Legal Remedies for Employment-Related Sexual Harassment

Minn. L. Rev. Editorial Board

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Note

Legal Remedies for Employment-Related Sexual Harassment

I. INTRODUCTION

Sexual harassment in employment is a severe problem that has received little public attention and even less analytical study. Although this form of harassment dates back to the initial entry of women into the marketplace, it has only recently become controversial. Only recently, too, have significant numbers of working women sought legal redress for the harms caused by sexual harassment.

Sexual harassment "can be any or all of the following: staring at, commenting upon, or touching a woman's body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape." In the employment setting, sexual harassment has been defined as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as worker." Employment-related sexual harassment is peculiarly threatening because of the harasser's generally superior economic posi-

3. L FARLEY, supra note 1, at 15. Theoretically, either sex is capable of engaging in sexual harassment. Undoubtedly, incidents of sexual harassment other than that of a female by a male do occur. Sexual harassment, however, is presently viewed by both commentators and women's groups as a problem faced uniquely by women because of such factors as society's tendency to view women as sex objects, the traditional male prerogative of sexual initiative, the inferior economic standing of women workers, and male distaste of female participation in the work force. See L. FARLEY, supra note 1, at 53; Meyers, Behind Closed Doors, STUDENT LAW., Nov. 1978, at 45. This Note, therefore, will focus on the common forms of sexual harassment suffered by women. Its analysis, however, is clearly applicable to all forms of sexual harassment, whether heterosexual or homosexual, or perpetrated by males or females.
4. L. FARLEY, supra note 1, at 15.
The problem is widespread and creates severe economic and psychological difficulties for the women affected. The outright demand for sexual favors made as a condition for

5. Working women earn substantially less than their male counterparts, and are concentrated in certain industries and occupations. For instance, in 1970, 40% of working males earned over $10,000 annually, and 70% earned over $7,000. On the other hand, 45% of women working full time earned less than $5,000 annually, and 74% earned less than $7,000. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORT, P-60, No. 80 (1971).

Job segregation is a pressing problem, as 52% of working women are employed at predominantly female occupations (occupations in which 70% or more of the workers are female). This index of segregation has remained nearly constant throughout the century; more than two-thirds of all working women would have to change occupations in order to achieve an occupational distribution similar to that of male workers. See Simmons, Freedman, Dunkle & Blau, Exploitation from 9 to 5: Background Paper for the Twentieth Century Fund Task Force on Women and Employment (1974), in B. BABCOCK, A. FREEDMEN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES 192, 195-99 (1975).

More significant disparities between male and female employment status appear when major occupational group figures are broken down. In 1971, over 60% of female white-collar workers (more than one-third of all women employed) held clerical positions, while almost 70% of male white-collar workers (28% of working males) held managerial, professional, or technical positions. In the same year, 43% of male blue-collar workers were craftsmen or foremen, while only 8% of female blue-collar workers held similar positions. Id. at 196-97.


7. Victims of sexual harassment may be subjected to demotion, withholding of overtime, refusal to hire, and job termination. See L. FARLEY, supra note 1, at 15. Women who are fired, or who resign to escape severe harassment, may lose accumulated fringe benefits and seniority rights. They also are forced to endure a period of unemployment and must seek new work with an unfavorable employment record. Sexual harassment also serves to maintain job segregation, since it often discourages women from entering nontraditional jobs. See id. at 45-89.

8. "All sexual harassment is a stressful experience and ego functioning may well be seriously impaired. The victim is violated either physically or psychologically and she experiences a loss of autonomy and control." L. FARLEY, supra note 1, at 17 (quoting social psychologists Harriet Connolly and Judith Greenwald, source not cited). Women who have been sexually harassed report feelings of anger, fright, and defeat, diminished ambition, decreased job satisfaction, impairment of job performance, and physical symptoms such as migraine headaches and loss of appetite. See Working Women United Institute, Sexual Harassment on the Job: Results of Preliminary Survey (1975) (on file at the Minnesota Law Review).
obtaining or maintaining employment is one of the most serious manifestations of sexual harassment. The courts thus far have focused primarily on this type of behavior.\footnote{See text accompanying notes 17-27 infra.}

This Note will examine a number of legal theories that can be used to compensate victims of sexual harassment.\footnote{The analysis in this Note contemplates two forms of sexual harassment. The first occurs when a male uses his superior employment status to extract compliance with his sexual demands, or to levy penalties for failure to comply. Penalties for refusal may include negative job evaluations, poor personnel recommendations, demotions, disadvantageous transfers, withholding of overtime, and termination. \textit{See L. Farley, supra} note 1, at 15. The second form of sexual harassment occurs when a female employee is subjected to a continuous stream of harassment and sexual intimidation by her male co-workers.} Since title VII of the 1964 Civil Rights Act\footnote{42 U.S.C. §§ 2000e to 2000e-17 (1976).} has provided the basis for most litigation in this area, attention will first be directed to the strengths and limitations of that Act. Next, certain common law causes of action—assault, battery, intentional infliction of emotional distress, and breach of contract—will be analyzed as possible methods of redress for sexual harassment. This Note concludes that further statutory regulation is necessary, and proposes a Model Statute designed to eliminate the inadequacies of the current legal remedies relied upon by women who have been sexually victimized on the job.

\section*{II. TITLE VII}

in 1976. The *Williams* court held that the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances,\(^ \text{14} \) constituted a form of sex discrimination in violation of title VII.\(^ \text{15} \) Subsequent decisions have followed the *Williams* holding, and four circuits currently recognize a title VII cause of action for sexual harassment.\(^ \text{16} \) The issue has not yet been addressed by the United States Supreme Court.

There are several problems with sexual harassment theory as it is now applied by the courts. First, courts have narrowly defined the factual contexts in which a title VII suit for sexual harassment will be recognized. Second, courts have been reluctant to impose vicarious liability on employers for harassment perpetrated by supervisory employees. Third, it is clear that the remedies available to successful plaintiffs are inadequate. Finally, the conservative trend discernible in recent Supreme Court decisions addressing other forms of sexual discrimination may undermine the sexual harassment cause of action altogether.

### A. Narrowly Defined Cause of Action

The courts that recognize a title VII cause of action for sexual harassment have all been presented with factual situations that fit neatly into a narrowly defined sexual harassment paradigm: the termination of a woman's employment for resisting the undesired sexual requests of her male supervisor. The rule that has evolved is that a plaintiff claiming sexual harassment under title VII must show that acquiescence in her supervisor's sexual demands was a term or condition of her employment.\(^ \text{17} \)

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14. Plaintiff's complaint alleged that after she refused a sexual advance made by her supervisor, she was subjected to a "continuing pattern and practice of harassment and humiliation . . . , including but not limited to, unwarranted reprimands, [and] refusal to inform her of matters for the performance of her responsibilities," and that her employment was terminated shortly thereafter. 413 F. Supp. 654, at 655-56.

