Sex and Economics: The Tie That Binds
Judicial Approaches to Sexual Harassment as a Title VII Violation

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I. Introduction

Women have experienced and reacted to sexual coercion at work for as long as they have traded their labor for a wage.[1] Yet the term "sexual harassment" was not socially recognized or acknowledged except by segments of the feminist community until the mid-1970's. In the middle and late 1970's, the experience of sexual harassment became widely publicized and discussed.[2] Stories and reports of sexual harassment began to appear regularly in the popular press.[3] Labor organizations and personnel departments began to publish policies, procedures, and pamphlets for employees on sexual harassment,[4] and scholars began to consider

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1. The term "wage" is meant to include what women receive in return for both productive and nonproductive labor. Thus sexual harassment has historically occurred in economic relations both within the labor force and the home. For a discussion of the history of sexual harassment, see generally Constance Backhouse & Leah Z. Cohen, Sexual Harassment On The Job 46-64 (1981); Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job 34-44 (1978); Mary Bularzik, *Sexual Harassment at the Workplace: Historical Notes*, Radical Am., July-Aug. 1978, at 25; Laurie Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet To Go*, 10 Cap. U.L. Rev. 445, 448-458 (1981).

2. The recognition of sexual harassment as a social problem in the 1970's is a result of changing consciousness about relations between the sexes due largely to efforts of a strong feminist movement. *See* Alliance Against Sexual Coercion, Fighting Sexual Harassment: An Advocacy Handbook (1979) [hereinafter Advocacy]; Linda Gordon, *The Politics of Sexual Harassment*, Radical Am., July-Aug. 1981, at 7.

3. *See* Goodman, *supra* note 1, at 446 n.6.

4. *See, i.e.*, AFSCME, Sexual Harassment: On The Job Sexual Harassment: What The Union Can Do (1980); Maine Advisory Comm'n to the U.S. Comm'n on Civil Rights, Information Kit on Sexual Harassment in Employment (1981); Nat'l Union of Provincial Gov't Employees, Sexual Harassment at Work (1980); University of Rhode Island Affirmative Action Comm. on Sexual Harassment, Sexual Harassment and Assault: Myths and Reality (1981).

and write about the legal and social implications of sexual harassment.[5] Finally, in November 1980, the Equal Employment Opportunity Commission (EEOC)[6] published final guidelines on sexual harassment which define and codify sexual harassment as an illegal form of sex discrimination in violation of title VII of the 1964 Civil Rights Act.[7]

By 1980, the social recognition of sexual harassment was accompanied by judicial recognition[8] of sexual harassment as a legal claim.[9] Judicial and societal definitions of sexual harassment did not, however, share common origins or a common understanding of the issues involved in this problem. The societal definition of sexual harassment evolved out of the experiences of women workers.[10] The sexist attitudes and perceptions manifested by the harassment they experienced—namely, the idea that women are sex objects first and workers second,[11] as well as the reality that men can and do make unilateral demands for sexual attention from or

5. *See* Alliance Against Sexual Coercion, Sexual Harassment: An Annotated Bibliography (1981); Beth L. Stanton, *Sexual Harassment: A Bibliography*, 10 Cap. U.L. Rev. 697-708 (1981). Most notably, Catharine MacKinnon published a seminal work entitled Sexual Harassment of Working Women (1979).

6. The EEOC is a bipartisan commission responsible for administering and enforcing federal antidiscrimination laws, including title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2000e-17 (1982). The EEOC's final guidelines appeared in the Federal Register on November 10, 1980 and are codified at 29 C.F.R. § 1604.11 (1986).

7. Equal Employment Opportunity Commission Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1986). The Supreme Court has held the guidelines are "entitled to great deference," but they do not have the force and effect of law and need not be followed. Albemarle Paper v. Moody, 422 U.S. 405, 431 (1975) (citation omitted).

8. Some courts began to recognize sexual harassment as unlawful sex discrimination in the late 1970's. Only recently, however, did the Supreme Court confirm the widely accepted view that sexual harassment in employment violates title VII of the 1964 Civil Rights Act. *See* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

9. As Catharine MacKinnon pointed out: "Sexual harassment, the experience, is becoming sexual harassment, the legal claim. As the pain and stifled anger have become focused into dissatisfaction, gripes have crystallized into a grievance, and women's inner protest has become a cause of action." MacKinnon, *supra* note 5, at 57. MacKinnon also recognizes the courts' inability to address the social issues underlying women's suffering. *See infra* text accompanying note 51.

10. Although some surveys indicate men experience sexual harassment, e.g., U.S. Merit Sys. Protection Bd. Office of Merit Review and Studies, Sexual Harassment in the Federal Workplace: Is It A Problem? 34-36 (1981) [hereinafter Merit Systems], *most* agree sexual harassment of women is far more common than harassment of men.

11. For a more complete discussion of this idea, see Advocacy, *supra* note 2; Farley, *supra* note 1, at 33-34; MacKinnon, *supra* note 5, at 18-23; Barbara Gutek & Bruce Morasch, *Sex-Ratios, Sex-Role Spillover, and Sexual Harassment of Women at Work*, J. Soc. Issues, Winter 1982, at 55.

contact with women[12]—shaped women workers' understanding of sexual harassment.

In contrast, the legal definition of sexual harassment ignored the reality of women workers' experiences. Courts reacted to claims of sexual harassment without acknowledging or understanding the social conditions which created the problem. In fact, the subtleties and pervasiveness of society's sexist attitudes, expressed through sexual harassment, are reflected in the courts' analysis of the problem. Recurring issues reflect the tension between the courts' approach to sexual harassment and women's experiences. These issues are: 1) is sexual harassment an expression of male sexual desire gone awry or a form of sex discrimination; 2) does sexual harassment happen to women workers because they are women, or are male workers equally at risk; 3) must victims suffer an economic injury or is enduring the offensive behavior sufficient for recovery; and 4) is the employer liable for harassment because it is a workplace condition or is employer liability inappropriate because the harassment results from an individual man's sexual games.[13]

This article demonstrates that the judicial approach in framing the problem and analyzing these issues is fundamentally unsound. By ignoring the reality of sexual harassment as women experience it, courts view sexual harassment as if it were aberrant behavior rather than an ongoing and constant condition of women's work. Courts do not recognize that every instance of sexual harassment includes both an economic and a sexual component. Sexual harassment, by definition, means a woman's job is threatened by sexual demands. This is, at once, both sexual and economic coercion.

Recent judicial trends indicate a recognition that both sexual and economic coercion are present in sexual harassment, yet courts continue to approach harassment as a form of *either* sexual *or* economic coercion without recognizing their inherent connection. This approach has led courts to develop two separate theories

12. *See* MacKinnon, *supra* note 5, at 149-58.

