EMPLOYER LIABILITY FOR COWORKER SEXUAL HARASSMENT UNDER TITLE VII

INTRODUCTION

Working women[1] have been victims of sexual harassment[2] at least since they entered the workforce in large numbers.[3] Public awareness of sexual ha-

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1. This Note will focus on the sexual harassment of females by males because sexual harassment is "presently viewed by both commentators and women's groups as a problem faced uniquely by women because of such factors as society's tendency to view women as sex objects, the traditional male prerogative of sexual initiative, the inferior economic standing of women workers, and male distaste of female participation in the workforce." Note, Legal Remedies for Employment-Related Sexual Harassment, 64 Minn. L. Rev. 151 n.3 (1979); C. MacKinnon, infra note 2, at 28 ("[T]he common denominator [in sexual harassment] is that the perpetrators tend to be men, the victims women."). Of course, the analysis presented here would apply to sexual harassment of males by females, of males by males, of females by females, but not to sexual harassment of either males or females by bisexuals. See note 41 infra. Also, many of the arguments in this Note concerning coworker sexual harassment are equally applicable to harassment by coworkers on the basis of race, color, religion, or national origin.

2. Sexual harassment has been defined, in broad terms, as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. MacKinnon, Sexual Harassment of Working Women 1 (1979). In more specific terms, sexual harassment has been defined by the Working Women's Institute as follows:

> Sexual harassment in employment is any attention of a sexual nature in the context of the work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work or interfering with her employment opportunities. It can be manifested by looks, touches, jokes, innuendoes, gestures, epithets or direct propositions. At one extreme, it is the direct demand for sexual compliance coupled with the threat of firing if a woman refuses. At the other, it is being forced to work in an environment in which, through various means, such as sexual slurs and/or the public display of derogatory images of women or the requirement that she dress in sexually revealing clothing, a woman is subjected to stress or made to feel humiliated because of her sex. Sexual harassment is behavior which becomes coercive because it occurs in the employment context, thus threatening both a woman's job satisfaction and security.

Working Women's Institute, Sexual Harassment on the Job: Questions and Answers (1980) (mimeograph) (on file at the New York University Review of Law & Social Change office) [hereinafter Questions and Answers]; see also Vermeulen, Employer Liability under Title VII for Sexual Harassment by Supervisory Employees, 10 Cap. U. L. Rev. 499 (1981). Compare the definition of sexual harassment of the Working Women's Institute with that of the guidelines of the Equal Employment Opportunity Commission (EEOC):

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

29 C.F.R. § 1604.11(a) (1984).

3. See L. Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 12, 28-44 (1978) ("The sexual harassment of working women has been practiced by men since women

rassment, however, has emerged only in the last decade, during which it has received a barrage of media attention.[4] Since then, sexual harassment in employment has been documented as pervasive,[5] inflicting devastating economic, physical, and psychological[6] hardships on working women.

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first went to work for wages. It is a practice that until now has gone virtually unchallenged largely as the result of a wide social acceptance of such behavior." Id. at 12.); see generally Goodman, infra note 4, at 448-58.

4. A. Larson, Employment Discrimination § 41.61 nn.6-13 (1984); Allegretti, Sexual Harassment of Female Employees by Nonsupervisory Coworkers: A Theory of Liability, 15 Creighton L. Rev. 437, 437 (1982) ("In the 1970's, sexual harassment exploded upon the national consciousness in a barrage of articles, investigations, and television shows") (citing A. Larson, Employment Discrimination § 41.61 (1984)); Goodman, Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go, 10 Cap. U. L. Rev. 445, 446 & nn.4-8.

5. Questions and Answers, supra note 2 ("Sexual harassment is the single most widespread occupational hazard women face in the workforce."); Working Women's Institute, Project Statement: Sexual Harassment on the Job (undated) ("Preliminary surveys by Working Women's Institute and others indicate that from 70%-88% of the respondents had experienced sexual harassment.") (mimeograph) (on file at the New York University Review of Law & Social Change office) [hereinafter Project Statement]; Testimony given by Lin Farley before the Commission on Human Rights of the City of New York, Hearings on Women in Blue-Collar, Service and Clerical Occupations, Special Disadvantages of Women in Male-Dominated Work Settings, April 21, 1975 (as many as seven out of ten women will be sexually harassed during their working careers); C. MacKinnon, supra note 2, at 28 (Sexual harassment "occurs across the lines of age, marital status, physical appearance, race, class, occupation, pay range, and any other factor that distinguishes women from each other.").

For example, a 1976 survey of working women (9,000 women responded) found that "nine out of ten reported experiences of sexual harassment" occurred on the job. C. MacKinnon, supra note 2, at 26 (citing C. Safran, What Men Do To Women on the Job: A Shocking Look at Sexual Harassment, Redbook Mag., Nov. 1976, at 149). Other studies also demonstrate that sexual harassment is pervasive in the American workplace. See, e.g., L. Farley, supra note 3, at 18-21; Note, supra note 1, at 152 n.6; Goodman, supra note 4, at 446 nn.7-8; C. MacKinnon, supra note 2, at 26; Bureau of Nat'l Affairs, Sexual Harassment and Labor Relations 20-30 (1981) (Thousands of complaints are pending before antidiscrimination agencies at the federal, state and local levels. Id. at 6.) [hereinafter BNA]. A survey at Harvard found that "34% of female undergraduates . . ., 41% of female graduate students and 49% of nontenured women faculty" experienced sexual harassment. Fair Harvard, Are You Fair?, Time, Nov. 14, 1983, at 109.

Like rape, sexual harassment is underreported. See L. Farley, supra note 3, at 21-27; S. Brownmiller, Against Our Will: Men, Women, and Rape (1975); FBI, Uniform Crime Reports 15 (1978); see also C. MacKinnon, supra note 2, at 27-28; Questions and Answers, supra note 2; Project Statement, supra note 5.

> 6. [W]omen are driven off the[ir] jobs, lose deserved promotions, miss out on training opportunities and receive poor personnel references as a result of sexual harassment. In a 1979 WWI [Working Women's Institute] study we found that 66% of the respondents lost their jobs as a direct result of sexual harassment; 24% were fired for failing to go along or for complaining about the harassment; 42% were eventually forced to quit when the working environment became intolerable. Women who become unemployed as a result of sexual harassment frequently have an especially hard time getting back on their feet again and are all too often denied unemployment benefits to tide them over.

Questions and Answers, supra note 2. See also Project Statement, supra note 5; C. MacKinnon, supra note 2, at 31-40; L. Farley, supra note 3, at 21-27; Vermullen, Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1604.11, Sexual Harassment, to its Guidelines on Sexual Discrimination, 6 Women's Rts. L. Rep. 285, 286-88 nn.8 & 14 (1980) (citing M. Crull, The Impact of Sexual Harassment on the Job: A Profile

As with public awareness, a legal remedy for sexual harassment was long in coming. The enactment of Title VII[7] of the Civil Rights Act of 1964 (Act) made sex discrimination in employment illegal. Nevertheless, ten more years passed before a federal court recognized sexual harassment as a form of sex discrimination under Title VII.[8] Nor did this recognition initially cover all forms of sexual harassment. The early Title VII sexual harassment cases were limited to claims of "quid pro quo" sexual harassment: the conditioning of tangible job benefits, such as a promotion or continued employment, on the employee's receptiveness to the employer's sexual advances.[9] Only very recently have courts recognized that "absolute" sexual harassment—the subjection of female employees to sexual advances, suggestions, jokes, or epithets without threatening the loss of tangible job benefits—can constitute sex

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of the Experiences of 92 Women, Working Women's Institute, Research Series (Report No. 3, 1979)) [hereinafter Comments on Guidelines].

Women's lower economic position increases their vulnerability to sexual harassment in employment:

> Women are overwhelmingly employed in low status, low-paying, dead-end jobs, primarily in the clerical (35% of all women workers) and service (19.6% of all women workers) areas. They constitute fewer than 3% of engineers, 5% of dentists, 11% of physicians, 13% of attorneys, 19% of scientists, and, perhaps most importantly, 25% of all salaried managers, officials, and administrators. Women earn S.59 for every S1.00 earned by comparably employed men; the gap between male and female earnings has not decreased since the passage of Title VII in 1964.

Comments on Guidelines, supra, at 286 (footnotes omitted); Vermeulen, supra note 2, at 500; L. Farley, supra note 3, at 45-51.

As to psychological hardships, see Questions and Answers, supra note 2 ("WWI [Working Women's Institute] research clearly links sexual harassment with a wide range of occupational stress reactions such as anxiety, nausea, headaches, high blood pressure, sleeplessness, ulcers, etc."); Project Statement, supra note 5; Comments on Guidelines, supra note 6, at 288 ("Psychological symptoms include feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction, and diminished ambition."); M. Crull, supra note 6, at 4; Goodman, supra note 4, at 456; L. Farley, supra note 3, at 17; C. MacKinnon, supra note 2, at 47-55.

7. 42 U.S.C. §§ 2000e-2000e-17 (1982). Title VII provides in relevant part:

> (a) It shall be an unlawful employment practice for an *employer*—
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> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, *terms, conditions,* or privileges of employment because of such individual's race, color, religion, *sex,* or national origin . . . .

42 U.S.C. § 2000e-2 (1982) (emphasis added).

8. Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd on other grounds sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), remanded sub nom. Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980). Prior Title VII suits in the lower federal courts were unsuccessful, but some were reversed on appeal. E.g., Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), rev'd, 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Indus., Inc., 14 Empl. Prac. Dec. 4896 (E.D. Va. 1976), rev'd and remanded sub nom. Garber v. Saxon Business Prods., Inc., 552 F.2d 1032 (4th Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Cal. 1976), rev'd, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded, 562 F.2d 55 (9th Cir. 1977); Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), rev'd and remanded sub nom. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

9. *Tomkins*, 568 F.2d at 1046 (discharge); *Barnes*, 561 F.2d at 985 (job abolished); see also Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064 (E.D. Miss. 1981) (discharge).

discrimination.[10]

Although quid pro quo sexual harassment can be perpetrated only by a female employee's supervisors[11] because only they have the power to threaten the employee's job status, absolute sexual harassment can be perpetrated by her supervisors, coworkers,[12] clients, and customers.[13] Predictably, supervisors seldom engage in absolute sexual harassment because they often couple their sexual advances with explicit or implicit threats to the employee's job, making their conduct quid pro quo harassment.[14] Absolute harassment is most often perpetrated by an employee's coworkers, and, in fact, statistics show that this type of harassment is at least as prevalent as quid pro quo harassment.[15]

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10. E.g., Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Hayden v. Atlanta Newspapers, 534 F. Supp. 1166 (N.D. Ga. 1982); Martin v. Norbar, Inc., 537 F. Supp. 1260 (S.D. Ohio 1982); Robson v. Eva's Super Market, Inc., 538 F. Supp. 857 (N.D. Ohio 1982); Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981); Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978).

