what; something for something. Used in law for the giving of one valuable thing for another.

Reasonable woman standard - The standard which one must observe to avoid liability for negligence...including the foreseeability of harm to one such as the plaintiff.

Respondeat superior theory - Let the master answer. This maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. As applied to education, this doctrine establishes the liability of the school district for the actions of its teachers.

Statute - An act of the legislature declaring, commanding, or prohibiting something. A particular law enacted by the will of the legislative department of government.

Tangible - Having or possessing physical form. Capable of being touched or seen.

Teacher - As used in this study, the term "teacher" encompasses all certified personnel below the rank of superintendent.

Tort - A private or civil wrong calling for compensation in damages.

CHAPTER II
REVIEW OF LITERATURE

Introduction

In reviewing the current literature related to sexual harassment, it is important to historically frame the issue of sexual harassment. Added to this framework are the underlying power dynamics of sexual harassment, the effects sexual harassment has on its victims, patriarchy, sexual stratification, and the recent heightened public awareness of sexual harassment abuses highlighted in the Judge Clarence Thomas confirmation hearings and the Navy's Tailhook scandal. Finally, legally intertwined in all of the literature regarding sexual harassment are the federal statutes regarding equal opportunities in employment and education, and the employer's responsibilities and possible liabilities.

Historical Overview

It wasn't until the early 1960s that women began entering the work force in numbers large enough to create a societal situation which would formalize sexual harassment

as a problem.¹ The seeds of future sexual harassment litigation were planted during debate over the 1964 Civil Rights Bill. When Title VII, dealing with discrimination in employment was expanded to include sex discrimination, the impact of the bill was broadened significantly. The 1964 bill also created the Equal Employment Opportunity Commission to investigate discrimination complaints against individuals, although initially, it was given no enforcement powers.²

The 1970s ushered in an era of efforts to curb workplace discrimination of all forms, as government and private employers launched affirmative action programs.³ In 1972, Congress passed the Equal Employment Opportunity Act. It gave the EEOC independent general counsel with the authority to bring cease-and-desist orders and bring suit in federal court against employers. The same year, Congress passed the Education Act Amendments, Title IX of which prohibited sex discrimination at schools and universities receiving federal funds.⁴ Sexual harassment victims during these years sued under a variety of laws, principally Title VII of the 1964 Civil Rights Act. Plaintiffs also sued

¹ Charles Clark, "Sexual Harassment," CQ Researcher 1 (9 August 1991): 546.

² Ibid.

³ Ibid.

⁴ Ibid.

under state anti-discrimination laws, state fair employment practice laws, and other state tort or contract laws citing infliction of emotional distress, assault and battery or breach of employment contract.⁵ In 1975, the first reported court case on sexual harassment was litigated.⁶ It was in 1977 that the first charge of sexual harassment of students was brought under Title IX of the 1972 Education Amendments.⁷ In 1980, the suit was dismissed because the plaintiff had graduated and Yale, in the meantime, had established a sexual harassment grievance procedure. In 1977, the Washington D.C. Circuit Court of Appeals ruled that sexual harassment constitutes sex discrimination under Title VII of the Civil Rights Act if it "adversely affects a job condition."⁸ In 1978, the first of several major studies of sexual harassment appeared.⁹ In 1979, Catherine A. McKinnon argued for legal remedies in Sexual Harassment of Working Women: A Case of Sexual Discrimination, and Margaret Mead wrote a widely noted article calling for a

⁵ Ibid.

⁶ *Corne v. Bausch & Lomb*, 562 F.2d 55 (9th Cir.1977).

⁷ *Yale v. Alexander*, 631 F.2d 178 (2d Cir.1980).

⁸ *Barnes v. Costle* F.2d 983 (1977).

⁹ Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978), as quoted in Clark, 546.

taboo on sexual relations in the workplace.¹⁰ In 1978, President Carter signed the Civil Service Reform Act prohibiting the personnel practice of discriminating on the basis of "race, color, religion, sex, or national origin." This law also created the Merit Protection Board to be used by the government as a board of appeal for grievance procedures. In 1979, the EEOC was given even greater power when it was assigned the responsibility for enforcing the 1963 Equal Pay Act and the 1967 Age Discrimination in Employment Act.¹¹

In 1980, the EEOC issued its first influential guidelines on sexual harassment. According to regulations of the Equal Employment Opportunity Commission, in order to establish a sexual harassment violation of Title VII, an employee must prove the following:

1. The employee belonged to a protected group.
2. The employee was subject to unwelcome sexual harassment.
3. The harassment complained of was based on sex.
4. The employee's reaction to the sexual harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment.
5. The employer is a respondeat superior.¹²

¹⁰ Margaret Mead, "A Proposal: We Need Taboos on Sex at Work," Redbook (April 1978): 31.

¹¹ Clark, 548.

¹² Stacey J. Garvin, "Employer Liability for Sexual Harassment," HR Magazine 36 (June 1991): 101. The respondeat superior theory establishes that employers are liable for actions of their supervisors, subordinates or co-

In 1981, during the Reagan administration, Orrin G. Hatch, a Republican Senator from Utah, held Labor Committee hearings to study the new sexual harassment guidelines of the EEOC to determine whether they were too strict, creating more antagonism toward women in the workplace, placing too great a burden on employers, and potentially infringing upon the freedom of expression of others.¹³ Among those testifying at the Hatch hearings was Phyllis Schlafly who said that "sexual harassment on the job is not a problem for the virtuous women."¹⁴

On June 19, 1986, the U.S. Supreme Court issued its first major ruling on sexual harassment¹⁵ making it illegal not only when the harassment results in a loss of a job or a promotion, but also when it creates an offensive or hostile working environment.¹⁶ However, defining a hostile environment has not been easy. The EEOC guidelines state that sexual harassment includes any unwelcome sexual advances or requests for sexual favors. Therefore, it is

workers if those in charge know or should have known of the harassment, as found in *Miller v. Bank of America*, 600 F.2d 211.

¹³ Clarke, 548.

¹⁴ Ibid.

¹⁵ *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

¹⁶ Id.

clear that whatever conduct is alleged, to constitute sexual harassment, it must be based on activity which is NOT welcomed by the victim. Such determination must be gathered from the facts surrounding each individual case. While both the harasser's and the victim's perspectives will be considered, it should be noted that the activity directed toward the victim and her response to it appear to carry the greatest weight in determining whether the alleged actions are unwelcome.¹⁷

It took years of court decisions before the distinction was formalized between sexual harassment that involves a direct demand for sex in return for job security and hostile environment, which can include, but is not limited to, lewd and suggestive remarks, displays of obscene or sexually oriented pictures or cartoons, name-calling, crude pranks, displays of pornography, pornographic notes to or about the victim, and graffiti. In addition to the usual uninvited comments, propositions, and fondling, other types of conduct can include staring, requesting women employees to wear short dresses, sexually oriented slide presentations, sexually oriented company advertising, and the circulation of sexually suggestive articles.¹⁸ Further, the victim

¹⁷ Dawn D. Bennett-Alexander, "Hostile Environment Sexual Harassment: A Clearer View," Labor Law Journal 42 (March 1991): 132-33.

¹⁸ Ibid.

does not have to be the person toward whom the unwelcome conduct is directed.¹⁹ That is, sexual activity directed toward one employee may create an atmosphere that is intimidating and hostile for a second employee who is not the direct object of the harassment.²⁰ While most cases have involved a combination of sexually oriented actions and non-sexual harassment, the courts have held that the harassment need not be sexually oriented to constitute hostile environment harassment.²¹ The behavior simply needs to be directed toward a specific gender.²² Although the EEOC guidelines are fairly explicit in their sexual orientation stance, the courts have not limited themselves to these guidelines.

As long as the harassment can be shown to be motivated by the plaintiff's gender, assuming all other requirements are met, hostile environment sexual harassment will be found.²³

¹⁹ Broderick v. Ruder, 46 FEP Cases 1272 (D. D.C. 1988).

²⁰ Bennett-Alexander, 133.

²¹ Barnes v. Costle, 561 F2d 983 (CA-D of C, 1977)

²² Bennett-Alexander, 141, citing Meritor Savings Bank v. Vinson.

²³ Ibid, 148.

Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.²⁴ Intimidation and hostility toward women simply because they are female can result from conduct other than that which is sexually oriented, and therefore, although the EEOC guidelines are still used as a standard against which to measure sexual harassment, the courts have gone beyond these regulations and broadened their interpretation.

Although the decade is still young, the 1990s have brought a plethora of sexual harassment action. In January of 1991, two important sexual harassment cases were litigated. In Florida,²⁵ the court upheld a female ship welder's complaint about having to look at pinups of nude women while on the job. The trial was notable because it was the first time expert witnesses were permitted in a sexual harassment case. The experts introduced the term "sex role spillover" which refers to the intrusion into the workplace of the gender-based role of the female as a sex object and the male as sexual aggressor. In a verdict that has caused many employers to re-examine their policies, the "ostrich defense" of the employer was rejected by the

²⁴ 42 U.S.C. 2000e

²⁵ Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486 (M.D. Fla.1991).

court.²⁶ That is, the employer should have known an environment hostile to women existed in this setting.

Simultaneously, in California,²⁷ a far-reaching sexual harassment ruling altered legal doctrine that goes back to the 19th century: the policy of analyzing behavior through the eyes of the "reasonable man" or, the gender neutral, "reasonable person." In Ellison v. Brady, the 9th U.S. Court of Appeals formalized the doctrine of the "reasonable women" solidifying the notion that women and men see sexual harassment differently. In November of 1991, Congress passed Public Law 102-166, known as the Civil Rights Act of 1991, which allows punitive damages for harassment filed under Title VII to be leveled against an employer. Previously, only "make whole relief" was available.²⁸ Relief under Title VII included only injunctions to restrain offensive practices, reinstatement and back pay, nominal damages, and attorney's fees.²⁹ Therefore, some victims of sexual harassment in the workplace chose to pursue state tort law claims rather than

²⁶ Clark, 550.

²⁷ Ellison v. Brady.

²⁸ "Explanation of Civil Rights Act of 1991," Human Resources Management extra edition, 6 December 1991, 37.

²⁹ Jim Walsh, "The Law of Sexual Harassment and Meritor Savings Bank v. Vinson," Sexual Harassment in Schools: Preventing and Defending Against Claims (Alexandria: National School Boards Association, 1990), 4.

the Title VII cause of action because additional remedies are available under common law tort theories of recovery.³⁰ With the enactment of the Civil Rights Act of 1991, for the first time, victims of sexual harassment are able to win damages for intentional discrimination on the job. However, unlike some state laws that have no monetary caps,³¹ maximum verdicts under Title VII are governed by a sliding scale, from \$50,000 for companies with 15 to 100 workers to \$300,000 for those with more than 500 employees on the payroll. Verdicts can include money to punish employers for malicious bias and to compensate the victim for "emotional pain" or inconvenience.³²

In addition, The 1991 Civil Rights Act contains provisions for a Labor Department work force to investigate a phenomenon called the "glass ceiling."³³ The commission is to investigate how executive and management positions are filled, how employees are encouraged and trained to advance to these positions, and how employees are compensated and

³⁰ Ibid., 4-5.

³¹ "Your New Civil Rights," U.S. News & World Report, 18 November 1991, 94.

³² 42 U.S.C. 1981.

³³ The term was first used in a report entitled "The Corporate Woman" which appeared in the Wall Street Journal, March 24, 1986.

rewarded.³⁴ The Department of Labor defines the glass ceiling as "artificial barriers based on attitudinal or organizational bias that prevent qualified minorities and women from advancing to mid- and senior-level management positions."³⁵ The Department has set forth a four-point voluntary program. This program includes:

1. Education of Labor Department personnel so they can work with companies on issues surrounding the glass ceiling.
2. The encouragement of voluntary efforts, starting with a broad-based public awareness effort to serve as a catalyst to foster voluntary efforts within the corporate community to remove any barriers which may exist to the advancement of minorities and women into management positions. The Department will act as a clearinghouse and resource for information so that federal contractors can receive assistance in their efforts.
3. Corporate management reviews, or the conducting of regular compliance reviews of federal contractors.
4. Public recognition and reward.³⁶

Employers, including school boards, need to examine their policies relative to the glass ceiling issue. Specifically, it is important to ask whether the board, for

³⁴ Mary Moran, "Up Against the Glass Ceiling," The American School Board Journal 179 (February, 1992): 38.

³⁵ "The Glass Ceiling Initiative - Q&A," Office of Information and Public Affairs, U.S. Department of Labor, Washington, D.C.

³⁶ "The Glass Ceiling: Employers Will Be Asked To Address the Problem Voluntarily," Human Resources Management Ideas & Trends, 21 August 1991, 129.

all of its gender-neutral talk, is indeed practicing what it preaches about equal employment opportunity.³⁷ Although many school systems have made great strides, the number of sex discrimination complaints within school districts has risen. The Equal Employment Opportunity Commission settled more than 100 of these cases in fiscal 1991, about double the number of the previous fiscal year.³⁸ Assistant Secretary for Civil Rights, Michael Williams, has reported that 3382 complaints from elementary and secondary schools were filed with the U.S. Office of Civil Rights in fiscal 1990, a 71 percent increase since 1987.³⁹ Office of Civil Rights complaints now exceed any previous level in the agency's history and sexual harassment is second only to minority special education in highest priority for compliance reviews.⁴⁰

In addition, although women account for more than half the students working toward doctorate degrees in educational administration, fewer than five percent of the nation's 15,557 superintendent's are women. Likewise, although more than two-thirds of public school teachers are women, nearly

³⁷ Moran, 38.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

80 percent of principals are men. Clearly, the glass ceiling exists for women in education.⁴¹

In February of 1992, the U.S. Supreme Court unanimously ruled in a sexual harassment case brought in Georgia⁴² that students may sue to collect a compensatory damage remedy from school officials for action brought to enforce Title IX of the Educational Amendments of 1972, as amended.⁴³ In September 1992, the California legislature passed sexual harassment legislation aimed specifically at schools. A pupil enrolled in the fourth grade or higher may be suspended or expelled from school if it is determined that the pupil has committed sexual harassment. This legislation requires each educational institution to have a written policy on sexual harassment that would include information on where to obtain specific rules and reporting procedures. This policy is required to be included by each institution in its regular policy statement and distributed to parents, students, faculty, administrators, and support staff. The policy is also required to be prominently displayed at the school site.⁴⁴

⁴¹ Ibid.

⁴² Franklin v. Gwinnett, 911 F.2d 617 (11th Cir.1990), 112 S. Ct. 1028 (U.S. 1992).

⁴³ 20 U.S.C. 1681.

⁴⁴ California Education Code, section 48980 § 212.6.

Finally, in March of 1993, The U.S. Supreme Court agreed to hear the sexual harassment case of a Tennessee woman in order to clarify what conduct amounts to illegal hostile environment sexual harassment. The Court is expected to rule on this issue in 1994.⁴⁵

Power: The Underlying Dynamic

Considering the historical evolution of the legal aspects of sexual harassment, it is unusual that this type of sexual discrimination has proven to be highly resistant to change. In part, at least, this may be because sexual harassment works.⁴⁶ "Socially, politically and economically, sexual harassment protects male turf, intimidating and humiliating those who would threaten it, putting them in their place and keeping them there."⁴⁷ Further, unwanted sexual behavior may be increasing as females increasingly challenge male hegemony, competing with men for places in the best schools, the best salaries, and the best careers.⁴⁸

⁴⁵ "Supreme Court to Define Illegal Sexual Harassment," The Daily News (Jacksonville, NC), 2 March 1993, 3A.

⁴⁶ Karen Bogart and Nan Stein, "Breaking the Silence: Sexual Harassment in Education," Peabody Journal of Education 64 (Summer, 1987): 155.

⁴⁷ Ibid.

⁴⁸ Ibid., 155-56.

Two major motivators for harassment are to obtain sexual activity and to abuse or increase one's power.⁴⁹ Sex and power are the primary components of sexual harassment but the issues are complex. Sociologists have developed models of power which, when applied to sexual harassment, lead to a better understanding of the issue. Types of power which can affect sexual harassment include achieved power, ascribed power, and situational power.⁵⁰

Achieved power is a form of power one earns through some effort. Sources of achieved power in the workplace include information, salary or money, and formal power such as title or position. Persons who have valued information have more power than those who do not. Those who are paid higher salaries are generally perceived as having more power than those who are paid less and higher status roles carry more power than lower status roles.⁵¹

Perhaps the most obvious source of power for people to understand as it relates to sexual harassment is formal role power which is based on a person's rank or position within the organization. The difficulty with achieved power comes when someone uses his success in an abusive way to sexually

⁴⁹ Donna M. Stringer et al., "The Power and Reasons Behind Sexual Harassment: An Employer's Guide To Solutions," Public Personnel Management 19 (Spring 1990): 43.

⁵⁰ Ibid.

⁵¹ Ibid.

harass someone else. Complicating this issue is the fact that the power role may be so new that the harasser may not see himself as having any power. Further, the power of the harasser may be relative only to the victim and not to the entire organization, thereby making it easy to deny that he has any power at all.⁵²

Ascribed power is an attributed characteristic, or something over which the person has no control and cannot change. One source of ascribed power, which is especially relevant to sexual harassment, is gender. Gender power is fundamental to sexual harassment. According to the Stringer article, virtually all research indicates that the Western culture attributes more power to men simply because of their gender. In work settings, men are viewed as more competent, responsible, committed, and valuable than women. In harassment situations, it is difficult for the female victim to censure the harassment because his word will always be given more weight than hers.⁵³ In our society, gender power is fostered by our Judaic/Christian heritage. In the Bible, God, the omnipotent, omniscient being is male and 'He' created man in his own image.⁵⁴ Woman was created

⁵² Ibid.

⁵³ Ibid., 45.

⁵⁴ Genesis 1:27

later, after man had been given dominion over all the world, as a helpmate.⁵⁵

Gender power makes women with achieved power particularly vulnerable to sexual harassment. Even when a woman has role, information, or money power in an organization, she does not have access to the societal value placed on the male gender. It is gender power that allows male subordinates to harass the female supervisor with impunity. The usual reaction to these women who report harassment is to disregard the complaint by saying that they have the formal power to stop the harassment if they really wanted to. If it is believed that they really were harassed and that they were unable to stop it, the validity of the women's formal power comes into question.⁵⁶ Until men and women are valued equally, women will continue to be at a disadvantage, especially where sexual harassment is concerned.

There are two sources of power of particular interest which impact sexual harassment because they combine ascribed and achieved powers. These sources of power are sexuality and physical size and strength. These emphasize the

⁵⁵ Genesis 2:20-23.

⁵⁶ Stringer, 187.

biological differences between men and women.⁵⁷ Sexuality is a combination of ascribed and achieved power. One's sex organs are biologically determined while one's perception of sexuality and sexual practices are learned through one's family, religion, and culture. Exchange of sex for power and vice versa is a common thread in our cultural fabric.⁵⁸ A person with some form of power may demand sex from a less powerful person or a person with little power may offer sexual favors in exchange for access to power. Physical size and strength are sometimes underrated as sources of power but they are strong factors in many sexual harassment situations. These forms also combine ascribed (size) and achieved (strength) powers and must be understood in the context of male/female differences. Because most men are larger and stronger than most women, some men may consciously or unconsciously use their size to intimidate or control women whom they are harassing.⁵⁹

Finally, situational power is that which may occur in one situation but not in another. Numbers and territoriality are primary sources of situational power. This subtle form of power can be used against a person who is the only one, or one of few, of their "kind" within a

⁵⁷ Ibid., 46.

⁵⁸ Ibid.

⁵⁹ Ibid., 47

particular setting. Abuse of this form of power is usually motivated by wanting to retain the homogeneous setting, wanting the "outsider" to leave. In sexual harassment, this takes the form of focusing on the person's gender to define her as different, not competent, or not taken seriously. While the entire group may not participate in the harassment, the mere existence of a "we/they" atmosphere based on numbers make it possible for someone to use the power of numbers and territoriality to harass the outsider.⁶⁰ This form of power is most generally found in male dominated, non-traditional work settings, such as law enforcement or construction.

Given the explanations of power described in the previous paragraphs, there are seven reasons for sexual harassment which can be discerned.

1. Abuse of power to obtain sexual favors. Because the harasser usually has formal role power assigned by the employer, there is a clear legal liability to the employer.
2. Sex used to obtain power. This kind of harassment occurs when a person offers sex in exchange for status or position. This type of harassment is a form of quid pro quo and is called sexual favoritism.
3. Power used to decrease the power of the victim. In this case, the harasser rarely expects or demands sex. Rather, the intent is to embarrass or intimidate the victim in such a way that her credibility, competence, or power is decreased.

⁶⁰ Ibid.

4. Personal crisis in the life of the harasser. Problems such as aging or divorce may create self doubt about one's value as a "real" man.
5. Sexual attraction gone wrong. This usually happens when the harasser is rebuffed but continues to pursue the relationship in such a way that it ultimately becomes harassing and affects the victim's ability to work.
6. Genuine deviance. Alcohol or substance abuse, character disorders, or other socially deviant behavior patterns can lead a person to become a harasser. These people usually harass more than one person, often successively as victims tend to leave the setting.
7. A genuine attempt to create new rules for new roles. This form of harassment can occur when a male is genuinely trying to welcome a female into a work setting but does not know how. Consequently, he may attempt to show acceptance through sexual jokes, touching, comments, or other sexual behavior and overstep the rules for traditional roles.⁶¹

Each of these seven reasons for sexual harassment can be viewed as an abuse of power by the harasser in a society where females are viewed to be subordinate to males.

The Patriarchy

The roles and behavior deemed appropriate to the sexes are expressed in values, customs, laws, and social roles. The sexuality of women, consisting of their reproductive capacities and services, were commodified long before the

⁶¹ Ibid., 48-51.

creation of Western civilization.⁶² The development of agriculture in the Neolithic period fostered the utilization of women as a resource acquired by men much as land was acquired by men. Women were exchanged or bought in marriages for the benefit of their families. Later, they were conquered and brought into slavery, where their sexual services were part of their labor and where their children were property of their masters. ⁶³

Thus, the enslavement of women, combining both racism and sexism, preceded the formation of classes and class oppression. Class differences were, at their very beginnings, expressed and constituted in terms of patriarchal relations. Class is not a separate construct from gender; rather, class is expressed in generic terms.⁶⁴

By the second millennium B.C. in Mesopotamian societies, the daughters of the poor were sold into marriage or prostitution in order to advance the economic interests of their families. The daughters of men of property could command a bride price, paid by the family of the groom to the family of the bride, which frequently enabled the bride's family to secure more financially advantageous

⁶² Gerda Lerner, The Creation of Patriarchy (New York: Oxford University Press, 1986), 212.

⁶³ Ibid.

⁶⁴ Ibid., 213.

marriages for their sons, thus improving the family's economic position. If a husband or father could not pay his debt, his wife and children could be used as pawns, becoming debt slaves to the creditor. These conditions were so firmly established by 1750 B.C. that Hammurabic law made a decisive improvement in the lot of debt pawns by limiting their terms of service to three years, where earlier it had been for life.⁶⁵

Claude Levi-Strauss speaks of the reification of women which occurred as a consequence of their commodification. However, it is not women who are reified and commodified, it is women's sexuality and reproductive capacity which is so treated. Since their sexuality, an aspect of their body, was controlled by others, women were not only actually disadvantaged but psychologically restrained as well.⁶⁶ From the second millennium B.C. forward, control over the sexual behavior of citizens has been a major means of social control in every state society. Conversely, class hierarchy is constantly reconstituted in the family through sexual dominance. Regardless of the political or economic system, the kind of personality which can function in a hierarchial system is created and nurtured within the patriarchal family. The family not only mirrors the order in the state

⁶⁵ Ibid.

⁶⁶ Ibid., 214.

and educates its children to follow it, it also creates and constantly reinforces that order.⁶⁷

The system of patriarchy can function only with the cooperation of women. This cooperation is secured by a variety of means: gender indoctrination; educational deprivation; the denial to women of knowledge of their history; the dividing of women one from another; by coercion; by discrimination in access to economic resources and political power; and by awarding class privileges to conforming women.⁶⁸

Reforms and legal changes, while ameliorating the condition of women and an essential part of the process of emancipating them, will not basically change the patriarchy. Such reforms need to be integrated within a type of cultural revolution in order to transform patriarchy.

Sexual Stratification in our Society

Many theories of sexual inequality pose the wrong question. Instead of asking what variables account for variation in degree of sex inequality, they address the issues of how the subordination of women to men came about or why females are subordinate to males.⁶⁹ These

⁶⁷ Ibid., 216-217.

⁶⁸ Ibid., 217.

⁶⁹ Janet Saltzman Chafetz, Sex and Advantage (Totowa, N.J.: Rowman & Allenheld), 1984, 2.

questions presuppose an era in history in which females were not subordinate to males or assume that females have always been subordinated and set up a dichotomy: subordination versus non-subordination.⁷⁰

Common sense tells us that female status is inferior to that of males. Yet when one considers the range of different societal types, one notes that the ways in which such inequality may be manifested vary enormously. In the most general sense, degree of stratification refers to the extent to which societal members are unequal in their access to the scarce values of their society.⁷¹

The concept sex stratification refers to a comparison of access levels by the two sexes within a given society at a given time. The dimensions of sex inequality include but are not limited to:

1. degree of access to material goods available in society;
2. degree of access to services provided by others;
3. degree of access to educational and/or training opportunities;
4. degree of access to public decision-making (formal power and authority);
5. degree of access to interpersonal, including familial, decision-making (informal power and authority);

⁷⁰ Ibid., 3.

⁷¹ Ibid., 4.

6. degree of access to prestige-conferring roles;
7. degree of access to opportunities for psychic enrichment and gratification;
8. degree of access to discretionary time;
9. degree of freedom from behavioral constraints, including physically constraining clothing and norms concerning "proper" behavior;
10. degree of formal rights granted by the society to its members; and
11. degree of access to life sustaining requisites, including food and medical care, and freedom from physical coercion (assault and homicide).⁷²

Societies differ on the extent and degree to which males and females are expected to differ, on traits of behavior, personality, interests and intellect. Gender stereotypes have been loosely placed under the term gender roles. At one extreme a society may assume very few categorical differences between the sexes, for example, the Arapesh studied by Mead in 1935, while at the other extreme the sexes are considered opposites as in Victorian England.⁷³

Societies also differ in the extent to which dominant and/or secular ideologies explicitly support extensive gender differentiation and sex stratification. Virtually all of the world's great religious systems (Buddhism, Hinduism, Islam, Judaism, and Christianity) explicitly

⁷² Ibid., 5-6.

