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SEXUAL HARASSMENT AND THE
EMPLOYER-EMPLOYEE RELATIONSHIP

by
ALAYNE B. ADAMS*

I. INTRODUCTION

"It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act . . . ."1

Sex is the most personal of human interactions and romance one of the happiest. Thus, the contention that relations between individuals in which sexuality was the issue could, when occurring in the workplace, constitute a violation of federal law2 has

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(a) Employer practices
"(a) [Employers.] It shall be an unlawful employment practice for an employer—
(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
(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."

For further reading on sexual harassment and Title VII, see Schrepp, Windham, and Draughn, Sexual Harassment Under Title VII: The Legal Status, 32 Lab. L.J. 233 (1981); Bryan, Sexual Harassment As Unlawful Discrimination Under Title VII Of The Civil Rights Act of 1964, 14 Loy. L.A.L. Rev. 25 (1980); Comment, Sexual Harassment In The Employment Context: An Analysis Of The New Title

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been difficult for jurists and laypersons to accept. The threshold of acceptance begins with recognition of the distinction between sexual harassment and flirtation.

Sexual harassment is an expression of power, not an adjunct of romance. It is the imposition of authority by sexual extortion. Sexual harassment may be as crude as rape; it may be as subtle as a leer. The "personal" nature of sexual harassment has given pause to courts reluctant to hold employers responsible for what might have been an isolated incident between two employees of which the employer had no notice and, thus, no opportunity to control.

For example, in Corne v. Bausch and Lomb, Inc., the first reported opinion involving a Title VII sexual harassment claim, the plaintiffs had been employed in clerical positions by the defendant. The two women claimed that their male supervisor had made incessant verbal and physical sexual demands on them and other female employees. The supervisor allegedly favored women who acquiesced with such favors and penalized those who did not. Company officials ignored their complaints, and the women resigned rather than undergo further alleged harassment.

The women employees then filed charges with the Equal Employment Opportunity Commission and subsequently sued the company in federal district court. The court granted the defendant's motion to dismiss, holding that even if the supervisor had acted as charged, forcing the women's resignations, Title VII did not provide a cause of action. In order for the complaints of conduct to establish a cause of action upon which relief could be granted, the court declared that the conduct must have rendered a benefit to the company and have occurred in pursuance of an enunciated company policy. Since the supervisor's behavior rendered no benefit to the company and was not performed in the service of company policy, but was merely the expression of the supervisor's "personal proclivities," the conduct had no relationship to the nature of the employment and thus did not constitute a civil rights violation.

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4 Id. at 163.
5 Id.
The court's concern with the lack of benefit to the company and with the question of the complained-of action being an assertion of company policy was based on its conclusion that Title VII regulated the behavior of employers only. The court did not address the issue of respondeat superior, but seemed rather to stutter in its shock at the idea that unwanted and unwelcome sexual advances which forced women to resign their employment could rise to the dignity of a cause of action under Title VII. The result of such a holding would mean, in the court's view, "a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual." 

Subsequent courts have held that sexual harassment which impacts upon employment is a violation of Title VII. The cases have been presented to the courts as sex discrimination, as sex and race discrimination combined, or as an imposition of less favorable working conditions in an environment charged with sexual animus. The courts have premised their finding of employer liability upon the familiar common law bases of respondeat superior or an implied ratification of impermissible behavior.

The exclusive concern of Title VII is the imposition of an impermissible factor such as sex, race, religion or national origin onto the employment relationship. Therefore, regardless of the legal theory of liability under Title VII, the courts have developed a standard which requires a plaintiff to establish a nexus between the alleged harassment and the employment of the harassed employee. This article will trace the development of this standard and examine methods by which plaintiffs have met the nexus requirement. Cases will be discussed in some detail to demonstrate both the effects of sexual harassment on individuals and the attachment of liability on the employer responsible for employee acts. Finally, case law and the sexual harassment guidelines of the Equal Employment Opportunity Commission will be compared to demonstrate the inclusion of case law in those guidelines.

II. REQUIREMENT OF NEXUS FOR INVOCATION OF RESPONDEAT SUPERIOR

The obvious disdain with which the Corne court viewed the
claims of the plaintiff women was clearly reflected in *Miller v. Bank of America* by the district court's definition of the issue before it: "[W]hether Title VII was intended to hold an employer liable for what is essentially the isolated and unauthorized sex misconduct of one employee to another." The *Miller* court expressed a concern similar to that in *Corne* that "flirtation of the smallest order would give rise to liability" and observed that "[t]he attraction of males to females and females to males is a natural sex phenomenon" which probably played at least a subtle part in most personnel decisions. The district court then granted the defendant's motion for summary judgment.

