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Sexual Harassment: Preventive Steps for the Healthcare Practitioner

*Christine Godsil Cooper**

“A well-intentioned compliment can form the basis of a sexual harassment cause of action.”¹

“The absence of notice [of sexual harassment] to an employer does not necessarily insulate that employer from liability.”²

I. INTRODUCTION

Sexual harassment occurs in the healthcare industry. This is not just common knowledge: it has been surveyed and it has been litigated. Its incidence in university training programs³ and community hospitals has been documented.⁴ Sexual harassment has been the subject of lengthy litigation in a medical university setting,⁵ and it is reported in a run-of-the-mill case about a doctor and a nurse.⁶ Is there anything unique about sexual harassment in the

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1. *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991).

2. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986).

3. Miriam Komaromy et al., *Sexual Harassment in Medical Training*, 328 *NEW ENG. J. MED.* 322 (1993).

4. Lynn Cavallo, *Sexual Harassment of Nurses* (1991) (unpublished research findings, on file with the Institute for Health Law).

5. *Lipsett v. Univ. of Puerto Rico*, 759 F. Supp. 40 (D.P.R. 1991). This constitutional and Title IX claim for sexual harassment and other discriminatory treatment by male physicians wended its way through six court decisions, the first in 1983, and culminated in post-trial motions in 1990. The plaintiff alleged that the chief surgical resident instigated a “regime of terror” designed to drive all women from the surgical residency program. Specific allegations of sexual harassment included persistent unwelcome sexual advances, hostile behavior, Playboy centerfolds in the workplace, sexually explicit drawing of the plaintiff’s body, sexually charged nicknames, and graffiti translated as “she [plaintiff] swallows them.” The jury returned a \$525,000 verdict in favor of the plaintiff. The court denied the university’s motions for new trial or remittitur. However, the plaintiff’s motion for reinstatement into the residency program was denied on the grounds that the close working relationships among surgeons and the interests of the patients made such equitable relief inappropriate.

6. *Lara v. Cadag*, 16 Cal. Rptr. 2d 811 (Cal. Ct. App. 1993) (plaintiff’s failure to present meaningful evidence of defendant’s financial condition, such as a financial state-

healthcare industry? Possibly, but the uniqueness, if it is that, lies in the degree to which the healthcare industry is exposed to liability for sexual harassment and for violating the rights of the harassers. The healthcare industry must be prepared to confront the usual panoply of civil rights actions⁷ and related tort claims⁸ for sexual harassment in the workplace, as well as Title IX claims from harassed students.⁹ For the public healthcare employer, constitutional claims may arise.¹⁰ When the healthcare institution disciplines a harasser, the institution must be prepared for exposure to union grievances,¹¹ breach of contract claims (including violations

ment, precluded an award of punitive damages; proof of only defendant's annual income does not suffice).

7. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000(e)-2002 (1988) [hereinafter Title VII], *as amended* by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071-1079 (Supp. III 1991) [hereinafter 1991 Civil Rights Amendments], is the most common vehicle for attacking sexual harassment in the workplace. Claims may also be brought under analogous state statutes prohibiting employment discrimination. *See, e.g.*, Illinois Human Rights Act, 775 ILCS 5/1-101 to 5/2-105 (1993). Plaintiffs seeking redress under Title VII face procedural obstacles: the charge-filing period is short (charges must be filed with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the occurrence of discrimination in deferral states, and suits must be instituted within 90 days of receipt of the right to sue letter from the EEOC), and the remedies available under Title VII are limited, with compensatory and punitive damages capped at \$300,000 for the largest employers. Consequently, sexual harassment plaintiffs often file tort claims as well.

8. *See, e.g.*, *Arnold v. United States*, 816 F.2d 1306 (9th Cir. 1987); *Priest v. Rotary*, 634 F. Supp. 571 (N.D. Cal. 1986) (jury awarded \$95,000 for claims of emotional distress, battery, and false imprisonment, plus \$15,000 punitive damages); *Rojo v. Kliger*, 801 P.2d 373 (Cal. 1990) (discharge arising out of plaintiff's sexual harassment claim constitutes tort of retaliatory discharge under California law). *See also* *Lara v. Cadag*, 16 Cal. Rptr. 2d at 812 ("plaintiff . . . assert[ed] the usual assortment of intentional tort theories" for sexual harassment).

9. In *Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992), the Supreme Court held that sexually harassed students can sue a school district for money damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681-1688 (1988) [hereinafter Title IX]. This decision clarified that harassed students could seek compensatory money damages as well as declaratory and injunctive relief. While there have been few developments since the *Gwinnett* decision, courts often rely on developments in the substantive law under Title VII to resolve sexual harassment issues in the educational setting. Title IX also prohibits sex discrimination in employment by educational institutions. *See Paddio v. Board of Trustees for State Colleges & Univs.*, 61 Fair Empl. Prac. Cas. (BNA) 86 (E.D. La. 1993).

10. *See, e.g.*, *Reynolds v. Borough of Avalon*, 799 F. Supp. 442, 446 (D.N.J. 1992) ("plaintiffs may be able to show that the risk of sexual harassment occurring in the workplace is obvious, and that the failure to inform employees of a policy against sexual harassment and to institute procedures for reporting and investigating such allegations creates an extremely high risk that constitutional violations involving sexual harassment will occur"); *Murphy v. Chicago Transit Authority*, 638 F. Supp. 464 (N.D. Ill. 1986) (supervisors were liable under 42 U.S.C. § 1983 for deliberate indifference to sexual harassment by co-workers).

11. The union may grieve the discharge as a violation of the just cause provision of

of tenure),¹² discrimination claims,¹³ and tort claims such as invasion of privacy, defamation, intentional infliction of emotional distress, and retaliatory discharge.¹⁴

the collective bargaining agreement. *See, e.g.,* KIAM, 97 Lab. Arb. Rep. (BNA) 617 (1991) (discharge of love-struck harasser reduced to written warning). *See generally,* Christine Godsil Cooper, *Sexual Harassment in the Unionized Workplace: Litigation and Arbitration*, in SIXTH ANNUAL NATIONAL CONFERENCE ON LABOR ARBITRATION: FOCUS ON SEXUAL HARASSMENT 1 (National Practice Institute 1992); Enterprise Wire Co., 46 Lab. Arb. Rep. (BNA) 359 (1966) (delineating the industrial just cause requirements). Courts will not enforce contracts that violate public policy and thus will set aside an arbitration award that violates a clearly defined public policy. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987). In two recent decisions, the courts found that reinstatement of a harasser violated public policy. *Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (reinstatement of accused without determination on the merits violates public policy against sexual harassment in the workplace), *cert. denied*, 113 S. Ct. 660 (1992); *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840 (2d Cir. 1990) (reinstatement of recidivist sexual harasser violates public policy against sexual harassment by perpetuating a hostile work environment and by inhibiting the employer's ability to perform its legal duty to prevent sexual harassment). *Accord* *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989). *Cf. Chrysler Motors Corp. v. Allied Indus. Workers*, 959 F.2d 685 (7th Cir. 1992) (reinstatement of employee discharged for grabbing a co-worker's breasts and commenting "Yup, they're real" upheld as within the arbitrator's remedial discretion).

12. *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356 (7th Cir. 1992) (Where a written employment contract for a fixed duration gives the employer no discretion in termination, an employee discharged for sexual harassment can assert a breach of contract claim if there has been no actual misconduct; a good faith belief in the employee's misconduct would not justify the firing. However, the court granted summary judgment to the employer, who produced evidence sufficient to show that plaintiff actually committed the sexual harassment. The employer's thorough investigation produced ample evidence of harassment, and the plaintiff's denials were equivocal.); *Ross v. Robb*, 662 S.W.2d 257 (Mo. 1983) (discharge of a tenured professor upheld under state anti-discrimination statute). *See also* *Ashway v. Ferrellgas, Inc.*, 59 Fair Empl. Prac. Cas. (BNA) 375 (D. Ariz. 1989) (Under Arizona law, failure to investigate allegations of sexual harassment prior to discharge would breach implied-in-fact employment contract.), *aff'd in part, rev'd in part without opinion*, 945 F.2d 408 (9th Cir. 1991) (text in Westlaw), *cert. denied*, 113 S. Ct. 72 (1992).

13. *Loyola Univ. v. Human Rights Comm'n*, 500 N.E.2d 639 (Ill. App. Ct. 1986) (discharge was racially discriminatory under state anti-discrimination statute where employer imposed harsher discipline on a black harasser than was imposed on nonblack harassers). All harassers who are similarly situated (in terms of harassing conduct and mitigating factors) must be treated similarly and not on the basis of race, age, sex, or other prohibited category. *See* *Lindsey v. Baxter Healthcare Corp.*, 962 F.2d 586 (7th Cir. 1992) (sexual indiscretions, rather than age discrimination, motivated the discharge); *Johnson v. Perkins Restaurants, Inc.*, 815 F.2d 1220 (8th Cir. 1987) (employee over forty was terminated for kissing a sixteen-year-old waitress on the back of the head; the firing was either for "good cause" or "based on reasonable factors other than age," both of which are statutory defenses under the Age Discrimination in Employment Act, 29 U.S.C. § 206(d) (1988)).

