Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline

Lisa Pfenninger
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REMEDIES, AND PROFESSIONAL DISCIPLINE

LISA PFENNINGER

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In the wake of Anita Hill's allegations against Clarence Thomas, the U.S. Navy's Tailhook scandal, charges against Oregon Senator Bob Packwood, and most recently, Paula Jones' suit against President Bill Clinton, the issue of sexual harassment has come under the spotlight, becoming the focus of studies, polls, workplace conversations, public debate, and political action throughout the United States. Surveys of women in various professions, predating the Thomas confirmation hearings, revealed a higher incidence of sexual harassment of female attorneys than of other female professionals. Experts suggest that certain characteristics of the legal profession make it particularly susceptible to sexual harassment. Some of those factors include long hours, frequent travel, partner autonomy, and the entry of large numbers of women at junior levels. Indeed, at an October 1990 meeting sponsored by the American Bar Association and the American Law Institute, the managing partners of more than half the represented law firms acknowledged investigating complaints of sexual harassment in their offices. Sexual harassment and other forms of gender bias in the legal profession impede female attorneys' abilities to serve their clients effectively. For example, overt judicial expressions of gender bias in the courtroom undermine client confidence in female attorneys, influence juror perceptions of their clients'
cases, and can prejudice the outcomes of hearings, litigations, and appeals.  

Sexual harassment of female associates in law firms' adversely affects employee morale and productivity. Furthermore, investigation and litigation of the charges can be time-consuming and expensive and jury awards to victims of sexual harassment significant. The publicity surrounding the "war" against decades of sexual harassment in the workplace may have particularly deleterious implications for female associates beginning their legal careers. Washington, D.C. lawyer Judith Richards Hope commented that the law on sexual harassment has made some people "overly sensitive and overly suspicious," which in turn has made law firms "awkward and less collegial." If law firms do not address the issue appropriately, one conceivable backlash of the sexual harassment frenzy is that male partners will avoid friendships and mentoring relationships with female associates. The importance to a new attorney of having a mentor who will introduce her to judges, current and prospective clients, and influential members of the local bar; take her along to assist with out-of-town depositions, hearings, and trials; and teach her how to become a rainmaker; cannot be overstated. Mentoring is an integral part of a young attorney's training and her road to success in the profession. However, although nearly half the lawyers entering into practice are female, nearly ninety-five percent of all law firm partners (i.e., potential mentors) are male.  

Many well-meaning, successful male attorneys who want to reach out to promising female associates as mentors and friends may understandably fear the possibility that their laudable intentions will

6. For example, a California appellate court recently cited biased remarks by a trial judge as grounds for overturning a decision denying a woman in a divorce case a 50% share of her millionaire husband's earnings during their marriage. The trial judge, questioning the woman's claim that her husband, as a live-in lover, had been the first to propose marriage, asked: "Why in heaven's name do you 'buy the cow when you get the milk free,' as we used to say." Phillip Hager, Women Lawyers Get Advice on Countering Sexual Bias, L.A. TIMES, Mar. 5, 1993, at B8 (discussing In re Iverson v. Iverson, 15 Cal. Rptr. 2d 70 (1992)).  

7. For purposes of this Comment, the term "firm" or "law firm" may denote a private firm or a legal department of a government agency, corporation, or other organization.  


9. "Rainmaking" is the generation of new business for the firm.  

be misconstrued.\textsuperscript{11} Henning of Hildebrandt Inc., a Chicago-based consulting firm, also suggested that men who are nervous about being accused of sexual harassment will not work with female colleagues on matters requiring out-of-town travel, which will result in discrimination against women in the delegation of assignments.\textsuperscript{12}

At the very least, partners might exclude female associates from valuable after-hours hobnobbing during which dealmaking and networking take place, to avoid having to "walk on eggshells" so as not to say or do something that might be deemed inappropriate. At worst, firms and other legal employers may try to avert the risk and uneasiness altogether by hiring as few female attorneys as possible. As Elaine Weiss, the staff director of the ABA Commission on Women in the Profession, summarized the problem, "This is an economic issue that affects a woman's ability to travel on the job, to entertain clients, to get constructive criticism, to relocate and [to] grow within the profession."\textsuperscript{13}

This Comment does not suggest, however, that enforcement of sexual harassment laws is at the root of the problem. Precisely because employers have turned a blind eye to workplace harassment and because society has expected and required women to tolerate intolerable circumstances, a condition of continued employment for decades, the situation finally escalated into an uprising. This Comment proposes as a solution that, rather than continuing to counsel women that they must either succumb to unwanted advances and tolerate degrading comments or seek employment elsewhere, law firms foster comfortable working relationships between men and women. Firms may accomplish this by eliminating workplace harassment and by sensitizing both sexes to the other's viewpoint and encouraging them to develop a mutual understanding of what standard of behavior both deem acceptable.\textsuperscript{14}

This Comment examines the problem of sexual harassment in law firms and the various solutions that have emerged to address it. Part I examines studies and individual accounts of sexual harassment and gender bias in the legal profession, particularly in law firms. Part II distinguishes between the two types of sexual harassment, defines the contours of the sphere of conduct that constitutes sexual harassment, and explains the legal standard employed in Title VII claims. Part III

\textsuperscript{11} Weidlich & Lawrence, supra note 1, at 23.


\textsuperscript{13} Id. at 52.

\textsuperscript{14} This Comment defines sexual harassment as a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. For more detail about the elements of sexual harassment, see infra part II.
discusses individual and law firm liability for sexual harassment and suggests measures that law firms can take to prevent sexual harassment and protect against firm liability for sexual harassment when it does occur. Part IV surveys the various causes of action and remedies that are available to redress victims of sexual harassment, the limitations of each, and possible barriers to their applicability. Part V concludes by suggesting that the American Bar Association, state legislatures, and state bars should require employers to educate the legal workplace about sexual harassment and to subject attorneys to professional discipline for sexual harassment and other discriminatory conduct.

I. THE NATURE OF SEXUAL HARASSMENT IN THE LEGAL PROFESSION

Gender bias studies conducted by state supreme court task forces reveal that sexual harassment is prevalent in every jurisdiction, is usually not reported, and goes largely unremedied even when it is reported. Very few victims of sexual harassment file formal charges, and when they do, most firms prefer to avoid adverse publicity by settling meritorious claims. Thus, the reported cases are a poor reflection of the magnitude of the problem. This section provides some notion of the scope of the sexually harassing activity and other types of gender bias that reveal themselves in the legal workplace, through the recital of recently publicized incidents and survey results.

A. Incidence of Sexual Harassment

Recent studies suggest that more than half of female attorneys have experienced sexual harassment in the legal workplace. Fifty-six percent of the female litigators who responded to a nationwide Prentice-Hall Law & Business survey conducted in February 1993 reported that they had experienced sexual harassment by law firm colleagues or opposing counsel within the previous five years.

17. Margolick, supra note 3.
18. See Angel, supra note 15, at 818.
reported that they had experienced sexual harassment on the job.20 A 1992 study found that 60% of female lawyers practicing in the area encompassed by the ninth federal appellate circuit had been sexually harassed by other lawyers, judges, or clients.21 Finally, the results of a Florida Bar poll conducted in 1993 revealed that 41% of the female respondents had seen sexual harassment in a law firm or a legal workplace and 29% had experienced it themselves.22

B. Gender Bias in the Courtroom

Sexual harassment and other gender bias in the courtroom take many forms,23 but the incidents reported by task forces are similar across the states.24

The Report of the New York Task Force on the Status of Women in the Courts concluded that "gender bias against women . . . is a pervasive problem with grave consequences. . . . Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility." The reports documented . . . [that] gender bias affects women in all the roles they play in the judicial system—court employees, attorneys, jurors, witnesses, judges, and litigants.25

One typical complaint is that judges frequently address female lawyers by their first names, or by endearments such as "sweetie,"

20. Weidlich & Lawrence, supra note 1, at 22 (examples of sexual harassment given by respondents included unwanted looks, gestures, being touched, pinched, cornered or leaned over, and unwanted pressure for sex or dates).

21. Mark Hansen, 9th Circuit Studies Gender Bias: Survey Finds 60 Percent of Female Lawyers Sexually Harassed in Last Five Years, A.B.A. J., Nov. 1992, at 30 [hereinafter 9th Circuit] (examples of sexual harassment given by respondents included demeaning treatment such as being addressed as "honey," "dear" and "little girl").

22. Gary Blankenship, Women lawyers report unequal treatment, Fla. Bar News, Aug. 1, 1993, at 1, 1 [hereinafter Fla. Bar] (examples of sexual harassment given by female respondents were comments on their appearance, assuming women lawyers were secretaries or assistants, and addressing women by their first names or endearments such as "sweetie," "honey," or "little lady").

23. The topic of sexual harassment by judges, to the extent addressed by this Comment, is discussed below in section V. This section focuses on gender bias in the courtroom generally. Actually, the kind of behavior described in this section, taken as a whole, might be sufficient to create a hostile working environment (one of the two types of sexual harassment actionable under Title VII), albeit of a lesser magnitude than is present when more egregious behavior is involved. See infra part II. The distinction between the biased behavior described in this section and that examined in part V lies in the sexual nature of the behavior discussed in part V.


