Sexual Harassment in the Work Place: New Rules for an Old and Dirty Game

On-the-job sexual harassment affects as much as one-half of our female workforce. While Title VII of the 1964 Civil Rights Act provides a federal cause of action for some victims, harassment in the work place is far from being eliminated. This comment argues for broader federal protection of harassment victims and evaluates the remedies presently available under state law.

INTRODUCTION

Jane Smith[1] used to enjoy her work as a dispatcher with the city police department. But twice recently her supervisor, Lieutenant Brown, approached her at work and asked her to remove her clothes. Jane promptly protested to the police chief, who told her that she was overreacting.

The situation steadily worsened. Brown repeatedly brought in pictures of nude women and asked Jane to compare herself with the photographs. Since department regulations forbade Jane from leaving the dispatch area during working hours, she could not ignore the constant sexual remarks and gestures. Work became unbearable, and Jane quit.

Jane's situation is quite common. Sexual harassment[2] in the employment setting affects a significant portion of the female workforce.[3] It is a form of sex discrimination[4] that can result in

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[1] The facts presented are based on Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

[2] Sexual harassment is commonly defined as "sexual advances made with an explicit or implied threat of adverse job consequences for a failure to comply or as one adversely affecting a condition of employment." Note, *Sexual Harassment and Title VII: The Foundation for the Elimination of Sexual Cooperation as an Employment Condition*, 76 MICH. L. REV. 1007, 1007 n.2 (1978).

[3] Recent surveys indicate that sexual harassment may affect as much as 50% of the female workforce. *See* Redbook, Nov. 1976, at 74-75; N.Y. Times, Aug. 19, 1975, at 38, col. 4; United Nations Ad Hoc Group on Equal Rights for Women, *cited in* Comment, *Employment Discrimination—Sexual Harass-*

severe psychological and economic harm to the victim.[5]

Title VII[6] of the 1964 Civil Rights Act[7] creates a cause of action for discrimination affecting the terms, conditions or privileges of an individual's employment.[8] Most federal courts narrowly interpret the phrase "term or condition of employment" to limit Title VII protection against on-the-job sexual harassment.[9] Under this interpretation, Title VII protection is avail-

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ment and Title VII, 51 N.Y.U. L. REV. 148, 149 n.6 (1976).

[4] The first district court decisions to consider the question held that sexual harassment did not constitute sex discrimination for purposes of Title VII. *See* Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976); Miller v. Bank of America, 418 F. Supp. 233, 234 (N.D. Cal. 1976); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975); Garber v. Saxon Indus., Inc., 14 Empl. Prac. Dec. 4896 (E.D. Va. 1976); Barnes v. Train, 13 Fair Empl. Prac. Cas. 123, 124 (D.D.C. 1974). The courts used two arguments to support this conclusion. The first was that sexual harassment did not constitute gender-based discrimination. The discrimination was not based upon the victim's gender, but upon her refusal to engage in sexual activity. *See, e.g.,* Tomkins v. Public Serv. Elec. Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976). The second argument was that the plaintiff had failed to establish that sexual harassment resulted from a practice or policy attributable to the employer. Sex discrimination did not violate Title VII unless it was based on an employer policy. *See, e.g.,* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975).

On appeal, the courts of appeals reversed each of these district court decisions and held that sexual harassment did constitute gender-based discrimination under Title VII. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Bus. Prods., Inc., 562 F.2d 1032 (4th Cir. 1977); Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (9th Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), *reversing and remanding* Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974).

[5] L. FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 17: "All sexual harassment is a stressful experience. . . . [T]he victim is violated either physically or psychologically and experiences a loss of autonomy and control." *See generally* S. DE BEAUVOIR, THE SECOND SEX (1974); S. FIRESTONE, THE DIALECTIC OF SEX (1970); Comment, *Title VII: Legal Protection Against Sexual Harassment,* 52 WASH. L. REV. 123, 123-24 (1977).

[6] 42 U.S.C. §§ 2000e-2000e-17 (1976).

[7] Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1976)); 42 U.S.C. §§ 1971, 1975a-1975, 2000a-2006 (1970).

[8] Title VII, § 703(a), 42 U.S.C. § 2000e-2 (1976), provides:

> It shall be an unlawful employment practice for an employer 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.

[9] *See* note 18 and accompanying text *infra.*

able to the victim only if her[10] resistance results in a loss or denial of tangible employment benefits.[11] Thus, while all sexual harassment contaminates the work environment, a sexual advance is not actionable unless it is accompanied by threats of direct employment consequences.[12]

In addition, the present judicial approach to sexual harassment discourages employees from complaining when they have been harassed. That is, some courts have required an employee to exhaust her employer's grievance process before bringing a Title VII action whether or not that process would be likely to eliminate the harassment.[13] Unfortunately, a victim's fear of employer inaction or retaliation causes many instances of harassment to go unreported.[14]

This comment examines these judicially imposed limitations with a view toward making Title VII more effective in discouraging sexual harassment. Part I proposes an expanded definition of the phrase "term or condition of employment" that would extend protection to the work environment. Part II suggests that employers develop comprehensive grievance mechanisms for processing employee complaints. It also urges that employees be allowed to go directly to the EEOC[15] when such mechanisms do

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[10] For convenience this comment will use the female gender in referring to victims of sexual harassment. While males can also be subject to sexual harassment, there is only one reported case involving a male making such a claim. Wright v. Methodist Youth Service, 25 Fair Empl. Prac. Cas. 563 (N.D. Ill. 1981) (male employee who claimed that he was discharged because he resisted the homosexual advances of his male supervisor stated a cause of action under Title VII).

