SEX DISCRIMINATION AND THE SEXUALLY CHARGED WORK ENVIRONMENT

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I
INTRODUCTION

Female workers historically have been subjected to many forms of sex discrimination, resulting in limited job opportunities, segregation in the workplace, lower wages, and less job security than men.[1] Sexual harassment of women in the workplace is a particularly insidious aspect of sex discrimination which has severe economic and psychological repercussions. Until very recently, society has failed to recognize sexual abuse at work. "Tacitly, it has been both acceptable and taboo; acceptable for men to do, taboo for women to confront, even to themselves."[2] The origins of sexual abuse in the workplace and the reasons for its tacit acceptance must be viewed in light of women's subordinate position in the labor force and the traditional relationship of women to men in American society. The detrimental impact of such sexual harassment, whose parameters are defined by the social context of employer-employee relations, can be seen as a derivative of the historical and structural position of inferiority occupied by female workers.

Legal recognition of sexual harassment is in its infancy. Just as employers, fathers, husbands, and even the victims themselves have often dismissed sexual abuse in the workplace as "trivial, isolated, and 'personal,' "[3] judges have seen it as "an unhappy and recurrent feature of our social experience,"[4] or "nothing more than a personal proclivity . . . satisfying a personal urge."[5] Recent judicial pronouncements, however, indicate that a more enlightened attitude is on the horizon.

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1. *See, e.g.*, Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 217-24. *See also* text accompanying notes 31-35 *infra*.

For recent figures evidencing the discrimination, *see* REPORT OF SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND WELFARE, WORK IN AMERICA, 48-49 (1973) [hereinafter cited as WORK IN AMERICA].

2. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 1 (1979).

3. *Id.* at 2.

4. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976) (footnote omitted), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

5. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and remanded*, 562 F.2d 55 (9th Cir. 1977).

This Article discusses the nature, extent, and effect of sexual harassment on working women, and the legal remedies available to them under Title VII of the Civil Rights Act of 1964.[6] Sexual harassment by an employer or his agent is now actionable sex discrimination under Title VII.[7] The Article argues that a sexually charged and psychologically enervating work environment violates Title VII, whether that debilitating environment is caused by the employer, co-workers, or customers. Finally, the Article asserts that employers are violating Title VII when they require female workers to wear provocative and revealing clothing which encourages sexual harassment.

II

NATURE, EXTENT, AND EFFECT OF SEXUAL HARASSMENT

A. "Sexual Harassment" Defined

Sexual harassment in employment is any repeated and unwanted verbal, non-verbal, or physical advance of a sexual nature—looks, touches, jokes, gestures, innuendos, epithets, or propositions—by someone in the workplace, that impedes a woman's enjoyment of her work, her ability to do her work, or her employment opportunities. Sexual harassment can take the form of a "friendly" arm around the shoulder or "accidental" brushes or touches. Although sexual harassment does not include the isolated instance where one employee asks another for a date and, once rebuffed, leaves the matter alone, a "put-out-or-get-out" demand made of a woman by someone with the power to hire, promote, or fire her is clearly sexual harassment. A more subtle form of sexual harassment occurs when sexual jokes, comments, innuendos, or epithets, often made by co-workers or customers, abound in the work environment.[8] Still another example of subtle harassment is the requirement that women wear sexually provocative uniforms.[9]

Whether the sexual harassment is blatant or subtle, the effect of such harassment is the same. The woman who loses or leaves her job because she refuses to tolerate continued sexual harassment by her co-workers or the public finds herself in the same predicament as the woman who is expected to have sexual relations with her boss as a condition of employment. Neither woman has any control over her own situation; both pay a penalty for being female.[10] Sexual harassment, in short, is the assertion of a woman's sexual-

6. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979).

7. *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1388-90 (D. Colo. 1978).

8. *See* Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1631 (W.D. Okla. 1980), and text accompanying notes 106-07 *infra*.

9. *See* EEOC v. Sage Realty Corp., 87 F.R.D. 365 (S.D.N.Y. 1980) and text accompanying notes 146-51 *infra*.

10. Examples of sexual harassment abound. *See generally* L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 52-110 (1978); C. MACKINNON, *supra* note 2, at 40-47. Two accounts of typical experiences faced daily by working women

ity over her role as a worker.[11] Sexual abuse in the workplace reinforces the notion that a woman is a sexual object before she is a contributing worker.[12]

Sexual harassment makes women workers dysfunctional in several ways. First, by underscoring the tension between their roles as women and

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are reported in Goodman, *Sexual Demands on the Job*, 4 CIV. LIB. REV. 55, 55-56 (March/April, 1978):

> Susan Mathews (not her real name) tells about her transfer from the shoe department of a suburban branch of a major department store to the downtown store where few women had ever worked. . . . [She] was subjected to a systematic campaign of physical and sexual assaults [by her male co-workers] in full view of the public. On her first day on the job, the assaults, which included hands up her skirt and on her breast, reached such proportions that a customer complained to the management and threatened to cancel her charge account. When Susan Mathews complained, management told her there was nothing that could or would be done to help her. She quit the job rather than endure the insults.
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> Barbara Smith (another alias), tells about her experience in a shipbuilding plant where yard jobs in skilled crafts, like welding and ship-building, recently were sexually integrated. Abusive and suggestive language, explicit offers of sex for money, and physical assaults are part of the daily life for her and other women at the plant. Refusing or resisting can mean oppressive work assignments and job disputes which end in dismissals. At one time, 150 women held yard jobs at this plant. Only 30 or 40 remain.

11. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981). *See also* Affidavit in Opposition to the Defendants' Motion for Summary Judgment, EEOC v. Sage Realty Corp., 87 F.R.D. 365 (S.D.N.Y. 1980), on file at the National Employment Law Project, New York, N.Y. (NELP). *See generally* C. BRODSKY, THE HARASSED WORKER 2-4 (1976); L. FARLEY, *supra* note 10, at 12-18; Evans, *Sexual Harassment: Women's Hidden Occupational Hazard,* in THE VICTIMIZATION OF WOMEN 203-23 (J. Chapman & M. Gates eds. 1978). *Cf.* K. MILLET, SEXUAL POLITICS 23-58 (1979) (discussing cultural dominance of the male sex over the female sex).

The likelihood that a female employee will be the target of harassment depends on her male employer or co-worker's perception of her vulnerability. Evidently, the single woman is seen as the most vulnerable. In a study undertaken for the Working Women's Institute, Research Director Peggy Crull found that of 92 women who had contacted the Working Women's Institute for assistance with a sexual harassment problem on the job, more than 75% were single, separated, divorced, or widowed; over 50% were the sole support of their families and/or themselves; 51% of those working full-time earned $150 or less per week before taxes; 53% were clerical workers; 15% were service workers. P. CRULL, THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN 2 (Working Women's Institute Research Series Report No. 3, 1979). This perception is shared by many fair employment practices agencies which responded to a 1977 Working Women's Institute survey. *See* RESPONSES OF FAIR EMPLOYMENT PRACTICES AGENCIES TO SEXUAL HARASSMENT COMPLAINTS: A REPORT AND RECOMMENDATIONS (Working Women's Institute Research Series Report No. 2, 1978).

12. It is apparent from our language that allusions to sexual availability have an especially pejorative meaning for women. Epithets relating to females are primarily references to women in sexual terms, *e.g.*, as the objects of sexual desire. Schulz, *The Semantic Derogation of Women*, in LANGUAGE AND SEX (B. Thorne & Henley eds. 1975). Moreover, this is not a gender-neutral phenomenon:

> Words indicating the station, relationship or occupation of men have remained untainted over the years. Those identifying women have repeatedly suffered the indignity of degeneration, many of them becoming sexually abusive.
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as workers, sexual harassment causes many women to experience conflict, tension, and stress, which interfere with their work performance. It may prevent them from applying for promotions or openings that are perceived as men's jobs.[13] Furthermore, by reinforcing the primacy of women's sexual identity over that of their status as workers, harassment decreases the likelihood that women will be viewed as persons capable of undertaking demanding work. Finally, to the extent that a woman can function and succeed in such an atmosphere, her male colleagues may well attribute such success to her manipulation of her sexuality.

B. Women's Structurally Inferior Position in the Workforce

In the past few decades, the number of women entering the labor market has been steadily increasing. In 1978, 50.5% of all adult women worked, representing 41.4% of the workforce.[14] Forty-three percent of those women workers provided the sole support for their households.[15] Married women with children have entered the labor force in increasing numbers.[16]

It is unquestionable that women are severely disadvantaged in employment due to the lower earning capacity which they command on the open market.[17] Women earn less than men at every level of educational attainment.[18] At present, women earn only fifty-nine cents for every dollar

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> [T]he largest category of words designating humans in sexual terms are those for women—especially for loose women. I have located roughly a thousand words and phrases describing women in sexually derogatory ways. There is nothing approaching this multitude for describing men.

Id. at 67, 71.

Sexual harassment is not only a stereotypic expression of woman as sexual object; it is also an expression of the stereotypic view of man as a sexually predatory being exercising his time-honored right of sexual initiative and control over the weaker, more vulnerable gender. *See* R. UNGER, FEMALE AND MALE: PSYCHOLOGICAL PERSPECTIVE (1979) for further development of theories of sex role stereotypes.

13. R. KANTER, MEN AND WOMEN OF THE CORPORATION (1977).

14. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 47-48, Tables A-40 and A-42 (December 1978).

15. U.S. WOMEN'S BUREAU, DEP'T OF LABOR, MOST WOMEN WORK BECAUSE OF ECONOMIC NEED (AUGUST 1978).

16. Approximately 20% of all married women with children under age 6, and 50% of those with children 6 to 17 years old, were in the labor force in 1973, an increase from earlier rates of 15.5% and 35%, respectively, in 1953. *See* U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT Table B-4 (1974).

17. For a thorough discussion of the effects of sex segregation in jobs, *see* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979).

18. U.S. WOMEN'S BUREAU, DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 1, Table 8 (1979).

earned by men.[19] In addition, the type of work most often available for women can pejoratively be labeled as "women's jobs."[20]

C. Sexual Harassment Is a Pervasive Problem

Relatively little study or analysis exists concerning the nature or scope of sexual abuse in the workplace. As MacKinnon observes:

> If [sexual harassment] is so common, one might ask why it has not been commonly analyzed or protested. Lack of public information, social awareness, and formal data probably reflects less its exceptionality than its specific pathology. Sexual subjects are generally sensitive and considered private; women feel embarrassed, demeaned, and intimidated by these incidents.[21]

Like sexual abuse at the workplace, other "sexual" subjects such as abortion, rape, and wife-beating were widespread yet never openly discussed until recently. While the precise contours of sexual harassment and its effects await further investigation, the evidence uncovered to date indicates a pervasive problem. There are numerous reports of sexual harassment throughout the workforce.[22] One court recently took notice of the prob-

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19. *Id.* at Table 1. Adjusting for inflation, the difference in women's and men's median earnings went from $1,911 to $3,310 in 1977. Women are also greatly overrepresented among low wage earners: they are 3.2 times as likely as men to be earning between $3,000 and $4,999 per year. *Id.* at Table 2.