13. The Supreme Court decision in Meritor Sav. Bank v. Vinson, 206 S. Ct. 2399 (1986), resolves the first issue. The Court in *Meritor* stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate(s)' on the basis of sex." *Id.* at 2404. In holding that there is a cause of action for environmental harassment, defined as unwanted verbal or physical conduct of a sexual nature which creates an offensive working environment, the *Meritor* decision appears to resolve all of these issues. Nevertheless, the attitudes and assumptions expressed by these issues continue to influence the approach and analysis courts employ in the continuing development of sexual harassment doctrine.

of recovery for sexual harassment depending on whether the harassment reflects economic or sexual coercion.[14]

Quid pro quo sexual harassment, the first theory adopted by the courts, allows recovery for economic coercion alone. Courts view quid pro quo harassment as workplace-sanctioned economic power used to pressure women sexually. The more recent theory, environmental sexual harassment, corresponds to harassment that courts view as primarily sex-based coercion.[15] Environmental sexual harassment theory developed to allow recovery for psychological harassment that was legal under quid pro quo doctrine because it did not result in direct economic harm to the woman worker.[16] The theory's usefulness, however, is limited by courts' reluctance to hold employers liable.[17] Courts view environmental harassment as an individual man's expression of personal sexual desires, rather than action within the scope of his employment. Because courts assume the harasser is not wielding any workplace-sanctioned authority over the woman, courts are reluctant to hold the

14. Courts have not consciously made a distinction between the economic and sexual aspects of sexual harassment; however, recently developed approaches to the issue reveal these underlying considerations. The new theory which focuses on sex-based coercion as opposed to economic is called environmental sexual harassment. For a discussion of the courts' approach to sexual harassment claims see part III, *Prima Facie Case of Sexual Harassment: Comparison of Quid Pro Quo and Environmental Harassment Theories.* Part IV, *Judicial Explanations for Two Types of Sexual Harassment,* and part V, *Implications of the Two-Type Model,* discuss the judicial distinction between economic coercion and sex-based coercion and the effect of these distinctions on women's legal remedy for sexual harassment.

15. *See generally* MacKinnon, *supra* note 5, at 32-47.

16. The Supreme Court's recent decision in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986), addresses various issues raised by environmental harassment theory. The plaintiff in *Meritor*, a former employee of the defendant bank, brought an action against the bank and her supervisor at the bank, claiming that her supervisor had sexually harassed her during her employment in violation of title VII. The district court denied the plaintiff relief, finding that any sexual relationship the plaintiff might have had with her supervisor had been voluntary and had *not* been a condition of her employment at the bank. The District of Columbia Court of Appeals reversed and remanded the case primarily because the district court had not considered the facts of the plaintiff's situation in light of environmental sexual harassment theory. The Supreme Court addressed three issues on appeal: 1) was there a cause of action for environmental sexual harassment; 2) was evidence of plaintiff's dress and personal fantasies properly admitted at trial; and 3) what is the proper standard for employer liability for environmental harassment by a supervisor. After discussing each of these issues at length, the Court concluded that: 1) a cause of action for environmental harassment definitely existed; 2) evidence of sexually provocative speech and/or dress was relevant to determine whether the plaintiff found the sexual advances unwelcome; and 3) the record was not sufficiently developed to allow the Court to issue a definitive rule on employer liability. *Id.* at 2401.

17. The majority opinion in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986), did not issue a definite rule on employer liability. *See infra* notes 201-206 and accompanying text.

employer liable unless the employer had knowledge of the harassment.[18] Courts are unwilling to impose liability because they understand the coercion to be *sexual* rather than *economic*.

This dichotomy allows certain types of sexual harassment to remain illegal in name only. In other words, the judicial approach theoretically recognizes that sexual harassment has occurred, but still refuses to compensate the woman worker for certain scenarios of harassment. For example, a supervisor may harass a woman worker and create an abusive environment. If the woman does not suffer direct economic harm as a result of the harassment, the supervisor's acts are considered environmental rather than quid pro quo sexual harassment. Under the environmental theory, the employer who lacks knowledge of the harassment will most likely escape liability, even though courts do not require employer knowledge of the harassment for a successful quid pro quo claim. Thus, although the environmental theory recognizes this scenario as sexual harassment, it rarely results in compensation. This is because it fails to recognize that: 1) an employer should have the same obligation to insure that women workers have a safe workplace environment free of abuse, regardless of whether a particular worker suffers an economic loss; and 2) supervisors exert economic coercion and power whenever and however they harass, regardless of the direct economic harm the woman suffers.

The two-type model of sexual harassment also ignores the *economic* coercion which may be imposed on women workers by co-workers. Courts assume that co-workers by definition can only coerce sexually. The assumption that only supervisors can demand sex in exchange for economic security fails to recognize ways in which nonsupervisory male employees gain access to avenues of control.[19]

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18. For details on the element of employer liability, see *infra* part III, notes 176-219 and accompanying text. See also Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449 (1984) for suggested reforms in the application of environmental sexual harassment theory. Within the context of the quid pro quo/environmental harassment distinctions, the author recommends using a disparate treatment standard to remove the discriminatory motive requirement, and extending the quid pro quo strict liability standard to environmentally harassing behavior by supervisors because of their employer-sanctioned authority over tangible as well as intangible conditions of employment. The author does not question the assumptions underlying the two-type model which distinguishes between sexual coercion and economic coercion. Nor does the author argue that these assumptions and distinctions make the two-type model unworkable.

19. Co-workers are frequently the harassers. In fact, the federal government survey on sexual harassment revealed that co-worker harassment accounted for 65% of all reported incidents. *See* Merit Systems, *supra* note 10, at 57-62.

Consider the following scenario:[20] Marie is the only woman engineer in a medium-sized contracting firm. All but one of her superiors are men and the three data technicians she supervises are men. One of her subordinates, Joseph, began to constantly ask Marie to sleep with him, to fondle his penis, and to go out with him after work. Despite Marie's persistent refusals *and* threats to fire him, Joseph continued to harass Marie at work and began to call her at home and appear unexpectedly at her front door. Marie was afraid to discipline or report Joseph because he was considered an outstanding employee, who spent many lunch and cocktail hours with the men who ran the company. She was unsure her supervisors would believe her, and she felt a truly competent supervisor would be able to remedy the situation herself. Once Marie realized her job performance was declining as a result of her preoccupation with Joseph's harassment, she decided to sleep with him just once to "get him off her back."

In Marie's situation, general male domination in the organization, Joseph's rapport with other men at work, and Marie's isolation and lack of self-confidence combined to enable a nonsupervisory male employee to extort sexual favors against the threat of economic loss. Marie would be unsuccessful in a claim brought under the quid pro quo theory because she would not be able to show any economic harm. The environmental theory does not provide Marie a remedy primarily because of the high standard of employer liability that results from the judicial assumption that this is sexual and not economic harassment.[21]

This scenario points out that sexual harassment cannot be neatly categorized into two types. Although Joseph did not utilize "official" workplace authority to force Marie to sleep with him, the organization of the workplace itself allowed Joseph to threaten Marie's economic position. Male sexual power and economic power, the factors which courts use to define environmental harassment and quid pro quo harassment respectively, are both present in this scenario. Neither theory, however, provides a remedy.

This article suggests that the judicial focus on whether the coercion expressed through sexual harassment is sexual or eco-

20. This scenario is based on a true situation faced by a client of the Alliance Against Sexual Coercion.

21. In Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986), the harasser was a supervisor, but neither the Court's decision nor Justice Marshall's concurrence addressed employer liability for environmental harassment by *co-workers*. Even if some courts alter the standard of employer liability applied in environmental harassment cases based on Marshall's concurrence in *Meritor*, the courts that view environmental harassment as primarily sexual rather than economic coercion will continue to be reluctant to impose liability for co-worker harassment.

nomic ignores the primary criterion that defines sexual harassment as women experience it: the impact it has on a woman worker's ability to participate equally in her workplace. The thesis of this article is that the judicial approach to sexual harassment will continue to be unworkable until it focuses on the range of factors that actually influences harassers' ability to affect the workplace conditions of their female counterparts.

Part II of the article discusses both the social and legal evolution of sexual harassment analysis. It traces the judicial understanding of sexual harassment as an abuse of power and suggests that the courts have not yet defined or responded to sexual harassment as women experience it. Even recent judicial trends, which expand possibilities for recovery to encompass a broader range of situations women experience, fall short of providing a workable and accurate definition of the problem of sexual harassment.