"Absolute" sexual harassment is usually referred to as the "conditions of work" form of sexual harassment. C. MacKinnon, supra note 2, at 32-47; *Henson*, 682 F.2d at 908 n.18 ("Professor MacKinnon makes a useful distinction between harassment that creates an offensive environment (condition of work) and harassment in which a supervisor demands sexual consideration in exchange for job benefits (quid pro quo)."). This latter label, however, has often been attached to the working conditions theory by courts. See notes 49-60 and accompanying text infra. Because this Note argues that this theory represents an incorrect interpretation of Title VII, it was necessary to adopt a label which does not imply approval of this theory.

Quid pro quo sexual harassment is analogous to racial, religious, or national origin harassment that results in the loss of tangible job benefits; however, the "quid pro quo" label is only applicable to sexual harassment because there is no "exchange" in nonsexual harassment cases. Absolute sexual harassment is parallel to racial, religious, or national origin harassment in which no tangible job benefits are lost but intangibles are. Consequently, the "absolute" label can be used with nonsexual harassment.

11. For the purposes of this Note, "supervisor" means "any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action." 29 U.S.C. § 152(11) (1982) (National Labor Relations Act).

12. For the purposes of this Note, coworker or fellow employee includes all nonsupervisory employees who are equal to or inferior to the plaintiff in job rank or status.

13. Questions and Answers, supra note 2; Project Statement, supra note 5.

14. See C. MacKinnon, supra note 2, at 31-47.

15. See C. MacKinnon, supra note 2, at 28 (A Working Women United Institute survey found that 22% of those harassed were harassed by coworkers or subordinates.); BNA, supra note 5, at 25 (A survey of employers found that 33% thought coworkers were the primary offenders.); United States Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Is it a Problem? 59 (1981) (An investigation of the federal workplace found that in 65% of the reported incidents, the source of the harassment was a coworker or other nonsupervisory employee.). See also Comments on Guidelines, supra note 6, at 291 ("The impact of coworker harassment on a woman's job productivity is at least as extensive as that of supervisory personnel."); Goodman, supra note 4, at 454-56 & nn.60-71; Note, Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment, 3 Harv. Women's L.J. 173, 177 (1980) ("One preliminary study suggests that coworkers rank as the most common perpetrators of sexual harassment . . . .") [hereinafter Compensation].

Coworker sexual harassment under Title VII is a new and evolving area of the law. In the years to come, it should become the focus of Title VII litigation:

Despite this fact, most sexual harassment actions brought under Title VII are quid pro quo cases.[16] Even in cases claiming absolute harassment, the female worker was usually harassed by her supervisor or by both her supervisor and her coworkers.[17] Cases involving only absolute coworker sexual harassment are rare.[18]

One may ask why these cases are so rare, given the prevalence of coworker harassment. This Note addresses that question. It explains that coworker cases have been discouraged by the federal courts' interpretation of Title VII, which has created two significant barriers to plaintiffs' suits. First, the level of proof required by the courts in coworker sexual harassment cases is unreasonably high. Second, the relief permitted these plaintiffs under the Act is inadequate. This discourages coworker harassment suits because even successful plaintiffs are often denied just compensation under Title VII.

First, this Note demonstrates that courts, in defining the elements of the coworker-plaintiff's case, have departed from established interpretations of Title VII. Additionally, this Note suggests that because Title VII should not be applied differently to different forms of discrimination, the courts' approach in the coworker area is inappropriate and serves to thwart the objectives of the Act. The Note proceeds to present a redefinition of the elements of the plaintiff's case more consistent with Title VII precedent.

Next, this Note analyzes the kinds of relief granted to injured coworkers and finds that courts have not provided the relief necessary to effectuate the remedial purpose embodied in the dual objectives of Title VII: to eliminate all forms of discrimination in employment and to make victims whole.

I
PROOF ISSUES IN COWORKER SEXUAL HARASSMENT CASES UNDER TITLE VII

The parameters of Title VII were sculpted by the federal courts in cases concerning racial, religious, national origin, and sex discrimination a decade before sexual harassment was recognized as a form of sex discrimination. Consequently, the courts confronted with early sexual harassment cases reapplied previously established proof models to the new fact patterns. However, these

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> First, as the law of supervisory harassment matures and achieves settled form the attention of litigants, advocacy groups, and scholars will turn to the unresolved problem of coworker harassment. Second, promulgation of the EEOC's sexual harassment guidelines, which extend to harassment by coworkers, will undoubtedly spark interest in the problem. Third, as employees become more aware of the legal remedies against harassment, and the enormity of the problem, they will become more sensitive to the varied forms job harassment can take.

Allegretti, supra note 4, at 444 (footnotes omitted).

16. E.g., Stringer v. Pennsylvania Dep't of Community Affairs, 17 Fair Empl. Prac. Cas. 605 (M.D. Pa. 1978); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977).

17. See, e.g., *Katz*, 709 F.2d at 253.

18. See, e.g., *Kyriazi*, 461 F. Supp. at 898.

courts added additional proof requirements to the plaintiff's prima facie case. This section argues that these heightened proof requirements represent a departure from well-established Title VII precedent and are indicative of judicial reluctance to give full effect to the broad remedial purpose of the Act. Accordingly, this section proposes an interpretation of sexual harassment cases that is more consistent with Title VII precedent and the underlying imperative of the Act.

A. General Overview: Proof Issues Under Title VII

To prove her case under Title VII, a plaintiff must establish an "unlawful employment practice."[19] Title VII defines an "unlawful employment practice" as an "employer['s] . . . discriminat[ing] 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 . . . ."[20] An examination of how the Act is applied is essential to an understanding of current judicial impropriety in sexual harassment cases. Because sexual harassment cases are brought under a disparate treatment theory,[21] this section first examines how a court would apply that theory in a non-harassment Title VII action.

1. Elements of the Plaintiff's Case

Disparate treatment occurs when an "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[22] The Supreme Court outlined the proof model for disparate treatment cases in *McDonnell Douglas Corp. v. Green*.[23] There the plaintiff, a black mechanic, alleged race discrimination based on his employer's refusal to rehire him. The Court held that to establish a case of hiring discrimination under Title VII, the plaintiff would have to show (1) that he was a member of a protected class; (2) that he applied for the job; (3) that he was not hired; and (4) that the employer continued to seek applicants for the job.[24] The first element establishes that the discrimination was illegal in that it was based on a prohibited criterion. The other three elements establish discriminatory motive,[25] a critical element in disparate treatment cases.[26] The Court noted that because the proof model in Title VII cases varies depending on the fact situa-

19. 42 U.S.C. § 2000e-2 (1976); see note 7 supra.

20. 42 U.S.C. § 2000e-2 (1976); see note 7 supra.

21. See C. MacKinnon, supra note 2, at 193-206.

22. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). Disparate impact involves "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and can not be justified by business necessity . . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory." *Teamsters*, 431 U.S. at 336 n.15.

23. 411 U.S. 792 (1973).

24. Id. at 802.

25. See id.

26. *Teamsters*, 431 U.S. at 335 n.15.

tion, the *McDonnell Douglas* proof model was "not necessarily applicable in every respect to differing factual situations."[27]

Since *McDonnell Douglas* it has become clear that although the particular proof model may vary with the facts of a case, certain proof elements are common to all disparate treatment cases. To illustrate, a black male employee who alleges that he was paid less than a white male employee because of his race must show (1) that he was a member of a protected class (that he was black); (2) that he was treated adversely (that he was paid less); (3) that the discrimination was on an illegal basis (that the pay difference was based on his race); (4) that the discrimination was intentional; (5) that the discrimination was with respect to the compensation, terms, conditions or privileges of his employment; and (6) that the employer is responsible for the discrimination against him. While these six elements must be shown in all disparate treatment cases, not all the elements will be contested issues of proof in a particular Title VII case.[28]

2. *Relevant Title VII Precedent*

Under well-established Title VII precedent, a plaintiff need only allege a single incident of discrimination to satisfy the *McDonnell Douglas* model.[29] Only in class actions (alleging class-wide discrimination) need the plaintiff prove a pattern or practice of discrimination.[30] In such cases, a plaintiff must show "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[31] She must show that discrimination was the employer's "standard operating procedure—the regular rather than the unusual practice"—to establish a violation of Title VII.[32] Thus, in non-harassment cases, an individual plaintiff is not obligated to prove a pattern or practice of discrimination.[33] Consequently, in individual cases of discrimination, the severity of the discrimination is only relevant with respect to relief, not to

27. *McDonnell Douglas*, 411 U.S. at 802 n.13.

28. See text accompanying notes 35-42 infra.

29. 42 U.S.C. § 2000e-2 (1976); see note 7 supra. For example, if a female employee is fired because of her sex, she can state a claim under Title VII based on this single act of discrimination, even if her employer has never fired another female because of her sex. Doe v. Osteopathic Hosp. of Wichita, Inc., 333 F. Supp. 1357, 1362 (D. Kan. 1971) (Where the court found that although no other women were known to have been discharged for pregnancy, this fact was irrelevant because Title VII prohibits discrimination against "*any* individual." (emphasis added)). E.g., King v. Laborers Int'l Union, 443 F.2d 273, 278 (6th Cir. 1971) (where the court held that proof of a single act of discriminiation was sufficient to state a claim of race discrimination).

30. See Note, Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition, 76 Mich. L. Rev. 1007, 1024-25 (1978).

31. *Teamsters*, 431 U.S. at 336; e.g., Croker v. Boeing Co. (Vetol Division), 437 F. Supp. 1138, 1191 (E.D. Pa. 1977), modified, 662 F.2d 975 (3rd Cir. 1981); Dickerson v. United States Steel Corp., 439 F. Supp. 55, 65 (E.D. Pa. 1977), certified question answered, 582 F.2d 827 (3d Cir. 1978).

32. *Teamsters*, 431 U.S. at 336.

33. See Allegretti, supra note 4, at 447-48.

liability.[34]

B. Problems of Proof in the Sexual Harassment Context

As courts began recognizing that sexual harassment is prohibited as sex discrimination under Title VII, they adapted their proof models to these new fact situations. In so doing, however, courts unnecessarily added proof requirements to the plaintiff's case.[35]

1. Elements of the Plaintiff's Case

In a coworker sexual harassment case, a plaintiff must plead and prove six elements: (1) that she belongs to a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the sexual harassment was based upon her sex; (4) that the sexual harassment was intentional; (5) that it adversely affected her compensation, terms, conditions, or privileges of employment (conditions requirement); and (6) that the employer is responsible for the sexual harassment.[36]

The first four elements of plaintiff's case are usually not difficult to establish. The first element merely requires a stipulation that the plaintiff is a female.[37] The second element requires the plaintiff to show that she regarded the conduct as undesirable or offensive.[38] The third element requires her to prove that the sexual harassment was based upon sex—that but for her sex, she would not have been subjected to sexual harassment. That is, a plaintiff must "show that gender is a substantial factor in the discrimination, and that if the plaintiff 'had been a man she would not have been treated in the same manner.' "[39] While in early cases courts held that sexual harassment was not discrimination within the scope of Title VII,[40] most courts now hold that sexual harassment is gender-based discrimination.[41] The fourth element requires

34. For example, if a black male employee is denied equal pay because of his race, he can state a claim under Title VII regardless of the amount of wages lost as a result of the discrimination. The amount lost determines his relief. The fact that he was denied equal pay, whatever the amount, determines liability. See notes 200 infra.