15. *Id.* at 657.


The phrase "term or condition of employment" has been interpreted to mean a "requirement." For example, in *Heelan v. Johns-Manville Corp.*, it was not the supervisor's frequent sexual advances that violated title VII, but the termination of the plaintiff's employment because she refused to acquiesce in the advances. The courts interpreting "term or condition of employment" as "requirement," however, have been faced with fact situations in which employee's acquiescence was indeed a requirement. It is thus unclear whether courts will apply the sexual harassment theory to situations in which frequent and emotionally disturbing sexual demands are made, but not as a requirement for promotion or continued employment.

This uncertainty dilutes the force of the sexual harassment cause of action. For example, a woman may suffer severe emotional and physical harm because of a sexually coercive job atmosphere, even though her employment is not "conditioned" on acquiescence to her supervisor's sexual demands. A coercive atmosphere might result from frequent sexual advances made by a supervisor who uses his economic advantage for leverage. Such coercion might also stem from persistent harassment by male co-workers who desire to keep a woman "in her place." In both these situations, a title VII cause of action would fail if "condition of employment" were interpreted to mean "requirement."

It would certainly be an anomaly of statutory interpretation if courts adjudicating title VII sexual harassment claims continue to apply such a narrow reading to the phrase "condition of employment." In other contexts, courts and the Equal Employment Opportunity Commission (EEOC) have liberally construed "condition of employment" to refer to the overall quality of the working environment. Thus, discriminatory

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1240 (D.C. Cir. 1978). This requirement follows from the language of the statute: "It shall be an unlawful employment practice for an employer—(1) . . . to discriminate against any individual with respect to his . . . terms [or] conditions . . . of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2 (1976).

20. *See cases cited in notes 18, 19 supra*.
conduct that degrades the quality of the working environment or that creates an atmosphere of prejudice has been held to violate title VII.23 This liberal interpretation has been used to prohibit the requirement that exaggerated courtesy be used by blacks when speaking to white supervisors,24 and has led to the condemnation of the discriminatory practice of referring to women as "girls."25

The evil of such conduct is that it reinforces the victims' perception of their subordinate social position. On-the-job sexual harassment embodies the same evil. It reinforces the perception that women should be subordinate and submissive, and that their primary role should be sexual and maternal, not aggressive and worldly.26

It is clear that courts must broaden their interpretation of the "condition of employment" element to encompass the type of on-the-job sexual harassment that results in poor working conditions and loss of opportunities for advancement. Failure to do so drastically limits title VII's efficacy as a remedy for sexual harassment. Such a result would be inequitable since "today employment discrimination is a complex and pervasive phenomenon... the nuances and subtleties of [which] are no longer confined to bread and butter issues."27

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23. In Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), the court noted, "The phrase 'terms, conditions, or privileges of employment' in Section 703 is an expansive concept which sweeps within itsprotective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F.2d at 238.


26. See Note, Title VII: Legal Protection Against Sexual Harassment, 53 Wash. L. Rev. 123, 134-36 (1977); Comment, supra note 6, at 158.

27. Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). Even if courts are willing to permit some expansion of the sexual harassment cause of action under title VII, they may require a high level of proof for establishing the existence of a sexually coercive atmosphere since most courts have been reluctant to hold employers liable merely for their em-
The scope of the title VII action for on-the-job sexual harassment has also been limited by the strict standard courts have imposed for determining whether an employee's harassing conduct will be attributed to his employer. Although courts have announced a variety of standards for determining the level of employer culpability required before vicarious liability may be imposed, in recent cases many employers are released from liability.

The courts in *Barnes v. Costle* and *Heelan v. Johns-Manville Corp.* have adopted the most expansive measure of employer liability, following a line of title VII decisions which hold that an employer is chargeable with the discriminatory actions of its agents or supervisory personnel. The utility of these holdings is limited, however, by the fact that both courts employees' abusive conduct. See *Younger v. Glamorgan Pipe & Foundry Co.*, 418 F. Supp. 743, 755 (W.D. Va. 1976), *vacated and remanded*, 561 F.2d 563 (4th Cir. 1977) ("[S]everal incidents of a white worker referring to a black worker in disparaging terms does not amount to a Title VII case of discrimination."); *Walker v. Columbia Univ.*, 407 F. Supp. 1370, 1377 (S.D.N.Y. 1976) ("[F]rom time to time residuary 'male chauvinism' on the part of individual employees has evidenced itself. However, this does not make a pattern or practice chargeable to an employer and actionable by an employee."); *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522, 537 (W.D. Pa. 1973), *modified*, 541 F.2d 394 (1976), *cert. denied*, 429 U.S. 1041 (1977) (The court held that "defendant is not necessarily responsible for actions of all its employees in expressing or actively carrying out feelings of hostility towards women," although employers are generally responsible for actions of supervisory personnel). Courts, however, might be less reluctant to recognize the discriminatory nature of a sexually coercive atmosphere if they understood the debilitating effect such an atmosphere has on a female employee's ability to work at optimal capacity. *See Comment, Sex—Title VII—Cause of Action under Title VII Arises when Supervisor, with Employer's Knowledge and Acquiescence, Makes Sexual Advances Toward Subordinate Employee's Job Status on Favorable Response, 9 SETON HALL L. REV. 108, 125 (1978).*


29. 561 F.2d 983 (D.C. Cir. 1977).


adopted the *Miller v. Bank of America* rule that an employer may be relieved of liability for sexual harassment perpetrated by its supervisory personnel if three conditions are present: (1) sexual harassment is contrary to company policy; (2) responsive internal grievance procedures have been established to process complaints; and (3) the victim has failed to avail herself of these procedures.

Other courts have adopted far more restrictive rules. Under the holding in *Munford v. James T. Barnes & Co.*, recovery against an employer is allowed only when the employer fails to investigate a claim of sexual harassment and deal appropriately with the offending personnel. The rule adopted in *Tomkins v. Public Service Electric & Gas Co.* is even narrower. The court held that employer liability for sexual harassment perpetrated by its employees exists only where the employer had actual or constructive knowledge of the harassment at the time of its occurrence.

The narrow holdings of these cases, because they insulate employers from liability, are unjustifiable given the liberal construction that generally has been accorded title VII. Broader

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35. *Id.* at 466.
36. 568 F.2d 1044 (3d Cir. 1977).

The term "employer" has been liberally construed to effectuate the purposes of the Act. For example, in *Curran v. Portland Superintending School Comm.,* 435 F. Supp. 1063 (D. Me. 1977), the city of Portland was deemed the plaintiff's employer for the purposes of her title VII claim even though she was actually employed by the school system, and the city was prohibited by charter from involving itself in the administration of the school system. *See id.* at 1073. The city's only tie to the school system was its financial support of the schools. In *Puntolillo v. New Hampshire Racing Comm'n,* 375 F. Supp. 1089 (D.N.H. 1974), the defendant Commission and the New Hampshire Trotting and Breeding Association were both deemed employers of the plaintiff driver-trainer even though driver-trainers were hired, fired, and paid by individual horse owners. The defendant organizations were responsible only for licensing the driver-trainers, and for assigning stall space at the tracks. *Id.* at 1092. *See* Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1342 (D.C. Cir. 1973).