Part III of the article analyzes plaintiffs' prima facie case of sexual harassment. It compares and contrasts the two court-identified types of harassment and argues that the advantages offered to plaintiffs by the new theory known as "environmental harassment"[22] have already been minimized.

In part IV the article considers the judicial explanations for two types of sexual harassment, and part V presents the implications of the two-type model. The article argues that the two-type model is unworkable because it is based on incorrect assumptions about sexual harassment in the workplace. The two-type model defines sexual harassment from the perspective of the employer, harasser, or both and fails to account for its impact on women workers. Part VI concludes by proposing criteria that can adequately respond to women workers' experience of sexual harassment.

II. Sexual Harassment as Sex Discrimination: Historical Evolution of a Legal Doctrine

A. Social Recognition of Sexual Harassment

The term "sexual harassment" dates back only to the mid-1970's.[23] Women workers began to discuss and share with each other stories of sexual exploitation at work.[24] As more and more

22. See definition of environmental harassment *infra* text accompanying notes 56, 101.

23. *See* Backhouse & Cohen, *supra* note 1, at 130-42; Goodman, *supra* note 1, at 443-48.

24. For descriptions of individual women's experiences, see Advocacy, *supra* note 2; Farley, *supra* note 1, at 21-31 (scenarios range from a receptionist in a den-

women told tales of leaving a job or being fired because of discomfort with a man's sexual behavior, it became clear their experiences were not unique but rather a reflection of a social problem commonly encountered by women at work.[25] When women brought sexual harassment to the public's attention, their analysis and definition of the problem grew out of the concrete realities of their experiences.[26] In the early stage of social recognition of sexual harassment,[27] the focus was not on its legal implications but rather on its sociopolitical origins and impact on working women.[28]

Despite the fact that sexual harassment is a workplace problem, feminists rather than labor activists initially analyzed and defined it.[29] As feminists explored the roots of sexual harassment, they recognized two distinct, but interrelated, forces in operation: physical or sexual coercion of women by men[30] and economic exploitation of women at the workplace.[31] They understood this co-

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tist office who was raped by the dentist to a restaurant manager who told female job applicants that sexual favors were a mandatory job requirement); case scenario, *supra* text following note 20.

25. Farley, *supra* note 1, at 12-14.

26. Many of the feminist organizations involved in analyzing and studying sexual harassment worked with and counseled victims of sexual harassment to help resolve their problems in the workplace. As such, their knowledge of the dynamics and issues involved came directly from women experiencing harassment. Examples of such organizations in the United States include Alliance Against Sexual Coercion (AASC), Working Women United Institute (WWUI), and Women Organized Against Social Harassment (WOASH). The author is familiar with the work of these organizations because of her own involvement with AASC and sexual harassment work from 1979 until the present. The types of work done by these organizations is not clearly documented in particular publications. The reader can look at pamphlets or studies done by these groups, however, to develop a general understanding of their work. *See, i.e.*, Advocacy, *supra* note 2; Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women*, Working Women's Inst., Research Series Report No. 3 (1979), *reprinted in* Sexuality in Organizations: Romantic and Coercive Behaviors at Work 67 (Dail Ann Newgarten & Jay M. Shafritz eds. 1980) [hereinafter Coercive Behaviors]. For further discussion of these organizations, see Backhouse & Cohen, *supra* note 1, at 138-42.

27. In addition to feminist organizations recognizing sexual harassment, *Redbook* magazine conducted a self-reporting survey in 1976 in which 88% of 9,000 respondents said they received unwanted sexual attention on the job. Additional studies have confirmed the prevalence of the problem. For a partial summary of studies documenting the incidence of sexual harassment, see Coercive Behaviors, *supra* note 26, at 4-7; *see also* Merit Systems, *supra* note 10.

28. *See supra* note 26.

29. For a more complete discussion of labor's early reactions to the issue of sexual harassment, see Advocacy, *supra* note 2; Farley, *supra* note 1, at 157-69; Alliance Against Sexual Coercion, *Organizing Against Sexual Harassment*, Radical Am. 17 (1981) [hereinafter AASC].

30. For complete discussion on the topic of violence against women and its relation to sexual harassment, see Backhouse & Cohen, *supra* note 1, at 32-45; MacKinnon, *supra* note 5, at 217-21; AASC, *supra* note 29.

31. For example, though women constitute 53% of the United States labor force, they are still concentrated in low-paying dead-end jobs. Among full-time,

ercive treatment was possible because of two separate, but connected, systems of social inequality: male dominance over women and employer control over employees.[32]

In trying to analyze and understand the origins and implications of sexual harassment, feminists drew from their experiences and knowledge about the crime of rape.[33] They analogized sexual harassment to rape because, like rape, the harassment stems from an attitude that women are "fair game" for male aggression—that it is a man's perogative to relate sexually regardless of female acquiescence.[34] In fact, at least one sexual harassment organization—the Alliance Against Sexual Coercion—grew out of a rape crisis center. Women who were raped or harassed by men at their workplace turned to the rape crisis center for help because their experiences at work resembled sexual abuse experienced in other situations.[35]

Although feminists recognized important differences between rape and sexual harassment, they were nonetheless influenced by the analytic paradigms developed in the rape-crisis movement.[36] Feminists stressed the importance of a subjective and flexible definition of sexual harassment and recognized that one incident of sexual coercion was sufficient to constitute sexual harassment.[37] As with rape, consent is a key element in defining sexual harassment. To constitute harassment, sexual attention must be unwanted.[38] The definition of sexual harassment, therefore, must

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year-round workers, the average white woman earns approximately 59% of the average white man's wages. Black women earn even less than white women. For those who are out of work, unemployment rates are higher among women than men. U.S. Dep't of Labor, Bureau of Labor Statistics, Report 673, The Female-Male Earnings Gap: A Review of Employment and Earnings Issues (1982); U.S. Dep't of Labor, Women's Bureau, 20 Facts on Women Workers (1982). Feminist writers have considered the significance of these facts. *See* Farley, *supra* note 1, at 45-51; MacKinnon, *supra* note 5, at 9-18.

32. Feminists recognized that the phenomenon of harassment mirrored male/female dynamics found outside the workplace. Further, they recognized that if women were *in fact* equal to men or employees equal to their supervisors, the basis for this type of coercive behavior would be eliminated. *See* Advocacy, *supra* note 2; MacKinnon, *supra* note 5, at 9-23.

33. For discussions concerning sexual harassment and rape, see Advocacy, *supra* note 2; Backhouse & Cohen, *supra* note 1, at 42-43; AASC, *supra* note 29.

34. *See* Kate Millet, Sexual Politics 23-58 (1970).

35. Backhouse & Cohen, *supra* note 1, at 140-41.

36. *See supra* notes 33, 35.

37. *See* Advocacy, *supra* note 2; Backhouse & Cohen, *supra* note 1, at 32-45; *infra* note 105.

38. In Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986), the Court recognized the need for a subjective determination of consent.

> [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gra-

account for specific behavior that might be acceptable to some women and not to others.[39] What is unwanted must be determined subjectively according to an individual woman's situation, sexual values, and cultural beliefs.[40] Feminists also agreed that one or two unwanted sexual acts were enough under an accurate definition of sexual harassment. The behavior need not be repeated to qualify as sexual harassment.[41]

As feminists learned more about the effects of sexual harassment and developed strategies to counter it, they realized that the analogy to rape was incomplete.[42] Women subjected to sexual harassment do report many of the same feelings and responses as rape victims,[43] but their experience is fundamentally altered because harassment occurs in the context of workplace relations. Sexual harassment threatens a woman's economic security[44] and thus raises questions about her ability to survive and support herself as an economically independent human being.[45] To challenge and ul-

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vamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."