35. Vermeulen, supra note 2, at 517-18.

36. See *Henson*, 632 F.2d at 903-06 and cases cited therein.

37. Id. at 903.

38. Id.; see also notes 115-16 and accompanying text infra.

39. *Tomkins*, 568 F.2d at 1047 n.4 (citations omitted).

40. See, e.g., *Tomkins*, 422 F. Supp. at 556; *Corne*, 390 F. Supp. at 163; *Barnes*, 13 Fair Empl. Prac. Cas. at 124.

41. See, e.g., *Tomkins*, 568 F.2d at 1047 n.4; *Barnes*, 561 F.2d at 990; *Heelan*, 451 F. Supp. at 1388. Consequently, this is no longer a contested proof issue in the plaintiff's case. See, e.g., *Katz*, 709 F.2d at 255; *Henson*, 682 F.2d at 903. It should, therefore, be simple for a plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment. See *Bundy*, 641 F.2d at 942 n.7. However, in cases where a bisexual supervisor sexually harasses workers of both sexes or where the harassment is equally offensive to workers of both sexes, the harassment would not violate Title VII because both were accorded like treatment. *Henson*, 632 F.2d at 904; see *Barnes*, 561 F.2d at 990 n.55. Except for such exceedingly atypical cases, it should be clear "that sexual harassment is discrimination based upon sex." *Henson*, 682 F.2d at 905 n.11; see *Bundy*, 641 F.2d at 942 n.7.

the plaintiff simply to show that the harassment occurred because a number of courts now recognize that harassment "always represents an intentional assault on an individual's innermost privacy."[42]

The last two elements of the plaintiff's case require a showing of proof beyond that required by non-harassment claimants. They present significant barriers to plaintiffs' suits.

2. Additional Proof Requirements

a. Discrimination with Respect to Compensation, Terms, Conditions, or Privileges of Employment

Where a tangible job benefit is lost due to any form of discrimination, courts routinely find that the discrimination was with respect to the plaintiff's compensation, terms, conditions, or privileges of employment.[43] For example, in a quid pro quo case, if a plaintiff lost her promotion because of sexual harassment, most courts would find that the harassment related to the "terms" of her employment.[44] However, where no tangible job benefit is lost, as in cases of absolute sexual, racial, religious, and national origin harassment, courts do not find that the harassment was with respect to a protected element of employment unless the plaintiff shows that the harassment constituted a "condition" of employment.[45]

Thus, until recently, plaintiffs charging absolute harassment, including coworker sexual harassment, were burdened with the additional requirement of showing that the harassment affected a condition of employment. In sustaining these suits, courts recognized that a plaintiff's mental, emotional, and physical work environment is a condition of employment,[46] and thus is within the scope of Title VII. However, this judicial concession did not remove the burden placed on plaintiffs by this proof requirements. While an employee who is fired can always show an effect on her term of employment, it is not clear at what point absolute sexual harassment has an effect on the conditions of employment. The degree of actionable harassment a plaintiff must prove to succeed in a Title VII suit depends on which of two judicial approaches is

42. *Bundy*, 641 F.2d at 945.

43. 42 U.S.C. § 2000e-2 (1982); see note 7 supra. For application of the statute see, for example, *Barnes*, 561 F.2d at 980-90; *Tomkins*, 568 F.2d at 1047; *Heelan*, 451 F. Supp. at 1389-90.

44. *Bundy*, 641 F.2d at 943-46. See note 29 and accompanying text supra.

45. Some courts have taken the position that there is no violation of Title VII when no adverse tangible job consequence results from sexual harassment. E.g., Clark v. World Airways, Inc., 24 Fair Empl. Prac. Cas. 305, 307-08 (D.D.C. 1980) (defendant did not relate sexual advances to her employment); Cordes v. County of Yavapai, 17 Fair Empl. Prac. Cas. 1224, 1227 (D. Ariz. 1978) (no claim that acquiescence to sexual demands was a condition of employment). These courts are in the minority. The Title VII law on sexual harassment is nascent so these courts' hesitant approach merely represents the law in transition. See generally Goodman, supra note 4.

46. Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977); *Bundy*, 641 F.2d at 943-44; EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384-85 (D. Minn. 1980).

applied: the *Rogers*[47] theory or the EEOC[48] analysis.

(i) The Rogers *Approach*

Rogers v. EEOC[49] established the working conditions theory. In *Rogers*, an Hispanic employee brought a Title VII suit against her former employer, an optical company, which had segregated patients by national origin.[50] The lower court held that the plaintiff had not alleged facts sufficient to state an unlawful employment practice enabling the EEOC to investigate the employer and gain access to its patient applications.[51] The Fifth Circuit reversed.[52]

Judge Goldberg of the Fifth Circuit concluded that Title VII protects an employee's psychological, as well as economic, fringe benefits.[53] Therefore, he found that the segregation of patients by national origin could violate Title VII because of the negative psychological effects of segregation on employees.[54] Judge Goldberg, however, sharply limited the reach of his theory:

> I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of . . . [Title VII]. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think . . . Title VII was aimed at the eradication of such noxious practices.[55]

While Goldberg's theory is significant because it recognizes that absolute harassment can violate Title VII, it does not protect employees from isolated incidents of harassment, or even from pervasive harassment where harassed employees maintain "emotional and psychological stability."

Other absolute harassment cases, both sexual[56] and nonsexual[57] are con-

47. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

48. The EEOC is charged with the enforcement of Title VII. 42 U.S.C. § 2000e-5(a) (1982).

49. 454 F.2d at 234.

50. Id. at 236.

51. Id. at 237.

52. Id. at 241.

53. Id. at 238.

54. Id. at 237-41.

55. Id. at 238.

56. E.g., *Katz*, 709 F.2d at 254-55; *Henson*, 682 F.2d at 904-05; *Bundy*, 641 F.2d at 943-46; *Hayden*, 534 F. Supp. at 1175-78; Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1631-32 (W.D. Okla. 1980).

57. E.g., Vaughn v. Pool Offshore Co., 683 F.2d 922, 923-24 (5th Cir. 1982) (court found that the derogatory racial remarks did not pollute the work atmosphere within the meaning of *Rogers* because all employees were subject to similar "obnoxious treatment"); Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (D.C. Cir. 1976) (pattern of racial slurs violates right to non-discriminatory work environment); Bridgeport Guardians, Inc. v. Delmonte, 553 F. Supp.

sistent with *Rogers*.[58] Indeed, these cases confirm that, under the *Rogers* theory, absolute harassment must be both pervasive and psychologically debilitating to violate Title VII. A single incident of discrimination is insufficient grounds upon which to bring a cause of action under Title VII.[59] When the *Rogers* theory is applied, it creates a formidable barrier to a plaintiff's bringing or maintaining suits alleging coworker sexual harassment because it significantly increases the extent to which such harassment remains legal conduct in the workplace.[60]

(ii) The EEOC Approach

The EEOC guidelines on sexual harassment (Guidelines)[61] embody a second approach to the conditions requirement. The Guidelines state that absolute sexual harassment violates Title VII when it "has the purpose or effect of *unreasonably interfering with an individual's work performance* or *creating an*

601, 614-18 (D. Conn. 1982) (intense racial harassment established a discriminatory work environment); *Murphy Motor*, 488 F. Supp. at 385 (racial harassment was "so excessive and opprobrious" as to establish a discriminatory work environment); United States v. City of Buffalo, 457 F. Supp. 612, 635 (W.D.N.Y. 1978) (black employees subjected to work environment "heavily charged with racial discrimination"), modified in part, 633 F.2d 643 (2d Cir. 1980); Compston v. Borden, Inc., 424 F. Supp. 157, 160 (S.D. Ohio 1976) (demeaning religious slurs created offensive work environment).

58. Although the courts have heard only a handful of coworker harassment cases, two cases deserve mention in light of *Rogers*. Decided some ten years after the Fifth Circuit decision, but before the final Guidelines (see notes 61-63 and accompanying text infra) were published, Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978), aff'd, 647 F.2d 388 (3d Cir. 1981) and Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980), are the only two coworker cases with detailed opinions. While *Kyriazi* was decided under Title VII, *Continental Can* was decided under the Minnesota Human Rights Act. Because the Minnesota Supreme Court applied principles developed in Title VII cases to adjudicate *Continental Can*, the Minnesota case is apposite.

In both *Kyriazi* and *Continental Can*, the plaintiffs were subjected to repeated injurious and malicious harassment by coworkers and supervisors. Thus, neither court was confronted with the prospect of adjudicating a sexual harassment case based upon only one illegal act. In *Kyriazi*, however, the district court of New Jersey did not discuss the working environment theory. While finding that the sexual harassment occurred, the court preferred to focus its lengthy opinion on the class action which the plaintiff spearheaded. Had there not been such weighty statistical evidence behind the class action, perhaps the court would have been encouraged to give more than brief treatment to *Kyriazi*'s well-founded and documented harassment claim. However, a *Rogers* analysis could easily have been applied to *Kyriazi* because the incidents of the illegal conduct were repeated and were shown to constitute a polluted working environment. 461 F. Supp. at 926. In *Continental Can*, on the other hand, the court expressly rejected the *Rogers* theory by stating that an employer has no duty "to maintain a pristine environment." 297 N.W.2d at 249. Rather, the Minnesota Supreme Court adhered to a narrow reading of the statute and based the employer's liability upon its failure to respond to notice of the sexual harassment.

59. See, e.g., 682 F.2d at 904; *Brown*, 22 Fair Empl. Prac. Cas. at 1631-33; see also cases cited notes 56-57 supra and notes 75-76 infra.

60. For the same reasons, the working conditions theory would burden plaintiffs in cases of absolute sexual harassment by supervisors. This burden, however, falls most heavily on victims of coworker sexual harassment as a class because such harassment is the more prevalent form of absolute sexual harassment. See note 15 and accompanying text supra.

61. 29 C.F.R. § 1604.11 (1984). See note 2 supra.

intimidating, hostile, or offensive working environment."[62] The Guidelines are relatively new,[63] and EEOC decisions arising under these guidelines, when reported at all, are generally brief and without analysis.