If courts were to liberally construe the scope of employer liability for sexual harassment claims arising under title VII, employers would not, of course, be liable for every sexual advance made by one of their employees. Liability would result only in those situations where a supervisor (or other employee
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application of a title VII analog to respondeat superior would encourage employers to take steps to prevent sexual harassment. Furthermore, the imposition of vicarious liability would not necessarily be unfair even when imposed on employers that have attempted to put an end to harassment. The fact that employees have brought title VII suits despite the existence of internal grievance procedures indicates that such procedures may be ineffective, and that employees have little confidence in them. Moreover, because employers profit from bringing employees together in a work environment, it is reasonable to hold employers liable for harm arising from the interaction of employees. Finally, if there is no comprehensive remedy in respondeat superior, victims of sexual harassment might be left uncompensated simply because of their harassers' financial status. It is clear that employers are better equipped to bear the costs of their employees' sexually discriminatory conduct.

C. UNCOMPENSABLE DAMAGES

Title VII is an inadequate remedy for sexual harassment for yet another reason: no punitive and only certain enumerated compensatory damages are allowed by the Act. Title VII relief may restore many of a harassment victim's tangible losses; under the Act, courts are permitted to award reinstatement.

39. No reason seems to justify relieving an employer of the minimal burden imposed by Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976). See text accompanying notes 32-33 supra. If the Miller standard were adopted by other courts, complaints would not be dismissed as a matter of law when a company pled that it had established internal grievance procedures. It would be a question of fact at trial whether an employer's grievance procedures were effective and operated without creation of an unreasonable fear of reprisal. Thus, a Miller-type standard would encourage employers to make something more than superficial responses to sexual harassment problems.

40. An employer has been held liable for the discriminatory acts of one of its supervisory personnel even when the upper-level management's record in race relations was "exemplary." See Anderson v. Methodist Evangelical Hosp., Inc., 464 F.2d 723, 725 (6th Cir. 1972).


42. See text accompanying notes 117-119 infra.

ment, back pay, lost employment benefits, and attorney's fees. Courts have recognized that acts of discrimination may cause their victims significant psychological harm. In Humphrey v. Southwestern Portland Cement Co., a title VII suit for racial discrimination, the court allowed damages for emotional anguish and loss of experience, concluding that the purposes of the Act would best be served if all injuries caused by discrimination were recompensable. The Humphrey suit, however, was filed prior to a 1972 amendment to title VII that altered section 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, rein-statement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

The addition of the phrase "any other equitable relief" has been interpreted to mean that Congress intended that traditional forms of legal relief, such as punitive and compensatory damages, should not be awarded in title VII suits.

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47. 369 F. Supp. at 835.


This approach has met with substantial criticism.\textsuperscript{51} In *Loo v. Gerarge*,\textsuperscript{52} the court noted that traditional damage awards would better effectuate the purpose of title VII by encouraging private suits and deterring would-be discriminators.\textsuperscript{53} Another court, after determining that the plaintiff's teaching efforts had been hindered by discriminatory working conditions, refused to hold that the "plaintiff may have a right but not a remedy."\textsuperscript{54} Since neither back pay nor reinstatement were appropriate in that case, the court awarded the teacher $1,000 per working year as compensation for the discriminatory working conditions, deeming it "compensatory relief in furtherance of this court's equitable power to make plaintiff whole."\textsuperscript{55} Such an expanded construction of the court's equity powers, of course, totally circumvents the statutory rule. Thus, it is more likely that if any other courts do award compensatory relief beyond that permitted by statute, they will do so only to the extent that it is "incidental" to an award of equitable relief.\textsuperscript{56} In light of the express language of section 2000e-5(g), and the almost unanimous

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\textsuperscript{52} 374 F. Supp. 1338 (D. Hawaii 1974).

\textsuperscript{53} Id. at 1341-42 & n.6.


\textsuperscript{55} Id. at 607.

\textsuperscript{56} This result has been reached in an analogous context. Under rule 23(b)(2) of the Federal Rules of Civil Procedure, plaintiffs may seek designation as a class where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." FED. R. CIV. P. 23(b)(2). Courts have interpreted this rule to mean that rule 23(b)(2) certification applies only to those situations where money damages are not the relief sought. See *LaMar v. A & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973); *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69, 102 (1966) (Advisory Committee note on proposed amendment to rule 23(b)(2)). Nevertheless, courts now permit classes certified under rule 23(b)(2) to bring claims for money damages, so long as the damages claimed are "subsidiary" or "incidental" to the declaratory and injunctive relief sought. See *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1976) (per curiam); *Jones v. Diamond*, 519 F.2d 1090, 1100 n.17 (5th Cir. 1975); *Lynch v. Sperry Rand Co.*, 62 F.R.D. 78, 85 (S.D.N.Y. 1973) (sex discrimination action brought under title VII).
refusal of courts to award compensatory damages, it does not seem probable that judicial action of this type can be relied upon to alleviate the problem of inadequate relief for victims of sexual harassment. 57

D. CONSERVATIVE SUPREME COURT PRECEDENT

A final problem with the cause of action for sexual harassment that has evolved under title VII is that it may not survive a challenge in the Supreme Court. In recent decisions, the Court has adopted a narrow view of what constitutes "gender-based" discrimination. 58 This trend indicates that the Court agrees with earlier lower court opinions which announced that sexual harassment is "not the type of discriminatory conduct contemplated" by title VII. 59

The courts that have recognized the title VII cause of action for sexual harassment have necessarily determined that such conduct constitutes discrimination based on a proscribed classification: sex. 60 These courts have, as a general rule, deemed the requisite "gender-based" variable present whenever a female employee has been sexually harassed, and male employees have not 61 or would not have been 62 subjected to

57. A method for partially ameliorating this inequity was rejected in Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973). The court refused to allow plaintiff to amend his title VII complaint to include a pendent state claim for intentional infliction of severe emotional distress. Id. at 840. Although Congress has expressed its intent that title VII relief not include compensatory awards, it does not necessarily follow that state remedies should not be permitted to fill the gap. Allowing pendent state claims would, therefore, be one method of expanding the relief available to victims of sexual harassment who bring title VII claims.


