

**SEXUAL HARASSMENT IN THE WORKPLACE:
A LEGAL REVIEW OF RECENT STATUTORY,
ADMINISTRATIVE, AND CASE LAW**

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ABSTRACT

This article examines the concept of sexual harassment and traces significant legal developments that have occurred. These issues are illustrated with reference to Supreme Court cases and cases in the Sixth Federal Circuit Court of Appeals. Recent tort issues that have been raised in sexual harassment cases in the Sixth Circuit are discussed. Sexual favoritism as a form of sexual harassment discrimination is discussed in relation to EEOC Guidelines and relevant case law. Finally, the issues of employer liability and defenses are covered.

Sexual harassment is a serious workplace concern that can cost employers large sums of money and severely damage employee morale. The law firm of Baker & McKenzie, for example, found this out on September 1, 1994, when a former secretary who had alleged she was sexually harassed by a partner was awarded \$50,000 in compensatory damages and \$7.125 million in punitive damages [1]. The fact that the organization where this occurred was a law firm points out that even firms that should be clearly aware of the danger are not immune from sexual harassment problems.

This article discusses the legal concept of sexual harassment, the significant case law, and the employer's tort liability for sexual harassment with attention to developments in the Sixth Federal Appeals Circuit. The standing of "sexual favoritism" [2] as a form of sexual harassment discrimination is also addressed.

Finally, employer defenses and the components of a legally effective policy to deal with sexual harassment discrimination are covered.

WHAT IS SEXUAL HARASSMENT?

Sexual harassment is a form of sex discrimination that can be defined as a “type of employment discrimination, [which] includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature prohibited by Federal law . . . and commonly by state statutes” [3]. Under federal law, sexual harassment is prohibited by Title VII of the Civil Rights Act of 1964 [4]. This act forbids an employer “to discriminate against any individual with respect to . . . employment, because of such individual’s . . . sex. . . .” [5].

Initially, federal courts narrowly interpreted Title VII and held that no cause of action existed under the act for sexual harassing conduct [6]. However, the scope of Title VII broadened after the landmark case of *Williams v. Saxbe* [7], where a federal district court held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII. Even after *Saxbe*, federal courts still needed guidance on what type of conduct or behavior constituted “sex” discrimination. In an attempt to clarify the issue, the EEOC published interim guidelines on sexual harassment on November 10, 1980, and final guidelines were published in 1988 [8]. The portion of the Guidelines on Discrimination Because of Sex (§ 1604.11 Sexual Harassment) that deals with sexual harassment states in part:

(a) Harassment on the basis of sex is a violation of §703 of Title VII. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

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

An Ohio victim of sexual harassment may also find relief under Ohio’s Fair Employment Practices Law [9]. This Ohio antidiscrimination law is interpreted in accordance with the standards applicable under Title VII [10]. Therefore, any

conduct or behavior considered to violate federal law would be a violation of Ohio law. In addition, the Ohio Supreme Court has recognized that sexual harassment is a common law tort that may be actionable in state courts [11].

Although sexual harassment encompasses a broad range of conduct, it usually falls into one of two general categories: 1) quid pro quo harassment, and 2) hostile work environment harassment. Both types of harassment violate Title VII, but each contains unique elements.

Quid Pro Quo Sexual Harassment

Quid pro quo (“something for something”) harassment is the more conspicuous type of harassment, which involves the exchange of employment benefits by a supervisor for sexual favors from a subordinate employee. Quid pro quo harassment typically involves a scenario where a supervisor demands sexual harassment consideration in exchange for some type of employment benefit [12].

The Sixth Federal Circuit Court of Appeals in *Kauffman v. Allied Signal, Inc.* [13] held that in order to prevail under a quid pro quo theory of sexual harassment, a plaintiff must establish:

- (1) that the employee was a member of a protected class;
- (2) that the employee was subject to unwelcomed sexual harassment in the form of sexual advances or requests for sexual favors;
- (3) that the harassment complained of was based upon sex;
- (4) that the employee’s submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee’s refusal to submit to the supervisor’s sexual demands resulted in a tangible job detriment; and
- (5) the existence of respondeat superior liability [14].