⁷³ Ibid., 12.

support a system of sexual inequity and substantial gender differentiation. Many societies today have secular, often political, ideologies that explicitly support sex equality. Such ideologies are often codified in a constitution and other legal statements of the society. These secular ideologies may sometimes contradict dominant religious views pertaining to sex and gender.⁷⁴

The way in which a society structures its productive activities is the single most important set of variables in sexual stratification. It consists of six subdivisions:

1. division of labor by sex, the extent to which females contribute to the most highly valued productive activities of their societies;
2. interchangeability of work by both sexes, workers who always perform tasks that many others can do tend to receive relatively few scarce and valued resources;

If these two aspects of work organization are combined, sex inequality will tend to be greatest where women's work is of low skill-level and readily replaceable.

3. productive roles in society are sex-segregated, the extent to which males and females specialize in very different forms of work activity;
4. attention span required for work activity, the extent to which women are interrupted by offspring;
5. control of means, the ownership of land and capital; and

⁷⁴ Ibid.

6. control of the products of production, salary and the methods of distribution.⁷⁵

Finally, the degree to which the societal environment poses a threat to a particular gender is important to sexual stratification. Together these elements of sexual stratification function to legitimize female subordination to males. Change in structure through upheaval or legislation or both tends to produce social definitional changes supportive of the newly emerging structural reality.⁷⁶ What stands out today in our society is a heightened public awareness of these societal sexual stratifications, their abuses, how they are related to sexual harassment, and a new willingness among victims to go public.

The Clarence Thomas Hearings

Anita Hill's televised accusations of sexual harassment against Clarence Thomas during his Senate Judicial Committee's Confirmation Hearings in October of 1991 brought the issue of sexual harassment into the public spotlight. The extensive publicity over the Clarence Thomas-Anita Hill controversy and the increasing unwillingness of women to tolerate male dominant actions focused the nation on the

⁷⁵ Ibid., 13-14.

⁷⁶ Ibid., 45.

issue of sexual harassment as never before. The drama of the Thomas-Hill hearings was enough to enrage the most passive women and make even liberated men squirm.⁷⁷ Although polls suggested that only 19-26 percent of women believed Hill, there is some indication that these polls didn't begin to reflect the views of all women, least of all women who work.⁷⁸ After all, Thomas appeared during prime time Friday and all day Saturday as the Republican's launched their attack on Hill's character. Whereas, Hill's only appearance came during the day on Friday, while most working women were not available to watch. Thus, a disproportionate number of polled women who actually saw Hill's testimony may have been women who work at home and are relatively unaware of sexual harassment in the workplace.⁷⁹ According to Sue Browder, who interviewed dozens of women after the hearings, the rage women felt was not really about Hill or Thomas or who was telling the truth, but rather about women's feelings of powerlessness and the fundamental differences in the ways men and women

⁷⁷ Stephen M. Crow and Clifford M. Koen, "Sexual Harassment: New Challenge for Labor Arbitrators?" Arbitration Journal 47 (June 1992): 6.

⁷⁸ Sue Browder, "On Sexual Harassment," New Woman Magazine (February 1992): 33.

⁷⁹ Ibid.

experience the world.⁸⁰ "When Thomas testified, the panel said, 'Oh your Honor, we wouldn't want to offend you. We don't mean any disrespect.' But they treated Hill like a perjurer-schizophrenic-psycho."⁸¹ The message to women was that regardless of the situation, you can expect to be treated with less respect than a man. Lynne Kramer, a college professor who was harassed by a male student, explains four phenomena in the institutional treatment of sexual harassment.

1. Appropriation of the victim's role. The harasser, in order to prevent the power shift from male to female that accompanies the reporting of an harassment incident, will take on the role of the victim. Clarence Thomas, for example, claimed he was a victim of racism in a high-tech lynching. The power base was then reconfigured and the female subjectivity erased, denying her experience, and the power shift went back to the male.
2. Re-establishing male discourse patterns. Men work out the problem, agree upon the solution, and act on the resolution. Meanwhile, the female, already displaced becomes transparent. In the Thomas hearings, this pattern was all too clear as the all male congressional panel discussed the regretful situation with Thomas.
3. Validation of the victimizer's plight from the institution.

What body could validate Clarence Thomas more conclusively than the Congress of the United States, which

⁸⁰ Ibid., 35.

⁸¹ Ibid.

has always exempted itself from the laws it passes to protect workers? Three incidents of Congressional sexual harassment surfaced in 1988⁸² and Senator Bob Packwood of Oregon was charged with sexual harassment by ten women in 1992.⁸³

4. Erasure of the female subjectivity. Clarence Thomas was clearly able to bond with his male peers over an issue of power and the actual topic of harassment was dismissed.⁸⁴

Roughly, two-thirds of women and one-fifth of men claim to have been sexually harassed at work.⁸⁵ The jolt of the Thomas-Hill display, to those who could identify with the issue, was mostly psychological. Anita Hill made the charge of sexual harassment socially respectable and politically powerful. The result is that Americans are now reporting sexual harassment in record numbers. Complaints filed with the Equal Opportunity Commission have jumped from 6,675 in 1991 to an expected 9,500 in 1992. Inquiries have risen even more sharply. The most significant change and the

⁸² Clarke, 551.

⁸³ "Packwood to Have Test for Alcohol Dependency," The Daily News (Jacksonville, NC), 28 November 1992, 7A.

⁸⁴ Lynne Kramer, "From Textual to Sexual Harassment," paper presented at the 43rd annual meeting of the Conference on College Composition and Communication. 19-21 March 1992, ERIC, ED 344224, microfiche.

⁸⁵ "Farewell, Dumb Blonde," The Economist, 1 August 1992, 21.

greatest costs, however, have occurred within companies, as many firms scramble to make themselves more sensitive to female employees.⁸⁶ Nowhere is this more noticeable than in the United States military.

The Tailhook Scandal

Incidents that took place at the Las Vegas Hilton in September, 1991 sparked the largest sexual harassment investigation in Naval history, ultimately led to the resignation of Secretary of the Navy H. Lawrence Garrett III,⁸⁷ and resulted in a directive from Chief of Naval Operations Frank B. Kelso that all Naval personnel undergo a comprehensive training course in sexual sensitivity.⁸⁸

"The worst scandal in the history of the Pentagon"⁸⁹ began when Lieutenant Paula Coughlin, helicopter pilot, naval officer, and admiral's aide recounted her experiences at Tailhook '91. Lieutenant Coughlin went to the annual convention of the Tailhook Association, an organization of carrier-trained aviators, on orders as the aide of Admiral

⁸⁶ Ibid.

⁸⁷ Tom Philpott, "Her Story," Navy Times, 6 July 1992, 12.

⁸⁸ Ray Formanek, Jr., "Navy Begins Classes on Sexual Sensitivity," The Daily News (Jacksonville, NC), 12 June 1992, 1A, 2A.

⁸⁹ Charles Kuralt on "CBS Sunday Morning," 27 September 1992.

Jack Snyder. According to the Navy Times, on the last night of a three-day conference, Secretary Garrett gave the keynote address at a formal banquet. Afterwards, Garrett's aide, Lt. Michael Steed introduced Coughlin to Garrett. Then Steed, Coughlin, and other aides made plans to go back to their hotel rooms, change clothes, and meet back on the third floor patio. As planned, Coughlin returned to the Hilton, took the elevator to the third floor and walked to the patio looking for the other aides. Finding no one she knew, Coughlin headed back to the elevator. As she looked down the third floor corridor, she saw a group of Navy and Marine officers standing in the hall talking and drinking beer. "I thought it was just overflow from the suites. So I thought, well, I'll go down there, check it out and see who's there."⁹⁰ When she approached the group, she was grabbed from behind and lifted off the floor by a an officer she had just passed. While dealing with him, two more men grabbed her and one of them began yelling, "Admiral's aide, Admiral's aide!" This same officer, Coughlin learned later, was the designated master of ceremonies and responsible for calling "wave offs." The term refers to the decision on an aircraft carrier to abort a landing. In this case it was used to abort attacks on women.⁹¹ This man would call

⁹⁰ Philpott, 12.

⁹¹ Ibid.

"wave off" when the approaching female was a senior officer's wife, an older woman, or an unattractive woman. The wave off would allow that person to pass with minimal harassment. "It was an organized sport, without a doubt."⁹²

When the second man grabbed Coughlin, the first man pressed his chest to her back and pushing, forced her down the hallway. Then men who lined the hallway started grabbing at Coughlin's shirt and skirt. The man pushing her then put his hands over her shoulders and down into her blouse, into her bra, and grabbed both breasts. To break off the attack, Coughlin crouched down, but he followed her to the floor and bent over her. Coughlin then bit her attacker on the hand until he released her. Nevertheless, while she was on the floor, another man reached between her legs, under her skirt, and tried to pull her panties off. Then many hands began reaching under her skirt. At this point, Coughlin said that she began to panic, "I'm in serious trouble. I can't get these guys off me."⁹³ Kicking and screaming, Coughlin finally got to her feet and ran to an open door, but two men jumped in front of her with their arms crossed and said smiling and giggling, "Uh, uh."

⁹² Ibid.

⁹³ Ibid.

Another man then grabbed her again and Coughlin thought she was going to be gang raped.⁹⁴

The crowd began to pull on her clothes and as she moved up the hallway, she saw a man leaning up against the wall on one leg. He took his foot off the wall and turned to leave. Coughlin reached for him and pounded on his back saying "Please let me get in front of you to get out of here. Help me." He turned around and grabbed her breasts.⁹⁵

Coughlin finally broke free and ran into an empty hotel room. Another officer Coughlin knew found her there and said, "Paula, you didn't just go down that hallway, did you? You didn't go through the gauntlet?" When Paula asked if he knew what those guys were doing, the officer responded, "Oh yeah. You shouldn't have gone down that hallway."⁹⁶ The next day, when Coughlin reported the incident to Admiral Snyder, he had a similar reaction. "That's what you get when you go on the third deck full of drunk aviators."⁹⁷

Coughlin tried to talk to Admiral Snyder about what had happened to her on three different occasions, only to be "shot down." Angered, Coughlin filed a formal complaint. On October 10, 1991, the Naval Investigative Service began

⁹⁴ Ibid., 13.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

its Tailhook Investigation and on November 4, Admiral Frank Kelso removed Snyder from command.⁹⁸

Simultaneously, Mr. Garrett, Secretary of the Navy, learned of five additional assaults and initiated a second inquiry into Tailhook by the Naval Inspector General.⁹⁹ The parallel Navy inquiries released on April 30, 1992 identified only two suspects from about 5,000 convention goers. The inquiries blamed the meager results on a wall of silence by aviators and their commanders. Mr. Garrett, angered by the failure of leadership displayed by the commanders at the convention who tacitly condoned the attacks, broadened the inquiry on June 2 to implicate about 70 officers, including many who failed to cooperate in the investigation.¹⁰⁰ In late June, however, the Naval Investigative Service turned up 55 pages of interviews indicating that Garrett, himself, had been in one of the hotel suites on the third floor during the attacks. Mr. Garrett acknowledged that he had been in the area but insisted he never saw or heard anything wrong.¹⁰¹ With

⁹⁸ Ibid.

⁹⁹ Eric Schmitt, "Navy Chief Quits Amid Questions Over Role In Sex-Assault Inquiry," The New York Times, 27 June 1992, 7.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

his credibility damaged and Lt. Coughlin granting interviews to ABC News and The Washington Post, Garrett resigned as Secretary of the Navy, accepting full responsibility for the handling of the Tailhook incident and the leadership failure which allowed such misconduct.¹⁰²

In the wake of the Tailhook debacle, senior members of the Senate Armed Forces Committee announced that the panel would not allow top Navy and Marine Corps promotions until junior officers were investigated and cleared of any involvement in the Tailhook incident.¹⁰³ Meanwhile, the officer in charge of the Air Force Academy's prestigious parachute team was fired for failing to stop sexual harassment,¹⁰⁴ two Marine Corps drill instructor's each face court martial hearings for sexual harassment at the Aviation Candidate School in Pensacola, Florida,¹⁰⁵ the promotions of two admirals were canceled because they were linked to sexual harassment incidents unrelated to Tailhook,¹⁰⁶ and the top men of the United States Armed

102 Ibid.

103 "Secretary of Navy Quits," Wilmington Morning Star (NC), 27 June 1992, 1.

104 "Academy Officer Sacked for Laxity on Improprieties," The Daily News (Jacksonville, NC), 25 June 1992, 1.

105 "Marines Deny Sex Harassment," The Daily News (Jacksonville, NC), 30 July 1992, 1.

106 Ibid.

Services tangled with the top women of the House Armed Services Committee, notably Representative Pat Schroeder (D-Colorado), over what they were doing in the aftermath of Tailhook to address sexual harassment of and assaults on servicewomen. They responded that they have had "a zero-tolerance policy for years."¹⁰⁷ A few weeks later, Representative Schroeder received an anonymous pornographic message faxed from a machine located within the Marine Corps Air Station at New River, North Carolina.¹⁰⁸ That Marine made Schroeder's case and point.

During the CBS Sunday Morning program, Charles Kuralt asked how the Tailhook officers could possibly have thought that they would get away with it. The official answer was that they were men with specialized skills, dare-devil types, a band of brothers, and isolated from the rest of the Navy,¹⁰⁹ but to any female who was watching the program, the real answer was obvious: they simply always had. The message now, however, is that women will no longer tolerate sexual harassment, and the Navy, along with the other armed services, is finally saying, "Okay, we get it!"¹¹⁰

¹⁰⁷ "War Chiefs: Battleground Not for Gals," The Daily News (Jacksonville, NC), 31 July 1992, 2A.

¹⁰⁸ The Daily News (Jacksonville, NC), 17 August 1992, 1.

¹⁰⁹ Kuralt, 27 September 1991.

¹¹⁰ Ibid.

On September 8, 1992, four of the women assaulted during the Tailhook incident filed law suits against the Tailhook Association, the Las Vegas Hilton, and the United States Navy for \$2.5 million each.¹¹¹

In March, 1993 a news brief in Time Magazine reported that the Pentagon claimed that the Tailhook Report could not be released because there was no Secretary of the Navy in place to receive it. However, according to Time, the full story was that the Department of Defense had a designated candidate for the Navy post but was holding back the public announcement in order to justify not releasing the Tailhook report.

On April 23, 1993, the details of the Tailhook report were finally released. In a harsh and sweeping indictment of the Navy's leadership and attitudes, the Pentagon's top investigator recommended that at least 140 officers face possible punishment for sexual assault, lewd behavior, or conduct unbecoming an officer at the Tailhook convention.¹¹² Derek J. Vander Schaaf, the Pentagon's acting inspector general, said the conduct was so outrageous and had occurred at Tailhook conventions for so many years,

¹¹¹ Hugh Downs, "Tailhook," 20-20, aired on CBS, 10 September 1992.

¹¹² Mark Thompson, "51 Officers Told Lies In Probe," The Daily News, 24 April 1993. 1A, 5A.

that it raised serious questions about the senior leadership of the Navy.¹¹³ The report detailed the interviews of more than 2900 people and displayed more than 800 photos obtained during its eight-month investigation.

The report painted a picture of a convention far more lurid than earlier investigations suggested and detailed "Tailhook traditions" such as "the gauntlet (the hallway where women were molested), ballwalking (officers walking around in their trousers with their testicles exposed), leg shaving (male officers publicly shaved women's legs and, in some cases, pubic areas), mooning, streaking, and lewd sexual conduct."¹¹⁴

Given the enormous task of litigating cases against 117 Navy and Marine Corps officers who are accused of sexual misdeeds and 51 officers who lied during the investigation, the disciplinary proceedings stemming from the Tailhook incident are expected to take a long time.

Sexual Harassment and Title VII

Before 1976, the courts granted little protection to plaintiffs who were victims of workplace harassment. The courts initially ruled that such cases were simply outside

113 Ibid.

114 Ibid.

the scope of Title VII of the Civil Rights Act of 1964.¹¹⁵ In order to win their discrimination actions, sexually harassed plaintiffs realized that they had to convince the courts that harassment involved more than "personal" acts. Victory in this effort came when plaintiffs confronted the courts with the most flagrant examples of harassment.¹¹⁶ In response to the ever-increasing public concern about sexual harassment in the workplace, courts finally began to recognize such action as a form of gender-based discrimination which falls within the scope of Title VII's prohibition against gender discrimination in employment. Such was the case in the first district court decision to recognize sexual harassment as a Title VII violation, William v. Saxbe.¹¹⁷

In part, Title VII makes it an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment based on the person's race,

¹¹⁵ Clifford M. Koen Jr., "Labor Relations: Sexual Harassment Claims Stem from a Hostile Work Environment," Personnel Journal 69 (August 1990): 88.

¹¹⁶ Michael D. Vhay, "The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment," The University of Chicago Law Review (1988): 334.

¹¹⁷ 413 F.Supp 654 (D.D.C. 1976), rev'd on other grounds as Williams v. Bell, 587 F.2d 1240 (D.C. Cir.1978).

color, religion, gender or national origin.¹¹⁸ The Equal Employment Opportunity Commission issued guidelines in 1980 stating that sexual harassment is a Title VII violation. Thus, as discussed earlier, two distinct forms of sexual harassment have been delineated by the EEOC and followed by the courts: quid pro quo harassment and hostile environment harassment.

In Meritor Savings Bank, FSB v. Vinson,¹¹⁹ the U.S. Supreme Court addressed for the first time the issues involved in a case of sexual harassment under Title VII. Any interpretation of the judicial standards applied to sexual harassment must begin with this pivotal case.¹²⁰ The case arose after Mechelle Vinson quit her job at the bank where she had worked for four years. Under the supervision of Sidney Taylor, Vinson began as a teller trainee and had received promotions up to the position of assistant branch manager. All parties agreed that these promotions had been based strictly on merit, a fact that became key in the analysis of the courts.¹²¹ According to Vinson, Taylor treated her kindly at first, but later suggested a sexual relationship. At first she refused, but

¹¹⁸ 42 U.S.C. 2000e.

¹¹⁹ 106 S. Ct. 2399 (1986).

¹²⁰ Walsh, 2.

¹²¹ Ibid.

then acquiesced for fear of losing her job. Vinson alleged that she had intercourse with Taylor 40-50 times in four years, that he fondled her in public, exposed himself to her, even forcibly raped her on several occasions. All of these allegations were denied by Taylor.¹²² The plaintiff never reported the manager's conduct to any senior manager, nor did she attempt to use the bank's complaint procedure.

Focusing on the fact that Vinson's promotions had been based on merit, the district court ruled that Vinson had not established a case for sexual harassment. Moreover, the court found that the relationship, if it existed, was one in which Vinson voluntarily participated.¹²³ The Court of Appeals for the District of Columbia Circuit reversed this decision.¹²⁴ The appeals court stated that a violation of Title VII may be predicated on either of two theories: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that creates a hostile working environment.¹²⁵ Furthermore, the court held that voluntary participation was

¹²² Ibid.

¹²³ 23 FEP Cases 37 (D.D.C. 1980).

¹²⁴ 753 F.2d 141 (D.C. Cir.1985).

¹²⁵ Id., 145.

irrelevant.¹²⁶ Finally, the view of the court was that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct.¹²⁷

When the case reached the Supreme Court, there were three key issues to be resolved: (1) Can a plaintiff establish a sexual harassment case in the absence of tangible economic loss? Is the creation and toleration of a hostile and offensive environment actionable under Title VII? (2) Can the complaining party willingly participate in a sexual relationship and still prevail in a sexual harassment suit? Does the voluntary participation of the complaining party provide a defense? (3) Under what circumstances is the employer liable for the acts of his employee?¹²⁸

The Supreme Court ruled squarely in favor of the hostile environment theory. Relying on the guidelines presented in the regulations of the EEOC, the Court agreed with the court of appeals that there are two distinct types of sexual harassment suits: quid pro quo and hostile environment. Since Vinson suffered no economic loss, she

¹²⁶ Id., 146.

¹²⁷ Id., 150.

¹²⁸ Walsh, 2.

was unable to establish a quid pro quo case, but the Court held that the individual who has to work in a hostile environment has been discriminated against on the basis of sex, just as much as the employee who loses a job because she refuses to have sex with her boss. Accordingly, the case was remanded to the district court to consider whether Vinson could prove a violation of Title VII under the hostile environment theory.¹²⁹

As for the second issue, the Supreme Court opened the door to sexual harassment suits even when a woman participates willingly. The Court, again focusing on the EEOC regulations found that the willing participation of both parties is not a defense.

The fact that sex-related conduct was "voluntary" in the sense that the complainant was not forced to participate against her will is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."¹³⁰

This posture by the Court directed lower courts to focus on whether the respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether the participation in sexual intercourse was voluntary.¹³¹ Accordingly, the Court also held that testimony concerning

¹²⁹ Vinson, 447 U.S. 68-69.

¹³⁰ Id.

¹³¹ Id.

the plaintiff's sexually provocative speech or dress is "obviously relevant."¹³² The Court noted that the EEOC regulations direct that sexual harassment must be assessed in light of the whole record and the totality of circumstances.¹³³

Finally, the Court declined to make a definitive ruling on the issue of employer liability. The Court rejected the strict liability standard of the circuit court, but, at the same time, rejected the position of the bank that the mere existence of a non-harassment policy and a grievance process insulated the employer from liability.¹³⁴

In Meritor, the Supreme Court gave considerable deference to the guidelines of the Equal Employment Opportunity Commission, making it clear that under Title VII, sexual harassment cases come in two varieties: quid pro quo and hostile environment.¹³⁵ Moreover, the key issue is the "unwelcomeness" of the sexually related conduct rather than whether the parties participated willingly.¹³⁶ Finally, on the issue of employer

132 *Id.*, 69.

133 *Id.*

134 *Id.*, 72.

135 *Walsh*, 3.

136 *Ibid.*

liability, the Court declined to rule. However, the Code of Federal Regulations¹³⁷ describes three sets of circumstances under which an employer might be held responsible for sexual harassment on the job.

1. An employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.
2. An employer is responsible for the acts of sexual harassment by fellow employees if it knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
3. An employer is responsible for the acts of non-employees if the employer knows or should have known of the conduct and fails to take immediate and appropriate action.¹³⁸

These regulations clearly show the extent to which an employer can be held liable for sexual harassment in the workplace. To protect themselves, employers should affirmatively raise the issue of harassment with employees, have a proactive sexual harassment policy, and set clear procedural guidelines. Appropriate education of employees

¹³⁷ 29 C.F.R. 1604.11 (1987).

¹³⁸ Id.

regarding their rights under Title VII and sanctions against violators provide the best defense for employers against possible harassment claims.¹³⁹

The Effects of Sexual Harassment

Being subjected to sexual harassment can have a negative impact on the victim's emotional, social, and physical sense of well-being.¹⁴⁰ In one study, adolescent females who had been sexually harassed reported "feelings similar to those identified by rape victims."¹⁴¹ "Decreased feelings of competence and confidence and increased feelings of anger, frustration, depression, and anxiety all can result from harassment."¹⁴² According to Riger, a sense of self-blame, especially among women with traditional sex-role beliefs, is also common.¹⁴³ In turn, these emotions can

139 Id.

140 Linda S. Lumsden, "Combatting Sexual Harassment," ERIC Digest 75 (December 1992): 1.

141 Susan Strauss, "Sexual Harassment in the School: Legal Implications For Principals," NASSP Bulletin 72 (March 1988): 94

142 Stephanie Riger, "Gender Dilemmas in Sexual Harassment Policies and Procedures," American Psychologist 46 (May 1991): 497.

143 Ibid.

create a decreased ability to concentrate and a sense of listlessness.¹⁴⁴

Studies also indicate that absenteeism tends to increase among employees who are sexually harassed, work attitudes are affected adversely, and productivity drops.¹⁴⁵ When students are the target, sexual harassment can rob them of their right to an equal education by interfering with "learning, attendance, course choices, grades, and therefore economic potential."¹⁴⁶

Sexual Harassment in Schools

Like sexual harassment in the workplace, harassment within educational institutions is fast becoming an area of legal concern.¹⁴⁷ Its illegality notwithstanding, sexual harassment constitutes a persistent and increasing problem in many secondary schools, where it ranges from the use of sexual humor and innuendos to physical threats and

¹⁴⁴ Kathy Hotelling, "Sexual Harassment: A Problem Shielded by Silence," Journal of Counseling and Development 69 (July/August 1991): 507.

¹⁴⁵ B. H. Collier and C. T. Holmes, "Sexual Harassment Is a Power Play Nobody Wins," The Executive Educator 11 (November 1989) 28.

¹⁴⁶ Strauss, 96.

¹⁴⁷ Judith B. Langevin and Thomas C. Kayser, "Sexual Harassment in Educational Institutions," Trial (June 1988): 29.

sexual assaults.¹⁴⁸ All too often, this behavior has been condoned with the attitude that "boys will be boys" or that "you can't change human nature," misconstrued as a normal rite of passage from adolescence to adulthood, or excused with the comment, "Can't you take a joke?" However, there is nothing innocent, normal, or funny about harassment.¹⁴⁹ Sexual harassment should not be confused with flirting, which is often welcomed and reciprocated and which, in any case, the recipient is free to ignore. Likewise, it is not seduction, which the recipient can stop by not responding. Sexual harassment is unwelcome sexual attraction that a victim is powerless to stop, and, as such, it may be better conceptualized as an act of aggression.¹⁵⁰ Sexual harassment may involve relationships between students and faculty, students with each other, or employees with one another. Whatever the nature of the relationship, sexual harassment has an adverse effect on both teaching and learning.¹⁵¹ In addition, the effects of sexual harassment extend far beyond its direct victims. Bystanders and witnesses to incidents of harassment express cynicism about education and a loss of

¹⁴⁸ Bogart and Stein, 146.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid., 6.

confidence in the effectiveness of school policies.¹⁵² Sexual harassment is maintained by silence: the silence of the educational community and the silence of individuals who are witnesses to sexual harassment of others or are subjected to it themselves. Not reported or addressed, sexual harassment emerges as a critical and divisive issue in our schools.¹⁵³ Sexual harassment may involve overt actions as extreme as physical threats, sexual assault and rape, as well as subtle interactions which communicate condescension, hostility, or invisibility. It may be expressed in verbal comments, jokes, innuendos of a sexual nature, or in nonverbal communications such as suggestive looks or unwanted touching. Psychological, as well as, physical in its power over others, sexual harassment also exerts control through disapproval and rejection.¹⁵⁴

The first survey on peer to peer sexual harassment was administered in 1980-81 to approximately 200 male and female high school students in Massachusetts.¹⁵⁵ This study revealed that sexual harassment is a problem for many students in high school. Female high school students reported:

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid., 11.