"honey," "little girl," and "girlie," while male attorneys are addressed with a title or as "gentlemen." 26 Another common complaint is that male judges and attorneys make comments in court about the anatomy of women lawyers and make remarks or jokes demeaning women. 27 One female attorney reported that in addition to the judge’s practice of addressing her through the use of endearments, he called her "menopausal" when she objected to a ruling. 28

Many female respondents report that women in the courtroom are initially assumed to be court reporters or legal assistants and sometimes are asked to prove they are attorneys, whereas such requests are rarely made of male attorneys. 29 Nancy Nicol, a lawyer of fourteen years’ experience and president of the Women’s Bar Association of Illinois, recalled standing before the bench with opposing counsel, a man fifteen years her junior, and being asked, after the judge glanced back and forth between the attorneys, whether she was a lawyer. Opposing counsel was not asked the same question. 30 One Florida judge’s comment to a female attorney was more egregious: he told her he would like to see her dressed in a see-through suit. 31 Another Florida judge, while hearing a case in which a man had set his wife on fire, revealed his disrespect for women by singing "You light up my wife" to the tune of You Light Up My Life. 32

Women have recovered money damages for sex discrimination by judges. 33 Regarding a case in which a male trial judge refused to hire a woman as a court reporter because his wife did not want him traveling with a woman, Judge Shirley Abrahamson opined:

Many male judges supported his decision despite state laws that prohibit sex discrimination in hiring. Unfortunately many of these male judges viewed court personnel as their personal employees, to be hired on the basis of their personal whims. It seemed to me that

26. See supra note 15; see, e.g., Fla. Bar, supra note 22, at 4; 9th Circuit, supra note 21, at 30; Report of the Missouri Task Force on Gender and Justice, reprinted in 58 Mo. L. Rev. 485 (Summer 1993) [hereinafter Mo. Task Force].
27. See supra note 15; see, e.g., Mo. Task Force, supra note 26, at 632-33.
29. See supra note 15; see, e.g., Fla. Bar, supra note 22, at 4; Mo. Task Force, supra note 26, at 634.
33. Abrahamson, supra note 15, at 1212; cf. supra note 6 (biased trial judge remarks were cited by appellate court as reason for overturning decision denying woman in a divorce case 50% of her husband's vast wealth).
the wife's views were interfering with the male judge's ability to do his job in accordance with state law. If he could not combine marriage and career, should he not leave the bench, rather than force a qualified woman applicant to forfeit her opportunity for employment?  

C. Sexual Harassment and Other Sex Discrimination in Law Firms

The following recently publicized accounts provide some notion of the scope of sexual harassment and other sex-based discriminatory behavior that takes place in law firms today.

1. Sexual Harassment in Law Firms

Three female lawyers and a female administrator filed suit against the San Diego law firm of Sulzner & Belsky, alleging that the men at the firm at all times referred to female attorneys by the use of a sexually explicit epithet, told jokes at their expense, mandated that women wear skirts so that the men could see their legs, hired female attorneys at salaries ""significantly lower" than those offered to male lawyers," and fondled some of them.  

One of the attorneys told of a case where she was assigned to assist one of the partners shortly after she was hired. During trial, he surprised her by announcing that she would cross-examine a key witness, and when she replied that she might not have sufficient time to prepare, he called her a "wimp," said he was disappointed in her, ran his hands up and down her thigh, talked about her "making it up" to him," stuck his tongue in her ear, and propositioned her.  

In July 1992, a Houston court was scheduled to hear the case of two paralegals and three other female staff members who alleged that an attorney forcibly touched their private areas and breasts, lowered his pants in their presence without their consent, and compelled one paralegal to ""engage in acts of sexual intercourse and oral sodomy against her will."" During the period when the incidents occurred, the attorney was promoted to partner.

34. Abrahamson, supra note 15, at 1212.
36. Id.
38. Id. The case was resolved, and "by agreement of the parties, there can be no discussion of any resolution of the case." Interview with William V. Wade, esq., counsel for plaintiffs, William Wade & Associates (July 27, 1994).
A former associate sued the law firm of Reed Smith Shaw & McClay, claiming that her mentor at the firm, “a high-profile Republican politico,” pressured her into sleeping with him three times by promising to assist her in making partner, yet she was fired after ending the sexual relationship. Jurors found that the partner harassed her but only held him liable in money damages for slandering her before the trial began.

One woman who left her practice at a large Florida law firm to become a full-time professor reported sexual harassment as the reason for her career change:

Before the incidents of sexual harassment, which continued daily for about eight months, my career was going well and it was clear from my evaluations that I would become partner in the next year. One of the senior partners, however, made it clear on several occasions that my advancement in the firm hinged on providing him with sex. When I refused to do this and reported it to my supervisor and ‘mentor,’ who was on the firm’s sexual harassment committee, he made it clear that I had to ‘make that man happy or get out’. I got out.

In February 1993, General Counsel of Morgan Stanley & Co. resigned amid claims of sexual harassment by three fired female employees, including his secretary.

A former female associate in the New York office of Paul, Hastings, Janofsky & Walker filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that, even after she complained to other partners in the firm, one partner continued to subject her and other females to unwelcome sexual comments and to address them using demeaning and sometimes vulgar terms, and that the firm retaliated against her for complaining of the sexual harassment by giving her lower performance evaluations.

Eleven years ago, while Elizabeth Hishon’s sex discrimination suit was pending in the United States Supreme Court, attorneys at Atlanta’s King & Spalding wanted to hold a “wet T-shirt” contest featuring the firm’s female summer associates. Instead, they held a swimsuit competition, the winner of which was offered a position with the firm.
because, according to one partner, "[s]he has the body we'd like to see more of."44

In another well-publicized case, Catherine Broderick filed suit against the Securities and Exchange Commission, claiming it was "a sexual playground" for the male attorneys.45 The male attorneys were in the practice of touching the female personnel during office parties, making crude sexual remarks about the women's appearances, and engaging in other conduct demeaning to women.46 Moreover, female employees who provided sexual favors to the attorneys were rewarded through favoritism, cash awards, and rapid advancement.47

A female accountant at the New York law firm of Skadden, Arps, Slate, Meagher & Flom filed an action against the firm and the department manager in 1992, alleging that the manager made her advancement contingent on her having sex with him.48 He allegedly had entered her office often, locked the door, sat on her desk, stared at her, and touched her without her permission.49

A secretary who found a remote-controlled video camera hidden under her desk filed a sexual harassment claim against the law firm of Boyd, Murray and Wick. An attorney at the firm who eventually admitted to having put the camera there was fired.50

2. Other Forms of Sex Discrimination in Law Firms

Sex discrimination in law firms does not always take the form of overt harassment. For example, one female attorney polled by the Florida Bar wrote: "Partners in my firm stated that they like to hire female attorneys because [female attorneys] work harder for less money and don't cause trouble."51 Another added: "A law firm of all male partners routinely hires female associates, works them to death for a few years on garbage cases and pays them the minimum possible until they resign in utter frustration. The law firm then hires new female associates at the same low pay."52

Several female associates responding to the poll said they had been asked to handle typing and clerical errands, while male associates had

44. Burleigh & Goldberg, supra note 12, at 46.
45. Perry, supra note 37.
46. Id. Broderick won $120,000 in backpay and interest, plus the promotions she had been denied. Burleigh & Goldberg, supra note 12, at 51.
47. Perry, supra note 37.
49. Id.
51. Fla. BAR, supra note 22, at 4.
52. Id.
not.53 "Many said male associates get the better assignments, better pay, and quicker promotions."54 Another respondent reported that male attorneys in her firm regularly took clients to clubs that do not allow women or minorities, or to topless bars, and the firm pays the bills.55

A woman offered a position as an associate at the Pennsylvania firm of Wolf, Block, Schorr and Solis-Cohen, who later sued the firm for discriminatory denial of partnership, was told at the time of her initial employment offer that she would have a hard time at the firm because she did not fit the Wolf Block mold, partly because she was a woman.56

Against the backdrop of these examples, which demonstrate the scope of sexual harassment and other sex-based discrimination in the legal workplace, it is appropriate to define sexual harassment and to examine the analytic framework within which Title VII cases based on sexual harassment are decided.

II. WHAT IS SEXUAL HARASSMENT?

Legally, sexual harassment is a form of sex discrimination in violation of Title VII of the Civil Rights Act of 1964.57 In the landmark case of Meritor Savings Bank v. Vinson,58 the Supreme Court, drawing from the EEOC Guidelines on Discrimination Because of Sex,59 recognized two types of sexual harassment that are actionable under Title VII: "quid pro quo" sexual harassment and "hostile environment" sexual harassment.60

The Code of Federal Regulations defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

53. Id. The Florida Bar mailed questionnaires to 4,805 in-state bar members in its 1993 Gender Equality In The Profession Survey, and 1,469 attorneys responded, 790 of which were female. The total response rate was 31%, which is very high for a "lengthy, controversial mail survey." Telephone interview with Mike J. Garcia, Senior Planning and Evaluation Analyst, The Florida Bar (July 26, 1994).
54. Supra note 51.
55. Id.
57. 29 C.F.R. § 1604.11(a) (1993).
60. Vinson, 477 U.S. at 65.
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(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,61
(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or62
(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.63

The conduct described in subsections (1) and (2) constitutes what is known as "quid pro quo" sexual harassment, whereas subsection (3) describes "hostile environment" sexual harassment.

Whether specific conduct amounts to sexual harassment is a question of fact to be determined in light of all the circumstances.64 Circumstances may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably interferes with an employee's work performance; and whether it causes psychological harm.65 However, no single factor is determinative.66

In most cases, the determination is based on the perspective of a reasonable person under similar circumstances.67 However, some jurisdictions have adopted a "reasonable woman" standard to evaluate whether the alleged harassment was sufficiently offensive to disrupt the work environment.68

A. Elements of a Title VII Sexual Harassment Claim

To succeed in a sexual harassment suit brought under Title VII, an employee must allege and prove five things: First, the employee must

62. Id. § 1604.11(a)(2).
63. Id. § 1604.11(a)(3).
64. Id. § 1604.11(b); accord Vinson, 477 U.S. at 69.
66. Id.
67. Id. at 370.
belong to a protected group.\(^6\) If the sexual harassment plaintiff is female, this element of proof requires nothing more than a stipulation to that effect.\(^7\)

Second, the employee must show that he or she was subject to sexual harassment.\(^7\) The harassment must be unwelcome both in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.\(^7\)

Third, the plaintiff must show that the harassment complained of was based on the plaintiff's sex.\(^7\) Stated differently, this element requires proof that, but for the fact of his or her gender, he or she would not have been the object of the harassment.