[11] It is not the frequent sexual advances, however objectionable they may be, but the termination for failure to acquiesce which violates Title VII. *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1390 (D. Colo. 1978). *See also* Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1047 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977).

[12] Sexual harassment in any form contaminates the work environment. As used in this comment, however, the phrase "contamination of the work environment" refers only to those instances where the victim is exposed to verbal or physical harassment without any threat of direct employment consequences.

[13] *See* Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977).

[14] *See* note 40 *infra*.

[15] The EEOC is the administrative agency created by Congress to enforce and interpret Title VII. 42 U.S.C. § 2000e-4 (1976). The function of the EEOC is to effectuate Title VII's policy of voluntary compliance through the tools of conference, persuasion and conciliation. Culpepper v. Reynolds Metals Co., 421

not exist. Part III discusses instances when state remedies may be more effective than Title VII in eliminating sexual harassment.

I. "Term or Condition of Employment"

A majority of federal courts have held that sexual harassment alone does not affect an employee's terms or conditions of employment.[16] According to these courts, the "term or condition" element of Title VII is violated only when the employer[17] fires, demotes or otherwise disadvantages the employment status of the victim in retaliation for her resisting sexual advances.[18]

F.2d 888, 891 (5th Cir. 1970). The EEOC has no legislative power. Its rule-making authority is limited to the establishment of requirements for employees and unions, as well as rules concerning procedure. 42 U.S.C. § 2000e-8 (1976). The EEOC has recently issued guidelines dealing with sexual harassment. 29 C.F.R. § 1604.11 (1980); *see* notes 26, 41 & 56 and accompanying text *infra*.

[16] *See* note 18 *infra*.

[17] As used in this comment, the term "employer" includes the employer's agents in supervisorial positions. Liability is imputed to the employer because supervisors are capable of directly affecting the employment status of victims of sexual harassment. While harassment by a co-employee generally does not directly affect the victim's employment status, it nevertheless contaminates the victim's work environment. *See* note 12 *supra*. Courts have found an employer liable for harassment committed by non-supervisorial employees if the employer knew or should have known of the alleged harassment. *See* Kyriazi v. Western Elec. Co., 461 F. Supp. 894, 935 (D.N.J. 1978) (employer held liable where supervisors were aware of sexual harassment to which plaintiff was subjected but failed to take any action against the employees who harassed her); *cf.* Friend v. Leidinger, 446 F. Supp. 361 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978) (upholding Title VII action against an employer for racial harassment of the plaintiff by co-employees).

The EEOC Guidelines on Sexual Harassment follow this approach with respect to employer liability. The employer will be liable for harassment by the victim's co-workers if he knew or should have known of the alleged conduct. 29 C.F.R. § 1604.11(d) (1980); *see, e.g.*, Continental Can Co. v. State, 297 N.W.2d 241, 248 (Minn. 1980) (citing EEOC guidelines with approval on this point).

[18] A Title VII cause of action is stated when the plaintiff complains of repeated sexual advances which impact as a "term or condition of employment." Most courts do not find a sufficient impact unless the victim's employment status is directly affected in retaliation for her rejecting a superior's advances. Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044, 1046 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 989 (D.C. Cir. 1977); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 (E.D. Mich. 1977); Williams v. Saxbe, 413 F. Supp.

Thus, the employer can make offensive physical contact, suggestions or gestures without violating Title VII by avoiding action which directly affects the victim's employment status.[19]

By defining "term or condition" to include protection of the work environment, the courts could use Title VII more effectively to discourage sexual harassment. The courts should do two things. First, they should recognize that sexual harassment, like racial and ethnic harassment, can result in psychological harm to the victim. Second, to protect the employee fully, the courts should follow decisions in other Title VII areas defining "term or condition" to extend protection to the work environment.

A. Psychological Harm Implicit in Sexual Harassment

Some courts, recognizing the severe psychological and emotional effects that discrimination can have on the victim, have extended Title VII protection to include the work environment.[20] Sexual harassment is no less threatening to the psycho-

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654, 657 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240, 1245-46, (D.C. Cir. 1978), *remanded for trial de novo,* Williams v. Civiletti, 22 Fair Empl. Prac. Cas. 1311, 1312 (D.D.C. 1980). Direct effects are actions which result in the loss or denial of tangible employment benefits. Examples of actions with direct employment effects are discharge, reassignment, demotion or failure to promote.

With only two recent exceptions, in every successful claim for sexual harassment plaintiffs were fired in retaliation for refusing a superior's sexual demands. Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd on other grounds sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *remanded for trial de novo,* Williams v. Civiletti, 22 Fair Empl. Prac. Cas. 1311 (D.D.C. 1980); Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd,* 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd,* 568 F. 2d 1044 (3d Cir. 1977); Garber v. Saxon Indus. Inc., 14 Empl. Prac. Dec. 4896 (E.D. Va. 1976), *rev'd sub nom.* Garber v. Saxon Bus. Prods., Inc., 562 F.2d 1032 (4th Cir. 1977); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977). *But see* Bundy v. Jackson, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980), *discussed in* note 26 *infra.*

[19] This loophole was criticized by the court in Bundy v. Jackson, 24 Fair Empl. Prac. Cas. 1155, 1161 (D.C. Cir. 1981), *discussed in* note 26 *infra.*