However, decisions on racial, religious, and national origin harassment rendered prior to the Guidelines are applicable to these phrases because the EEOC followed such Title VII precedent when drafting the Guidelines.[64] In these cases, the EEOC held that a single incident of harassment could violate Title VII.[65] For example, a violation occurs when a supervisor refers to an employee as a "nigger," and the employee feels insulted or intimidated.[66] Moreover, the EEOC has found actionable Title VII violations even when the injured employee was characterized "hypersensitive,"[67] the harassment was intended as a joke,[68] or the harassment was directed at others who were not offended.[69] The EEOC has also found that pervasive workplace harassment violates Title VII.[70] Indeed, the EEOC places a positive duty on employers to maintain a harassment-free working atmosphere: an employer is "obliged under [Title VII] . . . to maintain a working atmosphere free of racial intimidation or insult. Failure to take steps reasonably calculated to maintain such an atmosphere violates . . . [Title VII]."[71] The principle behind this oft-quoted passage has been codified in the Guidelines.[72]

Under EEOC decisions, then, sexual harassment that "unreasonably in-

62. 29 C.F.R. § 1604.11(a)(3) (1984) (emphasis added). See note 2 supra. The Guidelines provide that in determining whether there was a violation of Title VII the EEOC will examine "the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination . . . will be made from the facts, on a case by case basis." 29 C.F.R. § 1604.11(b) (1984).

63. The Guidelines were issued in 1980. Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74, 677 (1980) (codified at 29 C.F.R. § 1604.11) (adding § 1604.11 on Sexual Harassment).

64. See Supplementary Information to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676 (1980); 29 C.F.R. § 1604.11 n.1 (1984) ("The principles involved here continue to apply to race, color, religion or national origin.").

65. EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. 837, 838 (1972); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. 317, 318 (1971).

66. 4 Fair Empl. Prac. Cas. at 318. See EEOC Dec. No. 72-1704, 4 Fair Empl. Prac. Cas. 1057, 1060 (1972); EEOC Dec. No. 72-1114, 4 Fair Empl. Prac. Cas. 842, 843 (1972).

67. EEOC Dec. No. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. 295 (undated).

68. EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. 837, 838 (1972).

69. EEOC Dec. No. 72-0967, 4 Fair Empl. Prac. Cas. 441, 442 (1971) (where employer called white and black employees "girls" with equal frequency, employer violated Title VII because the term insulted the black employees by evoking "repellent historical images").

70. EEOC Dec. No. 72-1115, 4 Fair Empl. Prac. Cas. 843, 844 (1972); EEOC Dec. No. 71-2344, 3 Fair Empl. Prac. Cas. 1254, 1255 (1971); EEOC Dec. No. 71-909, 3 Fair Empl. Prac. Cas. 269, 270 (1970).

71. 3 Fair Empl. Prac. Cas. at 269 (citing EEOC Dec. No. YSF 9-108, 1 Fair Empl. Prac. Cas. 922 (1969)).

72. 209 C.F.R. § 1604.11(f) (1984):

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

terf[eres] with an individual's work performance" or "creat[es] an intimidating, hostile, or offensive working environment" can be the result of one or more incidents.[73] The EEOC's interpretation of Title VII protects employees against both single and pervasive incidents of illegal harassment, including insults and ridicule.

These decisions, though issued prior to the Guidelines, are true to the concerns addressed by the Commission in drafting the new Guidelines. Additionally, all EEOC guidelines and decisions are entitled to great judicial deference;[74] thus, courts should adopt the EEOC approach to the conditions requirement rather than the *Rogers* approach. In both sexual[75] and nonsexual[76] absolute harassment cases, however, most courts have failed to recognize that isolated, sporadic, or insulting incidents of harassment may violate Title VII. Rather, courts have followed the *Rogers* approach.[77] The conditions requirement thus remains a difficult barrier for absolute harassment plaintiffs to overcome.

b. Discrimination by the Employer

Title VII provides that it is an unlawful employment practice for an "employer" to discriminate on the basis of sex.[78] The term "employer" means "a person [individual or organization] engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ."[79] Unless the plaintiff shows that the harassment was imposed upon her by the employer or its agent, the harassment does not violate Title VII.

The vast majority of courts have held the employer liable for any form of

73. A key factor in EEOC determinations has been the harassed employees' subjective reaction to the harassment. But the EEOC Guidelines make clear that the test is not strictly subjective; rather, it is a "totality of the circumstances" test. 29 C.F.R. § 1604.11(b) (1984). See note 62 supra.

74. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); cf. General Elec. Co. v. Gilbert, 429 U.S. 125, 140-45 (1976) (EEOC guidelines are not entitled to deference when they conflict with EEOC's earlier positions and with the statute's proper interpretation); *Teamsters*, 431 U.S. at 343-44 (rejecting EEOC guidelines on bona fide seniority systems); Washington v. Davis, 426 U.S. 229 (1976) (rejecting EEOC guidelines on employment selection procedures in a non-Title VII case).

75. See *Katz*, 709 F.2d at 256; *Henson*, 682 F.2d at 904; *Bundy*, 641 F.2d at 943 n.9.

76. E.g., Johnson v. Bunny Bread Co., 25 Fair Empl. Prac. Cas. 1326, 1332 (8th Cir. 1981) (sporadic or isolated incidents of harassment do not violate Title VII); *Cariddi*, 568 F.2d at 88 (comments by supervisor—occasionally calling plaintiff "dago" and others "mafia"—were part of the casual conversation and did not amount to a violation of Title VII); Kidd v. American Air Filter, 23 Fair Empl. Prac. Cas. 381, 382 (W.D. Ky. 1980) (harassment by fellow employees, unless excessive and opprobrious, does not violate Title VII); *Murphy Motor*, 488 F. Supp. at 384 (to violate Title VII more than a few incidents of harassment must have occurred; "comments that are merely part of the casual conversation, are accidental, or are sporadic are not prohibited by Title VII."); Winfrey v. Metropolitan Util. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (a single incident—supervisor called black employee "boy"—is not a Title VII violation).

77. See text accompanying notes 56-58 supra.

78. 42 U.S.C. § 2000e-2(a) (1982).

79. 42 U.S.C. § 2000e-(b) (1982).

discrimination by supervisors.[80] However, courts in absolute sexual, racial, religious, and national origin harassment cases have refused to find the employer liable for discrimination by coworkers unless the plaintiff shows that the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.[81] As with the "conditions" requirement, these additional proof requirements unduly burden plaintiffs in absolute harassment cases. The difference in treatment accorded injured coworkers stems from the courts' narrow interpretation of the term "agent."

(i) Agents of the Employer: Supervisors

Title VII does not define "agent" and its legislative history does not make clear whether Congress intended to incorporate the common law "scope of employment test" into Title VII.[82] At common law, an employee is deemed an "agent" of an employer if the act in question was performed within the scope of employment. The mere illegality of an "agent's" act does not place it outside the scope of employment. Similarly, the lack of employer knowledge or an employer policy against discrimination has no bearing upon such scope of employment.[83]

Under a strict application of the common law test, an employer is rarely held vicariously liable[84] for discriminatory acts by employees because these acts are deemed purely personal acts and thus outside the scope of employment.[85] Most courts, however, have recognized that a broader interpretation of employer liability under Title VII is more consistent with the broad imperative of the Act. When the discrimination is committed by a supervisor, the judicial trend has been to hold employers vicariously liable, even though the discrimination may have been the result of purely personal motives:[86]

> [The] fact that the employer delegated authority to its supervisors makes it responsible for unlawful exercise of that authority.
>
> Although employers do not ordinarily authorize supervisors to harass other employees[, they do authorize supervisors to oversee employees] in their daily work and to make specific hiring, firing,

80. Vermeulen, supra note 2, at 515. But see note 91 infra.

81. See notes 94-95 and accompanying text infra.

82. *Barnes*, 561 F.2d at 997-98 (MacKinnon, J., concurring).

83. W. Prosser, Handbook of the Law of Torts §§ 69-70 (1971). In general, an employee's conduct is within the scope of employment "if it is of the kind which he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a purpose to serve the . . . [employer]." Id. at § 70 at 461; Restatement (Second) of Agency § 228 (1958).

84. Vicarious liability or respondeat superior is a common law theory under which an employee's illegal acts are imputed to the employer. W. Prosser, supra note 83, § 69 at 458.

85. Significant Development, infra note 91, at 539.

86. See, e.g., Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Ostopowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973), modified, 541 F.2d 394 (3d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971); Vermeulen, supra note 2, at 508 & nn.51-55.

> and promotion decisions. In Title VII actions, vicarious liability does not hinge on whether the employer authorized the specific unlawful employment practice or whether it benefitted from the practice. Liability is premised on whether the employer authorized the act of hiring, firing, or supervising; it is this authorization which establishes the agency relationship and which results in imputation of the supervisor's unlawful employment practice to the employer.[87]

Thus, an employer should be vicariously liable when an employee is discharged, demoted, or loses other tangible job benefits because the supervisor who perpetrated the illegal act was authorized to fire or demote the employee.[88] Further, in harassment cases, the courts and the EEOC have both consistently interpreted Title VII as imposing a duty on employers to maintain a work environment free from sexual, racial, religious, or national origin harassment.[89] Even "if a supervisor does not have authority to hire, fire, or promote, he . . . does have authority to direct employees in their daily work"[90] and, therefore, to control their work environment. Consequently, an employer is vicariously liable when a supervisor injects harassment into the work environment.[91]

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87. Significant Development, infra note 91, at 542 (footnotes omitted); see W. Prosser, supra note 83, at 529-30.

88. Significant Development, infra note 91, at 543 & n.42; see *Miller*, 600 F.2d at 213; *Williams*, 413 F. Supp. at 660.

89. See notes 71-72 and accompanying text supra; e.g., *Gray*, 545 F.2d at 169; *Brown*, 22 Fair Empl. Prac. Cas. at 1631-32; *Murphy Motor*, 488 F. Supp. at 384; *Croker*, 437 F. Supp. at 1191.

90. Significant Development, infra note 91, at 544.

91. See, e.g., Lucero v. Beth Israel Hosp. & Geriatric Center, 479 F. Supp. 452, 455 (D. Colo. 1979); *Compston*, 424 F. Supp. at 160-61. In sexual harassment cases, quid pro quo and absolute, some courts have held employers not liable for harassment by supervisors, regardless of whether there was the loss of a tangible job benefit, unless the employers knew or should have known of the harassment and failed to take appropriate action. See, e.g., *Katz*, 709 F.2d at 256; *Tomkins*, 568 F.2d at 1048; *Barnes*, 561 F.2d at 992-93; *Munford*, 441 F. Supp. at 466. In these cases the courts deemed only upper management to be "agents" of the employer. See *Katz*, 709 F.2d at 255; *Henson*, 682 F.2d at 905. In contrast, most courts rejected the requirement that:

> [A] vice-principal [(agent)] must be a superior servant [(employee)], such as a foreman, in a position of direct authority over the plaintiff . . . and defined a vice-principal to include any servant of whatever rank, who was charged by the master [(employer)] with the performance of his common law duties toward plaintiff, such as maintenance of a safe place to work . . . . These duties were said to be non-delegable, in the sense that the employer could not escape repsonsibility for them by entrusting them to another.