similar harassment. The rationale is that any consideration of gender in employment decisions is proscribed by title VII. In other words, since the victim would not have been sexually harassed "but for" her sex, the harassment is gender-based discrimination.\textsuperscript{63} A major problem with this "but for" rationale is that it is likely it will be reversed by the Supreme Court. \textit{General Electric Co. v. Gilbert},\textsuperscript{64} a major title VII sex discrimination case, may foreshadow adverse treatment of sexual harassment claims by the Court. In \textit{Gilbert}, the Court held that a disability plan that provided nonoccupational sickness and accident benefits to all General Electric employees, but excluded any benefits for disabilities arising from pregnancy, did not violate title VII's ban on sex discrimination.\textsuperscript{65} The Court stated:

\begin{quote}
[The] insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .
\end{quote}

There are two aspects of the \textit{Gilbert} decision that presage a narrow construction of "gender-based" discrimination in the sexual harassment context. First, the Court relied on its earlier decision in \textit{Geduldig v. Aiello},\textsuperscript{67} a case factually similar to \textit{Gilbert}. The lower court in \textit{Gilbert} had expressly rejected the applicability of \textit{Geduldig} because it had arisen under the equal protection clause of the fourteenth amendment rather than under title VII.\textsuperscript{68} The Supreme Court, however, quoted heavily from \textit{Geduldig}, concluding that decisions arising under the

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\textsuperscript{64} 429 U.S. 125 (1976).

\textsuperscript{65} \textit{Id.} at 145-46.

\textsuperscript{66} \textit{Id.} at 134 (quoting \textit{Geduldig v. Aiello}, 417 U.S. 484, 494 (1974)).

\textsuperscript{67} 417 U.S. 484 (1974).

fourteenth amendment are "a useful starting point" in deciding title VII cases, even though "there is no necessary inference that Congress . . . intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the equal protection clause of the fourteenth amendment." This conclusion is paradoxical since, in the context of racial discrimination, the Supreme Court has sharply differentiated between the standard required to prove discrimination under title VII, and the higher standard required to prove discrimination prohibited by the fourteenth amendment. If the title VII and fourteenth amendment standards become blurred when sex discrimination claims are at issue, it will become increasingly difficult to prove gender-based discrimination under title VII, since the Court has refused to adopt strict scrutiny analysis for challenges of gender-based classifications.

The second important aspect of the *Gilbert* decision is the mode of analysis adopted by the Supreme Court. As Justice Brennan noted in dissent, the outcome of the case was largely predetermined by the conceptual framework within which the Court chose to examine the challenged disability benefits program. The plaintiffs had urged the Court to find a violation of title VII because the omission of pregnancy from the list of covered disabilities had the intended result of leaving "only women [subjected] to a substantial risk of total loss of income

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because of temporary medical disability.” The Court, however, chose to focus on the plan as a “gender-free assignment of risks,” attaching great importance to the fact that “there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” Thus, it concluded that the classification at issue was not gender-based, but simply underinclusive “of the set of risks that the State has selected to insure.”

If the conceptual framework of Geduldig were used in analyzing sexual harassment questions, the title VII cause of action would disappear. Rationales reminiscent of Gilbert and Geduldig have been used by several of the lower courts that have dismissed sexual harassment complaints. For example, in Tompkins v. Public Service Electric & Gas Co., the court concluded that no gender-based claim was made:

In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.

This reasoning ignores the fact that the plaintiff would not have been subjected to harassment but for her sex, just as the plaintiffs in Gilbert would have received total coverage for all potential risks but for their sex.

In Barnes v. Train, the court found that no sex discrimin-
nation was present where the plaintiff had been fired for resisting her supervisor's sexual advances. The *Barnes* court reasoned, "The substance of [the appellant's] complaint is that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."81 This rationale separates employees into two classifications, those who are sexually harassed and those who are not, with the latter classification composed both of males and females. Such reasoning is functionally identical to the rationale employed by the Supreme Court in *Gilbert*, which held that the challenged disability plan was not gender-based since its potential recipients were divided into two groups: pregnant women and nonpregnant persons.82

The *Gilbert* decision, although indicative of the Supreme Court's posture toward claims of gender-based discrimination under title VII, is certainly not controlling precedent for suits involving sexual harassment. *Gilbert* can, of course, be distinguished on its facts. But it also should be read in light of a subsequent Supreme Court decision, *Nashville Gas Co. v. Satty*.83 In *Satty*, the Court did not retreat from its position that distinctions based on pregnancy are not gender-based, but it did hold that an employer's practice of depriving women on pregnancy leave of their accumulated seniority had a prohibited discriminatory effect.84 It seems, therefore, that if plaintiffs in a test case could provide the Supreme Court with sufficient empirical evidence that sexual harassment is largely male behavior directed at females, the Court could conclude that such conduct has a discriminatory effect on women. Discriminatory effect might be established more easily when there is evidence that a supervisor has made advances to several employees, all of whom were female.85 It should also be noted that much of *Gilbert's* precedential value was destroyed by a 1978 amendment to the Civil Rights Act of 1964, which provided that distinctions based on pregnancy constitute sex discrimination violative of

82. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974)).
84. Id. at 140-41.
title VII. This amendment is a clear indication of Congress’ intent that courts should not take a narrow view of the forms of conduct that constitute gender-based discrimination.

The appellate courts that have recognized a cause of action for sexual harassment have adopted an appropriate conceptual framework for examining the problem, properly noting that it is the victim’s gender that prompts the harasser’s attention. One district court has urged that since sexual stereotyping of the kind title VII was meant to eradicate is at the root of a harasser’s conduct, sexual harassment should be within the purview of the Act. Thus, despite the Supreme Court’s conservative stance on gender-based discrimination, there are compelling rationales for justifying a cause of action under title VII for sexual harassment.

III. THE COMMON LAW REMEDIES

Since title VII fails to provide a wholly satisfactory remedy for employment-related sexual harassment, alternative remedies must be devised. Certain common law doctrines provide realistic alternatives for compensating victims of sexual harass-

87. See Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978). The Heelan court noted, “the stereotype of the sexually-accommodating secretary is well documented in popular novels, magazine cartoons and the theatre.” Id. at 1390. The Supreme Court has also noted this dimension of sex discrimination, stating that it is “one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects.” Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall, J., concurring in part and dissenting in part).