Examples of harassing conduct that are “based upon sex” may include the following: 1) offensive or repeated unwelcomed sexual flirtation, advances, or propositions; 2) sexual innuendo or suggestive comments to or about someone; 3) graphic, verbal commentaries about a person’s body; 4) degrading comments about an individual or his/her appearance; 5) display of sexually suggestive objects or pictures; 6) sexual-oriented “kidding” or “teasing”; 7) foul or obscene language; and 8) staring, leering, or whistling [15]. A “tangible job detriment” may include termination [16], transfer [17], delay or denial of job benefits [18], or adverse performance appraisals.

Hostile Work Environment Sexual Harassment

The second category of sexual harassment is hostile work environment harassment. Courts have had difficulty defining this type of harassment because what is hostile or abusive to one employee may not be hostile or abusive to another. In *Meritor Savings Bank v. Vinson*, the United States Supreme Court recognized for

the first time that Title VII prohibits sexual harassment that takes the form of a hostile work environment [19]. The Court stated that sexual harassment is actionable if it is “sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive work environment” [19, at 67]. An important question is what standard should be used to determine whether the work environment has become abusive or hostile. In *Meritor*, the Court said Title VII would not regard an isolated sexual joke as sexual harassment. Instead, the conduct must be sufficiently offensive that a “reasonable person” would consider the work environment hostile to the victim [19].

This issue was addressed by the Sixth Circuit Court of Appeals in *Rabidue v. Osceola Refrigerator Company* [20]. The Appeals Court agreed with the district court judge who wrote in the trial court decision:

... it cannot seriously be disputed that in some work environments humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. . . . [While] Title VII is the . . . mainstay in the struggle for equal employment opportunity for . . . female workers . . . it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers [20, at 620-21].

In *Rabidue*, the Court stated that to establish a hostile work environment sexual harassment action a plaintiff must prove the same five elements that were identified in the Kauffman case [13, 14], which is discussed above [17].

The fourth element (i.e., the harassment interfered with the victim’s work performance and created a hostile work environment) was recently altered by the United States Supreme Court in the 1995 case *Harris v. Forklift Systems, Incorporated* [21]. The Supreme Court said that in order to prove that a work environment is sexually hostile or abusive, one has to examine all the circumstances involved including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance. The effect on the employee’s psychological well-being is . . . relevant to determining whether the [victim] actually found the environment abusive” [21, 114 S.Ct., at 371].

The plaintiff in *Harris* worked as a rental manager from April 1985 until October 1987 for Forklift Systems, Incorporated. Ms. Harris alleged that Forklift’s president, Charles Hardy, treated her differently from the male managers in regard to salary and by being subjected to discriminatory and sexist conduct. Specifically, the magistrate found that Hardy “often insulted [Ms. Harris] because of her gender and often made her the target of unwanted sexual innuendos” [21, 510 U.S., at 19]. Hardy made statements such as: “You’re a woman, what do you know,” . . . “We need a man as rental manager,” . . . [You are] “a dumb ass

woman,” [and] Let’s “go to the Holiday Inn to negotiate [your] raise.” Harris also alleged that Hardy threw objects on the ground and asked her and other female employees to pick the objects up. He also asked Harris and other female employees “to get coins from his front pants pocket” [21, 510 U.S., at 22-23].

The U.S. District Court for the Middle District of Tennessee adopted the magistrate’s recommendation and held that Hardy’s conduct did not create an abusive environment because Hardy’s comments “were not so severe as to be expected to seriously affect Harris’ psychological well-being . . . [The magistrate did] not believe that [Hardy] created a working environment so poisoned as to be intimidating or abusive to Harris” [22]. The district court here was following the Sixth Circuit’s *Rabidue* decision, which required proof that the defendant’s actions had a serious effect on the plaintiff’s psychological well-being.