This really huge senior would come up to me at my locker and hug me, and start kissing me, and touching me. There was no way I could make him stop because he was so big. I wasn't the only one he harassed.

It is a common and recurring problem that certain male students make repeated propositions to female students. These propositions are often accompanied by obscene comments. It makes students very uncomfortable and influences attendance.

A young woman who had been a cheerleader at our school received threatening notes and phone calls with sexual innuendos, in school and at home.

In class, a young woman was going to the front of the classroom and suddenly a group of young men began calling her names and making rude and insulting comments. She said nothing and her friends said nothing because they were used to it. She felt very low and disrespected.¹⁵⁶

According to a recent study conducted by Seventeen Magazine in conjunction with the NOW Legal Defense and Education Fund and the Wellesley College Center for Research on Women, this is what happens in schools today: "You are walking down the hall and a guy comes up behind you and snaps your bra or gropes your breast; a guy leers at you, grabs his crotch Marky-Mark style, and says, 'Do me'; a counselor who has gained your trust asks whether you've ever thought about sex with an older man; your name shows up on a list being passed around labeled 'Piece of Ass of the Week'; you are cornered by a guy who whispers obscenely about what he wants to do to you" and some even reported being

¹⁵⁶ Ibid., 12

assaulted or raped.¹⁵⁷ More than 4000 teenagers answered this questionnaire which was the first national survey ever to ask teenage girls about sexual harassment.¹⁵⁸

A classic peer sexual harassment incident was that of Katy Lyle. In 1989, Katy was a junior in high school in Minnesota when vulgar remarks about her first appeared on the walls of the boys' bathroom. The graffiti was a daily humiliation for Katy. Despite repeated complaints to the administration, this form of sexual harassment went unchecked for eighteen months. Katy and her parents finally took legal action. Duluth Central High School is believed to be the first school in the nation to pay damages to a student who was sexually harassed. The litigants reached an out of court settlement that clarified sexual harassment policies and paid Katy \$15,000.¹⁵⁹

More recently, "Street Stories" broadcast a report of sexual harassment on school buses. In Eden Prairie, Minnesota a first grade girl was being harassed by a boy on the bus who was calling her a bitch and telling her to have oral sex with her father. The schools handled it as a bus

¹⁵⁷ Adrian Nicole LeBlanc, "Harassment at School: The Truth is Out," Seventeen Magazine, May, 1993, 134.

¹⁵⁸ Ibid.

¹⁵⁹ Jane Gross, "Schools Are Newest Arena for Sex-Harassment Cases," The New York Times, 11 March 1992, 1A, 8B.

discipline problem rather than a sexual harassment situation because of the age of the child. The mother of the girl contacted a lawyer and was expected to file charges against the school.¹⁶⁰ In the same broadcast, a similar situation in Texas was explored. In this situation a ten-year-old boy was sexually harassing a female student on the school bus by threatening to rape her and fuck her in the mouth. Again school officials did not treat it as an incident of sexual harassment and the principal of the school viewed that notion as "sensationalism." The "boys will be boys" attitude prevailed.¹⁶¹

In Jacksonville, North Carolina, two reported sexual attacks took place on a middle school bus within a month. The attacks allegedly had been going on for two or three weeks prior to the second reported incident on December 9, 1992.¹⁶²

On February 24, 1993 in Fairmont, North Carolina, nine and ten-year-old boys dragged a ten-year-old girl from the bleachers of the school gymnasium and tried to pull her clothes off. The boys tried to take the girl to the boys'

¹⁶⁰ Ed Bradley. "Street Stories" aired on CBS, 21 January 1993

¹⁶¹ Ibid.

¹⁶² Carolyn Alford. "Second Girl Attacked On School Bus," The Daily News (Jacksonville, NC), 16 December 1992, 1B.

locker room, but it was locked. Two of the boys then pinned the girl to the floor while the others started to pull down her pants. When she screamed, another girl tried to help her, but the boys pinned her down, too, and began reaching under her skirt and fondling her.¹⁶³

These are not idiosyncratic, isolated incidents. They are compelling repeated events. Every year more and more incidents of peer harassment are collected, not only by the Massachusetts Department of Education, but also by other educational agencies around the country, including California, Hawaii, Maryland, Minnesota, Pennsylvania, and Washington Departments of Education.¹⁶⁴ In September of 1992, the California legislature passed the first sexual harassment legislation that targeted schools directly and addressed harassment by students as young as nine years old.¹⁶⁵

A Massachusetts study also reported on teacher-student harassment. Among the allegations were:

A science teacher measured the craniums of the boys in the class and the chests of the girls. This lesson in skeletal frame measurements was conducted one by one, at the front of the class, by the teacher.

¹⁶³ "Boys Attack Girl At School," The Daily News (Jacksonville, NC), 6 March 1993, 4B.

¹⁶⁴ Bogart and Stein, 153.

¹⁶⁵ Section 48980 § 212.6 of the California Education Code.

A classroom teacher asked one junior high girl, in front of the whole class, how far she had gone with her boyfriend, specifically if she had gone to "second" or "third" base with him.

A teacher from a vocational school was making sexual comments to a young lady in class. The comments included questions about the kind of underwear the young women was wearing.¹⁶⁶

Dan Wishnietsky conducted a study which reported the extent of sexual harassment between North Carolina high school students and teachers. Wishnietsky surveyed 140 North Carolina school superintendents and 300 high school seniors. The data revealed a discrepancy between the number of faculty that the superintendent's reported as having been disciplined for sexual harassment of a student and the number of students who believed they had experienced sexually harassment. In the study, conducted in 1989, 65 superintendents responded that 26 teachers had been disciplined for sexual harassment while, during the same time period, 148 students who responded reported 90 incidents of sexual harassment. Regardless of the discrepancy, Wishnietsky states that "whether the actual percentage of educators involved in sexual harassment is 1%, 5%, or 20% becomes inconsequential. The fact that there are

¹⁶⁶ Ibid., 151.

teachers involved in unethical relationships with students, indicates a problem that can not be ignored."¹⁶⁷

Historical events indicate that secondary school administrators who do not protect students from sexual harassment from teachers are vulnerable to legal prosecution. In Ingraham v. Wright,¹⁶⁸ the Supreme Court established the right of students to be free of physical abuse by agents of the state. Using Ingraham v. Wright as a precedent, the federal court serving Western Pennsylvania indicated that a safe environment is free of sexual harassment.¹⁶⁹ The case involved a male high school teacher who had sexual relations with several female students. Testimony indicated that several administrators knew of the teacher's behavior and did not intervene. While this case was still being litigated, the Bradford Area School District settled out of court with two other female students for \$700,000.¹⁷⁰

Susan Strauss states that sexual harassment is widespread in the school setting but receives little attention from administrators. Many school officials fear

¹⁶⁷ Dan H. Wishnietsky, "Reported and Unreported Teacher-Student Sexual Harassment," Journal of Education Research 84 (January-February 1991): 164-5.

¹⁶⁸ Ingraham v. Wright, 97 S. Ct. 1401 (1977).

¹⁶⁹ Stoneking v. Bradford Area School District, 667 F. Supp. 1088 (W.D. Pa. 1987).

¹⁷⁰ Wishnietsky, 168.

that if students learn of their rights, they will file false charges to "get back" at teachers or principals.¹⁷¹ However, this "what they don't know won't hurt them" attitude is dangerous to the student and the district, as well.¹⁷² Informing teachers and students of their rights under Title IX is imperative. "If school districts do not have a sexual harassment grievance procedure, they are in violation of Title IX."¹⁷³

Sexual Harassment and Title IX

Students who have been sexually harassed may bring suit under Title IX of the Educational Amendments of 1972 which the courts have interpreted by borrowing many of the principles developed under Titles VI and VII of the Civil Rights Act of 1964.¹⁷⁴

Title IX was to have a comprehensive effect on sex discrimination in educational institutions.¹⁷⁵ It emphasized two general objectives: restricting federal funds to institutions that support discriminatory practices and

¹⁷¹ Strauss, 96.

¹⁷² Ibid., 96.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ 118 Cong.Rec. 5804-06 (1972).

providing individuals protection against such discriminatory practices.¹⁷⁶ Instead of prohibiting certain conduct within the Act, Congress patterned its wording of Title IX on that of Title VI¹⁷⁷ and expressly emphasized the rights of the victim in Section 901:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.¹⁷⁸

After the enactment of Title IX, it became the responsibility of the Department of Housing, Education and Welfare (HEW)¹⁷⁹ to issue the procedural and substantive regulations under Title IX. The HEW regulations did not address the enforcement and the relief problems of the victim that appeared to be inherent in the funding termination option. The regulation placed primary emphasis on the systematic monitoring and subsequent correction of discrimination. Less emphasis was placed on investigation

¹⁷⁶ Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed 2d 560 (1979).

¹⁷⁷ 42 U.S.C. 2000d (1976).

¹⁷⁸ Id.

¹⁷⁹ The HEW has since become the Department of Health and Human Services. The Department of Education has taken over jurisdiction of educational matters. Regulations were reissued as 34 C.F.R. 106.1-.71 (1981).

and correction of individual discrimination.¹⁸⁰ However, the courts have ruled that Title IX, like Title VII, prohibits both quid pro quo and hostile environment sexual harassment.¹⁸¹ In Lipsett, the court also found that the theories of employer liability applicable to Title VII cases also apply to educational institutions for violations of Title IX. In Cannon v. University of Chicago, the Supreme Court determined that private causes of action could be filed under Title IX. In deciding Cannon, the Supreme Court relied on the four-pronged test it had previously defined in Cort v. Ash.¹⁸² The Cort test examines whether: (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) a legislative intent to create or deny such a remedy is apparent; (3) a remedy would be consistent with the underlying purposes of the statute; and (4) the cause of action is traditionally relegated to state law. Cannon left unresolved, however, what remedies would be available to a plaintiff on a private action under Title IX.

Since the Supreme Court decision in Cannon, three circuits have decided whether compensatory relief should be

¹⁸⁰ Roak J. Parker, "Compensatory Relief Under Title IX of the Education Amendments of 1972," West's Education Law Reporter, 68 (1991), 563.

¹⁸¹ Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir.1988).

¹⁸² 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

available under Title IX. Two circuits¹⁸³ held that compensatory relief should not be available, while the third¹⁸⁴ held that it should be. Because of these conflicts, Franklin v. Gwinnett was granted certiorari by the Supreme Court.

In this case, Christine Franklin alleged that she was subjected to continual harassment beginning in the autumn of her tenth grade year (1986) from Andrew Hill, a coach and teacher employed by the district. Franklin said that Hill engaged her in sexually-oriented conversations in which he asked her about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man (these conversations were reported by Franklin's boyfriend to the band teacher, Dr. Prescott). In addition, Franklin alleged that Hill forcibly kissed her on the mouth in the school parking lot, that he called her at home and asked whether she would meet him socially, and that on three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse. The complaints further alleged that although

¹⁸³ Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir.1981), Franklin v. Gwinnett Public Schools, 911 F.2d 617 (11th Cir.1990) 112 S.Ct 1028 (U.S. 1992).

¹⁸⁴ Pfeiffer v. School Board for Marion Center Area, 917 F.2d 779 (3rd Cir.1990).

teachers and administrators became aware of and investigated Hill's sexual harassment of Franklin and other female students, they took no action to halt it and discouraged Franklin from pressing charges against Hill. In April of 1988, Hill resigned on the condition that all matters pending against him be dropped. The school then closed its investigation.¹⁸⁵ Prior to bringing this lawsuit, Franklin filed a complaint with the Office of Civil Rights of the U.S. Department of Education (OCR). After investigating these charges for several months, OCR concluded that the school district had violated Franklin's rights and interfered with her right to complain about conduct proscribed by Title IX. It then terminated its investigation.¹⁸⁶ Focusing on the fact that the alleged harasser had resigned and the school district had come into compliance with Title IX, the District Court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The Court of Appeals affirmed.¹⁸⁷

When the case reached the Supreme Court, there was only one key issue to be resolved: Is a damages remedy available for an action brought to enforce Title IX?

¹⁸⁵ 911 F.2d at 618.

¹⁸⁶ The United States Law Week 60, (25 February 1992): 4168.

¹⁸⁷ Id.

The Supreme Court found that the substantive right at issue in this case is one that Congress did not expressly create, but can be implied. The Civil Rights Remedies Equalization Amendment of 1986¹⁸⁸ must be read, not only as a validation of Cannon's holding, but also as an implicit acknowledgement that damages are available.¹⁸⁹ Therefore, the Court ruled that damages are available for an action brought under Title IX, thereby reversing the judgement of the Court of Appeals and the case was remanded for further proceedings consistent with this ruling.¹⁹⁰

Employer Liability

Courts have ruled that the right to be free from sexual harassment is constitutionally protected through the equal protection cause¹⁹¹ and substantive due process.¹⁹² The Supreme Court has ruled that a municipal corporation is a "person" for the purposes of section 1983 of the Civil

188 42 U.S.C. 2000d-7(a).

189 The United States Law Week, 4172.

190 Ibid., 4172.

191 Brenner v. School District 47, No. 86-1343C (E.D. Mo. 1987) (West Law AllFed Directory).

192 Stoneking, 667 F. Supp. 1088.

Rights Act of 1964.¹⁹³ Thus, school districts, as well as individual administrators, may be held liable for the conduct of a harassing teacher.¹⁹⁴

A school district will not be held responsible on the basis of respondeat superior. Rather, liability will occur when execution of a government unit's policy or custom inflicts the injury.¹⁹⁵ It is important to note that the custom that causes the injury need not have received formal approval through official channels.¹⁹⁶ A district court, denying summary judgement, has held that evidence of a school district's failure to investigate complaints of sexual abuse and harassment may evidence a "custom" and lead to liability.¹⁹⁷ This same court also held that individual school administrators have a duty to ensure that a school environment is safe for students. Although courts must defer to the judgement of professionals executing their duties, evidence that administrators have failed to detect or investigate harassment complaints may show a "substantial departure from accepted professional judgement, practice or

¹⁹³ Monell v New York City Department of Social Services, 436 U.S. 658 (1978).

¹⁹⁴ Stoneking, 667 F. Supp. 1088.

¹⁹⁵ Monell, 436 U.S. 658.

¹⁹⁶ Id.

¹⁹⁷ Stoneking, 667 F. Supp. 1088.

standards," thus subjecting them to possible liability.¹⁹⁸ Since more than mere negligence is needed to establish liability of state officials,¹⁹⁹ the court held that there was a genuine issue of material fact as to whether these administrators, if shown to have substantially departed from accepted professional judgement, acted recklessly in handling sexual harassment complaints.²⁰⁰ However, the court also held that administrators may not be shielded from liability on the basis of qualified immunity if their conduct violates a clearly established statutory or constitutional right about which a reasonable person would have known,²⁰¹ such as the right to be free from sexual harassment.

In a nutshell, school officials and administrators can be held liable for sexual harassment by supervisors, employees, students, and even non-employees who harass school personnel at the school, unless it can be proven that immediate and appropriate action was taken.²⁰²

¹⁹⁸ Youngberg v. Romero, 457 U.S. 307 (1982).

¹⁹⁹ Daniels v. Williams, 474 U.S. 327 (1986).

²⁰⁰ Stoneking, 667 F. Supp. 1088.

²⁰¹ Harlowe v. Fitzgerald, 457 U.S. 800 (1982).

²⁰² Julie Underwood, "End Sexual Harassment of Employees, Or Your Board Could Be Held Liable," American School Board Journal 174 (April 1987): 43

School board members and superintendents should protect employees and students from sexual harassment aggressively by establishing a sexual harassment policy, informing employees and students of their rights, and making sure everyone understands the procedures for dealing with complaints of harassment. Training and prevention programs need to be established and, if a sexual harassment complaint arises, immediate and appropriate action needs to be taken.²⁰³

Policies and Procedures

In its guidelines on sexual harassment, the Equal Employment Opportunity Commission directs employers to take all steps necessary to prevent sexual harassment. Naomi Gittins has translated these guidelines into the school setting.²⁰⁴ In her article, Gittins outlines seven separate responsibilities.

1. Develop a sexual harassment policy. Any sexual harassment policy should include a definition of sexual harassment. The policy can refer to the EEOC's definition of sexual harassment, but should also attempt to explain, in easily understand terms, conduct that will and will not be tolerated. The policy should then be disseminated to employees. The policy should

²⁰³ Ibid., 44

²⁰⁴ Naomi E. Gittins, "Practical Advice For Handling Sexual Harassment in Schools," Sexual Harassment in the Schools: Preventing and Defending Against Claims (Alexandria: National School Boards Association, 1990): 31.

be given to all employees, posted, and become part of a package given to new employees.

2. Train all employees. Develop a training program and tailor it to the educational work force. Use hypothetical situations that could arise or have already arisen and give guidance concerning the difference between welcome, consensual relationships, and sexual harassment. Stress that the harassment does not only depend on the perpetrators intention, but also on how the target perceives the behavior or is affected by it. Educate employees to recognize and confront harassment. Give additional training to supervisors on how to handle sexual harassment.

3. Adopt a complaint procedure. Describe in specific terms the informal and formal complaint process. The procedure should make it easy for the victim to come forward. Assure complainants that they will be protected against retaliation and that the identity of both the complaining employee and the alleged harasser will remain confidential. Although confidentiality does not necessarily mean anonymity, all complaints need to be handled discreetly. The procedure also needs to address the investigative process, both formal and informal, as well as the time frame involved.

4. Take prompt and effective corrective action. Document every aspect of the investigation, make a decision quickly and inform the complainant in writing of the proposed disposition of the matter including the corrective action, if any to be taken. The disposition should discuss the facts and the points of law supporting the decision, as well as, explain any right of appeal. Deal with the offending employee immediately and provide appropriate remedy to the victim. Periodic follow up is recommended to assure that the harassment has stopped and that no retaliation has taken place.

5. Implement preventive policies. Conduct periodic, random surveys to determine if sexual harassment is a problem in a given area and remind supervisors of the inherent risks of their own behavior. Provide feedback and workshops for supervisors on their styles and tactics of leadership. Two helpful guidelines for everyone to remember: Would you engage in the same conduct if your spouse or the other person's spouse (or significant other) were present? Would you subject your mother, sister, or daughter to the same conduct? If the answer is "no," stop the behavior.

6. Protect students in the same manner. Provide policies, information and procedures for students to follow and thoroughly investigate all allegations in a timely manner. Require teachers, counselors, nurses, etc. to notify the administration of any allegations of harassment. The superintendent should be informed of every allegation and the superintendent should then seek specific legal advice from the school attorney. Keep the student's parents informed and avoid co-mingling counseling and investigative functions.

7. Release information about former employees. With the counsel of the school attorney, inform prospective employers of a former employee's adjudication of sexual impropriety or resignation in the face of accusations of sexual misconduct. Do thorough pre-employment reference checks for all employees.²⁰⁵

These guidelines provide a way for school officials to view sexual harassment and consider their legal and moral responsibility to stop it.

Summary

Sexual harassment is a serious problem and it exists, in one of its many forms, in virtually every human setting. Recent headlines, including the Judge Clarence Thomas hearings and Tailhook, have catapulted sexual harassment into the national spotlight, thereby educating the public about what it is and how it can be remedied. Legal action is on the increase and employers are scrambling to construct policies, procedures, and training to educate and sensitize their work forces to recognize and eliminate the problem of

²⁰⁵ Ibid., 31-43.

sexual harassment. School systems need to realize that they are particularly vulnerable to sexual harassment litigation because, in addition to the same liability faced by all employers, schools have the additional burden of protecting students. An effective, proactive, well-publicized sexual harassment policy accompanied by procedures which provide for an immediate and adequate employer response is the key element in curbing sexual harassment and protecting the employer from liability.

CHAPTER III
LEGAL ASPECTS OF SEXUAL HARASSMENT

Introduction

Meritor Savings Bank, FSB v. Vinson¹ is the most significant landmark decision in sexual harassment claims brought under Title VII of the Civil Rights Act of 1964.² Therefore, a portion of the focus of this chapter is an analysis of legal cases leading up to Meritor, the Meritor case itself, and the resulting influence of Meritor on case law. The balance of this chapter focuses on significant cases of sexual harassment whose claims were brought under Title IX of the Education Amendments of 1972.³ Finally, it is important to note that other legislation exists under which sexual harassment victims can file successful claims. Therefore this chapter touches briefly on sexual harassment claims brought under alternative legal theories.

On the following pages, many court cases are discussed. The facts in each case are introduced, the decision of the court is presented, and the implications of the court decision are included.

¹ 106 S. Ct. 2399 (1986).

² 42 U.S.C. § 2000e (1982).

³ 20 U.S.C. § 1681.

Sexual Harassment Claims Under Title VII

Pre-Meritor

Since Meritor, claims of sexual harassment are no longer seen as being beyond the intent of Title VII of the Civil Rights Act of 1964. Prior to Meritor, however, cases of sexual harassment were dismissed as not contemplated by Title VII. For example, in Corne v. Bausch and Lomb, Inc.⁴ the court focused on the personal aspects of sexual harassment. The court found sexual advances by a supervisor to an employee as "nothing more than a personal proclivity or mannerism"⁵ In this case, a supervisor repeatedly made verbal and physical advances toward two female employees who were allegedly forced to quit because of his behavior. The court held that the supervisor's actions arose from the supervisor's "personal urge," which was distinct from Bausch and Lomb's company policies. Only the latter could provide a basis for a Title VII claim. Further, the Corne court concluded that allowing suits for sexual harassment under Title VII was "ludicrous" for two reasons. First, if the activity in question was directed equally to males, Title VII would not apply. The court inferred from this that Congress had not intended to redress sexual harassment

⁴ 562 F.2d 55 (9th Cir. 1977).

⁵ Id.

through the discrimination laws. Second, the court believed that to hold such conduct to be actionable under Title VII, would create a potential lawsuit every time an employee made amorous or sexually oriented advances toward another.⁶ Likewise, in Miller v. Bank of America⁷ the court writes that it would seem wise for the courts to refrain from delving into the natural sex phenomenon of personal decisions.⁸ In this case, the court began by characterizing the sexual advances of the plaintiff's supervisor as "unauthorized isolated sex-related acts" that could not constitute the acts of the Bank of America. Only if the employer had actively or tacitly approved personnel policies requiring sexual favors as a condition of employment would there be a Title VII violation. Otherwise, the court reasoned, if harassment was discrimination, then every firing or failure to promote could be turned into a discrimination action. Further, because it felt that sexual attraction was pervasive, the Miller court doubted its capacity to distinguish actual illegal harassment from harmless flirtation.⁹

⁶ Id.

⁷ 418 F. Supp. 233 (N.D. Cal 1976), rev'd on other grounds, 600 F.2d 211 (9th Cir. 1979).

⁸ Id at 236.

⁹ 418 F. Supp. at 236.

In order to win their discrimination actions, sexually harassed plaintiffs began to realize that they had to convince the courts that harassment involved more than "personal" acts. In the late 1970s, the courts began to recognize that quid pro quo sexual harassment violated Title VII.

In a case bearing many names,¹⁰ Diane Williams, an employee of the Department of Justice, refused her supervisor's sexual advances. Her supervisor retaliated with annoying comments, unfavorable reviews, and unwarranted reprimands. While maintaining that "non-employment related personal encounters" were not actionable under Title VII, the court held that it was improper for a supervisor, whom the court regarded as an agent of the employer, to retaliate against an employee for refusing to comply with an illegitimate, discriminatory employment condition, in this case, a demand for sexual favors.¹¹ This was the first case in which a district court recognized sexual harassment as a Title VII violation.

Soon thereafter, courts began holding that plaintiffs made a prima facie case of sexual harassment if they proved facts similar to those involved in Williams, that is, an

¹⁰ Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd and remanded sub nom.; Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), aff'd sub nom.; Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980).

¹¹ Williams, 413 F. Supp. at 662.

employer or supervisor's demand for sexual favors in return for a job, a promotion, or other benefits.¹² It made sense that Title VII protected victims of this kind of conduct because Title VII explicitly forbids discrimination in the terms, conditions, and privileges of employment.¹³

In Barnes v. Costle,¹⁴ a supervisor repeatedly solicited the plaintiff to join him for social activities after hours despite her repeated refusals to do so. He made continuous sexual remarks, and repeatedly suggested that if the plaintiff cooperated in a sexual affair, her employment status would be enhanced. The court found sexual harassment when, subsequent to the employee's resistance, she was stripped of her duties and her job was abolished.¹⁵

The federal appellate court in Tomkins v. Public Service Electric and Gas Company¹⁶ reversed the ruling of a lower court. It found sexual harassment where an employee had received advances at lunch from her supervisor who stated that sexual relations were necessary for a satisfactory working relationship. These advances were

¹² Michael D. Vhay, "The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment," The University of Chicago Law Review 55 (1988): 334.

¹³ 42 U.S.C. § 2000-e.

¹⁴ 561 F.2d 983 (D.C. Cir. 1977).

¹⁵ Id.

¹⁶ 422 F. Supp. 553 (D.N.J. 1976) ("Tomkins I") rev'd. 568 F.2d 1044 (3rd Cir. 1977) ("Tomkins II").

followed by threats of recrimination and physical force which, when resisted, led to the employee's transfer to an inferior position, false and adverse employment evaluations, disciplinary lay-offs, and finally dismissal.

In a Michigan case,¹⁷ sexual harassment was found where a supervisor made repeated verbal sexual suggestions and innuendos and left cartoons on an employee's desk, demanded that the employee share his motel room on a business trip, and discharged her when she refused. In Heelan v. Johns-Manville Corporation,¹⁸ sexual harassment was found where a supervisor placed his arm around an employee saying she did not yet really understand the job requirements of travel and family sacrifices but would in time. This was followed by his explicit sexual invitations and an offer of an apartment if the employee would leave her husband and consent to an affair. Finally there was a demand that she have an affair with him or be fired, which she was.