Id. at 2406. The Court held that "the correct inquiry is whether plaintiff, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation . . . was voluntary." *Id*. Thus, the Court recognized, as did feminists years earlier, that the issue is whether a woman worker *willingly* consents.

39. This concern was also shared by the policymakers who drafted the EEOC guidelines on sexual harassment. For discussions concerning the subjective component of a definition of sexual harassment, see generally Jan Leventer, *Sexual Harassment and Title VII: EEOC Guidelines, Conditions, Litigation, and the United States Supreme Court*, 10 Cap. U.L. Rev. 481, 482-83 (1981); T. Clay Smith Jr., *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 Cap. U.L. Rev. 472, 473-74 (1982).

40. *See, e.g.*, AASC, *supra* note 29.

41. Compare the following two definitions as to the requirement that the harassment be repeated: "Any interference with an individual's work performance because of sex discrimination should not be tolerated under title VII, regardless of its substantiality . . . ," *Comments on the EEOC Interim Guidelines on Sexual Harassment* submitted by National Organization for Women, National Women's Political Caucus, New York City Commission on the Status of Women, Center for National Policy Review, Women Employed, Women's Equity Action League Educational and Legal Defense Fund, NOW Legal Defense and Education Fund, Inc., Women's Legal Defense Fund [hereinafter *Comments*], June 10, 1980, or "sexual harassment is deliberate or repeated unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome." U.S. Office of Personnel Management, Memorandum to Heads of Departments and Independent Agencies, Subject: Policy Statement and Definition of Sexual Harassment (Dec. 12, 1979).

42. Advocacy, *supra* note 2; Backhouse & Cohen, *supra* note 1, at 42-43; AASC, *supra* note 29.

43. For a discussion of women's emotional responses to sexual harassment, see Backhouse & Cohen, *supra* note 1, at 38-39.

44. Evidence of the direct impact sexual harassment can have on the lives of working women can be found in the results of the U.S. Merit System's Protection Board report. *See* Merit Systems, *supra* note 10, at 63-74.

45. In this way, sexual harassment parallels the experience of many women

timately defeat sexual harassment, women must confront the hierarchical organization of work itself.[46] Feminists came to understand that "[w]ork is the key element in understanding sexual harassment, because this is the prize men are controlling through their extortion."[47]

When sexual harassment finally was recognized as a form of sex discrimination, feminists were enthusiastic but skeptical.[48] Although the opportunity for women to seek compensation through the legal system was long overdue and welcomed,[49] some feminists believed the legal system could not respond to or remedy the systematic origins of sexual harassment.[50] Catharine MacKinnon commented on the problems embodied in the legal recognition of sexual harassment as early as 1979:

> [W]hen a form of suffering is made a legal wrong, especially when its victims lack power, its social dynamics are not directly embodied or reflected in the law. Legal prohibitions may arise because of the anguish people feel or conditions they find insupportable, but the legal issues may not turn on the social issues that are the reasons they exist.[51]

Indeed, the gap which frequently exists between the legal understanding of a problem and its social reality is reflected in the development of sexual harassment theories of recovery.[52] Courts began to compensate some women for the unfair treatment they endured, but courts drew lines which caused other behavior recognized as sexual harassment by feminists to fall outside the legal

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who are abused by their husbands. For discussion on the role of economic dependence and battered women, see generally Roger Langley & Richard Clevy, Wife Beating: The Silent Crisis (1977); Del Martin, Battered Wives (1976); Erin Pizzey, Scream Quietly or the Neighbors Will Hear (1977).

46. Many authors have argued, as does this one, that sexual harassment as we know it is largely a function of a capitalist system of economic organization. The inherent inequities of a competitive wage-labor system result in job segregation, with women concentrated in low-paying, dead-end jobs, lacking power and independence to control the terms and conditions of their work. *See generally* Farley, *supra* note 1, at 28-44. For a more complete discussion of the organization of work in modern America, see Harry Braverman, Labor and Monopoly Capital (1974).

47. Farley, *supra* note 1, at 29.

48. *See, e.g.*, Alliance Against Sexual Coercion, Fighting Sexual Harassment: An Update (1981); *Comments*, *supra* note 41.

49. *Comments*, *supra* note 41.

50. For a more complete discussion of this idea, see MacKinnon, *supra* note 5, at 57-99.

51. *Id.* at 41.

52. This schism is also present in other areas of the law which attempt to address social problems women face. *See, e.g.*, Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 Harv. Women's L.J. 121 (1985) (judicial understanding of the experiences of battered women does not reflect the social realities).

definition. This tension continues to permeate even the most recent developments in sexual harassment case law.

B. Legal Recognition of Sexual Harassment

The law recognizes two types of sexual harassment: quid pro quo and environmental sexual harassment.[53] Early cases recognized only quid pro quo harassment, defining it as unwanted requests or demands for sex which result in tangible economic loss to a worker who did not comply.[54] The economic harm could be either a benefit the worker deserved and was denied when she refused the harassment, or a detriment imposed solely because she did not comply with sexual demands.[55] More recently, courts began to accept a theory of environmental harassment defined as unwanted verbal or physical conduct of a sexual nature which creates a hostile or offensive working environment.[56] In contrast to quid pro quo harassment, environmental theory requires no tangible

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53. These two types are defined and discussed most clearly in Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982).

54. Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom*. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978).

55. The critical factor is that the harm be tangible and quantifiable. Most frequently that means plaintiff lost her job. *E.g.*, Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3d Cir. 1983); Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Hall v. F.O. Thacker Co., 24 Fair Empl. Prac. Cas. (BNA) 1499 (N.D. Ga. 1980); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978); *cf*. Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983) (promotion granted to another female employee because she slept with the boss); Cummings v. Walsh Const. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (plaintiff required to do harsh tasks for refusing advances).

56. Environmental sexual harassment was first recognized in Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). It has since been recognized in other circuits. *See* Downes v. Federal Aviation Administration, 775 F.2d 288 (Fed. Cir. 1985); Horn v. Duke Homes, 755 F.2d 599, 606 n.9 (7th Cir. 1985) (facts alleged indicate quid pro quo harassment, however analysis implicitly recognizes environmental harassment). Simmons v. Lyons, 746 F.2d 265 (5th Cir. 1984) (overruling district court dismissal of plaintiff's case for failure to state a cause of action); Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982). The Supreme Court has also recognized the environmental theory in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

The EEOC regulations also recognize environmental sexual harassment. These guidelines provide that sexual harassment violates title VII when it "has the purpose or effect of unreasonably interfering . . . or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11 (a)(3) (1986).

economic loss.[57]

Courts purport to distinguish between quid pro quo and environmental harassment on the basis of the harm a woman worker experiences—psychological (environmental) or economic (quid pro quo) harm. The distinctions courts impose are actually more far-reaching. Courts identify quid pro quo harassment with economic harm to the victim and with an abuse of economic power by the harasser. Courts define environmental harassment as behavior that harms a worker psychologically and results from sexual or gender-based coercion, which courts believe does not originate in the workplace itself. The distinctions between the two types of harassment have guided the courts' analysis of the problem and have resulted in different standards of employer liability for quid pro quo and environmental harassment.[58] As a result, plaintiffs have great difficulty in establishing employer liability, particularly in environmental harassment cases.[59]

Judicial decisions reflect a fundamental incapacity to conceive of and accept what women workers knew from the beginning: sexual harassment is an expression of both male sexual power and economic power. The two cannot be separated. As a result, even recent changes in the doctrine that brought hope of a breakthrough in legal consciousness have been quickly undercut.[60]

The courts' inability to grasp the dual nature of the problem of sexual harassment was explicitly revealed in the first cases brought in the mid-1970's.[61] Not only were the courts blind to the existence of and connections between the *two* types of power exerted over women workers through sexual harassment, they were also incapable of understanding sexual harassment as an expression of *power* at all. Courts viewed the harassment as sexual behavior which happened to occur at work.[62] Although recognizing a

57. Although the definitions used by the courts theoretically require no showing of tangible loss, i.e., economic harm, patterns of recovery indicate otherwise. *See infra* notes 163-168 and accompanying text.