On appeal, the Sixth Circuit affirmed the district court’s holding in Harris. That decision was appealed to the U.S. Supreme Court, which agreed to review the case. Justice O’Connor writing the majority opinion for the court in *Harris v. Forklift* explicitly addressed two important issues and implicitly addressed a third [20, 21].

First, *Harris* identified what the appropriate test is to determine whether the work environment was hostile or abusive. By now, three tests had been applied in the lower courts: a subjective test (i.e., whether plaintiff actually perceived her working environment to be hostile), an objective test (i.e., whether a reasonable person would perceive plaintiff’s working environment to be hostile), or requiring both tests to determine whether the work environment was hostile or abusive. The Court held in *Harris* that in order to establish a sexual harassment claim under Title VII, both tests must be satisfied [23].

Second, the Court held that a plaintiff is not required to prove serious psychological injury in order to establish that she worked in an “abusive work environment” [23]. Psychological harm may be taken into account but is not a mandatory requirement that must be present to have an abusive work environment. Justice O’Connor explained that the “appalling” conduct described in *Meritor Savings Bank v. Vinson* provided egregious examples of harassment that indeed did harm the emotional and psychological stability of the victim. However, having the same or similar conduct present is not necessary for a work environment to be considered abusive [23, at 371].

Lastly, *Harris* addressed the issue of whether the objective standard should be a “reasonable person” standard or whether it should be a “reasonable woman” standard. In defining an objectively hostile or abusive work environment, O’Connor stated that such an environment would be one “that a reasonable person would find hostile or abusive” [23, at 370]. Thus, it appears that the “reasonable person” is the appropriate objective standard.

Although concurring with O’Connor’s opinion, Justice Scalia noted that in practice *Harris* offers the parties little real guidance in determining whether sexual harassment has occurred. Scalia maintained that the “opinion does list a

number of factors that contribute to abusiveness . . . but since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude” [23, at 372]. This point was also noted in a law review article where the author stated that since Harris “does not provide detailed guidelines regarding workplace conduct. . . . [I]ts impact very likely will not be significant in guiding employees in their behavior or assisting employers in judging what sort of behavior is acceptable and what is unlawful” [24, p. 19].

WHEN IS AN EMPLOYER LIABLE UNDER TITLE VII?

A common element to both quid pro quo harassment and hostile work environment harassment is “the existence of respondeat superior liability” [25]. Respondeat superior (“let the master answer”) is an agency doctrine that means a master (i.e., the employer) is liable in certain cases for the wrongful acts of the servant (i.e., the employee). Normally, an employer will be liable for all the torts committed by its employees who are acting “within the scope of their employment.”

With regard to quid pro quo harassment, which deals with sexual harassment by a supervisor, several federal courts have held employers strictly liable for the sexual harassment of an employee based on the agency doctrine of respondeat superior [26]. Even the U.S. Supreme Court stated in *Meritor Savings Bank v. Vinson* “that the act of a supervisory employee or agent is imputed to the employer” [19, at 74].

However, the employer may not automatically be liable under a hostile work environment claim for harassment by supervisory employees. In *Meritor*, the U.S. Supreme Court suggested lower courts should carefully examine hostile work environment claims to determine whether the employer knew or should have known about the harassing conduct, or whether the harasser was acting in an agency capacity or within the scope of employment. The Court stated it would be improper to find strict employer liability if the harasser was a supervisor in another part of the business and had no authority over the victim [19, at 76]. This is in accord with the EEOC’s Guidelines on Discrimination Because of Sex, where it is stated:

(c) . . . The [EEOC] will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action [27].

As applied in the Sixth Circuit, the standard for determining employer liability in a hostile work environment claim was stated in the *Rabidue* case. The Court of Appeals stated:

[T]he plaintiff [must] . . . demonstrate respondeat superior liability by proving that the employer, through its agents . . . knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. . . . The promptness and adequacy of the employer's response to correct instances of alleged [hostile environment] sexual harassment . . . must be evaluated upon a case by case basis [20, at 611, 621].