However, in following the pattern set by Williams, the courts did not find sexual harassment in cases where actions of supervisors could not be directly tied to the loss of a

¹⁷ Munford v. Barnes & Company, 441 F. Supp. 459 (E.D. Mich. 1977).

¹⁸ 451 F. Supp. 1382 (D. Colo. 1978).

tangible job benefit.¹⁹

Quid pro quo harassment by a supervisory employee of a subordinate has been found to result in strict liability of the employer for the acts of the supervisory employee. This agrees with the standard of liability of Title VII, under which an employer is liable for the discriminatory acts of its supervisors, regardless of whether the employer knew, should have known, or approved of the supervisor's actions.²⁰

Bundy v. Jackson²¹ first articulated the offensive environment sexual harassment theory. The court held that sexual advances by a supervisor in the workplace could be sexual harassment even though the employee did not lose tangible employment benefits. Courts have debated and refined the theory of offensive or hostile working

¹⁹ Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981) (supervisor's bottom patting of employee not sexually oriented but intended as a show of support and encouragement; alleged incidents of breast touching and an inebriated attempt to have an affair on a business trip were not sufficient to establish sexual harassment when employee continued to carry out her duties and get raises); Bouchet v. National Urban League, 730 F.2d 799 (D.C. Cir. 1984) (although evidence suggested that the supervisor was attracted to the employee and flirted with her on several occasions, it did not establish that any sexual advances or demands were made, and the employee's subsequent dismissal was based on poor performance.

²⁰ Meritor, 106 S. Ct. at 2408.

²¹ 641 F.2d 934 (D.C. Cir. 1981).

environment, however the federal circuit courts of appeal have split on several important related issues.

Before Meritor, the circuits were divided on whether the theory of respondeat superior or strict liability was the required standard for determining the liability of an employer for the acts of supervisory employees in an offensive environment cases. Henson v. City of Dundee²² and Katz v. Dole²³ were the leading federal court cases which held that the respondeat superior theory applied.

In Henson, a female dispatcher in the city of Dundee's police department alleged that she had received numerous demeaning sexual inquiries and advances from her police chief, that she had complained about these acts to the city manager, but that no action was taken. She brought a Title VII sexual harassment action against the city for the chief's actions. The 11th Circuit Court of Appeals held that the existence of a hostile working environment could violate Title VII of the Civil Rights Act of 1964 regardless of whether a plaintiff suffered tangible loss. The court relied on N. Jay Rogers v. EEOC,²⁴ a hostile environment

²² 682 F.2d 897 (11th Cir. 1982).

²³ 709 F.2d 251 (4th Cir. 1983).

²⁴ 454 F.2d 234 (5th Cir. 1971). cert denied, 406 U.S. 957 (1972). The court held that an Hispanic complainant could establish a Title VII violation by demonstrating that her employer created a hostile work environment for employees by giving discriminatory service to its Hispanic clientele.

race discrimination case, as well as, Bundy, for its decision. The court acknowledged that an individual's well-being could be undermined by a series of complex and pervasive activities.²⁵

The court in Henson established five criteria for a Title VII claim against an employer for a hostile work environment. First, the employee must belong to a group which is protected by Title VII. Simply enough, in a sexual harassment case, this means that an employee must be either male or female. Second, the employee must have experienced sexual harassment. The employee must have experienced sexual advances, requests for sexual favors, or other verbal or physical sexual conduct which the employee did not solicit or incite and found undesirable or offensive. Third, the harassment must have been based on gender, in other words, the employee would not have been harassed except for his or her sex. This criterion included conditions which a heterosexual superior places upon a subordinate of the opposite gender, or which a homosexual superior places upon a subordinate of either gender.²⁶

²⁵ Rogers, 454 F. 2d at 238.

²⁶ Barnes v. Costle, 561 F.2d 983 (D.C. Cir 1977).

Fourth, the harassment must have affected a "term, condition or privilege" of employment.²⁷ The harassment must have been so pervasive that it altered the conditions of employment and created an abusive environment.

Henson then established respondeat superior as the fifth criterion. In hostile environment sexual harassment cases, the employee must show that the supervisor knew or should have known of the sexually hostile environment before a court can hold the employer responsible. Therefore, Henson distinguished between an employer's liability in an offensive environment sexual harassment case and an employer's liability in a quid pro quo case. Henson recognized that in a quid pro quo case, strict liability would apply to the supervisor and the employer for sex discrimination.²⁸ This standard is used because, in quid pro quo cases, the supervisor relies on the apparent or actual authority which the employer confers on him to perform the harassment.

The Fourth Circuit followed Henson in Katz v. Dole.²⁹ Katz, a former federal air traffic controller, alleged she had been subjected to vulgar and offensive epithets by her

²⁷ The court held that the state of "psychological well being" of the employee could be such. Henson, 682 F.2d at 904.

²⁸ Id. (Citing Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979)).

²⁹ 709 F.2d 251 (4th Cir. 1983).

co-workers and her supervisor on the job. Katz successfully sued the Secretary of the Department of Transportation for sex discrimination under Title VII. In Katz, the court held an offensive environment actionable under Title VII and adopted Henson's respondeat superior theory. It put upon the plaintiff the burden of proving that the employer had actual or constructive knowledge of the existence of the sexually hostile working environment and did not take prompt and adequate remedial action. The employer could rebut the plaintiff's case in two ways. One, by showing that the events did not take place, were isolated, or generally trivial, or two, by pointing to prompt remedial action reasonably calculated to end the harassment.³⁰ The court noted in its opinion that the FAA did have a policy against sexual harassment, but that it was not effective and was known not to be effective by FAA supervisory personnel. This decision issued an early warning that a printed policy against sexual harassment alone would not be a sufficient defense in an offensive environment harassment case.³¹

In the 1980s women continued to utilize the hostile work environment theory when charging sexual harassment. However, there remained confusion and inconsistency among the courts in applying the hostile work environment in

³⁰ Id. at 256.

³¹ Id.

sexual harassment claims.³² Some of this confusion was settled by the Supreme Court in its 1986 decision in Meritor Savings Bank, FSB v. Vinson.³³

Meritor Savings Bank, FSB v. Vinson

The United States Supreme Court issued its first decision regarding sexual harassment in Meritor Savings Bank, FSB v. Vinson. The Court upheld the theory of offensive environment sexual harassment but left somewhat undecided the liability which an employer incurs in such cases if the harassing employee is a supervisor. Although the opinion did not make every employer automatically liable for the harassment of a supervisory employee, it indicated that courts must scrutinize the employee's delegation of authority in harassment cases. As a result of Meritor,

³² In Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), rev'd and remanded sub nom., Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986), strict employer liability was held when the court ruled that the EEOC guidelines imposed on an employer liability for a substantially discriminatory work environment, and citing Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) also held that a women did not have to prove resistance to sexual overtures in a sexual harassment case. The court in Jeppsen v. Wunnicke, 611 F. Supp. 78 (D.C. Alaska 1985) followed the Vinson approach finding it unnecessary for the plaintiff in a sexual discrimination case to prove that the employer knew that the supervisor had created a hostile working environment.

³³ 106 S. Ct. 2399 (1986).

courts probably will hold liable an employer who broadly delegates responsibility to a supervisory employee.³⁴

Justice Rehnquist, writing the majority opinion in which four justices joined, relied on the EEOC Guidelines, Rogers, Henson, Katz and Bundy.³⁵ First, the majority opinion of the Court recognized that an offensive sexual environment constitutes sexual harassment under Title VII. Rehnquist rejected the need for an economic effect for a sexual harassment claim. However, again citing Rogers and Henson, he stated that the harassment must be severe and pervasive.³⁶

Justice Rehnquist then stated that the correct inquiry in a sexual harassment case is whether the harassment was unwelcome and that evidence of a plaintiff's sexually provocative speech and dress would be relevant to the issue of "unwelcomeness."³⁷ However, addressing the crucial

³⁴ Elsa Kircher Cole, "Recent Legal Developments in Sexual Harassment," Sexual Harassment on Campus: A Legal Compendium (Washington, D.C.: National Association of College and University Attorneys, 1990), 9.

³⁵ Meritor, at 2406.

³⁶ Id.

³⁷ Id., at 2407. However, in Priest v. Rotary, 73 A.L.R. FED. 736 (N.D. Cal 1983), the court held that evidence of a plaintiff's sexual history would be inadmissible to prove her propensity to act in conformity with sexual harassment or to show her habit of sexual activities. The court said that the purpose of the discovery request was to harass, intimidate and discourage the plaintiff in her efforts to prosecute the case and therefore denied the discovery request.

issue of an employer's liability, Justice Rehnquist provided no definitive principle. He stated only that employers are not automatically liable for sexual harassment by supervisors. Rehnquist wrote that the supervisor must be acting as an agent of the employer. Congress used the term "agent" in its definition of employer in Title VII. To Justice Rehnquist, this usage evidenced an intent to place some limits on the extent to which employers should be liable for the acts of employees. He discussed the EEOC's conclusion that where an employee or supervisor exercises authority actually delegated by the employer to make or threaten to make employee decisions affecting subordinates, the action of the employee may be imputed to the employer.³⁸ Therefore, Meritor implies that employers are not subject to automatic liability if they have not delegated such authority to their employees.³⁹ The operative word in this discourse is automatic, thereby indicating that liability may still be found on a case by case basis.

Meritor appears to rely on four elements for a prima facie case of sexual harassment.⁴⁰ First, the supervisor made sexual advances. Second, the sexual advances were

³⁸ Meritor, 106 S. Ct. at 2407-08.

³⁹ Cole, 11.

⁴⁰ Ibid.

unwelcome. Third, the advances were sufficiently pervasive to constitute a condition of employment. Finally, the advances were so pervasive and continuous that the employer must be conscious of them or, the harassing employee had authority to make decisions affecting the employment status of the harassed employee.⁴¹

Justice Rehnquist noted that Vinson's failure to use the Bank's grievance procedure did not necessarily insulate the bank from liability.⁴² This conclusion seemed to be based on the fact that the bank's policy barred discrimination generally but did not necessarily alert Vinson of the bank's interest in correcting sexual harassment. Further, Justice Rehnquist indicated his dislike for the bank's policy because it required Vinson to complain first to the very person who was harassing her, her supervisor.⁴³ Thus, he implied that the decision might have been different if the procedure better informed employees that the bank would investigate and resolve sexual harassment complaints and if that procedure encouraged victims to come forward.⁴⁴

⁴¹ *Id.*, at 2408.

⁴² *Id.*, at 2408-09.

⁴³ *Cole*, 11.

⁴⁴ *Meritor*, 106 S. Ct. at 2408-09.

Justice Marshall wrote a concurring opinion that addressed only the issue of employer liability. Justice Marshall saw no reason to distinguish an employer's liability in an offensive environment sexual harassment situation from that in any other case of sex discrimination.⁴⁵ Justice Marshall felt that a failure to distinguish such liability would impose no additional hardship on an employer. Title VII's requirement that a plaintiff file a complaint with the EEOC provides the employer an opportunity to correct an unperceived or unknown problem before any injunction.⁴⁶

Although Meritor did not explicitly determine an employer's liability in offensive environment cases, the Court did alert employers that their delegation to supervisors of an authority affecting the employment status of employees may make those employers strictly liable for the sexual harassment inflicted by such supervisors. Therefore, employers must provide a procedure for receiving and addressing complaints, and make this procedure known to employees. The procedure must contain sufficient flexibility to allow and encourage a harassed employee to approach management with a complaint, not only at the

⁴⁵ Id., at 2411.

⁴⁶ Id.

supervisory level, but also at any level chosen by the employee.⁴⁷

Post-Meritor

Women have long understood the detrimental nature of a hostile work environment. The courts, however, have been slow to grasp the concept.⁴⁸ For example, during the same year that Meritor was decided, the court reasoned in Rabidue v. Osceola Refining Company⁴⁹ that

indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to, or can, change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But, it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers.⁵⁰

In this case, Henry, Vivienne Rabidue's supervisor, was described as an "extremely vulgar and crude individual who customarily made obscene comments about women generally,

⁴⁷ Cole, 12.

⁴⁸ Robert J. Shoop, "The Reasonable Women in a Hostile Environment," West's Education Law Reporter, 23 April 1992, 710.

⁴⁹ 805 F.2d 611 (6th Cir. 1986).

⁵⁰ Id., at 620-21.

and, on occasion, directed such obscenities to Rabidue."⁵¹ In addition to the vulgarity, Rabidue and other women employees were exposed to displayed pictures of nude and scantily clad women in offices and other work areas. Circuit Judge Krupansky agreed with the district courts finding that "Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees."⁵² Judge Krupansky did not believe that the evidence demonstrated that this single employee's vulgarity substantially affected the totality of the workplace. He believed the sexually oriented poster displays had a "de minimis" effect on the plaintiff's work environment.⁵³ Therefore, the Federal court affirmed the findings of the district court that Rabidue failed to sustain her burden of proof that she was the victim of a Title VII sexual harassment violation.

It is ironic that the "reasonable women" theory was first set out in the dissenting opinion in the Rabidue case. Writing in dissent, Judge Keith stated that "the court is mistaken in affirming the findings that the defendant's treatment of the plaintiff evinced no anti-female animus and that gender-based discrimination played no role in her

⁵¹ Id., at 622.

⁵² Id.

⁵³ Id.

discharge.⁵⁴ Judge Keith listed some of the vulgarity that Judge Krupansky believed had only a minimal effect on the work environment. The court record shows that Henry routinely referred to women as "whores," "cunt," "pussy," and "tits."⁵⁵ In referring to the plaintiff, Henry specifically remarked that "all that bitch needs is a good lay."⁵⁶

Judge Keith identified misogynous language and decorative displays as a "fairly significant" part of the job environment, and was unable to accept the standard for sexual harassment set forth in the majority opinion. In rejecting the continued use of the "reasonable person" standard for determining a hostile work environment, he said that it failed to account for the wide divergence between most women's views of appropriate sexual conduct and those of men.⁵⁷ Instead he proposed the adoption of the "reasonable woman." Judge Keith also disagreed with the majority opinion that a woman assumes the risk of working in an abusive, anti-female environment. He believed that the

⁵⁴ Id., at 623.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id., at 626.

precise purpose of Title VII is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act.⁵⁸

Ellison v. Brady⁵⁹ and Robinson v. Jacksonville Shipyards, Inc.⁶⁰ are two 1991 decisions that indicate that some courts are becoming aware of the gender hierarchy that shapes much of the interaction between women and men in the workplace.⁶¹

In Ellison, a female revenue agent for the Internal Revenue Service received a series of strange love letters from a male co-worker. Believing that her grievances had not been satisfactorily resolved, Ellison filed a formal complaint alleging sexual harassment. Although the IRS investigator agreed that Ellison was being sexually harassed, the Treasury Department rejected Ellison's complaint because it did not describe a pattern or practice of sexual harassment covered by EEOC regulations. After an appeal, the EEOC affirmed the Treasury Department's decision on the ground that the agency took adequate action to prevent the repetition of the harassing conduct.⁶² The

⁵⁸ Shoop, 711.

⁵⁹ 924 F.2d 872 (9th Cir. 1991).

⁶⁰ 760 F.Supp. 1486 (M.D. Fla. 1991).

⁶¹ Shoop, 712.

⁶² Ellison at 875.

trial court granted summary judgement to the Secretary of the Treasury.

However, Circuit Court Judge Beezer believed that if the standards set forth in Rabidue were accepted, employees would have to endure sexual harassment until their psychological well-being was so seriously affected that they suffered anxiety and debilitation before they could establish a hostile environment.⁶³ Beezer rejected the Rabidue standard and accepted, instead, the minority opinion of the "reasonable woman" voiced in that case, thereby reversing the district court's decision. He felt that the offensive behavior in the Ellison case fell somewhere between forcible rape and the mere utterance of an epithet. "Although an isolated epithet by itself fails to support a cause of action for a hostile environment, Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance. The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct"⁶⁴

Beezer reinforced the argument that in the evaluation of a hostile work environment the focus should be on the

⁶³ Id. at 878

⁶⁴ Id.

perspective of the victim. To use the "reasonable person" standard would run the risk of reinforcing the prevailing level of discrimination.⁶⁵ Harassers could continue to harass simply because a particular discriminatory practice was common and victims of harassment would have no remedy. Recognizing that there are a wide range of view points among women as a group, Beezer believed that many women share concerns which men do not necessarily recognize. He concluded that a "reasonable person" standard tends to be male-biased and, as such, tends to systematically ignore the experiences of women. Quoting Henson,⁶⁶ Beezer stated, "by acknowledging and not trivializing the effects of sexual harassment on a 'reasonable women,' courts can work toward ensuring that neither men nor women will have to 'run a gauntlet of sexual abuse for the privilege of being allowed to work and make a living.'"⁶⁷

Judge Beezer states further that in order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee, we hold that the female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive

⁶⁵ Id.

⁶⁶ 682 F.2d 897 (11th Cir. 1982).

⁶⁷ Ellison at 880.

to alter the conditions of employment and create an abusive working environment.⁶⁸

In the case of Robinson v. Jacksonville Shipyards, Inc., a female employee brought action alleging a hostile work environment. The court accepted Robinson's testimony that there was "extensive, pervasive posting of pictures depicting nude women, partially nude women, or sexual conduct and the occurrence of other forms of harassing behavior perpetrated by her male coworkers and supervisors between 1977 and 1988."⁶⁹ Robinson's testimony chronicled a visual assault of the sensibilities of female workers. In the one year period prior to the filing of her EEOC charge, Robinson's corroborated testimony reported that she saw

pictures of a woman, breasts and pubic area exposed; a picture of a nude Black woman, pubic area exposed to reveal her labia; drawings and graffiti on the walls, including a drawing depicting a frontal view of a nude female with the words 'USDA Choice' written on it; a corsetted nude with her breasts and buttocks area exposed; calendars posted which included pictures of nude women bending over with their buttocks and genitals exposed to view; pictures of nude women apparently involved in lesbian sex; a drawing on a heater control box of a nude woman with fluid coming

⁶⁸ Id. at 879. Judge Beezer further stated that the court realized that the reasonable woman standard would not address conduct which some women find offensive. Conduct considered harmless today may be considered discriminatory in the future. Fortunately, the reasonableness inquiry which we adopt is not static. As the views of the reasonable woman change, so too does the Title VII standard of acceptable behavior.

⁶⁹ 760 F.Supp. at 1489.

from her genital area; and, a dart board with a drawing of a woman's breast with the nipple as the bull's eye.⁷⁰

When Robinson complained about the above materials, she was either ignored or the pictures were removed only to be replaced by more offensive material.⁷¹ She was told to take cover so the men could exchange dirty jokes,⁷² stay away from the offending materials,⁷³ and to look the other way just as she would turn off the television if she were offended.⁷⁴ She was also told that "nautical people always had displayed pinups and other images of nude or partially nude women, like figureheads on boats, and that posting of such pictures was a natural thing in a nautical workplace,"⁷⁵ and that "men had a constitutional right to post the pictures."⁷⁶

The court found that sexually harassing behavior had occurred throughout the working environment with both frequency and intensity over an extended period of time. The court stated "that the objective standard asks whether

⁷⁰ Robinson at 1495-96.

⁷¹ Id. at 1498

⁷² Id at 1499.

⁷³ Id. at 1514.

⁷⁴ Id. at 1515.

⁷⁵ Id. at 1616.

⁷⁶ Id.

a...reasonable women would perceive that an abusive working environment has been created."⁷⁷ The court further stated that

the conclusion holds true whether the concept of psychological well-being is measured by the impact of the work environment on a reasonable woman's work performance or more broadly by the impact of the stress inflicted on her by the continuing presence of the harassing behavior. The fact that some female employees did not complain of the work environment or find some behaviors objectionable⁷⁸ does not affect this conclusion concerning the objective offensiveness of the work environment as a whole.⁷⁹

It does not follow that because men and women may interpret each other's behaviors differently that intimidating, hostile or offensive work environments are simply the result of differences in perceptions. In Sparks v. Pilot Freight Carriers, Inc.,⁸⁰ the court stated that the "whole point of sexual harassment claims is that behavior that may be permissible in some settings can be abusive in the workplace."⁸¹

⁷⁷ Id. at 1524.

⁷⁸ Robinson was the first case to use an expert witness (K.C. Wagner) to discuss various responses to sexual harassment.

⁷⁹ Robinson at 1525.

⁸⁰ 830 F.2d 1554 (11th Cir. 1987).

⁸¹ Id. at 1561.

Since whatever conduct is alleged to constitute the hostile environment must be based on activities that are not welcomed by the plaintiff, it is clear that such a determination must be gathered from the facts surrounding each incident.⁸²

Perspective, therefore, becomes a very important factor for determining whether a defendant's activity was offensive. In Lipsett v. University of Puerto Rico,⁸³ the court understood that perspective "is particularly important because often a determination of sexual harassment turns on whether it is found that the plaintiff misconstrued or overreacted to what the defendant claims were innocent or invited overtures."⁸⁴ In Lipsett, the plaintiff was discharged from a medical residency program because she did not react favorably to her professor's requests to go out for drinks, his compliments about her hair and legs, or to questions about her personal and romantic life. These gestures were commonly accompanied by thinly veiled statements suggesting that the defendant was in a position to make things go favorably for the plaintiff if she acquiesced. The plaintiff was also subjected to comments from others in the program asserting that she should not be

⁸² Bennett-Alexander, 134.

⁸³ 864 F.2d 881 (1st Cir. 1988).

⁸⁴ Id. at 898.

in the program because she was female. In addition, she was shown lewd drawings of her body and called sexual nicknames. During the plaintiff's first rotation under this professor, she sensed that she had to react favorably by smiling during these intrusions. On her second rotation, however, she did not do so and gave disapproving looks or turned away.⁸⁵

The trial court held that since the plaintiff admittedly responded favorably to these flattering comments, there was no way anyone could consider them as unwelcome.⁸⁶ The appellate court rejected this view and stated that an initial favorable response does not constitute a continued welcomeness.

The man must be sensitive to signals from the woman that his comments are unwelcome and the woman must take the responsibility for making those signals clear. In some situations the woman may have the responsibility of telling the man directly that his comments or conduct is unwelcome, however, a woman's failure to respond to suggestive remarks or gestures may be sufficient to indicate that the man's conduct is unwelcome.⁸⁷

The court realized that the activity directed toward the victim and her response to it, carry more weight in determining whether the actions complained of are unwelcome.

⁸⁵ Id. at 884.

⁸⁶ Lipsett v. Rive-Mora, 669 F.Supp. 1188 (D.Puerto Rico 1987).

⁸⁷ Supra note 82.

The arguments that defendants could use to prove that a plaintiff intimated she would be receptive to sexual advances might include testimony regarding her use of foul language or her participation in sexual horseplay in the workplace, an allegation that she voluntarily came to a defendant's hotel room, or that she was engaging in a consensual sexual relationship. Generally speaking, each case could have circumstances that, in the specific context, might generate a finding that the alleged activities were welcomed, but the presence of factors, such as the ones mentioned above, do not automatically mean that the victim welcomed the specific acts in the complaint.

In Swentek v. USAir, Inc.,⁸⁸ an airline stewardess complained that a pilot sexually harassed her by exposing himself to her, grabbing her, disparaging her age and weight, and by making obscene comments to her about another employee's wife. The plaintiff said that she asked the defendant to stop the harassing activity, but it continued. The pilot countered that the stewardess was a "foulmouthed" individual who always talked about sex. There were allegations, denied by the plaintiff, that she had placed a dildo in her female supervisor's mailbox and that she had made frank sexual invitations to another pilot. The trial court determined that such activities on the plaintiff's

⁸⁸ 830 F.2d 552 (4th Cir. 1987).

part, even if true, did not necessarily mean that she welcomed the defendant's actions specifically. However, such activity by the plaintiff would indicate that she was the type of person who would not be offended by the defendant's actions, and therefore his actions were not unwelcomed generally.

The appellate court disagreed. Finding that the defendant was not aware of the plaintiff's past conduct, the court determined that such conduct could not have served as a basis for him to believe that she would welcome his actions, especially since she had asked him to stop those actions.⁸⁹ In addition, the court stated that the plaintiff's use of foul language and sexual innuendo in a consensual setting did not wave "her legal protection against unwelcome sexual harassment."⁹⁰ This served notice that even if the defendant had known beforehand of the allegations made against the plaintiff, it would not have necessarily defended his conduct.

In Wyerick v. Bayou Steel Corporation,⁹¹ an employee charged sexual harassment on the basis of a lewd comment made by a fellow employee during an electrocardiogram he

⁸⁹ Id. at 556.

⁹⁰ Id. at 557.

⁹¹ 887 F.2d 1271 (5th Cir. 1989).

performed on her. After the plaintiff reported the comment, she experienced a great deal of teasing about it. The defendant attempted to defend against the sexual harassment claim by asserting that the plaintiff, herself, used profanity at work.⁹² The trial court held in the defendant's favor on the basis of the plaintiff's conduct, but the appeals court reversed the decision claiming that the plaintiff's foul language did not automatically mean that she welcomed the sexually harassing activity.

Closely related to the foul language cases, and sometimes overlapping them, were those cases involving workplace sexual horseplay in which the victim engaged. Although this kind of horseplay may have taken place on a daily basis, the courts have found that there is a difference between consensual horseplay in which the victim participated of her own free will and horseplay that involved anti-female animus, which served as the basis for sexual harassment. This can be a highly troublesome thin line for some employers.

In Spencer v. General Electric Company,⁹³ horseplay included pervasive double entendres, sexual questions, jokes and stories, and intimate touching. The supervisor's department was known as "Jim's harem" or "the animals." In

⁹² Id. at 1273.

⁹³ 697 F.Supp. 204 (DC Va 1988).

addition to the pervasive sexual horseplay atmosphere, the court found evidence of anti-female sentiment in the supervisor's comments. Despite the fact that the victim at times had participated in the office horseplay, the court found that she had not welcomed the harassing activity and found hostile environment sexual harassment. In the court's view, participation in some of the milder horseplay did not waive her right to be protected from a hostile sexual environment and from female animus.⁹⁴

In a few cases the harassing employee attempted to defend against a finding of unwelcomeness by arguing that the victim was voluntarily in the hotel room of the defendant when the harassment occurred. The courts have found that being in a hotel room is an insufficient basis upon which to find welcomeness.