14. *Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (After the harasser's discharge and in response to plant rumors and confusion about the nature of prohibited harassment, the employer distributed a newsletter to employees noting that "a serious act of employee misconduct [occurred] . . . but . . . cannot be discussed in

A thorough, extensive, and good faith investigation prior to disciplinary action may protect the employer from claims for wrongful discharge and intentional infliction of emotional distress.¹⁵ Disclosure of investigatory information on a "need to know" only basis may save the employer from invasion of privacy and defamation claims.¹⁶ By imposing discipline that is appropriate to the "crime," an employer may prevail in an arbitration. Actual harassment may be required before an employer can discharge an employee protected by a fixed-term, written employment contract.¹⁷ For the healthcare attorney, prevention is the key to minimizing liability for sexual harassment and corporate responses to it.

While the healthcare attorney can take several important steps to protect the client, the healthcare environment may present special problems. According to conventional wisdom, the medical profession is rigidly hierarchical and resistant to any change demanded by outsiders. These characteristics, if true, leave certain dangers that the healthcare attorney must strive to counteract. First, because the essence of sexual harassment is sexual subordination,¹⁸ any organization that justifies and perpetuates hierarchy will be more likely to engage in sexual harassment. Second, courts, often influenced by non-medical experts who have testified in cases of sexual harassment,¹⁹ may demand sweeping changes in the es-

detail. However, deliberate, repeated, and unsolicited physical contact as well as significant verbal abuse was involved in this case." *Id.* at 384. The terminated employee then sued for libel and slander. The case was remanded for a determination of whether the publication was excessive (thereby destroying the qualified privilege to defame) in light of the employer's duty to eradicate and prevent sexual harassment.). *See also* Scherer v. Rockwell Int'l, 766 F. Supp. 593 (N.D. Ill. 1991) (qualified privilege to invade privacy applies to investigations of suspicious employee conduct), *aff'd*, 975 F.2d 356 (7th Cir. 1992); Lovelace v. Long John Silver's, Inc., 841 S.W.2d 682 (Mo. Ct. App. 1992) (intra-corporate immunity for defamation and derivative claim for loss of consortium); Carlson v. Crater Lake Lumber Co., 796 P.2d 1216 (Or. Ct. App. 1990) (discharge for resistance to sexual harassment constitutes tort of retaliatory discharge). Common law tort claims for co-worker harassment are often barred by the exclusivity provision of state workers' compensation acts. *See* Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992).

15. Johnson v. International Minerals & Chem. Corp., 40 Fair Empl. Prac. Cas. (BNA) 1651 (D.S.D. 1986).

16. *See* Garziano, 818 F.2d 380; Scherer, 766 F. Supp. 593.

17. Scherer, 975 F.2d 356.

18. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987). Although sexual subordination is usually involved in sexual harassment, it must be noted that men can be—and are—sexually harassed by both men and women.

19. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir., argued Dec. 2. 1992). *See also* Snider v. Consolidation Coal, 973 F.2d 555 (7th Cir.

established order. The medical profession, like any organization that insists upon self-regulation, may prove resistant to judicial commands based upon the conclusions of non-medical experts.

The healthcare attorney's preventive work, however, is a financial necessity. Sexual harassment claimants can obtain huge judgments: a Florida actress was awarded \$1.4 million;²⁰ a California jury awarded over \$1 million to a male harassed by his female supervisor for a five-year period;²¹ a Kansas woman obtained a \$710,000 verdict.²² Although the 1991 Civil Rights Amendments cap compensatory and punitive damages at \$300,000 for the largest employers,²³ these caps do not apply to the tort claims that are often appended to the federal statutory claims or brought separately in state court. These caps apply to each individual plaintiff; thus, a class action suit could cost an employer millions of dollars.²⁴ Moreover, these caps do not apply to backpay awards or to attorneys' fees. There is no explicit cap on damages under Title IX.

There is a certain irony in the emphasis on damage awards: most harassed women want nothing more than to have the harassment stopped. Women satisfied with corrective action often do not pursue monetary relief. This fact should encourage the healthcare attorney to enact appropriate policies and procedures to eliminate harassment. It should also inspire the attorney to consider creative

1992); *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992); *KIAM*, 97 Lab. Arb. Rep. (BNA) 617 (1991).

20. *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992) (upholding a verdict in favor of plaintiff against the wealthy owner of an entertainment business for claims under Title VII, battery, invasion of privacy, intentional infliction of emotional distress, and false imprisonment).

21. *Gutierrez v. California Acrylic Indus.*, No. BC 055641 (Cal. Super. Ct. 1991), summarized in 97 DAILY LAB. REP. (BNA) A-17 (May 21, 1993). In this action brought under state law, the harasser was held individually liable for \$10,000. The harassment consisted of repeated coerced embraces and kisses, one instance of fondling of genitals, and threats of adverse job actions, which were ultimately implemented. Complaints to higher officials were ignored.

22. *Laughinghouse v. Risser*, 786 F. Supp. 920 (D. Kan. 1992) (eighteen-month period of sexual harassment caused the plaintiff life-threatening injury).

23. These caps for compensatory and punitive damages are based on the employer's number of "employees" as follows: for more than 500 employees, the cap is \$300,000; 201-500 employees, \$200,000; 101-200 employees, \$100,000; and 15-100 employees, \$50,000. 42 U.S.C. § 1981a(b)(3) (Supp. III 1991).

24. In *Jenson v. Eveleth Taconite Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1252 (D. Minn. 1993), the plaintiffs won a class action lawsuit against a Minnesota mining company where sexist graffiti, photos, cartoons, and language pervaded the workplace. If the caps are applied retroactively, the damage award to the approximately 200 women could reach \$30 million.

relief and alternatives to litigation.²⁵

This article will begin with the fundamentals of the definition of sexual harassment. It will then discuss some special problems the definition evokes: (1) the "reasonable woman" standard, (2) the risks of real or apparent consensual sex in the workplace, and (3) the silent or nonreporting target²⁶ of harassment. These definitions and problems must be understood before the attorney can draft an appropriate sexual harassment policy or make a determination, when conducting an internal investigation, of whether or not sexual harassment has occurred. Finally, the critical features of an effective sexual harassment policy will be detailed.

II. SEXUAL HARASSMENT: WHAT IS IT? WHEN (AND WHY) IS IT SEX DISCRIMINATION?

What is sexual harassment? To paraphrase the Equal Employment Opportunity Commission ("EEOC") Guidelines²⁷ definition of sexual harassment, a definition that was accepted by the Supreme Court in *Meritor Savings Bank v. Vinson*:²⁸ Sexual harassment is *unwelcome* conduct of a sexual nature where (1) submission to or rejection of such conduct is used as a basis for making employment decisions ("quid pro quo harassment"), or (2) such conduct is so "severe or pervasive" that it alters conditions of employment and "creates an abusive working environment" ("hostile environment harassment").²⁹

The two different categories of harassment, quid pro quo and hostile environment, are usually distinguished in terms of the types of employer liability they create. Courts adopt varying approaches to the issue of employer liability, but in general an employer may be held financially liable for sexual harassment in the following situations: (1) if a supervisor or other agent of the employer commits quid pro quo harassment;³⁰ (2) if any employee, whether supervisor

25. See, e.g., Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, ARB. J., Dec. 1992, at 61. See also *ITT Consumer Financial Corp. v. Wilson*, 61 Fair Empl. Prac. Cas. (BNA) 509 (S.D. Miss. 1991) (arbitration of sexual harassment claim compelled pursuant to employment contract arbitration clause).

26. I prefer to refer to the harassed employee as a "target" and not as a "victim." The term "victim" connotes helplessness, an attribute that harms women.

27. 29 C.F.R. § 1604.11 (1992).

28. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). Although the Court accepted the EEOC Guidelines' definition of sexual harassment, it did not accept the EEOC's broad imposition of liability on employers for all supervisory harassment.

29. *Id.* at 65.

30. *Carrero v. New York City Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) (employer automatically lia-

or co-worker, creates a hostile working environment, and the employer knew or should have known about it and failed to take appropriate remedial action;³¹ or (3) when a client, customer, or stranger harasses an employee and the employer can control the situation.³² This third category would apply to the harassment of employees by physicians who are independent contractors with the hospital. If a hospital has knowledge, whether actual or imputed, of sexual harassment by independent contractors, it must take reasonable steps to prevent and remedy the harassment.

Knowledge of a hostile working environment can be imputed to the employer when (1) the abusive environment is so noticeable that management should have seen it and eradicated it, regardless of whether or not a complaint was filed;³³ (2) a complaint, formal or otherwise, from the target or someone else is lodged with a supervisor³⁴ or made pursuant to a formal complaint procedure;³⁵ or

ble for supervisor's quid pro quo harassment); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986) (knowledge of employment decision imputed to employer); *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (automatic liability for supervisor's quid pro quo harassment). See EEOC Policy Guidance on Sexual Harassment, reprinted in 8 Fair Empl. Prac. Manual (BNA) 405:6681, 405:6694 (Mar. 19, 1990) and reproduced in BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 661 (1992). See also cases cited in LINDEMANN & KADUE, *id.* at 221 n.9.

31. In *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178 (6th Cir. 1992), the Sixth Circuit discussed liability standards for hostile environment harassment. First, where a supervisor creates the hostile environment, traditional agency principles rather than the law of strict liability are used to establish liability. Second, even if a supervisor creates a hostile working environment, "agency liability . . . can be negated if the employer responds adequately and effectively once it has notice of the actions." *Id.* at 174. Third, where a co-worker creates a hostile environment, respondeat superior establishes liability; this is the "knew or should have known" standard. See also *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990). See also LINDEMANN & KADUE, *supra* note 30, at 226-252.