The plaintiff, Margaret Miller, had been employed by the defendant, Bank of America, and had received excellent evaluations and a raise in salary. However, when she refused her supervisor's demand for sexual favors from "a black chick," she was fired.

The district court based its decision on sworn statements from company officials that the bank had a policy against such conduct and its finding that the plaintiff had not utilized the company's internal grievance procedures.

Where . . . there exists a company-wide policy expressly condemning the alleged misconduct and there exist responsive internal mechanisms established to process employee complaints of the instant sort, a failure on the part of the employee allegedly aggrieved by the condemned practice to avail him- or herself of these internal avenues of redress renders tenuous a finding of employer culpability. The Court of Appeals for the Ninth Circuit rejected this argument, comparing it to a situation in which a taxi company could not be held liable for injuries to a pedestrian because of its driver's negligence simply because the company had a safety program and a policy against negligent driving.

The court observed that employers were generally liable for the torts of employees acting in the course of their employment.

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8 Id. at 234.
9 Id. at 236.
10 Id.
11 Id. at 236 n.2.
12 Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979).
Moreover, the Ninth Circuit said it knew of no provision in either Title VII or 42 U.S.C. § 1981 which exempted employers from the doctrine of respondeat superior. Further, the court pointed out that Title VII defined "employer" to include any agent of an employer.\[^{14}\]

In reversing the district court, the Court of Appeals defined the parameters of an employer's liability for sexual harassment. "We conclude that respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such actions, even though what the supervisor is said to have done violates the company policy."\[^{15}\] Thus, the Ninth Circuit distinguished "flirtation" from a violation of Title VII by requiring that the complained of actions be capable of having direct impact on the employment status of the complaining party.

Other jurisdictions have focused on the effect upon employment by including it in the definition of sexual harassment. In *Heelan v. Johns Manville Corp.*,\[^{16}\] the court defined sexual harassment as "'repeated unwelcome sexual advances' which impact as a term or condition of employment."\[^{17}\] The plaintiff had been hired by the defendant company in 1971 as a senior secretary. In less than three years, she had doubled her salary and earned numerous bonuses, commendations and promotions. The company fired her in 1974 for poor performance and insubordination.\[^{18}\] The court found that the plaintiff had been subjected to "repeated, unwelcome sexual advances" by her supervisor for two years prior to her discharge. However, the court ruled that the imposition of sexual harassment upon an employee did not, in and of itself, suffice to trigger federal sanctions; "termination of plaintiff's employment when the advances were rejected made the conduct legally objectionable."\[^{19}\]

Citing *Heelan*, the district court for the Northern District of Alabama has held that allegations of repeated unwelcome advances

\[^{13}\] Plaintiff had filed suit alleging discrimination on the basis of sex and race in violation of Title VII and 42 U.S.C. § 1981.

\[^{14}\] 600 F.2d at 213.

\[^{15}\] *Id.*


\[^{17}\] *Id.* at 1389.

\[^{18}\] *Id.*

\[^{19}\] *Id.* at 1390.
from a co-worker with no authority as to the plaintiff's employment did not constitute a cause of action under Title VII because "there was no nexus between the alleged statements and any term or condition of the plaintiff's employment..." Similarly, another plaintiff's allegation that her termination was the result of her rebuff of her department chairman's romantic overtures was found insufficient to state a claim upon which relief could be granted because she had not alleged that he had any input in the decision to terminate her. Therefore, the court concluded "plaintiff has not alleged a sufficient nexus between her refusal to accede ... and her termination." Sufficient nexus between the rejection of advances and the refusal to hire, and between rejection of advances and termination, was found where the alleged advances were made by an official with the authority to affect the employment status of the plaintiffs.

III. AFFIRMATION BY RATIFICATION

When the Corne court held that the supervisor's behavior did not violate Title VII because it had not occurred in furtherance of a company policy, it is unlikely that the court really expected to find an employer which had an enunciated policy requiring harassment of female employees. Rather, the court was expressing its reluctance to connect the employee's behavior to his employer so as to subject Bausch and Lomb to liability.