W. Prosser, supra note 83, at 529 (footnotes omitted).

More importantly, these holdings are contrary to the EEOC Guidelines and to well-established Title VII precedent in racial, religious, and national origin harassment cases:

> The position taken in the guidelines follows well-established precedent in Title VII racial, religious, and national origin harassment cases. In these cases, courts have routinely held employers vicariously liable for discriminatory acts by their supervisors . . . . In sexual harassment cases, however, most courts . . . have imposed liability only if the employer . . . [knew] and [failed] . . . to take appropriate action.

Significant Development, New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII, 61 Boston U. L. Rev. 535, 536 (1981) (foot-

The Guidelines parallel this case law when supervisors are the harassers.[92] They provide that employers are responsible for the acts of "[their] agents and supervisory employees with respect to sexual harassment regardless of whether the . . . acts . . . were authorized or forbidden by the employer[s] and regardless of whether the employer[s] knew or should have known of their occurrence."[93]

(ii) Agents of the Employer: Coworkers

Currently, an employer is not vicariously liable for a coworker's discriminatory acts unless it fails to take remedial action against discrimination of which it knew or should have known.[94] Courts refuse to impose vicarious liability because the nature of the coworker relationship differs from that of the supervisor: "Although the coworker is the employer's agent for the specific job he . . . is employed to perform, the coworker usually has no authority over the person he . . . harasses. The harassing act thus cannot occur within the scope of the harasser's employment and cannot be imputed to the employer."[95]

The employer, however, has a duty to maintain a harassment-free working environment.[96] Consistent with Title VII precedent in sexual, racial, religious, and national origin harassment cases,[97] the Guidelines also impose liability directly on employers for coworker sexual harassment: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."[98] Employer knowledge thus becomes a necessary element of a plaintiff's coworker harassment suit.

(a) Notice Requirement

The plaintiff in a coworker harassment case can establish that her em-

notes omitted) [hereinafter Significant Development]. The unique treatment accorded sexual harassment by these courts is unjustified: sexual harassment is sex discrimination. Certainly, Title VII does not differentiate between sex and other forms of illegal discrimination. Id. at 561-62 nn.172-73. See text accompanying notes 106-08 infra.

92. See note 91 supra.

93. 29 C.F.R. § 1604.11(c) (1984). The Guidelines use the terms "agents" and "supervisory employees" interchangeably. See 29 C.F.R. §§ 1604.11(c)-(e) (1984). Title VII contains neither the term "supervisor" nor the term "supervisory employee."

94. See, e.g., *Katz*, 709 F.2d 256; *Henson*, 682 F.2d at 905; Higgins v. Gates Rubber Co., 578 F.2d at 281, 282 (10th Cir. 1978); *Martin*, 537 F. Supp. at 1262; *Kidd*, 23 Fair Empl. Prac. Cas. at 382; *Murphy Motor*, 488 F. Supp. at 385-86; Friend v. Leidinger, 446 F. Supp. 361, 382 (E.D. Va. 1977); Howard v. National Cash Register Co., 388 F. Supp. 603, 606 (S.D. Ohio 1975) (quoting Fekete v. United States Steel Corp., 353 F. Supp. 1177, 1186 (W.D. Pa. 1973)).

95. Significant Development, supra note 91, at 545.

96. See note 89 and accompanying text supra.

97. Significant Development, supra note 91, at 557; see cases cited note 94 supra.

98. 29 C.F.R. § 1604.11(d) (1984).

ployer knew or should have known of the harassment either directly, by showing that she complained to her superiors, or indirectly, by showing that the harassment was so pervasive that the employer had constructive knowledge of its existence.[99] However, this notice requirement presents two almost insurmountable barriers to a plaintiff's coworker harassment suit.

First, it is unlikely that victims of coworker harassment will be able to show direct notice to the employer because these victims must often suffer in silence. They do not articulate their outrage and seek compensation for their injuries because they are embarassed, intimidated, and demeaned by the sexual harassment.[100] They also justifiably fear retaliation. For example, in one coworker case in which an injured woman worker complained of coworker harassment to her supervisors, the supervisors joined the harassment rather than take action against it. Moreover, the plaintiff's supervisor told her that "a woman must expect such things in a man's world."[101] In another case, when the plaintiff complained to her supervisor that her coworker told her "he wished slavery days would return so that he could sexually train her [to] be his bitch," the plaintiff's supervisor said there was nothing he could do because she had to expect that kind of behavior (including being patted and grabbed between the legs) while working with men.[102] Second, the requirement of indirect notice to the employer severely limits the actionable forms of coworker harassment: unless the plaintiff can show direct notice, any harassment that is not pervasive is not actionable.

(b) Subsequent Remedial Action Defense

The subsequent remedial action defense represents further judicial reluctance to consider sexual harassment claims empathetically. Under this defense, courts relieve an employer of liability for coworker sexual harassment if it took prompt remedial action upon learning of the harassment.[103] This issue is discussed in detail under the relief section of this Note.[104] However, an employer's preventive efforts to prohibit further acts of sexual harassment should not vitiate the fact that a wrong occurred. Thus, although such a defense may aid in measuring damages, it should not be used to deny a plaintiff any recovery.

C. Redefining the Plaintiff's Case

The federal courts' interpretation of "conditions" and "agent" in absolute harassment cases has severely limited the forms of coworker sexual harass-

99. *Katz*, 709 F.2d at 256; *Henson*, 682 F.2d at 905.

100. C. MacKinnon, supra note 2, at 27; see Montgomery, Sexual Harassment in the Work Place: A Practitioner's Guide to Tort Actions, 10 Golden Gate U.L. Rev. 879, 881 (1980); Goodman, supra note 4, at 454-57 & nn.60-82.

101. *Kyriazi*, 461 F. Supp. at 935.

102. *Continental Can*, 297 N.W.2d at 246.

103. See notes 94-95 and accompanying text supra.

104. See Section II infra.

ment actionable under Title VII. This section explores why courts have not construed the Act consistently with its purposes and with most Title VII case law. Further, it offers a model on which courts may more fairly adjudicate coworker sexual harassment cases.

1. Redefining Condition *of Employment*

As seen in absolute harassment cases, courts have required that the harassment constitute a "condition" of employment before it is deemed a violation of Title VII. Most courts translate this proof requirement to require the plaintiff's showing of more than one incident of harassment and of her mental, emotional, or physical debilitation at work.[105]

In Title VII cases not involving absolute harassment, plaintiffs have not had to demonstrate that the conduct was pervasive or injurious. Moreover, in such cases, proof of how the plaintiff was affected is a question of relief, not liability.[106] Judicial treatment of coworker sexual harassment is inapposite to well-established Title VII precedent.[107]

One commentator has suggested that courts are hesitant to analyze sexual harassment cases as the language and precedent of Title VII seem to dictate because these cases require a distinction between welcome and unwelcome sexual conduct.[108] Yet, evidentiary questions such as whether the conduct was welcome are "well within the courts' ability to resolve."[109] For example, in cases of national origin harassment, courts have had to distinguish between "harmless" remarks and "unwelcome" harassment, despite the prevalence of ethnic jokes in American humor.[110]

Further, this reasoning does not address the fact that the Act does not distinguish between forms of discrimination. The addition of barriers to claims of one specific form of discrimination, such as in sexual harassment cases, violates the Act itself. Title VII makes it illegal for employers "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[111] The EEOC and the courts agree that the employee's work environment is a condition of employment. Therefore, she is entitled to have that environment free of illegal harassment.[112]

The plaintiff in a coworker sexual harassment case should need to prove only the first four elements of her case to establish discrimination with respect to her conditions of employment. These elements establish that if she has been intentionally subjected to harassment in her work environment to which she would not be subject were she male, she has established that she was treated

105. See text accompanying notes 49-60 supra.
106. See text accompanying notes 29-34 supra.
107. See Significant Development, supra note 91, 561-62 & nn.171-73.
108. Id. at 561.
109. Id.
110. Id. at 561 n.170.
111. 42 U.S.C. § 2000e-2(a) (1982); see note 7 supra.
112. 42 U.S.C. § 2000e-2 (1982); see notes 7, 89 and accompanying text supra.

adversely because of her sex.[113] Once she has shown that the sexual conduct was unwelcome, she has established a detrimental effect on her work environment, and thus on her conditions of employment.

Courts have been asking the wrong question concerning this proof issue. The question is not whether the harassment constituted a condition of the employee's employment; the question is simply whether the conduct was unwelcome. A plaintiff need only show that the coworker conduct was harassment to establish that her conditions of employment were adversely affected. Consequently, the pervasiveness of the harassment and its effect on the plaintiff become issues of relief, not liability.[114]

In short, the fifth element of the plaintiff's case in coworker sexual harassment suits, the question of whether the sexual harassment was a condition of employment, must be redefined. When the sexual conduct at work is unwelcome, it has an effect on the plaintiff's conditions of employment. Redefining this element would make a plaintiff's case considerably easier. Even so, a plaintiff's evidentiary problems would not then be solved. A plaintiff would still find it difficult to prove that she was subjected to harassment if there were no witnesses or corroborating evidence.[115] Additionally, a plaintiff might find it difficult to prove that the sexual conduct was unwelcome because many courts still harbor "the misconception that sexually harassing behavior is both natural to men and flattering to women."[116]

2. *Redefining* Agent *of the Employer*

The courts in Title VII cases have interpreted "agent" of the employer within the context of common law tort and agency principles.[117] But incorporating such principles wholesale, however, is inconsistent with the broad remedial purposes of Title VII.[118] Thus, in the context of supervisor discrimination, courts have given a broad interpretation to the term "agent."[119] However, in coworker discrimination cases, courts have relied only upon common law to avoid imposing liability on the employer for coworker harassment.

At common law, employers were not vicariously liable for coworkers' torts because coworkers were not authorized to oversee the safety of the work environment.[120] This doctrine is, however, at odds with the employers' duty under Title VII to maintain a work environment free from harassment. This is especially true in the context of sexual harassment because coworkers maintain substantial control over the work environment:

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113. See text accompanying notes 36 supra.
114. See text accompanying notes 33-34 supra.
115. See EEOC Decision No. 82-13, 29 Fair Empl. Prac. Cas. 1855 (1982).
116. Vermeulen, supra note 2, at 504, 523-25.
117. See notes 84-88 and accompanying text supra.
118. Significant Development, supra note 91, at 540 n.31; Vermeulen, supra note 2, at 515-16.
119. See notes 84-88 and accompanying text supra.
120. W. Prosser, supra note 83, at 529-30; see note 96 and accompanying text supra.

> [While] not able to fire, demote, transfer, or withhold promotion, [coworkers] are perfectly capable of making it difficult, if not impossible, for a woman to do her work and, indeed, of forcing her to leave the job. The impact of co-worker harassment on a woman's job productivity is at least as extensive as that of supervisory personnel. It is arguably even greater, as a woman must often rely on the cooperation and support of her co-workers to learn her job and to do it properly.[121]

Thus, the maintenance of a work environment free of harassment by supervisors and coworkers should be within the scope of the employer's Title VII duties. The employer would then be vicariously liable for coworker harassment just as it is now vicariously liable for supervisor harassment.