32. *EEOC v. Sage Realty Corp.*, 507 F. Supp. 599 (S.D.N.Y. 1981) (employer's insistence that employees wear a sexually provocative uniform caused harassment by strangers); EEOC Dec. 84-3, reprinted in 34 Fair Empl. Prac. Cas. (BNA) 1887 (1984) (Where the employer had a friendly relationship with the harasser, a regular and frequent customer, the employer should have told the harasser not to engage in further offensive conduct toward the waitress.).

33. *Robinson v. Jacksonville Shipyards, Inc.* 760 F. Supp. 1486 (M.D. Fla. 1991), appeal docketed, No. 91-3655 (11th Cir., argued Dec. 2, 1992); *Hansel v. Public Serv. Co.*, 778 F. Supp. 1126, 1133 (D. Colo. 1991) (Because the very nature of sexual harassment inhibits its targets from complaining, an employer "simply cannot sit back and wait for complaints." Title VII imposes an "affirmative duty to seek out and eradicate a hostile work environment. . . . In this case [of pervasive pornography and hostile graffiti directed toward plaintiff,] the writing was literally on the walls.").

34. The employer in *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987) was held liable for supervisory harassment even though informal notice of the harassment was given by a co-worker years earlier. However, in *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992), a supervisor's knowledge of the complaint and of the harasser's proclivities was not imputed to the employer because the supervisor had

(3) when the employer does not have an effective sexual harassment policy in place.³⁶

A complaint not only charges management with knowledge of the situation, it also triggers an obligation to investigate and take appropriate corrective action.³⁷ An appropriate investigation may be one that considers whether systemic problems exist and whether existing complaint procedures are adequate.³⁸ When the employer conducts a prompt investigation and undertakes appropriate corrective action designed to end the harassment, the employer will not be liable.³⁹ An inadequate response to the situation, however, will result in employer liability.⁴⁰ A corporation that does not have an effective complaint procedure in place will be deemed to have ignored, tolerated, or condoned the harassment.⁴¹

The clearest example of quid pro quo harassment is "put out or get out." In the typical quid pro quo case, the target has lost a job benefit: the target has either been terminated or not promoted because the sexual advances of a supervisor have been refused. In the less typical quid pro quo case, where the target submits to the supervisor's sexual advances and is therefore retained or promoted, it is unlikely that the target will admit receiving a job benefit as a result of complying with a supervisor's sexual demands. Indeed, this scenario is most often categorized as a hostile working environment, with the target claiming that sexual favors were part of

no supervisory authority over the harasser, had no duty to report claims of sexual harassment, and had no involvement with the human resources department. "Knowledge of an agent is imputed to her corporate principal only if the agent receives the knowledge while acting within the scope of her authority *and* the knowledge concerns a matter within the scope of that authority." *Id.* at 321 (emphasis in original). *See also* Canada v. Boyd Group, Inc., 809 F. Supp. 771 (D. Nev. 1992) (employer's knowledge of hostile working environment was shown by complaint to officials as well as by manager's earlier concern about the "professional conduct of accused").

35. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

36. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (employer's policy was ineffective because it was unclear and because it required the target employee to complain to the harasser).

37. *Risinger v. Ohio Bureau of Workers' Compensation*, 883 F.2d 475, 481-83 (6th Cir. 1989); *Yates*, 819 F.2d 630, 636.

38. *Jenson v. Eveleth Taconite Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1252 (D. Minn. 1993).

39. *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

40. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Martin v. Norbar, Inc.*, 537 F. Supp. 1260 (S.D. Ohio 1982) (employer's motion for summary judgment denied because the court deemed the employer's failure to reassign a truck after a single, uncorroborated complaint by his co-driver to be an insufficient response to the complaint).

41. EEOC Policy Guidance on Sexual Harassment, *supra* note 30.

the job description rather than the basis for an employment decision.⁴²

Where hostile working environment harassment occurs, it is not necessary for the target to suffer a tangible loss of position, wages, or other economic benefit. However, it is necessary that the harassment “be sufficiently severe or pervasive ‘to alter the conditions of [the target’s] employment and create an abusive working environment.’”⁴³

The Supreme Court has agreed to hear a case in which the issue is whether or not the target in a hostile environment case must prove serious psychological harm in order to prevail, or whether the harassment itself entitles the target to relief.⁴⁴ While the case may prove significant, it is unlikely to deter the most serious and costly of claims, for these often cause serious psychological harm.

The hostile environment claim can be difficult to decide, whether the decision is made by a court or pursuant to a corporate investigation. “Severe or pervasive” harassment cannot be mechanically defined, although it has been established that the more severe the

42. *Meritor*, 477 U.S. 57.

43. *Id.* at 67.

44. *Harris v. Forklift Sys. Inc.*, 61 Fair Empl. Prac. Cas. (BNA) 240 (M.D. Tenn. 1991), *aff’d without opinion*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (Mar. 1, 1993) (No. 92-1168). The trial court dismissed the plaintiff’s complaint of constructive discharge arising from a hostile working environment, stating:

I believe that Hardy is a vulgar man and demeans the female employees at his work place. Many clerical employees tolerate his behavior. . . . This does not mean, however, that plaintiff, a managerial employee, took it the same way. In fact, I believe she did not. She believed that Hardy’s sexual comments undermined her authority; this was especially painful when Hardy would make demeaning sexual comments to plaintiff in front of coworkers.

Id. at 248. Nonetheless, the court held that the conduct, while offensive to a reasonable woman, did not violate Title VII because it did not “seriously affect plaintiff’s psychological well-being.” *Id.* at 249. This Sixth Circuit approach, first set forth in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (1986), accords with that of the Seventh and the Eleventh Circuits. *See Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-20 (7th Cir. 1989); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987). The more liberal standard of the Third, Eighth, and Ninth Circuits allows recovery where the conduct would have offended a reasonable victim, regardless of psychological harm. *See Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990); *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). Amicus briefs on behalf of the target in *Harris* were filed by the EEOC, the American Medical Women’s Association, the NOW Legal Defense and Education Fund, the American Jewish Committee, the National Conference of Women’s Bar Associations, the NAACP Legal Defense and Education Fund, the National Council of Jewish Women, and numerous other groups. Available in LEXIS, Genfed library, Briefs file. The American Psychological Association filed a brief on behalf of “Neither Party,” but it reads as a brief to support plaintiff. Available in LEXIS, Genfed library, Briefs file.

conduct, the less pervasive it need be.⁴⁵ What must be evaluated are the consequences that the harassing conduct had on the workplace environment.⁴⁶ Any judgment made must be based on the totality of the circumstances.⁴⁷ Courts typically find that a hostile environment exists only where the fact situation is egregious, either in duration or intensity. Examples of conduct that creates a hostile working environment include feigning masturbation to express anger,⁴⁸ daily comments and sexual advances by supervisors,⁴⁹ touching private body parts,⁵⁰ pervasive pornography, and sexist slurs.⁵¹ One claim for sexual harassment involved sexual comments and compliments, jokes, looks, shoulder-touching, and leaning against or rubbing the target.⁵² The hostile working environment can consist of sexual events that might not constitute a hostile environment in and of themselves, but that are unlawful when combined with either racial harassment or nonsexual physical abuse.⁵³ Evidence of harassment directed toward other women is relevant to hostile working environment.⁵⁴ By contrast, a small amount of sexual joking and compliments usually will not result in a judicial finding that the working environment is hostile.⁵⁵

Regardless of whether the harassment is quid pro quo or results

45. *Carrero v. New York Hous. Auth.*, 890 F.2d 569 (2d Cir. 1989); EEOC Policy Guidance on Sexual Harassment, *supra* note 30.

46. *Ellison*, 924 F.2d at 880.

47. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir., argued Dec. 2, 1992).

48. *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992).

49. *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815 (7th Cir. 1990); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370 (9th Cir. 1990).

50. *See Jones v. Wesco Invs., Inc.*, 846 F.2d 1154 (8th Cir. 1988).

51. *Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990).

52. *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771 (D. Nev. 1992) (denying employer's motion for summary judgment on employee claim of hostile working environment).

53. *Andrews*, 895 F.2d at 1485-86; *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989) (court found that the repeated presentation, even after warning, of pornographic pictures depicting black women in submissive poses of sodomy, with the comments "That's what you're hired for" and "That's the talent of a black woman," created a hostile working environment); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987).

54. *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

55. *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333 (7th Cir. 1993) (Requests for dates, joking references to plaintiff as a "dumb blond," attempted kisses, shoulder-touchings, and placing "I love you" signs in plaintiff's work area did not constitute a hostile working environment because the incidents were "relatively isolated" and not serious.) *Accord Saxton v. AT&T*, 785 F. Supp. 760 (N.D. Ill. 1992). *See also Hallquist v. Plumbers Local 276*, 843 F.2d 18 (1st Cir. 1988); *Jackson-Colley v. Department Army Corps of Eng'rs*, 655 F. Supp. 122 (E.D. Mich. 1987) (supervisor's bad habit of scratching his

from hostile working environment, the sexual conduct must be “unwelcome” to constitute unlawful sexual harassment.⁵⁶ Invited sexual attention is not sexual harassment. Courts may consider the speech and dress of the target in determining whether the sexual attention was welcome.⁵⁷ Obviously, if the target pursues the alleged harasser, the claim will fail.⁵⁸ However, this evidence must relate to the interaction between the complaining party and the alleged harasser, not to the complaining party’s general attitude toward sexual behavior.⁵⁹

The “unwelcomeness” aspect of a sexual harassment case presents difficult problems of proof and may depend upon determinations of credibility.⁶⁰ The trier of fact (which, pursuant to the 1991 Civil Rights Amendments, may be a jury) must look to “the record as a whole” and “the totality of the circumstances” to determine whether sexual harassment occurred.⁶¹ These same determinations must be made by the employer following an internal investigation of sexual harassment.