Thus, employers can reduce their liability risk by adopting and enforcing a sexual harassment, and if warranted, taking appropriate corrective action. Finally, an employer should be aware that it could be liable for sexual harassment by nonemployees. Sexual harassment by nonemployees usually involves the conduct of clients or customers. The EEOC guidelines state:

(f) An employer may also be responsible for the acts of non-employees with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such nonemployees [28].

Employers are especially vulnerable to a sexual harassment claim if the non-employee harassment is encouraged by an employer's requirement that female employees wear revealing apparel or act in a provocative manner to stimulate business [29].

SEXUAL FAVORITISM AS A TYPE OF SEXUAL HARASSMENT

Does a situation where a manager has engaged in "sexual favoritism" (i.e., favored a close friend or a lover at another employee's expense) establish another form of sexual harassment discrimination? In general, courts have held that, while such favoritism may be unfair, isolated instances of such conduct are not actionable under Title VII [30]. However, sexual favoritism that is equivalent to quid pro quo sexual harassment (i.e., the employee receives a work benefit because of the employee's relationship with the manager) is prohibited by Title VII [31].

In *Avers v. American Telephone & Telegraph Company*, a federal district court in Florida explained that this type of discrimination "is not based on sexism (whether gender or activity), but is rather more akin to nepotism [32]. The

favoritism is a gender-neutral, albeit unfair, justification for the given action” [32, at 445]. Also, the EEOC Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism [27] states that:

Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. . . . [F]avoritism toward a “paramour” (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.

On page four of this EEOC Policy, it describes the following example of a nonactionable Title VII claim for favoritism:

Example 1.—Charging Party (CP) alleges that she lost a promotion for which she was qualified because the co-worker who obtained the promotion was engaged in a sexual relationship with their supervisor. EEOC’s investigation discloses that the relationship at issue was consensual and that the supervisor had never subjected CP’s co-worker or any other employees to unwelcomed sexual advances. The Commission would find no violation of Title VII in these circumstances, because men and women were equally disadvantaged by the supervisor’s conduct for reasons other than their genders. Even if CP is genuinely offended by the supervisor’s conduct, she has no Title VII claim [27, at 4].

In *Miller v. ALCOA*, a female plaintiff alleged “her supervisors discriminated against her on the basis of sex by showing favoritism toward the other female product technician, Mary Hollihan, because Hollihan was having an affair with the plant manager Thomas Plantin” [33]. The court held:

. . . these assertions do not state a Title VII claim. We follow the Court of Appeals for the Second Circuit in holding that preferential treatment on the basis of a consensual romantic relationship between a supervisor and an employee is not gender based discrimination. . . . [A] plaintiff must show that her employer would have or did treat males differently to make out a Title VII claim. Male employees in Ms. Miller’s workplace shared with her the same disadvantage relative to Ms. Hollihan: none could claim the special place in Mr. Plantin’s heart that Ms. Hollihan occupied. Favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII [33, at 501 (emphasis added)].

The Second Circuit case referenced above is *DeCintio v. Westchester Cts. Med. Center* [34]. Seven male respiratory therapists alleged they were unlawfully disqualified for a promotion that went to a woman who was engaged in a sexual relationship with the department administrator. The court held that the administrator’s conduct, though unfair, did not violate Title VII. The court reasoned that

since Title VII protects against discrimination on the basis of one's sex, the plaintiffs' claims of discrimination were not actionable because the alleged discrimination was based on the administrator's preference to his "paramour," rather than because of their status as males [34, at 308].

This argument is in accord with the Sixth Circuit's decision in *Rabidue*, which held that "a plaintiff must demonstrate that she would not have been the object of harassment but for her sex" [20, at 611, 620]. The Court stated in *Rabidue* that "sexual conduct that prove[s] equally offensive to both male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment" [20, at 620].

Even though sexual favoritism is "technically" legal, an employer has reason to be cautious of romantic relationships within the workplace. Aside from lower employee morale caused by one employee being favored, problems may arise if an unamicable end occurs to the romantic relationship. There have been cases filed alleging quid pro quo sexual harassment when the supervisor retaliated against a female employee for terminating the relationship [35]. Employers should consider including "sexual favoritism" as a prohibited practice when developing a sexual harassment policy.