Traditionally, vicarious liability has been imposed on the employer for:

> The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise. . . because, having engaged in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, [the employer] rather than the innocent injured plaintiff, should bear them . . . . [Also] an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.[122]

The threat of liability for coworker harassment would encourage employers to eliminate such illegal conduct. Furthermore, liability would then be placed on the party most able to control the work environment and to compensate the victims of sexual harassment.

Current Title VII case law, however, shields the employer from responsibility for coworker harassment unless it had notice of the illegal conduct.[123] This notice requirement unfairly and severely limits the ability of victims to secure just relief.[124] It would be more consistent with the broad remedial purpose of Title VII to impose vicarious liability on employers for coworker sexual harassment because victims would be made whole and the harassment would be drastically reduced. Thus, the term "agent" should be redefined in coworker sexual harassment cases to include coworkers.

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121. Comments on Guidelines, supra note 6, at 290-91. The male coworker who sexually harasses a female coworker may be expressing, among other things, his indignation that a female can do the same work. Sexual harassment may thus be a competition-reducing device: male workers can protect their salaries, positions, and egos by limiting the number of females in the workplace. Finally, sexual harassment can be viewed as a no-cost status benefit conferred by male supervisors upon male subordinates: harassment, no matter what its degree or quantity, is an assertion of dominance and superiority. See C. MacKinnon, supra note 2, at 18-23.

122. W. Prosser, supra note 83, at 459.

123. See notes 94-98 and accompanying text supra.

124. See notes 99-102 and accompanying text supra.

II
RELIEF IN COWORKER SEXUAL HARASSMENT CASES UNDER TITLE VII

As is true of evidentiary issues, relief under Title VII was shaped by federal courts before sexual harassment was recognized as a form of sex discrimination. In cases involving traditionally recognized forms of discrimination, where plaintiffs lost tangible job benefits as a result of the discrimination, courts fashioned remedies to respond primarily to tangible injuries.[125]

In the early absolute harassment cases, courts failed to recognize that harassment was employment discrimination because no job benefit was considered lost and, therefore, the plaintiff's "compensation, terms, conditions or privileges of employment" were not affected.[126] However, as the definition of discrimination became more fully developed, courts began to recognize that discrimination also affects intangible job benefits:

> Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits.[127]

In turn, a number of courts have begun to hold that a plaintiff's intangible job benefits—i.e., her mental, emotional, and physical work environment—are protected under Title VII as a "condition" of employment. [128] Nonetheless, courts continue to deny just relief for those injuries.

This section proposes that the judicial refusal to adjust relief for sexually harassed coworkers is not consistent with the objectives of the Act. This section also proposes ways to provide remedies that are adequate and consistent with these objectives.

A. General Overview: Relief

1. Types of Relief

Federal courts can grant legal or equitable relief.[129] While legal relief is limited to monetary awards, the courts' equitable powers include the authority to fashion any appropriate relief—monetary, injunctive, or declaratory—when

125. In Title VII cases, courts use the terms "economic" and "tangible" interchangeably to modify the terms "injuries" and "job benefits." See, e.g., *Rogers*, 454 F.2d at 238.

126. E.g., *Cordes*, 17 Fair Empl. Prac. Cas. at 1225, 1227.

127. *Rogers*, 454 F.2d at 238.

128. See cases cited in notes 59, 89 supra.

129. D. Dobbs, Handbook on the Law of Remedies § 2.6 (1973).

they cannot provide adequate relief under their legal powers.[130] A court's ability to grant remedies of a certain kind is determined by the case or statute at hand.[131]

The two general types of monetary relief available to a court are compensatory[132] and punitive[133] damages. Compensatory damages are given to make the plaintiff whole for actual injury, whether to her person (mental, emotional, and physical) or her property.[134] Punitive damages are damages over and above actual or compensatory damages and are given to punish the defendant and to deter both the defendant and others from similar future misconduct.[135] Punitive damages are also given to compensate the plaintiff "for elements of damage which are not legally compensable, such as wounded feelings or the expenses of suit."[136] Punitive damages are appropriate when the defendant's conduct was not only intentional and deliberate but also outrageous, offensive, or malicious.[137] These damages are available even if the defendant is only vicariously liable[138] because they encourage employers to exercise closer control over their employees to prevent outrageous conduct.[139]

Equitable powers, in general, are very broad; the historic purpose of equity is to "secur[e] complete justice."[140] Equitable relief frequently takes the form of an injunction,[141] but may also take the form of monetary awards[142] if legal damages are inadequate or unavailable.[143]

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130. Id. at § 2.5.
131. Id. at § 2.6.
132. Id. at § 3.1.
133. Id. at § 3.9.
134. Id. at § 3.1.
135. W. Prosser, supra note 83, at 9.
136. Id.; e.g., Northwestern Nat'l Casualty Co. v. McNulty, 302 F.2d 432, 436 (5th Cir. 1962).
137. W. Prosser, supra note 83, at 9.
138. Id. at 13; see note 84 supra.
139. W. Prosser, supra note 83, at 12. Under Title VII, relief is available only when the employer has intentionally engaged in a discriminatory practice. 42 U.S.C. § 2000e-5(g) (1982). However, the unanimous Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), interpreted this requirement liberally to include practices that have a discriminatory impact (disparate impact) as well as practices that are motivated by discrimination (disparate treatment). "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Id. at 432 (emphasis in original). Proof of intent is required only in disparate treatment cases, which includes cases of sexual harassment. See notes 21-26, 42 and accompanying text supra. Punitive damages, if proven, could therefore be allowed in sexual harassment cases. Although as most courts now interpret Title VII punitive damages are not recoverable, see note 149 and accompanying text infra, courts have allowed more extensive affirmative action where the employer's conduct was outrageous. Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 284 (2d Cir. 1981), cert. denied, 455 U.S. 933 (1982) (in case where city actively deterred minorities from becoming firefighters, the court found hiring goals which greatly exceeded the percentage of minorities in the labor force were justified since there was long-standing egregious discrimination).
140. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Brown v. Swann, 10 Pet. 497, 503 (1836)).
141. D. Dobbs, supra note 129, at §§ 2.1, 2.10.
142. Id. at §§ 2.1, 2.5.
143. Id. at § 52.5.

2. Relief under Title VII

Title VII has two objectives. Its primary objective is prophylactic. It was enacted to eliminate employment discrimination by "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[144] Its secondary objective is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[145] Under the "make whole" policy of Title VII, courts have a statutory duty "to fashion the most complete relief possible."[146]

Congress intended the relief provided under Title VII to achieve these two objectives by creating an incentive for employers to eliminate discrimination and by ameliorating the tragic effects of discrimination.[147] The remedial section of Title VII provides:

> [T]he court may enjoin the . . . [employer] from engaging in . . . [the] unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate . . . . In any action under this subchapter the court, in its discretion, may allow the prevailing . . . party a reasonable attorney's fee . . . .[148]

The majority of courts have interpreted the phrase "any other equitable relief" to mean that monetary relief is not available in Title VII suits except as expressly provided.[149]

In cases involving the loss of tangible job benefits, courts have provided a wide variety of relief to implement the objectives of the Act. To illustrate, if a plaintiff was fired for refusing to submit to her supervisor's sexual propositions, a court could, as a matter of course, reinstate[150] her to her former position, compensate her for any tangible job benefits lost as a result of her

144. *Griggs*, 401 U.S. at 429-30; see also *Albemarle Paper Co.*, 422 U.S. at 417; Ford Motor Co. v. EEOC, 456 U.S. 923 (1982).

145. *Albemarle Paper Co.*, 422 U.S. at 418; *Ford Motor Co.*, 458 U.S. at 230.

146. *Albemarle Paper Co.* 422 U.S. at 421 (quoting, 118 Cong. Rec. 7168 (1972)).

147. See id. at 416-17, 421-22.

148. 42 U.S.C. §§ 2000e-5(g), 2000e-5(k) (1982); see notes 151-52 infra.

149. B. Schlei & P. Grossman, Employment Discrimination Law 1452 & nn.153-56 (1983) (see cases cited therein). The remedial section of Title VII was patterned after the National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-182 (1982), and "it has been settled law for decades that compensatory and punitive damages are not available under the NLRA." B. Schlei & P. Grossman, supra, at 1452 (see cases cited id. at 1452 n.156). An award of monetary relief is not necessarily legal relief (i.e., compensatory (actual) or punitive damages). See text accompanying notes 141-43 supra. Back pay awards under Title VII have generally been characterized as equitable relief. Curtis v. Loether, 415 U.S. 189, 197 (1974); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). The phrase "any other equitable relief" was added to the remedial provision when Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 107 (1972).

150. See *Meyers*, 527 F. Supp. at 1069.

discharge (such as wages and other economic fringe benefits),[151] and award her reasonable attorney's fees.[152] A court could also enjoin[153] the employer from harassing her, and order the employer to take affirmative steps to eliminate the sexual harassment and to deal more effectively with complaints of harassment.[154]

The relief provided in these cases is consistent with the objectives of Title VII. First, back pay and injunctions effectuate the "make whole" objective of the Act. Back pay compensates plaintiffs for the loss of such tangible job benefits as wages, vacation pay, pension benefits, and bonuses.[155] Injunctions compensate plaintiffs for the loss of such tangible job benefits as seniority rights and promotions.[156] The loss of these benefits can also be compensated for by a monetary award under back pay.[157] Thus, plaintiffs in these Title VII cases can recover for any tangible benefits lost and are therefore made whole.[158]

Second, back pay, injunctions, and attorney's fees discourage discrimination. Injunctions can be used to order the employer to stop present discrimination and to refrain from future illegal conduct.[159] Money awards of back

151. *Albemarle Paper Co.*, 422 U.S. at 419-21 (back pay is to be awarded as a matter of course); *Meyers*, 527 F. Supp. at 1070 (back pay includes fringe benefits such as interest, overtime, vacation pay, medical and pension benefits); see *Heelan*, 451 F. Supp. at 1391 (plaintiff is entitled to back pay and lost employment benefits).

152. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978) ("a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances") (emphasis in original); see, e.g., *Heelan*, 451 F. Supp. at 1391.

153. E.g., *Morgan*, 542 F. Supp. at 128.

154. E.g., *Bundy*, 641 F.2d at 946 n.13, 948 n.15. Other relief is available under Title VII if needed "to restor[e] aggrieved persons . . . to the position [they] . . . would have been were it not for the unlawful discrimination." *Albemarle Paper Co.*, 422 U.S. at 421 (quoting 118 Cong. Rec. 7168 (1972)); see, e.g., Franks v. Bowman Transp. Co., 424 U.S. 747, 779 (1976) (seniority award).

155. See cases cited in note 151 supra; e.g., Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976), cert. denied, 429 U.S. 920 (employer pension and profit sharing contributions); Love v. Pullman Co., 13 Fair Empl. Prac. Cas. 423, 426 (D. Colo. 1976), aff'd, 569 F.2d 1074 (10th Cir. 1978) (insurance premiums, estimated tips, sick and vacation pay).