It is important not to confuse the term “welcome” with the term “voluntary.” The two are different concepts. In *Meritor Savings Bank v. Vinson*, the complainant’s sexual relationship with the ac-

groin in public did not constitute sexual harassment); EEOC Dec. 82-2, *reprinted in* 28 Fair Empl. Prac. Cas. (BNA) 1843 (1982).

56. In order to distinguish harassment from consensual office romances, it has been argued that “welcome” applies only to quid pro quo cases. Amicus Brief for Women’s Legal Defense Fund et al., *Harris v. Forklift Systems, Inc.*, No. 92-1168, available in LEXIS, Genfed library, Briefs file.

57. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

58. EEOC Policy Guidance on Sexual Harassment, *supra* note 30 (citing a case where the plaintiff lost because she behaved in a flirtatious and provocative manner, inviting the man to have dinner at her house several times).

59. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 963 (8th Cir. 1993) (“The plaintiff’s choice to pose for a nude [motorcycle] magazine outside work hours is not material to the issue of whether plaintiff found her employer’s work-related conduct offensive. This is not a case where Burns posed in provocative and suggestive ways at work. Her private life, regardless of how reprehensible the trier of fact might find it to be, did not provide lawful acquiescence to unwanted sexual advances at her work place by her employer. To hold otherwise would be contrary to Title VII’s goal of ridding the work place of any kind of unwelcome sexual harassment.”) *See also* Swentek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (“Plaintiff’s use of foul language or sexual innuendo in a consensual setting does not waive ‘her legal protections against unwelcome harassment.’”) (quoting *Katz v. Dole*, 709 F.2d 251, 254 n.3 (4th Cir. 1983)); *Weiss v. Amoco Oil Co.*, 142 F.R.D. 311 (S.D. Iowa 1992) (accused can discover information concerning past sexual conduct with co-workers that was known to accused, as this information is relevant to issue of offensiveness); *Thoreson v. Penthouse Int’l*, 606 N.E.2d 1369 (N.Y. 1992) (a woman who worked in the sex industry obtained a \$60,000 judgment against Bob Guccione); EEOC Policy Guidance on Sexual Harassment, *supra* note 30.

60. *Meritor*, 477 U.S. at 68.

61. *Id.* at 69 (quoting the EEOC Guidelines, 29 C.F.R. § 1604.11(b) (1980)).

cused spanned nearly three years, during which time they had intercourse approximately fifty times. The fact that the intercourse was voluntary—in the sense that it was not rape—did not defeat the plaintiff's claim for sexual harassment. Where submission to sexual advances is, in effect, part of the job description, sexual harassment exists. "Welcome" means that the target really wanted to engage in sexual contact; "voluntary" can mean that the target felt the job demanded sexual contact.

III. WHEN IS SEXUAL HARASSMENT SEXUAL DISCRIMINATION?

Title VII of the 1964 Civil Rights Act does not explicitly outlaw sexual harassment; instead, it prohibits discrimination on the basis of sex. Sex-based discrimination must be proved in a statutory claim of sexual harassment under Title VII.⁶²

Earlier, courts rejected claims that sexual harassment in the workplace constituted sex discrimination. Judges refused to believe that sexual harassment was "based on sex." Rather, the conduct, while recognized as obnoxious, was considered merely "a personal proclivity" of the perpetrator and not a form of sex discrimination.⁶³ By 1977, however, courts recognized that sexual harassment occurred because of the sex of the target and that sexual harassment therefore constituted discrimination on the basis of sex. Imposing a condition of employment on one sex (a woman) when the same condition is not imposed on the other sex (usually a man) is sex discrimination.⁶⁴

A plaintiff can prove that sexual harassment constitutes sex discrimination in one of several ways: (1) sexual behavior directed toward another person, male or female, is, by its nature, conduct motivated on the basis of the target's sex and raises the inference that harassment is on the basis of sex;⁶⁵ (2) harassing behavior, whether sexual or not, that is based on animosity toward women is

62. Such proof may not be needed under state statutes that independently outlaw sexual harassment. See, e.g., Illinois Human Rights Act, 775 ILCS 5/1-102 (1992).

63. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (granting defendant's motion to dismiss plaintiff's complaint), *vac'd without opinion*, 562 F.2d 55 (9th Cir. 1977).

64. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977), *rev'g Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974) (in which the court had granted defendant's motion for summary judgment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

65. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988); *Hansel v. Public Serv. Co.*, 778 F. Supp. 1126 (D. Colo. 1991) (etiology of sexual harassment is "pure gender bias").

discrimination on the basis of sex;⁶⁶ or (3) conduct that is disproportionately demeaning to or more offensive to one sex is harassment on the basis of sex. Such conduct creates an artificial barrier to full employment opportunities.⁶⁷

Most plaintiffs are able to show that the sexual harassment constitutes sex discrimination using the inference that the sex of the target caused the conduct. Since all discrimination on the basis of sex is prohibited, it is irrelevant whether the perpetrator is male or female or whether the target is male or female.⁶⁸ Although homosexuality is not a category protected from discrimination by Title VII,⁶⁹ homosexual advances, like heterosexual advances, occur because of the sex of the target. Thus, all sexual harassment, whether heterosexual or homosexual, is prohibited.

Sometimes the sex of the target is not what caused the harassment. For example, the reason for the disfavored treatment may be something other than sex. In one case the court found that sexual harassment occurred not because the plaintiff was a man, but because he had jilted his female supervisor, his former lover; he could not prove that the harassment was on the basis of sex.⁷⁰

Occasionally, an employee who is not promoted will bring a charge of harassment based on sexual favoritism: the non-promoted person claims injury because some other person received a job benefit for granting sexual favors. Such claims meet with limited success. Isolated (in contrast to widespread) sexual favoritism is usually not considered sexual harassment because the personal relationship, rather than sexual harassment, accounted for the promotion or other job benefit.⁷¹ However, pervasive sexual

66. *Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129 (D.C. Cir. 1985).

In an Illinois case decided under the state statute, the court approved a rule that divided "dirty words" into those that are gender-neutral (e.g., "fuck" and "motherfucker") and those that are gender-specific and used to express animosity toward women ("cunt," "bitch," "twat," and "raggin' it"). These words, together with other specific incidents, constituted unlawful sexual harassment. *Illinois v. Human Rights Comm'n*, 534 N.E.2d 161, 170-71 (Ill. App. Ct. 1989).

67. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir., argued Dec. 2, 1992).

68. *See, e.g., Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186 (1st Cir. 1990).

69. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

70. *Huebschen v. Department of Health & Social Servs.*, 716 F.2d 1167 (7th Cir. 1983). *See also Murray v. Wal-Mart Stores*, 61 Fair Empl. Prac. Cas. (BNA) 850 (D. Kan. 1993) (no actionable harassment for animosity toward a particular woman and not toward women in general).

71. *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304 (2d Cir. 1986)

favoritism would constitute sexual harassment because the message sent by the employer is that sexual favors are required for promotions.⁷²

IV. SPECIAL PROBLEMS IN SEXUAL HARASSMENT DETERMINATIONS

Three specific issues in sexual harassment law must be recognized by any organization hoping to prevent and remedy sexual harassment: (1) in cases where the target is a woman, the reasonable woman standard, (2) the risks of consensual sex in the workplace, and (3) the consequences of a target's failure to report sexual harassment. Each of these issues should be addressed by every organization, either in its formulation of a sexual harassment policy or in its internal strategies for dealing with sexual harassment complaints.

A. *The Reasonable Woman Standard*

In hostile environment cases, some courts ask whether a reasonable person in the position of the target would find the working environment abusive; some also insist that the target actually found the environment to be abusive.⁷³ A recent, well-publicized trend is to ask: "What would a reasonable woman experience?"⁷⁴

(When the boss wrote a new job description in order to promote his paramour, the non-promoted men sued for sexual harassment. The court found no causal connection between the gender of the men denied the promotion and the resultant preference for the female lover. In other words, it was not the sex of the men that caused the employment decision, it was the personal relationship with the woman.). *Accord*, EEOC Policy Guidance on Employer Liability for Sexual Favoritism, *reprinted in* 8 Fair Empl. Prac. Manual 405:6817 (Feb. 15, 1990) (isolated instances of favoritism do not violate Title VII because all nonparamours are disadvantaged for reasons other than their gender).

72. Favoritism based upon coerced sexual conduct may constitute quid pro quo harassment, and widespread favoritism may constitute hostile environment harassment. EEOC Policy Guidance on Employer Liability for Sexual Favoritism, *supra* note 71. *Accord*, *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990) (essence of plaintiff's claim is that the sexual affairs of other workers "prevented [plaintiff] from working in an environment in which she could be evaluated on grounds other than her sexuality"). *See also* *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988) (The conduct of supervisors at the Securities and Exchange Commission was to bestow preferential treatment upon those who submitted to their sexual advances; this undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities.).

73. *Brooms v. Regal Tube Co.*, 881 F.2d 1504 (7th Cir. 1989); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986).