[20] Section 703 is a comprehensive proposition protective of the "employee's psychological [welfare] as well as economic fringes." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972) (ethnic discrimination). The employer must maintain an atmosphere free from psychological harm. *See* Gray v. Greyhound Lines East, 545 F.2d 169 (D.C. Cir. 1976) (psy-

logical welfare of the employee than any other form of discrimination.[21] Sexual harassment inhibits job performance by requiring women to choose either to tolerate sexual advances, to fulfill sexual conditions or to leave work.[22] The psychological injury accompanying such harassment prevents the victim from enjoying the full benefits of employment.[23]

In cases alleging racial or ethnic discrimination, courts have held that racial epithets, insults and ethnic jokes may serve as a basis for a Title VII violation.[24] Surely, sexual harassment in-

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chological harm that resulted from defendant's racially discriminatory hiring was sufficient to support a Title VII action).

One aspect of the psychological harm recognized by the courts and the EEOC is the perpetuation of demeaning stereotypes that reinforce a victim's perception of a subordinate social position. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (requirement of high school diploma or passage of intelligence test for employment disproportionately impacted upon blacks); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (refusal to hire women with preschool-age children); Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir. 1971) (requirement that female flight attendants be single); EEOC Dec. (CCH) 6324 (1971) (referring to black female employees as "girls"); EEOC Dec. (CCH) 6251 (1971) (requiring exaggerated courtesy titles to be used by black employees when addressing white supervisors); EEOC Dec. (CCH) 6160 (1970) (referring to white employees as "Mr." or "Mrs." while calling black employees by their first names).

[21] "Like women who are raped, sexually harassed women feel humiliated, degraded and ashamed, . . . as well as angry." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 124 (1979); *see also* note 5 *supra*. Like other forms of discrimination, sexual harassment also involves the perpetuation of a demeaning stereotype. *See* note 20 *supra*; Heelan v. Johns-Manville, 451 F. Supp. 1382, 1390 (D. Colo. 1978): "The sex stereotype of the sexually accommodating secretary is well documented in popular novels . . . ." *See generally* Comment, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123-34 (1977); S. FIRESTONE, *supra* note 5; S. DE BEAUVOIR, *supra* note 5.

[22] C. MACKINNON, *supra* note 21, at 210. *See also* Tomkins v. Public Serv. Elec. & Gas. Co., 568 F.2d 1044, 1047 (3d Cir. 1977) (court described sexual demands made on plaintiff as an "additional duty or burden plaintiff was required by her Supervisor to meet").

[23] A person under psychological stress is unlikely to be as productive as a worker who is free from any psychological barriers. Therefore, her opportunities for advancement could be inhibited. "The necessity to escape sexual harassment discourages women from remaining at one job long enough to acquire seniority and experience, to their detriment in employment." C. MACKINNON, *supra* note 21, at 210; L. FARLEY, *supra* note 5.

[24] United States v. City of Buffalo, 457 F. Supp. 612, 631-35 (D.N.Y. 1978) (racial slurs); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976)

volving physical contact poses a greater threat to the employee's ability to functon than do racial or ethnic slurs. Yet the majority of decisions do not prohibit sexual harassment involving physical contact unless accompanied by a threat of a direct, adverse effect on continued employment.[25] Moreover, while verbal comments with sexual overtones are no less disruptive or psychologically disturbing than those with racial or ethnic overtones, the latter may give rise to Title VII violations while the former do not. The psychological well-being of the worker is as worthy of protection when the injury results from sex discrimination as when it results from racial or ethnic discrimination.[26]

(religious slurs); Steadman v. Hundley, 421 F. Supp. 53, 57 (N.D. Ill. 1976) (racial slurs); *see* EEOC Dec. (CCH) 6324 (1971) (referring to adult black female employees as "girls"); EEOC Dec. (CCH) 6183 (1970) (racial insults); EEOC Dec. (CCH) 6354 (1970) (racial epithets and harassment); EEOC Dec. (CCH) 6085 (1969) (Polish jokes).

[25] *See* note 18 *supra*.

[26] A recent decision by the U.S. Court of Appeals recognized that Title VII accords sex discrimination the same degree of protection that courts give to racial and ethnic discrimination. The plaintiff complained that she had been denied promotion because she had refused to submit to sexual advances made by her male supervisors. The district court denied relief. It ruled that the plaintiff's submission had not been a "term or condition of employment." Instead, the court said, the supervisors considered their conduct "a fact of life, a normal condition of employment in the office." Bundy v. Jackson, 19 Fair Empl. Prac. Cas. 828, 831 (D.D.C. 1979), *rev'd and remanded,* 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981). The Court of Appeals interpreted "term or condition of employment" to include the psychological work environment. *Id.* at 1160. In so doing, the court stated:

> The relevance of the[se] . . . "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII. Sexual stereotyping through discriminatory dress requirements may be benign in intent, and may offend women only in a general, atmospheric manner, yet it violates Title VII. Racial slurs, though intentional and directed at individuals, may still be just verbal insults, yet they too may create Title VII liability. 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?

Id. at 1161. To insure the psychological well being of the worker, the court held that sexual harassment violates Title VII even if the employee's resistance does not result in a loss of tangible job benefits. *Id.* at 1163.