Similarly, in Tomkins v. Public Service Electrical & Gas Co., the district court held that sexual harassment and sexually-motivated assault did not violate Title VII. "It [Title VII] is not intended to provide a federal tort remedy for what amounts to a physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than in a back alley." Thus, the court granted, in part, defendant's motion to dismiss for failure to state a claim under Title VII. However, the court found the connection with the employer necessary to invoke Title VII in the employer's failure to take

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21 Fisher v. Flynn, 598 F.2d 663, 665 (1st Cir. 1979).
25 Id. at 556.
appropriate remedial action upon being made aware of what had occurred.26

In the case, Adrienne Tomkins had complained that her supervisor had required her to have lunch with him, purportedly to discuss her evaluation. During lunch, he made sexual advances to her and told her that acquiescence was necessary for a satisfactory working relationship. When she attempted to leave, he held her in the booth and threatened her with physical harm and economic retaliation. When she complained to his superiors, she was demoted and subjected to disciplinary layoffs, threats of demotion and salary cuts. The defendant company fired her fifteen months after the lunch.

The court held that a company's decision to terminate a female employee who complained of sexual harassment, rather than investigate her complaint, could be a violation of Title VII even though the action of which she complained was not. Such a decision, the court reasoned, could reflect a decision to favor the male over the female on the presumption that a male's services are worth more than those of a female.27

On appeal, the Third Circuit reversed the district court's decision to grant part of the defendant's motion to dismiss. The appellate court ruled that Ms. Tomkins' employer had made acquiescence in her supervisor's demands a necessary prerequisite to continuation of or advancement in her job.28

The Third Circuit defined a violation of Title VII as occurring when:

a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status—evaluation, continued employment, promotion, or other aspects of career development—on a favorable response to those ad-

26 Id. at 557.
27 Id.
28 Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977). As an alternative theory of liability, the plaintiff alleged that her employer had failed to provide a work environment free from an atmosphere of discrimination. Id. at 1046 n.1. However, the court did not reach this issue because it found that the plaintiff's allegations met the two-part test of a condition of employment imposed in a sexually discriminatory manner.
vances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge."

Thus, the Third Circuit established the connection between the acts of the supervisor and the responsibility of the employer on the elements of notice, the impact on the victim's employment status and the response of the employer upon becoming aware of the harassment.

It is to the final element of the Tomkins formula that courts have looked to find that corporations have become parties to acts of sexual harassment by failing to condemn them and thus acquiesce in the perpetration. In Munford v. James T. Barnes & Co., the court placed an affirmative duty on an employer to investigate complaints of sexual harassment. Maxine Munford had been hired to work as an assistant collections manager for the defendant. On January 28, 1976, the first day she began work, a supervisor made sexual overtures which she rejected. He suggested that her job might depend on her response to his demands. Over the next several days the supervisor made repeated sexual suggestions to Ms. Munford, both verbally and by leaving obscene cartoons on her desk. When she threatened to report him, he told her she would be fired.

On February 12, 1976, the supervisor told her she was to accompany him on a business trip to Grand Rapids, Michigan, where she would share a motel room with him and have sexual relations with him. When she refused, the supervisor fired her. The plaintiff complained to company officials but to no avail.

In filing her civil suit, the plaintiff proceeded on the theory that although company officials had not engaged in any actual sexual harassment against her, they were equally liable because they had ratified the conduct by acquiescing in it without any investigation of her allegations. The court agreed. "The failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior."

The Court of Appeals for the Fourth Circuit similarly has held that a complaint alleging sexual harassment in violation of Title VII is sufficient if it contains allegations that an employer

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29 Id. at 1048-49.
31 Id. at 466.
32 Id.
acquiesced in a practice of compelling female employees to submit to the sexual advances of their supervisors. The Court of Appeals for the District of Columbia holds an employer generally liable for the discriminatory acts of its supervisory personnel. However, the employer may be relieved of responsibility for such acts where the supervisor acted in contravention of company policy and the employer, upon becoming aware of the occurrence, took timely and appropriate steps to rectify the wrong.

IV. SEXUAL HARASSMENT AS A CONDITION OF EMPLOYMENT

A. Historical Development From Other Forms of Discrimination

Recognition of the imposition of an unfavorable condition of employment based on the discriminatory attitudes of supervisors and co-employees did not originate in cases alleging sexual harassment. In 1971, the Fifth Circuit found that a working environment could be so heavily polluted with discrimination as to destroy the psychological and emotional stability of minority group workers in violation of Title VII.