74. *Burns v. McGregor Electronic Indus.*, 989 F.2d 959, 962 n.3 (8th Cir. 1993); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews v. City of Phila.*, 895 F.2d 1469 (3d Cir. 1990); *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655

Would a reasonable woman consider the conduct so severe or pervasive as to alter the conditions of employment and create an abusive working environment?⁷⁵

The justification for utilizing the reasonable woman standard when a woman is the target is that women and men are differently situated when it comes to conduct of a sexual nature.⁷⁶ Women view sexual conduct differently than men: where women see coercion in sexual attention, men see compliment.⁷⁷ Women, being more vulnerable to sexual aggression and violence, are more likely to see sexual advances as threatening and demeaning.⁷⁸ Women are generally more careful of and vigilant about sexual activity than are men.⁷⁹

The rationale behind the reasonable woman standard is best illustrated by *Ellison v. Brady*,⁸⁰ a case involving perceived sexual aggression, and *Robinson v. Jacksonville Shipyards, Inc.*,⁸¹ a pornography case.

In *Ellison*, the target employee was pestered by Gray, her co-

(11th Cir., argued Dec. 2, 1992); *Jenson v. Eveleth Taconite Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1252 (D. Minn. 1993); *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771 (D. Nev. 1992).

75. "It is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment." *Ellison*, 924 F.2d at 877.

76. The reasonable woman standard is not without its critics, however. At least two amicus briefs in *Harris v. Forklift Systems, Inc.*, No. 92-1168 (1993), took the position that the reasonable woman standard is inappropriate because it perpetuates discriminatory conditions and stereotypes by incorporating the views of the harassers, and it accepts, as the trial court did, that many women have been "conditioned to accept denigrating treatment." Amicus Brief of Women's Legal Defense Fund et al., available in LEXIS, Genfed library, Briefs file. The standard "forces plaintiffs to prove that discrimination at work is worse than discrimination in society." Moreover, it invites an intrusive inquiry into the plaintiff's past sexual history. Amicus Brief of NOW Legal Defense and Education Fund, Catharine A. MacKinnon, The American Jewish Committee, American Medical Women's Association et al., available in LEXIS, Genfed library, Briefs file. The Women's Legal Defense Fund filed an amicus brief in the appeal of *Robinson v. Jacksonville Shipyards, Inc.*, calling for a "reasonable person" standard or for "a standard that credits a plaintiff's credible allegations of adverse change in her employment condition." Available in LEXIS, Genfed library, Briefs file.

77. The *Robinson* court noted that sexual advances in the workplace are perceived as compliments by most men (66 2/3%) and as insults by only 15% of the men. For women, the numbers are reversed: 2/3 of women are insulted by sexual advances in the workplace and 15% are flattered. *Robinson*, 760 F. Supp. at 1505.

78. *Ellison*, 924 F.2d at 879.

79. See generally, MARY BATTEN, *SEXUAL STRATEGIES: HOW FEMALES CHOOSE THEIR MATES* (1992); RICHARD A. POSNER, *SEX AND REASON* (1992); DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976).

80. 924 F.2d 872.

81. 760 F. Supp. 1486.

worker at the Internal Revenue Service. Despite a request to cease his attentions, Gray wrote Ellison a three page letter with such comments as "I know that you are worth knowing with or without sex," and describing how he was "experiencing you from O so far away." Ellison, fearing that Gray was "crazy," complained to her supervisor. Gray was transferred to another office, but after the union grieved the transfer, he was allowed to return six months later with only an instruction to leave Ellison alone. Ellison was not consulted about this resolution. When she realized that Gray had returned, she filed a charge with the EEOC. The EEOC determined that the employer had adequately addressed the plaintiff's complaints;⁸² the district court granted summary judgment to the employer, reasoning that Gray's conduct was "isolated and genuinely trivial."⁸³

The appellate court disagreed, sent the case to trial, and promulgated and explained the reasonable woman standard:

[W]e hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.⁸⁴

* * *

If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.⁸⁵

The court acknowledged that one possible result of its new standard is that unlawful sexual harassment could occur without the perpetrator realizing that the conduct was wrong. However, as the court noted, "Title VII is not a fault-based tort scheme."⁸⁶ It is aimed at discriminatory consequences, not motivation.

In *Robinson v. Jacksonville Shipyards, Inc.*,⁸⁷ a federal district court in Florida adopted the perspective of the reasonable woman

82. 924 F.2d at 875.

83. *Id.* at 876.

84. *Id.* at 879.

85. *Id.* at 878. The appellate court considered the question of whether the conduct was severe or pervasive enough to constitute an abusive environment as a question of law, with de novo review. *Id.* at 876.

86. *Id.* at 880.

87. 760 F.2d 1486.

as well as the feminist perspective⁸⁸ that views workplace pornography as creating an abusive working environment for women. At the Jacksonville Shipyards, where fewer than five percent of the craftworkers were women, the hostile working environment was created by posters, centerfolds, and vendor advertising calendars. The pictures depicted naked women “in sexually suggestive or submissive poses.” Included among the various poses were breasts and labia, a nude female torso with the words “USDA Choice,” a woman’s pubic area pressed with a meat spatula, and a dart board drawing of a woman’s breast with her nipple as the bull’s eye. The pictorial display was accompanied by language directed to the females: “Hey pussycat, come here and give me a whiff”; “The more you lick it, the harder it gets”; and so on. Graffiti included “lick me you whore dog bitch.” In addition to the pictorial environment, some of the women employees were pinched on the breasts by their male co-workers.

In order to determine what effect this environment would have on a reasonable woman, the court, which was presided over by a male judge interested in the experiences of women,⁸⁹ heard expert testimony. One expert, psychologist Dr. Susan Fiske, had a profound influence on the court’s decision; the opinion includes an extensive description of her findings. With the increasing use of experts in sexual harassment cases, Dr. Fiske’s testimony is worth covering in detail.

Dr. Fiske described four preconditions that enhance workplace stereotyping and the resulting discrimination: (1) the rarity of women in the workplace, (2) the priming of stereotypic thinking by sexual stimuli, (3) the male-dominated power structure of the workplace, and (4) the atmosphere of a sexualized workplace.⁹⁰

Rarity occurs when a disfavored group (here, women) constitutes less than fifteen to twenty percent of the workforce. The consequence of rarity is that these “solos” elicit extreme responses from the majority group: for instance, “mildly substandard work performance or workplace behavior is perceived as much worse.”⁹¹

Sexual stimuli in the workplace promotes stereotypic thinking. Pornography, sexual joking, and sexist slurs cause the men in the

88. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAN. L. REV. 1183, 1212 n. 118 (1989), cited in Robinson, 760 F. Supp. at 1526.

89. “[T]he Court risks injustice if it attempts to fashion a reasonable woman’s reaction out of whole cloth.” 760 F. Supp. at 1507 n.4.

90. *Id.* at 1503.

91. *Id.*

workforce “to view and interact with women coworkers as if those women are sex objects.”⁹² Dr. Fiske described a study in which college men were divided into two groups, one that viewed non-violent pornography and one that viewed nonviolent films that were not pornographic. When the men were subsequently asked to describe a woman who had interviewed them shortly after the films, “the males who viewed the pornographic film remembered little about the female interviewer other than her physical attributes. The males who viewed the neutral film remembered the contents of the interview.”⁹³ In general,

to categorize a female employee along the lines of sex produces an evaluation of her suitability as a “woman” who might be expected to be sexy, affectionate and attractive; this female employee would be evaluated less favorably if she is seen as not conforming to that model without regard for her job performance.⁹⁴

This unfavorable evaluation seemed to occur in the *Robinson v. Jacksonville Shipyards, Inc.* case: several witnesses disapproved of Robinson, the plaintiff, because she was “crude” and “unaffectionate.”

A male-dominated power structure in the workplace causes men to see its own members (men) as right and the others (women) as wrong. As a consequence, the men take sexual harassment complaints less seriously because they come from women. The complaining party becomes the focus of attention (“what did *she* do wrong?”) rather than the misconduct of which she complains.

An atmosphere of pervasive sexuality in the workplace harms women’s status. “[S]tudies show that the tolerance of nonprofessional conduct [such as profanity and sexual joking] promotes the stereotyping of women in terms of their sex object status.”⁹⁵ With the aid of this expert testimony, the court in *Robinson v. Jacksonville Shipyards, Inc.* concluded that the reasonable woman differs from the reasonable man. A workplace characterized by pornography and sexual speech impairs women’s job opportunities, but sex in the workplace has almost no affect on men.

The sexualization of the workplace imposes burdens on women that are not borne by men. Women must constantly monitor their behavior to determine whether they are eliciting sexual attention. They must conform their behavior to the existence of

92. *Id.*

93. *Id.* at 1503-04.

94. *Id.* at 1502-03.

95. *Id.* at 1504.

the sexual stereotyping either by becoming sexy and responsive to the men who flirt with them or by becoming rigid, standoffish, and distant so as to make it clear that they are not interested in the status of sex object.⁹⁶

The reasonable woman standard, if broadly adopted, promises to challenge attitudes and behaviors that have previously been socially acceptable, if impolite. This standard will address women's experiences and women's needs.

An organization that receives an internal complaint of sexual harassment should adopt the reasonable woman standard as a preventive measure in determining whether or not sexual harassment occurred. While not all jurisdictions accept the reasonable woman standard, all adopt some aspect of "reasonableness," with some focus on a reasonable person in the position of the target,⁹⁷ who is usually a woman. For this reason, an institution is well advised to include women among the decision makers who will determine whether or not sexual harassment occurred. All decision makers, whether male or female, should be trained in the widely recognized differences between men and women in their attitudes toward sexual attention. What has previously been deemed trivial (obsessive sexual attention)⁹⁸ or acceptable (sexist posters and slurs)⁹⁹ is now quite dangerous.