156. E.g., *Franks*, 424 U.S. at 767-71 (seniority, promotions, and jobs); Locke v. Kansas City Power & Light Co., 660 F.2d 359, 369 (8th Cir. 1981) (job and promotion); *City of Bridgeport*, 647 F.2d at 287 (jobs, seniority, and promotions).

157. *Franks*, 424 U.S. at 781 (Burger,C.J., concurring) (back pay as an alternative to seniority relief); *Patterson*, 535 F.2d at 269 (back pay as compensation until employees can be promoted); *Locke*, 660 F.2d at 369 (back pay in conjunction with promotion).

158. There is agreement that plaintiffs cannot always regain their "rightful place[s]," *Franks*, 424 U.S. at 764-65 n.21, because of some overriding interest. For example, a seniority award can be used to bid on the next open job but it cannot be used to bump because of the unfairness to the displaced worker. E.g., Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). Also, a plaintiff in a quid pro quo case cannot really be made whole because compensatory damages for psychological, emotional, or physical harm caused by the sexual harassment are not now recoverable. *Henson*, 682 F.2d at 905 (plaintiff "cannot recover damages for mental suffering or emotional distress under Title VII"); *Bundy*, 641 F.2d at 946 n.12. Because the relief available to plaintiffs in quid pro quo cases is otherwise suitable, it is unlikely that the victims of such harassment will be discouraged from bringing suit on the grounds of inadequate relief alone.

159. See cases cited in notes 153-54 supra.

pay and attorney's fees encourage plaintiffs to bring suit for the injuries they have suffered, increasing the risk of litigation for the discriminating employer.[160] Also, few employers would allow sexual harassment to occur in the workplace if faced with the possibility of back pay awards and double attorney's fees (their own and the plaintiffs') will be further encouraged to prevent discrimination.[161] Thus, these money awards deter potential violators and discourage repetition of the violations.[162]

B. Inadequacy of Relief

Under the federal courts present interpretation of Title VII relief, victims of coworker sexual harassment have no judicial recourse for their injuries. In attempting to put "new wine into old skins," the courts have failed to compensate plaintiffs for the injuries they suffer as a result of coworker harassment. They have also failed to create incentives for employers to eliminate discrimination.

The relief available to victims of coworker harassment has been limited to injunctions restraining employers from further discriminatory conduct or ordering the employers to take affirmative steps to eliminate the discrimination and reasonable attorney's fees.[163] Thus, these victims are denied not only back pay, because no tangible job benefits were lost, but also recovery for the psychological, emotional, or physical harm caused by sexual harassment.[164] The victims remain uncompensated for the harm caused by sexual harassment—the lost intangible job benefits. The threat of injunctive relief alone[165]

160. See Comment, infra note 183, at 334-37, 336 n.78.

161. Id.

162. In *Albemarle Paper Co.*, the Supreme Court addressed the issue of back pay relief under Title VII in a suit charging racial discrimination and lost tangible job benefits. The Court held that back pay must be awarded as a matter of course because of its importance to both objectives of the Act: it is necessary to make victims whole where the injury is primarily economic, 422 U.S. at 418; also, it is essential to spur employer compliance:

> If employers faced *only* the prospect of an *injunctive order*, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of [discrimination] . . . .

Id. at 417-18 (emphasis added) (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

163. See, e.g., *Morgan*, 542 F. Supp. at 128 (relief for sexual harassment limited to injunction restraining further harassment); *Bundy*, 641 F.2d at 946 n.12 (prevailing party can request attorney's fees). This is consistent with the Title VII precedent in racial, religious, and national origin harassment cases. See, e.g., *Murphy Motor*, 488 F. Supp. at 389; De Grace v. Rumsfeld, 614 F.2d 796, 808 (lst Cir. 1980).

164. See note 158 supra.

165. See text accompanying notes 144-47 supra. In some sexual harassment cases, plaintiffs have quit their jobs rather than continue to work where they are subjected to sexual harassment. In such cases, the plaintiff has lost a tangible job benefit—her job—and she is entitled to be reinstated. However, some courts have used the discretion given them by the remedial section of Title VII to deny the plaintiff's request for reinstatement on grounds that reinstatement might cause "difficulties or hostilities" between the parties. *Meyers*, 527 F. Supp. at 1070;

is insufficient to compel employer compliance with Title VII.[166]

On the other hand, employers faced with the possibility of enormous attorney's fees might be encouraged to comply with Title VII. However, the courts and the EEOC have practically eliminated employer liability in these cases. As discussed earlier, the Guidelines provide that an employer has no liability under Title VII if it took prompt and appropriate remedial action upon learning of the harassment,[167] even though the employer has an ongoing duty to maintain a harassment-free working environment.[168] The judicial trend has paralleled the Guidelines.[169] Thus, in coworker sexual harassment cases, if employers provide prompt and appropriate relief, the employers are not liable and the victims are not entitled to any relief, including attorney's fees, although they may have suffered extensive mental, emotional, and physical damage.

C. *Proposals for Providing Adequate Relief*

The Supreme Court has required that when rights under Title VII are violated, the remedies allotted by courts must speak to the injuries received.[170] However, in cases involving absolute harassment, courts have failed to award remedies that compensate intangible injuries. Courts, however, should adjust their remedies to include monetary awards for the mental, emotional, and physical harm resulting from this discrimination.[171]

There are three ways in which lawmakers may authorize monetary awards for harassed coworkers: via the courts' equitable powers, via compensatory and punitive damages, and via legislative amendment of Title VII. Further, the subsequent remedial action defense should be abolished since it is inconsistent with the mandate of Title VII.

Brown, 22 Fair Empl. Prac. Cas. at 1634. In light of the objective of Title VII to eliminate discrimination, these courts' denial of reinstatement frustrates this goal. Employers have no incentive to deal with the problem when the victim is allowed to be removed. Also, the failure to reinstate thwarts the "make whole" policy of Title VII. Generally, where courts have refused to reinstate or reinstatement was not requested, courts have awarded only nominal damages (usually a trivial sum of one dollar or less); again, such relief does not make plaintiffs whole. See *Katz*, 709 F.2d at 253 n.1; *Henson*, 682 F.2d at 905. But see *Meyers*, 527 F.Supp. at 1070 ("[I]n lieu of reinstatement, plaintiff will be awarded an additional $3,000.00 in accordance with the 'make whole' policy embodied in [Title VII] . . . ."). See text accompanying notes 197-98 infra.

166. See note 162 supra.

167. See note 98 and accompanying text supra.

168. See notes 71-72 and accompanying text supra.

169. See text accompanying notes 94-97 supra.

170. *Albemarle Paper Co.*, 422 U.S. at 418 ("[W]here 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."). See also note 162 supra.

171. See notes 151, 162 supra.

1. Money Awards

a. Expanding the Scope of Relief through the Courts' Equitable Powers

Title VII has been interpreted as bestowing equitable, not legal, powers of relief on courts.[172] Indeed, a court's equitable powers under Title VII are very broad.[173] Congress intended that the courts exercise their equitable powers to provide complete relief[174] in light of the broad remedial purpose of Title VII.[175] Nonetheless, courts have consistently read "equitable relief" to mean "non-monetary relief" except for back pay for tangible injuries.[176]

Courts should exercise their equitable discretion whenever complete relief is unavailable to victims of coworker harassment because the explicit provision for back pay awards provides no relief for intangible injuries. Harassed coworkers can be understood as having a right to a discrimination-free work environment without having a remedy for illegal conduct against them that occurs on the job.[177]

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172. *Albemarle Paper Co.*, 422 U.S. at 416.

173. Id. at 418 (citing Brown v. Swann, 10 Pet. 497, 503 (1836)).

174. *Albemarle Paper Co.*, 422 U.S. at 421.

175. Id. at 416; *Griggs*, 401 U.S. at 429-30.

176. The right to a jury trial arises if monetary relief is awarded as legal damages. See Comment, infra note 183, at 369. Because courts interpret Title VII as permitting only equitable relief, they have uniformly denied jury trials in Title VII cases. Id. at 351 n.166. However, if money awards are equitable in nature, they should not give rise to a jury right. Money awards in the form of back pay are expressly permitted under Title VII. See text accompanying note 148 supra. Even though such money awards are usually considered compensatory damages, most courts characterize back pay as equitable. Comment, infra note 183, at 338. Also, attorney's fees, which are ordinarily considered punitive damages, see text accompanying note 136 supra, are expressly permitted within the court's equitable discretion. See text accompanying note 148 supra. Therefore, money awards, whether compensatory or punitive, are equitable if granted within the court's equitable discretion. Consequently, money awards for intangible injuries should not give rise to a jury right. See, e.g., Claiborne v. Illinois Cent. Gulf R.R. Co., 401 F. Supp. 1022, 1026 (E.D. La. 1975), aff'd in part, vacated and remanded in part, 583 F.2d 143 (5th Cir. 1978), cert. denied, 422 U.S. 934 (1979); Harrington v. Vandalla-Butler Bd. of Ed., 418 F. Supp. 603, 607 (S.D. Ohio 1976), rev'd, 585 F.2d 192 (6th Cir. 1978), cert. denied, 99 S. Ct. 2053 (1979); see Comment, infra note 183, at 338-44; Development, infra note 178, at 1269.

177. E.g., *Harrington*, 418 F. Supp. at 607 (court refused to find plaintiff had a right but not a remedy so it gave her compensatory relief using its equitable powers to make her whole—plaintiff, a teacher, was given $1,000 per year for discriminatory work environment). Although such damages are difficult to measure, this difficulty cannot bar relief where a violation has been found. *Albemarle Paper Co.*, 422 U.S. at 442 (quoting Story Parchment Co. v. Patterson Co., 282 U.S. 555, 556 (1931)) (Rehnquist, J. concurring) ("Difficulty of ascertainment is no longer confused with 'right of recovery' for a proven invasion of the plaintiff's rights.") As one commentator explained:

> [D]ifficulties in calculating an appropriate award for mental suffering in discrimination cases are no different from those encountered in many other types of actions, such as malicious prosecution, alienation of affections, wrongful death, and many cases of libel, slander, and assault . . . . [T]here is ample precedent for awards of compensatory damages for mental suffering in discrimination cases in the state and federal courts.

Comment, infra note 183, at 369 (footnotes omitted).

b. Implying Compensatory and Punitive Damages

Money awards can be made available by judicial implication of legal damages under Title VII. Most courts, however, have not implied such relief for two reasons.[178] First, courts have not implied legal damages because of the legislative history of the Act. In enacting Title VII, Congress never considered the availability of either compensatory or punitive damages.[179] Moreover, the legislative history of Title VII indicates that it was modeled after the National Labor Relations Act[180] (NLRA). Indeed, the remedial provisions of the two acts have similar wording.[181] Therefore, most courts have assumed that because the NLRA provides neither compensatory nor punitive damages, these damages are not available under Title VII.[182] While under Title VII relief is obtained from the courts, under the NLRA the National Labor Relations Board, an administrative agency, can issue remedial orders.[183] Courts, unlike administrative agencies, "do not require explicit statutory authorization for familiar remedies to enforce statutory obligations."[184] This difference alone creates the possibility of broader Title VII relief.