Fourth, the harassment complained of must have affected a term, condition, or privilege of employment.\(^7\) To state a Title VII claim for "quid pro quo" sexual harassment, the employee must show that submission to unwelcome advances was an express or implied condition for receiving job benefits or that refusal to submit to the advances resulted in tangible job detriment.\(^7\) On the other hand, the employee is not required to prove "economic" or "tangible" discrimination to state a Title VII claim for "hostile environment" sexual harassment.\(^7\)

Fifth, where an employee seeks to hold the employer responsible for a "hostile work environment" created by the employee's supervisor or coworker, some circuits require that the plaintiff show the employer knew or should have known of the harassment\(^7\) and failed to take prompt, effective remedial action.\(^7\) In contrast, an employer is strictly liable for "quid pro quo" sexual harassment by its supervisors.\(^7\)

**B. Hostile Environment Sexual Harassment**

The typical rendition of the standard of conduct upon which one may base a claim of "hostile work environment" sexual harassment

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\(^6\) Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982).

\(^7\) Id.

\(^7\) Id.

\(^7\) Id.

\(^7\) Id.

\(^7\) Id. at 904.


\(^7\) Other circuits have adopted less demanding standards for employer liability. See infra notes 121-27 and accompanying text, section on The Standard for Employer Liability.


states that the behavior must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The Vinson standard requires both an objectively hostile work environment and the victim's subjective perception that the environment is hostile. However, there is no requirement that the plaintiff prove that his or her tangible productivity declined as a result of the harassment. Moreover, the conduct need not even result in concrete psychological harm to the employee to be actionable under Title VII as "abusive work environment" sexual harassment.

1. Hostile Environment Not Found

One requisite element for stating an actionable sexual harassment claim based on a hostile working environment is that the offending conduct be pervasive and regular. A single instance of sexually provocative or suggestive conduct by a superior is not sufficient. Title VII does "not create a claim of sexual harassment for each and every crude joke or sexually explicit remark made on the job by employees, even supervisors." As a rule, joking, teasing, and conversation that may include sexual connotations may not necessarily rise to the level of "hostile work environment" sexual harassment under Title VII. Accordingly, the mere utterance of an epithet which engenders offensive feelings in a female employee would not affect employment conditions enough to violate Title VII. As one court aptly explained, Title VII is not "a vehicle for vindicating the petty slights suffered by the hypersensitive." Similarly, without more, the fact that a female employee finds racist sexual cartoons in her supervisor's desk drawer while performing job duties is insufficient to state a claim for "hostile

80. Vinson, 477 U.S. at 67; Henson, 682 F.2d at 904 (brackets and quotation marks omitted).
82. Id. at 372 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988), cert. denied, 490 U.S. 1110 (1989)); accord Harris, 114 S. Ct. at 372 (Scalia, J., concurring).
83. Harris, 114 S. Ct. at 371.
85. Id.
86. Downes v. FAA., 775 F.2d 288, 293 (Fed. Cir. 1985).
work environment” sexual harassment, so long as the employee is not forced to view the cartoons.90

Finally, a plaintiff cannot state a claim for “hostile work environment” sexual harassment where the incidents of sexual harassment creating the “hostile work environment” were not directed at the plaintiff.91

2. Hostile Environment Found

Cases in which “hostile work environment” sexual harassment has been found sometimes may involve physical contact. In Stockett v. Tolin,92 repeated acts of sexual harassment by the employer’s managing agent included sexually explicit, degrading, and vulgar language and repeated acts of physical abuse and culminated in a threat to fire the plaintiff if she did not have intercourse with him. These acts were sufficient to establish “quid pro quo” sexual harassment, “hostile environment” sexual harassment, and constructive discharge in violation of Title VII, in addition to several torts.

Successful “hostile work environment” claims also have been premised on visual references to sex, provided the circumstances viewed as a whole were “sufficiently severe or pervasive ‘to alter the conditions of the victim’s employment and create an abusive working environment.’”93 For example, a district court held an employer liable for maintaining a hostile working environment in Jensen v. Eveleth Taconite Co.94 There, the court found that visual references throughout the employer’s facility to sex and to women as sexual objects, in a work environment characterized by language derogating both females generally and the plaintiffs in particular, and sexually motivated physical acts upon female employees, reflected a sexualized, antifemale atmosphere and a hostile working environment.95

In another case, involving no physical acts, the court based employer liability almost exclusively on an employee’s subjection to extremely vulgar and sexually explicit graffiti in the workplace, some of which was present for at least two years, even though some of the

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95. Id. at 879-80.
graffiti was not on grounds controlled exclusively by the employer. The court held the employer had a duty to take prompt remedial measures to eradicate the graffiti from the workplace. The judge in Robinson v. Jacksonville Shipyards, Inc., found sexually explicit pictures in that workplace, sometimes directed at the plaintiff, so appalling that he ordered all sexually suggestive images removed from the workplace immediately and barred employees from displaying, possessing, or viewing such materials in their private workspaces at any time. His rationale for imposing such a broad order was that sexually suggestive images of women undermine women's equality, thereby fostering an environment ripe for violations of Title VII's prohibition on sex-based employment discrimination.

The facts of Boyd v. James S. Hayes Living Health Care Agency, Inc. illustrate yet another form of behavior constituting "hostile environment" sexual harassment. At issue in that case was the conduct of a male superior toward a female employee during a business trip. The male supervisor insisted that the employee come to his hotel room, provided her with wine, turned the television to a sexually explicit movie, attempted to restrain her departure, and slammed the door behind her when she left. The case highlights the fact that conduct can constitute sexual harassment under Title VII even if a superior does not explicitly invite his employee to enter into a sexual relationship with him and does not force one on her.

Finally, it is important to note that conduct need not have clear sexual overtones to constitute sexual harassment but may instead consist of nonsexual conduct that ridicules women, treats them as inferior, or is intended to intimidate them.

III. LIABILITY, PREVENTION, AND PROTECTION

A. Law Firm Liability

The EEOC guidelines impose an affirmative duty on employers to

97. Id. at 611.
99. See id. at 1526.
100. Id.
102. Id. at 1158-59.
eliminate and prevent sexual harassment in the workplace. According to the guidelines, employers are responsible for the actions of their agents and supervisors. Additionally, an employer is liable for the actions of all other employees if the employer knew or should have known about the sexual harassment and failed to take "immediate and appropriate corrective action." The definition of employer under Title VII applies to the relationship between partners and associates in law firms. Thus, law firms are subject to liability for sexual harassment. If a law firm partner expressly or impliedly promises to consider an employee for partnership, that promise is a "term, condition, or privilege of employment" giving rise to a Title VII cause of action by an associate who is denied partnership for discriminatory reasons, including the associate's refusal to surrender to a partner's advances. However, existing case law does not support a Title VII claim by a female partner or shareholder against her law firm partnership or corporation. Justice Powell's concurring opinion in Hishon v. King & Spalding made clear that "the reasoning of the Court's opinion does not require that the relationship among partners be characterized as an 'employment' relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates." In addition, several circuit courts have specifically held that partners in partnerships and shareholders in incorporated

104. 29 C.F.R. § 1604.11(f) (1993).
105. Id. § 1604.11(c).
106. Id. § 1604.11(d). As indicated supra note 59, these guidelines do not bind the courts.
107. Under Title VII, "'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person . . . ." 42 U.S.C. § 2000e(b) (1988). Section 2000e(a) defines "person" to include partnerships, associations, and corporations, among other entities. 42 U.S.C. § 2000e(a) (1988).
108. See, e.g., Isaacson v. Keck, Mahin & Cate, No. 92-C3105, 1993 WL 68079, at *9 (N.D. Ill. Mar. 10, 1993) (partners in a law firm are employers both within the meaning of Title VII and for purposes of tort actions based on sexual harassment); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175 (E.D. Pa. 1990) (law firm held liable for its discriminatory failure to promote a female associate to partnership status). Ezold was later reversed, but the reversal was based on the merits of the discriminatory motive claim; the applicability of Title VII to a law firm employer was not disputed. 983 F.2d 509 (3d Cir. 1992); see also Lucido v. Cravath, Swaine & Moore, 425 F. Supp. 123 (S.D.N.Y. 1977) (finding a law firm organized as a partnership with more than 400 employees qualifies as an employer within the meaning of Title VII).
110. Id. at 76-77.
111. Id. at 79.
112. Id. (emphasis added).
SEXUAL HARASSMENT

law firms are not employees and therefore are not entitled to bring a Title VII action against their firm.113

1. The Standard for Employer Liability

The standard for determining whether an employer is liable for sexual harassment by its agents depends upon whether the agents' behavior constitutes "quid pro quo" sexual harassment or "hostile work environment" sexual harassment. In "quid pro quo" cases, harassing employees act for the company, holding out the employer's benefits as an inducement to the employee for sexual favors. Accordingly, in a "quid pro quo" sexual harassment case, the employer is strictly liable for its employees' unlawful acts.114 The standard of employer liability for "hostile work environment" sexual harassment, on the other hand, is less clear.

(a) Meritor Savings Bank v. Vinson

The United States Supreme Court considered at length the issue of the proper standard for employer liability for "hostile work environment" sexual harassment.115 The Court rejected the plaintiff's suggestion that under EEOC guidelines116 the employer should be held liable for its agents' acts without regard to whether the employer had notice of those acts.117 However, the Court also rejected the defendant's view that the mere existence of a grievance procedure, coupled with the victim's failure to avail herself of that procedure, should shield an employer from liability.118 The EEOC, in tension with its own guidelines, argued for a rule adopting the defendant's view in the "hostile work environment" case.

113. See Wheeler v. Hurdman, 825 F.2d 257 (10th Cir.) (holding partner in law firm partnership not an employee), cert. denied, 484 U.S. 986 (1987); EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984) (en banc) (holding shareholders in law firm organized as a professional corporation not employees); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (holding partners of accounting firm not employees for purpose of Title VII).