20. Blumrosen, *supra* note 17, at 405.

> The pattern of sex segregation in jobs is well known. In a suburban school, for instance, the classroom elementary teachers tend to be women, the principal a man, the maintenance workers minority males. In a hospital, the doctors typically are majority males, the nurses are female, orderlies are minority males, and nurses' aides minority (probably black or Hispanic) women.

Id.

In 1970, 76.6% of all employed women were in occupations which were from 45 to 100% female. Bergman & Adelman, *The 1973 Report of the President's Council of Economic Advisors: The Economic Role of Women*, 63 AM. ECON. REV. 509, 510 (1973). *See also* STATISTICAL ABSTRACT OF THE UNITED STATES, 1971, EMPLOYED PERSONS BY MAJOR OCCUPATION AND SEX: 1950-1971 at 222. More recently, 35% of all women employed had clerical jobs, constituting 77% of all clerical jobs; 19.6% of women workers held service jobs, occupying 58% of all service jobs. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT AND EARNINGS Table A-21 (May 1980). In 1974, women occupied 98.5% of paid private household jobs and 41.7% of all sales jobs. U.S. WOMEN'S BUREAU, DEP'T OF LABOR, HANDBOOK ON WOMEN WORKERS 86-87 (1975) [hereinafter cited as HANDBOOK]. By contrast, women comprised 4.2% of craft and kindred workers, 18.6% of managers and administrators, and 31.6% of factory workers. In sum, half of all working women work in occupations that are over 70% female, and more than one quarter work in jobs that are at least 95% female. *See id.* at 89-91.

21. C. MACKINNON, *supra* note 2, at 27 (footnote omitted).

22. *See, e.g.*, Baltimore Sun, Dec. 16, 1979, at A1, col. 1 (women in the military experiencing sexual harassment including physical attacks); N.Y. Times, Nov. 11, 1979, § 1,

lem, stating that "[t]he Court is of the opinion that sexual harassment is a deeply rooted form of sex discrimination which does operate systematically to deny women equal job opportunities and equal terms and conditions of employment . . . ."[23]

Pioneering work in this area has been done by the Working Women's Institute.[24] A 1975 study conducted by the Working Women's Institute and the Women's Section of the Human Affairs Program at Cornell University revealed that 70% of the women surveyed had been subjected to sexual harassment at least once. Of 9,000 women who responded to a survey conducted by *Redbook* magazine, a shocking 88% stated that they had experienced sexual harassment on the job.[25] Utilizing the *Redbook* questionnaire, a naval officer found that 81% of the women on a California naval base had experienced sexual harassment.[26]

Both the Working Women's Institute study and the *Redbook* survey relied on self-selected respondents. Two separate surveys, directed at scientifically selected samples drawn from women employed by the State of Illinois[27] and the United States government,[28] indicate that their findings were fairly representative of women in general. Fifty-nine percent of the

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at 30, col. 1 (women coal miners integrating the mines reported extremely high incidence of sexual harassment).

23. Neidhardt v. D.H. Holmes Co., 21 Fair Empl. Prac. Cas. 452, 469-70 (E.D. La. 1979).

The victims of sexual harassment are diverse in age, marital status, race, class, and occupation. C. MACKINNON, *supra* note 2, at 28. There is some indication, however, that blue-collar women are subjected to more harassment than middle-class or professional women. *Id.* at 29. *See also* U.S. EMPLOYMENT AND TRAINING ADMINISTRATION, DEP'T OF LABOR, RESEARCH AND DEVELOPMENT MONOGRAPH NO. 65, WOMEN IN TRADITIONALLY MALE JOBS: THE EXPERIENCE OF TEN PUBLIC UTILITY COMPANIES (1978). Although this study did not focus on sexual harassment, it did indicate that women in blue-collar jobs were subjected to more harassment by co-workers than women holding white-collar jobs. *Id.* at 10. Some women stated that their husbands or male friends were concerned that they would be subjected to sexual advances by their male co-workers. *Id.* at 12. Nevertheless, this study also noted that these attitudes changed rather rapidly, and that overall the experience was more positive than negative. *Id.* at 9-12.

24. The Working Women's Institute, located in New York City, is a national resource and research center which focuses on the problems of sexual harassment and intimidation in employment. The Institute provides educational programs, counseling to women, and assistance to attorneys handling sexual harassment claims.

25. Safran, *supra* note 1, at 217-24.

26. *Id.* at 218.

27. *Testimony of Barbara Hayler, Member of Illinois Task Force on Sexual Harassment in the Workplace and Assistant Professor, Sangamon State University, before the Illinois House Judiciary II Committee* (Mar. 4, 1980) [hereinafter cited as Testimony of B. Hayler]. Surveys were sent to 4,859 women ranging in age from 18 to 70, approximately 15% of the targeted workforce. Completed questionnaires were received from 1,495 women, a response rate of 31%.

28. The United States Merit Systems Protection Board sent a questionnaire to 19,500 randomly selected federal employees. *Summary of Preliminary Findings on Sexual Harassment in the Federal Workplace Before the Subcomm. on Investigations, House Comm. on Post Office and Civil Service,* 96th Cong., 2nd Sess. (1980) [hereinafter cited as *MSPB Survey*].

women surveyed in the Illinois study reported one or more incidents of sexual harassment,[29] while 42% of the women in the United States employee survey experienced some form of harassment.[30]

The economic hardship caused by sexual harassment is staggering. Almost 50% of the *Redbook* respondents said they or someone they knew had either quit or been fired from a job as a result of sexual harassment.[31] Forty-two percent of the women surveyed in 1978 by the Working Women's Institute resigned either because they could not stop the sexual harassment or because their refusal to cooperate led to retaliation. An additional 24% had been fired.[32] The Illinois Task Force survey found that, as a consequence of refusing to tolerate sexual harassment, 6% of the respondents had been denied promotions; 14% said this had happened to women they knew; 3% had been involuntarily transferred; 10% knew of such cases; 3% had been fired; 13% knew of other women who had been fired; 7% quit; and 24% knew of others who had done so.[33]

Sexual harassment contributes to women's lower rate of continuous employment,[34] with such attendant consequences as failure to obtain promotions or to receive on-the-job training, loss of non-transferable fringe benefits, and failure to accumulate seniority rights. In addition, it contributes to the higher rate of female unemployment.[35]

Sexual harassment interferes with a woman's ability to perform her job even when it does not result in her departure from work. The Working Women's Institute study found that 83% of the respondents felt that sexual harassment had interfered in some way with their ability to do their work; a woman must devote time and energy, which could otherwise be expended on work, to handling sexual advances and remarks. Some women suffered a loss of self-confidence because they had come to doubt their ability to handle themselves professionally and socially. Many began to dread going to work and lost their desire to be successful.[36]

Women who are the victims of sexual harassment at work experience stress symptoms similar to those experienced by persons working under conditions more commonly understood to cause stress, such as poor lighting, work speedup, and inadequate ventilation.[37] Psychologically, these

29. *Testimony of B. Hayler, supra* note 27, at 2. Respondents were asked to report only those incidents of unwanted sexual attention that made them feel humiliated or threatened.

30. *MSPB Survey, supra* note 28, at Graph 3.

31. Safran, *supra* note 1, at 217-24.

32. CRULL, *supra* note 11, at 4.

33. *Testimony of B. Hayler, supra* note 27, at 4.

34. Department of Labor statistics for 1973 indicated that women averaged only 2.8 years of continuous service with the same employer, while men averaged 4.6 years. HANDBOOK, *supra* note 20, at 61.

35. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, SPECIAL LABOR REP. No. 199, EMPLOYMENT AND UNEMPLOYMENT 1976, at 8 (1977). Relative gains in that year, however, were greater for adult men. *Id.* at 4.

36. CRULL, *supra* note 11, at 4.

37. *See* STELLMAN & DAUM, WORK IS DANGEROUS TO YOUR HEALTH 79 (1973).

stress symptoms include feelings of powerlessness, fear, anger, nervousness, decreased job satisfaction, and diminished ambition. Ninety-six percent of the women in the Working Women's Institute study reported such symptoms. Furthermore, 63% experienced physical stress symptoms, including headaches, nausea, and weight change. In the case of 12% of these respondents, the symptoms were so severe that therapeutic help was sought.[38]

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

III
SEXUAL ADVANCES BY AN EMPLOYER CONSTITUTE ACTIONABLE SEX DISCRIMINATION

Title VII of the Civil Rights Act of 1964 specifically prohibits discriminatory employment practices.[39] Indeed, the sexual harassment cases to date overwhelmingly establish that sexual advances by an employer or his agent constitute actionable sex discrimination.[40] In addition, the Equal Employment Opportunity Commission (EEOC) recently issued guidelines stating

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38. CRULL, *supra* note 11, at 4. *See also* Evans, *supra* note 11, at 203, 205.

39. 42 U.S.C. § 2000e-2(a) (1976).

40. *See, e.g.,* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Prod. Inc., 552 F.2d 1032 (4th Cir. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Rinkel v. Associate Pipeline Contractors, Inc., 17 Fair Empl. Prac. Cas. 224 (D. Alaska 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977), *appeal docketed*, No. 79-1120 (6th Cir. July 21, 1978); 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). *Cf.* Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979) (complaint insufficient to support relief without allegation of facts supporting nexus between sexual advances and loss of employment); Pantchenko v. C.B. Dolge Co., 581 F.2d 1052 (2d Cir. 1978) (evidence insufficient to support plaintiff's claim that sexual advances were made). *Contra*, Smith v. Rust Eng'r Co., 18 Empl. Prac. Dec. 4783 (N.D. Ala. 1978); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated without published opinion*, 562 F.2d 55 (9th Cir. 1977). *See generally* Ginsburg & Koreski, *Sexual Advances by an Employee's Supervisor: A Sex Discrimination Violation of Title VII,* 3 EMPLOYEE REL. L.J. 83 (1977); Comment, 51 N.Y.U.L. REV. 148 (1976); Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123 (1977). *See also* Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *appeal of other plaintiffs dismissed for mootness,* No. 79-7547 (2d Cir. Sept. 22, 1980) (women college students alleging sexual harassment by male professors stated a cause of action under Title IX, Educational Amendments of 1972, 20 U.S.C.. § 1681 (1976)).

that sexual harassment is a violation of Title VII.[41] To establish a cause of action under Title VII, a plaintiff must show that (1) a term or condition of employment had been imposed, (2) it was imposed because of the employee's sex, and (3) it was imposed by the employer.[42]

Two leading circuit court decisions, *Barnes v. Costle*[43] and *Tomkins v. Public Service Electric & Gas Co.*,[44] held that allegations of sexual harassment before them made out prima facie cases of employment discrimination.[45] The typical case of sexual harassment involves a male supervisor

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41. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11(a)) reads in part:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. 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.