In Rogers v. Equal Employment Opportunity Commission, the complainant, Ms. Chavez, was employed by an optometrist located in Texas. Ms. Chavez filed a charge with the EEOC alleging that she, a Spanish-surnamed American, was being discriminated against in the terms and conditions of her employment because of the disparity in the doctor's treatment of his Spanish and Anglo-Saxon patients. She made no allegation of direct mistreatment because of her national origin.

The case came before a federal district court because of the doctor's refusal to provide patients' files to the Commission. The district court upheld Rogers' position on the basis that even if the doctor had segregated his patients as Ms. Chavez had alleged, and even if such treatment made her uncomfortable in her job, she was not an aggrieved person in the sense contemplated by Title VII.

The appellate court disagreed, finding that the relationship

35 Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).
37 Id. at 425.
between an employee and the working environment was of sufficient significance to be entitled to statutory protection.

Employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and . . . the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.30

Thus, the Fifth Circuit found that Ms. Chavez could be an aggrieved person because of the atmosphere in which she worked.

Similarly, in Carroll v. Talman Federal Savings & Loan Association,31 the Court of Appeals for the Seventh Circuit found the imposition of a dress code on female employees, but not on male employees, to be a demeaning condition of employment based on impermissible sexual stereotypes. The defendant required its female employees to wear uniforms of interchangeable slacks, tops, skirts and jackets. The men were permitted to exercise individual taste and discretion in their choice of attire. Women, the defendant explained, dressed "competitively" and so could not be trusted to exercise good business judgment in their choice of attire. Interestingly, the district court found that neither the plaintiff, who refused to wear the uniform, or the other women, when allowed to appear in clothing of their own choice on the once a month "glamour day," had ever appeared in any clothing that was less than dignified or that was inappropriate for a business occasion.

Nevertheless, the district court granted the defendant's motion for summary judgment on the basis that the women were not affected in their employment opportunities by being required to wear recognizable uniforms.32 Although the uniforms were not provocative as in Equal Employment Opportunity Commission v. Sage Realty,33 or disfiguring, the Court of Appeals held that "when some employees are uniformed and others are not there is a natural tendency to assume that the uniformed women have a lesser professional status than their male colleagues attired in normal business clothes."34 The court concluded that the defendant

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30 Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).
31 604 F.2d 1028 (7th Cir. 1979).
34 604 F.2d at 1033.
had discriminated against women in violation of Title VII's prohibition against sex discrimination with respect to compensation, terms, conditions or privileges of employment.

B. Racial and Ethnic Harassment Compared

The liability of an employer for the contamination of a work environment due to racial, ethnic and religious taunts and slurs depends in large part on who the offenders are and what the employer's reaction is. Although the employer may be absolutely liable for the acts of his supervisors, an employer they avoid liability to the extent that it tried to exercise control over employees to prevent such behavior.

In Howard v. National Cash Register Co., the plaintiff, a black male, had been encouraged by his supervisors to apply for a plant guard position. He applied, was given appropriate training and was appointed to the position. No evidence was presented that plaintiff had suffered any discrimination in any of the terms of his employment other than harassment from his white co-workers because of his race. To the contrary, the evidence showed that he earned slightly more than the average guard and had the sympathetic attention of management when he complained of jokes about and reference to his race. Each of his complaints was diligently investigated and appropriate action was taken. One employee who had used the word "nigger" in his presence was suspended for three days. Meetings were held with employees and supervisors at which company policy was made explicit—harassment of other employees because of race or other ethnic or religious basis would not be tolerated.

The court found that the plaintiff had not been subjected to a concerted pattern of harassment, but had been the subject of a few isolated incidents which the defendant's supervisors acted to correct as soon as they had knowledge of them. The court concluded that "the defendant in this case is charged with avoiding all discrimination; the defendant is not charged by law with discharging all Archie Bunkers in its employ."45

In Compston v. Borden, Inc., the court held the employer

44 Id. at 606.
45 Id.
liable for subjecting an employee to an unfavorable condition of employment resulting from his supervisor's taunts and jibes about his ancestry. Ironically, the evidence did not support a finding that the plaintiff was, in fact, of Jewish ancestry. It did, however, support a finding that his supervisor believed he was Jewish and had subjected him to malicious invectives.