Some federal appeals courts have examined the actual role of the partner to determine whether the partner is an employee within the meaning of Title VII. Under this "economic realities" test, a partner's employment status is analyzed by examining whether the partner has assumed attributes of ownership such as unlimited liability, capital contributions, profit sharing, and management. See, e.g., Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398 (11th Cir. 1991) (holding member/shareholder of a professional corporation was not an employee entitled to bring suit under Title VII, as evidenced by profit and loss sharing, expenses, and voting rights). In either case, a Title VII claim by a female partner or shareholder in a law firm will almost always be barred by the employee status requirement.


116. 29 C.F.R. § 1604.11(c) (1985).

117. Vinson, 477 U.S. at 72.

118. Id.
environment" context. The Court refused to issue a definitive rule, and instead, stated that Congress intended for courts to consult agency principles for guidance in Title VII claims. The Court noted that while Congress apparently meant to limit employer liability for acts of employees to some extent, it did not necessarily intend absence of notice alone to insulate the employer from liability.

(b) The Standard for Employer Liability after Vinson

In response to Vinson, three standards have emerged among the United States Courts of Appeals for determining Title VII employer liability for the acts committed by employees within the scope of employment. Most circuits have adopted the pre-Vinson standard, basing employer liability on the doctrine of "respondeat superior." The Eleventh Circuit Court of Appeals applied this standard in Henson. Under this standard, employer liability is contingent upon a finding that the employer had either actual or constructive knowledge of the harassment: "...[L]iability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action." Other circuits have followed the Restatement (Second) of Agency's approach. Under this approach, an employer who is aware of the sexual harassment in the workplace is liable if it acts negligently or recklessly by failing to take "reasonable steps to eliminate such offensive conduct."

119. Id. at 71.
120. Id. at 72.
122. Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).
123. Andrews, 895 F.2d at 1316.
124. RESTATEMENT (SECOND) OF AGENCY § 219(2) (1958). 2nd Circuit: See Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987). 10th Circuit: See Hicks v. Gates Rubber Co., 833 F.2d 1406, 1417 n.3 (10th Cir. 1987) (citing the Supreme Court's rejection in Vinson of an absolute requirement of actual or constructive notice, rejects the "knew or should have known" standard and adopts in its place the Restatement standard).
125. Lopez, 831 F.2d at 1189.
Finally, a third group of federal circuit courts employs a negligence standard for employer liability for "hostile work environment" sexual harassment. According to this standard, an employer will be liable "if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring."[127]

2. Protecting the Firm

Sexual harassment causes significant costs, whether the enterprise is private, public, legal or nonlegal. A 1988 Working Woman study of the effect of sexual harassment on Fortune 500 companies revealed that approximately 24% of harassment victims use leave time to avoid the harassment; 10% resign, citing harassment as their reason; 5% quit without explanation; and the 50% who remain and attempt to deal with the harassment show a 10% decline in productivity.[128] The survey found that sexual harassment costs the typical Fortune 500 company $6.7 million per year in absenteeism, employee turnover, depressed morale, and lost productivity.[129] The additional costs of litigating or settling sexual harassment suits and of the harm to the company's public image are often substantial as well.[130] A similar 1988 survey of sexual harassment in the federal workplace conducted by the U.S. Merit Systems Protection Board estimated that between 1985 and 1987, absenteeism due to harassment, replacement of employees who left their jobs, and reduced productivity cost the federal government $267 million.[131] Moreover, a firm's liability insurance policy is likely to exclude from coverage employment-related claims, sexual abuse claims, or both.[132]

127. Guess, 913 F.2d at 465.
131. ABA COMM'N ON WOMEN, supra note 128, at 4 (citing Sexual Harassment in Federal Agencies Found Still Prevalent, Costs Millions, 6 BNA'S EMPLOYEE REL. WKLY., July 11, 1988, at 879).
132. See, e.g., Old Republic Ins. Co. v. Comprehensive Health Care Assocs., Inc., 2 F.3d 105 (5th Cir. 1993).
The Supreme Court has warned that failure to adopt and implement a written policy specifically intended to remedy sexual harassment bears on an employer's liability exposure. Federal employment regulations add that "[a]n employer should 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 issue of harassment under Title VII, and developing methods to sensitize all concerned." As a practical matter, an effective sexual harassment policy is needed to reduce a firm's vulnerability to the personal and financial costs of diminished productivity, collegiality, and morale; increased absenteeism; a work environment pervaded by mistrust; litigation; and unfavorable publicity.

(a) Drafting an Effective Policy

The ABA's Commission on Women in the Profession provides a pamphlet containing detailed discussion of the essential elements of a sexual harassment policy, how to implement a sexual harassment policy, and how to respond to and resolve complaints. This Comment provides only brief highlights; a law firm interested in drafting and implementing its own policy should consult the ABA pamphlet directly. A comprehensive sexual harassment policy, however, should include each of the following:

1. A strong statement of the firm's policy against sexual harassment;
2. A clearly articulated definition of sexual harassment, which includes examples of behavior constituting verbal and physical sexual harassment;
3. Identification of individuals covered under the policy, including outside vendors and consultants, whose harassment may expose the firm to liability as well;
4. Procedures to be followed in response to sexual harassment complaints, including guidelines to ensure confidentiality and protect complainants from retaliation;
5. A statement of disciplinary consequences;
6. An explanation of the appeals process;

135. See ABA Comm'n on Women, supra note 128, at 5, 15.
7. A mechanism for implementing and monitoring the policy;
8. Mandatory educational and training programs, repeated regularly;
9. A commitment to act in response to circumstances suggesting sexual harassment, even in the absence of a formal complaint;
10. A cautionary note regarding the potential consequences of law firm romances; and
11. Sensitivity training to promote respect and understanding and to head off a possible backlash response by male partners and associates who may otherwise avoid close working relationships with female employees.\(^{136}\)

Additionally, the *National Law Journal* suggests that upon becoming aware of a romantic relationship between personnel, law firms may rearrange reporting functions so that problems relating to unequal power do not arise. However, the *Journal* cautions that a sex-based rearrangement that disadvantages the subordinate is equally unacceptable.\(^{137}\)

\(\text{(b) Ensuring Effective Enforcement}\)

As discussed below in subsection (c), a sexual harassment policy will not shield an employer from liability for the sexual harassment of its agents unless the employer takes the necessary steps to ensure effective enforcement of the policy. The ABA Commission on Women's guide to drafting and implementing sexual harassment policies for lawyers and a 1993 *National Law Journal* article suggest several measures that law firms may take to curb workplace harassment and protect themselves against liability:

1. Communicate the policy to all employees, vendors, and clients. Ways to do this include posting the policy in a common area, printing the policy in an employee handbook; distributing the policy directly to each employee; conducting mandatory periodic workshops on sexual harassment and other forms of sex discrimination; holding an orientation training session on sexual harassment for entering associates and new administrative staff and lateral hires; and stating in the sexual harassment policy that the firm will investigate and remedy harassment by outsiders, possibly resulting in termination of the business relationship.

2. Educate those responsible for enforcing the firm's policy about the policy and about the psychological effects of sexual harassment, and train them to receive and respond to complaints appropriately.


(3) Designate someone other than the employees' immediate supervisor to receive complaints. For example, a law firm may form a committee consisting of members drawn from both attorneys and staff from each of the firm's offices.

(4) Investigate the complaint and take appropriate action as soon as possible after the complaint. Subsection (c) below explains the standard for this requirement.

(5) Conduct employee surveys and exit interviews to detect sexual harassment.

(6) Include "refrain from sexual harassment" among work performance evaluation criteria.\textsuperscript{138}

\textit{(c) Prompt and Effective Remedial Action}

Once a plaintiff has proven that her employer had the requisite notice of the "hostile work environment" (in jurisdictions that require actual or constructive notice), an employer can avoid liability by proving that it took "prompt, effective remedial action."\textsuperscript{139} The employer's response is ineffective if "it delay[ed] unduly . . . [and] the action it [did] take, however promptly, [was] not reasonably likely to prevent the misconduct from recurring."\textsuperscript{140}

Courts consider several factors in judging whether an employer's response to a complaint of sexual harassment was prompt and effective. First, courts examine whether and how soon after the complaint the employer investigated the alleged acts of harassment, and the type of investigation the employer conducted.\textsuperscript{141} Second, courts consider the employer's post-investigation remedial steps.\textsuperscript{142} Finally, courts evaluate effectiveness by ascertaining whether the harassment ceased after such steps were taken.\textsuperscript{143}

Courts are split as to whether a good faith investigation, even if it does not result in disciplinary action, is nevertheless sufficient to con-
stitute "prompt, effective remedial action." The general rule is that a good faith investigation is sufficient if the harassment ends. A meeting with the complainant and the alleged harasser probably is not sufficient if it fails to end the harassment. Similarly, an oral warning following an investigation is sufficient if the harassment ceases. If the harassment continues despite the oral warning, then further action is necessary. Essentially the same rule applies to written warnings.

Prompt investigation and transfer of the alleged harasser is sufficient under appropriate circumstances. However, a transfer of the harasser to another supervisory position may support a determination that the employer was willing to permit the malfeasance to continue and may thus form the basis for employer liability.

In Guess v. Bethlehem Steel Corp., the court considered the appropriateness of transferring the victim as a corrective measure. In Guess, the alleged harasser was promptly reprimanded, ordered to stay away from the plaintiff, and denied a promotion and a merit raise. No further incidents of sexual harassment occurred thereafter. However, the plaintiff argued that transferring her, rather than her harasser, out of the department was improper, even if effective.

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For a case holding the employer liable despite "token" efforts to address complaints, see Davis v. Tri-State Mack Distrib., Inc., 57 Fair Empl. Prac. Cas. (BNA) 1023 (E.D. Ark. 1991), rev'd, 981 F.2d 340 (8th Cir. 1992).