See also 45 Fed. Reg. 86,216, 86,250-51 (1980) (to be codified in 41 C.F.R. § 60-20.8) (sexual harassment guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11,246). While EEOC guidelines and administrative decisions are not binding on the courts, the Supreme Court has said that "[t]he administrative interpretation of [Title VII] by the enforcing agency is entitled to great deference." Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

Recently amended state fair employment laws similarly prohibit sexual harassment on the job. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.2103, *as amended by* Pub. Act No. 202, § 1, 1980 Mich. Legis. Serv. 626 (West); Act Concerning Harassment as an Unfair Employment Practice, Pub. Act No. 80-285, 1980 Conn. Legis. Serv. 634 (West) (to be codified as CONN. GEN. STAT. ANN. § 31-126(a)(8)); R.I. Exec. Order No. 80-9 (1980) (applies only to state government employees); D.C. Mayor's Order 79-89 (1979) (applies only to District of Columbia government employment).

42. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 989 n.49 (D.C. Cir. 1977). *See also* 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11(a)). Section 703(a) of Title VII provides:

> 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; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

43. 561 F.2d 983, 990 (D.C. Cir. 1977).

44. 568 F.2d 1044, 1046 (3d Cir. 1977).

45. Under the test for establishing a prima facie case in an individual discrimination case, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the plaintiff must also demonstrate that she was qualified for the job. The only sexual harassment case to date which discussed the plaintiff's job qualifications in any detail was Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978). Once a plaintiff has established

demanding sexual relations from a female subordinate, who is then faced with a choice of submission or adverse job consequences. According to the complaint in *Tomkins*, Adrienne Tomkins was invited to lunch by her supervisor and told that sexual relations would be necessary in order to have a satisfactory working relationship.[46] When she attempted to leave, her supervisor responded with threats of physical force and recrimination and physically restrained her.[47] Ultimately she was fired by the employer.[48] In *Barnes*, Paulette Barnes alleged that her supervisor repeatedly made remarks of a sexual nature to her and suggested that sexual cooperation would enhance her employment status.[49] She was subsequently belittled, harassed, and stripped of her job duties.[50] Finally, her job was eliminated.[51] Similarly, in a 1979 case, *Miller v. Bank of America*,[52] Margaret Miller was allegedly fired shortly after she refused her supervisor's demand for sexual favors.

These courts of appeals found that the alleged acts of sexual harassment were impermissibly discriminatory.[53] The court in *Barnes* stated that "[t]he vitiating sex factor . . . stemmed not from the fact that what appellant's superior demanded was sexual activity—which of itself is immaterial—but from the fact that he imposed upon her tenure in her then position a condition which ostensibly he would not have fastened upon a male employee."[54] The Third Circuit relied on Tomkins' allegation that her status as a female was the "motivating factor" underlying her supervisor's sexual harassment.[55]

Both the *Tomkins* court and the *Barnes* court held that in order to prove that sexual harassment is discriminatory, a plaintiff need only show that the harassment would not have occurred but for the plaintiff's gender.

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a prima facie case, the defendant can articulate a legitimate nondiscriminatory reason for the adverse employment action. Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978). The plaintiff then has the opportunity to show that the employer's reason is a mere pretext for discrimination.

46. 568 F.2d 1044, 1045 (3d Cir. 1977).

47. *Id.*

48. *Id.* at 1046.

49. 561 F.2d 983, 985 (D.C. Cir. 1977).

50. *Id.*

51. *Id.*

52. 600 F.2d 211, 212 (9th Cir. 1979).

53. For further discussion of the actionability of sexual harassment under Title VII, *see generally* Seymour, *Sexual Harassment: Finding a Cause of Action Under Title VII*, 30 LAB. L.J. 139 (1979); Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007 (1978); Note, *Title VII—Cause of Action Under Title VII Arises When Supervisor, With Employer's Knowledge and Acquiescence, Makes Sexual Advances Toward Subordinate Employee and Conditions Employee's Job Status on Favorable Response*, 9 SETON HALL L. REV. 108 (1978).

54. 561 F.2d 983, 989 n.49 (D.C. Cir. 1977).

55. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977).

Although a female plaintiff must prove that her employer's actions were motivated by sex, it is not necessary to show that comparable male employees were treated differently.[56] The discriminatory character of the actions instead may be gleaned from the type of conduct at issue, the surrounding circumstances, or the employer's own words.

In fact, the findings of discrimination in *Barnes* and *Tomkins* did not depend on the presence or absence of a similarly situated employee of the opposite sex. While it is theoretically possible that both men and women may be subjected to sexual harassment,[57] women are traditionally the victims.[58] Sexual harassment operates as a particularly difficult impediment to the equal employment opportunities of women. As the *Tomkins* court noted, "[i]t is only necessary to 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.' "[59]

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56. *See, e.g.*, City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978), *modified on other grounds*, 473 F. Supp. 786 (D.N.J. 1979). An analysis of constitutional cases decided by the Supreme Court reveals a consistent line of authority in which sex discrimination is found wherever similarly situated individuals are treated in a disparate manner, and the sole basis for that disparate treatment is the individual's gender. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199 (1977) (provisions of the Federal Old-Age, Survivors, and Disability Insurance Benefit Program, which provided widows with benefits in all cases, but limited widowers' benefits to those who had received at least one-half of their support from their wives, held unconstitutional); Craig v. Boren, 429 U.S. 190 (1976) (equal protection clause violated by state statute which prohibited the sale of beer to men under the age of 21 and women under the age of 18); Stanton v. Stanton, 421 U.S. 7 (1975) (equal protection clause violated by state statute which specified a greater age of majority for men than women, in the context of a parent's obligation for child support payments); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (invalidating provisions of the Social Security Act which provided for payment of benefits to a widow and her children after a male wage earner died, but provided for benefits only to minor children if a female wage earner died); Frontiero v. Richardson, 411 U.S. 677 (1973) (federal statute which presumed wives of male military personnel were their husbands' dependents while requiring husbands of female military personnel to demonstrate their dependency held violative of due process); Reed v. Reed, 404 U.S. 71 (1971) (equal protection clause violated by state statute which gave an absolute preference to males over equally entitled females in determining the appointment of an administrator of an estate).

57. The *Barnes* court notes that a heterosexual female could sexually harass a male subordinate or a homosexual could harass a subordinate of the same gender. The court considers the legal problems to be the same: "the exaction of a condition which, but for his or her sex, the employee would not have faced." The court distinguishes these two situations from the bisexual superior who imposes sexual conditions upon subordinates of both sexes. 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

58. The fact remains that males in our society have the exclusive social right to initiate sexual interaction with others. Indeed, the assumption of male initiative is so prevalent that researchers of male-female sexual interaction uniformly consider males to be initiators or "pass-makers" and females to be the passive "pass-receivers."

59. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (citing Skelton v. Blazano, 424 F. Supp. 1231, 1235 (D.D.C. 1976)). *See also* Slack v. Havens, 7 Fair Empl. Prac. Cas. 885 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975); EEOC Dec. No. 71-2227, 3 Fair Empl. Prac. Cas. 1245 (1971). The *Barnes* court recognized that "[b]ut for her womanhood, from aught that appears, her participation in sexual activity would never have been solicited." 561 F.2d 983, 990 (D.C. Cir. 1977) (footnote omitted).

A. "Sex-Plus" Analysis

Both the *Barnes* and *Tomkins* courts rely in part on the "sex-plus" analysis.[60] This view recognizes that Title VII's proscription of sex discrimination is not limited to discriminatory or disparate treatment based solely on sex. "[I]t is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, *it is enough that gender is a factor contributing to the discrimination in a substantial way.*"[61] As long as sex is a factor in a particular employment decision, that decision involves discrimination based on sex.[62]

The Supreme Court enunciated a "sex-plus" analysis in *Phillips v. Martin Marietta Corp.*[63] In *Phillips*, the Court held that an employer's refusal to hire women with pre-school-age children was prima facie sex discrimination. The Court rejected the employer's argument that it was not discrimination between men and women, but only between the two classes of women. An employment decision based on a person's womanhood as well as on her having young children constituted sex discrimination in violation of Title VII.

Using a "sex-plus" analysis, the Seventh Circuit in *Sprogis v. United Air Lines, Inc.*[64] invalidated the airline's policy forbidding the employment of married female flight attendants. In so holding, the court stated:

> Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex.[65]

Similarly, in *Allen v. Lovejoy*,[66] the Sixth Circuit invalidated a rule which required married women to adopt their husbands' names on their personnel forms.

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60. *See also* Williams v. Saxbe, 413 F. Supp. 654, 658-59 (D.D.C. 1976).

61. Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (emphasis added) (footnote omitted). *See also* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.4 (3d Cir. 1977).

62. Barnes v. Costle, 561 F.2d 983, 990-92 (D.C. Cir. 1977); Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1088-89 (5th Cir. 1975); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 91 (1971).

63. 400 U.S. 542 (1971).

64. 444 F.2d 1194 (7th Cir. 1971).

65. *Id.* at 1198.

66. 553 F.2d 522 (6th Cir. 1977).

B. Employer's Liability for Sexual Harassment by a Male Supervisor

Due to the varied treatments of sexual harassment by the several circuits that have considered the problem, the standards by which an employer is held liable for the sexual harassment of a female employee by a male supervisor are far from clearcut. In *Miller v. Bank of America*,[67] the Ninth Circuit held the employer liable for the acts of the supervisor under the principle of respondeat superior, even though the supervisor's acts constituted a violation of company policy.[68] The district court had granted summary judgment in favor of the bank after finding that the employer had a policy of discouraging sexual advances, including disciplining employees found guilty of such conduct, and that the plaintiff had failed to avail herself of the employer's employee-relations department.[69] The court of appeals reversed, stating clearly that exhaustion of company remedies was not required to state a cause of action under Title VII.[70] The court did qualify the employer's liability, however, suggesting that the supervisor must possess the authority to hire, fire, discipline, promote the employee, or at least to participate in or recommend such actions.[71]

In *Barnes*,[72] which preceded the *Miller* decision, the Court of Appeals for the District of Columbia Circuit held that "generally speaking, an employer is chargeable with Title VII violations occasioned by discriminatory practices of supervisory personnel."[73] The *Barnes* case involved a

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67. 600 F.2d 211 (9th Cir. 1979).

68. *Id.* at 213.

69. Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979). In a footnote, the district court stated that it was not "holding that exhaustion of company remedies is a prerequisite to suit under Title VII. Rather, failure of exhaustion [of remedies] goes more to whether the employer is liable at all." *Id.* at 236 n.2 (citation omitted).

70. Miller v. Bank of America, 600 F.2d 211, 214 (9th Cir. 1979). *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974) (exhaustion of union grievance procedure not a prerequisite to Title VII suit).

71. Miller v. Bank of America, 600 F.2d 211, 214 (9th Cir. 1979).

72. 561 F.2d 983 (D.C. Cir. 1977).