B. Legal Arguments for Extending Protection to the Work Environment.

In numerous cases alleging racial, ethnic or religious discrimination, both the courts and the EEOC have broadly interpreted the phrase "term or condition of employment" to encompass the overall quality of the work environment.[27] This broad interpretation is consistent with the congressional purpose of Title VII—*i.e.*, to achieve equality of employment opportunity.[28] Sex discrimination is a substantial barrier to equal employment op-

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In rejecting the requirement of direct adverse effects on the employment status of the victim, the court cited the recent EEOC Guidelines on Sexual Harassment. *Id.* at 1162-63. The guidelines attempt to abolish the distinction between acts which compromise the work environment and sexual demands which are a requirement for continued employment. 29 C.F.R. § 1604.11 (1980). The guidelines offer three basic criteria for determining whether or not an act constitutes unlawful sexual harassment:

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

29 C.F.R. § 1604.11(a). *See generally* C. MACKINNON, *supra* note 21; L. FARLEY, *supra* note 5.

[27] "[T]he 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." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972) (ethnic discrimination); *see also* Gray v. Grayhound Lines, East, 545 F.2d 169, 174 (D.C. Cir. 1976) (racial discrimination); United Transp. Local 974 v. Norfolk & W.R.R., 532 F.2d 336, 340 (4th Cir. 1975), *cert. denied,* 425 U.S. 934 (1976) (racial discrimination); Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123, 126 (S.D.N.Y. 1977) (ethnic and religious discrimination), 4 Fair Empl. Prac. Cas. 312 (1972) (ethnic discrimination); 4 Fair Empl. Prac. Cas. 317, 318 (1971) (race discrimination). *But see* Dickerson v. United States Steel Corp., 439 F. Supp. 55, 73 (E.D. Pa. 1977), in which the court concluded that the plaintiffs failed to state a prima facie case of discrimination with respect to a claim of a racially discriminatory atmosphere. The court said, "[S]uch a nebulous concept—that of atmosphere—is not susceptible to any accepted methods of proof. . . ." *Id.* at 74.

[28] *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 26 (1963): "The purpose of Title VII is to eliminate discrimination in employment based on race, color, sex, and national origin." *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

portunity.[29] Courts that construe "term or condition" to exclude protection of the work environment are frustrating the clear intent of Congress to eliminate discrimination in employment.[30]

Further, the language of Title VII does not provide a basis for treating racial, ethnic or religious discrimination differently from sex discrimination.[31] Therefore, plaintiffs alleging sex discrimination should receive the same degree of protection extended to victims in other Title VII areas.[32]

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[29] In hearings conducted before the Senate Subcommittee on Labor; it was stated that "there exists a profound economic discrimination against women workers . . . [and that] [w]omen are subject to economic deprivation as a class." [1973] U.S. CODE CONG. & AD. NEWS, 92d Cong., 2nd Sess. 2137, 2140. *See generally* C. MACKINNON, *supra* note 21.

[30] *See* note 28 *supra;* Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970): "It is the duty of the courts to make Title VII work and the intent of Congress should not be hampered by a combination of strict construction and a battle with semantics." *See also* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957 (1972); Bujel v. Borman Food Stores, Inc., 384 F. Supp. 141, 144 (E.D. Mich. 1974).

[31] *See* Title VII, § 703(a), 42 U.S.C. § 2000e-2 (1976), set out in note 8 *supra.*

The legislative intent behind the original inclusion of the word "sex" is unclear. The word "sex" was adopted by amendment one day prior to House passage of the Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447 (1976), 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000b (1976)). Several writers have theorized that the amendment was offered as a tactic to defeat the measure. Representative Smith (Va.), who proposed the amendment, was an ardent critic of the Act. Nevertheless, the word "sex" was adopted by a vote of 168 to 133. An amendment to clarify the meaning of the word "sex" was defeated. *See* [1964] U.S. CODE CONG. & AD. NEWS, 88th Cong., 2d Sess. 2355-2519. For a further discussion of the legislative history in this area, see Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971); Rosen v. Public Serv. Elec. & Gas Co., 328 F. Supp. 454, 462 n.4 (D.N.J. 1971).

When the 1964 Act was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (1976)), there was considerable discussion of the topic. The report of the Senate Committee on Labor and Public Welfare declared that "[d]iscrimination against women is no less serious that other prohibited forms of discrimination. . . . [I]t is to be accorded the same degree of concern given to any type of similarly unlawful conduct." S. REP. No. 92-415 92d Cong., 1st Sess. 7, 8 (1971).

[32] The courts have applied a higher degree of scrutiny to cases involving racial or ethnic discrimination for purposes of equal protection analysis. In Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978), Justice Powell wrote,

In sexual harassment cases, however, the courts have provided only limited protection to the work environment.[33] Two courts have held that an employer violated Title VII when his harassment created such an oppressive work environment that the employee was forced to resign.[34] Although the employee severed the employment relationship, those courts found a constructive discharge and held the employer liable.[35] The problem with the constructive discharge concept is that it is not invoked unless the employee resigns. Thus the employee risks losing the possibility of any relief if a subsequent Title VII action fails.[36] This

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"In sum, the Court has never viewed such classification [gender] as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis." *Id.* at 303. *See also* Hunter v. Erickson, 393 U.S. 385, 392 (1969); Wayne State Univ. v. Cleveland, 473 F. Supp. 8, 11 (E.D. Mich. 1979).