For example, in Boyd v. James Haves Living Health Care Agency, Inc.,⁹⁵ the victim initially refused the invitation to the room of her supervisor, but later accepted when he asked her to come and discuss the seminar they were attending. While in the room, the supervisor gave the plaintiff wine and turned on the television to a pay-to-view graphic movie. The plaintiff told him she was not interested in viewing the movie. When she began to leave

⁹⁴ Id.

⁹⁵ 671 F.Supp. 1155 (DC Tenn 1987).

the room, the supervisor touched her in an attempt to make her stay and slammed the door when she left. After the seminar, on the way home, the supervisor gave the plaintiff graphic magazines when she asked if he had anything to read. The plaintiff told him she was not interested in his graphic magazines. The court found sexual harassment because the victim had made her position clear to her supervisor. The fact that she was voluntarily in his hotel room and then rode home with him from the seminar did not mean that she welcomed his harassing activity. The totality of the circumstances were weighted for a finding of unwelcomeness.

The totality of the circumstances brought the court to exactly the opposite conclusion in McLean v. Satellite Technology Services,⁹⁶ where the plaintiff was invited to her supervisor's room to carry out part of her job responsibilities by viewing his upcoming presentation. She alleged that while there, the supervisor placed his arm around her, touched her leg, and tried to kiss her.

During the hotel room incident, the defendant wore shorts and a shirt, while the plaintiff was in a bathing suit and a towel. During the two months in which the plaintiff had been employed by the defendant company, she had displayed semi-nude photos of herself, lifted her skirt to show her supervisor the absence of undergarments, and

⁹⁶ 673 F.Supp. 1458 (E.D.Mo 1987).

made offers of sexual gratification during work hours. She made "highly salacious" comments to employees, customers, and competitors, even though she had been warned by the company not to do so. She was intimate with an employee of a customer at least twice in her hotel room during the same business trip on which the alleged harassment took place and several times during the trip she was not working as required and it was not clear where she was or what she was doing. Based on these circumstances, the court found that if the defendant did engage in questionable behavior toward the plaintiff, it was probably welcomed.⁹⁷

These two cases taken together indicate that simply being in a defendant's hotel room during a business trip does not prove that a plaintiff could reasonably be thought to welcome sexual advances. However, plaintiffs should be aware that other conduct may lead to a finding by the court that the alleged activity was welcomed. Similarly, potential perpetrators and their employers should be aware that an invitation to a hotel room while on a business trip could lead to employer liability for sexual harassment.

Even the presence of a consensual relationship between the plaintiff and the defendant does not necessarily mean that the plaintiff welcomed the defendant's harassing

⁹⁷ Id. at 1460.

actions. Once again, the entire context must be considered. In Koster v. Chase Manhattan Bank,⁹⁸ for example, the court found no sexual harassment where the defendant had a previous consensual relationship with the plaintiff and there were simply no facts to support the harassment claim. In this classic case of "love gone sour," the plaintiff never complained about the defendant until he tried to break off their relationship so that it would not interfere with his pending divorce action. There was no abusive treatment of the plaintiff and no other evidence produced to support a finding of sexual harassment.⁹⁹ This case illustrates that there is more to making a sexual harassment case than simply making allegations: the allegations must be proved.

Although the outcome was different, the same conclusions were borne out in Shrout v. Black Clawson Company.¹⁰⁰ Here, there was a consensual relationship between the plaintiff and the defendant for three years. However, for the four years after the relationship ended, the defendant made sexual advances and remarks, attempted to force the advances by not giving the plaintiff pay raises and performance evaluations, left sexual materials on her desk, and looked down her blouse and up her skirt. The

⁹⁸ 687 F.Supp. 848 (DC NY 1988).

⁹⁹ Id.

¹⁰⁰ 689 F.Supp. 744 (DC Ohio 1988).

plaintiff rejected the defendant's advances, leaving the court little alternative except to find that, even though the relationship began on a consensual basis, the defendant's activity was not welcomed by the plaintiff and the relationship had passed into the realm of sexual harassment.¹⁰¹

It should be clear that when an employee brings a sexual harassment action, her entire workplace reputation and activities may be opened up for public scrutiny. The courts have shown themselves willing to entertain those matters they deem relevant, but will not draw unwarranted conclusions based on the plaintiff's private life. The more work related the activities are, the more relevant they become.¹⁰²

Anti-female animus is consistently seen as a basis for finding hostile environment sexual harassment even when the activity directed toward the employee is not sexual in nature. Anti-female sentiment can be indicated by virtually any remark or gesture indicating a lack of respect for female employees simply because of their gender. In other words, if it wasn't for her sex, the employee would not be subjected to the same actions.¹⁰³

101 Id.

102 Bennett-Alexander, 139.

103 Ibid.

In Andrews v. City of Philadelphia,¹⁰⁴ anti-female animus was held to be present when female police officers were subjected to touching, sexual propositions, pornography, obscene language, and name calling. In addition, the work files of the female employees disappeared and their personal property was tampered with. In one incident, someone put acid on one of the female officer's civilian clothing hanging in her locker, causing burns on her back when she put them on. The defendant argued that a "police station need not be run like a day care center."¹⁰⁵ Nevertheless, the court found the presence of a hostile environment.

Likewise, the court found in Hall v. Gus Construction Company¹⁰⁶ that a hostile work environment existed where female construction workers were subjected to sexual propositions, name calling, crude pranks, displays of pornography, and unwanted touching. Moreover, anti-female animus was demonstrated by such actions as refusing to let the women have a truck to go into town for bathroom breaks and refusing to repair a truck exhaust leak for women but doing so immediately when men began to drive the truck. The women complained to their supervisor, but the supervisor

¹⁰⁴ 895 F.2d 1469 (3rd Cir. 1990)

¹⁰⁵ Id. at 1486.

¹⁰⁶ 842 F.2d 1010 (8th Cir. 1988).

disciplined no one and only talked to the men about their activity once.

Although many of the courts have found hostile work environments when the harassment was continuous over a substantial period of time, one incident alone is sufficient to create a hostile environment if it is flagrant. One such decision involved a plant foreman who forced the plaintiff's face against his crotch in the presence of other male co-workers, forcing her to leave crying as they laughed.¹⁰⁷

Two days of sexual harassment were found to be sufficiently severe and pervasive in another case. Within the first hour on the job, the plaintiff was asked if she "fooled around." Within the first day, the plaintiff's supervisor requested that she pull up her dress so he could take her picture, and another co-worker actually did take a picture under her dress.¹⁰⁸

Defendants have attempted to argue that there should be no finding of sexual harassment where the actions in question were not sexual in nature, but the courts have rejected this defense. While most cases have involved a combination of sexual and non-sexual actions, courts have uniformly held that the harassment need not be sexual in

¹⁰⁷ *Guess v. Bethlehem Steel Corporation*, 913 F.2d 463 (7th Cir. 1990).

¹⁰⁸ *Ross v. Double Diamond, Inc.*, 672 F.Supp. 261 (DC Tex 1987).

nature to constitute hostile environment sexual harassment. This position can be traced directly to the Meritor decision: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹⁰⁹

Sexual Harassment Claims Under Title IX

Background

In 1970, Representative Edith Green of Oregon was the Chairperson of the House Special Subcommittee on Education, proposed an education bill¹¹⁰ designed to expand financial assistance to educational institutions and their students. The bill also was designed to prohibit sex discrimination in educational institutions. Section 805 of the Act would have amended Title VI of the Civil Rights of 1964¹¹¹ to prohibit sex discrimination on the basis of sex in all federally assisted programs. The bill never passed through the House. However, in the next legislative session, Representative Green sponsored a new sex discrimination bill¹¹² at the same time that Senator

¹⁰⁹ Meritor, at 65.

¹¹⁰ H.R. 16098, 91st Cong., 2d Session (1970).

¹¹¹ 42 U.S.C. § 2000d (1976).

¹¹² H.R. 7248, Title IX, 92d Cong, 1st Sess. 117 Cong. Rec. 39364-65 (1971).

Birch Bayh from Indiana sponsored the Senate version.¹¹³ Unlike the bill from the previous year, the new bill specifically incorporated a provision disallowing sex discrimination rather than proposing such a provision as an amendment to Title VI. The data presented in support of the bill made the need for the bill apparent, however, to gain support for the bill, the Senate excluded military schools and certain single sex institutions. Initially introduced as an amendment to Title VI, Title IX today reflects a broad ban on sex discrimination in educational institutions.¹¹⁴

The Title IX regulatory scheme¹¹⁵ provides for a system of institutional self-regulation as well as federal government enforcement. The regulations require every institution receiving federal funds to establish a publicized policy, a grievance procedure, and to appoint an employee responsible for investigating complaints and coordinating compliance efforts.¹¹⁶ The U.S. Department of Education is the agency of the United States government

¹¹³ S. 659, 92d Cong., 1st Sess. 117 Cong. Rec. 30399-400 (1971).

¹¹⁴ Today Title IX excludes certain organizations entirely and excludes admissions policies of other organizations, 20 U.S.C. § 1681 (1976). Some of these exclusions are religious schools where the application of Title IX would be inconsistent with religious beliefs, military schools, sororities, fraternities, boy scouts, and girl scouts.

¹¹⁵ 20 U.S.C. § 1682 (1982).

¹¹⁶ 34 C.F.R. § 106.8 (1986).

that administers federal funds for educational programs, enforces federal statutes prohibiting discrimination in activities receiving federal funds, and ensures equal access to education for every individual.

Unlike Title VII which depends upon the Equal Employment Opportunity Commission for enforcement, Title IX is enforced by the Office of Civil Rights (OCR). Although the OCR is responsible for the enforcing the federal civil rights statutes that prohibit discrimination based on race, color, national origin, sex, handicap, or age in Department of Education programs and activities,¹¹⁷ the EEOC guidelines for sexual harassment apply to educational programs, too. This covers approximately 16,000 school districts, 3,600 post secondary institutions, and 6,800 proprietary institutions.¹¹⁸

The principal enforcement activity of the OCR is the investigation and resolution of complaints. Anyone who believes that an educational institution that receives federal financial assistance has discriminated against someone on the basis of race, color, national origin, sex, handicap, or age may file a complaint. The person or organization filing the complaint need not be a victim of

¹¹⁷ Department of Education, Information About the Office of Civil Rights, (Washington D.C.: Government Printing Office, 1991), 1.

¹¹⁸ Ibid.

the alleged discrimination, but may complain on behalf of another person or group. A complaint must be filed within 180 calendar days of the date of the alleged discrimination, or within 60 days after the last act of the institutional grievance process, unless the time for filing is extended by OCR for good cause.¹¹⁹

The Title VII sexual harassment cases opened the door for harassment actions under other discrimination statutes, including Title IX. Two basic issues needed to be decided: 1) what are the boundaries of a sexual harassment claim under Title IX and, 2) are compensatory damages available?

In deciding Cannon v. University of Chicago,¹²⁰ The Supreme Court relied on the four-prong test it had previously defined in Cort v. Ash.¹²¹ The Cort test examines whether: (1) the plaintiff is one of the class for whose special benefit the statute was enacted; (2) a legislative intent to create or deny such a remedy is apparent; (3) a remedy would be consistent with the underlying purposes of the statute; and (4) the cause of action is traditionally relegated to state law.¹²²

¹¹⁹ Department of Education, How to File a Discrimination Complaint With the Office of Civil Rights, (Washington, D.C.: Government Printing Office, 1991), 1.

¹²⁰ 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979).

¹²¹ 422 U.S. 66, 95 S. Ct. 2080, 45 L.Ed.2d 26 (1975).

¹²² Id.

In Cannon, the Supreme Court noted that the statutory language that satisfied the first part of the Cort test was most often found in the civil rights statutes such as Title IX.¹²³ In examining the second prong of the Cort test, the Court noted that Congress had explicitly patterned Title IX after Title VI. Because Title VI was understood to infer an implied right of action at the time of the passing of Title IX, and because Congress made repeated references to Title VI during discussions of Title IX, the Court inferred that the previous interpretation of Title VI reflected the Congressional intent with regard to Title IX.¹²⁴ In determining the third prong of the Cort test, the Court defined two general purposes of Title IX: "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."¹²⁵ Finally, the Court determined that the final prong of the Cort test was satisfied because the subject matter of the Title IX suit is not relegated to state law.

The Supreme Court found that both an interpretation of Title IX as parallel statute to Title VI and an

¹²³ 441 U.S. at 689, 99 S. Ct. at 1953.

¹²⁴ 441 U.S. at 696, 99 S. Ct. at 1957.

¹²⁵ 441 U.S. at 704, 99 S.Ct. at 1961.

interpretation of Title IX under the Cort analysis created a private right of action under Title IX.¹²⁶ Although private causes of action would support declaratory and injunctive relief, it was less clear whether compensatory damages could be supported under Title IX.

Sexual Harassment Defined Under Title IX

In Alexander v. Yale University,¹²⁷ the federal district court determined that an educational institutional's failure to respond to complaints of sexual harassment constituted grounds for a Title IX action. The court held that a student plaintiff who complained to university officials that she received an undeserved low grade because she refused to submit to the sexual demands of her professor presented a "justifiable" claim.¹²⁸ Allegation of educational harm distinguished her claim from those student plaintiffs who alleged harm as a result of the "contamination" of the educational environment.¹²⁹ The court dismissed the co-plaintiff's claim that even though she had not personally been a direct victim of sexual

¹²⁶ 441 U.S. 677, 99 S. Ct. 1946, 60 L.Ed.2d 560 (1979).

¹²⁷ 459 F. Supp. 1 (D. Conn. 1977), 631 F.2d 178 (2d Cir. 1980).

¹²⁸ 459 F. Supp. at 4.

¹²⁹ Id. at 3.

harassment, she had suffered emotional distress, was fearful of associating with male faculty, and was deprived of "the tranquil atmosphere necessary to her pursuit of a liberal education."¹³⁰ The trial court held that such vicarious and environmental claims were "imponderables" not recognized under Title IX.¹³¹ The plaintiffs in Alexander asserted that the absence of any grievance procedures to process and resolve complaints of sexual harassment by professors contributed to the creation of an offensive, harassing environment. The court's refusal to recognize maintenance of an offensive educational environment as sexual harassment under Title IX ignored a critical element of learning, that of the creation and fostering of an environment conducive to intellectual growth.¹³²

The Second Circuit affirmed the judgement of the lower court.¹³³ However, it did not address the issue of environmental harm because several issues decided by the

¹³⁰ 631 F.2d at 182.

¹³¹ 459 F. Supp. at 3.

¹³² Ronna Greff Schneider, "Sexual Harassment and Higher Education," Sexual Harassment on Campus: A Legal Compendium (Wash. D.C.: National Association of College and University Attorneys, 1990), 36.

¹³³ Alexander v. Yale University, 631 F.2d 178 (2d Cir. 1980).

district court had become moot.¹³⁴ Therefore, the circuit court's disposition of the case made it impossible to discern the boundaries of a sexual harassment claim under Title IX beyond academic extortion, that is, "academic advancement conditioned upon submission to sexual demands."¹³⁵ Thus, the Second Circuit recognized only quid pro quo sexual harassment as violating Title IX.

In Moire v. Temple University School of Medicine,¹³⁶ a female medical student who failed her third year psychiatric clerkship at a private clinic sued the university and her supervisor. She alleged that the defendants conspired to give her a failing grade because of her sex. Specifically, Moire alleged that her supervisor created an offensive work environment by sexually harassing her and that the clinic staff and the university faculty members joined the conspiracy in an effort to protect the supervisor. Although the district court found no merit in this particular claim, it permitted a claim of sexual

¹³⁴ Id. at 184. The student complainants had since graduated and, by the time the suit reached the court of appeals, Yale had complied with its duty to implement a grievance procedure.

¹³⁵ Id. at 182.

¹³⁶ 613 F.Supp. 1360 (E.D. Pa. 1985), 800 F.2d 1136 (3d Cir. 1986).

harassment based solely on environmental harm.¹³⁷ For the first time, a court intimated that the EEOC guidelines on sexual harassment are "equally applicable to Title IX."¹³⁸

Compensatory Damages Under Title IX

Since the Supreme Court decision in Cannon, three circuits have decided whether compensatory relief should be available under Title IX. The first two circuits held that it should not be and the third court held that it should.

In Lieberman v. University of Chicago,¹³⁹ the first case claiming damages that was heard by a court of appeals after the Cannon decision, the Seventh Circuit considered whether compensatory damages are available under Title IX. The Lieberman court relied on the Supreme Court's analysis in Pennhurst State School & Hospital v. Halderman¹⁴⁰ in deciding that no damages were available under Title IX. First, it was found that both Title IX and the Developmentally Disabled Assistance and the Bill of Rights Act, which was the issue in Pennhurst, were enacted by

¹³⁷ 613 F.Supp. at 1366-67. The court specifically identified the Title IX issue as being "whether plaintiff because of her sex was in a harassing or abusive environment..."

¹³⁸ Id. at 1366.

¹³⁹ 660 F.2d 1185 (7th Cir. 1981).

¹⁴⁰ 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981).

Congress pursuant to its spending clause powers and that remedies are limited under Spending Clause statutes. Second, like the court in Pennhurst, the court in Lieberman was concerned with the financial effects that money damages could have.¹⁴¹ The court in Lieberman reasoned that available remedies needed to be outlined clearly so that educational institutions could choose whether or not to accept federal assistance.¹⁴² Even though the Supreme Court in Cannon had found that Title IX creates implied right of action, the Lieberman court found that this right was distinct from the damage remedy issue.

Nine years after Lieberman, the Eleventh District heard a case arising out of Georgia, Franklin v. Gwinnett Public Schools.¹⁴³ Although the court in Franklin recognized that a private right of action existed under Cannon, the court made it clear that "whether a litigant has a cause action is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."¹⁴⁴ Like the court in Lieberman, the court in Franklin determined that compensatory damages were not an available remedy under Title IX.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ 911 F.2d 617 (11th Cir. 1990), 111 S. Ct. 2795 (1992).

¹⁴⁴ 911 F.2d at 619.

The court in Franklin relied on the post-Lieberman Supreme Court ruling in Guardians Association v. Civil Service Commission.¹⁴⁵ In Guardians, Black and Hispanic police officers of the City of New York brought a class action suit against the Civil Service Commission under Title VI. The district court awarded relief, but the court of appeals reversed on the issue of damages, holding that intentional discrimination, which the trial court had not found, was required for compensatory relief. At the Supreme Court, a 5-4 judgement affirming the court of appeals was split into four groups.¹⁴⁶

Given the split in Guardians, the court in Franklin found that although "the judgement of Guardians Association precludes a cause of action for compensatory damages for unintentional discrimination, we believe the various opinions of the majority of the Justices simply leaves open

¹⁴⁵ 463 U.S. 582, 103 S. Ct. 3221 (1983).

¹⁴⁶ For the majority, Justice White, joined by Justice Rehnquist, put aside the issue of relief involving intentional discrimination, as unnecessary for determining the case. Justice White wrote, however, that "it may be that the victim of intentional discrimination should be entitled to a compensatory reward..." (103 S. Ct. at 3230). Justice Powell joined by Chief Justice Burger concurred, finding no implied cause of action exists under Title VI. Justice O'Connor concurred in the decision concluding that no relief was available without intentional discrimination. In dissent, Justice Stevens, joined by Justices Brennan and Blackmun, determined that relief was available. In a separate dissenting opinion, Justice Marshall stated that compensatory relief was available without a showing of intent.

the question of whether compensatory damages for intentional discrimination may be sought."¹⁴⁷ Because the Franklin court interpreted Guardians in a restrictive manner, it did not find Guardians to be controlling. Instead, it turned to a precedent within its own district and relied upon a Title VI case, Drayden v. Needville Independent School District, to decide the case. Although the court in Franklin recognized Lieberman, it did not rely upon the same contract analysis, but rather adopted a Title VI case to the Title IX claim. Later, to lend definition and direction on the issue of Title IX compensatory damages, the Franklin case was granted a writ of certiorari by the Supreme Court. The findings of the Court in the Franklin case will be discussed in detail after an analysis of Pfeiffer v. School Board For Marion Center Area,¹⁴⁸ whose decision in favor of compensatory damages in a Title IX claim, set the stage for the landmark Franklin ruling.

The court in Pfeiffer was the first court of appeals to acknowledge compensatory damages under Title IX.¹⁴⁹ Plaintiff Arlene Pfeiffer was an excellent student and participated in a variety of extracurricular activities,

¹⁴⁷ 911 F.2d at 621.

¹⁴⁸ 917 F.2d 779 (3rd Cir. 1990).

¹⁴⁹ In Beehler v. Jeffes, 664 F.Supp. 931 (1986), the district court for the Middle District of Pennsylvania held that compensatory relief was available under Title IX. This court's analysis was similar to the analysis of Pfeiffer.

including serving as president of the student council. Because of her record, she was elected to the National Honor Society (NHS) at the Marion Center Area High School.

Guidelines for membership in the National Honor Society required that students be selected on the basis of four qualities: scholarship, service, leadership and character. Under the heading of Leadership, one of the qualities to be assessed was whether the student demonstrated the type of leadership that influenced others for good conduct. Under the heading of Character, one quality was whether the student upheld principles of morality and ethics.

During the spring of her junior year (1983), Pfeiffer discovered she was pregnant. She notified her school guidance counselor and the school principal, telling them that although she was unmarried, she wanted to have the child and finish high school. Upon learning of Pfeiffer's pregnancy, Judith Skubis, a teacher at the high school, brought the matter to the attention of the National Honor Society faculty council members. The following fall, the council scheduled a meeting on November 4, to which Pfeiffer was invited. At the meeting, the council notified Pfeiffer that her status in the National Honor Society was in question because of her premarital sexual involvement. The faculty then asked Pfeiffer whether the sexual activity that led to her pregnancy was voluntary, to which Pfeiffer replied in the affirmative.

On November 8, Pfeiffer's father telephoned the school principal requesting a prompt decision because a NHS induction ceremony was scheduled for the next day and Arlene wanted to attend. The council met on the morning of November 9, and by secret ballot, unanimously voted to dismiss her from the NHS chapter. The council told Pfeiffer by letter that she had been dismissed for "failure to uphold the high standards of leadership and character required for admission and maintenance of membership."¹⁵⁰

On November 30, the council met with her parents, who requested that the subject be placed on the agenda of the school board meeting scheduled for December 12. Pfeiffer and her parents appeared at the meeting with counsel. The board requested that the matter be discussed privately, but Pfeiffer and her parents insisted that the issue be discussed publicly. The board was asked to review the decision of the faculty council.

On December 19, the board and the council met to consider the matter further and on January 16, 1984, the school board adopted a resolution unanimously affirming the action of the faculty council.

Arlene Pfeiffer filed suit, via her parents, alleging discrimination in her dismissal from the NHS. She sought

¹⁵⁰ 917 F.2d at 782.

an injunction that she be reinstated in the chapter, that the records of the school district be corrected to show that she remains in good standing in the society, that a procedure for dismissal be ordered that is not discriminatory, that the NHS be prohibited from disseminating information about her dismissal and that she be awarded compensatory and punitive damages.¹⁵¹

Pfeiffer sought relief under Title IX and state law under the Pennsylvania Human Rights Act (PHRA),¹⁵² and the Pennsylvania Equal Rights Amendment.¹⁵³

Initially, the district court of the Third Circuit denied Pfeiffer her Title IX claim based on the Supreme Court holding in Grove City College v. Bell.¹⁵⁴ However, while the case was pending, Congress amended Title IX to circumvent Grove City College by passing the Civil Rights Restoration Act of 1987. The district court then ruled that the Restoration Act made the school district subject to the Title IX claim.¹⁵⁵

¹⁵¹ Id. at 783.

¹⁵² 43 P.S. § 955(i)(1) (Purdon's Supp. 1988).

¹⁵³ Commonwealth Constitution art. 1, § 28.

¹⁵⁴ 465 U.S. 555, 104 S. Ct. 1211, 79 L.Ed.2d 516 (1984). This ruling allowed Title IX claims only if the claim was directed at a department within the institution that received federal funding. Pfeiffer's claim stated although the NHS received no federal funding, the school received federal funding through various programs, such as the lunch program.

¹⁵⁵ 917 F.2d at 783.

Under regulations promulgated pursuant to Title IX, no person shall be discriminated against on the basis of pregnancy, parental status, or marital status.¹⁵⁶ The district court examined considerable evidence, including that no male member of the chapter had ever been dismissed for premarital sexual activity.¹⁵⁷ Pfeiffer had offered to introduce testimony by a former student who was a male member of the chapter who, two years after Pfeiffer's dismissal, impregnated his girlfriend and was not dismissed from the chapter. The district court excluded the evidence.

The argument of the court settled on whether Pfeiffer was dismissed from the NHS because she was pregnant, a clear violation of Title IX, or if she was dismissed because she failed to uphold the standards of the National Honor Society.

The Third Circuit Court found that the lower court had made an error in excluding pertinent evidence. The circuit court then determined that Pfeiffer's claim for injunctive relief was moot because the National Honor Society had been

¹⁵⁶ 20 U.S.C. § 1681(a); § 1681(b)(1) states "A recipient shall not discriminate against any student or exclude any student from its educational program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

¹⁵⁷ 917 F.2d at 783.

disbanded at the high school and no records were kept as to who was in the society or who had been dismissed. The court then turned to the issue of compensatory relief. If no compensatory relief was available under Title IX, it would be pointless to remand the case to the district court to reconsider the excluded evidence. Determining what monetary damages, if any, could be available to Pfeiffer became an important issue. She had not lost any tangible benefit. Her status as a student was not affected; she did not apply for or lose any college scholarships, and the fact that her dismissal became public was the result of her own actions.¹⁵⁸

Ultimately two theories of statutory construction opposed each other in this inquiry. On one side existed the principle that when a statute expressly provides a particular remedy, it is improper to imply the existence of other remedies.¹⁵⁹ On the other side was the precept that the existence of a statutory right implied the existence of all necessary and appropriate remedies.¹⁶⁰

¹⁵⁸ *Id.* at 786.

¹⁵⁹ Lieberman, 660 F.2d at 1187.