58. See *supra* notes 200-206 and accompanying text for a discussion of the impact the Supreme Court's recent decision in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) might have on standards of employer liability for the two types of harassment.

59. *See generally infra* part III(D), (E).

60. *See generally infra* part III.

61. Recovery was denied despite factual proof of sexual advances and retaliation following plaintiff's refusal to comply in Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of Am., 418 F. Supp. 233 (N.D. Ca. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

62. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976)

woman may not desire or seek out the sexual attention, courts accepted that lack of mutuality as part and parcel of male/female relations.[63] In keeping with the traditional cultural model of heterosexual relationships,[64] courts assumed sexual harassment stemmed from male sexual desire gone awry, not male dominance over women, expressed sexually. In *Barnes v. Costle*,[65] a 1977 decision, the court concluded: "We are not here concerned with racial epithets or confusing union authorization cards, which serve no one's interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm."[66] A year earlier, another court described the harassment as "physical attack motivated by sexual desire . . . which happened to occur in a corporate corridor rather than a back alley."[67] One court refused to recognize sexual harassment as an illegal practice because "[t]he only sure way an employer could avoid such charges would be to have employees who were asexual."[68] Such comments illustrate an incapacity to distinguish between heterosexual relationships based on mutual attraction and desire, and male/female power dynamics expressed through the medium of sexual control.

Beginning in the late 1970's, courts began to grapple with this distinction and to identify coercive *economic* behaviors that tainted even these "normal and expectable" patterns. Courts finally determined sexual harassment was sex discrimination in employment when it was clear a harasser relied on his workplace authority to extort sexual favors.[69] They began to define sexual

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rev'd, 568 F.2d 1044 (3d Cir. 1977); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

63. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd* , 568 F.2d 1044 (3d Cir. 1977); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

64. For a discussion of traditional male/female sexual dynamics, see generally Eleanor Maccoby, The Development of Sex Differences (1976); Margaret Mead, Male and Female: A Study of the Sexes in a Changing World (1949); Millet, *supra* note 34; Lionel Tiger, *Male Dominance? Yes. A Sexist Plot? No.*, N.Y. Times, Oct. 25, 1970, (Magazine) at 35.

65. 561 F.2d 983 (D.C. Cir. 1977).

66. *Id.* at 1001 (MacKinnon, J., concurring).

67. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977).

68. Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163-64 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

69. *E.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978). For cases where this connection was supposedly absent, see Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Mich. 1981); Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305

harassment as primarily an abuse of economic power. This meant a sexual harassment plaintiff had to show that an economic benefit was conditioned on her compliance with the harasser's sexual demands.[70] Courts named this harassment "quid pro quo sexual harassment." Implicit in this definition was the requirement that the harasser occupy a position of power in the workplace hierarchy sufficient to threaten his victim's status at work. He must be a supervisor or manager and not the plaintiff's co-worker.[71] The assumption underlying this approach to sexual harassment is ultimately the same as the sexual desire model applied in the earlier cases: male sexual expression and aggression in the workplace is acceptable, or at least lawful. It exceeds the bounds of legitimate behavior only if accompanied by economic dominance or coercion.

Even though courts recognized the economic coercion involved, they were reluctant to impose liability on employers for sexual harassment. This reluctance stemmed from an inability to understand the employer's role in either causing or allowing the discrimination. Courts viewed sexual harassment as one man's sexual ploys, rather than a condition of work employers must account for in exercising their management responsibilities.[72] In addition, courts could not identify an economic motive underlying the discrimination. Unlike other discriminatory policies aimed at women, such as unequal pay,[73] sexual harassment does not benefit employers by saving them significant amounts of money.[74] In fact,

(D.D.C. 1980); Hall v. F.O. Thacker Co., 24 Fair Empl. Prac. Cas. (BNA) 1499 (N.D. Ga. 1980).

70. To show that quid pro quo harassment affects a term or condition of employment, a plaintiff must satisfy a two part test: 1) plaintiff was otherwise entitled to the benefit she did not receive (or not entitled to the detriment); and 2) plaintiff's reaction to the sexual harassment caused the resulting job loss. *See* Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983); Henson v. City of Dundee, 682 F.2d 847 (11th Cir. 1982).

71. In defining quid pro quo harassment, the courts do not explicitly state that only supervisors possess workplace authority sufficient to extort sexual favors, but the analysis clearly leads to such a conclusion. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (workplace authority not necessary for environmental harassment as no economic harm is required); Smith v. Rust Eng'g Co., 18 Empl. Prac. Dec. (CCH) ¶ 8698 (N.D. Ala. 1978) (co-worker could not use economic coercion to extort sexual favors).

72. *See, e.g.*, Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 483 (E.D. Wisc. 1979) (recovery denied because "[t]itle VII is directed at acts of employment discrimination rather than individual acts of discrimination" as in this instance); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977) ("In the present case, Mr. Price's [the harasser's] conduct appears to be nothing more than a personal proclivity, pecularity or mannerism.").

73. *See supra* note 31; *cf.* Equal Pay Act of 1963, 29 U.S.C. § 206 (1982).

74. While employers save vast sums of money by paying female employees wages roughly equal to 59% of their male counterparts, *supra* note 31, sexual har-

sexual harassment is expensive. It lowers the productivity of all workers[75] and causes higher absenteeism and turnover among women workers.[76]

For these reasons, courts have applied less stringent employer liability standards in sexual harassment cases than those imposed in other employment discrimination contexts.[77] Employers are frequently not liable for failing to prevent sexual harassment. Courts used a less strict standard even though sexual harassment has the same effect on women workers as any other discriminatory behavior: it is a barrier to equal opportunity at work that women must cross only because of their sex.

As quid pro quo sexual harassment theory developed, it became increasingly clear that the narrow definition of sexual harassment limited recovery as much as the less stringent standards for employer liability. Workers came to the courts protesting harassing treatment, even though they had not suffered a direct economic injury.[78] Women argued that sexually harassing behavior was itself a violation of title VII, whether the harassment resulted in tangible economic losses or not. Courts began to recognize that the legal model did not account for many of the factual scenarios women sought to challenge.

In the mid-1970's, courts assumed sexually harassing behavior absent concomitant economic coercion was legally tolerable, even though socially undesirable, because it was an acceptable social pattern—a mirror of society's sanction of male/female relations.[79] Later in that decade, an active feminist movement stimulated

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assment is very expensive. The cost of sexual harassment to the federal government alone over a two-year period was conservatively estimated at $189 million. *See* Merit Systems, *supra* note 10, at 76.

75. Dollar cost of diminished productivity of sexual harassment victims in the federal government for a two-year period was estimated at $72.1 million. Emotional and physical stress was estimated at $5 million. *See* Merit Systems, *supra* note 10, at 77-78.