It is well-established that “the primary thrust of [title VII] was to discard outmoded sex stereotypes posing distinct employment disadvantages for one sex.” Knott v. Missouri Pac. Ry. Co., 527 F.2d 1249, 1251 (8th Cir. 1975); accord, Dothard v. Rawlinson, 433 U.S. 321, 328 (1977); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969). Therefore, judicial recognition of the dominant role sexual stereotyping plays in instances of sexual harassment would certainly bring such misconduct within the purview of title VII. If courts were to recognize that sexual harassment is a form of invidious discrimination rooted primarily in a pervasive stereotype of women, and grounded the title VII cause of action on this realization, an anomalous situation would result: sexual harassment perpetrated by women against men would not be covered by the Act. Although this situation is relatively unimportant since there is little observed incidence of male victimization by females, it does suggest that the “stereotyping” theory of sexual harassment is somewhat at odds with the “but for” theory discussed earlier. See text accompanying notes 60-63 supra.
ment. Specifically, three actions in tort—assault, battery, and intentional infliction of severe emotional distress—as well as actions for breach of contract, are potentially useful for this purpose.88

A. BATTERY

Battery, usually defined as an “intentional and unpermit-
ted [contact] with the plaintiff’s person,”89 is a remedy of obvi-
ous utility to victims of on-the-job sexual harassment. Such
harassment frequently involves physical contact to some de-
gree.90 Although the contact usually does not result in actual
physical harm, its offensive and insulting nature makes it ac-
tionable as battery.91

The range of compensatory relief available to victims of
battery is wide. Courts have allowed damages for resultant
physical injury, including pain and suffering, and reasonable
medical expenses.92 Moreover, damages have been allowed for
lost earnings and loss of earning capacity suffered as a con-
sequence of battery.93 And, most importantly for victims of sex-
ual harassment, courts have begun to award damages for the
humiliation, disgrace, degradation, and emotional distress that
often result from offensive contact.94 In certain cases, courts

88. See Note, Title VII: Legal Protection Against Sexual Harassment, 53
90. A recent survey revealed that physical contact was present in 56% of
the cases where the survey respondents had reported incidents of sexual har-
assment. Working Women United Institute, Sexual Harassment on the Job: Re-
results of Preliminary Survey, supra note 8.
91. See, e.g., Skousen v. Nidy, 90 Ariz. 215, 218, 367 P.2d 248, 249 (1960) (wo-
man recovered $3,500 actual damages and $1,500 punitive damages as a result of
her employer “placing his hand upon [her] private parts ... and attempting to
found where man slapped woman on buttocks). See generally W. PROSSER,
supra note 89, at 36.
92. See Bullock v. Tamiani Trail Tours, Inc., 266 F.2d 326, 332 (5th Cir.
1970); Baskin v. Tarver, 170 So. 2d 197 (La. Ct. App. 1964); McFadden v. Tate, 350
Mich. 84, 90-91, 85 N.W.2d 181, 183-84 (1957); Powell v. State, 19 Misc. 2d 9, 13, 119
N.Y.S.2d 846, 850 (1959); Garner v. State ex rel. Askins, 37 Tenn. App. 510, 522-23,
266 S.W.2d 338, 364 (1954); Houston Transit Co. v. Felder, 146 Tex. 428, 432-34, 208
S.W.2d 880, 882-83 (1948).
93. See Tollett v. Mashburn, 183 F. Supp. 120, 126 (W.D. Ark. 1960), aff’d,
291 F.2d 89 (8th Cir. 1961); Mobley v. Garcia, 54 N.M. 175, 178, 217 P.2d 256, 256
(1950).
94. See Bullock v. Tamiani Trail Tours, Inc., 266 F.2d 326, 332 (5th Cir.
1959); Jones v. Franklin, 139 Colo. 384, 387, 340 P.2d 123, 125 (1959); Earle v. Wil-
hite, 299 So. 2d 393, 394 (La. Ct. App. 1974); Squyres v. Phillips, 285 So. 2d 337,
have allowed damages for emotional distress even when no physical harm resulted from the battery. 95

A tort action such as battery, which recognizes and provides compensation for the emotional harm resulting from physical harassment, certainly can be useful in overcoming the problem of sexual harassment. The battery action, however, has only limited applicability to the wide spectrum of harmful conduct that comprises this problem. Its primary limitation is that liability for battery does not reach purely verbal harassment. A second constraint is that even where harmful or offensive contact has occurred, many of the resulting harms may not be compensable under battery theory. Third, the battery action is designed for circumstances in which the offensive contact is a single incident involving some use of physical force. It is not well-suited, therefore, to the situation where a supervisor or co-worker who engages in a continual pattern of harassment at some point commits a single battery, since the victim normally can receive only those damages proximately caused by the battery. Thus, the economic 96 and emotional harm caused by a harasser's prior conduct will not attach to the harm resulting from a single battery such as a pat on the buttocks. 97


96. Although courts may award damages for lost earnings or loss of earning capacity resulting directly from a battery, see text accompanying note 93 supra, the economic losses suffered by victims of sexual harassment relating to lost employment opportunities, unfairly withheld promotions, and voluntary resignations are not compensable.

97. Proof of a pattern of sexual harassment preceding the battery, however, may be considered "aggravating circumstances" that justify punitive or exemplary damages. Some jurisdictions deny punitive awards altogether. See, e.g., McVay v. Ellis, 148 La. 247, 88 So. 783 (1921); Adams v. Strain, 80 N.H. 90, 113 A. 209 (1921). Others require a showing of malice. See, e.g., Vancherie v. Siperly, 243 Md. 366, 221 A.2d 356 (1966); Walker v. Kellar, 226 S.W. 796 (Tex. Civ. App. 1921). Furthermore, punitive damages are normally not allowed where the battery was merely technical, with no actual force used. See W. Prosser, supra note 89, at 35. Thus, even when the harasser's aggravated pattern of conduct causes emotional harm, the punitive damages remedy will prove, at best, only partially sufficient.
B. ASSAULT

The action for assault is another possible means for compensating victims of sexual harassment. Assault is an "intentional, unlawful offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt." An action for assault will lie where an employee is subjected to words and actions that reasonably would cause her to believe that an offensive contact is imminent. A victim of assault may recover damages for fright, humiliation, or other forms of emotional distress caused by the defendant's misconduct.

The limitations on the use of this action to combat sexual harassment are similar to the limitations on the use of battery. Although the assault cause of action reaches certain conduct not involving harmful or offensive bodily contact, it provides a remedy only for those damages that result directly from the specific instance of assault. It therefore would not provide a remedy for the emotional harm arising from prior patterns of verbal intimidation that were unaccompanied by demonstrations of physical force. Although a regular pattern of sexual harassment undoubtedly creates a coercive, debilitating atmos-

99. In State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956), the defendant repeatedly stopped his car within a few feet of a woman and moved the lower part of his body back and forth, creating a "reasonable apprehension that [he] was planning to get out of his car and inflict upon her immediate bodily harm to satisfy his lust." Id. at 189, 95 S.E.2d at 529. In Western Union Tel. Co. v. Hill, 25 Ala. App. 540, 150 So. 709 (1933), the court found the requisite "reasonable apprehension" where the defendant extended his hand toward the plaintiff, who was standing behind a four-foot-wide counter, and made suggestive remarks.
101. "Mere words" cannot amount to an assault if unaccompanied by some show of physical force. See Western Union Tel. Co. v. Hill, 25 Ala. App. 540, 150 So. 709 (1933); Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926); Prince v. Ridge, 32 Misc. 666, 66 N.Y.S. 454 (1900). Where solicitations for sexual intercourse form the substance of an assault claim, courts have often said that "it doesn't hurt to ask." See generally Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936). Thus, a supervisor's constant demands for sexual contact may create serious emotional disturbances in the victim, yet such solicitations per se are not actionable as assaults.
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phere, it probably does not create a reasonable apprehension of imminent offensive contact.

C. INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS

A common law remedy clearly suited to compensating victims of sexual harassment is an action for intentional infliction of emotional distress. The emotional harm that may result from persistent sexual harassment is severe, even though it is less tangible than the adverse economic consequences.\(^\text{102}\) In recent years, courts have become increasingly disposed to entertain actions premised on severe emotional distress. Only one jurisdiction refuses to recognize the cause of action altogether,\(^\text{103}\) and many others now allow recovery for mental distress even when it is unaccompanied by physical contact or harm.\(^\text{104}\)

The difficulty with recovering under the intentional infliction of severe emotional distress theory arises from the requirement by most courts that the defendant’s conduct be “extreme and outrageous”\(^\text{105}\) if the plaintiff suffers no physical

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102. See note 8 supra.
103. See Bartow v. Smith, 149 Ohio St. 301, 78 N.E.2d 735 (1949).

[T]he conduct [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, [and] utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”

It is difficult to discern any factual patterns that courts consider “extreme and outrageous.” The following cases involved employment-related incidents determined to be outrageous: Alcorn v. Anbro Eng’r, Inc, 2 Cal. 3d 493, 496, 496 P.2d 216, 217, 86 Cal. Rptr. 88, 89 (1970) (cause of action stated by complaint which alleged that white supervisor shouted at black employee in a “rude, violent and insolent manner” using racial epithets); Beavers v. Johnson, 112 Ga. 1979.
harm along with the mental distress. Therefore, the vitality of this cause of action depends almost entirely on judicial sensitivity to the true nature of sexual harassment. Acts of sexual initiative among co-workers or from a supervisor toward a subordinate may not be recognized as extreme or outrageous unless courts understand the element of economic coercion involved in sexual harassment.

The common law rule that there is no harm in asking, i.e., that an invitation to illicit intercourse is not sufficiently outrageous to be actionable does not necessarily bar recovery for

App. 677, 145 S.E.2d 776 (1965) (cause of action stated by complaint that alleged that manager accused cashier of stealing funds, threatened to call police if she did not replace funds, and verbally abused her in other fashions); Agis v. Howard Johnson Co., 371 Mass. 140, 355 N.E.2d 315 (1976) (cause of action stated by complaint alleged that restaurant owner had announced that until persons stealing from business were discovered, he would fire waitresses in alphabetical order, beginning with plaintiff). The following cases, however, were held not to involve outrageous conduct: Cornblith v. First Maintenance Supply Co., 268 Cal. App. 2d 564, 74 Cal. Rptr. 216 (1968) (following plaintiff's injury in auto accident, defendant supervisor engaged in a pattern of harassment which greatly impeded plaintiff's ability to service his accounts); Dowling v. Blue Cross, Inc., 338 So. 2d 88 (Dist. Ct. App. Fla. 1976) (plaintiffs dismissed from employment on basis of knowingly false accusation that they had engaged in sexual relations with one another in the ladies' lounge of defendant's building).

One court has recognized the potential for severe mental distress resulting from a work atmosphere charged with prejudice. In Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977), plaintiff claimed that he was subjected to continuous humiliation and embarrassment in the form of racial slurs and jokes made in his presence by fellow employees during work hours. The court stated,

Where a person is not free to leave but must remain in physical proximity to others who continually make racial slurs and comments, it is for the jury to determine both whether this is a factor in making the claim one of extreme outrage and the extent to which the employer was or should have been aware of these conditions. . . .

Id. at 741, 565 P.2d 1176-77.


107. A defendant's conduct is more likely to be deemed outrageous if he abuses some relation or position that entails actual or apparent power to damage a plaintiff's interest. See State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952) (individual rubbish collector threatened with economic ruin and physical harm by rubbish collectors association); Johnson v. Sampson, 167 Minn. 203, 208 N.W. 814 (1926) (young pupil harassed by school administrators). See generally RESTATEMENT (SECOND) OF TORTS § 46, Comment e (1965). Abuse of the employer-employee relationship in particular has been noted as a significant factor in the outrageousness of a defendant's conduct. See, e.g., Alcorn v. Anbro Eng'r, Inc., 2 Cal. 3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1977); Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 565 P.2d 1173 (1977).

108. See Davis v. Richardson, 76 Ark. 348, 89 S.W. 318 (1905); Reed v. Maley, 115 Ky. 816, 74 S.W. 1079 (1903); Prince v. Ridge, 32 Misc. 666, 66 N.Y.S. 454 (1900). See generally Magruder, supra note 101, at 1055.
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sexual harassment causing mental distress. Courts have recognized that when aggravating circumstances accompany the invitation, such as when the proposition is repeated to the point of hounding or involves an indecent exposure, a cause of action for mental distress may be stated. Furthermore, at least one court has indicated its willingness to abandon the common law rule altogether.

Another problem with the cause of action for intentional infliction of emotional distress is that courts may be reluctant to apply it, believing that a harasser may not have intended to harm his victim. Courts instead may believe that the harasser's intent was simply to satisfy his own sexual needs. There are a number of cases that have involved persistent sexual advances, however, where courts have found the requisite intent to harm even though the defendants were apparently acting for their own benefit. More generally, courts have found liability where a defendant's actions were intentional, although the particular result, emotional distress, was not.

D. The Scope of Employment

An obvious problem with these common law tort remedies is that they normally allow recovery only from the primary tortfeasor. In order to make these actions viable remedies for victims of sexual harassment, the doctrine of respondeat supe-
rior must be expanded to hold employers liable for the miscon-
duct of their employees.

Under common law, an employer is not liable for the tort of
its agent or servant unless the tort was committed while the
agent or servant was acting within the scope of his employ-
ment. Many courts require that for a servant's act to be
within the scope of employment, it must be motivated, at least
in part, by an intent to serve the master. This requirement,
if strictly followed, would virtually preclude extending liability
to employers for their employees' acts of sexual harassment,
since it is not clear that an employee is in any way furthering
his employer's interest by sexually victimizing a fellow em-
ployee.

This narrow construction of respondeat superior, however,
has not been universally followed. It has been held that where
a tort was not committed in furtherance of the master's busi-
ness, but "arose out of" the employment, it is "within the scope
of employment." By definition, on-the-job sexual harassment
arises out of the employment. It is clearly within a supervisor's
scope of employment to make decisions affecting an employee's
job status. When the supervisor threatens to modify those de-
cisions, or actually does, according to the extent of an em-
ployee's sexual cooperation, no sharp line can be drawn to
separate this conduct from his employment. Similarly, the
ability of an employee's co-workers to create a debilitating
work atmosphere through persistent harassment certainly
arises out of the employment. It is only because the employer
has brought workers together in a confined area on a daily ba-
sis that the harassment can be perpetrated.