B. *Risks of Consensual Sex*

While the gravamen of a sexual harassment charge is that the sexual attention was unwelcome, it is a mistake to assume that consensual sex, whether truly consensual or apparently consensual, does not run the risk of resulting in a sexual harassment charge. There is no such thing as safe sex. Indeed, one expert has testified that dating relationships between supervisors and subordinates are never truly consensual.¹⁰⁰

96. *Id.* at 1505.

97. *See Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir. 1990) (reasonable person of the same sex as the target); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 192-93 (1st Cir. 1990) (reasonable person); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) (reasonable person objective standard combined with subjective standard).

98. The EEOC and the trial court considered Ellison's complaints trivial. *Ellison*, 924 F.2d at 875.

99. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986).

100. *Snider v. Consolidation Coal Co.*, 973 F.2d 555 (7th Cir. 1992) (upholding the court's finding of a Title VII violation based in part on expert testimony, even though the jury, which did not hear the expert, found for defendants on common law claims; the harasser testified to consensual sexual encounters with at least nine female subordinates).

When sexual relations at work are truly consensual, there is no sexual harassment as long as the relationship remains truly consensual and welcome. The danger lies in the transformation of a sweet relationship into a sour one: one party terminates the relationship and the other is angry.¹⁰¹ If that "other" is a supervisor, any subsequent attempts at sex can constitute sexual harassment for which the institution may be liable. When a supervisor commits quid pro quo harassment, the institution is often strictly liable.¹⁰² Regardless of the identity of the "other," whether supervisor or co-worker, continued sexual attention can constitute a hostile working environment.¹⁰³

Where a relationship was at one time consensual, the party who terminated and thus no longer welcomes the relationship has a clear duty to confront the harasser and explain that further sexual attention is unwelcome.¹⁰⁴ If the sexual attention continues and the employer has either imputed or actual knowledge of the situation, the employer may be liable if it fails to take appropriate remedial action.

The more difficult problem arises when a voluntary relationship appears to be "welcome" but is not. The target who experiences performance problems may attribute the problems, including termination or constructive discharge,¹⁰⁵ to sexual harassment. It may well be that an unwelcome relationship (sexual harassment) caused the performance problems.¹⁰⁶ Since a voluntary relationship is not necessarily a welcome one, the employer who had imputed or actual knowledge of a voluntary but unwelcome sexual

101. See *Underwood v. Washington Post Credit Union*, 59 Fair Empl. Prac. Cas. (BNA) 952, 955 (D.C. Super. Ct. 1992) (The court upheld a jury verdict against the harasser for intentional infliction of emotional distress, in part because "[c]ruelty from an ex-lover is unlike hostility that has some other trigger. Because of the congeries of emotions involved, the ex-lover's actions are far more likely to cause pain and mental turmoil.").

102. See *Kotcher v. Rosa & Sullivan Appliance, Inc.*, 957 F.2d 59 (2d Cir. 1992).

103. See, e.g., *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992).

104. EEOC Policy Guidance on Sexual Harassment, *supra* note 30.

105. A constructive discharge occurs when an employer makes the workplace so intolerable that a reasonable person would feel compelled to resign. The constructive discharge, unlike a truly voluntary resignation, subjects the employer to continuing liability for lost wages. *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992) (inadequate response to complaints of harassment led to a finding of constructive discharge). Compare *Landgraf v. USI Film Prods.*, 968 F.2d 427 (5th Cir. 1992) (mere hostile working environment will not support constructive discharge claim; greater severity or pervasiveness is required), *cert. granted*, 113 S. Ct. 1250 (Feb. 22, 1993) (No. 92-757). Some jurisdictions require that the employer must have intended to force the resignation. See generally LINDEMANN & KADUE, *supra* note 30, at 261-62.

106. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

relationship may be liable for sexual harassment if it fails to take appropriate remedial action.

While the employer may have no duty to monitor sexual relations in the workplace,¹⁰⁷ the potential liability for apparently consensual relationships requires a sexual harassment policy that is clear in what it prohibits and user friendly in its reporting procedure. Any target engaged in a voluntary but unwelcome sexual relationship must know that the employer will provide protection when the target reports the situation. In addition, it may be wise for an employer who has knowledge of a sexual relationship at work, particularly one between a supervisor and subordinate, to reissue the sexual harassment policy to the parties involved and perhaps meet with parties to restate the policy orally. This approach enables the employer to avoid invasion of privacy issues and finesses the issue of nondating policies, which are difficult to enforce and may themselves cause problems with employee morale.¹⁰⁸ The reissuance of the sexual harassment policy and the meeting should be documented in preparation for a potential sexual harassment charge. The purpose of these steps is to emphasize to the parties involved in a seemingly welcome relationship that the employer will not tolerate an *unwelcome* sexual relationship and will protect a victim of such a relationship by prompt corrective action designed to end the harassment. Of course, the employer will also reduce the risk of a sexual harassment charge.

C. The Silent Target: When Failure To Complain Creates Liability

Failure to complain does not mean that sexual harassment is not occurring and does not constitute a complete bar to a lawsuit.¹⁰⁹ Thanks to expert testimony, courts have begun to recognize that many women engage in coping strategies rather than complain about the sexual harassment. These coping strategies are seen as a consequence of sexual harassment, not as an excuse for it or a defense to it. Indeed, courts recognize that sexual harassment is no-

107. *Jackson v. Kimel*, 992 F.2d 1318, 1323 (4th Cir. 1993) (“[W]e do not believe that employers have a duty to investigate every office romance occurring outside the work place to insure that coercion is not a factor. Something more than mere knowledge by AT&T of the affair itself must be shown in order to establish ratification under respondeat superior principles . . .”).

108. *See Sarsha v. Sears, Roebuck & Co.*, 796 F. Supp. 1132 (N.D. Ill. 1992).

109. *Meritor*, 477 U.S. 57 (failure to complain is no defense where sexual harassment policy discouraged claims; the policy was not explicit and it required the target to complain to the harasser).

toriously underreported.¹¹⁰

Coping methods commonly employed by women experiencing sexual harassment include: (1) denial ("there's no harassment here"); (2) avoidance (taking sick leave); (3) compliance (engaging in similar banter or conduct);¹¹¹ (4) confrontation ("stop this"); and (5) formal complaint.¹¹² Of these options, the formal complaint is least likely because women are embarrassed, they fear blame and retaliation, and they believe that their complaints will be ignored or, worse, that a complaint will aggravate the problem.¹¹³

Because of the impediments to reporting harassment, "[a]n effective policy for controlling sexual harassment cannot rely on ad hoc incident-by-incident reporting and investigation."¹¹⁴ The employer must be aware of what is occurring in the workplace. Often the writing is on the wall (in the form of offensive posters or hostile graffiti) or the harassment is so pervasive that management will be deemed to know it exists.¹¹⁵ Because the employer may be held liable for the sexual harassment of the silent target, the employer

110. See *Snider v. Consolidated Coal Co.*, 973 F.2d 555, 558 (7th Cir. 1992) (expert testified that over ninety-five percent of victims do not complain because of fear of reprisal or loss of privacy); *Reynolds v. Borough of Avalon*, 799 F. Supp. 442 (D.N.J. 1992). Compare *Komaromy et al.*, *supra* note 3 (fewer than one quarter of medical students sexually harassed in their university training programs reported the incidents, citing a fear of retaliation, embarrassment, and concern that their complaints would be ignored as the reasons for not reporting); *Cavallo*, *supra* note 4 (in the community hospital survey, none reported harassment).

However, there has been an increase in claims following the Anita Hill-Clarence Thomas hearings in October of 1991 and the passage of the 1991 Civil Rights Amendments, which encourage targets to bring claims of sex discrimination by allowing for jury trials and by providing for compensatory and punitive damages in cases of intentional discrimination. A plaintiff who establishes a prima facie case of sexual harassment is entitled to a presumption that the defendant intended to discriminate. *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771 (D. Nev. 1992). Between October 1 and December 31, 1991, the EEOC experienced a forty-one percent increase in sexual harassment claims compared to the same period one year earlier. 52 DAILY LABOR REPORT A-12 (March 17, 1992).

111. Compliance with sexual harassment is often seen as a coping strategy rather than as consent to the harassment. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1506 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir., argued Dec. 2, 1992).

112. *Stockett v. Tolin*, 791 F. Supp. 1536, 1549 (S.D. Fla. 1992) (clinical psychologist testified that targets frequently tolerate sexual harassment because the harassment itself causes a helplessness that results in "the inability to develop strategies for handling the [mis]treatment").

113. In *Robinson*, 760 F. Supp. at 1498-1501, after the plaintiff complained, the plaintiff's co-workers posted more pornographic material and directed increasingly explicit jokes and graffiti toward the plaintiff and her work area.

114. *Id.* at 1506.

115. *Id.* at 1529-31.

should train its workforce: supervisors should know that they are obligated to prevent, report, and remedy sexual harassment,¹¹⁶ and employees, including supervisors, must understand that their failure to abide by the company's sexual harassment policy may result in dismissal and may subject them individually to a lawsuit by the target or by the employer.¹¹⁷ Supervisors should be evaluated on the basis of their compliance with the institution's sexual harassment policy.