The opinion gave no indication that the plaintiff had complained of his supervisor's harassment, but the court declared that when "a person vested with managerial responsibilities embarks upon a course of conduct calculated to demean an employee before his fellows because of the employee's professed religious views, such activity will necessarily have the effect of altering the conditions of his employment."47

The Compston opinion would appear to hold employers liable for harassment of employees by their supervisors whether the employer had knowledge of that harassment or not. Other courts have held employers liable for such acts "only where the employer, either overtly, or covertly, authorized, acquiesced in or ratified the supervisor's discriminatory conduct."48 The Court of Appeals for the First Circuit has gone further, however, holding an employer responsible for its supervisors' actions or inactions in preventing harassment as opposed to merely stopping it when it occurs.49

Demanding not only remedy but also prevention may seem an onerous burden. However, the response of the employer to employee complaints will have an impact not only on the employer's liability, as seen in Howard, but also as a definition of that behavior which is acceptable and that which is not.

C. Ratification of Sexual Harassment by Acquiescence

The response, or rather, the lack of response of an employer to allegations of sexual harassment by co-employees, was a critical factor in the landmark decision of the Minnesota Supreme Court in Continental Can Co. v. Minnesota.50 The state sued pursuant to the state legislation modeled on Title VII, on behalf of a black, female former employee of the defendant, Continental Can. The

47 Id. at 160-61.
49 DeGrace v. Rumsfield, 614 F.2d 796 (1st Cir. 1980).
50 297 N.W.2d 241 (Minn. 1980).
woman alleged that she had been hired by Continental Can in December, 1974, to work in a plant in which only one other woman was employed. She stated that both she and the other woman had been subjected to explicit, sexually derogatory remarks, had been the recipients of unwelcome sexual advances, and that she had been humiliated both racially and sexually by three co-workers. One of the men, referring to the movie Mandingo, told her that if slavery were legal he would own her and train her sexually to be his “bitch.” She and the one other female worker complained to their supervisor in March. However, his response was that they must expect such behavior if they wanted to work with men. The tempo of the harassment increased. One co-worker began patting the woman’s buttocks each time he was near her. Three men told the two women that any woman who worked in a plant had to be a “tramp.” On October 13, 1975, one man grabbed the plaintiff between the legs as she bent over a piece of machinery. She immediately complained to the plant manager, but no action was taken.

Soon afterwards, the plaintiff’s husband confronted one of her tormentors in the plant parking lot. Later, when the husband came at midnight to escort his wife home because of fear for her safety, they discovered that the headlights on her car had been smashed.

The company verbally reprimanded the co-worker the next day for the parking lot confrontation. On that same day, another employee confronted the plaintiff at her home—she had been afraid to return to work—and, in the presence of her children, threatened her with a gun. The plaintiff then had several meetings with plant officials, but she refused to return to work because her employer refused to guarantee her physical safety.

The company, under pressure from the Urban League and the New Way Community Center, and spurred by threats of adverse publicity, suspended two of the co-workers for six weeks. Continental Can then initiated a formal investigation. The firm held a plant meeting at which time employees were advised that the company did not approve of sexual harassment. Soon afterwards, the plaintiff, who had been afraid to return to work, was discharged. She had lasted one year in a “man’s” job.

After her termination, she filed a charge with the Minnesota Department of Human Rights alleging that Continental Can and its plant manager had discriminated against her on the basis of
her sex with respect to the condition of her employment. The department found cause to believe that the company had violated state law and filed a complaint against Continental Can and the plant manager. After a hearing, the examiner concluded that Continental Can had committed two unfair discriminatory employment practices and that the plaintiff had been constructively discharged as a result. Continental Can appealed the decision to the trial court which dismissed the plaintiff's complaint with prejudice. On appeal, the Minnesota Supreme Court, sitting en banc, looked to Title VII cases for precedent as directed by state statute. The court found that the Title VII cases had been brought on causes factually distinguishable from the one before it because those cases involved situations in which a female employee's promotion or retention of her job was conditioned upon her dispensation of sexual favors. "It is as invidious, although less recognizable when employment is conditional either explicitly or impliedly on adapting to a work place in which repeated and unwelcome sexually derogatory remarks and sexually motivated physical conduct are directed at an employee because she is a female."5

The court held that an employer is liable within the purview of the Minnesota statute for acts of sexual harassment which impact on the condition of employment when that employer knew or should have known and failed to take timely and appropriate action. The court's emphasis was very much on the reaction of an employer to such behavior. It explicitly found that the act imposed no duty upon an employer to maintain a "pristine working environment," but that it did impose a duty of timely and appropriate response to complaints of harassment.52 The court concluded that Continental Can had discriminated against the plaintiff when she first complained in March of 1975. The court recognized that because she had refused at that time to name her tormentors, the company was limited in its response but that the total lack of response constituted an unfair practice.