76. Absenteeism in the federal survey is estimated to cost $7.9 million and job turnover $26.8 million. *See* Merit Systems, *supra* note 10, at 76-77.

77. Courts have unevenly applied three different standards for employer liability in sexual harassment cases. For a more complete discussion, see *infra* notes 187-192 and accompanying text. For a discussion of employer liability in other employment discrimination contexts, see Joseph Allegretti, *Sexual Harassment of Female Employees by Nonsupervisory Co-workers: A Theory of Liability*, 15 Creighton L. Rev. 437 (1982); Joan Vermeulen, *Employer Liability Under Title VII for Sexual Harassment by Supervisory Employees*, 10 Cap. U.L. Rev. 499 (1981).

78. *See* Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981), *aff'd* 725 F.2d 1070 (6th Cir. 1984); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981); Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480 (E.D. Wis. 1979); Smith v. Rust Eng'g Co., 18 Empl. Prac. Dec. (CCH) ¶ 8698 (N.D. Ala. 1978).

79. *See supra* text accompanying notes 61-68.

identifiable changes in social awareness of the relationships between male dominance, power, violence, and sex.[80] This change was most apparent in the growing understanding of rape as a violent crime, rather than a passionate one.[81] As social understanding of acceptable heterosexual dynamics began to change, so did the corresponding legal analysis. Courts began to think critically about male/female relations—to think about what *should* be, rather than what was or had always been true. This movement in legal consciousness cannot be seen through explicit discussions within judicial opinions. Rather, it can be inferred from the withering away of comments characterizing sexual harassment as the inevitable result of relations between any sexual adults.[82]

Changes in judicial interpretation of certain aspects of title VII also altered the approach to sexual harassment. The first important change occurred in the early 1970's as courts redefined the "terms, conditions, or privileges of employment" protected under title VII.[83] In *Rogers v. Equal Employment Opportunity Commission*,[84] the Fifth Circuit recognized the claim of a Hispanic employee that her employer's discriminatory attitudes toward Hispanic *clients* created an offensive work environment for the firm's Hispanic *employees*. Although the plaintiff alleged no tangible economic losses, the court recognized that "today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues."[85] The court concluded that "terms, conditions, or privileges of employment" is "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[86] The *Rogers* analysis recognized that title VII's reach protects workers from psycho-

80. This change became most apparent in the redefinition of three important issues facing women: rape, wife battering, and incest. The public has increasingly recognized the existence of these problems and has begun to alter societal assumptions about what provokes and perpetuates these types of violence against women. *See generally* Boston Women's Health Book Collective, The New Our Bodies, Ourselves 99-117 (1984).

81. *See generally* Susan Brownmiller, Against Our Will: Men, Women and Rape (1975); Lorenne M. Clark & Debra Lewis, Rape: The Price of Coercive Sexuality (1977); Diana Russell, The Politics of Rape (1975).

82. For examples of comments characterizing sexual harassment as normal and expectable behavior, see *supra* text accompanying notes 66-68.

83. 42 U.S.C. § 2000e-2(a) (1982). *See, e.g.*, Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

84. 454 F.2d 234 (5th Cir. 1971).

85. *Id.* at 238.

86. *Id.*; *accord* Carroll v. Talman Fed. Sav. & Loan Assoc., 604 F.2d 1028, 1032-33 & n.13 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

logically unfair treatment even if measurable economic conditions remain untouched.

In 1980, the EEOC issued guidelines which interpret and define sexual harassment as a title VII violation,[87] advise employers of their legal responsibilities to prevent sexual harassment,[88] and help courts to develop legal theories of recovery.[89] Section A of the guidelines states that sexual harassment is a violation of title VII and defines it as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[90]

The definition incorporated the *Rogers* principle of protecting the psychological terms and conditions of employment by making conduct creating a hostile or offensive work environment illegal.[91]

The guidelines also established standards of employer liability for sexual harassment based on the harasser's position in the workplace hierarchy. Section C provides that the employer[92] is responsible for harassment by its agents and supervisory employees "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[93] Liability for harassment by co-workers, defined in sec-

87. The EEOC first published its interim guidelines on sexual harassment in the Federal Register at 45 Fed. Reg. 25,024 on April 11, 1980. After a 60-day public comment period, the final guidelines were published on November 10, 1980 at 45 Fed. Reg. 74,676. *See supra* notes 6-7 and accompanying text.

88. The EEOC decided to issue the guidelines in part to give employers notice of and assistance in understanding their liability for sexual harassment. *See* Clay, *supra* note 39, at 472.

89. *See supra* note 9.

90. 29 C.F.R. § 1604.11(a) (1985).

91. Both the EEOC guidelines and *Rogers* require plaintiffs to show a pervasive atmosphere of discriminatory harassment and not a "mere utterance" of discriminatory remarks. Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

92. Section C specifies the meaning of the term "employer." It includes: employer, employment agency, joint apprenticeship committee, and labor organization.

93. 29 C.F.R. Section 1604.11(c) (1985) states in full:

> Applying general title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sex-

tion D, follows only where the employer[94] "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[95]

The legal and social developments of the 1970's finally forced courts to recognize that the impact of sexual harassment on women workers went beyond the losses they suffered as a direct result of economic coercion.[96] Courts recognized sexual coercion was itself a problem, separate and distinct from the interwoven economic abuse. Given this new understanding, courts began to rule that the law should provide recourse to a woman who is subjected to harassing behavior, regardless of whether she is also disciplined economically. Otherwise, "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance."[97] Through this progression of the law, courts accepted the claim that sexual coercion without economic harm violated title VII and adopted a new legal theory, environmental sexual harassment, to address the experiences of women whose most obvious injury was psychological rather than economic.

The remainder of this article examines these two theories of sexual harassment and concludes that courts have refined and applied environmental sexual harassment theory in ways that mini-

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ual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

94. In this context, the term "employer" includes the employer, its agents, and supervisory employees. Section D states in full: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d) (1985).

95. Section E of the guidelines applies the same measure for employer liability to harassment by non-employees. The full text reads:

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

29 C.F.R. § 1604.11(e) (1985).

96. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981) stated this implicitly, but other courts reached similar conclusions. *See* cases cited *infra* notes 149-168.

97. Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981).

mize the differences between it and quid pro quo theory. To the extent courts acknowledge a scenario of environmental harassment distinct from a quid pro quo situation, they are reluctant to hold employers liable for the abusive or offensive environment. The initial judicial perceptions of sexual harassment, which failed to accurately reflect discrimination as women experience it, continue to stymie the development and application of this latest addition to the evolving legal doctrine of sexual harassment as a title VII violation.

III. Prima Facie Case of Sexual Harassment: Comparison of Quid Pro Quo and Environmental Harassment Theories

The elements of a plaintiff's prima facie case for quid pro quo and environmental harassment are identical in name but not in the underlying proof a plaintiff must produce to present her claim. Quid pro quo harassment occurs when an economic benefit[98] a worker rightfully deserves is conditioned on her compliance with the harasser's sexual demands.[99] The typical situation involves a male supervisor who demands sex from a female subordinate and retaliates when she refuses, either by withholding a promotion or raise or firing her for a pretextual reason. In contrast, environmental sexual harassment takes place when a worker's psychological well-being[100] is threatened by the offensive environment surrounding her. Environmental sexual harassment theory allows recovery for sexual harassment when the plaintiff establishes the sexual harassment was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."[101] In theory, the worker need not suffer measurable economic loss. This type of harassment supposes a woman worker amidst a group of male co-workers (or supervisors) who make repeated obscene sexual comments and innuendos.