A well-designed sexual harassment policy may insulate an employer from claims by a silent target. However, such protection is available only if the sexual harassment policy is truly user-friendly and if the harassment is not otherwise obvious. A harassed employee has no duty to report obvious harassment, but when the harassment is not obvious, the target's failure to complain in the face of a well-designed complaint procedure should insulate the employer from liability. An employer with an effective complaint procedure can legitimately argue that had the target complained, the employer would have provided protection. Moreover, in such circumstances, failure to complain may reflect on the target's credibility.¹¹⁸

116. *Id.* at 1527.

117. Although a recent case, *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), held that there can be no individual liability under either Title VII or the Age Discrimination in Employment Act, 29 U.S.C. § 206(d) (1988), other decisions have held supervisors individually liable when acting as an agent of the employer or when committing sexual harassment. *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990) (supervisor liable under Title VII as employer's agent only in his or her official capacity); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987); *Canada v. Boyd Group, Inc.*, 809 F. Supp. 771 (D. Nev. 1992) (individuals not liable for compensatory damages under the 1991 Civil Rights Amendments); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 411 (N.D. Ill. 1991) (supervisor acting as agent was not individually liable under Title VII, but supervisor was liable in official capacity only so as to bind employer); *Robinson*, 760 F. Supp. at 1533 n.11 (while liability attaches to the supervisor individually, only the employer can be held responsible for relief in the form of backpay). *But see* *Otto v. Department of Health & Human Servs.*, 781 F.2d 754 (9th Cir. 1986) (supervisor held independently liable for state tort claims of defamation and invasion of privacy arising out of sexual harassment); *Murphy v. Chicago Transit Auth.*, 638 F. Supp. 464 (N.D. Ill. 1986) (supervisors liable under 42 U.S.C. § 1983 for deliberate indifference to sexual harassment by co-workers); *Biggs v. Surrey Broadcasting Co.*, 811 P.2d 111 (Okla. Ct. App. 1991) (employer, who settled a sexual harassment claim for \$65,000 and subsequently sued the harasser for indemnification, could be indemnified by the harasser if the employer showed that the settlement was reasonable, and if the harasser could not show employer fault).

118. EEOC Policy Guidance on Sexual Harassment, *supra* note 30. ("Where there is some indication of welcomeness or when the credibility of the parties is at issue, the . . . claim will be considerably strengthened if [the target] made a contemporaneous complaint or protest.").

V. PREVENTIVE STEPS: THE EFFECTIVE SEXUAL HARASSMENT POLICY

The law under Title VII allows an employer to limit substantially sexual harassment liability if the employer does the following: (1) implements a written sexual harassment policy that encourages meritorious claims; (2) promptly and effectively investigates all claims or "known" instances of sexual harassment;¹¹⁹ (3) takes appropriate corrective action designed to end harassment (when it is found);¹²⁰ and (4) monitors corrective action to ensure that harassment has stopped and does not recur.¹²¹

The investigation must be thorough, extensive, and conducted in good faith;¹²² it should consider whether the number and types of complaints indicate a systemic problem; and, if the workplace is male-dominated, the employer may have "an increased obligation to create environments which are safe for all employees."¹²³

Appropriate corrective action may range from counselling to termination. In no event should the target be disadvantaged by the corrective action; a transfer or change in job duties should not be implemented without the target's consent. The target should not

119. An employer should not respond to complaints with (1) unfulfilled promises of investigation, (2) demotion, (3) advice that a slander suit could follow, or (4) an observation that harassment is like a pink elephant and can vanish with the snap of a finger. These actions sustained a claim for constructive discharge as a result of sexual harassment in *Cortes v. Maxus Exploration Co.*, 977 F.2d 195 (5th Cir. 1992). Other ill-advised responses include "lighten up, develop a thicker skin," "carry a knife," *Hansel v. Public Servs. Co.*, 778 F. Supp. 1126 (D. Colo. 1991); "tell him you have herpes," *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989); and "don't go to the EEOC," *Yates v. Avco Corp.*, 819 F.2d 630 (6th Cir. 1987).

120. *Davis v. Tri-State Mack Distribs.*, 981 F.2d 340 (8th Cir. 1992) (response neither prompt nor adequate when no action was taken on first complaint and attempted corrective action was merely a request for an apology); *Kauffman v. Allied Signal, Autolite Div.*, 970 F.2d 178 (6th Cir. 1992) (company's prompt and adequate response to supervisor's harassment insulated company from liability).

121. *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990) (reprimand and denial of promotion and merit raise to foreman who publicly forced plaintiff's face into his crotch was appropriate discipline because foreman was responsive to discipline and conduct did not recur).

122. Such an investigation conducted prior to disciplinary action should minimize claims for wrongful discharge and intentional infliction of emotional distress. See *Johnson v. International Minerals & Chem. Corp.*, 40 Fair Empl. Prac. Cas. (BNA) 1651 (D.S.D. 1986).

123. *Jenson v. Eveleth Taconite Co.*, 61 Fair Empl. Prac. Cas. (BNA) 1252 (D. Minn. 1993) (The employer lost this class action suit for hostile working environment because of its inadequate responses to claims of sexual harassment: it "did not create a system for handling complaints, it did not attempt to identify or discipline the employees responsible for the sexually explicit materials, and it did not communicate to male employees the need to show respect for females.").

be punished for making the charge, even if an internal investigation results in a conclusion that no harassment occurred. When complainants are punished for complaining, the sexual harassment policy is not sincere and indeed is interpreted as a warning to all victims that they complain at their own peril.¹²⁴

Implementing the right kind of sexual harassment policy should absolve an employer of corporate liability, at least for claims of hostile working environment: the employer will learn of sexual harassment that is otherwise undisclosed and take appropriate corrective action. If the employer has an effective harassment policy in place but an employee does not complain, the employer can argue that knowledge of the harassment cannot be imputed to the employer. When a good policy is in effect, the obligation to bring private harassment to light should be on the target. If the target does not complain, the corporation should not be held liable, though the harasser may be. Where the harassment is obvious, however, the employer cannot insist upon a complaint. Since many courts impose automatic liability for quid quo pro harassment, the employer must control its supervisors to ensure against corporate liability for this harassment.

An effective sexual harassment policy is one that *encourages* meritorious claims and responds with appropriate corrective and preventive action. When the employer has determined that harassment occurred, it must, at a minimum, express strong disapproval of the conduct, reprimand the harasser, and inform the harasser that repeated harassment can result in termination.¹²⁵ The employer must determine what impact any corrective action short of discharge will have on the complaining party.¹²⁶ When the harassment is mild and the harasser is cooperative and contrite, counseling may be appropriate. But where the harassment is severe or the harasser appears recalcitrant, discharge may be required.

An employer taking a preventive approach to sexual harassment should take the following steps:¹²⁷

124. An employer should think very carefully before terminating an employee who makes a false claim of harassment. The proof of falsehood and malice should be clear.

The accused may sue the untruthful employee for defamation. The Illinois Human Rights Act, 775 ILCS 5/1-102 (1992), states that public policy includes preventing unfounded charges of harassment. The employer may use this or other similar policy statements when confronting a patently false claim.

125. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

126. *Id.*

127. The Appendix to this article contains an excellent model policy that can be adapted to the healthcare setting. It was drafted by the Women's Bar Association of Illinois. Other excellent model policies can be found in ABA COMM. ON WOMEN IN THE

Commit to, widely disseminate, and implement an effective written policy designed to *encourage* meritorious complaints.

Clearly describe sexual harassment using simple, direct, and specific language.

Provide an illustrative list of prohibited behaviors, but state clearly that the list is not exhaustive.

Acknowledge that what the accused may perceive as a compliment or a joke may be perceived as harassment by the target. "Unintentional" conduct that gives offense should be prohibited.

Explain that sexual harassment can result from the behavior of supervisors, co-workers, or subordinates.

Forcefully prohibit sexual harassment.

Emphasize that violations of the policy will result in discipline, up to and including discharge.

Establish multiple avenues for complaint in order to guard against the possibility that the target's only recourse is to report the offensive conduct to the harasser.

Select respected, compassionate, and accessible employees to receive complaints; include at least one woman. An "open door" policy to the company president may be intimidating and therefore discourage complaints.

Eliminate sexually offensive graffiti, posters, and other material, and prohibit sexist slurs. Take immediate action when potentially harassing situations are observed; do not wait for a complaint when the harassment is obvious.

Assure employees that complaints will not result in reprisal or retaliation. Do not try to eradicate the harassment by taking action adverse to the claimant; such action could subject the employer to a charge of retaliation under Title VII.

State that all complaints will be promptly investigated in an appropriate manner and ensure that this is done.

Devise appropriate and objective investigative techniques. Obtain the who-what-when-where information, as well as a list of witnesses and names of people, such as

PROFESSION, LAWYERS AND BALANCED LIVES: A GUIDE TO DRAFTING AND IMPLEMENTING WORKPLACE POLICIES FOR LAWYERS (1990) and ABA SECTION OF LITIGATION, THE WOMAN ADVOCATE (1993). A more succinct model policy can be found in LINDEMANN & KADUE, *supra* note 30, at 722.

friends, relatives, and co-workers, to whom the target contemporaneously reported the harassment.

Maintain all records of the complaint, investigation, and determination in a separate, locked file.