Next, the state supreme court focused on the timeliness of the defendant's action in regard to the "grabbing incident" and concluded that Continental Can's failure to act promptly "connected" the company to that act of harassment. Therefore, Continental Can had committed a second unfair discriminatory prac-

51 Id. at 248.
52 Id. at 249.
tice. Finally, the court concluded that the plaintiff had been constructively discharged when she could only avoid those intolerable working conditions by resigning.

Because the Minnesota court found that the plaintiff had been constructively discharged, it did not have before it the question of a discriminatory work environment which had no effect on employees other than requiring them to accept daily humiliation as the price for maintaining their job. In *Bundy v. Jackson,* the Court of Appeals for the District of Columbia faced that issue and held that an employer violated Title VII when it subjected female employees to sexual harassment even though the resistance of the female employees did not deprive them of any tangible job rights. The district court, which had ruled otherwise, had made an express finding of fact that sexual advances to female employees in the defendant’s agency was "standard operating procedure, a fact of life, a normal condition of employment in the office," but failed to find a violation of Title VII. Plaintiff Sandra Bundy alleged that she was subjected to sexual harassment by her supervisors and had complained to their superior. However, no action was taken and she was told that "any man in his right mind would want to rape you."

Because the plaintiff had been harassed by supervisory personnel and had put the employer on notice, the issue of whether notice to the employer of acts of misconduct by supervisory employees was necessary to invoke liability did not arise. Neither did the issue of employer liability for acts of non-supervisory employees arise. However, the court’s analysis of injury done to a female employee when she must work in an atmosphere of degradation and humiliation because of her sex strongly indicated that it would hold an employer liable, at least upon notice, for any impermissibly-based situation which subjected an employee to less desirable working conditions because of his protected classification.

In reaching its conclusion, the D.C. Circuit referred to *Rogers* and *Talman* as authority for the proposition that racial or ethnic discrimination which manifests itself exclusively by poisoning the work environment violates Title VII. The court then compared those types of discrimination to sexual harassment. "How then

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55 Id.
can sexual harassment, which injects the most demeaning sexual stereotype into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?" The court pointed out the illogical nature of demanding that a person be fired or suffer some other tangible deprivation before permitting a legal remedy. To do so, held the court, would endorse the employer's right to subject a person to a work environment in which endurance of indignities and degradation would be without remedy as long as employment continued.  

In *Kyriazi v. Western Electric Co.*, a case which alleged employment discrimination against women as a class in hiring, pay and promotion and which, after a finding of liability, was settled for six million dollars, the plaintiff also alleged sexual harassment. The plaintiff, Cleo Kyriazi, was a Greek engineer employed by Western Electric. The court found that Kyriazi had been subjected to harassment by her three male co-workers in the form of loud and bawdy speculations as to her marital status and her virginity, physical confrontations, and an obscene cartoon of which she was the subject. Her complaints, which the court characterized as being vociferous and repeated, were largely ignored. She was told that she should be complimented that the young men took such an interest in her, and that such things happened "in a man's working world" every day of the week. When she, in frustration and fury, turned on one of the men and suggested that he was a homosexual, she was sharply criticized for her behavior. The only investigation into any of Kyriazi's complaints occurred after she threatened suit and consisted of interviews of the three men. In fact, the company told Kyriazi that she had to seek psychiatric help or be terminated. Such disregard of her complaints exacerbated the situation by encouraging the perpetrators and infuriating the victim. "When they totally disregarded Kyriazi's complaints about the cartoon and the boisterous speculations about her virginity, she was left with the understanding that her supervisors were discriminating against her and in favor of her male

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54 641 F.2d at 945.
57 Id. at 945-46.
59 Id. at 935.
co-workers." Thus, the employer became a party to the harassment by refusing to alleviate the conditions of Kyriazi's work environment. Even prior to the threat of termination, Kyriazi's shame from the treatment to which she was subjected and her subsequent pain and rage were evident in her somewhat inarticulate discussion with her employer. She would have been allowed to continue in her employment if only she had submitted to the degradation imposed upon her by her co-workers and of which her employer, by its inaction, gave approval.