145. Id.


149. See, e.g., Swentek, 830 F.2d at 556, 558 (written warning sufficient where harassment ceased); Llewellyn v. Celanese Corp., 693 F. Supp. 369, 380-81 (W.D.N.C. 1988) (prompt remedial action not found where employer gave alleged harasser written warning based only on what the latter had admitted, delayed initiation of investigation and did not interview alleged harasser for two weeks although employee had been threatened).


152. 913 F.2d 463 (7th Cir. 1990).

153. Id. at 464.

154. Id.

155. Id. at 465.
While the court agreed that a transfer which reduces a plaintiff's salary, increases the burdens of work, or impairs her prospects for promotion would be ineffective per se, it noted that the plaintiff's transfer in that case was distinguishable because she was no worse off. The plaintiff, who had been on temporary assignment in the department in which she experienced the harassment, merely returned to her regular employment after she completed her temporary assignment.

To summarize, education and a comprehensive sexual harassment policy that is enforced will go a long way toward preventing workplace harassment. Lawyers in firms with such policies consistently report fewer incidents of sexual harassment than those in firms without policies. However, without appropriate reporting mechanisms, including a pool of trained individuals to whom incidents of harassment may be reported, and strict enforcement practices, the mere existence of a policy is neither likely to deter potential violations nor likely to shield the firm from liability. Therefore, it is essential that every report of alleged harassment be investigated as soon as possible and that prompt and effective remedial action be taken when a violation is found.

B. Individual Liability

Individual liability for sexual harassment serves the two purposes of Title VII: to compensate victims of discrimination and to deter future discrimination. Courts have reasoned that firm partners and shareholders can be held individually liable because they are employers within the meaning of Title VII.

In Isaacson v. Keck, Mahin & Cate, both the offending party and a third party were held subject to personal liability. After the plaintiff complained about sexual harassment and obscene phone calls by

156. Id.
157. Id. at 465.
158. Weidlich & Lawrence, supra note 1, at 22.
160. See EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984) (shareholder attorneys with certain characteristics in an incorporated law firm are Title VII employers); Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (finding partners in accounting firm are liable as employers under Title VII); Isaacson v. Keck, Mahin & Cate, No. 92-C3105, 1993 WL 68079 (N.D. Ill. Mar. 10, 1993); Ruich v. Ruff, Weidenaar & Reidy, Ltd., 837 F. Supp. 881 (N.D. Ill. 1993) (legal secretary sued law firm and individual partner for sexual harassment; as partner in the partnership-employer, he, too, was legal secretary's "employer"); Janopoulos v. Harvey L. Walner & Assoc., Ltd., 835 F. Supp. 459 (N.D. Ill. 1993) (holding owner of a professional corporation is an employer).
162. Id. at *4.
another partner, the head of the plaintiff’s practice group stopped giving the plaintiff substantive work assignments, discouraged other attorneys from doing so, and began to exclude the plaintiff from firm activities. The practice group leader also responded in a hostile manner to the plaintiff’s subsequent attempt to inquire about the other partner’s status.

Three years later, soon after the plaintiff reported a request the other partner made of her to alter the dates on some documents relating to a transaction, the legality of which she had questioned, the plaintiff was further stripped of her responsibilities in the firm, given negative evaluations, and told that the firm was contemplating terminating her employment.

The court recited the rule that only employers and agents can be held liable for retaliatory actions under Title VII. It added that any individual who "authorizes, directs, or participates" in the discriminatory conduct is an agent and may be held liable. An allegation, however, that an agent merely knew about the conduct and did nothing to stop it is insufficient to impose individual liability. The court concluded that both partners were subject to personal liability to the plaintiff because their actions were sufficient to support a finding that they both participated in the discriminatory conduct. In sum, individual partners are subject to individual liability either for conduct that amounts to sexual harassment or for authorizing such conduct.

IV. Causes Of Action

A. Title VII

Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991 provide statutory causes of action not only for sexual harassment, but also for discriminatory failure to promote and for constructive discharge, in which sexual harassment often culminates. The remedies available under Title VII to victims of discrimination are committed to the discretion of the trial court.

163. Id. at *1.
164. Id. at *4.
165. Id. at *1.
166. Id. at *3.
167. Id.
168. Id. at *4.
1. Remedies Before the Civil Rights Act of 1991

Before enactment of the Civil Rights Act of 1991,\(^{172}\) Title VII remedies were limited to tangible losses.\(^{173}\) A plaintiff who succeeded on a "quid pro quo" sexual harassment claim was entitled to reinstatement and back pay, lost employment benefits, costs, and attorneys' fees.\(^{174}\) A successful victim of "hostile work environment" sexual harassment could enjoin the defendant(s) and could recover reasonable costs and attorneys' fees, but could not recover compensatory or punitive damages.\(^{175}\) In either case, the benefit of a remedy conditioned upon the plaintiff's return to the harassing worksite must be seriously questioned.

2. Remedies Under the Civil Rights Act of 1991

The Civil Rights Act of 1991 amended the 1964 Act to entitle Title VII plaintiffs to jury trials and to expand the available remedies to include compensatory and punitive damages.\(^{176}\) Defendants will now be subject to liability for declaratory or injunctive relief and a plaintiff's reasonable costs and attorney's fees, if a plaintiff proves that his or her sex was a "motivating factor" underlying any employment practice, even if other factors also motivated the employment decision.\(^{177}\) However, a plaintiff will not be entitled to reinstatement, backpay, or money damages if the defendant establishes that it would have taken the same action in the absence of the impermissible motive.\(^{178}\)

3. Discriminatory Failure to Promote

To state a claim for discriminatory failure to promote, a plaintiff must allege the following: (1) plaintiff belongs to a protected group; (2) plaintiff applied for and was qualified for a position for which the employer was seeking applicants; (3) plaintiff was rejected despite qualifications; and (4) the position was filled by or held open for someone not belonging to the protected group.\(^{179}\) The following two cases illustrate the point, because both involve Title VII suits based on a firm's failure to promote a female employee to partnership status.


\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) See 42 U.S.C.A. § 1981(a)(1), (b), (c) (West Supp. 1993).

\(^{177}\) Id.


In the first, the employee succeeded on the merits of her case, and in the second the plaintiff failed.

In the widely publicized case of *Price Waterhouse v. Hopkins*, the United States Supreme Court held that an accounting firm organized as a partnership could be held liable for sex discrimination under Title VII. Ann Hopkins worked at Price Waterhouse for five years when the partners nominated her for partnership. Of the 662 partners then at the firm, only seven were women. The district court found that Hopkins had "played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State" and that "none of the other partnership candidates . . . had a comparable record in terms of successfully securing major contracts for the partnership." In the joint statement supporting her candidacy, Price Waterhouse partners praised Hopkins' character as well as her accomplishments. The Supreme Court stated that evidence that the firm's decision to place her "on hold" rather than elevate her to partnership status that year was based, in part, on evaluations that included suggestions that she be required to take a course at charm school and that her flawed interpersonal skills could be corrected with makeup and more feminine attire. This, the Court held, was sufficient to establish that sex stereotyping played a part in the decision. On remand, the trial judge determined that Price Waterhouse did not prove by a preponderance of the evidence that its failure to make Hopkins a member of the partnership was based on nondiscriminatory concerns. The judge ordered the firm to admit Hopkins into the partnership and held the partnership liable for backpay.

Contraposed against the *Price Waterhouse* decision is *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, in which a female law firm associate charged that she was passed over for promotion to partnership.

180. 490 U.S. 228 (1989).
181. *Id.* at 233.
182. *Id.*
183. *Id.* at 234.
184. *Id.*
187. The trial court ordered that she be offered a partnership effective July 1, 1990, with compensation and benefits as if she had been admitted to partnership on July 1, 1983. But because she had not tried hard enough to find equivalent work in the intervening years, she was awarded backpay (including interest) of only $371,175. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1215 (D.D.C. 1990), aff'd, 920 F.2d 967 (D.C. Cir. 1990).
status for discriminatory reasons. Although the trial court ruled for the plaintiff, the United States Court of Appeals for the Third Circuit reversed.\textsuperscript{189} The district court found that: (1) the plaintiff, Ezold, was given a negative evaluation expressly because of her involvement with women’s issues in the firm; (2) a male associate’s sexual harassment of female employees at the firm was deemed “insignificant” and not mentioned to the Associates’ Committee before the partnership decision; (3) Ezold was evaluated negatively for being very demanding, while male associates were evaluated negatively for lacking assertiveness; and (4) Ezold “was the target of several comments demonstrating [the firm’s] differential treatment of her because she is a woman.”\textsuperscript{190} On appeal, the parties did not dispute that Ezold had demonstrated a prima facie case of discrimination and that, in particular, she was qualified for admission into the partnership.\textsuperscript{191}

However, the Third Circuit disagreed with the district court’s finding that the firm’s asserted reason for its denial of promotion was a pretext for discrimination. The court noted that the lower court’s finding was based on irrelevant comparisons of Ezold’s strengths to those of males admitted to the partnership, in several different categories of the firm’s evaluation form other than those relating to legal analytic ability.\textsuperscript{192} Such comparisons were irrelevant because the issue was whether the firm’s articulated basis for its decision, that Ezold did not possess legal analytic ability sufficient to handle complex litigation, was pretextual. Several partners, including some who favored promoting Ezold to partnership, had expressed clear concern about Ezold’s legal analytic abilities.\textsuperscript{193} Ezold’s evaluations in this category were not as good as those of even the least capable male associate who was offered a partnership position.\textsuperscript{194} Also, Ezold herself admitted that because of the nature of the firm’s litigation practice, its litigators devoted much more time to legal analysis than to in-court trial work.\textsuperscript{195} The Third Circuit explained that the district court improperly based its decision on its own disagreement with the great weight and high standard the firm placed on analytic ability in its evaluation of candidates for partnership.\textsuperscript{196} The Third Circuit then reaffirmed its