¹⁶⁰ *Bell v. Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L.Ed. 939 (1946) ("where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief"); *Beehler v. Jeffes*, 664 F.Supp. 931 (M.D. Pa. 1986).

In Cannon, the Supreme Court indicated that Congress intended to create remedies in Title IX comparable to those available under Title VI. Therefore, the Pfeiffer court looked to guidance from the Supreme Court in cases involving Title IX and its statutory predecessor, Title VI.¹⁶¹ In Guardians, a majority of the Court found that compensatory relief based on past violations of conditions regulating use of federal funds is available for Title VI violations when intentional discrimination is present.¹⁶² Tracking this analysis to a Title IX claim, the Pfeiffer court concluded that compensatory relief is available for Title IX violations. However, the court did not decide specifically whether intent is a necessary element of a Title IX claim.

Franklin v. Gwinnett County Public Schools

Because of the split of opinion between the 11th and the Third Circuits on the matter of whether compensatory damages are allowed under Title IX, the Supreme Court agreed to hear the Franklin case.

The plaintiff in the Franklin case was a young women who had allegedly been sexually harassed by a teacher while attending a public high school in Gwinnett County, Georgia. Before filing the lawsuit, she made formal complaint to the

¹⁶¹ 917 F.2d at 787.

¹⁶² 463 U.S. at 602, 103 S. Ct. at 3234.

U.S. Department of Education's Office of Civil Rights (OCR), which investigated the allegations. The inquiry uncovered a pattern of circumstances that can best be described as every school executive's worst nightmare.¹⁶³

On February 26, 1992, the Court issued its opinion, overturning the 11th Circuit decision and remanding the matter for trial.¹⁶⁴ The ruling that Title IX does support claims for monetary damages was unanimous, but the Court divided into a six-member majority opinion and a three-member concurring opinion.

Writing for the majority, Justice White went all the way back to the 1803 case of Marbury v. Madison¹⁶⁵ for the judicial tradition that, if a cause of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief. This ruling effectively rebuffed the arguments of the friend-of-the-court brief filed by the Bush Administration.

Next, the majority relied on legislative history since the Cannon decision, during which period Congress amended Title IX, and related civil rights, to abrogate the constitutional immunity of states and to eliminate the

¹⁶³ David A. Splitt, "Sexual Harassment Can Cost You Money," The Executive Educator 14 (May 1992): 12.

¹⁶⁴ 112 S. Ct. 1028 (1992).

¹⁶⁵ 1 Cranch 137 (1803).

program-specific requirement. Finally the majority rejected the defendants' argument that other remedies were available as completely inadequate in this case.

Justice Scalia wrote a separate concurring opinion, subscribed to by Chief Justice Rehnquist and Justice Thomas. Although he agreed with the decision of the Court, Scalia accused the majority of begging the question in relying on the implication in the Cannon decision of a right of action in Title IX, rather than on a congressional specification. Referring to the former Court as an ancient regime, Scalia warned, "We have abandoned the expansive rights-creating approach exemplified by Cannon...and perhaps ought to abandon the notion of implied causes of action entirely."¹⁶⁶ Nevertheless, Scalia concurred because, considering the legislation enacted subsequent to Cannon, "it is too late in the day to address whether a judicially implied exclusion of damages under Title IX would be appropriate."¹⁶⁷

The Franklin decision provided another weapon for victims of intentional sex discrimination in schools, whether they are students or employees. Franklin's attorney, Michael Weinstock, read the message of the Franklin Court as loud and clear: "Schools have to take

¹⁶⁶ 112 S. Ct. at 1034.

¹⁶⁷ Id.

sufficient steps to ensure a central figure is readily available to receive complaints in confidence and to act on them effectively with a protective, supportive process."¹⁶⁸

Alternatives in Sexual Harassment Cases

On the state level, noncompensatory remedies include criminal statutes and administrative discipline while compensatory remedies include civil suits for assault and battery or intentional infliction of emotional distress.¹⁶⁹ Now that the Civil Rights Act of 1991 allows for monetary damages up to \$300,000 for claims brought under Title VII, plaintiffs who would have chosen to seek remedy under state laws providing monetary damages may now choose to bring suit under Title VII.

An example of a sexual harassment case brought under statutes other than Titles VII and IX was Howard University v. Best.¹⁷⁰ In Howard, the court held that the creation of a hostile working environment was sufficient to constitute a prima facie case of intentional infliction of

¹⁶⁸ Perry A. Zirkel, "Damages for Sexual Harassment," Phi Delta Kappan 73 (June 1992): 812.

¹⁶⁹ Zirkel, 813.

¹⁷⁰ 484 A.2d 958 (D.C. App. 1984).

emotional distress.¹⁷¹ The court held that a jury could find that the intentional infliction of emotional distress arose out of and in the course of employment. The court stressed that the sexually hostile acts of the dean toward the faculty member occurred during faculty, administrative, or other professional meetings which both attended in their professional capacities. Thus the court held the university liable for the tort of outrage.¹⁷² The court in Best rejected the Henson and Katz respondeat superior approach and adopted the strict liability approach of Miller v. Bank of America. In fact, the court stated that upon the plaintiff's establishing a case of sexual harassment at a new trial, the jury was to be instructed that the university was to be held liable for sexual harassment.¹⁷³ The court based its decision on the fact that the Vice-President for Health Affairs at Howard did not conduct an independent review of the dean's non-renewal of Best's appointment and that his adoption of the non-renewal constituted full knowledge and acceptance of the dean's actions.

¹⁷¹ Id. at 986. The court held that the standard for showing emotional damages as a result of sexual harassment should be lower than that which is required by a plaintiff to prove intentional infliction of emotional distress because the higher standard of proof would not serve the broad purpose of antidiscrimination acts.

¹⁷² Id. at 987.

¹⁷³ Id. at 983.

In Glasgow v. Georgia-Pacific,¹⁷⁴ female employees brought suit against their employer and others for sex discrimination and outrage, alleging that a co-worker fondled them and used abusive language. They said they informed the plant manager who allegedly did nothing. The court held that in a hostile environment case the employee must show that the employer authorized, knew, or should have known of the harassment and failed to take reasonably prompt and adequate corrective action to be held liable. The court stated that an employer may ordinarily avoid liability by taking prompt and adequate corrective action when it learns that an employee is being sexually harassed.

The court in Estate of Scott by Scott v. deLeon¹⁷⁵ approved an alternate theory of damages: denial of equal protection under the fourteenth amendment by allowing harassing incidents to occur. In Scott, the personal representative of a pharmaceutical assistant at the University of Michigan alleged that the assistant's supervisor violated the equal protection clause by sexually harassing the assistant through letters, notes, and threats aimed at coercing her into sexual relations. The assistant allegedly complained to three university administrators about these incidents but nothing was done because she did

¹⁷⁴ 103 Wash.2d 401, 693 P.2d 708 (1985).

¹⁷⁵ 603 F. Supp. 1328 (E.D. Mich. 1985).

not file a formal complaint with university personnel. The assistant died of a drug overdose, allegedly related to the harassment. The court found that sexual harassment could violate rights protected by the equal protection clause because harassment was "the sort of invidious gender discrimination that the equal protection clause forbade."¹⁷⁶

The Court of Appeals for the Seventh Circuit in Bohen v. City of East Chicago¹⁷⁷ approved the use of the equal protection clause to support a claim of sexual harassment. In Bohen, a female fire dispatcher alleged that she had suffered numerous incidents of harassment by supervisory personnel and that these incidents represented the accepted practice of the department. In fact, the employee had been warned of sexually oppressive working conditions in her hiring interview. The court held that under the equal protection clause the employee had only to establish intentional discrimination, not that the harassment had altered the conditions of employment. The court held in favor of the fire dispatcher.¹⁷⁸

¹⁷⁶ Id. at 1332.

¹⁷⁷ 799 F.2d 1180 (1986).

¹⁷⁸ Id.

Although there are several states that have sexual harassment statutes,¹⁷⁹ most states depend upon state fair employment practice statutes to enforce sexual harassment claims. These and other alternative state statutes vary from state to state. Although many state fair employment practices statutes are often interpreted by the courts in conformity with Title VII and EEOC guidelines when determining the merits of a sexual harassment claim, state courts considering harassment under state law are not bound by federal court decisions interpreting Title VII. The more closely the wording of the state fair employment practices law follows Title VII or the EEOC guidelines, the more likely it is that state courts will use Title VII precedent in interpreting the state law.¹⁸⁰ Given these discrepancies and variances, it may be useful to provide a chart (Figure 1) outlining legal avenues that have been used successfully by victims of sexual harassment to remedy their situations.¹⁸¹

¹⁷⁹ California, Connecticut, District of Columbia, Illinois, Michigan, Minnesota, New York, North Dakota, Pennsylvania, and Wisconsin. 45 Am Jur 2d § 779, 703.

¹⁸⁰ 45 A Am Jur 2d § 779, 702-3.

¹⁸¹ Adapted from "Section 4- Legal Issues," Who's Hurt and Who's Liable: Sexual Harassment in Massachusetts Schools. A Curriculum Guide for School Personnel, 1986, 17-22.

Table 1. Description of Legal Remedies Used
in Sexual Harassment Cases

Legal Remedy	Brief Descript'n	Types of Benefits	Length of Time	Problems/Limits
Title VII	Federal legislat'n prohibit'g sex discrimination in employ'm't; file with state and appeal via EEOC	Monetary compensation for back pay, lost benefits, & punitive damages; possible job reinstatement	Six months to one year on the state level; 2-3 years federally	Applies to workplace with at least 15 employees
Title IX	Federal legislat'n prohibit'g sex discrimination in education; file with ED-OCR; also a private right of action	Cut-off of federal funds to ed. institut'n and compensatory damages are available	Varies regionally could be 1-2 years	Right to private action; employ'm't covered. Sexual harassm't a form of sex discrimination
Criminal Child Abuse Statutes	Varies state by state; usually includes abuse, neglect, assault of minors by adults	Conviction and/or imprisonment of abuser	Approximately one year	Victim compensation varies by state. Convicted adults could possibly retain their employ'm't

Criminal Rape Statutes	Varies state by state; some include degrees of sexual assault	Conviction and/or imprisonment of harasser rapist	Approximately one year	A women's sexual history can be admitted; Often sentences suspended
Other Criminal Sanctions	Assault, battery and other criminal charges; varies state by state	Conviction of harasser; fines or imprisonment	Approximately one year	Similar to rape charges
Civil Lawsuit	Breach of contract; various tort lawsuits based on common laws	Punitive damages; compensation for employment losses, physical/emotional injury	Approximately 2-3 years	Must hire a private attorney. However legal fees may be awarded by the court
Worker Compensation Act	Offers benefits for injury sustained on job. Operates via State Division of Industrial Accidents	Weekly wage & benefits based on percent of income for period of disability and/or medical benefits	Depends on locale; nearer urban area 3-6 months with appeal taking 6 months to one year longer	Usually awarded for physical injury; woman must get medical or psychiatric evaluat'n
Occupational Safety and Health Act	Federal Act which guarantees a "safe and healthful workplace"	Employer fined for violations	Greatly varies	Applies to workplace with at least 15 employees

Summary

The courts have made great strides over the last several years interpreting sexual harassment claims under both federal and state statutes. They have evolved from an attitude of sexual harassment being a "personal problem" to defining two distinct types of sexual harassment. They are holding employers responsible for sexual harassment in the workplace and providing monetary damages when employers are found to be liable. In addition, students also now have a way to seek compensatory relief under Title IX. Sexual harassment is a problem that educational administrators should not take lightly.

Sexual harassment is illegal. Employers need to comply with procedural requirements and provide prompt and adequate responses after complaints are received.

CHAPTER IV
ANALYSIS OF FEDERAL APPELLATE SEXUAL HARASSMENT CASES
FROM MERITOR¹ TO FRANKLIN²

Introduction

Information about what influences the outcomes of sexual harassment cases would be of practical use to both potential complainants and potential defendants. It would allow potential complainants to review their cases and decide whether to file formal charges, but more importantly, for potential defendants like school administrators, it would aid organizations in deciding whether to contest the charges or settle out of court.³ Therefore this chapter details the outcomes of 34 federal appellate court cases between 1986 and 1992 with respect to seven specific variables.

David Terpstra and Douglas Baker conducted a study that examined the influence of nine characteristics on the outcomes of 81 sexual harassment charges filed with the Illinois State Equal Employment Opportunity Commission

¹ Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986).

² Franklin v. Gwinnett Public Schools, 112 S. Ct 1028 (1992).

³ David E. Terpstra and Douglas D. Baker, "Outcomes of Federal Court Decisions on Sexual Harassment," Academy of Management Journal 35 (March 1992): 181.

Agency over a two year period. Case characteristics that were related to the courts decisions were: (1) the severity of the behavior involved; (2) the frequency of the harassment; (3) the status of the harasser; (4) the severity of the job related consequences; (5) the presence of witnesses; (6) the existence of documentation; (7) whether complainants had notified their organizations of the harassment before filing charges; (8) managements reasons for adverse employment consequences; and, (9) whether the organization had taken investigative or remedial action when notified of a problem.⁴

Later, Terpstra and Baker conducted another study that examined the influence of these nine characteristics on the outcomes of federal court cases involving sexual harassment. The purpose of their second study was to assess the generalizability of their earlier findings. Of the nine characteristics studied, five were found to be significant. Complainants were more likely to win their cases if the harassment was severe, witnesses and documentation supported their cases, they had given notice to management before filing their complaints, and their organizations took no action.⁵

⁴ Ibid.

⁵ Ibid., 185.

Since the Supreme Court's decision in Meritor, courts have decided numerous cases involving sexual harassment. Most of these cases involve allegations of hostile environment rather than quid pro quo sexual harassment. Quid pro quo sexual harassment cases often present such egregious factual situations that the employer frequently resolves the situation before it reaches a court. Therefore, the case law tends to focus on whether the plaintiff has established sexual harassment under the criteria set forth in Meritor and, if so, whether the employer should be held liable. Following the Supreme Court's advice on the liability issue, the courts have applied agency principles in making their determination.⁶

Since many very strong or very weak cases either never reach the courtroom or are settled satisfactorily in the district courts, the appellate courts often must decide those cases which involve complex convoluted issues and are less clear cut. Therefore, the federal courts of appeals seemed like the likely place to examine the principles of agency.

Six of the elements found by Terpstra and Baker to be influential in their studies were used in this analysis to determine if these characteristics also apply to the

⁶ Naomi Gittins, "Developments in Case Law Since Meritor Savings Bank v Vinson," Sexual Harassment in the Schools: Preventing and Defending Against Claims (Alexandria: National School Boards Association, 1990): 13.

outcomes of federal appellate cases from Meritor in 1986 to Franklin in 1992. These characteristics included: (1) the severity of the alleged harassing conduct, which was judged to be severe if it included sexual assault, unwanted physical contact of a sexual nature, or sexual propositions linked to threats or promises of a change in the individual's conditions of employment; (2) the frequency or continuity of the harassing actions, which was judged to be frequent if the number of occasions on which the sexual harassment occurred was three or more; (3) the existence of corroborating witnesses, and (4) the existence of supporting documentation were combined into one category called simply corroborating support; (5) the notification to the organization of the problem; (6) the response of management to the report of sexual harassment. A seventh characteristic, the circuit in which the appeal was heard, was also included to determine whether a balance of findings existed across the nation.

Following are short summaries of sexual harassment decisions issued by the federal courts of appeals from Meritor to Franklin. They are categorized according to the prevailing party and by circuit. The plan of organization is centered around three major areas: the facts, the decision, and the rationale.⁷

⁷ H. C. Hudgins and Richard S. Vacca. Law and Education (Charlottesville, Va.: The Michie Company, 1985), 51.

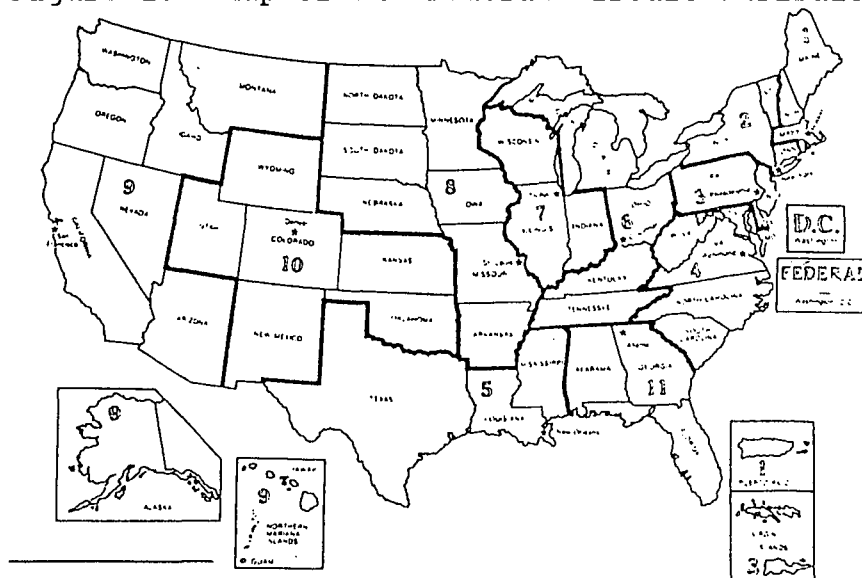
The facts. Who are the parties to the case? Who is suing whom? What factual situation occurred that precipitated a suit? On what does the plaintiff base (her) case? What is the defendant's response?

The decision. What is the court's actual decision?

The rationale. What are the reasons for the decision?⁸

Each case is discussed with these major areas in mind in order to provide examples of the types of actions which may be considered by the courts to constitute sexual harassment, and the rationale for determining the liability of the employer. A map⁹ of the federal circuit jurisdictions is provided in addition to Table 2 which depicts a crosswalk of the seven characteristics examined in each case.

Figure 1. Map of the Federal Circuit Jurisdictions



⁸ Ibid.

⁹ H.C. Hudgins and Richard S. Vacca. Law and Education (Charlottesville, Va.: The Michie Company, 1985), 13.

Table 2. Crosswalk of Important Variables Used to Determine Federal Appellate Case Outcomes and to Predict Future Case Outcomes

Case	Cir	Dec	Fre	Sev	Corr	Rep	Rsp
<u>Lipsett</u>	1	P	√		√	√	
<u>Morgan</u>	1	D	√			√	√
<u>Moire</u>	2	D				√	
<u>Andrews</u>	3	D				√	
<u>Pfeiffer</u>	3	P		√	√	√	
<u>Paroline</u>	4	P	√		√	√	
<u>Swentek</u>	4	D	√	√	√	√	√
<u>Dwyer</u>	4	D				√	√
<u>Wyerick</u>	5	P	√		√	√	
<u>Waltman</u>	5	P	√	√	√	√	
<u>Jones</u>	5	D			√	√	
<u>Bennett</u>	5	D		√		√	√
<u>Dornhecker</u>	5	D		√		√	√
<u>Yates</u>	6	P	√		√	√	
<u>Highlander</u>	6	D				√	√
<u>Rabidue</u>	6	D	√	√	√	√	
<u>Bohen</u>	7	P	√	√	√	√	
<u>Gilardi</u>	7	P		√	√	√	
<u>Volk</u>	7	P	√	√	√	√	
<u>Brooms</u>	7	P	√	√		√	
<u>Scott</u>	7	D				√	√
<u>Swanson</u>	7	D	√			√	
<u>Dockter</u>	7	D					
<u>Guess</u>	7	D				√	√
<u>Hall</u>	8	P	√	√	√	√	
<u>Jones</u>	8	P	√	√		√	

<u>Moylan</u>	8	D		✓		✓	✓
<u>Ellison</u>	9	P	✓		✓	✓	
<u>EEOC</u>	9	P	✓	✓	✓	✓	
<u>Jordan</u>	9	D		✓		✓	✓
<u>Hicks</u>	10	D	✓	✓			
<u>Ebert</u>	10	D				✓	✓
<u>Sparks</u>	11	P	✓	✓	✓	✓	
<u>Steele</u>	11	D	✓		✓	✓	✓

Key:

Case = The name of the appellate court case

Cir = The circuit in which the appellate court resides

Dec = The winning decision

P = Plaintiff

D = Defendant

Fre = The sexual harassment was frequent

Sev = The sexual harassment was severe

Corr = Corroborating witness or documentation was available

Rep = The incident was reported to management

Rsp = Management responded promptly and adequately

Decisions for the PlaintiffLipsett v. University of Puerto Rico¹⁰

In Lipsett, the plaintiff was discharged from a medical residency program because she did not react favorably to her professor's requests to go out for drinks, his compliments about her hair and legs, or to questions about her personal and romantic life. These gestures were commonly accompanied by thinly veiled statements suggesting that the defendant was in a position to make things go favorably for the plaintiff if she acquiesced. The plaintiff was also subjected to comments from others in the program asserting

¹⁰ 864 F.2d 881 (1st Cir. 1988).

that she should not be in the program because she was female. Since the University of Puerto Rico knew of the harassment, they were held responsible. The lower court had held that since the plaintiff admittedly responded favorably to these flattering comments, there was no way anyone could consider them as unwelcome. However, the First Circuit Court disagreed saying that an initial favorable response does not constitute a continued welcomeness. The appellate court stated that the man must be sensitive to signals from the woman that his conduct is unwelcome.

Pfeiffer v. School Board for Marion Center Area¹¹

The Pfeiffer case, discussed at length in Chapter III, involved a female high school student who became pregnant and was dismissed from the National Honor Society. In this case, the school contended that Pfeiffer had been dismissed because she had engaged in pre-marital sex, not because she was pregnant, which would have been a clear violation of Title IX. However, the school had never dismissed a male from the Society for engaging in pre-marital sex.

The Third Circuit Court ruled that the lower court had made an error in excluding pertinent evidence, which was the testimony of a male member of the National Honor Society who had impregnated his girlfriend and was not dismissed. The

¹¹ 917 F.2d 779 (3rd Cir. 1990).

appellate court reversed the decision of the lower court and remanded the case for consideration of compensatory relief which it ruled was available under Title IX. This case set the stage for the 1992 Supreme Court ruling in Franklin.

Paroline v. Unisys Corp¹²

Paroline was hired as a word processor at Unisys in the fall of 1986. During her job interview, Moore, the defendant supervisor, asked her what she would do if subjected to sexual harassment in the workplace. Soon after Paroline started work, Moore began to make sexually suggestive remarks to her that she considered offensive. In January 1987, Paroline accepted a ride home with Moore during a severe snowstorm. During the car ride, he made remarks, kissed her and repeatedly tried to hold her hand. When they reached the plaintiff's apartment, Moore insisted on coming in despite Paroline's objections. In the apartment, Moore grabbed Paroline and began kissing her and rubbing his hands up and down her back, ignoring her demands that he stop. Eventually she persuaded him to leave. When Paroline informed the head of her office of the incident, he told her that he knew of previous complaints about sexual harassment in the office and assured her that it would not happen again. Unisys launched an official investigation of

¹² 879 F.2d 100 (4th Cir. 1989).

Moore's behavior after which Moore was disciplined. The company issued a written notice to Moore that any recurrences of his behavior or any retaliatory conduct would be grounds for immediate termination. He was instructed to seek counseling and to limit contact with female employees to official company business. Unisys also terminated his access to the company's intelligence facility. Unisys notified the plaintiff of the actions taken against Moore at the end of January, but she considered those actions inadequate since Moore had allegedly sexually harassed other female workers and the company's previous warnings had failed to deter him. In addition, revoking Moore's access to the intelligence area left Moore in Paroline's work area even more than before the complaint. Paroline resigned two weeks later.

In reversing the district court's grant of summary judgement for the supervisor, the Fourth Circuit Court found that Paroline had produced enough evidence to establish that Moore exercised sufficient supervisory authority over her to qualify as an employer under Title VII. The supervisory employee need not have the ultimate power to hire and fire as long as he has significant input into such personnel decisions. Even if the employee is not the plaintiff's designated supervisor, as long as the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will

hold "employer" status for Title VII purposes. The court noted that the power to determine work assignments often represents a key element of supervisory authority.

The Fourth Circuit in Paroline adopted a dual standard to determine whether the harassment was sufficiently severe or pervasive. The plaintiff must first demonstrate that the harassment interfered with her ability to perform her work or significantly affected her psychological well-being, and second, that the harassment would interfere with the work performance or significantly affect the psychological well-being of a reasonable person in the plaintiff's position. The court found that both standards had been met.

On the question of the company's liability for Moore's activities, the Fourth Circuit noted that in a hostile environment claim, an employer is liable for one employee's sexual harassment of another worker if the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action. The court also accepted the theory that liability can be imputed to the employer on the ground that where it has notice of the harasser's prior conduct toward other female employees, the employer should know of the likelihood of the individual harassing other female employees, and therefore, it has a duty to take adequate steps to try to prevent future harassment.

In this case there was evidence that prior warnings had not deterred Moore and that the head of the office had openly joked about the complaints of harassment after ostensibly having warned male employees not to engage in the harassment of women.¹³

Wyerick v. Bayou Steel Corporation¹⁴

In Wyerick, the plaintiff, a female crane operator, brought a sexual harassment suit under Louisiana state law. The court noted that the Louisiana courts have determined that the state statute is similar in scope to Title VII, and therefore, the court looks to the criteria under the federal statute to determine whether a plaintiff has asserted a cause of action for sexual discrimination.

Wyerick claimed that she was subjected to a hostile working environment when she became the target of numerous sexual comments by coworkers and supervisors after she complained about the quality of emergency care she received when she had experienced chest pain and shortness of breath while working. Her treatment had included an examination by a male emergency medical technician and an electrocardiogram, during which it was necessary for her to remove her blouse. The plaintiff made four reports to

¹³ Gittins, 13-15.

¹⁴ 887 F.2d 1271 (5th Cir. 1989).

company management about the sexual comments. The company acknowledged that it was aware of the comments and that immediate action would be taken to halt them. The company monitored the radio for sexually harassing comments and asked the plaintiff to report any future comments made to her by male employees. There was, however, no evidence that the employees who made the remarks were contacted by Bayou Steel or that management took any affirmative steps to remedy the situation.