However, Title VII does not incorporate the constitutional standards used in equal protection analysis. *See, e.g.,* Washington v. Davis, 426 U.S. 229 (1976), in which the Court upheld testing procedures used by the District of Columbia police department against an equal protection challenge. The Court stated that it was erroneous to apply Title VII standards in the resolution of constitutional issues. Unlike Title VII, under which disparate impact is sufficient, the Fifth Amendment requires a showing of discriminatory intent. *Id.* at 236, 237. *See also* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), in which the Court upheld the exclusion of pregnancy disability from a benefit plan for non-occupational sickness and accident benefits. The Court indicated that while Fourteenth Amendment concepts of discrimination were not incorporated in Title VII, they were a useful starting point. *Id.* at 133; *cf.* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (Title VI proscribes only those racial classifications that would violate the equal protection clause of the Fifth Amendment).

[33] *See* note 18 *supra.*

[34] Bundy v. Jackson, 24 Fair Empl. Prac. Cas. 1155 (D.D.C. 1981); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980); *discussed in* note 26 *supra.*

[35] The concept of constructive discharge evolved in the field of labor relations. Employers were prohibited from making an employee's working conditions intolerable and thereby forcing employees to resign because of union activity. *See* NLRB v. Brennan's, Inc., 366 F.2d 560, 563 (5th Cir. 1966); J. P. Stevens & Co., Inc., v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972).

Constructive discharge is increasingly recognized in Title VII cases. The fact that the plaintiff severs the employment relationship does not bar a Title VII cause of action. *See, e.g.,* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 143 (5th Cir. 1975); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 162 (D. Ariz. 1975), *vacated and remanded,* 562 F.2d 55 (9th Cir. 1977); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627, 1631, 1632 (W.D. Okla. 1980).

[36] *See, e.g.,* Brown v. President Nat'l Maritime Union, 14 Fair Empl. Prac.

drastically limits Title VII's efficacy as a remedy for sexual harassment.[37] The courts should extend protection to the environment without forcing the employee to take this significant risk.

II. Employer Policies Prohibiting Sexual Harassment

Even if the phrase "term or condition of employment" is interpreted to extend protection to the work environment, sexual harassment cannot be eliminated unless it is reported. Two things can be done to increase the likelihood that victims will report incidents of harassment. First, employers should establish comprehensive grievance mechanisms designed to eliminate sexual harassment. Second, employees should be allowed to go directly to the EEOC when the employer does not provide an adequate internal mechanism for processing and remedying employee complaints.

A. Employer Grievance Mechanisms

A few courts have held that mere statements by the employer condemning sexual harassment were sufficient remedial mechanisms.[38] Much more comprehensive procedures are necessary, however, if an employer seriously intends to eliminate sexual

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Cas. 639 (S.D.N.Y. 1977) (plaintiff voluntarily resigned and subsequently brought a Title VII action for racial discrimination; court held that the failure to establish discriminatory conduct precluded a cause of action for the voluntary resignation).

[37] *See* Comment, *Legal Remedies for Employment Related Sexual Harassment*, 64 Minn. L. Rev. 151, 156 (1979); Bundy v. Jackson, 19 Fair Empl. Prac. Cas. 828 (D.D.C. 1979), *rev'd*, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981).

[38] Miller v. Bank of America, 418 F. Supp. 233, 235 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 463, 466 (E.D. Mich. 1977).

In *Miller* Bank of America, the employer, had a grievance mechanism designed to investigate employee complaints. This policy only encouraged the reporting of "improper actions or behavior" and suggested that an employee could be suspended for "moral misconduct." *See* Plaintiff's Response To Defendant's Motion to Dismiss for Summary Judgment, Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *quoted in part* in C. MacKinnon, *supra* note 21, at 62. The policy did not state what constituted "improper behavior" or "moral misconduct." It made no mention of sexual harassment and contained no procedure for the rectification of employee grievances. The district court nevertheless held that this policy was sufficient to relieve the employer of liability. 418 F. Supp. at 236.

harassment.[39] It is unlikely that policy statements, by themselves, will effectively deter sexual harassment. As a result, the harassed employee will be reluctant to present her grievance to the employer.[40] Instead, employers must combine internal grievance mechanisms with company-wide policies expressly condemning acts of harassment.[41] The employer should state that

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[39] The facts of Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211 (9th Cir. 1979), support the need for more comprehensive procedures. The plaintiff filed a written complaint with the EEOC. As required under Title VII, *see* notes 53-54 and accompanying text *infra*, the EEOC then contacted the defendant to apprise it of the plaintiff's grievance and to allow the defendant to remedy the situation. Bank of America's grievance mechanism apparently did not rectify the plaintiff's grievances, as evidenced by the "right to sue" letter issued to the plaintiff by the EEOC and the Ninth Circuit's reversal of the district court decision.

[40] A 1975 Working Women's United Institute survey illustrates employee reluctance in these situations. Seventy percent of the 105 women who responded to the survey reported that they had been subjected to "repeated and unwanted sexual comments, looks, suggestions or physical conduct that [they found] objectionable or offensive and cause[d] [them] discomfort on the job." Yet only 12% of these women utilized an internal grievance mechanism to try to stop the abuse, and in more than half of these cases the employers ignored their complaints. E. POLANSKY, *Sexual Harassment in the Workplace*, 8 HUMAN RIGHTS 14, 16 (Winter 1980); *see also* C. MACKINNON, *supra* note 21, at 64.

[41] The EEOC has recognized the need for employer mechanisms designed to eliminate sexual harassment. According to the EEOC guidelines, an employer should take steps 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. 29 C.F.R. § 1604.11(e) (1980).