73. *Id.* at 993. The court relied in part on cases which hold that the employer is liable for the racially or sexually motivated acts of its supervisors. *See, e.g.*, Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (6th Cir. 1972) (despite finding that upper management's race relations were exemplary, employer liable under Title VII for racially motivated discharge by a person in authority at a lower level of management); Slack v. Havens, 7 Fair Empl. Prac. Cas. 885, 889-90 (S.D. Cal. 1973), *aff'd*, 522 F.2d 1091 (9th Cir. 1975) (employer liable for supervisor's demand that black female workers perform work he would not require of a white female, even where top level management did not intend to discriminate). *See also* DeGrace v. Rumsfeld, 614 F.2d 796, 803-04 (1st Cir. 1980); Calcota v. Texas Educ. Foundation, Inc., 578 F.2d 95, 97-98 (5th Cir. 1978); Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977); Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 n.7, 145 (5th Cir. 1975); Baxter v. Savannah Sugar Ref. Corp., 495 F.2d 437, 443 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033 (1974); Rowe v. General Motors Corp., 457 F.2d 348, 355-59 (5th Cir. 1972); McMullen v. Warner, 416 F. Supp. 1163,

male supervisor who repeatedly approached a female employee and who, after her refusal to cooperate, initiated a campaign of harassment which culminated in her losing her job. The court stated that Title VII prohibits sex discrimination and that "a single instance of discrimination may form the basis of a private suit."[74] However, the court noted that if an employer enforces its policy prohibiting sexual harassment, the employer may not be liable under Title VII.[75]

Judge MacKinnon, in a concurring opinion, agreed with the majority's decision to reverse, but rejected the majority's holding that an employer should be held vicariously liable for the tortious acts of its employees.[76] Drawing on both labor relations and employment discrimination law, MacKinnon instead found liability based on the agency concept of respondeat superior.[77] Under this theory, the employer would be liable only when the plaintiff could show, in addition to the sexual advance culminating in a retaliatory action, that other agents of the employer, who had knowledge of the advance, assisted in the retaliation or impeded the complaint.[78]

Certain other courts have conditioned the employer's liability for its employees' tortious acts on the employer's knowledge of the sexual harassment and its subsequent action or inaction. In *Tomkins,*[79] for example, the Third Circuit held that an employer is liable for sexual harassment by a supervisor where the employer has actual or constructive knowledge of the incident and "does not take prompt and appropriate remedial action after acquiring such knowledge."[80] The court refused to make the factual determination of whether the incident was company policy or a purely personal incident,[81] choosing instead to condition the liability on the employer's failure to take remedial action.

The district courts which have addressed the question of employer liability generally have not imposed absolute liability on employers for the

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1165-66 (D.D.C. 1976); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 536 (W.D. Pa. 1973), *aff'd in part and vacated in part on other grounds*, 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).

74. Barnes v. Costle, 561 F.2d 983, 993 n.75 (D.C. Cir. 1977) (citing King v. Laborers Int'l Union, 443 F.2d 273, 273-78 (6th Cir. 1971)).

75. *Id.* at 993.

76. *Id.* at 995.

77. *Id.* "Employer" within the meaning of Title VII includes "a person engaged in an industry affecting commerce who had fifteen or more employees . . . and any agent of such a person." 42 U.S.C. § 2000e(b) (1976).

78. Barnes v. Costle, 561 F.2d 983, 1000 (D.C. Cir. 1977).

79. 568 F.2d 1044 (3d Cir. 1977).

80. *Id.* at 1048-49. *See also* Price v. Lawhon, 16 Empl. Prac. Dec. 5786 (N.D. Ala. 1978); Neeley v. American Fidelity Assurance Co., 17 Fair Empl. Prac. Cas. 482, 485 (W.D. Okla. 1978).

81. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 n.3 (3d Cir. 1977). *But see* Ludington v. Sambo's Restaurant, Inc., 474 F. Supp. 480, 483 (E.D. Wis. 1979) (incidents must be sanctioned by the employer or constitute official employer policy).

acts of supervisors, but rather have chosen to consider the company's official policy towards sexual harassment. In *Munford v. James T. Barnes & Co.*,[82] the court held that although the employer is not "automatically and vicariously liable for all discriminatory acts of its agents or supervisors . . . [it] has an affirmative duty to investigate complaints . . . and deal appropriately with the offending personnel."[83]

Applying a seemingly lighter burden of proof for the plaintiff, the court in *Heelan v. Johns-Manville Corp.*[84] held that the plaintiff did not have to prove a "policy or practice of the employer endorsing sexual harassment."[85] The court, however, citing *Miller*, stated that "where the employer has no knowledge of the discrimination, liability may be avoided if the employer has a policy or history of discouraging sexual harassment of employees by supervisors and the employee has failed to present the matter to a publicized grievance board."[86] Citing *Barnes,* the *Heelan* court added that if the employer rectifies the situation, the employer may not be held liable.[87] In *Heelan*, the evidence failed to establish the existence of an internal grievance procedure, but the court found that even if the grievance procedure existed and plaintiff had not availed herself of it, the employer was nevertheless liable due to its actual knowledge of the harassment and its subsequent failure to institute an active inquiry into her allegations. The plaintiff had complained of the harassment to an assistant vice-president, who was also administrative assistant to the president. The vice-president questioned the harassing supervisor, but did not pursue the matter. In holding the harassment actionable, the court stated that the "depth and scope of these inquiries can hardly satisfy the corporation's obligation under Title VII."[88]

In *Vinson v. Taylor*,[89] the sexual harassment came from the male branch manager, an assistant vice-president of the employer. The court found that the employer was not liable. Although the branch manager had the authority to make employment recommendations, he could not hire, fire, or promote. Since the employee notified only the branch manager, the bank had insufficient notice of the sexual harassment for liability to attach.[90] Additionally, this court gave weight to the fact that the employer had issued an "equal employment opportunity policy statement," stating its commitment to equal treatment and employee rights.[91]

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82. 441 F. Supp. 459 (E.D. Mich. 1977).
83. *Id.* at 466.
84. 451 F. Supp. 1382 (D. Colo. 1978).
85. *Id.* at 1389.
86. *Id.*
87. *Id.*
88. *Id.* at 1389.
89. 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980), *appeal docketed*, No. 80-2369 (D.C. Cir. Mar. 18, 1980).
90. *Id.* at 42.
91. *Id.*

Regulations recently promulgated by the EEOC generally condemn sexual advances in any form if they are made a term or condition of employment. The EEOC guidelines hold the employer absolutely liable for the acts of its agents and supervisory personnel, regardless of whether sexual harassment was forbidden by the employer or whether the employer knew or should have known of the occurrence.[92] The views of employer liability as espoused by the EEOC and the *Miller* court are consistent with the purpose and judicial interpretation of Title VII. The effective enforcement of Title VII requires holding the employer absolutely liable for acts of sexual harassment committed by its agents and supervisory employees. Any advance made by a person with power over one's job is inherently coercive. The courts have long recognized that if an employer is able to avoid liability by raising the shield of individual employee action,[93] sex discrimination in employment will be extremely difficult to combat. Furthermore, since agents and supervisory personnel are within the direct control of the employer, strict employer liability is equitable. The burden should be on the employer to enunciate a firm policy prohibiting sexual harassment and to take preventive measures to minimize the potential for such harassment.

IV
SEXUAL HARASSMENT RESULTING IN DEBILITATING WORK ENVIRONMENTS IS ACTIONABLE

Courts have not hesitated to hold employers liable under Title VII where ethnic or racial harassment subjects employees to psychologically debilitating work environments.[94] A work environment rife with unwel-

92. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11(c)) reads:

> Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

93. *See* note 73 *supra.*

94. *See* DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) (employer liable under Title VII when supervisors permit racial harassment by co-workers); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (derogatory ethnic slurs could be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 515 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977) (city may not allow on-duty firefighters using city cooking facilities to exclude blacks from informal "supper club" eating arrangements); Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976) (discriminatory hiring policies which affect a plaintiff's psychological well-being give plaintiff standing to challenge these policies under Title VII); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (working environment heavily charged with discrimination may constitute an unlawful

comed sexual advances is no less discriminatory than one filled with racial or religious harassment; the humiliation, degradation, and discomfort are equally debilitating whether caused by a racially or a sexually charged atmosphere. When an employee is subjected to continued and unwelcome sexual advances by her employer or co-workers, such harassment constitutes a condition of her employment under Title VII.

Whether an employee is deprived of a specific job benefit as a result of sexual harassment is irrelevant, since Title VII prohibits discriminatory terms or conditions of employment.[95] The concept of "a discriminatory term or condition" has been construed liberally to achieve Title VII's objective. The *Barnes* court, quoting language from Judge Goldberg in *Rogers v. EEOC*,[96] said:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious

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practice under Title VII); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381 (D. Minn. 1980) (employer liable under Title VII when it knew or should have known of numerous instances of racial harassment); United States v. City of Buffalo, 457 F. Supp. 612 (W.D.N.Y. 1978) (repeated racial slurs and harassment created a work environment charged with discrimination); Friend v. Leidinger, 446 F. Supp. 361, 383 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978) ("No black person (nor any white person) should be required or suffered to work under conditions of constant racially motivated harassment and insult," by supervisor or co-worker); Croker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977) (employer liable for harassment where supervisor made comments concerning dress and used racially demeaning language); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (supervisor's barrage of verbal abuse using anti-semitic terms discriminatory); United States v. Lee Way Motor Freight, 7 Empl. Prac. Dec. 6461 (W.D. Okla. 1973) (derogatory racial statements by supervisors held unlawful); Murry v. American Standard, Inc., 373 F. Supp. 716 (E.D. La.), *aff'd*, 488 F.2d 529 (5th Cir. 1973) (supervisor's calling only black employee "boy" held discriminatory); *see also* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 236-38 (1976). *Cf.* Harrington v. Vandalia-Butler Bd. of Educ., 418 F. Supp. 603 (S.D. Ohio 1976), *cert. denied*, 441 U.S. 932 (1979) (underlying inferior work conditions for female physical education instruction no less actionable under Title VII than discriminatory wages or hiring).

Similarly, a number of decisions by the EEOC hold that inherently demeaning behavior directed against members of a protected class by supervisors or co-workers violates Title VII. The EEOC has repeatedly held that an employer is obligated under Title VII to "maintain a working atmosphere free of intimidation based upon race, color, religion, sex or national origin." EEOC Dec. No. 72-1114, 4 Fair Empl. Prac. Cas. 842 (1972). *Accord*, EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. 852 (1972). EEOC decisions have held a variety of conduct to violate Title VII, including use of the word "nigger" to refer to blacks, EEOC Dec. No. 72-0957, 4 Fair Empl. Prac. Cas. 837 (1972); EEOC Dec. No. 72-0779, 4 Fair Empl. Prac. Cas. 317 (1971); EEOC Dec. No. 71-909, 3 Fair Empl. Prac. Cas. 269 (1970), use of the word "girl" to refer to adult women, EEOC Dec. No. 72-0679, 4 Fair Empl. Prac. Cas. 441 (1971), and telling derogatory jokes about racial or ethnic groups, EEOC Dec. No. 74-05, 6 Fair Empl. Prac. Cas. 834 (1973); EEOC Dec. No. 72-1561, 4 Fair Empl. Prac. Cas. 852 (1972); EEOC Dec. No. 71-1442, 3 Fair Empl. Prac. Cas. 493 (1971); EEOC Dec. No. 70-683, 2 Fair Empl. Prac. Cas. 606 (1970); EEOC Dec. No. CL 68-12-431EU, 2 Fair Empl. Prac. Cas. 295 (1969).