The Fifth Circuit Court reversed the district court's judgement for the employer on several grounds. The appeals court ruled that the district court made a mistake in finding that the sexual conduct was as offensive to men as it was to women workers and therefore, the conduct was not based on sex. The appeals court pointed out that the conduct complained of consisted of highly personalized, lewd statements and gestures regarding the plaintiff's breasts and the physical examination that she underwent. Therefore, by its nature, the remarks could not be said to be equally offensive to both men and women. The Fifth Circuit also held that summary judgement should not have been granted since the question of welcomeness should have been committed to the trier of fact in this case. The district court also held that the plaintiff was barred as a matter of law from maintaining a claim for hostile environment because her work atmosphere as a whole was heavily charged with sexual

comments and gestures. The appeals court said that such environments are the very core of the hostile environment theory.¹⁵

Waltman v. International Paper¹⁶

In Waltman, the plaintiff worked in the powerhouse of the mill on the "B" shift. The first instance of sexual harassment occurred in the Spring of 1982 when another employee broadcast obscenities over the loudspeaker that were directed at Waltman. In response, other employees began making suggestive remarks to Waltman. Waltman complained to her supervisor who said he would take care of it. A foreman told the broadcaster to stop, but the employee was not punished and no note of the incident was placed in his employment file.

In September, Waltman was moved to the "A" shift. While there, Waltman's supervisor and his assistant urged Waltman to have sex with a co-worker. On several occasions her supervisor touched her in an offensive manner and made sexually suggestive remarks to Waltman. During her tenure on the "A" shift, Waltman received over thirty pornographic notes in her locker. There were explicit drawings of women

¹⁵ Gittins, 15-16

¹⁶ 875 F.2d 468 (5th Cir. 1990).

in the restrooms, on the walls of the powerhouse, and in the elevators. Employees displayed sexually oriented calendars on their lockers, as well as hung used tampons from them.

In October of 1983, Waltman reported these incidents to one of the managers. The manager did not discipline anyone nor did he investigate Waltman's claims. Rather, he transferred Waltman to another shift.

Waltman was warned to keep her mouth shut and one employee told Waltman he would cut off her breast and shove it down her throat. Eventually, as a result of the constant harassment, Waltman became ill. Although many meetings took place to discuss Waltman's allegations, no substantial changes were made. Waltman finally resigned and filed charges with the EEOC.

The Fifth Circuit Court overturned the district court's judgement for the employer finding that there was a continuing violation of the law at the mill and held the employer responsible.

Yates v. Avco¹⁷

In Yates v. Avco, two secretaries charged that their supervisor had sexually harassed them by creating a hostile working environment. The supervisor's harassment included such acts as closing the door whenever one of the

¹⁷ 819 F.2d 630 (6th Cir. 1987).

plaintiff's entered his office, discussion of personal matters with them, numerous invitations for drinks or meals, inviting himself to one of the plaintiff's home, comments on the plaintiffs' appearance, lewd references to parts of their bodies, dirty jokes, frequent sexually suggestive comments, mentioning sleeping together, telling one plaintiff that she was on his mistress list, and calling one of the plaintiff's into his office for the purpose of watching her walk out at which time he would make groaning sounds.

When the plaintiffs complained about the supervisor's conduct, their employer asked that they not file a complaint with the EEOC. The employer conducted an investigation that ultimately found that the supervisor had harassed the plaintiffs. He was demoted and given a salary cut. However, the company refused to give the secretaries copies of tapes that contained statements they had made in connection with the company's investigation, declined to give the complainants written assurance of job protection and refused to correct the plaintiffs' personnel files to explain their long absences during the course of the investigation. During the investigation, the employer had allowed the accused supervisor to take administrative leave but forced the two secretaries to use their sick leave.

The Sixth Circuit Court found that there was no question that the supervisor had harassed the two

secretaries and that the sexual advances were unwelcome. The court focused instead on the question of whether the company should be held responsible for the supervisor's acts. The court cited the Supreme Court decision in Meritor which held that an employer cannot be held strictly liable for harassment by a supervisor and that agency principles should be applied. The Sixth Circuit found in this case that the employer should be held liable given that its sexual harassment policy was vague and ineffective. The policy provided for that an employee should report harassment to the immediate supervisor who then would be responsible for reporting and correcting the harassment. However, the policy failed to provide an alternative for those instances where the supervisor is the harasser. The court also implied that any sexual harassment is foreseeable; otherwise, employers would not have policies against it.¹⁸

Bohen v. City of East Chicago¹⁹

In Bohen, an Hispanic female fire department dispatcher brought suit under 42 U.S.C § 1983, alleging violation of her equal protection rights based on the harassment to which she was subjected by her immediate supervisor and other fire

¹⁸ Gittins, 16.

¹⁹ 799 F.2d 1180 (7th Cir. 1986).

fighters. The plaintiff's supervisor committed such acts as touching the plaintiff's crotch, talking to her constantly about sex, including his preferred positions, plaintiff's participation, and his expectations for her behavior, rubbing his pelvis against the plaintiff's buttocks, touching her with his leg while she was sitting, and forcing her to leave the bathroom door open. The other fire fighters harassed the plaintiff by making obscene comments, describing sexual fantasies about the plaintiff, constantly inviting the plaintiff to engage in deviate sexual conduct and implying that the plaintiff was a lesbian because she did not respond to them. Her captain told her that being forcibly raped in the bushes would improve her disposition.

When the plaintiff complained, no action was taken. The fire department did not have a written policy against sexual harassment even though fire officials knew of the sexually oppressive working conditions. There was evidence that the department considered the abusive environment to be the problem of women employees.

In ruling in the plaintiff's favor, the Seventh Circuit Court held that sexual harassment by a state employer constitutes sex discrimination in violation of the equal protection clause and is actionable under § 1983. Creating abusive conditions for female employees but not for male employees is discriminatory and the type of conduct prohibited by the equal protection clause.

The court held that the city is liable even for informal actions if they reflect a general policy, custom or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutional rights. In this case, the management officials knew of a pattern of sexual harassment in the fire department and chose not to address the issue. The case was remanded for determination of damages.²⁰

Gilardi v. Schroeder²¹

In Gilardi, the Seventh Circuit Court ruled that the owner of a trucking company discriminated against a female office clerk on the basis of sex in violation of Title VII when he drugged and raped her at his home and then fired her at the insistence of his wife. There was also evidence that he often boasted that he would have sex with any woman, used a note pad with a sexual drawing to instruct female employees, talked about sexual intercourse and group sex with female employees, patted female employees on the buttocks and asked them if they wore bras. He repeatedly brought up sexual topics with the plaintiff, made comments about her breasts, patted her on the buttocks and placed his hand between her thighs.

²⁰ Gittins, 16-17.

²¹ 833 F.2d 1226 (7th Cir. 1987).

The court found the defendant in violation of Title VII since his sexual advances were not only unwelcome, but he also had sex with the plaintiff without her consent. In addition, the court also upheld damage awards for the plaintiff's state law claims of battery and intentional infliction of emotional distress.²²

Volk v. Coler²³

In Volk, the plaintiff was a child abuse outreach worker. She alleged that she was sexually harassed by her immediate supervisor. The harassment consisted of such acts as persistent social invitations, overtly offensive sexual touching, explicit sexual gestures, calling the plaintiff such names as "honey" or "babe," several sexually offensive advances and questioning plaintiff about personal issues during a promotion interview. When the plaintiff rebuffed her supervisor's suggestions and advances, he treated her abruptly and ignored his responsibilities with respect to her cases. He also complained that the plaintiff and a female co-worker spent too much time together and suggested that they were "queer." The plaintiff was also denied a promotion in favor of a male candidate who scored lower on a written test and had less experience than the plaintiff.

²² Gittins, 17-18.

²³ 845 F.2d 1422 (7th Cir. 1988).

The plaintiff also alleged that the supervisor's harassment extended to three other female employees who were subjected to offensive touching and sexual gestures and were called inappropriate names. The supervisor also made numerous degrading remarks about other female employees.

After the plaintiff filed a grievance, the labor relations administrator concluded that the supervisor's actions were improper, and if true, would be hard to defend. However, the grievance was ultimately denied. After the plaintiff was transferred against her wishes to another office, she filed a second grievance that also failed.

In her suit the plaintiff asserted violations of her rights under the equal protection clause and under Title VII of the Civil Rights Act of 1964. The Seventh Circuit Court held that the equal protection clause prohibits the employer from creating working conditions abusive toward women and that liability for sexual harassment amounting to sexual discrimination under the equal protection clause has been found where a female employee was subjected to "repeated crude sexual advances and suggestive comments" despite her explicit rejection. Under the equal protection clause, the plaintiff need not prove that all women were discriminated against; it is enough to show that the plaintiff alone was harassed because of her sex.²⁴

²⁴ Gittins, 18.

Brooms v. Regal Tube Company²⁵

In Brooms, The plaintiff, a black female industrial nurse, sued her employer, its parent company and her supervisor for subjecting her to racial and sexual harassment. Brooms brought a Title VII sexual harassment claim when she alleged that during her sixteen months of employment, her supervisor made numerous explicit sexual remarks. Although she protested or attempted to ignore his advances and sexual commentary, he persisted.

After Brooms wrote a letter to the company's vice president and to the parent company's vice president of human resources, an independent investigator was hired who determined that Brooms had been straightforward and honest about the incidents. The vice president then made the supervisor apologize to Brooms, postponed his merit salary increase and warned him that he would be fired if the conduct occurred again.

After this meeting, the supervisor informed the plaintiff that he was not afraid of the vice president and after several weeks resumed his offensive comments. This time his conduct also included showing Brooms a pornographic photograph depicting an interracial act of sodomy and told her that the photo showed the "talent" of a black woman and that she had been hired for the purpose indicated in the

²⁵ 881 F.2d 412 (7th Cir. 1989).

photo. Brooms then filed a charge of discrimination with the state department of human rights and the EEOC. A few months later, the supervisor again showed Brooms another racist pornographic picture involving bestiality and told her that the picture showed how she "was going to end up." As she tried to grab the photo, the supervisor grabbed her arm and threatened to kill her if she moved. She threw coffee on him and ran away, screaming and falling down a flight of stairs as she fled. She did not return to work after this incident but remained on the company's payroll for two months.

In upholding the district court's ruling for the plaintiff on her Title VII sexual harassment claim, the Seventh Circuit Court of Appeals followed the standard set forth in Meritor Savings Bank v. Vinson, that a plaintiff must demonstrate that she has experienced "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."²⁶

In determining the company's liability for the supervisor's actions, the appellate court did not address the district court's grounds that the supervisor was a manager of the company and his acts were the acts of the

²⁶ 477 U.S. 57, 67 (1986).

corporation, but instead upheld the lower court's other basis for liability that the company knew of the problem but failed to take appropriate action.

Although the plaintiff did not allege constructive discharge in connection with her Title VII claim, the appeals court nevertheless approved the lower court's finding that Brooms had in fact proved that she had been constructively discharged and therefore was entitled to back pay.²⁷

Hall v. Gus Construction Company²⁸

Hall involved a claim under Title VII brought by three female traffic flaggers who alleged that they were subjected to a sexually hostile environment at the road construction site where they worked. The harassment committed by some of the male crew members included such things as referring to women as "fucking flag girls," calling one of the flaggers "herpes" and writing offensive names such as "cavern cunt" and "blond bitch" on the plaintiff's cars. The male crew members also repeatedly asked that the plaintiffs engage in sexual intercourse and oral sex. The men also physically harassed the plaintiffs by rubbing the women's thighs and grabbing their breasts. Some of the crew members exposed

²⁷ Gittins, 18-19.

²⁸ 842 F.2d 1010 (8th Cir. 1988).

their buttocks or genitals to the plaintiffs and flashed obscene pictures at them. Someone also urinated in one of the plaintiff's water bottle and gas tank. The mechanic refused to fix the plaintiff's pilot truck when it leaked carbon monoxide fumes. The plaintiff's were denied use of a vehicle to make trips to town for bathroom breaks, thus forcing them to relieve themselves in a ditch in view of the male crew members.

When the plaintiff's complained to the job foreman, he talked to the crew members, but the harassment soon resumed. The foreman also observed some of the incidents but did nothing.

The Eighth Circuit Court of Appeals recognized that plaintiffs may establish sexual harassment in violation of Title VII by showing that sexual conduct has the purpose or effect of unreasonably interfering with work performance or creating an intimidating hostile environment. However, the predicate acts underlying a sexual harassment claim need not be clearly sexual in nature. A court may correctly consider incidents of harassment and unequal treatment that would not have occurred but for the fact that the plaintiffs are women.

On the issue of employer liability, the court held that an employer may be held liable for the conduct of a plaintiff's fellow workers, if management knew or in the exercise of reasonable care should have known about a

barrage of offensive conduct and did nothing about it. In this case, the job foreman as an agent of the company had both actual and constructive notice of the harassment. The court found that the incidents were so numerous that the foreman and the company were liable for failing to take remedial steps to end it.²⁹

Jones v. Wesco Investment, Inc.³⁰

In Jones, the plaintiff was a receptionist who was promoted to the position of office manager. She alleged that her employer, the president of the company, sexually harassed her in violation of Title VII. The president made repeated sexual advances toward her, requested sexual favors and engaged in verbal and physical conduct of a sexual nature with her. His conduct included such acts as rubbing his hands up and down the sides of her body, touching her breasts, pinching her, patting her buttocks, kissing the top of her head, putting his hand up her dress on the outside of her thigh, telling the plaintiff that one day her breasts would be his, telling the plaintiff to spend more time in the kitchen because he could see her nipples better in cool temperature, asking the plaintiff to accompany him to unoccupied apartment buildings ostensibly for advice on

²⁹ Gittins, 19-20.

³⁰ 846 F.2d 1154 (8th Cir. 1988).

decorating the apartments, putting his arm around the plaintiff and once kissing her on the lips.

The Eighth Circuit Court affirmed the district court's judgement in favor of the plaintiff.³¹

E.E.O.C. v. Hacienda Hotel³²

The EEOC brought this employment discrimination action on behalf of several Hispanic maids employed by Hacienda Hotel. The suit charged Hacienda with sexual harassment, terminations based on pregnancy, failure to accommodate religious beliefs, and retaliation for opposing discriminatory practices. With respect to the sexual harassment claim the EEOC alleged that the Hacienda Hotel had created a hostile working environment by the conduct of the chief of engineering and the executive housekeeper who was female. The chief of engineering made numerous crude and disparaging remarks regarding the pregnancy of three of the maids and subjected them to sexually offensive remarks in the presence of the executive housekeeper who merely laughed. The head housekeeper also made disparaging remarks about the pregnancies of several of the maids referring to them a "dogs," "whores," or "sluts." The engineering chief also threatened one of the maids that he would have her

³¹ Gittins, 20.

³² 881 F.2d 1504 (9th Cir. 1989).

fired if she did not submit to his sexual advances. He regularly offered another maid money and an apartment, if she would give him her body and assured her that she would never be fired if she had sex with him. At least one of the maids complained to the hotel's general manager and her union representative about the sexually offensive comments, but the situation did not improve. Each of the maids eventually filed a complaint with the EEOC.

The Ninth Circuit Court of Appeals upheld the district court's determination that the harassment was sufficiently severe and pervasive so as to alter the terms and conditions of employment and to create a sexually hostile work environment. As to employer liability, the court ruled that employers may be held liable for failing to remedy or prevent a hostile or offensive work environment known to the management level employee. In this case the hotel manager had direct knowledge and failed to take prompt and adequate action. The court rejected the employer's argument that the complainants' failure to pursue internal remedies insulated the employer from liability.³³

³³ Gittins, 20-21.

Ellison v. Brady³⁴

In Ellison, a female revenue agent for the Internal Revenue Service received a series of strange love letters from a male co-worker. Believing that her grievances had not been satisfactorily resolved, Ellison filed a formal complaint alleging sexual harassment. Although the IRS investigator agreed that Ellison was being sexually harassed, the Treasury Department rejected Ellison's complaint because it did not describe a pattern of sexual harassment covered by EEOC regulations.

The Ninth Circuit Court reversed the lower court's decision of summary judgement to the Secretary of the Treasury by setting forth the "reasonable woman" theory which enforces the acknowledgement of the effects of sexual harassment on a female victim. The female employee states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment.

Sparks v. Pilot Freight Carriers, Inc.³⁵

In Sparks the plaintiff was a billing clerk and general secretary. She alleged that her supervisor, the terminal

³⁴ 924 F.2d 872 (9th Cir. 1991).

³⁵ 830 F.2d 1554 (11th Cir. 1987).

manager, created a sexually hostile working environment in violation of Title VII and that she had been discharged on the basis of sex as a result of quid pro quo harassment. The supervisor had engaged in such behavior as rubbing the plaintiff's shoulders, touching and smelling her hair, making repeated sexual remarks to her, making repeated inquiries about the plaintiff's personal life, making threatening remarks, and making at least one remark the district court characterized as "too sexually explicit" to repeat. When the plaintiff called in sick and did not report to work, she was fired the next day while a male employee who also did not report to work the same day because of illness was not discharged.

There was no evidence that the plaintiff had notified any superior about the harassment, but there was also no evidence that the employer had a policy against sexual harassment or an effective grievance procedure.

The Eleventh Circuit Court reversed the trial court's grant of summary judgment to the defendant. The Eleventh Circuit held that the trial court had erroneously applied the respondeat superior doctrine to determine the employer's liability. The appeals court stated that respondeat superior does not apply where the supervisor is the employer's agent. The EEOC has determined that a supervisor is an agent of the employer for Title VII purposes, if the supervisor exercises authority actually delegated to him by

his employer by making or threatening to make decisions affecting the employment status of a subordinate. This usually applies in a quid pro quo case, but the court applied it here, since the evidence showed that the supervisor used his delegated authority to assist him in harassing the plaintiff.

The court also found that the harassment was sufficiently persistent and severe to satisfy the Meritor requirement that the conduct must seriously affect the plaintiff's psychological well-being.³⁶

Decisions for the Employer

Morgan v. Massachusetts General Hospital³⁷

A black male who was a former hospital employee brought a civil rights action against the hospital asserting claims for discrimination, sexual harassment, and retaliatory discharge.

The conduct that was the subject of the male hospital employee's claims of harassment involved another male, purportedly homosexual co-worker. The court ruled that the harassment was neither sufficiently severe nor adequately pervasive to be actionable under Title VII.

³⁶ Gittins, 21.

³⁷ 901 F.2d 186 (1st Cir. 1990).

The employee alleged only that the co-worker stood behind him and bumped him, that the co-worker looked at his "privates" in the restroom, and the co-worker "hung around him a lot." The only other event complained of was that the co-worker asked the plaintiff to dance at hospital Christmas party.

The First Circuit Court found that the allegations concerning homosexual advances by a co-worker did not involve the type of conduct that could serve as basis for Title VII claim since the situation was not sufficiently severe "to alter the conditions of the victim's employment and create an abusive working environment."

Moire v. Temple³⁸

In Moire, a female physician brought a civil rights action against the medical school and the supervisor of her psychiatric clerkship program at a private clinic alleging that the defendants illegally conspired against her and gave her a failing grade because of her sex, necessitating that she repeat her third year of medical school. The Second Circuit Court upheld the trial court's decision that the medical student failed to establish that the supervisor at the private clinic sexually harassed her or sanctioned a

³⁸ 800 F.2d 1136 (2nd Cir. 1986).

harassing environment at the clinic. Therefore, the student failed to establish her claims against both the supervisor and the medical school under the fourteenth Amendment and Title IX.

Andrews v. City of Philadelphia³⁹

Female police officers claiming sexual discrimination and harassment filed action against their employer and supervisors for violations of federal employment discrimination and civil rights laws and for intentional infliction of emotional distress. The district court entered a judgement for the plaintiffs as to their Civil Rights Act § 1983 claim against supervisors and found for the defendant employer on the Title VII claims.

The Third Circuit Court held that the supervisors either acquiesced in discrimination or directly participated in such discrimination but that the employer could not be held liable under § 1983 because there was no proof that the employer directed or had actual knowledge and acquiesced in the harassment.

³⁹ 895 F.2d 1469 (3rd Cir. 1990).

Swentek v. USAir, Inc⁴⁰

In Swentek, The plaintiff, a flight attendant, alleged that she was sexually harassed by a 20-year pilot who was not the plaintiff's supervisor. She claimed that the pilot made obscene comments, embarrassed her in front of an FFA official with a nonsexual prank, disparaged her age and weight, jumped in front of her at a hotel to "check out" the legs of a registration clerk, exposed himself to her, reached under the plaintiff's skirt and grabbed the plaintiff's genital area, threatened to delay the plaintiff's by withholding her name from the flight logbook, dropped to his knees and sniffed her when they were introduced, made taunting remarks about the plaintiff's off duty attire, attempted to block the plaintiff's way through doors at the airport and made obscene phone calls to her. She also alleged that another pilot grabbed her breasts and told her it was a greeting from the first pilot. The defendant denied all of these acts and presented evidence that the plaintiff was vindictive, that she threatened lawsuits against coworkers for real or imagined slights, that she used foul language, frequently talked about sex, placed a sexual object in her supervisor's mailbox, urinated in a cup and passed it to someone as a drink, grabbed the

⁴⁰ 830 F.2d 552 (4th Cir. 1987).

genitals of another pilot and invited him to have sex. The plaintiff denied all of these acts.

When the plaintiff complained, her employer investigated the allegations and issued a letter of reprimand to the pilot and informed him that he would be suspended if another complaint was made against him. The employer claimed that it notified the plaintiff of the action but the plaintiff denied receiving any notice that the pilot had been disciplined. When the plaintiff filed an EEOC claim, an attorney at USAir investigated the charges and determined that they lacked merit because the pilot had stopped using foul language and no new complaints had been made.

In reviewing the conflicting evidence, the Fourth Circuit Court found only that the pilot had used foul language and had sung lewd limericks in front of the plaintiff.

Although the appeals court noted that the district court had made a mistake in finding that the plaintiff's past use of foul language or sexual innuendo in a consensual setting indicated that she would not be offended by the pilot's conduct and comments, it did rule that the employer was not liable because the pilot was not the plaintiff's supervisor and, therefore, the employer would be liable only if it had actual or constructive knowledge of the hostile work environment and did nothing to remedy the situation.

In this case the response of USAir was prompt and adequate.⁴¹

Dwyer v. Smith⁴²

In Dwyer, A female police officer alleged that other male police officers created a sexually hostile environment by subjecting her to innuendo, disparagement, humiliation, and insinuation. She claimed that she received pornographic materials through the department's mail system and that she was accused of having sex with other officers. The plaintiff also charged that she was present during graphic conversations about victims of sex crimes, that women were referred to in degrading terms, that other employees drove by her home to see if she had male visitors and that on one occasion she was exposed to graphic descriptions of sexual behavior.

Other officers who testified presented a vastly different picture of what took place on the job and indicated that the plaintiff often engaged in "dirty talk" or used profanity. Other evidence showed that while the plaintiff had previously received above average evaluations, her record was marred by several incidents of misconduct

⁴¹ Gittins, 21-22.

⁴² 867 F.2d 184 (4th Cir. 1989).

that questioned her truthfulness and for which she was eventually dismissed.

The Fourth Circuit Court found that only one pornographic mailing of undetermined origin occurred and that there was only occasional inappropriate language or references to sex. The court also pointed out that the plaintiff had made very few complaints and gave no testimony about the alleged incidents prior to the suit, and for several years while she was on the police force, she made no complaints at all. Based on its factual findings, the court ruled that the plaintiff had failed to prove sexual harassment that altered the conditions of her employment and created an abusive working environment.⁴³

Jones v. Flagship International⁴⁴

Jones was decided very shortly after Meritor. The plaintiff alleged that she was subjected to both quid pro quo and hostile environment sexual harassment. The plaintiff, an attorney hired as an equal employment opportunity manager, claimed that her supervisor, the vice president of personnel harassed her by inviting her to go to a hotel with him because she needed the "comfort of a man," propositioning her on business trips, and making numerous

⁴³ Gittins, 22.

⁴⁴ 793 F.2d 714 (5th Cir.1986).

other advances. She also complained about the use of bare breasted mermaid sculptures as table decorations at an office party and alleged discrimination in pay and promotion.

At first the plaintiff's grievances were ignored, but when she filed a complaint with the EEOC, she was suspended with pay the next day. The plaintiff was terminated when the employer learned that she had solicited two other female employees to file charges and had taken home material from her supervisor's personnel file.

The Fifth Circuit Court ruled that the plaintiff had not been subjected to hostile work environment harassment. Although the plaintiff does not need to show a tangible job loss or adverse employment effect to establish a prima facie case of sexual harassment under Title VII, the absence of such detriment then requires a much greater proof that the sexually harassing conduct was pervasive and destructive of the work environment.

The appellate court also held that the plaintiff failed to establish quid pro quo sexual harassment because she failed to show tangible job detriment, that is that she was required to accept sexual harassment as a condition of employment.⁴⁵

⁴⁵ Gittins, 23.

Dornhecker v. Malibu Grand Prix Corporation⁴⁶

In Dornhecker, the plaintiff was a corporate staff employee who resigned after four days on the job because of alleged sexual harassment by a marketing consultant to the company. Claiming a violation of Title VII for hostile environment harassment, the plaintiff asserted that on a business trip, the consultant had put his hands on her hips, had dropped his pants in front of her at the airport, touched her breasts, and "playfully" choked her when she complained of him putting his feet on the table. When the plaintiff became hysterical after the choking incident, her immediate supervisor agreed to speak to the company president about the behavior of the consultant. The president assured the plaintiff that she would not have to work with the consultant after the current trip which was to last one and a half more days. After she received the assurance, the plaintiff resigned the same day. The harasser did not attend the rest of the business meetings on the trip and his contract was not renewed.

The Fifth Circuit Court found in favor of the employer because it responded promptly to the plaintiff's complaint of harassment. The court also noted that the offending conduct had spanned only two days and had not been aggressive or coercive. The court believed that the action

⁴⁶ 828 F.2d 307 (5th Cir. 1987).

of the employer had been decisive and that the plaintiff had not been constructively discharged.⁴⁷

Bennett v. Corroon & Black Corporation⁴⁸

In Bennett, cartoons depicting the plaintiff engaged in crude and deviant sexual activities were posted in the men's room. When the plaintiff learned of the presence of the cartoons, she left work and did not return. The chief executive officer of the company had seen the cartoons but did nothing to have them removed until the next day when he learned of the plaintiff's reaction to them. The company removed the CEO in part because of this incident. It also assured the plaintiff of its good opinion of her and requested on numerous occasions that she return to work. In addition, the plaintiff received her full salary until she found new employment.