Despite these differences, plaintiffs must establish the same

98. Note that quid pro quo harassment also includes the scenario wherein a worker is punished or otherwise negatively impacted because she refuses to comply with sexual demands.

99. As noted before, the court's implicit assumption regarding quid pro quo harassment is that the harasser must control the economic fate of his victims to extort sexual favors. In other words, he must be above her in the workplace hierarchy. This assumption is incorrect. Even male co-workers often have power sufficient to force compliance. *See supra* note 19 and text following note 20. The power of male co-workers is frequently the result of the economic vulnerability of most working women. *See infra* note 174.

100. The legal theory defines the harm suffered in an environmental harassment scenario as psychological harm only; in reality, a worker's psychological and economic well-being are inextricable.

101. 29 C.F.R. § 1604.11(a)(3) (1985).

elements to complete a prima facie case: 1) she is a member of a protected group; 2) she experienced unwanted sexual harassment; 3) the harassment was based on sex; 4) the harassment was a term or condition of her employment; and 5) the employer knew or should have known of the harassment and failed to take action.[102] The following discussion analyzes the elements[103] of the prima facie case, focusing on the differences and similarities between the two theories of harassment. The analysis will show courts *minimize* the differences between the two theories with respect to the plaintiff's burden of proving she suffered unwanted harassment as a condition of her employment, but *maximize* the differences with respect to employer liability. To understand environmental harassment as discrimination in violation of title VII, courts define and explain it in quid pro quo terms. Yet, the differences are strong enough that courts are unwilling to impose liability equally for both types of harassment. The result for women workers is to erode expectations for additional routes to recovery promised by the environmental theory.

A. Unwelcome Sexual Harassment

This element requires plaintiffs to identify harassing behavior and prove the acts[104] were unwanted. The determination varies according to the context. A given behavior might be harassing in one situation and perfectly acceptable in another—depending on the reaction of a particular woman.[105] Consequently, most courts

102. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

103. This discussion is limited to elements two through five. Element one simply requires the plaintiff to be either a man or woman, as sex is a protected group under title VII. 42 U.S.C. §§ 2000e-2000e-17 (1982).

104. The acts themselves are frequently identical in environmental and quid pro quo harassment given that the critical distinction between the two is what happens to an employee *after* she experiences sexual harassment, not the treatment itself. *Compare* Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983) (quid pro quo claim based on offensive comments, remarks and questions with occasional requests for sex) *and* Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982) (environmental claim based on vulgar comments about sex) *with* Meritor Sav. Bank v. Vinson 106 S. Ct. 2399 (1986) (environmental claim based on forced sexual intercourse 40-50 times during work hours; claim defeated on other grounds).

105. The dilemma in precisely circumscribing acts which constitute sexual harassment is twofold. First, the same acts of verbal comments, requests for dates, etc., may or may not be acceptable depending on the circumstances. Second, the same acts may be acceptable to one woman and harassing or coercive to another. The latter, which involves the woman's subjective response, is at issue as courts determine whether the sexual harassment was unwelcome. Well-established principles of tort law indicate liability generally extends to include the particularities of victims, most notably the "eggshell skull" theory. *See* William Prosser, Law of Torts 43 (4th ed. 1979).

focus less on the acts of the harasser and more on the plaintiff's response: was the sexual attention the plaintiff received *unwanted*? The Supreme Court's recent decision in *Meritor Savings Bank v. Vinson* [106] confirms the importance of the plaintiff strenuously voicing her objections to the sexual attention. In *Meritor*, the Court distinguished between *voluntary* participation in sexual conduct and *welcome* participation in that conduct. The Court indicated that the proper focus is not whether the plaintiff *voluntarily* complied with the harasser's sexual demands (that is, submitted to the demands without physical resistance or without being forced to comply) but whether the plaintiff *willingly* or *unhappily* complied.[107] Thus, the Court concluded, "The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome."[108]

As a result, it is critical for any sexual harassment case that the plaintiff have publically expressed discomfort or disapproval when confronted with the harassment. Although the legal inquiry concerning the unwelcome nature of the harassment is the same for both quid pro quo and environmental harassment, the practical reality for a plaintiff who must publically indicate her disapproval varies greatly depending on the type of harassment.

1. Quid pro quo sexual harassment.

Quid pro quo sexual harassment occurs, by definition, when a supervisor retaliates against an employee for rebuffing his sexual demands. Thus, the discomfort or disapproval an employee feels must be known by the harasser. The difficult situation, legally, arises when the initial sexual relationship was mutual, and the employee's *subsequent* decision to terminate it catalyzes the retaliatory behavior.[109] In general, a woman's free and voluntary consent to a sexual relationship will bar a subsequent sexual harassment claim because the employee was not offended or intimidated by the supervisor's behavior until the relationship began to deteriorate. Courts contend that in these situations she

106. 106 S. Ct. 2399 (1986).

107. The Court's distinction in *Meritor* between "voluntary" participation and "unwelcome" participation is erroneous. Anytime a woman finds sexual advances unwelcome, but nevertheless submits to the sexual conduct, she is "involuntarily" engaging in the conduct.

108. 106 S. Ct. at 2406.

109. In such instances, courts frequently find the female employee has "assumed the risk" involved in relating sexually to her male supervisors and bar recovery. Although the term "assumption of risk" is not utilized, the underpinnings of the analysis closely follow that defense to a negligence action. *See generally* Prosser, *supra* note 105, at 68.

welcomed the allegedly harassing conduct.[110] Once the relationship ends, courts characterize the fall out as either a personality conflict or "sour grapes"—as a personal consequence of intimate choices rather than a work-related event. Some courts, however, have awarded damages when plaintiffs' initial consent was not free and voluntary. In one case in which a prior relationship evolved into harassing treatment, the court highlighted that the employee initially began the relationship because the harasser's supervisor indicated "her success [at work] or anywhere else depended on him."[111]

The courts' insistence that *every instance* of sexual contact between the plaintiff and her harasser be coercive illustrates an inability to distinguish between acceptable sexual behavior and sexual harassment. Women who challenge sexual coercion at work are not objecting to all sexual attention at the workplace; rather, the objection is aimed specifically at instances of *forced* sexual interaction.[112] Women who choose to have sexual relationships with their workplace superiors do not consent to harassing behavior. They assume an equal right to determine the future course of that relationship, free from economic threats. The courts' approach to this scenario of quid pro quo harassment unfairly penalizes certain workers simply because of their interest in men who later turn against them.

2. Environmental sexual harassment.

In environmental sexual harassment cases, courts ask, as they do in quid pro quo cases, whether the sexual attention was unwanted. Courts focus on the plaintiff's participation in creating the hostile and abusive environment and look for a public pronouncement that the plaintiff finds the workplace atmosphere offensive.[113] In two recent cases, courts denied recovery specifically because the plaintiff employees chimed in and contributed to shop

110. *See, e.g.*, Evans v. Mail Handlers, 32 Fair Empl. Prac. Cas. (BNA) 634 (D.D.C. 1983) (recovery denied primarily because plaintiff had a mutually consensual relationship with her supervisor for almost three years before problems arose).

111. Koster v. Chase Manhattan Bank, 554 F. Supp. 285, 288 (S.D.N.Y. 1983); *see also* Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (plaintiff had sex with her foreman two times, but the court found it was not voluntary).

112. Some have argued for a policy against all sexual interaction at work given the numerous difficulties some feel exist in distinguishing mutual from coercive sexual relations. *See, e.g.*, Margaret Mead, *A Proposal: We Need Taboos on Sex at Work*, in Coercive Behaviors, *supra* note 26, at 53.