95. 42 U.S.C. § 2000e-2(a)(1) (1976).

96. 454 F.2d 234 (5th Cir. 1971).

> activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily be the injustices of the morrow.[97]

Similarly, the Seventh Circuit, in rejecting an employer's contention that it violated Title VII only if it deprived women of benefits available to men,[98] noted that Section 703(a)(1) "proscribes discrimination with respect to terms and conditions of employment as well as compensation and privileges."[99]

Two federal district courts and a state supreme court have, in fact, recognized the discriminatory impact of sexually charged work environments and have found violations of Title VII and a state fair employment law.[100] These recent decisions have found that a sexually charged environment has debilitating effects, and plays a role in maintaining a sexually segregated workforce, whether the harassment emanates from a supervi-

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97. Barnes v. Costle, 561 F.2d 983, 994 (D.C. Cir. 1977) (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)).

98. Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1032 n.13 (7th Cir. 1979), *cert. denied,* 445 U.S. 929 (1980).

99. *Id.* The *Carroll* court further noted that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 1030 (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

100. Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980); Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978); Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980).

Women workers forced to leave work because of sexual harassment have frequently been denied unemployment compensation because their leaving was determined to be "without good cause." Recent administrative decisions have reversed these determinations, finding these women claimants eligible for benefits. *See, e.g., In re* Perkins, No. 78-68695, New York State Department of Labor, Unemployment Insurance Law Judge Section (1979); No. 3714, Tennessee Department of Employment Security, Board of Review (1979); *In re* Veelik, No. 9-02866, Employment Security Department, State of Washington (1979); *In re* Hickman, No. B77-2034-56506, State of Michigan Employment Security Board of Review (1979).

The Michigan Employment Security Commission, in a release dated February 23, 1979, defined sexual harassment with relation to "voluntary" resignations as follows:

> Sexual harassment has been defined as (1) sexual contact or threat of sexual contact or coercion for the purpose of sexual contact which is not freely entered into and mutually agreeable to both parties; (2) the continual or repeated abuse of a sexual nature including, but not limited to, graphic commentaries on the victim's body, sexually degrading words used to describe the person, propositions of a sexual nature, or the display of sexually offensive pictures and objects; or (3) the threat or insinuation that the lack of sexual submission will adversely affect the victim's employment, wages, or other conditions which affect the victim's livelihood. The Michigan Department of Civil Rights considers sexual harassment to be a form of sex discrimination and will accept jurisdiction over such cases.

In re Kent, No. B79-10133, Department of Labor, Michigan Employment Security Commission, Referee Section at 3 (1979). *See also* Illinois Unemployment Insurance Act, § 601(c)(4), 1980 Ill. Legis. Serv. 1542 (West) (to be codified as ILL. ANN. STAT. ch. 48, § 601 (Smith-Hurd)).

sor, as in *Brown v. City of Guthrie*,[101] or from co-workers, as in *Kyriazi v. Western Electric Co.*[102] and *Continental Can Co. v. Minnesota*.[103] In addition, the EEOC has also recently taken cognizance of sexually debilitating working environments and has issued regulations prohibiting sexually harassing conduct that creates "an intimidating, hostile or offensive working environment."[104] A recent federal district court decision interpreting the EEOC interim guidelines, however, intimates that the evidence in such sexual harassment cases must support a finding that the harassment substantially interfered with the plaintiff's work performance or created an offensive work environment.[105]

A. The Cases

In *Brown v. City of Guthrie*,[106] Phyllis Brown, a civilian dispatcher with the city police department, was repeatedly subjected to offensive sexual suggestions by her male supervisor, who, on two occasions, asked her to remove her clothing. She was further humiliated and harassed when he asked her to compare herself to photographs of nude women contained in magazines which the policemen had stored in the dispatcher's desk to look at during their spare time. Although Brown reported these incidents, the Chief of Police failed to take any action.

In a separate incident, Brown was asked to perform a search of a female prisoner. Although the search was conducted in a private room, Brown learned later that a videotape had been made to critique her search technique. The supervisor repeatedly played back the videotape, often commenting to Brown about the physical attributes of the prisoner. On still another occasion, the supervisor sat at Brown's desk and made lewd sexual gestures accompanied by sexual remarks. Brown resigned because she "felt total despair with regard to the sexual harassment."[107]

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101. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).
102. 461 F. Supp. 894 (D.N.J. 1978).
103. 297 N.W.2d 241 (Minn. 1980).
104. 45 Fed. Reg. 74,676 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).
105. Clark v. World Airways, 24 Fair Empl. Prac. Cas. 305 (D.D.C. 1980). *See also* Halpert v. Wertheim & Co., 22 Empl. Prac. Dec. 17,557 (S.D.N.Y. 1980) (coarse and frequent references to male and female genitalia and to sexual activity did not constitute harassment).
106. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).
107. *Id.* at 1629. Plaintiff also felt she was unfairly denied the opportunity to obtain the education necessary to become a certified police officer. She cited this and the "rampant sexual harassment" she was expected to endure as reasons for her resignation. *Id.* The court found no violation of Title VII in regard to the first claim, but held that plaintiff's resignation as a result of the sexual harassment amounted to a constructive discharge. *Id.* at 1630-31. *See* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144 (5th Cir. 1975) (constructive discharge occurs when employee resigns in order to escape intolerable working conditions caused by illegal discrimination). *See also* Continental Can Co. v. Minnesota, 297 N.W.2d 241, 251 (Minn. 1980). *Accord*, Calcote v. Texas Educ. Foundation, 578 F.2d 95, 97 (5th Cir. 1978); Thompson v. McDonnell-Douglas Corp., 552 F.2d 220, 223 (8th Cir. 1977); Muller v. United States Steel Corp., 509 F.2d 923, 929 (10th Cir. 1975).

The *Brown* court, finding the EEOC guidelines[108] persuasive, held that "sexual harassment that permeates the workplace thereby creating an intimidating, hostile or offensive working environment should be deemed an impermissible condition of employment."[109] After noting that an isolated incident is insufficient to trigger the protection of Title VII,[110] the court looked to the EEOC guidelines to define the quantum of harassment necessary to establish a violation. The court considered the totality of the circumstances and the form of harassment imposed upon the plaintiff by her supervisor, and concluded that the repeated, unwelcome sexual advances constituted a violation of Title VII.[111]

In an analogous state court decision involving sexual harassment, *Continental Can Co. v. Minnesota*,[112] the Minnesota Supreme Court held that sexually derogatory statements, verbal sexual advances, and sexually motivated physical contacts directed at a female employee by male co-workers violated the prohibition against sex discrimination in Minnesota's Human Rights Act.[113] Three male co-workers repeatedly made explicit, sexually derogatory remarks and verbal sexual advances to the complainant, Willie Ruth Hawkins, and another woman who was her only female co-worker. One male co-worker frequently patted Hawkins on her posterior. The women complained to their supervisor about the remarks but refused to identify their harassers. Continental took no action in response to the complaints, and the offensive remarks and touching continued. After one of Hawkins' male co-workers grabbed her between her legs while she was bending over, she complained immediately to the plant manager. Continental did not initiate a formal investigation until more than two weeks after that incident. A week later Continental held a plant meeting during which company officials informed the employees that verbal or physical

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108. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)(3)).

109. 22 Fair Empl. Prac. Cas. 1627, 1632 (W.D. Okla. 1980).

110. *Id. Cf.* DeGrace v. Rumsfeld, 614 F.2d 796, 804-05 (1st Cir. 1980) (violation of Title VII where co-workers frequently sent racially threatening letters to plaintiff); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977) (racial comments that are merely part of one casual conversation did not constitute a violation of Title VII); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 384 (D. Minn. 1980) (a violation of Title VII must comprise more than a few isolated incidents of racial harassment); Winfrey v. Metropolitan Util. Dist., 467 F. Supp. 56, 60 (D. Neb. 1979) (referring to a black man as "boy" in one isolated conversation does not constitute a violation of Title VII); Friend v. Leidinger, 446 F. Supp. 361, 382-83 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978) (isolated incidents of racial slurs and harassment, contrary to the employer's policy, not actionable under Title VII); Croker v. Boeing Co., 437 F. Supp. 1138, 1191 (E.D. Pa. 1977) (plaintiff's allegation of class-wide racial harassment must show more than isolated, "accidental" or sporadic discriminatory acts); Fekete v. United States Steel Corp., 353 F. Supp. 1177, 1186 (W.D. Pa. 1973) (no cause of action under Title VII for a few isolated instances of harassment over five-year period, which employer took steps to prevent and control).

111. Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1633 (W.D. Okla. 1980).

112. 297 N.W.2d 241 (Minn. 1980).

113. MINN. STAT. ANN. § 363.03(1) (West 1966 & Supp. 1980).

harassment would not be tolerated. Hawkins and representatives of Continental held a number of meetings, but when Hawkins refused to return to work because the company made no assurance for her safety, her employment was terminated.[114]

Hawkins then filed a complaint with the Minnesota Department of Human Rights, alleging that she had been discriminated against on the basis of sex in violation of the Minnesota Human Rights Act.[115]

The Minnesota Supreme Court noted that a violation of the state Human Rights Act was more easily discernible "when promotion or retention of employment is conditioned on dispensation of sexual favors."[116] Nevertheless, the court recognized that a working environment permeated by male co-workers' sexual harassment affects a woman's ability to perform her job.

> It is as invidious, although less recognizable, when employment is conditioned either explicitly or impliedly on adapting to a workplace in which repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct are directed at an employee because she is female. Repeated, unwarranted and unwelcome verbal and physical conduct of a sexual nature, requests for sexual favors and sexually derogatory remarks clearly may impact on the conditions of employment. When sexual harassment is directed at female employees because of their womanhood, female employees are faced with a working environment different from the working environment faced by male employees.[117]

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114. 297 N.W.2d 241, 251 (Minn. 1980).

115. The Department found probable cause to believe that a violation of the Minnesota Human Rights Act had occurred. After a hearing, the hearing examiner concluded that discriminatory employment practices had been committed, and awarded back pay. Continental appealed to the district court, which reversed the hearing examiner's decision and dismissed the complaint with prejudice. Continental Can Co. v. Minnesota, No. 85511 (D. Minn. Feb. 16, 1980). The Department appealed the decision to the state supreme court, 297 N.W.2d 241 (Minn. 1980).

The Minnesota Human Rights Act resembles Title VII in providing that "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice: . . . (2) For an employer because of . . . sex . . . (c) to discriminate against an employee with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." MINN. STAT. ANN. § 363.03(1) (West 1966 & Supp. 1980). The analogous portion of Title VII provides: "(a) It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976).