\textsuperscript{189}. 983 F.2d at 509.
\textsuperscript{190}. Id. at 513.
\textsuperscript{191}. Id. at 523.
\textsuperscript{192}. Id. at 524-26.
\textsuperscript{193}. Id. at 526.
\textsuperscript{194}. Id. at 525. The portions of the partners’ evaluations of Ezold dealing with her legal analytic ability are set forth in 983 F.2d at 518-20.
\textsuperscript{195}. Id. at 526.
\textsuperscript{196}. Id. at 528.
position that it is the firm's prerogative to employ its evaluation process however it deems most appropriate using its business judgment. The court concluded that Ezold failed to produce evidence showing that her legal analytic ability was comparable to that of male associates who were offered partnership positions.\(^\text{197}\)

Women's rights advocates argued that the Third Circuit's decision "reinforced the 'glass ceiling' for women in the legal profession."\(^\text{198}\) Although a rule requiring absolute deferral "to the judgment of the discriminators"\(^\text{199}\) would indeed grant employers carte blanche to continue to engage in discriminatory employment practices undaunted by the threat of liability, one must seriously question whether the Third Circuit's mandate may be read so broadly. Although there was some evidence that discrimination played a part in the firm's evaluations of Ezold, it is not clear that the decision to deny Ezold partnership status was not in fact attributable to her failure to meet the high standard of legal analytic ability required of partners in that firm's practice. Had the partners who favored her admission to the partnership given her high ratings in that category, or had the firm's practice involved little complex litigation, or had there been some evidence that the decision was retaliatory, or had Ezold's achievements been more comparable to those of the plaintiff in \textit{Price Waterhouse},\(^\text{200}\) the Third Circuit would have been obliged to defer to the district court's judgment. Such was not the case in \textit{Ezold}, however, and thus, the conclusion that the Third Circuit's holding requires trial judges to give absolute deferral to the judgment of alleged discriminators is unwarranted.

4. \textit{Constructive Discharge}

Evidence of a discriminatory refusal to promote is not always sufficient to support a finding of constructive discharge. Generally, Title VII requires employees to attack discrimination from within existing employment relations.\(^\text{201}\) Thus, constructive discharge occurs only when an employer ""deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.""\(^\text{202}\) The standard for finding constructive discharge re-

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197. \textit{Id.} at 527, 533.
199. \textit{Id.}
202. \textit{Id.} (quoting Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983)).
quires a determination of how a reasonable person would behave ""in the employee's shoes.""\footnote{203}

It is fairly difficult to succeed on a constructive discharge claim because, as in the discriminatory refusal to promote context, even if a plaintiff can establish a prima facie case of discrimination, the defendant need only demonstrate some legitimate, nondiscriminatory reason for its action to rebut the presumption of discrimination.\footnote{204} Although theoretically, the plaintiff can still succeed by proving the employer's proffered reason is merely a pretext for discrimination, courts have held plaintiffs to a very high standard of proof.\footnote{205} This is probably because courts recognize the various subjective factors that enter into promotion decisions and that such decisions are founded on employers' intimate familiarity with day-to-day occurrences uniquely within the knowledge of the parties.\footnote{206} Stated differently, courts are reluctant to invoke the limited information available to them to impose liability based on their second-guess of an employer's informed business judgment. Consequently, absent proof of an admission of discrimination by an employer or one of its agents, a plaintiff claiming constructive discharge is unlikely to be able to sustain the burden of proof that the nondiscriminatory reason proffered by the employer was pretextual.\footnote{207}

For example, a former assistant general counsel of Reichhold Chemicals, Inc., brought a Title VII suit alleging that she was denied a promotion to the position of general counsel and was constructively discharged on the basis of her sex.\footnote{208} In that case, the plaintiff, Halbrook, was subjected to several incidents of sexual harassment. She was told to read a book on women's alleged fear of success, told not to let women's issues get in her way, and forced to strike a ""bargain"" with management whereby she promised to refrain from raising women's issues in exchange for a promise from management to cease harassing her about maternity leave.\footnote{209} After the plaintiff had been employed for five years as the general counsel's second-in-command, a man whom she had trained and who had worked under her supervi-

\footnote{203} Id. (quoting Pena, 702 F.2d at 325).
\footnote{205} See, e.g., Halbrook v. Reichhold Chem., Inc., 766 F. Supp. 1290 (S.D.N.Y. 1991) (holding that evidence was insufficient where it failed to prove employer's nondiscriminatory reasons were a pretext) (see infra text accompanying notes 208-213), aff'd, 956 F.2d 1159 (2d Cir. 1992); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), discussed supra text accompanying notes 180-91.
\footnote{207} See supra note 205.
\footnote{209} Id. at 123.
sion was promoted to general counsel. Shortly thereafter, Halbrook complained to the former general counsel about this decision, in general terms and without reference to sex discrimination. The former general counsel responded by volunteering that "it was intentional that there [were] no women in top management at [the corporation]" and that the vice president of human resources at the corporation was of the opinion that women are difficult to manage. After the promotion to general counsel of the man she had trained, Halbrook's responsibilities were decreased. The court concluded that Halbrook had proffered sufficient evidence to establish a prima facie case of discriminatory refusal to promote and constructive discharge. Nevertheless, the evidence was deemed insufficient to prove, at a subsequent trial on the merits, that the employer's proffered nondiscriminatory reason for passing the plaintiff over for promotion was pretextual.

B. State and Local Human Rights Statutes

Many states have human rights statutes analogous to Title VII. Local ordinances may afford similar relief to employees of organizations having fewer than fifteen employees.  

C. State Workers' Compensation Statutes

Whether a sexual harassment victim may recover under a state workers' compensation act depends on whether there is a sufficient relationship between the injury and the employment "to make the injury arise out of and in the course of the employment." Courts also have found that some instances of sexual harassment can be considered accidents within the meaning of the statute.

If there is a physical injury, courts will look at whether the risk of sexual assault was connected to the conditions where the employee worked and whether the incident took place where the employee

210. See id. at 121.
211. See id.
214. See, e.g., Laborers' Int'l Union v. Burroughs, 541 So. 2d 1160 (Fla. 1989).
216. Id.
would be expected to be while performing employment duties. Stress-related consequences of sexual harassment are generally compensable under workers' compensation acts and may be the only remedy available because of the exclusivity doctrine of the acts. Mental injuries fall within the definition of "injury" under most state workers' compensation laws, although some states have restricted their definitions of "injury."

In states where the consequences of sexual harassment are compensable under workers' compensation acts, there are three categories of cases. First, physical injuries resulting from a mental stimulus are almost always compensable. Second, under most statutes, when physical trauma is amplified or prolonged by depression, neurosis, or a personality disorder, the full disability is compensable. Third, some jurisdictions also have allowed recovery for nervous injuries caused by a mental stimulus.

D. Tort Actions


The exclusivity provision of an individual state's workers' compensation law, stating that workers' compensation is the exclusive remedy for work-related injuries, may bar tort and contract claims. However, recent court decisions have treated injuries arising from sexual harassment as exceptions to the exclusivity provision. Such cases invoke the phrase "neither covered nor barred [by the Workers' Compensation Act]" and reason that because injuries from sexual harassment are not covered by that state's workers' compensation act, tort claims are not barred. Other courts have held that although sexual harassment arose in the course of employment, it was not a "risk

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218. Id.
219. Id. The exclusivity doctrine holds that tort and contract claims are barred because workers' compensation laws provide the exclusive remedy for work-related injuries. See infra note 222 and accompanying text.
220. Goodson et al., supra note 216.
221. Id.
223. Goodson et al., supra note 216; see Isaacson v. Keck, Mahin & Cate, No. 92-C3105, 1993 WL 68079 at *9 (N.D. Ill. Mar. 10, 1993) (holding intentional infliction of emotional distress claims not preempted by the Illinois Workers' Compensation Act; IWCA only insulates employers from accidental injuries and does not preempt claims for intentional torts, so that if the employer or his alter ego intended injury to the employee, the claim is not barred).
224. Goodson et al., supra note 216.
SEXUAL HARASSMENT

of employment” and therefore did not come within the ambit of the act. The Ohio Supreme Court in Kerans v. Porter Paint Co. pointed out that victims of sexual harassment suffer intangible injuries that may require remedies beyond the economic compensation provided by workers’ compensation laws; whereas workplace injuries rob a person of resources, sexual harassment also robs an individual of his or her dignity and self-esteem.

In Byrd v. Richardson-Greenshields Securities Inc., the Florida Supreme Court invoked state and federal public policy to make a powerful statement against using the exclusivity doctrine to shield employers from sexual harassment claims:

There can be no doubt . . . that both the state of Florida and the federal government have committed themselves strongly to outlawing and eliminating sexual discrimination in the workplace, including the related evil of sexual harassment . . . Applying the exclusivity rule of workers’ compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964. This, we cannot condone.