OTHER ACTIONS INVOLVED WITH SEXUAL HARASSMENT CASES

When a plaintiff brings a sexual harassment claim against an employer, she may also assert additional claims, which frequently include: 1) retaliation; 2) constructive discharge; and 3) intentional infliction of emotional distress.

Retaliation

Section 704 of Title VII provides that an employer may not discriminate against an employee "because [she] has opposed any practice made an unlawful practice by this subchapter, . . ." [36]. Therefore, Title VII prohibits discrimination against an employee who has either opposed or objected to an employment practice made unlawful under Title VII, made a charge, or participated in any manner in an investigation, procedure, or hearing under Title VII.

Sexual harassment complaints frequently include claims of retaliation, and such claims may be upheld despite a finding that no violation of Title VII has occurred [37]. Retaliation has been found where an employee shows that she engaged in a protected activity, she was then subjected to adverse employment action, and a causal link existed between the two events [38]. Examples of adverse employment action include: dismissal [39], demotion, transfer, negative evaluation, and charges of verbal misconduct [40].

Constructive Discharge

Another claim that is frequently made with a Title VII action is constructive discharge. An employee is constructively discharged when the employer deliberately makes the employee's working conditions so arduous and difficult that a reasonable person would find it to be intolerable [41]. Either type of harassment, quid pro quo or hostile work environment, may form the basis for a constructive discharge claim [42].

In *Yates*, the Sixth Circuit Court of Appeals described a two-step analysis to determine whether a constructive discharge has occurred. The process involves an inquiry into both the objective feelings of the employee and the intent of the employer. On the basis of this analysis, a constructive discharge exists if "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" [43]. Thus, an employee may be a victim of sexual harassment and quits her employment as a result, but she would not be considered constructively discharged because other aggravating factors (i.e., factors in addition to those that caused the sexual harassment) were not the reason for her decision to quit.

Intentional Infliction of Emotional Distress

Finally, defendant-employers are often faced with an additional claim of intentional infliction of emotional distress. In 1983, Ohio recognized the independent tort of intentional infliction of serious emotional distress in *Yeager v. Local 20, Int'l. Bhd. of Teamsters* [44]. The Ohio Supreme Court held that "in order to state a claim alleging the intentional infliction of emotional distress, the emotional distress alleged must be serious" [44, at 374 (emphasis added)]. The standard recognized by the Court in *Yeager* was taken directly from the Restatement of the Law 2d, Torts (1965) 71, Section 46(1), which states: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm" [44].

The next question is what degree of conduct would be judged to be an intentional infliction of emotional distress. The Restatement makes it clear that only outrageous and extreme conduct that would "be regarded as atrocious and . . . intolerable in a civilized community" falls in the proscribed area [44, at 375]. In defining a standard for "serious" emotional distress, the Ohio Supreme Court in *Paugh v. Hanks* stated:

By the term "serious," we of course go beyond trifling mental disturbance, mere upset or hurt feelings. We believe that serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally

constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case [45].

In *Gagne v. Northwestern Nat'l. Ins. Co.*, the Sixth Circuit Court of Appeals followed the Ohio Supreme Court's standard in *Yeager* for tortious intentional infliction of emotional distress [46]. The Sixth Circuit also noted *Paugh's* standard for "serious" infliction. In *Gagne*, the Sixth Circuit held that the facts did not support a finding that the plaintiff had suffered severe emotional distress. Plaintiff alleged she suffered "sleepless nights" and a feeling that she was "sort of withdrawn" along with a generalized impression that she was "not the same person she was prior to her termination." In denying her claim, the court noted some significant missing facts: the plaintiff "never consulted either medical or psychological experts for assistance, and she never missed work during the time that these allegedly outrageous episodes had occurred" [46, at 317].