Similar requirements are found in several California government agency policies prohibiting sexual harassment. *See, e.g.*, California State Personnel Board, Memo to all state agencies and employment organizations concerning the resolution of discrimination in state employment (April 21, 1976); Department of Health Services, Director's memo on sexual harassment (May 7, 1980); California State Department of Motor Vehicles, Memo to staff officers and employees concerning department policy on discrimination and harassment (copy on file at U.C. Davis Law Review office).

An excellent example of a comprehensive mechanism designed to cope with sexual harassment was issued by the United States Secretary of Health, Education and Welfare. The memorandum gave concrete examples of three different types of sexual harassment: (1) explicit or implicit promises of career advancement in return for sexual favors; (2) explicit or implicit threats on the victim's career resulting from rejection of sexual advances; and (3) deliberate, repeated, unsolicited verbal comments, gestures or physical actions of a sexual

sexually offensive conduct will not be tolerated and that punitive steps will be taken against those who engage in such conduct. The employer should develop procedures for adjudicating disputes between employees concerning offensive conduct. Only these affirmative steps will enhance the reporting and thus the elimination of sexual harassment.

B. Direct Resort to the EEOC

An employee may be reluctant to present sexual harassment complaints to her employer if the employer has not provided an adequate mechanism for redress of her grievance. Some courts, however, have not considered this potential reluctance of employees. Instead, these courts have relieved the employer of liability for sexual harassment when the employer had a mere policy prohibiting sexual harassment and the victim failed to complain to the employer.[42] Thus, these courts have required the employee to seek redress through the employer before pursuing her federal remedy.[43]

This requirement is logically and legally unsound. Few employees will be willing to complain to an employer who has not exhibited a clear intention to eliminate the harassment. The employee may suspect that the employer will side with the

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nature. The memorandum also mandated that department heads advise all employees of the prohibitions against such conduct, make employees aware of how to seek redress through the EEOC, train EEO officers to spot the subtleties of sexual harassment, make supervisors aware of their responsibility to take timely corrective action, and designate a high-ranking official to assure compliance with the memorandum.

Other policies emphasize that sexual harassment will result in disciplinary action for the offending employee, including the possibility of discharge for serious violations. *See* American Federation of State, County and Municipal Employees, ON THE JOB SEXUAL HARASSMENT: WHAT THE UNION CAN DO, pgs. 27-29.

[42] Miller v. Bank of America, 418 F. Supp. 233, 236 (N.D. Cal. 1976), *rev'd and remanded*, 600 F.2d 211, 214 (9th Cir. 1979); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382, 1389 (D. Colo. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 463, 466 (E.D. Mich. 1977).

[43] Note, however, that the employee may have other means of redress apart from Title VII, since state law may provide a cause of action for sexual harassment. *See* Section III, "POTENTIAL STATE REMEDIES," *infra*. The victim may also be able to bring a common law action for assault, battery or intentional infliction of emotional distress. *See* Note, *Legal Remedies for Employment Related Sexual Harassment*, 64 MINN. L. REV. 151 (1979).

harassing supervisor to maintain harmony in management.[44] She may even believe that the employer himself will make sexual advances.[45] By failing to consider these legitimate employee concerns, courts requiring the employee to first utilize the employer's mechanism are in effect denying relief to the employee.

There is no legal basis for establishing such a prerequisite to an employee's federal cause of action. Title VII does not make the exhaustion of company remedies a condition precedent to a federal cause of action.[46] It requires only that the EEOC contact the employer after receiving a grievance.[47] The employer is then given the opportunity to implement his grievance mechanism.[48] If the employer rectifies the harassment, no further proceedings involving the employee's complaints are necessary.[49] In this way, the EEOC complaint procedures obviate the need for an exhaustion of employer remedies as the employee's first step.

Thus, allowing employees to go directly to the EEOC will increase the possibility that victims will report harassment and make Title VII a more viable remedy. The employee will be encouraged to complain to the EEOC because of its neutral stance and attractive remedial mechanisms. The possibility of redress

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[44] The facts of Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) are illustrative. The plaintiff was discharged after refusing to acquiesce to her supervisor's sexual demands. Immediately following her discharge, she complained to her supervisor's superiors. The superiors told Ms. Barnes that they would have to support their supervisor and that the termination would stand. *Id.* at 459. *See also* C. MACKINNON, *supra* note 21, at 49.

[45] Company officials often laugh [the complaints] off or consider the woman now available to themselves as well. One factory worker reports: "I went to the personnel manager with a complaint that two men were propositioning me. He promised to take immediate action. When I got up to leave he grabbed my breast and said, 'Be nice to me and I'll take care of you.' "

C. MACKINNON, *supra* note 21, at 49.

[46] "While Congress has established certain preconditions to a suit [under Title VII,] it has not established use of the employer's personnel procedures as such a precondition." Miller v. Bank of America, 600 F.2d 211, 214 (9th Cir. 1979). *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974); Swellwood v. National Can Co., 583 F.2d 419, 421 (9th Cir. 1978); Waters v. Wisconsin Steel Works of Int'l Harvester Co., 502 F.2d 1309, 1316 (7th Cir. 1974).

[47] The EEOC must notify the employer within 10 days after receiving the employee's complaint. 42 U.S.C. § 2000e(5)(b) (1976).