113. See generally 77 C.J.S. Respondeat Superior § 77 (1952).
114. See, e.g., Avery v. United States, 434 F. Supp. 937 (D. Conn. 1977); Tri-
State Coach Corp. v. Walsh, 188 Va. 299, 49 S.E.2d 363 (1948). See generally W.
Prosser, supra note 89, at 461.
115. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 174 (2d Cir.
1968). See Carr v. Wm. C. Crowell Co., 28 Cal. 2d 652, 171 P.2d 5 (1946); Hiro-
116. It is not the illegal, malicious, unauthorized, or negligent act of the
servant which is required to be within the scope of the employment,
... because ... the master is liable for any such act of the servant
which, if isolated, would not be imputable to the master, but which is
so connected with and immediately grows out of another act of the ser-
vant imputable to the master, that both acts are treated as one indivi-
dible tort, which, for the purposes of the master's liability, takes its color
and quality from the earlier act.
117. See Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 14 (D.C. Cir.
1940) (construing Workmen's Compensation Act). See also Ira S. Bushey &
Sons, Inc. v. United States, 398 F.2d 167, 174 (2d Cir. 1968); Lundberg v. State, 25
Holding employers liable for the sexual harassment of their employees would be consonant with the rationale behind respondeat superior. The employer's liability is not based on fault, but rather on the notion that because [the employer has engaged] in an enterprise which will, on the basis of all past experience, involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.¹¹⁸

Both these rationales make it reasonable to hold employers liable for the tortious acts of sexual harassment perpetrated by their employees. It is, after all, the employer's personnel structure that tends to create the coercive environment characteristic of sexual harassment. Furthermore, the employer is in the best position to establish the employment policies, grievance procedures, and disciplinary measures necessary to combat the problem. Finally, it is the employer who can most efficiently spread the economic loss suffered by individual employees to the community at large. Thus, there are sound reasons for extending the doctrine of respondeat superior to legitimize employer liability for the narrow class of tortious conduct that comprises on-the-job sexual harassment.¹¹⁹

E. BREA CH OF CONTRACT

When sexual harassment culminates in the dismissal of a victimized employee, that employee may be able to recover her resulting economic loss in a suit for breach of contract. An apparent bar to such an action, the common law rule that employment for an indefinite period of time is absolutely at will, has been modified by a number of recent decisions that hold that under certain circumstances, such as where an employee is dis-

¹¹⁸. W. PROSSER, supra note 89, at 459.
¹¹⁹. A version of respondeat superior broad enough to encompass such liability would not be without precedent. See Ira S. Bushey & Sons, Inc. v. United States, 396 F.2d 167, 171 (2d Cir. 1968) ("a business enterprise cannot justify disclaim responsibility for accidents which may fairly be said to be characteristic of its activities"). Accord, Cruikshank v. United States, 431 F. Supp. 1355, 1358 (D. Hawaii 1977) ("the modern and expanding view is to hold an employer liable for the intentional torts of his employees if . . . it is fair to shift the loss from the victim to the employer").
missed in bad faith, an action for breach of contract will lie. In *Monge v. Beebe Rubber Co.*, the plaintiff claimed that her refusal to date her supervisor resulted in harassment and, ultimately, her dismissal. The court affirmed a jury verdict for back pay on a breach of contract theory.

The *Monge* decision is a significant judicial step toward eliminating sexual harassment that results in wrongful discharge. Its influence, however, may be somewhat limited. Some courts have refused to follow the decision, and, as with title VII claims, the victimized employees may be limited to recovering their consequential economic losses.

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"We believe that the holding in the *Monge* case merely extends to employment contracts the rule that "in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."


123. See text accompanying note 44 supra.


This rule, however, is not without exceptions. Courts have allowed damages for mental suffering where the contract comprehends benefits other than those that are purely pecuniary, such as contracts for undertaking services, see Chelini v. Nieri, 32 Cal. App. 2d 480, 196 P.2d 915 (1948); Lamm v. Shingleton, 231 N.C. 10, 55 S.E.2d 810 (1949), contracts for support of a relative, see Alabama Water Serv. Co. v. Wakefield, 231 Ala. 112, 163 So. 626 (1935), Westervelt v. McCullough, 68 Cal. App. 198, 228 P. 734 (1924), contracts for performance of medical services, see Stewart v. Rudner, 349 Mich. 459, 84 N.W.2d 816 (1957), and contracts for insurance coverage, see Eckenrode v. Life of America Ins. Co., 470 F.2d 1, 5 (7th Cir. 1972), Crisci v. Security Ins. Co., 66 Cal. 2d 425, 429, 426 P.2d 173, 179, 58 Cal. Rptr. 13, 17 (1967). See generally RESTATEMENT (SECOND) OF
F. Summary

Liberal use of the common law remedies described above could provide the flexibility needed to combat sexual harassment in employment. None of the actions would depend upon a judicial finding that the challenged conduct amounted to gender based discrimination. Moreover, a particular charge, or combination of charges, could be tailored to the factual circumstances of almost any case. Finally, under these theories, victims of sexual harassment could be adequately compensated, since damages for mental distress would be available. However, one general problem exists with these common law remedies. The utility of each cause of action is dependent on liberal judicial interpretations of the requisite elements, and of the damages that may be awarded. Judicial conservatism in this area would certainly retard progress toward recompensing victims through the common law.

IV. Further Statutory Regulation

Development of further statutory prohibitions against sexual harassment should be pursued because the continued vitality of the title VII cause of action is questionable, and because the adaptation of common law remedies to sexual harassment problems may require years of litigation. These new statutory prohibitions should arise on two fronts. First, at the federal level, title VII should be amended to provide expressly that sexual harassment constitutes gender-based discrimination in violation of the Act. Second, uniform state legislation similar to

CONTRACTS § 367 (Tent. Draft No. 14, 1979) ("recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the breach is of such a kind that serious emotional disturbance was a particularly likely result"). The wrongful discharge of an employee because of her refusal to submit to sexual advances is much more akin to the cases where mental suffering is to be expected, see id., than to purely commercial transactions where the general rule against damages for mental suffering is rigorously followed. Furthermore, courts may be more willing to award damages for mental suffering if the action for breach of contract also sounds in tort. See Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972); Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Richardson v. Employers Liability Assurance Corp., 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972); Crisci v. Security Ins. Co., 66 Cal. App. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

126. See text accompanying notes 58-87 supra.
the Model Statute proposed below should be promulgated in order to provide expedited relief to sexual harassment victims.