In the 1992 Florida case of Stockett v. Tolin, involving sexual harassment of a female employee by her male employer, the court found sufficient evidence to establish the torts of battery, invasion of privacy, intentional infliction of emotional distress, and false imprisonment. Thus the court found the plaintiff entitled to compensatory and punitive damages in addition to the Title VII remedies of back pay and front pay based on the employer’s “quid pro quo” sexual harassment, “hostile environment” sexual harassment, and constructive discharge. In Stockett, the defendant repeatedly harassed the plaintiff, both physically and verbally, throughout her term of employment. Examples included pressing down on the plaintiff’s shoulders while

225. See, e.g., Hart v. National Mortgage & Land Co., 189 Cal. 3d 1420, 1430 (Cal. Ct. App. 1987); see also Byrd v. Richardson-Greenshields Sec. Inc., 552 So. 2d 1099, 1104 n.7 (Fla. 1989) (To be barred, “the injury must 'arise out of' employment in the sense that it is caused by a risk inherent in the nature of the work in question.”) (emphasis added).
227. Id. at 431.
228. 552 So. 2d 1099 (Fla. 1989).
229. Id. at 1102, 1104; see also Gomez v. Metro Dade County, 801 F. Supp. 674, 683 (S.D. Fla. 1992) (interpreting Byrd as holding that workers’ compensation statute does not bar a claim of negligent supervision and retention).
231. Id.
232. Id. at 1542.
she was seated so that she could not get up, then reaching over and squeezing her breasts; pinning the plaintiff against a wall and refusing to allow her to escape; following the plaintiff into the ladies' bathroom; sticking his tongue in the plaintiff's ear while propositioning her in crude terms; cornering her and then proceeding to run his fingers up the front of her shirt, grab her breasts and pinch her nipples; and making vulgar demands for sex as a condition of continued employment.233

2. Types of Tort Actions

The court in Stockett noted that other courts considering emotional distress claims have consistently held "that the allegations sufficient to state a claim for sexual harassment are sufficient to state a claim for emotional distress, and have generally found what one court called 'a common thread—a continued course of sexual advances, followed by refusals and ultimately, retaliation.'"234 The elements of the tort are: (1) extreme and outrageous; (2) intentional or reckless disregard by a coworker or supervisor for the probability of causing severe emotional distress; (3) that resulted in severe emotional distress; and (4) for which the employer is somehow responsible.235

Courts have created their own standards of proof for this tort in sexual harassment cases.236 Due to most states' public policy against sexual harassment, courts generally have not required strong evidence of intent or outrageousness by the coworker or supervisor to establish a cause of action.237 For example, in Ford v. Revlon, Inc.,238 a corporate employer was held liable for intentional infliction of emotional distress where an employee's complaints and corporate policies and guidelines for handling sexual harassment claims were completely disregarded.239 In Bryant v. Thalheimer Bros., Inc.,240 a North Carolina court upheld a jury verdict finding an employer liable for intentional infliction of emotional distress upon his former employee. In that case the employer made sexual advances and followed with false accusa-

233. Id. at 1542-43. The vulgar comments included "I want to fuck you" and "Fuck me or you're fired."
236. See infra notes 237-44.
239. Id. at 585-86.
tions and false performance reviews after the employee rejected his advances.²⁴¹

Florida courts, in contrast, have been less receptive of intentional infliction of emotional distress claims based on sexual harassment. For example, in Ponton v. Scarfone,²⁴² the Second District Court of Appeal, while acknowledging that Florida recognizes the tort, held utterances by an employer attempting to induce his employee to engage in sexual relations with him did not descend to the level necessary to state a claim for intentional infliction of emotional distress.²⁴³ Moreover, the court stated that whether conduct is so "atrocious, and utterly intolerable in a civilized community" as to constitute intentional infliction of emotional distress is a question of law to be evaluated objectively by the judiciary without regard to the subjective response of the target of such behavior.²⁴⁴ Thus, Florida courts are likely to hold victims to a strict standard of proof of the outrageousness of the behavior upon which a claim of intentional infliction is premised.

Sexual harassment victims may be able to state a claim for assault or battery, particularly where physical injury or a threat of physical injury was involved. A person acting with the intention of causing harmful or offensive contact, or of causing another to experience imminent apprehension of such contact, is subject to liability for assault.²⁴⁵ Furthermore, a person acting with intent either to cause harmful or offensive contact or to cause imminent apprehension of such a contact, and who causes a harmful or offensive contact, is subject to liability for battery.²⁴⁶ Physical behavior such as groping, fondling, and kissing a female employee may constitute battery.²⁴⁷ However, words alone are insufficient to constitute either assault or battery.²⁴⁸

The invasion of privacy tort consists of four distinct wrongs: "1) the intrusion upon the plaintiff's physical solitude or seclusion; . . . 2)
publicity which violates the ordinary decencies; 3) putting the plaintiff in a false... position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use."

The first of these wrongs is the one most likely to be implicated in sexual harassment cases. The Restatement defines it as the intentional intrusion, "physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns... if the intrusion would be highly offensive to a reasonable person." Courts have held that acquisition of information from a plaintiff is not a requisite element of "wrongful intrusion" invasion of privacy. Thus, liability for this tort can be premised upon a defendant's invitation to engage in sexual acts and inquiries about a plaintiff's sexual experiences, practices, or inclinations, even if the plaintiff declines the invitation and does not answer the inquiries.

In Phillips v. Smalley Maintenance Services, Inc., the Supreme Court of Alabama applied the wrongful intrusion theory of the invasion of privacy tort to patterns of sexual harassment. The court held that it was not necessary for the defendant to invade some physically defined space, as opposed to the plaintiff's psychological integrity. The court also held the defendant was responsible to the plaintiff for the treatment of severe emotional problems that were proximately caused by his tort. Persistent and unwelcome phone calls have also been held to be an invasion of privacy in the sexual harassment context.

Many sexual harassment plaintiffs include in their complaints a defamation count, often based on inaccurate performance evaluations. To create liability for defamation, a plaintiff must show: (1) a false


253. 435 So. 2d 705 (Ala. 1983).

254. *Id.* at 711.

255. *Id.* at 712.

256. *See, e.g.*, *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981) (finding the plaintiff stated a claim for invasion of privacy by alleging that her supervisor had repeatedly called her at home and at work and made leering comments to her about her sex life).

and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.\textsuperscript{258} If a direct statement of facts would be defamatory, then a statement of an opinion which implies the existence of those false facts is also defamatory.\textsuperscript{259} Furthermore, one cannot avoid liability by phrasing a defamatory comment as a question.\textsuperscript{260}

The court in \textit{Isaacson v. Keck, Mahin & Cate} discussed the tort of defamation in the context of employment performance evaluation.\textsuperscript{261} Oddly, while acknowledging that a false statement that another person is incapable of performing her profession is defamatory per se,\textsuperscript{262} and that "'[a] false statement which imputes a lack of ability in one's profession is actionable as defamation,'"\textsuperscript{263} the \textit{Isaacson} court nevertheless held that the plaintiff failed to allege a defamatory assertion of fact because her supervisor's statements were subjective appraisals of her performance, that is, opinions.\textsuperscript{264}

The overwhelming weight of authority holds that at-will employment relationships are protected against unlawful interference by third parties.\textsuperscript{265} The elements of intentional interference with an employment relationship include the plaintiff's reasonable expectation of continued employment; knowledge of the business relationship by the interferer; intentional interference with that relationship; and damage caused by the interference.\textsuperscript{266} One major limitation is that it does not permit \textit{employer} liability, because the nature of the wrong is a third party's interference with the employer-employee relationship.\textsuperscript{267} A sec-

\textsuperscript{258} RESTATEMENT (SECOND) OF TORTS \S 558 (1977).
\textsuperscript{260} \textit{Id.}; see also \textsc{William L. Prosser, Handbook of the Law of Torts} \S 111, at 741 (1971) ("The form of the statement is not important, so long as the defamatory meaning is conveyed. . . .").
\textsuperscript{261} \textit{Isaacson}, No. 92-C3105, 1993 WL 68079, at *6-7. The facts of the case are discussed supra text accompanying notes 161-68.
\textsuperscript{262} \textit{Id.} at *6 (citing Powers v. Delnor Hosp., 499 N.E.2d 666 (Ill. App. Ct. 1986)).
\textsuperscript{263} \textit{Id.} (quoting Erickson v. Aetna Life & Casualty, 469 N.E.2d 679 (Ill. App. Ct. 1984)).
\textsuperscript{264} \textit{Id.} at *7.
\textsuperscript{265} \textsc{William J. Holloway & Michael J. Leech, Employment Termination: Rights and Remedies} 212 (2d ed. 1985).
\textsuperscript{266} \textit{Id.} at 211; see RESTATEMENT (SECOND) OF TORTS \S 766 (1977).
\textsuperscript{267} See Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 883 (S.D. Ga. 1983) (holding that at-will employee has contract right that may not be unlawfully interfered with by third party; agent who fires employee without absolute authority is subject to liability for intentional interference with employment relations); see also Note, \textit{A Theory of Tort Liability for Sexual Harassment in the Workplace}, 134 U. Pa. L. Rev. 1461, 1480 (1986) (discussing advantages and disadvantages of the intentional interference with an employment contract tort for victims of sexual harassment).
ond limitation is that the plaintiff must prove economic harm; the tort may not be invoked to redress mental injuries. Nevertheless, sexual harassment plaintiffs have won claims for intentional interference with contractual relations.

**E. Tort and Contract Actions for Wrongful Discharge**

1. **Contract Action for Wrongful Discharge**

If an employment contract does not contain an express or implied provision that the employment is for a specific term, the employee is an employee at-will, meaning the contract is terminable at the option of either party. Several theories of relief are available to protect at-will employees, but states differ as to the theories upon which they will allow a cause of action to be premised.

In some states, it is possible to state a claim in contract for wrongful discharge based on a breach of the implied covenant of good faith and fair dealing. However, some states' at-will employment rules, including those of Florida and Georgia, preclude claims for breach of the implied covenant of good faith and fair dealing in wrongful discharge cases. Alternatively, an employee manual may create an implied contract for a definite period of employment or an implied contractual obligation not to discharge the employee without cause, upon which a breach of contract action can be based.

2. **Tort Action for Wrongful Discharge**

In most jurisdictions, a tort cause of action for wrongful discharge exists, which requires the plaintiff to demonstrate that a specific pub-
lic policy against employment discrimination and sexual harassment, preferably one evidenced by a statute, warrants a limitation on the employer's right to discharge an employee at-will. Nevertheless, state and federal antidiscrimination statutes may preempt wrongful termination actions in both tort and contract.

The rule in Florida is that, absent a specific statute granting a property interest, if the term of employment is discretionary with either party or is indefinite, then either party may terminate the employment at any time, with or without cause, and no action may be maintained for breach of the employment contract. Moreover, Florida does not recognize an exception to the at-will doctrine in the form of a common law tort for retaliatory discharge.