The Fifth Circuit Court affirmed the ruling of the district court in this case only because at this time (prior to the Civil Rights Act of 1991) the only relief the plaintiff could receive under Title VII was reinstatement and back pay which the employer had already paid her. Because the employer changed management and continued to pay

⁴⁷ Gittins, 23.

⁴⁸ 845 F.2d 104 (5th Cir. 1988).

the plaintiff, no other equitable relief would be appropriate.

However, the appellate court specifically noted that the district court's finding that the employer had responded promptly was in error in view of the fact that the CEO had seen the cartoons and allowed them to remain posted.⁴⁹

Highlander v. KFC National Management Company⁵⁰

In Highlander, the plaintiff, an assistant manager in a restaurant, alleged that the district training manager and her immediate supervisor sexually harassed her. The plaintiff claimed that the training manager made comments about her uniform, touched her legs and buttocks, and touched her name tag which was pinned over her breast. She charged that her immediate supervisor put his arm around her and suggested that she go with him to a motel if she wanted a promotion. The plaintiff was subsequently dismissed. After the plaintiff complained, the company conducted an investigation which led to the demotion of the training manager but which revealed insufficient evidence to discipline the plaintiff's immediate supervisor.

The Sixth Circuit Court found in favor of the employer with respect to the quid pro quo and hostile environment

⁴⁹ Gittins, 23-24.

⁵⁰ 805 F.2d 644 (6th Cir. 1986).

harassment. With respect quid pro quo harassment, the court said that the employee bears the burden of proving that submission to the unwelcome sexual advances of supervisory personnel was an express or implied condition of receiving job benefits or that tangible job detriment would result from the employee's failure to submit to the sexual demands of supervisory employees. In this case the court found no quid pro quo harassment because there was evidence that the plaintiff and her husband had indicated that they did not place any serious implications upon the supervisor's conduct, and that there was no indication that the plaintiff was denied a job benefit or suffered detriment as a result of her refusal to engage in the activities suggested by the supervisor. The supervisor did not participate in the decision to terminate the plaintiff who was dismissed for poor performance.⁵¹

Rabidue v. Osceola Refining Company⁵²

The plaintiff in Rabidue was an executive secretary. She alleged that the supervisor of the company's key punch and computer section made obscene comments about women generally and about the plaintiff, in particular. The company knew of the supervisor's crude and vulgar but had

⁵¹ Gittins, 24.

⁵² 805 F.2d 611 (6th Cir. 1986).

not been successful in curbing his behavior. The plaintiff also complained that other employees displayed pictures of nude or scantily clad women in their offices or work area.

Ruling in favor of the employer, the Sixth Circuit Court said that the plaintiff must demonstrate that she would not have been the object of her harassment but for her sex. According to this court, sexual conduct that proves equally offensive to men and to women would not support a Title VII sexual harassment charge. It is important to note that it was the minority opinion written in the Rabidue case that first set forth the "reasonable woman" theory rather than the reasonable person. The court held that one employee's vulgar language coupled with sexually oriented posters did not result in a hostile or offensive environment.⁵³

Scott v. Sears Roebuck⁵⁴

In Scott, a case decided a few months after the Supreme Court's decision in Meritor, the plaintiff, a female auto mechanic, brought a hostile environment claim alleging that a senior auto mechanic and other mechanics sexually harassed her. The harassment included making repeated propositions to plaintiff, winking at her, offering to give plaintiff a

⁵³ Gittins, 24-25.

⁵⁴ 798 F.2d 210 (7th Cir. 1986).

rub down, the senior mechanic asking plaintiff what he would get if he helped her after she requested assistance, slapping the plaintiff on the buttocks and one mechanic telling the plaintiff that he knew that she moaned and groaned while having sex. The plaintiff never complained to any supervisory personnel about this conduct before bringing suit.

The Seventh Circuit Court ruled that even if all of the plaintiff's allegations were true, they fell short of what is necessary to maintain a hostile environment claim under Title VII. The court held that the plaintiff must allege instances of harassment sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment. The conduct and sexual stereotyping must cause such anxiety and debilitation to the plaintiff so that her working conditions are "poisoned." The court found that the conduct of the other mechanics was too isolated and lacking in repetitive and injurious effect to sustain a hostile working environment claim. There was also no sign that the senior mechanic retaliated for plaintiff's refusal to entertain his advances; he gave her a favorable performance review.⁵⁵

⁵⁵ Gittins, 25-26.

Swanson v. Elmhurst Chrysler-Plymouth⁵⁶

The plaintiff in Swanson, was an assistant to the finance manager of a car dealership, claimed that she was discharged for refusing to submit to sexual harassment. She claimed that the general manager subjected her to sexually suggestive remarks, humiliating comments in front of other people and physical contact. Some of the other employees testified that the work atmosphere was relaxed and friendly and dismissed the manager's conduct as harmless teasing. The general manager claimed that the plaintiff was discharged for excessive absences.

The Seventh Circuit Court of Appeals upheld the district court's ruling that the plaintiff had been subjected to sexual harassment but that her discharge was for reasons unrelated to any sex discrimination. However, the Seventh Circuit rejected the lower court's award of nominal damages of one dollar and attorney's fees to plaintiff. The court held instead that only equitable relief was available under Title VII and that any award of damages is necessarily legal relief. The plaintiff, however, although she had been subjected to sexual

⁵⁶ 882 F.2d 1235 (7th Cir. 1989).

harassment could not receive equitable relief given that her discharge was unrelated to the harassment. Therefore, the award of attorney's fees was also reversed by the court.⁵⁷

Guess v. Bethlehem Steel Corporation⁵⁸

Juanita Guess sued her employer, Bethlehem Steel Corporation, charging sexual harassment in violation of Title VII. Although the particulars of the actual harassment are not discussed, the employers reaction to the harassment is. The Seventh Circuit Court affirmed the finding of the lower court that the employer, when learning of the sexual harassment, took prompt, appropriate, and effective corrective action.

Dockter v. Rudolff Wolff Futures, Inc.⁵⁹

In Dockter, a discharged female employee brought action against her former employer for sexual harassment and common law battery.

The Seventh Circuit Court held that (1) even if the employee's initial two weeks of work were "hostile" such as to be actionable as sexual harassment under the Civil Rights Act, the employee could not obtain relief under the Act in

⁵⁷ Gittins, 26.

⁵⁸ 913 F.2d 463 (7th Cir. 1990).

⁵⁹ 913 F.2d 456 (7th Cir. 1990).

the absence of any continuing harassment or discharge bases on that harassment, and (2) the district court was not erroneous in determining termination was the result of the employee's inability to become proficient as an operator of a personal computer, and thus, that discharge was not a result of quid pro quo sexual harassment.

Moylan v. Maries County⁶⁰

In this case, a female ambulance dispatcher, alleged that the county sheriff created a hostile working environment by making numerous unsolicited sexual advances and on one occasion by raping her. After an investigation, the county prosecutor determined that no criminal charges should be filed against the sheriff. The defendant presented evidence that the plaintiff often flirted with other officers and hugged and kissed them. The plaintiff also had pled guilty to falsifying her employment application to obtain CETA benefits.

While the Eighth Circuit Court ruled that a sexually hostile environment can constitute a violation of Title VII, it held that the plaintiff had failed to make such a case because she did not prove that the harassment was unwelcome. The court also believed that the alleged harassment did not impact on the plaintiff's employment since the plaintiff

⁶⁰ 792 F.2d 746 (8th Cir. 1986).

worked regular shifts for ten days after the alleged rape, and she produced no testimony that she was distressed or unable to perform her duties.⁶¹

Jordan v. Clark⁶²

In Jordan, the plaintiff, an administrative assistant at the U.S. Fish and Wildlife Service alleged that her immediate supervisor engaged in quid pro quo and hostile environment sexual harassment in violation of Title VII. The plaintiff charged that her supervisor made harassing phone calls to her at home, improperly touched her, made sexist comments, and requested that she sleep with him in order to get a promotion. However, the court did not credit her allegations, finding that there was insufficient evidence of the harassing phone calls and that the touching did not occur or was insignificant. The court based this finding on the plaintiff's failure to mention this conduct throughout lengthy administrative hearings. The court also noted that many people at the office made off-color jokes and that the supervisor had flirted the plaintiff, rather than making a sexual advance.

When the plaintiff complained about the alleged harassment, the Service conducted an investigation and found

⁶¹ Gittins, 26.

⁶² 847 F.2d 1368 (9th Cir. 1988).

that no discrimination had occurred, but that the supervisor had retaliated against the plaintiff for filing a complaint.

Finding in favor of the employer, the Ninth Circuit Court ruled that the plaintiff had not been subjected to a hostile working environment within the meaning of Meritor. It held that the harassment was not sufficiently pervasive to alter the terms of the plaintiff's employment and did not create an abusive environment.

The court also held that the plaintiff had not been subjected to retaliation for engaging in an activity protected by Title VII. Alleged resistance to a supervisor's advances is protected activity only if the advances occurred and were unlawful. The court viewed the case not as one of retaliation, but a problem of conflicting personalities.⁶³

Hicks v. Gates Rubber Company⁶⁴

The plaintiff in Hicks was a black female security guard. She alleged that she was the victim of racial and sexual harassment from her supervisors and other security guards who subjected her to racial slurs and jokes, referring to blacks as "niggers," "coon," and "lazy niggers;" calling the plaintiff "buffalo butt;" disparate

⁶³ Gittins, 26-27.

⁶⁴ 833 F.2d 1406 (10th Cir. 1987).

treatment such as not permitting her to sit while inspecting the plant; not allowing her to take lunch at the usual time and making her ride in a car on a wet passenger seat. The plaintiff alleged that a supervisor rubbed her thigh, touched her on the buttocks, grabbed her breasts, and got on top of her. The plaintiff did not report these incidents to her employer but did file a complaint with the EEOC.

The employer claimed that the plaintiff's work performance was deficient, that she accidentally dropped her gun and challenged another employee to a fight.

The Tenth Circuit Court found that the trial court had correctly ruled that no racial harassment or quid pro quo sexual harassment occurred, be remanded the case to the district court for consideration of the hostile environment claim. In so ruling, the court stated that the predicate acts underlying a sexual harassment claim do not have to be clearly sexual in nature. Any harassment or other treatment of an employee or group of employees that would not have occurred but for the sex of the employee may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII. In determining the pervasiveness of harassment against the plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility.⁶⁵

⁶⁵ Gittins, 27.

Ebert v. Lamar Trucking Plaza⁶⁶

Reviewing the district court's finding under a "clearly erroneous" standard, the Tenth Circuit Court acknowledged that Title VII does cover harassment based on sex which creates an offensive and abusive environment, but pointed out that under the Supreme Court's ruling in Meritor the harassment must still be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." However, where the harassment consisted of the use of rough language which was used by supervisors and employees alike, both male and female, and occasional unwelcome touching, the conduct did not rise to the level of a Title VII violation. The court of appeals also noted that the management of the truck stop took prompt and appropriate corrective action when it received complaints.⁶⁷

Steele v. Offshore Shipbuilding, Inc.⁶⁸

In Steele, the plaintiffs, an executive secretary and an emergency medical technician, charged their employer with a violation through Title VII through the creation of a

⁶⁶ 878 F.2d 338 (10th Cir. 1989).

⁶⁷ Gittins, 27-28.

⁶⁸ 867 F.2d 1311 (11th Cir. 1989).

sexually hostile working environment. They alleged that one of the employer's vice presidents, who acted as a general manager, harassed them by making sexually oriented jokes, requesting sexual favors from the plaintiffs, making suggestive comments about their attire and requesting that they visit him on his office couch.

When the plaintiffs reported the harassment, the company's EEOC officer interviewed the plaintiffs and told them that remedial action would be taken. The vice president who had harassed the women was summoned from an overseas assignment and given a verbal reprimand and instructions to stop the offensive conduct immediately. The company then assured the plaintiffs that their positions with the company were secure. The harassment did in fact stop.

The Eleventh Circuit Court found for the employer because when the employer was made aware of the harassment, prompt and appropriate action was taken to stop it. The court distinguished its decision in this case from its earlier decision in Sparks v. Pilot Freight Carriers.⁶⁹ The court pointed out that Sparks involved quid pro quo harassment where the supervisor used his authority to compel

⁶⁹ *Supra* note 28.

submission to sexual advances. Here the supervisor's harassment did not relate to his authority.⁷⁰

Summary

Individuals who are considering legal action on sexual harassment charges in the federal courts would be well-advised to review the strengths and weaknesses of their potential cases before proceeding. Overlaying the selected Terpstra and Baker categories on the thirty-four cases outlined above, finds several patterns and dimensions that influence case outcomes. If an individual has been the victim of sexual harassment, has witnesses or documentation to support the allegation, has notified management of the harassment, and management has taken no action or inadequate action upon notification, the individual is nearly 100 percent likely to win the case.

No differences were found relative to the circuit in which the cases were tried so no advantage to either the defendant or the plaintiff is dependent upon the area of the country in which the case is tried. The Seventh Circuit had the most cases with eight but the decisions were split down the middle, four for the plaintiff and four for the

⁷⁰ Gittins, 28.

defendant. Each district that tried three or more cases had an even or almost even number of decisions for both the plaintiff and the defendant.

The cases discussed above suggest several tactics that an individual might employ in dealing with future incidents of sexual harassment. A potential victim might arrange for witnesses to be present in situations where previous sexual harassment has taken place. If harassment takes place, the victim should gather as much documentation of the incident and surrounding circumstances, as possible. Next, the victim should notify management of the sexual harassment through any existing grievance procedure. Finally, if management fails to take prompt and appropriate action, the victim should proceed with formal charges.

Steps that organizations might take to decrease the likelihood of sexual harassment lawsuits and unfavorable settlements are also distinguishable. The first step for organizations is to lessen the possibility of sexual harassment happening by providing a formal, forceful, and proactive sexual harassment policy complete with penalties and a simple reporting procedure. Organizations need to use orientation and training films for new and existing employees as a means of eliminating such behaviors. Second, the response of the organization to a report of sexual harassment must be prompt. Immediate investigative action is imperative. If the investigation finds merit in the

sexual harassment complaint, swift remedial action should be taken to penalize the perpetrator.

Finally, if an organization has been threatened with a sexual harassment lawsuit, management needs to review the strength of the potential case against them with regard to the influential variables discussed here and make an informed decision as to the odds of successfully rebutting the charges. If odds of success are low, the organization might opt to reach an out-of-court settlement to avoid the time, expense, and negative publicity associated with losing a court battle.

CHAPTER V
SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

History did not record the name of the first boss who told a subordinate, "Have sex with me or you are fired." However, it is safe to assume that the employee did not file a formal complaint with her employer. For decades, many victims felt the only way to cope with sexual harassment at work was to quit their job or suffer in silence. Not any more.

Women, who now make up nearly half of the nation's work force, are demanding that employers take steps to prevent harassment and punish offenders. Victims of sexual harassment are also showing an increased willingness to take their cases to court. Sexual harassment has become a prominent issue in American politics and American life, and it will not soon go away.

Educational institutions and their students also have begun to realize that sexual harassment occurs at school and can be subject to legal action. It seems inevitable that the publicity accorded the problem of sexual harassment in the workplace, combined with clearer standards of proof and liability resulting from these cases, will ultimately lead to increased litigation.

The introductory material in Chapter I delineated the concerns regarding sexual harassment and framed the issues which have been addressed within this study. Throughout this study, the researcher has sought to clarify the legal issues surrounding sexual harassment and, therefore, provide guidelines for school leaders to facilitate compliance with the laws regarding sexual harassment. In Chapter I, the researcher identified several key questions which were answered within Chapters II, III, and IV. The answers to these questions, when summarized, serve as a basis for the development of administrative guidelines.

The first question listed in Chapter I was: What is sexual harassment as defined by the judicial process? Sexual harassment is a form of discrimination based on sex. The most frequently cited definition of sexual harassment was established in 1980 by the Equal Employment Opportunity Commission (EEOC) as a violation of Title VII of the Civil Rights Act of 1964. Title VII makes such discrimination an unlawful employment practice and Title IX of the 1972 Education Acts makes sexual harassment an unlawful educational practice. Accordingly, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (or education); 2) submission to or

rejection of such conduct by an individual is used as the basis for employment (or educational) decisions affecting such individual; or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working (or educational) environment. The activity directed toward the victim and her response to it carry the greatest weight in determining whether sexual harassment has taken place.

The second question was: How does the literature analyze sexual harassment? Power is the underlying dynamic of sexual harassment; the power to impose unwelcome sexual demands or conditions on another with impunity. The literature speaks to the patriarchal nature of our society and the effect of sexual stratification within our culture.

Historically, it wasn't until the early 1960s that women began entering the work force in numbers large enough to create the societal situation which would formalize sexual harassment as a problem. The 1970s ushered in an era of legislative efforts to curb discrimination and in 1980, the EEOC first issued its first influential guidelines on sexual harassment. In 1986, the Supreme Court issued its first major ruling on sexual harassment in Meritor Savings Bank v. Vinson making it illegal not only when the harassment results in a loss of a job or a promotion, but

also when it creates an offensive or hostile work environment.

Several surveys established sexual harassment as a pervasive problem and discovered that men and women view sexual harassment quite differently. This was the premise upon which the 'reasonable woman theory' was established.

In addition to a great deal of sexual harassment legislation, the 1990s have brought much sexual harassment publicity. First, the Judge Clarence Thomas confirmation hearings in which Anita Hill accused Judge Thomas of years of sexual harassment played on national television and then the humiliating United States Navy's Tailhook scandal covered the media.

Finally, the literature has pointed to schools as the newest locus of sexual harassment as California became the first state to pass legislation addressing sexual harassment as an educational issue.

The third question posed in Chapter I was: What does an analysis of federal and state statutes reveal regarding sexual harassment? Before Meritor Savings Bank v. Vinson, the court found sexual advances by a supervisor toward an employee to be nothing more than a personal problem in which the court should not become involved. Therefore, it became apparent to sexually harassed plaintiffs that they had to convince the court that harassment involved more than just personal acts.

In the late 1970s, the courts began to recognize that quid pro quo sexual harassment violated Title VII. While maintaining that non-employment related personal encounters were not actionable under Title VII, the courts held that it was improper for a supervisor, whom the court regarded as an agent of the employer, to use compliance to a demand for sexual favors as a basis for altering an employee's working conditions. Soon thereafter, courts began to hold that plaintiffs made a prima facie case of sexual harassment if they proved that an employer or supervisor had made demands for sexual favors in return for a job, a promotion, or other benefits. However, the courts did not find sexual harassment in cases where actions of supervisors could not be directly tied to the loss of a tangible job benefit.

In Meritor, the Supreme Court recognized a second type of sexual harassment, hostile environment, as well as the liability of employers for sexual harassment in the workplace. Meritor relied on four elements for a prima facie case of sexual harassment. First, sexual advances took place. Second, these advances were unwelcome. Third, the advances were sufficiently pervasive to constitute a condition of employment. Fourth, the advances were so pervasive and continuous that the employer either knew or should have known of them.

Since Meritor, the courts have found that the plaintiff's participation in sexual innuendo or foul

language in a consensual setting does not waive her legal protection against unwelcome sexual harassment. Even the presence of a consensual relationship between the plaintiff and the defendant does not necessarily mean that the plaintiff welcomed the defendant's harassing actions. In addition, the 'reasonable woman' theory has been adopted as the standard for determining a hostile working environment. Who is the reasonable woman? The reasonable woman is seen as the average American female, the one you see everyday. It could be the woman who lives down the street from you, the woman who waits on you at your favorite restaurant, delivers your mail, teaches your children, or the woman who has become your best customer. It could be your mother, your sister, your daughter, your wife, or your girl friend. The rationale behind the reasonable women theory is that men and women perceive sexual harassment differently and the courts have declared that in order to fairly judge the impact of sexual harassment, cases must be seen from the point of view of a 'reasonable women.' When trying to sort out the appropriateness of their own actions, men might do well to remember the MS DaWG theory. That is, they need to consider whether they would be doing or saying the same things if their mother, sister, daughter, wife, or girlfiend was present. Or, if they would appreciate similar speech or action directed toward their mother, sister, daughter, wife, or girlfriend.

Finally, anti-female animus has been consistently seen as a basis for finding sexual harassment even when the activity is not of a sexual nature. The Civil Rights Act of 1991 provided additional relief for victims of intentional employment discrimination in the form of compensatory and punitive damages and in Franklin v. Gwinnett Public Schools, the Supreme Court ruled that compensatory damages were also an available remedy under Title IX. On the state level, state tort law claims were the only avenue for monetary recovery for emotional distress and punitive damages before the Civil Rights Act of 1991 and often plaintiffs were successful in combining Title VII sexual harassment claims with state tort claims. Finally, in 1992, California became the first state to address the increasing problem of sexual harassment in schools by passing legislation that speaks to students involved in sexual harassment upwards from grade four.

The fourth question asked in Chapter I was: What are the discernible patterns and trends regarding judicial decisions in sexual harassment cases? If an individual has been the victim of sexual harassment, has witnesses or documentation to support the allegation, has notified management of the harassment, and management has taken inadequate action, the individual has a very good chance of prevailing in court. On the other hand, an organization needs to have a formal, forceful, proactive sexual

harassment policy complete with penalties and a simple reporting procedure. Then, when a report is received, immediate investigative action is imperative. If the investigation finds merit in the sexual harassment allegation, swift remedial action should be taken to penalize the perpetrator. Regardless of the situation, organizations that can prove that they took prompt and appropriate action when a report of sexual harassment was received, have an excellent chance of prevailing in court.

The final question asked in Chapter I was: What legal guidelines can be established as a result of this research to aid school administrators and board members in administrative decisions and policy making? The basis for determining liability depends on the actions and reactions of the organization. School board members and administrators must affirmatively raise the subject of sexual harassment, express strong disapproval, develop appropriate policies and procedures, inform employees and students of their rights and methods by which they can report undesirable conduct, and develop methods to sensitize all concerned. Schools need a written policy for both employees and students specifically prohibiting sexual harassment and should communicate this policy to them at regular intervals. The policy should include appropriate definitions of both quid pro quo and hostile environment sexual harassment and should explicitly state that any

employee or student who engages in sexual harassment will be subject to discipline, including discharge or expulsion. In addition, schools should periodically conduct training sessions to inform employees and students of the policy. Examples of various types of behavior that are prohibited should be given and discussed to help everyone recognize sexual harassment when it occurs. Schools need an easy highly publicized report procedure for both employees and students. This report procedure needs to designate several possible contacts in order to insure objectivity and fairness with a guarantee of confidentiality and no retaliation. Then a procedure for an internal investigation needs to be identified and followed to determine the merits of the allegation, complete with interviews of both the alleged victim and the alleged harasser, as well as any possible witnesses. Once a determination has been made as to the validity of the complaint, both parties need to be informed and prompt disciplinary action taken, if necessary.

Based upon the answers provided to these research questions, there are several conclusions which can be drawn regarding the legal aspects of sexual harassment and the implications for educational leaders.

Conclusions

Even when legal issues appear to be similar, different circumstances can produce entirely different decisions.

Therefore, drawing conclusions based upon legal research can be difficult. However, based upon an analysis of judicial decisions, the following general conclusions can be made regarding the legal aspects of sexual harassment.

1. Sexual harassment is clearly illegal and protected under both Title VII and Title IX.

2. A written proactive policy for both employees and students is necessary to protect school systems and officials from liability.

3. Clear proactive communication of the written policy with appropriate training should be repeated at set intervals is essential for both employees and students.

4. Men and women see sexual harassment differently. Men need to understand that his behavior is unacceptable when a woman finds his behavior toward her to be undesirable.

5. Simple procedures for reporting sexual harassment need to be outlined for both students and employees.

6. After a report of sexual harassment is received, a prompt, adequate, and confidential investigation of the report must take be undertaken.

7. When the investigation is finished, the organization must make an adequate response to its findings. Continuous and complete documentation is important.

8. If sued, the organization should look at facts surrounding each case to determine if it would be advantageous to settle out of court.

9. School officials who have a proactive, publicized policy in place, complete with clear reporting procedures, and prompt and adequate responses to complaints make their chances of avoiding or successfully defending a sexual harassment suit much better.

10. School officials should refuse to give any recommendations to employees who have been found to be guilty of sexual harassment and removed from employment.

Recommendations

Based upon an analysis of the legal research accomplished through the study, the following recommendations are made for school board members and school administrators. These recommendations should serve as guidelines for school officials faced with sexual harassment proceedings.

1. Know all state and federal statutory details regarding what constitutes sexual harassment.

2. Define policies and precise procedures to be followed during sexual harassment complaints.

3. Understand the property rights and liberty interests of each employee as they relate to that particular employee's contract status.

4. Keep employees continuously informed concerning sexual harassment issues through training and written communication.

5. Maintain sufficient documentation so that if there is an appeal to the courts, all steps can be verified.

6. Document with specificity, including time, date, and place any reported acts of sexual harassment and the school system's response to them.

7. Avoid any situation in which the constitutionally guaranteed rights of either the employees or the students are usurped. Such situations may taint an entire case and result in the reversal of an action of the school board or official.

8. Notify both parties of the final outcome of the school's investigation of sexual harassment complaints.

9. Never mislead an employee or a student by implying that sexual harassment is acceptable behavior. Employees and students should always be aware of what behavior is expected and what steps will be taken if sexual harassment is reported.

Recommendations for Further Study

This study has focused upon the legal aspects of sexual harassment. Continued research is suggested on the legal aspects of sexual harassment as the courts continue to define and clarify sexual harassment issues. This study

might focus on research of sure to be forthcoming state sexual harassment legislation as it relates specifically to schools.

In addition, studies that focused on ethnographic research conducted within the schools to determine the pervasiveness of sexual harassment in the halls and behind the walls would add tremendously to this body of research. Studies focused on the development of appropriate sexual harassment curriculum materials for various grade levels would also be of interest, as well as studies which would utilize personal interviews to shed light on the actual effects of sexual harassment on individual students.

Finally, while this study was developed as a use document for administrators, a similar study would be helpful for both the teacher and the student.

All of these recommended areas of further study serve the important purpose of focusing on the positive goal of eradicating sexual harassment in the educational setting. Only through education on the issues will the issues facing education be successfully addressed and dissolved.

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