[48] *Id.*

[49] *Id.*

will be far greater with the EEOC than with an employer lacking a sincere commitment to the elimination of sexual harassment.

III. Potential State Remedies

While Title VII protection would be enhanced by allowing initial redress through the EEOC, state remedies may be even more effective in eliminating sexual harassment.[50] In California, for instance, regulations prohibiting sexual harassment are more

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[50] Only six states and the District of Columbia have any official statements prohibiting sexual harassment. These statements, which vary in terms of legal authority and the amount of protection that they provide to the victim, may be summarized as follows: California: Terms, Conditions or Privileges of Employment, Cal. Admin. Code tit. 2, § 7287.6 (1980); *see* note 51-58 and accompanying text *infra*; Connecticut: Human Rights and Opportunities, Conn. Gen. Stat. tit. 46a, 814c, §§ 46-60(8) (1980) (makes sexual harassment unlawful and provides for enforcement through the state's Fair Employment Practices grievance mechanisms); Colorado: Commission on Sex Discrimination, Rule 80.11 (1980) (guidelines) (specific prohibitions against sexually offensive conduct; no discussion of remedial mechanisms); District of Columbia: Sexual Harassment of Government Employees, Exec. Order No. 79-89 (May 24, 1980) (applicable only to employees of the District of Columbia; provides specific definitions of and prohibitions against sexual harassment; mandates investigation of allegations and disciplinary action when warranted); Illinois: Governor's Exec. Order No. 80-1 (designed to heighten awareness of the sexual harassment problem; no remedial mechanisms provided); Rhode Island: Governor's Exec. Order No. 80-9 (Mar. 24, 1980) (applicable to public employees only; contains an expansive definition of sexual harassment, giving more protection against conduct with sexual overtones; provides for EEO officers to train all officers and heads of departments to identify, investigate and resolve sexual harassment problems; enforcement is through Title VII or internal personnel procedures); Wisconsin: Fair Employment/Practices Act, 13 Wis. Stat. § 111.32(5)(g)4 (prohibits making sexual harassment a "term or condition" of employment).

The following states specifically adopt the EEOC guidelines on sex discrimination: Kentucky, 104 KAR 1:050; Michigan, Mich. Civil Rights Commission Interpretative Guidelines, A.6; Nevada, Nevada Equal Rights Commission Guidelines, 6; Washington, State Human Rights Commission, Sex Discrimination Regulations, WAC 162-30-010. However, these legislative mandates preceded the creation of the EEOC Guidelines on Sexual Harassment in 1980, 29 C.F.R. § 1604.11 (1980). Consequently, it is unclear whether or not these states have adopted or will adopt the guidelines.

Virtually every other state prohibits sexual discrimination in employment without referring to sexual harassment. As under Title VII, a plaintiff might argue that sexual harassment is discrimination on the basis of sex and, therefore, a violation of sex discrimination laws. Since that argument is already accepted in federal courts, however, *see* note 18 *supra*, a federal cause of action would likely be advantageous to actions in these state courts.

comprehensive and authoritative than the EEOC guidelines. Although the California courts have not had occasion to determine the validity of these regulations, they appear to be the most effective remedy against sexual harassment available.

The California regulations illustrate how state remedies may provide more protection to the employee than does Title VII. First, California's regulations are issued by the Fair Employment and Housing Commission and, hence, are enforceable as law.[51] The EEOC, on the other hand, does not have the authority to promulgate regulations. Its power is limited to issuing guidelines reflecting the agency's interpretation of Title VII.[52]

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[51] CAL. ADMIN. CODE § 7287.6 (1980) provides, in part:

> Terms, Conditions and Privileges of Employment.
>
> (b) Harassment.
>
> (1) Harassment includes but is not limited to:
>
> (A) Verbal harassment, *e.g.*, epithets, derogatory comments or slurs on a basis enumerated in the Act;
>
> (B) Physical harassment, *e.g.*, assault, impeding or blocking movement, or any physical interference with normal work or movement when directed at an individual on a basis enumerated in the Act;
>
> (C) Visual forms of harassment, *e.g.*, derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or
>
> (D) Sexual favors, *e.g.*, unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors. . . .
>
> (E) In applying this subsection, the rights of free speech and association shall be accommodated consistently with the intent of this subsection.
>
> (2) Harassment of an applicant or employee by an employer or other covered entity, its agents or supervisors is unlawful . . . .
>
> (4) An employee who has been harassed on the job by a co-employee should inform the employer or other covered entity of the aggrievement; however, an employee's failure to give such notice is not an affirmative defense . . . .
>
> (d) Reasonable Discipline. Nothing in these regulations may be construed as limiting an employer's or other covered entity's right to take reasonable disciplinary measures which do not discriminate on a basis enumerated in the Act. . . .

CAL. GOV'T CODE § 12935 (West 1980) provides: "The commission shall have the following . . . powers . . . (a) To adopt, promulgate, amend and rescind suitable rules, regulations and standards . . . to . . . implement . . . and apply . . . any . . . section to this part pertaining to unlawful employment practices. . . ." These regulations are enforceable under CAL. GOV'T CODE § 12960 (West 1980).