EMPLOYER POLICIES TO COMBAT SEXUAL HARASSMENT

The EEOC's Guidelines encourage employees to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issues of harassment under Title VII, and developing methods to sensitize all concerned [28].

There are numerous practical reasons to implement a program to prevent sexual harassment and to address allegations of sexual harassment. A well-designed sexual harassment program will 1) increase workforce productivity by reducing the distractions caused by harassment; 2) increase the company's record of good faith if a sexual harassment claim goes to litigation; 3) provide a good defense against punitive damages; 4) increase the chance for successful internal resolution through early intervention; and 5) reduce the time it takes for the employer to learn of the harassment [47].

An effective sexual harassment program should include these elements: 1) a written sexual harassment policy, and 2) a well-defined procedure for receiving and investigating complaints [47]. The written policy should include a clear and unambiguous statement that sexual harassment will not be tolerated in the workplace and severe sanctions will result if any harassing conduct occurs. This policy should comport with the EEOC's guidelines and should identify examples of offensive behavior that may constitute sexual harassment [48]. All supervisory and nonsupervisory employees should receive a copy of this policy, and the

employer should obtain signed acknowledgments from these employees, which indicate that the employees received and read the policy.

The policy should also include a well-defined procedure for receiving and investigating complaints. This procedure should be designed to encourage victims of harassment to come forward and should not require a victim to complain first to a supervisor who may be the offender. For example, in *Yates* [38] the Sixth Circuit Court of Appeals found that the employer's antiharassment policy failed to function effectively because the victim's supervisor had the responsibility for reporting and correcting harassment at the company, yet he was the harasser.

An employer must promptly investigate any complaint and should take immediate and appropriate corrective action by doing whatever is necessary to end the harassing conduct. In developing complaint and investigation procedures, an employer should: 1) choose an investigator carefully, 2) have a planned investigative structure that will be used in all cases, 3) investigate all allegations (no matter how trivial), 4) interview witnesses, and 5) handle all allegations with sensitivity.

Disciplinary action against the offending employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective measures should reflect the severity of the harassing conduct [49]. Response options include: 1) counseling for both individuals, 2) reprimand, 3) reassign one or both parties, 4) alternate work schedules, 5) an apology, or 6) discharge (if warranted).

CONCLUSION

The most direct way to lower the incidence of sexual harassment is by changing the attitudes of managers, supervisors, and employees. Training seminars can educate and probably will reduce the amount of sexual harassment but will be unlikely to eliminate sexual harassment from the workplace. The statutory and tort law remedies that victims of sexual harassment have make this conduct risky and expensive. Given the recalcitrant nature of human behavior, it would behoove employers to implement comprehensive and legally acceptable sexual harassment policies. The choice is clear. To do nothing is an open door for harassment and exposes the employer to significant legal and monetary liability. To take action, albeit even action that only lowers but will not end the problem, is the ethical response that should be made for the good of employees and employers.