116. Continental Can Co. v. Minnesota, 297 N.W.2d 241, 248 (Minn. 1980) (footnote omitted). The court also distinguished most federal court decisions holding that sexual harassment constituted actionable sex discrimination, because the facts in those cases did not involve harassment by co-workers; rather, they generally involved a male supervisor's demand for sexual favors from a female employee. When she refused, she was discharged, demoted, or denied a promotion, or her job was abolished. *Id.* at 1812. *See* text accompanying notes 42-49 *supra.*

117. Continental Can Co. v. Minnesota, 297 N.W.2d 241, 248 (Minn. 1980).

The *Continental* court buttressed its decision by citing factual similarities in two racial harassment cases[118] and the EEOC guidelines.[119] The court thus held that the Minnesota Human Rights Act prohibits sexual harassment which affects the conditions of employment when the employer knows or should know of the harassment by nonsupervisory employees and fails to take timely and appropriate action.[120]

In *Kyriazi v. Western Electric Co.*,[121] three male co-workers harassed the plaintiff by making "loud remarks" about her marital status and "wagers" concerning her virginity, and by drawing an obscene cartoon designed "to humiliate her *as a woman*."[122] The *Kyriazi* court held that such actions constituted harassment based on the plaintiff's sex. Additionally, the court recognized the employer's legal responsibility to stop this harassment by co-workers. The court found that her three male supervisors knew of the sexual harassment yet failed to take any action to curb it.[123] In addition to a Title VII violation by the employer, the court found that the individual defendants, including the supervisors and co-workers, were liable to the plaintiff under state law for tortious interference with her contract of employment.[124] In a separate opinion,[125] the court awarded punitive damages of $1,500 against each individual, reasoning that "[w]hile it is hardly this

118. *Id.* at 1813 (citing Friend v. Leidinger, 446 F. Supp. 361 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978), and Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975)). *See also* cases cited note 110 *supra*.

119. 297 N.W.2d 241, 248 (Minn. 1980) (citing EEOC Interim Guidelines, 45 Fed. Reg. 25,025 (1980)) (to be codified in 29 C.F.R. § 1604.11(a)). Section 1604.11(a) of the Interim Guidelines is identical in language to the final guidelines adopted by the EEOC at 45 Fed. Reg. 74,676 (1980).

120. Continental Can Co. v. Minnesota, 297 N.W.2d 241, 249 (Minn. 1980). The court did not address the appropriate theory of liability when the employer's agents or supervisors are the source of the sexual harassment. *Id.* at 1814 n.5.

121. 461 F. Supp. 894 (D.N.J. 1978).

122. *Id.* at 934.

123. *Id.* at 935.

124. *Id.* at 950. Violations of state law have been alleged in a number of cases brought in federal court under Title VII. The federal courts have pendent jurisdiction over such claims. UMW v. Gibbs, 383 U.S. 715, 725-29 (1966). In *Tomkins*, for example, the plaintiff alleged, *inter alia*, the torts of malicious interference with a contractual relationship and intentional infliction of emotional distress. Amended Complaint, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977). *See also* Peter v. Aiken, No. L-13891-77 (Sup. Ct. N.J. May 12, 1977) (torts of libel and false imprisonment); Fuller v. Williams, No. A 7703-040001 (Cir. Ct. Or. June 14, 1977) (plaintiff's allegations included slander and libel). In Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974), the New Hampshire Supreme Court upheld a jury verdict finding the employer liable for breach of an oral contract because the plaintiff was harassed and discharged when the plaintiff refused the foreman's sexual advances. The court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good . . . ." *Id.* at 551.

For a discussion of state tort causes of action in sexual harassment cases, *see* Note, *Legal Remedies for Employment Related Sexual Harassment*, 64 MINN. L. REV. 151, 167-77 (1979).

125. Kyriazi v. Western Elec. Co., 476 F. Supp. 335 (D.N.J. 1979).

Court's role to penalize mere rudeness, when a party's deliberate conduct is so extreme that it intentionally interferes with another's ability to practice a profession or earn a livelihood, the wrongdoer must be punished and deterred."[126]

The district court in *Clark v. World Airways*,[127] however, found that plaintiff had not shown that submission to the company president's sexual advances constituted a condition of her employment. During plaintiff's first and only week at work, the company's president made several "off-color" remarks to her, touched her in ways which she found offensive, and, while she was in his apartment on business, made explicit sexual advances.[128] The *Clark* court found that these actions had no substantial effect on plaintiff's employment.[129] The court was unpersuaded by the line of cases holding sexual harassment actionable under Title VII where the employer terminated the employment in retaliation for the employee's refusal of sexual favors. In addition, the *Clark* court refused to give deference to the EEOC Interim Guidelines on the grounds that they were subject to further revision after public comment, and because the plaintiff had not established that the president's conduct "had the effect of substantially interfering with plaintiff's work performance or creating an offensive work environment."[130]

B. The Employer's Knowledge of Harassment

Both the *Continental* court and the EEOC guidelines require that the plaintiff, in order to state a cause of action, show that the employer knew or should have known of the discriminatory conduct of co-workers.[131] An

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126. *Id.* at 340.

127. 24 Fair Empl. Prac. Cas. 305, 307-08 (D.D.C. 1980).

128. *Id.* at 307.

129. *Id.* After plaintiff rebuffed the sexual advances, the president did not intimate that he would retaliate against her. Additionally, the decisive reason for the plaintiff's leaving work was unclear. She testified that, in addition to the sexual advances, the amount of travel involved in her position played a role in her decision. *Id.* at 307.

130. *Id.* at 308 n.11. The Interim Guidelines have since been finalized at 45 Fed. Reg. 74,676 (1980).

131. 297 N.W.2d 241, 249 (Minn. 1980); 45 Fed. Reg. 74,676-77 (1980) (to be codified in 29 C.F.R. § 1604.11(d)) ("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"). *See* EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 386 (D. Minn. 1980) (racial harassment). In Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1633 (W.D. Okla. 1980), the court did not decide the issue of the extent of employer liability because it found that the employer had knowledge of the harassment and failed to take action. Some earlier decisions refused to find Title VII violations unless supervisory personnel actually participated in the harassment. *See, e.g.*, Clark v. South Cent. Bell Tel. Co., 419 F. Supp. 697, 706 (W.D. La. 1976); Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973); Roberts v. St. Louis Southwestern Ry. Co., 329 F. Supp. 973, 978 (E.D. Ark. 1971). *See also* Compston v. Borden, Inc., 424 F. Supp. 157, 160 (S.D. Ohio 1976).

employer may avoid liability for acts of employees by showing that it took prompt and appropriate corrective action.

Because sexual harassment is such a widespread phenomenon and has received so much public attention in recent years, all employers should be on notice that sexual harassment may be occurring in their workplaces.[132] The burden, therefore, should be on the employer to show by conclusive evidence that he had no such notice. At a minimum, employers in the following situations should be held to have actual or constructive notice of sexual harassment in the workplace: where women are placed in traditionally male jobs,[133] where women are forced to wear sexually provocative clothing,[134] and where women must travel as part of their employment.[135] Such presumptions are necessary to make employers take notice of the high probability of sexual harassment in these situations.

The EEOC's guidelines require employers to take preventive action to destroy the roots and manifestations of sexual harassment.[136] The guidelines' list of preventive measures should be read to include requiring an employer to develop a policy statement, to create ongoing training programs for both old and new employees, and to institute a grievance procedure. The requirement that the employer adopt policies which condemn sexual harassment and communicate these policies frequently and seriously to the work force should effectively signal to all employees that sexual harassment will not be tolerated as a condition of employment in the workplace.

An employer who fails to create an internal procedure for immediately processing complaints alleging sexual harassment, or who fails to discipline promptly employees found to have engaged in harassment, should be held liable for sexual harassment by co-workers. Furthermore, the employer's defense of having taken "immediate and appropriate corrective action"[137] similarly should be given a narrow construction. "Appropriate" corrective action must be read as *effective* corrective action. Disciplinary procedures consisting more of form than of substance, mechanically followed, and with little impact upon existing sexual harassment, are not sufficient. The employer must demonstrate a legitimate commitment toward ending sexual harassment.

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132. *See* text accompanying notes 8-13 *supra*.
133. *See* Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980).
134. *See* EEOC v. Sage Realty Corp., 507 F. Supp. 599 (S.D.N.Y. 1981).
135. *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978).
136. The guidelines provide that

> [p]revention 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.

45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(f)).
137. *Id.*

In *Continental*, the court noted that because the employer did not know the identity of the harassers, its options were limited. Nevertheless, the court found the company liable because it took no action whatsoever.[138] At a minimum, the court stated, the company could have disseminated an anti-harassment policy to its employees. The *Continental* court further held the company liable for failure to take immediate action after the "grabbing" incident.[139] The debilitating environment created by such inaction, in the face of blatant sexual harassment, should provide a cause of action under Title VII.

Employers have tried a number of remedial plans to deal with problems of discrimination in the workplace, whether such discrimination manifests itself as sexual or racial harassment. *Howard v. National Cash Register Co.*[140] and *Bell v. St. Regis Paper Co.*[141] provide excellent examples of actions employers should take in order to remedy sexual harassment by co-workers. In the *Howard* case, plaintiff claimed that he had been subjected to racial intimidation and harassment by his co-workers. The court found no liability because management took the following steps: (a) transferring plaintiff from the night shift to the day shift; (b) holding frequent meetings with the plaintiff and with the head of his department; (c) explaining the company policy against racial harassment to co-workers and telling them that harassment would be disciplined and that discrimination would not be condoned; (d) taking disciplinary action against a fellow worker who used the word "nigger" in plaintiff's presence even though the term was not directed to him.[142]

In *Bell v. St. Regis Paper Co.*,[143] plaintiff claimed that she was harassed by her co-workers because of her race, sex, and interracial marriage. The plaintiff initially refused to identify all the co-workers who were harassing her. Nevertheless, the company took immediate action to redress her complaints of harassment: it posted notices of company policy regarding harassment, reminded the employees on her shift of the company rules regarding harassment of fellow employees, sought the advice of an independent expert, and transferred plaintiff to a different shift. The company declined to take disciplinary action against the alleged harassers only after the investiga-

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138. Continental Can Co. v. Minnesota, 297 N.W.2d 241, 250 (Minn. 1980). *See also* DeGrace v. Rumsfeld, 614 F.2d 796, 805 n.5 (1st Cir. 1980) (employer failed to satisfy burden of preventing harassment by mere verbal reprimand); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 386 (D. Minn. 1980) (clear company policy against harassment and strong steps to sensitize and discipline workers are required); Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 935 (D.N.J. 1978) (failure to take action after receiving complaint of sexual harassment demonstrates implicit encouragement of such harassment).

139. 297 N.W.2d 241, 250-51 (Minn. 1980).

140. 388 F. Supp. 603 (S.D. Ohio 1975).

141. 425 F. Supp. 1126 (N.D. Ohio 1976).

142. Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975).