A. AN AMENDMENT TO TITLE VII

The most serious problem with the title VII cause of action for sexual harassment—the necessity for a finding of gender-based discrimination—is also the problem that could be most easily remedied by statutory amendment. As noted previously, it is unclear whether the Supreme Court will find that sexual harassment is gender-based discrimination violative of title VII. Congressional action is necessary, therefore, to bring sexual harassment expressly within the purview of the Civil Rights Act, and to encourage further title VII litigation of sexual harassment claims.

One state, Wisconsin, has taken a similar step by extending its antidiscrimination statute to cover on-the-job sexual harassment. A 1977 amendment to its Fair Employment Act specifically provides that conditioning employment-related decisions on consent to sexual favors constitutes prohibited sex discrimination.

Congress has already demonstrated its willingness to explicitly define behavior that constitutes gender-based discrimination by amending title VII to cover pregnancy-related issues. Other such action should be taken, constituting an

128. Some of the problems with the title VII cause of action, see text accompanying notes 17-87 supra, call for a more liberal judicial interpretation of statutory language rather than statutory amendment. For example, the phrase "term or condition," see text accompanying notes 17-27 supra, is at the heart of many diverse factual issues, and a comprehensive statutory definition of the phrase would be virtually impossible as well as unnecessarily inflexible. Similarly, the issue of whether a court should impose vicarious liability on an employer for the discriminatory acts of his employees is probably best treated on a case-by-case basis with attention given to the particular facts involved.

Extending the remedies provided by title VII to include compensatory relief, however, is a secondary problem that is amenable to treatment by statutory amendment.

129. See text accompanying notes 58-87 supra.

130. The amendment states that it shall be considered discrimination based on sex "[f]or any employer, labor organization, licensing agency or person to make hiring, employment, admission, licensure, compensation, promotion or job assignments contingent upon a person's consent to sexual contact or sexual intercourse." Act of May 8, 1978, 1977 Wis. LAWS 1236, ch. 286 § 3 (codified at Wis. Stat. § 111.32(5)(g)(4) (1979)). The amendment also extended unemployment benefits to employees who quit their jobs because of sexual harassment. See Act of May 8, 1978, 1977 Wis. LAWS 1236, ch. 286 § 1 (codified at Wis. Stat. § 108.04(7)(i) (1979)).

131. See text accompanying note 86 supra.
express declaration of national public policy against sexual harassment.

B. A MODEL STATE STATUTE

A Bill for An Act Prohibiting Sexual Harassment in Employment

(a) It shall be unlawful for any employer, labor organization, licensing agency, or person to make any hiring, employment, admission, licensure, compensation, promotion, or job assignment decision contingent upon a person's consent to sexual contact, or to fail to prevent any employee from being subjected to persistent, unreciprocated sexual advances from or sexual intimidation by supervisory personnel or other employees and agents.

(b) Any person aggrieved by a violation of this chapter may, within six months after the occurrence of the violation, file a verified charge with the State Commission on Human Rights, setting forth the details of the practice complained of, and other such information as the Commission may require. The Commission shall serve a copy of the charge upon the defendant within five days of such filing. The defendant may, prior to the hearing provided for in subdivision (c), file an answer denying, excusing, or justifying the alleged violation.

(c) Within sixty days of the filing of the charge, a hearing shall be held by a hearing officer designated to handle complaints under this Act. The hearing officer shall make findings of fact and conclusions of law, and publicize the same. If the officer finds that a violation of subdivision (a) has occurred, the officer shall issue an order directing the defendant to cease and desist from the violative conduct, and may order the defendant to pay the aggrieved party punitive damages in an amount not less than $25 or more than $500.

(d) Anyone found guilty of repeatedly violating this Act may be subject to such greater civil penalties as are necessary in the judgment of the hearing officer, to effectuate the purposes of this Act.

(e) The court may award attorney's fees and court costs to the prevailing party in any action brought under this Act.

(f) Nothing in this Act shall preclude an aggrieved person from proceeding under federal or common law.

The Model Statute is designed to provide expedited relief in state courts for victims of sexual harassment. Expeditious treatment of such claims is essential, given the emotionally charged nature of sexual harassment situations. Furthermore, speedy procedures are desirable since a lengthy trial, replete with testimony regarding years of discriminatory practices, statistical proof, and so forth, is simply not necessary to correct

132. This language is taken from the 1977 amendment to the Wisconsin Fair Employment Act, see note 130 supra, except that the phrase "sexual contact" has been substituted for "sexual intercourse." This substitution is meant to make the statutory action for sexual harassment capable of redressing the various situations where sexual harassment is present even though no explicit demand for sexual intercourse has been made.

133. The name of the state agency empowered to enforce the state's antidiscrimination laws should be inserted here.
the problem. Generally, under the Model State Statute, it will be necessary to have testimony only from the victim, the defendant, and perhaps from corroborating witnesses.

The prescribed penalties under the Model State Statute are limited, but they will deter particular instances of sexual harassment and educate employers, employees, and the public in general. If the penalties were made more severe, state legislatures might be reluctant to enact them since sexual harassment does not engender a high level of opprobrium from all strata of society. The hearing officer, however, would be accorded sufficient discretion to impose more severe penalties when repeated violations were involved. Finally, the Model State Statute makes clear that in appropriate cases, litigants are free to pursue title VII suits, and recover greater damages, or to bring suits based on common law. Thus, victims of sexual harassment will be accorded the proper measure of freedom to pursue the remedy most clearly suited to their needs and to the factual circumstances of their cases.

V. CONCLUSION

Courts now recognize that on-the-job sexual harassment is a severe problem, and occasionally allow victims to recover under title VII of the Civil Rights Act. As it currently stands, however, the title VII cause of action suffers from serious defects. The first is that courts have restricted its application to a narrow set of factual situations that together comprise only a fraction of the incidents constituting sexual harassment. Another problem is that many of the injuries commonly suffered by sexual harassment victims are not compensable under the Act. A third defect in the title VII cause of action is that the Act makes no provision for imposing vicarious liability on employers for sexual harassment perpetrated by their employees. The final, and most distressing, problem with the title VII sexual harassment theory, however, is that it appears to run afoul of the gender-based discrimination doctrine evolving in the Supreme Court.

Some of these defects can be cured by the common law actions of assault and battery; a relatively recent tort cause of action, the intentional infliction of emotional distress theory is particularly well-suited to recompensing certain injuries not covered by title VII. Moreover, breach of contract theory may provide new avenues of relief as courts become more sensitive to the economic pressures underlying on-the-job sexual harass-
ment. These common law theories do not, however, resolve the respondeat superior problem created in situations where the harasser is a lower-echelon employee.

The best solution to the inadequacies of current sexual harassment theories appears to be further statutory treatment. Title VII should be amended to define sexual harassment as a form of gender-based discrimination. Furthermore, states should enact specific legislation to provide expedited relief to victims of sexual harassment. This response is the least that should be expected from legislatures given the conservative approach courts have taken to this long-standing problem.