V. PROFESSIONAL DISCIPLINE

A. The Model Code of Judicial Conduct as a Model for Comparison

Courts routinely discipline judges for sexual harassment under the American Bar Association's Model Code of Judicial Conduct ("Judi-
cial Code”).279 Canons 2 and 3 of the Judicial Code not only require judges themselves to refrain from manifesting gender-based bias or prejudice,280 which manifestations include membership in an organization that discriminates,281 but also obligate judges to hold attorneys and subordinates to the same standard of conduct.282 Moreover, Canon 3.B.(5) prohibits sexual harassment specifically and requires judges to hold “others subject to the judge’s direction and control” to the same standard of conduct.283 The commentary to Canon 4.A.(1) explains further that it is inappropriate for a judge to tell jokes or make other remarks demeaning individuals based on their sex.284

One judge who was removed from office for his sexual misconduct asked a third-year law student in his chambers to take off her clothes and bend over; hugged a docket clerk and unlatched her bra strap while making a comment to the effect that he hadn’t lost his touch; told a prosecutor that he “would really like to jump [her] bones”; winked and blew a kiss to a different attorney in the presence of her client and other courtroom observers; and responded to a student intern’s comment that “Miss [Name] is here on a matter that will be very quick” by retorting: “Oh, she’s here for a quickie, uh.”285 Other judges have been disciplined for engaging in sexual relations with female juvenile wards under their jurisdiction;286 requiring employees to engage in sexual relations as a condition of employment and firing one for refusing to do so;287 offering female defendants leniency in exchange for sexual favors;288 engaging in sex with a female juror in chambers while a chief deputy guarded the door, while at the same time involving himself in an unethical arrangement with a bail bondsman who “lined up” women for the judge to “take out”;289 and misusing office to “prolong a sexual relationship with a law assistant and, later, to exact personal vengeance when she refused to continue


281. Id. Canon 2.C.


283. Id. Canon 3.B.(5).

284. Commentary to MODEL CODE OF JUD. CONDUCT Canon 4.A.


286. See Angel, supra note 16, at 823 (citing AMERICAN JUDICATURE SOCIETY, JUDICIAL DISCIPLINE AND DIGEST KY 4 (Jan. 1981-June 1986) (judge resigned and was publicly censured)).

287. See In re Hammond, 585 P.2d 1066 (Kan. 1978) (holding that conduct warranted at least public censure and at least six months’ suspension without pay, and perhaps removal from office).

288. See Kentucky Bar Ass’n v. Hardesty, 775 S.W.2d 87 (Ky. 1989) (holding that public censure and one-year suspension from practice of law were appropriate penalties).

their affair." The vengeance included firing the clerk, emptying her office desk and dumping the contents on the doorstep of her residence, leaving more than sixty obscene messages on her answering machine, falsely identifying himself to her doorman as her attorney in a desperate attempt to see her, threatening to have her boyfriend fired if he did not reveal her whereabouts, asking the Deputy Chief Administrative Judge to view unfavorably any application that the law clerk might submit, and remonstrating with the clerk’s new employer for hiring her without first consulting him.

Neither the Model Code of Professional Responsibility ("Model Code") nor the Model Rules of Professional Conduct ("Model Rules") addresses sex discrimination or the more specific issue of sexual harassment. However, sexual harassment of clients by attorneys has been held to violate the "catch-all" provision of the Model Code, which states that "[a] lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law." Moreover, Judge Miera, who made unwelcome sexual advances to his male court reporter and who, on another occasion, touched a female employee’s breast while offering her money for coffee she had bought, was disciplined under a provision of the Minnesota lawyer code that replicates Model Code DR 1-102(A)(6). The court specifically found that such misconduct is "no less troubling when engaged in by an attorney" and publicly reprimanded him in his capacity as a lawyer as well. Minnesota, along with several other states, has since enacted an amendment to its lawyer code proscribing both violations of antidiscrimination laws generally and sexual harassment specifically.

B. Lawyer Discipline for Sexual Harassment of Clients

In April 1991, the State Bar of California became the first to approve a professional conduct rule prohibiting lawyers from "demand-
ing or requiring" sexual relations with clients. The rule states that a bar member may not continue representing a client "if a sexual relationship causes the attorney to perform legal services incompetently," and placing the burden of proof on the attorney. 296 The need for a similar rule prohibiting sexual harassment of female attorneys and staff by male attorneys is even more compelling. In addition to the psychological and financial repercussions common to sexual harassment of both employees and clients, 297 sexual harassment of employees damages its victims' professional futures. And, like sexual harassment of clients by attorneys, condoning sexual harassment of employees by attorneys undermines the integrity of and the public's confidence in the profession, and sends a message to the public that such demoralizing conduct is acceptable and that it typifies the legal profession. 298

C. Criminal Sanctions and Mandatory Education Laws Addressing Workplace Harassment

In some places, legislatures have passed strict laws designed to curb workplace harassment. 299 For example, Maine requires employers to educate workers about sexual harassment by posting notices stating that sexual harassment is illegal and by explaining how to file a complaint with the Maine Human Rights Commission. 300 The state also requires employers with fifteen or more workers to conduct training about sexual harassment for all new employees within one year after they are hired. 301 France and Spain have imposed criminal sanctions of up to one year in prison for workplace harassment. 302

D. State Codes of Professional Lawyer Conduct

Lawyers in the District of Columbia, Florida, Minnesota, New Jersey, New York, Rhode Island and Vermont have responded to discriminatory practices by enacting amendments to their state codes of

297. See supra notes 128-32 and accompanying text.
298. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 81-82 (1986).
299. See infra notes 300-02 and accompanying text.
301. Id.
professional conduct to prohibit such practices.\textsuperscript{303} Florida, for example, amended Rule 4-8.4(d)\textsuperscript{304} to state that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice, including to . . . disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on account of . . . gender . . . ."\textsuperscript{305} Minnesota's amended rule 8.4 explicitly prohibits sexual harassment.\textsuperscript{306} The Law Society of Upper Canada also recently made sexual harassment by lawyers a ground of professional misconduct that could lead to disbarment.\textsuperscript{307}

California, Massachusetts,\textsuperscript{308} and Michigan have proposed such amendments to their states' professional codes, and a Hawaii Supreme Court committee is drafting an antidiscrimination rule for that state's code of professional conduct.\textsuperscript{309} Michigan's proposed rule 5.7 would restrict lawyers' conduct both in professional and private life.\textsuperscript{310} California's proposed rules, like New Jersey's amended rule, restrict an attorney's conduct in a professional capacity only.\textsuperscript{311}

\section*{E. The Next Step}

The ABA's Model Rules, as well as every state's lawyer code of professional responsibility, should be amended to specifically condemn sexual harassment of employees by lawyers. Courts must discipline lawyers not just to punish them, but also to protect the public, the administration of justice, and the integrity of the bar.\textsuperscript{312} Sanctions

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{304} See The Florida Bar Re Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720 (Fla. 1993) (approving the amendment).
\item \textsuperscript{305} Id. at 721 (emphasis added).
\item \textsuperscript{306} See supra note 295.
\item \textsuperscript{307} Sexual Harassment, Spelled Out, Toronto Star, Apr. 8, 1993, at A21.
\item \textsuperscript{308} See Linda M. Jorgenson & Pamela K. Sutherland, Lawyer-Client Sexual Contact: State Bars Polled, Nat'l L.J., June 15, 1992, at 27 n.5 (discussing Massachusetts' proposed antidiscrimination amendment).
\item \textsuperscript{310} See Michigan Rules of Professional Conduct Proposed Rule 5.7 (1988).
\item \textsuperscript{311} The California proposals prohibit sex-based discrimination by a member of the bar in setting the terms or conditions of employment and in the acceptance or termination of client representation, California Rules of Professional Conduct Proposed Rule 2-400 (1991); in the performance of legal services, id. Proposed Rule 3-220(A); and in trial practice, id. Proposed Rule 5-200(F). Proposed Rule 5-200(F) explicitly proscribes sexual harassment.
\item \textsuperscript{312} Charles W. Wolfram, Professional Discipline of Lawyers § 3.1, at 79 (1986).
\end{itemize}
\end{footnotesize}
should be imposed to educate and deter unethical conduct by the offending lawyer and all members of the legal profession.\textsuperscript{313} None of these purposes can be served while the legal profession continues to condone the reprehensible abuse of power by lawyers. Furthermore, if the legal profession truly desires to deter sexual harassment, sanctions imposed in response to such behavior must be commensurate with the violations. Measured by such a standard, sanctions typically imposed for sexual misconduct by judges are woefully inadequate.\textsuperscript{314}

VI. CONCLUSION

Sexual harassment in law firms is a widespread problem that damages its victims' careers, law firms' financial statuses, employee productivity and morale, workplace atmospheres, working and mentoring relationships between male and female lawyers within an office, client confidence in their legal counsel, and the public image of the legal profession generally. The first step toward avoiding these repercussions is to educate all firm personnel. This should include explaining what is and what is not sexual harassment and, while recognizing differing viewpoints, making clear the fact that sexual harassment will not be tolerated and will be handled promptly and effectively. Mandatory sexual harassment education should be part of every employee's orientation, should be repeated periodically, and should include sensitivity training to reduce possible backlash to the policy, such as resentment toward, disparate treatment of, or avoidance of female attorneys and staff. Effective detection and enforcement mechanisms should be in place to ensure a prompt and adequate response to any problem or potential problem that may arise. The policy should be communicated to business associates outside the firm as well.

Furthermore, every state's lawyer code should be amended to prohibit sexual harassment and other forms of sex discrimination by lawyers. It is unacceptable for state bars to countenance among its members abusive, morally reprehensible conduct that is condemned and prohibited by both state and federal law.

Finally, state supreme courts should impose sanctions severe enough to send a clear message that sexual misconduct will not be tolerated in the legal workplace and to make it worthwhile for victims of harassment to come forward.

\textsuperscript{313} \textit{Id.} at 80.

\textsuperscript{314} \textit{See}, \textit{e.g.}, \textit{supra} notes 285-93 and accompanying text.