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ENDNOTES

1. *Weeks v. Baker & McKenzie* (Sept. 30, 1994), 1994 WL 636488 (Cal.Super.). Punitive damages were assessed against the defendants as follows: \$225,000 to the harassing partner; \$6.9 million to the law firm. The law firm's \$6.9 million judgment was later reduced by the trial court to \$3.5 million. *Weeks v. Baker & McKenzie* (Nov. 28, 1994), 1994 WL 759219 (Cal.Super.).
2. Sexual favoritism is where a close friend or a person who is involved with a manager is favored over other employees. Cases involving charges of favoritism are, e.g., *Platner v. Cash & Thomas Contractors*, 908 F.2d 902 (11th Cir. 1990); *Miller v. ALCOA*, 679 F.Supp. 495 (W.D. Pa.), aff'd without op., 856 F.2d 184 (3d Cir. 1988); *DeCinti v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir.), cert. denied, 484 U.S. 825 (1987); *Avers v. Am. Tel. & Tel.*, 826 F.Supp 443 (S.D. Fla. 1993) (held that favoring a "paramour" does not constitute a violation of Title VII) See EEOC Policy at 3-4 for discussion of favoritism.
3. *Black's Law Dictionary*, 1375 (6th ed. 1990).
4. 42 U.S.C. §§ 2000e-2000e17.
5. 42 U.S.C. § 2000e-2(a) (emphasis added).
6. See e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F.Supp. 161, 163 (D. Ariz. 1975) (court stated that the sexual harassing conduct could not be considered "company-directed policy which deprived women of employment opportunities").
7. *Williams v. Saxbe*, 413 F.Supp. 654.
8. See 45 Fed. Reg. 25,024 (1980) and C.F.R. 29 § 1604.11 (1988).
9. Ohio Rev. Code §§ 4112.01-4112.99.
10. *Baab v. AMR Services Corp.*, 811 F.Supp. 1246 (N.D. Ohio 1993) (recognized that Ohio cases of discrimination brought under Chapter 4112 of the Ohio Revised Code are interpreted in accordance with federal law).
11. *Kerans v. Porter Paint Co.*, 61 Ohio St. 3d 486, 575 N.E.2d 428 (1991).
12. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).
13. There are thirteen federal judicial divisions in the United States called "Circuits," and Ohio is located within the Sixth Circuit. See *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), cert. denied, 113 S.Ct. 831 (1992).
14. *Respondeat superior* means let the master beware, an agency concept that means the employer is responsible in certain situations for the acts of an employee. See *Black's Law Dictionary*, 1312 (6th ed. 1990).
15. The "conduct" examples are taken from an unpublished outline compiled by Pamela S. Krivda, an attorney with Hahn Loeser & Parks, Cleveland, Ohio.
16. *Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644 (6th Cir. 1986).
17. *Broderick v. Ruder*, 685 F.Supp. 1269 (D.D.C. 1988).
18. *Sparks v. Piolet Freight Carriers*, 830 F.2d 1554 (11th Cir. 1987).
19. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).
20. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986).
21. *Harris v. Forklift Systems, Inc.*, 510 U.S., 126 L. Ed 2d 295, 114 S.Ct. 367 (1993). The fourth element should now read "the charged sexual harassment had the effect of

- unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment."
22. *Harris*, 510 U.S. at 114 S.Ct. at 369 126 L.Ed.2d, at 114 S.Ct. at 370 126 L.Ed.2d at 301 (internal brackets and quotation marks omitted).
 23. *Harris*, 510 U.S. at 114 S.Ct. at 370, 126 L.Ed.2d at 302.
 24. B. Plevan, (1993). *Harris won't end harassment questions. National Law Journal*, Dec. 6, 1993, p. 19.
 25. *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 186 (6th Cir.), cert. denied, 113 S.Ct. 831 (1992); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986).
 26. See e.g., *Shrout v. Black Clawson Co.*, 689 F.Supp. 774 (S.D. Ohio 1988). In the EEOC Policy Guidance on Current Issues of Sexual Harassment, N-915-050 (Mar. 19, 1990), it states, "An employer will always be held responsible for acts of 'quid pro quo' harassment. A supervisor in such circumstances has made or threatened to make a decision affecting the victim's employment status, and he therefore has exercised authority delegated to him by his employer."
 27. 29 C.F.R. § 1604.11(c)-(d) (1988).
 28. 29 C.F.R. § 1604.11(f) (1988).
 29. See, e.g., *EEOC v. Newtown Inn Assocs.*, 647 F.Supp. 957 (E.D. Va. 1986) (cocktail waitresses were required to wear provocative outfits, flirt, and dance in a provocative manner); *EEOC v. Sage Realty Corp.*, F.Supp. 599 (S.D.N.Y. 1981) (lobby attendant was required to wear revealing outfit); *Marentette v. Michigan Host. Inc.*, 506 F.Supp. 909 (E.D. Mich. 1980) (sexually provocative dress code may violate Title VII).
 30. See, e.g., *Platner v. Cash & Thomas Contractors*, 907 F.2d 902 (11th Cir.1990); *Miller v. ALCOA*, 679 F.Supp. 495 (W.D. Pa.), aff'd without op., 856 F.2d 184 (3d Cir. 1988); *DeCinti v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir.), cert. denied, 484 U.S. 825 (1987); *Avers v. Am. Tel. & Tel.*, 826 F.Supp. 443 (S.D. Fla. 1993) (held that favoring a "paramour" does not constitute a violate of Title VII).
 31. See, *Broderick v. Ruden*, 685 F.Supp. 1269 (D.C.C. 1988); EEOC Policy at 3-4.
 32. *Avers v. American Telephone & Telegraph Company*, 826 F.Supp. 433, at 445.
 33. *Miller v. ALCOA*, 679 F.Supp. 495, 498 (W.D. Pa.), aff'd without op., 856 F.2d 184 (3d Cir. 1988).
 34. *DeCintio v. Westchester Cty Med. Ctr.*, 807 F.2d 304 (2d Cir), cert. denied, 484 U.S. 825 (1987).
 35. *Boddy v. Dean*, 821 F.2d 346, 348 (6th Cir. 1987). See, Diane Solov, "Love & Work: More Women on the Job Give New Meaning to Business Affairs," *The Plain Dealer* 3 April 1994, 1G; (noting that "Any fraternization policy today should limit restrictions to supervisor-subordinate relationships, since those have the most potential to explode into sexual harassment").
 36. 42 U.S.C.S. §2000e-3(a).
 37. *Boyd v. James S. Hayes Living Health Care Agency*, 671 F.Supp. 1155, 1168 (W.D. Tenn. 1987).
 38. *Yates v. Avco Corp.*, 819 F.2d 630, 638 (6th Cir. 1987), citing, *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982).
 39. *Hollis v. Fleetguard, Inc.* 668 F.Supp. 631, 635 (M.D. Tenn. 1987).
 40. Employer delayed plaintiff's promotion, threatened to terminate her, gave her bad performance appraisals, and transferred her [17].

41. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982).
42. Plaintiff who resigned when she returned to work after sick leave to find alleged harasser at an adjacent desk was not constructively discharged because employer did not intend for parties to see each other and plaintiff refused to listen when her employer called to explain that a mistake had occurred [38, at 630, 637].
43. *Yates*, 819 F.2d at 636, 637, citing, *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). See also, *Henry v. Lanais Indus.*, 768 F.2d 746, 752 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984).
44. *Yeager v. Local 20, Int'l Bhd. of Teamsters*, 6 Ohio St.3d 369, 453 N.E. 2d 666 (1983).
45. *Paugh v. Hanks*, 6 Ohio St.3d 72, 78; 451 N.E. 2d 759 (1983).
46. *Gagne v. Northwestern Nat'l. Ins. Co.*, 881 F.2d 309 (6th Cir. 1989), all quotes at 317 (citing *Yeager*). Accord, *Bellios v. Victor Batata Belting Co.*, 724 F.Supp. 514, 520 (S.D. Ohio 1989) (court listed the four elements of this tort: 1) that the actor intended to cause emotional distress or knew or should have known that the actions taken would result in "serious" emotional distress to the plaintiff; 2) that the actor's conduct was "extreme and outrageous," that it went beyond all possible bounds of decency and that it could be considered as utterly intolerable in a civilized community; 3) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and 4) that the mental anguish suffered by the plaintiff is "serious" and of a nature that no reasonable person should be expected to endure it).
47. William L. Kandel, *Sexual Harassment: Persistent Prevalent. But Preventable*, 14 *Employee Relations L.J.* (Winter 1988), pp. 439-451.
48. The antiharassment policy at NYNEX Corp., a New York City telecommunications company, lists the following prohibited acts: "Repeated, offensive sexual flirtations, advances, propositions; continued or repeated verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; display of sexually suggestive objects or pictures." David S. and Marilyn M. Machlowitz, *Preventing Sexual Harassment*, *ABA Journal*, Oct. 1, 1987, pp. 73-78.
49. See, e.g., *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989) (remedial action will depend on the severity and persistence of the harassment).

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