D. Available Remedies

In her complaint, Dr. Kyriazi alleged common law tort claims as well as violation of Title VII. Thus, the court was able to require the three men who had taken such pleasure in harassing her to each pay $1,500 with no contribution from the company.

In Compston, which was filed under Title VII, the court found that the plaintiff had been fired for legitimate reasons, but had been harassed during his employment because of his purported ancestry. The court awarded, perhaps quixotically, "nominal" damages of $50 plus attorney's fees. Title VII, of course, does not provide for damages other than for lost wages, reinstatement and other equitable relief. However, as the D.C. Circuit pointed out in Bundy, it would be a violation of the public policy expressed by the enactment of Title VII to refuse an employee relief unless and until he had been forced to relinquish a position or promotion because of his objection to a demeaning condition of his job. Through the decisions in Bundy, Kyriazi and Continental Can, harassment as a condition of employment has been recognized to be a violation of Title VII. However, absent a direct impact on the employment status of the victim, a remedy other than equitable relief remains beyond the parameters of Title VII.

V. EEOC GUIDELINES

The Equal Employment Opportunity Commission published its "Final Amendment to Guidelines on Discrimination Because of Sex" in October, 1980. The Commission defined sexual harass-
ment as "unwelcome sexual advances, requests for sexual favors or physical conduct of a sexual nature" when:

1) submission is a term or condition of employment;
2) submission or rejection is the basis for employment decisions;
3) such conduct unreasonably interferes with work performances or creates an intimidating, hostile or offensive work environment.

The Commission conditioned the degree of the employer's responsibility on the relationship of the harasser to the victim. According to the Guidelines, an employer is absolutely responsible for the actions of its supervisory personnel whether or not it had knowledge or notice of those actions. However, where the malfeasant was not supervisory but was a co-employee, the employer becomes responsible for those acts only when it knew or should have known of the acts. Even then, liability attaches only if it failed to take immediate and appropriate remedial action. The Commission went a step beyond the decided cases and declared that an employer could be held responsible for the behavior of non-employees if it knew or should have known of the behavior and failed to take appropriate action.

The Commission had first proposed employer liability for harassment by non-employees in its "Interim Interpretive Guidelines" in March, 1980. Before corporate teeth could manage a proper gnashing, the United States Court for Southern New York issued an exemplary ruling. On defendant's motion for summary judgment, the court ruled that an employer who, ignoring an employee's complaints, required her, as a condition of her employment, to wear in public a sexually provocative costume may be held liable under Title VII for the sexual harassment of that employee by members of the public.

Margaret Hasselman was employed by Sage Realty Corp. as a lobby hostess at a Manhattan office building. The male and female lobby attendants were required to wear outfits specified by Sage. The costumes were normally changed twice a year. The women's uniforms included tennis outfits and kilts while the men wore suits in complementary colors. In June 1976, Sage chose a skimpy red, white and blue "Bicentennial" poncho which revealed

65 Id.
66 Id.
portions of the plaintiff’s breasts and buttocks. The company discharged her when she refused to wear the outfit. In the complaint, filed on her behalf by the EEOC and the National Employment Law Project, Hasselman alleged that she had been subjected to lewd comments and sexual advances from members of the public on the two days she had worn the poncho. The requirement that she wear the sexually provocative outfit was sex based because, but for being female, she would not have been required to expose her body and endure the public’s sexual harassment as a condition of her employment. She also contended that the costume bore no rational relationship to her job but simply was an onerous and irrational condition based on outmoded sexual stereotypes.

The defendant countered by filing a motion for summary judgment based on Title VII cases upholding an employer’s right to maintain grooming and dress codes. The court rejected the motion, stating, “None of these cases support the proposition that an employer has 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.”

At trial, witnesses testified that the garment not only was not job related, but impeded the plaintiff in her duties. The poncho had been constructed for a prototype four inches shorter than the plaintiff and its flowing folds interfered with her ability to operate elevators and to perform other parts of her job. Furthermore, the plaintiff revealed parts of her body each time she stooped or walked. The district court awarded full damages as prescribed by Title VII.