Second, courts have not awarded compensatory and punitive damages because the Civil Rights Act of 1964 does not expressly provide for compensatory and punitive damages. Yet the Act does not expressly disallow such relief, and its remedial section authorizes courts to order affirmative action that

178. See, e.g., EEOC v. Detroit Edison Co., 515 F.2d 301, 309 (6th Cir. 1975), vacated on other grounds, 431 U.S. 951 (1971) (circuit court held punitive damages were not recoverable under Title VII); Curran v. Portland Superintending School Comm., 435 F. Supp. 1063, 1078 (D. Me. 1977) (compensatory damages are not recoverable under Title VII); Smith v. Columbus Metropolitan Hous. Auth., 443 F. Supp. 61, 65 (S.D. Ohio 1977) (compensatory damages are not recoverable under Title VII); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854, 856 (N.D. Ga. 1974) (punitive and compensatory damages are not recoverable under Title VII); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 838 (N.D. Cal. 1973) (punitive and compensatory damages are not recoverable under Title VII).

179. Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1262 (1971) [hereinafter Developments].

180. 29 U.S.C. §§ 141-187 (1984); 110 Cong. Rec. 6549 (1964) (remarks of Sen. Humphrey); Comment, Enforcement of Fair Employment under the Civil Rights Act of 1964, 32 U. Chi. L. Rev. 430, 432 (1965).

181. Compare 42 U.S.C. § 2000e-5(g) (1982) (quoted at text accompanying note 148 supra) with 29 U.S.C. § 160(c) (1984). If the NLRB finds that the defendant has engaged in an unfair labor practice, the Board "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . ." Id.

182. E.g., *Harrington*, 585 F.2d at 196-97.

183. The analogous administrative agency under Title VII, the EEOC, is without authority to grant relief. The EEOC's only sanctions are the use of "informal methods of conference, conciliation and persuasion," 42 U.S.C. § 2000e-5(b) (1982), and the threat of a suit where conciliation fails. 42 U.S.C. § 2000e-5(f)(1) (1982); see Comment, Implying Punitive Damages in Employment Discrimination Cases, 9 Harv. C.R.-C.L. L. Rev. 325, 341-43 (1974) [hereinafter Comment].

184. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 261 (1951) (Frankfurter, J. dissenting); see Comment, supra note 183, at 343.

"may include, *but is not limited to*"[185] the specific remedies such as reinstatement or back pay "or any other equitable relief." One commentator has argued persuasively that "equitable relief"[186] is only one of the possible remedies that follows the phrase "but is not limited to."[187]

Nonetheless, courts have asserted that the phrase "or any other equitable relief" limits the relief available to equitable relief under the principles of *ejusdem generis* and *expressio unio est exclusio alterius.*[188] In light of the former construction of the Act, this latter interpretation is unpersuasive; it should instead be "subordinated to the doctrine that courts will construe the details of the act in conformity with its dominating purpose."[189] Because this first construction is more consistent with the objectives of Title VII, legal damages should be allowed under the Act.

It is commonplace for the federal courts to imply remedies in ambiguous federal legislation. For example, the courts have implied punitive damages in many federal statutes, including other anti-discrimination acts.[190] In the process of reading new remedies into federal statutes, courts have emphasized the importance of examining the main objective of an act for guidance.[191] The award of compensatory and punitive damages in coworker harassment cases will further the important objectives of the Civil Rights Act of 1964.[192]

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185. 42 U.S.C. § 2000e-5(g) (1982) (emphasis added); see text accompanying note 148 supra.

186. 42 U.S.C. § 2000e-5(g) (1982); see text accompanying note 148 supra.

187. Comment, supra note 183, at 337-38. A few courts have awarded legal damages under Title VII. E.g., Allen v. Amalgamated Transit Union Local 788, 554 F.2d 876, 883-84 (8th Cir.), cert. denied, 434 U.S. 891 (1977) ("an award of punitive damages does not so conflict with Title VII that it should be disallowed in a § 1981 suit (42 U.S.C. § 1981)"); *Claiborne*, 401 F. Supp. at 1026-27; 583 F.2d at 153-54 (district court awarded plaintiff $50,000 in punitive damages under Title VII and under 42 U.S.C. § 1981 but circuit court affirmed the award only on the basis of the § 1981 claim); Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 835 (W.D. Tex. 1973), rev'd on other grounds, 488 F.2d 691 (5th Cir. 1974) (district court awarded compensatory damages for mental distress, arguing that "the purpose of the Act will be best served if all of the injuries which are caused by discrimination are entitled to recognition"); Dessenberg v. American Metal Forming Co., 6 Fair Empl. Prac. Cas. 159, 161 (N.D. Ohio 1973) (court found punitive damages may be appropriate); Evans v. Sheraton Park Hotel, 5 Fair Empl. Prac. Cas. 393, 396 (D.D.C. 1972) (court awarded $500 in compensation for harassment of plaintiff for complaining to the EEOC about sex discrimination); cf. Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972) (court struck claim for compensatory relief but allowed claim for punitive damages).

188. E.g., *Harrington*, 585 F.2d at 195; *Van Hoomissen*, 368 F. Supp. at 837.

189. *Claiborne*, 401 F. Supp. at 1026 (citing SEC v. Joiner Corp., 320 U.S. 344, 351 (1943)).

190. Comment, supra note 183, at 332-33.

191. See J.I. Case Co. v. Borak, 377 U.S. 426, 434 (1964); see Comment, supra note 183, at 333.

192. Of course, the availability of compensatory and punitive damages would invoke the right to jury trial. Comment, supra note 183, at 351 n.166. Besides being a departure from Title VII precedent, id., a jury right could create delay in the disposition of the case and could subject the plaintiff to jury prejudice. Id. at 369-70. These risks, however, should not deny the availability of these damages. The plaintiff, not the court, should decide whether to take these risks in order to seek these damages. Id at 370.

c. Amending Title VII to Include Compensatory and Punitive Damages

If courts continue to deny money awards to victims of coworker sexual harassment, Congress should amend Title VII to expressly provide for these remedies.[193] Because relief under current judicial interpretation of Title VII is inadequate, victims of coworker sexual harassment have often been forced to resort to state tort and contract remedies. Such remedies are neither broad nor national in scope and do not build one body of federal discrimination law. The federal government must step in, as it stepped in originally with Title VII, to remedy this situation in accordance with basic constitutional values of indvidual equality.

2. Subsequent Remedial Action Should Not Relieve the Employer of Liability

A final barrier to full relief in this area comes not from the courts' unwillingness to grant relief, but from a defense that sometimes bars a plaintiff's cause of action. In coworker sexual harassment cases, courts relieve the employer of liability if it took prompt and appropriate remedial action upon learning of the harassment.[194] This defense denies many plaintiffs the ability to rectify past injustice.

Most courts agree that appropriate remedial action entails more than merely posting a general notice or having a general meeting about the company policy against harassment. Rather the employers' response must be specific and effective.[195] What "[is] . . . required is an investigation of the incident, and if the charge [of harassment] is warranted, some disciplinary measures against the perpetrator."[196]

Unfortunately, in some absolute harassment cases, the court has deemed remedial action to be appropriate when an employer transfers the victim rather than the perpetrator.[197] This frustrates the dual objectives of Title VII: transferring the victim does not necessarily make her whole—in effect, it allows the status quo to remain intact while silencing the injured party. Further, the employer is not encouraged to comply with Title VII when it learns it can remove the victim rather than restrain the assailant.[198]

Under current case law, successful plaintiffs in these cases are entitled

193. See Compensation, supra note 15, at 159, 167; Note, supra note 1, at 159-62; Montgomery, supra note 100, at 885; see also Rogers v. Loes L'Enfant Plaza Hotel, 526 F. Supp. 523, 533-34 & nn.34-35 (D.D.C. 1981) (plaintiff can state claim for compensatory and punitive damages under common law theories of invasion of privacy, assault, battery, and intentional infliction of emotional distress where male supervisor sexually harassed female employee).

194. See text accompanying notes 94-95 supra.

195. See *Katz*, 709 F.2d at 256; Marlowe v. General Motors Corp., 11 Fair Empl. Prac. Cas. 1357, 1359 (E.D. Mich. 1975).

196. Allegretti, supra note 4, at 470.

197. E.g., *National Cash Register*, 388 F. Supp. at 605-06; Bell v. St. Regis Paper Co., 425 F. Supp. 1126, 1129-30, 1137-38 (N.D. Ohio 1976).

198. See note 165 supra.

only to injunctive relief and attorney's fees.[199] If their employers take appropriate remedial action, they will be completely relieved of liability. Unsuccessful plaintiffs will merely be denied a redundant compliance order (in light of the employer's remedial action) and their attorney's fees. Given such inadequate relief, plaintiffs in coworker cases are discouraged from seeking justice. The defense must be abandoned if the goals of Title VII are to be effectuated.

If judges fully understood the deleterious nature of sexual harassment, they would demonstrate this awareness by awarding monetary damages for the victim's lost intangible benefits. This would truly allow victims to receive just compensation. Moreover, the courts should eliminate the employer defense of subsequent remedial action for two reasons. First, plaintiffs will continue to go uncompensated, contrary to Title VII, because the employer defense obviates this money relief. Second, and more important, once monetary relief for lost intangibles is awarded as a matter of course, the cases will properly parallel well-established Title VII precedent where tangible job benefits were lost. The rule in such cases is that subsequent remedial action may reduce damages but does not relieve the employer of liability.[200]

CONCLUSION

Coworker sexual harassment is widespread and potentially devastating. Yet cases charging this form of discrimination are rarely brought under Title VII. This plaintiff timidity is symptomatic of the federal courts' failure to shape proof and relief to respond to the extensive and varied injuries this discrimination causes. This Note's recommendations in the areas of proof and relief tailor Title VII to more fairly meet the needs of injured women coworkers, and to achieve the dual objectives of Title VII.

Most importantly, however, this Note was written to increase the awareness of those who adjudicate coworker sexual harassment suits: a statute written and an injury received are meaningless without an empathetic and fair consideration of the issues at hand.

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199. See text accompanying notes 162-64 supra.

200. Where an employer provides relief after the discrimination occurred, its subsequent remedial actions will not relieve it of liability. Rather, it only reduces damages if the plaintiff prevails. For example, if an employer initially refuses to hire the plaintiff because of her sex, and later hires her, the employer is liable, but the back pay award will be reduced by the period the plaintiff worked. See *Ford Motor Co.*, 458 U.S. at 232; *Henson*, 682 F.2d at 910 n.19; see also 42 U.S.C. § 2000e-5(g) (1982) ("Interim earnings or amounts earnable with reasonable diligence by the person . . . discriminated against shall operate to reduce the back pay otherwise allowable."). See note 34 and accompanying text supra.