Assure that confidentiality will be protected to the extent possible, with information divulged only on a "need to know" basis. However, do not promise unqualified confidentiality: employers cannot provide complete confidentiality and at the same time conduct an appropriate investigation. A complaint charges the employer with knowledge of potential harassment. Hence, the employer must conduct an investigation that will protect not only the complaining party but silent or future targets as well. This is true even if the complaining party insists that the employer take no action. If this happens, try to determine why the complaining party is taking this position. Is it because of a fear of retaliation?

Respect the rights of all parties involved in an investigation, and remain objective and fair.

Insist that all employees, whether the complaining party, the accused, witnesses, or other interviewees, have an obligation to cooperate in the investigation and to keep all information confidential. Assure that there will be no reprisals for cooperating in the investigation. Impose sanctions for noncompliance with this company policy.

Explain that after an appropriate and thorough investigation, the employer will make a reasonable and good faith determination of whether harassment occurred.

Emphasize that any harasser will be appropriately disciplined, up to and including discharge; impose discipline that will prevent any recurrence of the harassment.

Note that any corrective action will be subject to follow-up to ensure that the harassment has ended and will not recur.

VI. CONCLUSION

As the law that applies to sexual harassment in the workplace has developed, all will benefit from its noble ends: employees will be evaluated on the basis of performance, members of the workplace will behave in a respectful, business-like manner, and productivity will be enhanced. Healthcare attorneys may face unique challenges given the hierarchical structure of the healthcare envi-

ronment, the number of independent contractors working in the area, the frequent existence of a teacher-student relationship, and the preference for self-regulation.

However, the law encourages a preventive approach to sexual harassment. The implementation of an effective sexual harassment policy, as described in this article, is an important step toward protecting the legitimate interests of all parties involved.

APPENDIX

SAMPLE SEXUAL HARASSMENT POLICY*

I. STATEMENT OF POLICY

_____ (hereinafter referred to as “the Firm”) is committed to maintaining a work environment that encourages and fosters appropriate conduct among employees and respect for individual values and sensibilities. Accordingly, the (Firm Name) intends to enforce its Sexual Harassment Policy at all levels within the work place in order to create an environment free from discrimination of any kind, including sexual harassment.

Sexual harassment, according to the Equal Employment Opportunity Commission and the Illinois Department of Human Rights, and for purposes of this policy, consists of unwelcome sexual advances, requests for sexual favors, other verbal, non-verbal, or physical acts of a sexual or sex-based nature, where

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
- (2) an employment decision affecting an employee is based on that individual's acceptance or rejection of such conduct; or
- (3) such conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

Sexual harassment can occur between men and women, or members of the same gender. This behavior is unacceptable in the work place itself and in other work-related settings such as business trips, court appearances and business-related social events.

It is also unlawful to retaliate in any way against anyone who has complained about sexual harassment or discrimination, whether that concern relates to harassment of or discrimination against the individual raising the concern or against another individual.

Sexual harassment affects the victim and other employees as well. Each incident of harassment contributes to a general atmos-

* Copyright, Women's Bar Association of Illinois; August, 1993. (This Sample Policy was developed as a result of the WBAI's Employment Law Committee's review of the EEOC Guidelines; the Illinois Human Rights Act and related regulations; several model policies from actual employers, including law firms; and the ABA's Commission on Women in the Profession's Sample Policy, from which some terrific language pertaining to certain areas was adapted or outright lifted. In addition, comments were solicited from organizations having or expressing an interest in contributing to the development of a model policy. The draft should be considered as an evolving document subject to modification as input is received from WBAI members and other sources.)

phere in which everyone suffers the consequences. Sexually-oriented acts or sex-based conduct have no legitimate business purpose. Where such conduct is directed by a supervisor (or someone in a management position) toward a subordinate, the former will be held to a higher standard of accountability because of the degree of control and influence he or she has or is perceived to have over the employment conditions and benefits of the subordinate.

II. PROHIBITED CONDUCT

Prohibited acts of sexual harassment can take a variety of forms ranging from subtle pressure for sexual activity or contact to physical contact. At times the offender may be unaware that his or her conduct is offensive or harassing to others. Examples of conduct which could be considered sexual harassment include:

- (a) persistent or repeated unwelcome flirting, pressure for dates, sexual comments or touching;
- (b) sexually suggestive jokes, gestures or sounds directed toward another or sexually oriented or degrading comments about another;
- (c) preferential treatment of an employee, or a promise of preferential treatment to an employee, in exchange for dates or sexual conduct; or the denial or threat of denial of employment, benefits or advancement for refusal to consent to sexual advances;
- (d) the open display of sexually oriented pictures, posters, or other material offensive to others;
- (e) retaliation against an individual for reporting or complaining about sexually harassing conduct.

III. INDIVIDUALS COVERED UNDER THE POLICY

This policy covers all employees (associates, paralegals, support staff) and partners. The Firm will not tolerate, condone or allow sexual harassment, whether engaged in by fellow employees, supervisors, associates, partners or by outside clients, opposing counsel, court personnel or other non-employees who conduct business with this Firm. The Firm supports and encourages reporting of all incidents of sexual harassment, regardless of who the offender may be, and will promptly investigate all reported incidents. Where the alleged offender is not an employee or partner of the Firm, the Firm's management, in consultation with the complainant, will review the complaint and make every effort to identify a reasonable remedy if sexual harassment has been confirmed.

IV. COMPLAINT PROCESS

While the Firm encourages individuals who believe they are being harassed to firmly and promptly notify the offender that his or her behavior is unwelcome, the Firm also recognizes that power and status disparities between an alleged harasser and a target may make such a confrontation impossible. In the event that such informal, direct communication between individuals is either ineffective or impossible, or even when such communication has occurred, the following steps should be taken to report a sexual harassment complaint.

- A. *Reporting of Incident:* All employees are urged to report any suspected sexual harassment by another employee to the _____ (Personnel Director; or Office Manager; or Senior Partner; or, where firm size and resources permit, to a member of a Committee created to handle complaints), except where that person is the individual accused of harassment. In that case, the complaint should be reported to _____. If the victim prefers to report the suspected harassment to someone of the opposite gender from that of the _____, the complaint can be reported to _____. The report may be made initially either orally or in writing, but reports made orally must be reduced to writing before an investigation can be initiated and a resolution achieved.
- B. *Investigation of Complaint:* When a complaint has been reduced to writing, the _____ or the individual informed pursuant to Paragraph A above will initiate an investigation of the suspected sexual harassment within five (5) working days of notification. If necessary, the Firm representative receiving the complaint may designate another supervisory or management employee of the opposite sex to assist him/her in the investigation. If any of said individuals is the subject of the investigation, the investigation will be conducted by the _____. The investigation will include an interview with the employee(s) who made the initial report, the person(s) towards whom the suspected harassment was directed and the individual(s) accused of the harassment. Any other person who may have information regarding the alleged sexual harassment may also be interviewed.
- C. *Report:* The person responsible for investigating the complaint shall prepare a written report within ten (10) working days of his/her notification of the suspected harassment unless extenuating circumstances prevent him/her from doing so. The report shall include a finding that sexual harassment

occurred, sexual harassment did not occur, or there is inconclusive evidence as to whether sexual harassment occurred. A copy of the report will be given to the employee(s) who made the initial report, the employee(s) to whom the suspected harassment was directed, and the individual(s) accused of the harassment.

- D. *Records; Confidentiality*: Employees who report incidents of sexual harassment are encouraged to keep written notes in order to accurately record the offensive conduct. Every effort shall be made to keep all matter related to the investigation and various reports confidential. In the event of a lawsuit, however, the Firm advises that records it maintains and the complainant maintains may not be considered privileged from disclosure. Written records will be maintained for _____ years from the date of the resolution unless new circumstances dictate that the file should be kept for a longer period of time.
- E. *Timeframe for Reporting Complaint*: The Firm encourages a prompt reporting of complaints so that rapid response and appropriate action may be taken. However, due to the sensitivity of these problems and because of the emotional toll such misconduct may have on the individual, no limited timeframe will be instituted for reporting sexual harassment complaints. Delayed reporting of complaints will not in and of itself preclude this Firm from taking remedial action.
- F. *Protection Against Retaliation*: The Firm will not in any way retaliate against an individual who makes a report of sexual harassment nor permit any partner or employee to do so. Retaliation is a serious violation of this sexual harassment policy and should be reported immediately. Any person found to have retaliated against another individual for reporting sexual harassment will be subject to the same disciplinary action provided for sexual harassment offenders.
- G. *Appeals Process*: If either party directly involved in a sexual harassment investigation is dissatisfied with the outcome or resolution, that individual has the right to appeal the decision. The dissatisfied party should submit his/her written comments in a timely manner to _____ (select the appropriate reviewers; individual or group of individuals, e.g., Administrative Partners of the Firm).

V. DISCIPLINE/SANCTIONS

Disciplinary action will be taken against any employee found to have engaged in sexual harassment of any other employee. The extent of sanctions may depend in part upon the length and condi-

tions of employment of the particular employee and the nature of the offense. The Firm has the right to apply any sanction or combination of sanctions, up to and including termination, to deal with unreasonable conduct or discrimination.

Where a hostile work environment has been found to exist the Firm will take all reasonable steps to eliminate the conduct creating such an environment.

If an investigation results in a finding that the complainant falsely accused another of sexual harassment knowingly or in a malicious manner, the complainant will be subject to appropriate sanctions, including the possibility of termination.

NOTE: This policy is not intended as a contractual obligation. The Firm reserves the right to amend the policy from time to time.

THE FIRM

DATED: _____

BY: _____