143. 425 F. Supp. 1126 (N.D. Ohio 1976).

tion failed to reveal proof against the particular individuals. In finding no valid claim of discrimination, the *Bell* court concluded that defendants' actions did not permit or condone the harassment of the plaintiff.[144]

V

AN EMPLOYER'S REQUIREMENT THAT WOMEN WEAR REVEALING OR SEXUALLY PROVOCATIVE UNIFORMS IS ACTIONABLE SEX DISCRIMINATION

The liability of an employer for sexual harassment extends beyond harassment by the employer himself or by co-workers. Under certain circumstances, harassment by "non-employees," such as customers, may constitute sex discrimination.[145] An employer who requires female workers to wear revealing or sexually provocative uniforms thereby subjects the women to sexual harassment by members of the public. Requiring women to wear revealing or provocative uniforms may itself violate Title VII.

In *EEOC v. Sage Realty Corp.*,[146] the only reported decision addressing the issue of revealing uniforms, the court first denied the defendants' motion for summary judgment, holding that requiring a woman to wear a sexually provocative uniform which resulted in harassment constituted either a prima facie violation of section 703, or, at a minimum, raised factual

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144. *Id.*

145. The EEOC guidelines provide:

> (e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

45 Fed. Reg. 74,676-77 (1980) (to be codified in 29 C.F.R. § 1604.11(e)).

146. 507 F. Supp. 599 (S.D.N.Y. 1981).

Female plaintiffs in two pending cases also have alleged that they were sexually harassed by customers and co-workers when they wore the revealing and provocative uniforms required by their employers. In Marentette v. Michigan Host, Inc., 506 F. Supp. 909 (E.D. Mich. 1980), waitresses employed in the cocktail lounge at the Detroit Metropolitan Airport were required to wear uniforms consisting of a brief red dress with a hem extending slightly below the waist, a ruffled white petticoat, a pair of nylon briefs, and red high-heeled shoes. As the women employees bent over to take drink orders from customers seated at low tables, the uniforms displayed their cleavage and buttocks. Male employees, who worked only as bartenders in the cocktail lounge, wore full-length black slacks, white shirts, ties, vests or blazers, and normal street shoes. At the restaurant, the women employees were required to wear dresses of mid-thigh length with low-cut bodices which exposed their breasts. Male waiters were covered from neck to toe. The court cited the reasoning and language of *EEOC v. Sage Realty Corp.* with approval, but dismissed the action as moot. In Engel v. Harvey's Super Store, No. H-64697 (Mass. Comm. Against Discrim., filed October 24, 1974), two women employees quit their jobs rather than conform to a dress code which required them to wear miniskirts or short shorts which subjected them to sexual harassment.

questions which entitled plaintiff to a trial on the merits. In a subsequent decision, the court found that the "short, revealing and sexually provocative" uniform which the defendants required the plaintiff to wear did in fact cause the plaintiff to be subjected to "repeated harassment," "sexual propositions," and "lewd comments and gestures" in violation of Title VII.[147]

Plaintiff Margaret Hasselman worked as a lobby attendant in a high-rise office building in New York City. Her job duties included security, maintenance, safety, and information functions. The employer provided new uniforms to the lobby attendants every six months and, in the spring of 1976, Hasselman received her new uniform—a loose-fitting, red, white, and blue "Bicentennial" poncho with large openings under the arms, dancer's underpants, and white pump shoes. Hasselman's uniform was exceedingly short, and exposed most of her thighs and buttocks. Because the uniform had large openings on the sides, Hasselman's brassiere and midriff were exposed whenever she moved around in the course of performing her job.

While dressed in the uniform, Hasselman was subjected to repeated sexual harassment by members of the public who came into the lobby where she worked. This harassment included many lewd remarks, sexual propositions, picture-taking, verbal abuse, innuendos, catcalls, whistles, and gestures.

Ms. Hasselman had complained to her employer that she was being harassed because of the provocative uniform.[148] The employer responded that it required all its personnel to wear the uniforms supplied.[149] Ms. Hasselman was subsequently fired, and the court found that she had been discharged for refusing "to comply with the sex-based terms and conditions of employment"[150] imposed by her employer. Although Ms. Hasselman had been discharged, the court stated that a plaintiff need not prove that she was fired in order to state an actionable claim. "A victim of sexual discrimination who quits, rather than comply with an unlawful job requirement,"[151] retains her Title VII rights.

The *Sage* court recognized that such a debilitating work environment, whether or not it results in an adverse job action such as discharge, has a discriminatory impact upon a female worker's employment violative of section 703(a).[152] This conclusion is consistent with the reasoning in *Brown*

147. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 605 (S.D.N.Y. 1981).

148. *Id.*

149. *Id.* at 606.

150. *Id.* at 608. In denying the defendants' motions for summary judgment, the court stated that "even if plaintiff Hasselman was not discharged, the uniform requirement, according to plaintiffs' allegations, had an adverse, discriminatory impact on the terms and conditions of Hasselman's employment in violation of Title VII." EEOC v. Sage Realty Corp., 87 F.R.D. 365, 369 (S.D.N.Y. 1980). *See also* note 107 *supra* for a discussion of constructive discharge.

151. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981).

152. Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (1976).

v. City of Guthrie,[153] *Continental Can Co. v. Minnesota*,[154] the racially discriminatory work environment cases,[155] and the recently finalized EEOC guidelines.[156] Mandatory degrading sex-based uniforms negatively affect women's job opportunities. Such uniform requirements are based on the very stereotypes which Title VII was designed to eliminate.[157]

Further support for the proposition that Title VII protects women from being forced to wear provocative uniforms is found in *Carroll v. Talman Federal Savings and Loan Association of Chicago*.[158] In *Carroll*, the defendant imposed a dress code on its female office employees without imposing a comparable dress code on its male employees. The court focused on Title VII and held that the uniform requirement "discriminated against plaintiff with respect to her 'compensation, terms, conditions or privileges of employment' because of her sex although such conduct is proscribed by the literal terms of that Section [703(a)(1)]."[159] The court noted that two sets of employees performing the same functions were, on the basis of sex, subjected to two entirely separate dress codes. The court stated that

> the disparate treatment is demeaning to women . . . . [T]here is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes.
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> Clearly [the defendants'] justifications for the rule reveal that it is based on offensive stereotypes prohibited by Title VII.[160]

Judge Pell, dissenting, found the uniforms to be appropriate, but recognized that if the uniforms in question had been demeaning to women, then a violation of Title VII could have been found.

> [W]e would have quite a different case if, for example, the female employees of a savings and loan association were required to wear dehumanizing or uncomfortable clothing . . . or any other attire which by the acceptable female dress norms of the time would be considered as embarrassing or demeaning to the wearer while male

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153. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980), discussed in text accompanying notes 106-11.

154. 297 N.W.2d 241 (Minn. 1980), discussed in text accompanying notes 112-20.

155. *See* note 110 *supra*.

156. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).

157. EEOC v. Sage Realty Corp., 87 F.R.D. 365, 368 (S.D.N.Y. 1980).

158. 604 F.2d 1028 (7th Cir. 1979).

159. *Id.* at 1029.

160. *Id.* at 1032-33. The defendants had argued that the uniform requirement reduced dress competition among the women and also insured that business judgment, rather than fashion, would function as the criteria for dress. *Id.* at 1033. Apparently the men were trusted to wear business attire.

> employees were only required to wear conventional business suits.[161]

Requiring a woman to wear revealing clothing, and thus be subject to sexual harassment, creates an inequitable situation when it is a condition of continued employment. Wearing such a uniform is not merely a minor inconvenience that is unrelated to a woman's ability to work. It is a requirement which causes the female worker unnecessary degradation and humiliation.

A. "Grooming" and "Long Hair" Decisions Are Distinguishable

The *Sage* court rejected the employer's contention that the "grooming" cases,[162] in which male employees were fired for their refusal to cut their hair or shave their beards, stand for the principle that a uniform requirement does not involve gender-based discrimination. Rather, these cases hold that Title VII does not prohibit employers from

> making reasonable employment decisions based on factors such as grooming and dress. None of these [grooming] cases supports the proposition that an employer has the unfettered discretion under Title VII to require its employees to wear *any* type of uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative.[163]

In fact, no gender-based discrimination was present in the "long hair" cases. Under the "sex-plus" analysis used by the Supreme Court in *General Electric Co. v. Gilbert*[164] and *City of Los Angeles v. Manhart*,[165] there is not a one-to-one relationship between gender and the regulation prohibiting males from having long hair. Such a regulation divides the employees into

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161. *Id.* at 1037-38.

162. *E.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084 (5th Cir. 1975) (short hair requirement for male employees); Dodge v. Giant Food, Inc., 488 F.2d 1333 (D.C. Cir. 1973) (short hair requirement for male employees); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979) (pantsuits prohibited for female employees); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141 (E.D. Mich. 1974) (short hair requirement for male employees).

The same general situation is presented in all of the "long hair" cases. A male employee, after refusing to cut his hair or shave his beard, is either not hired or discharged by a company. The employee then brings suit charging that the employer's regulations violate Title VII because similarly situated women are allowed to wear long hair. Most courts have held that such regulations do not violate Title VII, although there are arguments to the contrary. *See, e.g.*, Barker v. Taft Broadcasting Co., 549 F.2d 400, 402 (6th Cir. 1977) (McCree, J., dissenting); Earwood v. Continental Southeastern Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (Winter, J., dissenting); Willingham v. Macon Tel. Publishing Co., 482 F.2d 535 (5th Cir.) *rev'd en banc*, 507 F.2d 1084 (5th Cir. 1975).

163. EEOC v. Sage Realty Corp., 87 F.R.D. 365, 369-70 (S.D.N.Y. 1980).

164. 429 U.S. 125 (1976).

165. 435 U.S. 702 (1978).

two classes, long-haired males and all other employees. The first group consists exclusively of males, but the second group contains short-haired males as well as all females. Courts have held that regulations on long hair do not involve discrimination based on sex as such, but rather involve discrimination among males on the basis of hair length.[166] Thus, the provocative-uniform cases may be distinguished from the "grooming" cases, because, unlike the "grooming" cases, the group of women discriminated against is coterminous with the gender.

Three circuits have held that grooming requirements do not violate Title VII unless they are based on immutable sex characteristics or affect constitutionally protected activities or privacy interests.[167] The courts have reasoned that because an employee's hair length, rather than being an immutable characteristic, is a trait over which the employee has complete control, a requirement that men have short hair does not violate Title VII. Here, too, the *Sage* court distinguishes the provocative-uniform cases, be-

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166. *See, e.g.*, Willingham v. Macon Tel. Publishing Co., 507 F.2d 1084, 1088 (5th Cir. 1975).

The Supreme Court has held that the critical issue in such cases is whether one group is exclusively male and the other exclusively female. Thus, in *Manhart*, the employer's pension plan required women employees to contribute approximately 15% more to the plan than similarly situated males. The justification for this differential was based on the actuarial likelihood that women live longer than men and are therefore likely to receive pensions for a longer time than their male counterparts. Nevertheless, the Court found this plan to violate Title VII, because the only reason for the disparate treatment was the individual's sex. City of Los Angeles v. Manhart, 435 U.S. 702, 708-13 (1978).