Although not explicitly stated in the Guidelines, the degree of responsibility imposed on the employer is directly proportional to the degree of control the employer might be expected to be able to exercise over the perpetrator. It readily may be assumed that an employer will be in closer contact and hence able to exercise greater control over its supervisors than over other employees. Thus, with differing degrees of control, differing degrees of responsibility may be imposed. But what control may an employer exercise over non-employees sufficient to impose responsibility for their actions? In Sage, the onus for the sexual harassment by

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68 Id. at 609.
members of the public was imposed not because of any control the employer might be expected to have over the public, but because the employer imposed a condition of employment which would produce certain foreseeable results and because it was put on notice that those foreseeable results had, in fact, occurred. By refusing to alleviate the cause of the harassment, the employer had made sexual harassment by non-employees a condition of employment. Thus, although the employer could not exercise control over the behavior of non-employees, it could have controlled the onerous condition which excited that behavior and it chose not to.

Additionally, an employer may also control the behavior of non-employees within its environ by refusing access to persons whose behavior could, if permitted by the employer, give rise to a condition of employment. Thus, an employer which has notice of unsuitable behavior on the part of a patient, client, customer or salesperson could, if it fails to take effective remedial action, be held liable under Title VII for having imposed an unfavorable condition of employment on an employee because of that employee's race, sex, color, age, religion or national origin.

The Commission, in its Guidelines, urged employers to take appropriate affirmative steps to prevent sexual harassment and avoid liability by clearly enunciating a policy in opposition to such behavior, by establishing procedures for resolving such complaints, by receiving all such complaints with dignity and seriousness and by promptly investigating and taking prompt and appropriate action.

The Commission at the close of its Guidelines, outlines an intriguing Title VII violation which is certain to become the subject of future litigation. Under the Guidelines, if sexual favors are demanded of an employee in exchange for employment benefits and if the transaction is completed—i.e., the sexual favors are granted and the employment benefits bestowed, the employer may be liable for sex discrimination to other employees who were equally or better qualified and who did not receive the same employment benefits. There are no reported cases involving this proposed cause of action; however, defendants have argued in sex harassment cases that the plaintiffs had not been discriminated against because of their sex but because they had rejected the

advances of a supervisor.\textsuperscript{71} The ready response of the courts was \textit{Phillips v. Martin-Marietta}\textsuperscript{72} in which the defendant was held to have violated Title VII by its refusal to hire women with preschool age children although they did hire similarly situated men. The Supreme Court noted that although the defendant did not discriminate against all women, they did discriminate against all women of a certain category—those having young children. Thus, the concept of "sex-plus" was born and later ratified in cases against airlines which refused employment to women who wore glasses\textsuperscript{73} or who were married\textsuperscript{74} although they hired other women as well as married and bespectacled men.

In two cases involving pregnancy,\textsuperscript{75} the Court divided the population into two interesting categories of pregnant persons and non-pregnant persons of either sex. The Court then proceeded to hold that denial of disability benefits to "pregnant persons" was not sexually discriminatory because persons in the remaining category were of both sexes. Conversely, it may be argued that a person of either sex, who is denied an employment opportunity in favor of a person who acquiesced to a sexual demand, may have a cause of action under Title VII.

VI. CONCLUSION

From the relatively new body of law on sexual harassment as a violation of Title VII, it is possible to define certain responsibilities which, if neglected by an employer, will give rise to a cause of action under Title VII.

The Guidelines and the case law impose an obvious duty on an employer, upon having notice of harassment of an employee protected by Title VII, to take prompt and effective remedial action. An employer may not, as did Western Electric and Continental Can, fail to take appropriate action because the employer thus ratifies and becomes a party to impermissible actions. Less clear, however, is the employer's liability for the acts of supervisors

\textsuperscript{72} 400 U.S. 542 (1971).
\textsuperscript{74} Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971), cert. denied, 404 U.S. 991 (1972).
of which it has not had notice. The question of whether the employer should have known is a question of fact to be determined in each instance. The issue as to whether an employer was aware that an impermissible condition of employment was imposed on employees by the creation of an unsavory work environment by other employees also is a question of fact. However, like the notice to an employer of harassment by supervisors, notice of such condition which is unheeded will trigger an allegation of violation of Title VII.

In conclusion, the imposition of sexual demands by a supervisor, or the creation of an odious work environment by supervisors or co-employees may constitute a violation of Title VII. Complete remedy for such violation may, in certain cases, be achieved only through resort to other statutes. The imposition of liability absent clear notice to the employer may be an issue of fact. However, both the case law and the Guidelines do exhort the prudent employer to take preventive measures to establish a work environment free of the pollution of sexual harassment.