[52] The EEOC's rule-making authority is limited to the establishment of re-

Consequently, the EEOC guidelines on sexual harassment lack the legal force of the California regulations.[53]

Second, the California definition of sexual harassment is expansive. Numerous acts with sexual overtones are included in the regulations' definition of sexual harassment, and that definition is not confined to the enumerated acts.[54] The only limit placed upon this protection is a provision that "the rights of free speech and association are to be consistently accommodated."[55] Thus, the California definition encompasses all conduct with sexual overtones not protected by the First Amendment. Once the employee proves conduct with sexual overtones, the burden shifts to the employer to show that the conduct is protected by the First Amendment.

In contrast, the EEOC guidelines define sexual harassment only in general terms. The guidelines state that "verbal or physical conduct of a sexual nature which unreasonably interferes with an individual's work performance or creates an intimidat-

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porting requirements for employees and unions. *See* note 15 *supra*. All other promulgations are expressed via guidelines issued by the EEOC. While the guidelines do not have the force of law, they generally are given great deference by the courts. Griggs v. Duke Power Co., 401 U.S. 424, 433, 434 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971); *cf.* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (EEOC guidelines can be used to determine legislative intent, but the court may accord less weight to such guidelines than to administrative regulations, which Congress has declared shall have force of law). *But see* Clark v. World Airways, 24 Fair Empl. Prac. Cas. 305 (D.D.C. 1980) (court expressly declined to apply EEOC guidelines).

The authoritative status of regulations and guidelines differs. Regulations are substantive rules which are promulgated pursuant to statutory authority and which implement the statute. Guidelines, on the other hand, are interpretive rules or statements used by an agency to advise the public of the agency's construction of the statutes and rules which it administers. K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03, at 126 (3d ed. 1972).

[53] The limited force of the EEOC guidelines may cause a victim of sexual harassment to be denied relief under Title VII. For example, under federal law, because the guidelines are not mandatory authority, the plaintiff may have to convince the court that the work environment is protected under Title VII. *See* notes 12, 18 & 56 and accompanying text *supra*. In deciding the issue, a court could ignore or reject the EEOC's determination that Title VII protection extends to the work environment. In California, however, the regulations extending protection to the work environment are law. Therefore, California courts are compelled to extend protection to the work environment. *See* note 52 *supra*.

[54] 2 CAL. ADMIN. CODE tit. 2, § 7287.6(b)(1) (1980), set out at note 51 *supra*.

[55] *Id.*

ing or hostile work environment" constitutes sexual harassment.[56] Under the EEOC guidelines, therefore, the employee must first prove that an employer or supervisor engaged in conduct with sexual overtones.[57] She must then prove that such conduct unreasonably interfered with her performance or con-

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[56] 29 C.F.R. § 1604.11(a)(3) (1980). By defining sexual harassment in general terms, the guidelines raise an important question: At what point does conduct that may be annoying but lawful become unlawful sexual harassment? Not all actions with sexual overtones constitute sexual harassment. Title VII does not seek to create a sterile work environment in which all comments relating to race, religion or national origin are prohibited. *See, e.g.*, Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977) (in action for ethnic discrimination, court recognized that derogatory comments could be so excessive and opprobrious as to violate Title VII, but ruled that remarks made by plaintiff's supervisors concerning Italians and organized crime did not rise to the level necessary to violate Title VII); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (while holding that the work environment must be kept free from racial discrimination, the court stated that not all remarks wih racial or ethnic overtones violate Title VII).

The guidelines provide little help in determining whether or not an act amounts to an illegal sexual advance:

> In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(b) (1980). Since the necessary factual determination is whether or not the conduct in question "unreasonably" interferes with an individual's work performance, the guidelines incorporate the standard of the "reasonably prudent person." *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 149-50 (4th ed. 1971). While this standard may be familiar to the courts, it provides little guidance to employers seeking to eliminate sexual harassment.

The effectiveness of the guidelines would be enhanced with the addition of two rebuttable presumptions. Under the first presumption, the initial incident of sexual conduct would not be regarded as a violation of Title VII. This presumption would not control, however, if conditions were placed upon the victim's employment status—a per se violation. The presumption could also be rebutted by the employee if the initial violation were sufficiently outrageous.

The second presumption would make any subsequent remarks or conduct of a sexual nature illegal, provided that the victim had previously informed the perpetrator that she found such remarks or conduct objectionable. If the perpetrator had been so informed, the defendant employer would have the burden of proving that the alleged conduct did not unreasonably interfere with the plaintiff's work performance.

[57] 29 C.F.R. § 1604.11(a)(3) (1980).

taminated her work environment.[58] Consequently, unlike the California regulations, the EEOC guidelines place the burden of proving sexual harassment on the victim.

At least in California, state regulations provide greater protection against sexual harassment than do the EEOC guidelines. Victims of sexual harassment should evaluate state remedies to determine if those means of redress are superior to those available under Title VII. If sexual harassment is to be eliminated, victims should be made aware of and have access to the most effective remedies available.

Conclusion

Instead of merely seeking to remedy sexual harassment as it occurs, courts and employers should actively seek to eliminate sexual harassment from the work place. By narrowly defining "term or condition of employment" to exclude protection of the work environment, courts are allowing a significant amount of sexual harassment to go unchecked. But expanding protection to the work environment is only the first step toward the elimination of sexual harassment. When employer mechanisms designed to eliminate sexual harassment are inadequate and nonexistent, victims of sexual harassment should have immediate access to the EEOC. Furthermore, employees should be aware that state remedies may be more effective than Title VII. However, since only a few states provide such alternative remedies, the need to improve federal mechanisms remains crucial.

James Crevelli Gross
Eric Steven Waxman

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[58] *Id.*