Such a decision is distinguishable not only from the "grooming" cases but from the pregnancy benefits cases as well. The Court has repeatedly held that plans which discriminate against pregnant women but not against nonpregnant women are not violative of Title VII. The Court distinguished the situation in *Manhart* from those in two leading pregnancy benefits cases, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and Geduldig v. Aiello, 417 U.S. 484 (1974), stating:

> In *Gilbert* the Court held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. Relying on the reasoning in *Geduldig v. Aiello*, 417 U.S. 484, the Court first held that the General Electric plan did not involve 'discrimination based on gender as such.' The two groups of potential recipients which that case concerned were pregnant women and nonpregnant persons. 'While the first group is exclusively female, the second includes members of both sexes.' 429 U.S. at 135. In contrast, each of the two groups of employees involved in this case is composed entirely and exclusively of members of the same sex. On its face, this plan discriminates on the basis of sex whereas the General Electric plan discriminated on the basis of a special physical disability.

435 U.S. at 715 (footnotes omitted).

167. *See, e.g.*, Dodge v. Giant Food, Inc., 488 F.2d 1333, 1336 (D.C. Cir. 1973) (per curiam). "Protected activities" include marriage, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), and childrearing, Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). When a governmental act intrudes upon an individual's fundamental right to make certain personal decisions, the state's purpose in restricting that right must be subjected to strict scrutiny analogous to that used to assess a statute's impact on a suspect class such as race. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (involuntary sterilization held unconstitutional).

cause the discrimination that occurs when a woman is required to wear a sexually provocative uniform is based upon her sex rather than on some condition over which she has control. In *Sage*, Hasselman was discharged when she refused to wear the sexually revealing uniform, a requirement that would never have been forced upon a male lobby attendant.[168]

In finding that grooming codes do not violate Title VII because they do not impinge upon a constitutionally protected right or interest, the courts unnecessarily narrowed the applicability of Title VII by basing their decisions on constitutional notions rather than on the statutory provisions of the Act.[169] No justification exists for narrowing an employee's otherwise clearly defined *statutory* rights vis-a-vis a private employer to the limits of constitutional protection against government action, particularly since the Supreme Court has held that employment discrimination is subject to more probing judicial review under Title VII than under the fourteenth amendment.[170] Finally, because of the profound effect on a woman's employment opportunities, the provocative-uniform cases must be distinguished from the cases which held that grooming requirements do not violate Title VII when there is only a negligible effect on employment opportunities.[171]

B. Business Necessity and Bona Fide Occupational Qualification Defenses

The employer in *Sage* originally argued that the sexually revealing uniform in question was necessary to the operation of the employer's business, a defense commonly known as "business necessity."[172] Although the *Sage* court did not address this issue, because defendants litigated the case solely on their averment that the uniform they required was not sexually revealing, a business necessity defense would not be viable. For a business necessity defense to be argued successfully under Title VII, the employer must show more than a valid business purpose to overcome a prima facie case of discrimination; it must show either that there is a business necessity[173] or that the discriminatory requirement is a bona fide occupational

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168. 507 F. Supp. 599, 609 n.15 (S.D.N.Y. 1981).

169. *See* cases cited note 162 *supra*.

170. Washington v. Davis, 426 U.S. 229, 247 (1976). *See also* Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 n.11 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977).

171. *See, e.g.*, Barker v. Taft Broadcasting Co., 549 F.2d 400, 401 (6th Cir. 1977); Knott v. Missouri Pac. R.R., 527 F.2d 1249 (8th Cir. 1975).

172. Defendants' Memorandum in Support of Motion to Dismiss at 10-12, EEOC v. Sage Realty Corp., 87 F.R.D. 365 (S.D.N.Y. 1980).

173. United States v. St. Louis-San Francisco Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 1116 (1973); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* Sagers v. Yellow Freight Sys., Inc., 529 F.2d 721, 730 n.18 (5th Cir. 1976).

The business necessity exception is applied in only the narrowest circumstances. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244-46 (5th Cir. 1974), *cert. denied*, 439 U.S.

qualification (BFOQ).[174] The employer has the burden of establishing one of these defenses.[175]

To qualify as a business necessity, the employer must demonstrate that the business purpose is

> sufficiently compelling to justify any discriminatory impact; the practice must effectively carry out the business purpose it is alleged to serve; and there must be available no alternative policies or practices which would better accomplish the business purpose or accomplish it equally well but with a lesser discriminatory impact.[176]

The business necessity doctrine is a judicial exception to Title VII which allows an employer to retain discriminatory practices in only a few narrow situations. The defense is applicable where neutral business practices,[177] such as educational requirements, have a disproportionately adverse impact on women or minorities. Where such a disproportionate impact occurs, the employer must demonstrate that the practice is essential because of a legitimate, overriding business purpose.[178] Since the requirement of wearing a revealing uniform applies to women only, the business necessity defense is not applicable.

Furthermore, courts have not only stated that a business necessity must directly foster the safety and efficiency of a business, but that the employer must also have no other reasonable alternatives.[179] Business necessity only justifies a "discriminatory employment practice where no acceptable alternative policies or practices would better accomplish the business purpose advanced with less discriminatory impact."[180] The preference of customers and co-workers for the retention of a discriminatory term of employment

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1115 (1979). *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977); *In re* Consolidated Pretrial Proceeding in the Airline Cases, 582 F.2d 1142 (7th Cir. 1978), *appeal pending*, 442 U.S. 916 (1979). *See also* 29 C.F.R. § 1604.2(a) (1979).

174. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (per curiam); Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1043 (4th Cir. 1976). *But see* Dothard v. Rawlinson, 433 U.S. 321 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Palmer v. General Mills, Inc., 513 F.2d 1040, 1043-44 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791, 797-800 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

175. Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1042-43 (4th Cir. 1976) (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)).

176. Palmer v. General Mills, Inc., 513 F.2d 1040, 1044 (6th Cir. 1975).

177. Neutral business practices are practices applied equally to men and women and to people of all races.

178. *See* Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1321 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

179. EEOC v. New York Times Broadcasting Serv., Inc., 542 F.2d 356, 361 (6th Cir. 1976); Watkins v. Scott Paper Co., 530 F.2d 1159, 1181 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

180. EEOC v. New York Times Broadcasting Serv., Inc., 542 F.2d 356, 361 (6th Cir. 1976).

does not meet this test.[181] The court in *Carroll v. Talman Federal Savings and Loan Association of Chicago*,[182] for example, addressed this element of the business necessity defense. There, the court noted that the employer did not rely on either a BFOQ or business necessity defense; rather, its defense was that the dress code "was job-related or reasonably necessary to the proper operation of its business."[183] Rejecting this contention, the Seventh Circuit recognized that the employer had several permissible alternatives to the discriminatory dress code, such as requiring men in comparable jobs to wear a uniform.[184]

Section 703(e) of Title VII also permits sex discrimination where sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[185] In *Dothard v. Rawlinson*,[186] the Supreme Court was "persuaded—by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[187]

The BFOQ exception provided by section 703(e) is inapplicable to the *Sage* case. It applies only when an employer can prove "that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[188] Because women are routinely hired as lobby attendants, the BFOQ exception is not applicable.[189] Moreover, it certainly does not justify the requirement that provocative uniforms must be worn by female employees.

C. Liability and Notice Requirement

An employer should be held strictly liable for the harassment caused by its requirement that a female employee wear revealing or provocative clothing, because it is the employer's policy which directly causes the harassment. Requiring a woman to wear revealing clothing in the workplace invites male responses to the woman as a sexual object. The probability of sexual advances is so great that employers must be presumed to have constructive notice of the harassment. In *Sage*, the court noted that the revealing and

181. Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971). *See also* 29 C.F.R. § 1604.2(a)(1)(iii) (1979).

182. 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

183. *Id.* at 1031.

184. *Id.*

185. 42 U.S.C. § 2000e-2(e) (1976).

186. 433 U.S. 321 (1977).

187. *Id.* at 334 (footnotes omitted).

188. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

189. *See* Chastang v. Flynn & Emrich Co., 541 F.2d 1040, 1043 (4th Cir. 1976).

sexually provocative uniform "could reasonably be expected to subject [Margaret Hasselman] to sexual harassment when worn on the job."[190] The court found support in *Tomkins v. Public Service Electric & Gas Co.*,[191] in which an employer was held liable for the conduct of his supervisor where the employer knowingly or constructively approved of the sexual advances. The *Sage* court noted that "[i]n requiring Hasselman to wear the revealing Bicentennial uniform . . . defendants made her acquiescence in sexual harassment by the public, and perhaps by building tenants, a prerequisite of her employment as a lobby attendant."[192]

VI
CONCLUSION

Sexual harassment, whether it emanates from a supervisor or co-worker, is actionable sex discrimination under Title VII of the Civil Rights Act of 1964. Similarly, harassment by "non-employees" constitutes sex discrimination when an employer requires female workers to wear revealing or sexually provocative uniforms. Holding the employer strictly liable for the acts of its agents or supervisory personnel is consistent with the purpose and the judicial interpretation of Title VII. When co-workers engage in discriminatory conduct, both the courts and the EEOC guidelines require that the plaintiff show that the employer knows or should have known of the unlawful activity. Since sexual harassment is such a widespread phenomenon, all employers are on notice that sexual harassment may be occurring in the workplace. Awareness of circumstances under which sexual harassment is likely to occur suffices to place the employer on notice. An employer that requires a woman to wear revealing clothing in the workplace should be held strictly liable for the harassment caused by the clothing. The required clothing may reasonably be expected to result in sexual harassment; thus, employers must be presumed to have constructive notice.

Sexual harassment severely interferes with women's ability to be contributing workers in the working life of this country. It is an occupational health hazard, an economic barrier, and it operates to confine women to traditionally female jobs. Society is deprived of the special contributions that individual female workers could provide. Since sexual harassment is deeply rooted in our popular culture, the judiciary must view the employer's liability under Title VII in light of this reality and the purpose of the Civil Rights Act of 1964 to eradicate all forms of discrimination based on sex.

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190. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981).
191. 568 F.2d 1044 (3d Cir. 1977).
192. EEOC v. Sage Realty Corp., 507 F. Supp. 599, 609-10 (S.D.N.Y. 1981).

After this article went to print, the Court of Appeals for the District of Columbia, in Bundy v. Jackson, *641 F.2d 934 (D.C. Cir. 1981), held that sexual harassment, even if it does not result in the loss of a tangible job benefit, is unlawful sex discrimination. The court found that Title VII was violated when an employer created or tolerated a substantially discriminatory work environment. Relying on Judge Goldberg's decision in* Rogers v. EEOC, *454 F.2d 234 (5th Cir. 1971), other racially charged work environment cases, and the EEOC's Final Sexual Harassment Guidelines, 45 Fed. Reg. 74,676 (1980), the court recognized that "conditions of employment" under section 703(a) include the psychological and emotional work environment, and concluded: "How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?" 24 Fair Empl. Prac. Cas. 1155, 1161 (D.C. Cir. 1981). Furthermore, in instructing the district court on appropriate language for an injunction on remand, the court stressed the employer's obligation to prevent sexual harassment, including its responsibility to develop sanctions or disciplinary measures for offending supervisors or co-workers.*