113. In *Meritor*, the Supreme Court went further and sanctioned trial courts to consider the plaintiff's dress and speech in deciding whether plaintiff welcomed the sexual advances she experienced. *See* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2407 (1986).

floor banter with vulgar language and sexual comments.[114] In each of those cases, the court noted it could not discern from the plaintiff's behavior that the environment was hostile or offensive.[115]

Again, courts place a burden on sexual harassment plaintiffs to abstain from all sexual activity at work in order to compensate for the courts' own inability to define and delineate the types of sexual interactions that occur.[116] This burden is especially onerous in an environmental sexual harassment situation because a certain level of workplace banter is commonplace, enjoyable, and expected. Particularly for women who work in nontraditional construction or industrial settings, some participation in potentially offensive workplace rituals is a prerequisite to acceptance as a serious co-worker.[117] Women in these workplaces must join in social interactions with their co-workers to build the trust and comradery they need to work safely[118] at the job site.

In quid pro quo and environmental sexual harassment cases, the underlying message is the same: women deserve protection from coercive sexual/economic treatment only when their "hands are clean."[119] Because courts cannot draw lines to separate illegal sexual coercion and undesirable social behavior, they impose standards of behavior on women workers which force women to act differently than their male co-workers. To protect and preserve later claims of sexual harassment, women must act like outsiders in much workplace activity, perpetuating and reinforcing the notion they are women first and workers second.

Courts should not draw the line between acceptable and ille-

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114. Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, (D.N.J. 1983); Gan v. Kepro Circuit Systems, Inc., 27 Empl. Prac. Dec. (CCH) ¶ 32,379, 32,380 (E.D. Mo. 1982) (plaintiff "actively contributed to the distasteful working environment by her own profane and sexually suggestive conduct").

115. Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1317 (D.N.J. 1983) (found that plaintiff accepted and participated in atmosphere at work despite diary entries documenting her concern and discomfort); *see also* Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149 (D. Pa. 1982) (plaintiff's discomfort not obvious because of her flirtatious personality).

116. It has been recognized that "the question of whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2406 (1986). Unfortunately, trial courts have not willingly engaged in this difficult fact-finding task.

117. *See, e.g.*, Backhouse & Cohan, *supra* note 1, at 11-14 (construction worker case study); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1319 (D.N.J. 1983) (plaintiff as only woman on production floor participated in the "customary plant language that pervaded the atmosphere").

118. Construction work, for example, requires team work to perform tasks safely. *See* Goodman, *supra* note 1, at 454-55 & nn.65-66.

119. 27 Am. Jur. 2d *Equity* §§ 136-44 (1966).

gal sexual activity by requiring women to act like puritans.[120] Instead, courts must attempt to identify the point where sexual coercion becomes discriminatory—when it begins to create a barrier to women workers' equal participation in the workplace.[121] In that way, courts can eliminate barriers to equality rather than impose additional ones.

B. Harassment Based on Sex

The plaintiff must next convince the court she experienced sexual harassment because she is a woman. In other words, a woman must prove a male worker in her position[122] would not have been subjected to the harassment. Because sexual harassment cases fall under "disparate treatment" theory,[123] a plaintiff would normally be required to show that her harasser had a subjective intent or motive[124] to discriminate against women.[125] In quid pro

120. By creating models of behavior for women workers that require essentially "prudish" and asexual behavior, courts can force women workers to isolate themselves from socializing at work, leaving themselves even more vulnerable to the harassment they are trying to avoid.

121. Fortunately, some courts have been able to identify this point: "A person's private and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment." Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983) (plaintiff's use of sexual nicknames with male co-worker did not bar sexual harassment claim).

122. See MacKinnon, *supra* note 5, at 101-41 for a discussion of legal constructs for sex discrimination. MacKinnon specifically challenges the assumption that male and female workers are similarly situated and can be compared in a "differences" approach.

123. Disparate *treatment* theory applies to situations where the employer literally treats workers differently because of their race, sex, etc. Disparate *impact* theory, in contrast, addresses employment practices which are facially neutral, but impact more harshly on one group than another and are not justified by business necessity. *See generally* MacKinnon, *supra* note 5, at 192-208; Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law (1976).

124. Intent under title VII disparate treatment means actual, subjective discriminatory intent. *See, e.g.*, United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir. 1978), *vacated*, 439 U.S. 24 (1978), *cert. denied* 444 U.S. 1045 (1980). For a similar rule on intent in constitutional litigation, see Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

125. Title VII plaintiffs actually may establish a prima facie case with a lesser evidentiary showing than would be required to prevail on the merits. Once a plaintiff establishes a prima facie case, she creates a rebuttable presumption of unlawful discrimination. The burden of production then shifts to the defendant to introduce legitimate explanations for the treatment plaintiff received. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711 (1983); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

quo cases, however, courts assume sexual harassment happens to women workers because of their sex. Courts do not require plaintiffs to meet the subjective intent standards imposed on other disparate treatment claims because courts acknowledge that sexual demands are not made of male workers.[126] On the other hand, in environmental sexual harassment cases, courts are unwilling to assume that those who created the hostile or offensive environment intended to discriminate against women. Plaintiffs proceeding under an environmental theory must show the work environment is specifically hostile to women in general, or to the plaintiff in particular.[127]

1. Quid pro quo sexual harassment.

Because courts recognize the sexually harassing behavior is motivated by a plaintiff's sex, the question becomes: was the plaintiff's economic harm the result of the sexual harassment or the result of a valid job consideration?[128] Theoretically, the connection between the plaintiff's economic harm and her sex is analytically distinct from the link between that economic harm and a term or condition of a plaintiff's job. Practically, the plaintiff's proof of each of these elements is the same.[129]

Courts apply traditional rules of causation to determine whether a plaintiff's injury resulted from her refusal to comply with her harasser's sexual demands.[130] The test is, but for plain-

126. For example, in Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), the court rejected defendant's "clever" argument that discrimination in the form of sexual harassment was not based on sex, but rather on the plaintiff's refusal to comply with sexual demands, a sex-neutral criteria. The court acknowledged the sexual demands would never have been made of a male employee. *Accord* Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom*. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). Courts have consistently bypassed rigid intent requirements, finding it easy to infer sex discrimination, Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981), and comment that it is "obvious that the supervisor did not treat male employees in a similar fashion." Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982). Note that plaintiffs may face proof problems under title VII if the harasser makes overtures to workers of both sexes. For a discussion of bisexual harassment, see generally MacKinnon, *supra* note 5, at 200-06.

127. *See infra* text accompanying notes 133-135.

128. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

129. Although the courts discuss this element of plaintiff's case with the language of intent, that is, stating she must prove intentional discrimination, the substantive requirements plaintiffs must actually meet are not the same as the subjective discriminatory intent standard applied in most disparate treatment cases. *See supra* note 124. In fact, the analysis courts utilize in discussing this element in a quid pro quo case is identical to the analysis relied upon in the "term or condition" element. *See infra* text accompanying notes 136-149.

130. *See, e.g.*, Mt. Healthy City School Dist Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Mark Brodin, *The Standard*

tiff's refusal, would the economic injury have occurred? Proof of causation can be difficult in sexual harassment cases. The plaintiff's work performance often declines as a result of harassment and the tension it causes. For example, an employer's claim that it fired the plaintiff because of her poor attendance record rather than her refusal to comply with sexual demands may be factually correct and a legitimate basis for dismissal. Ironically, a plaintiff's poor attendance may result from the harassment. In *Hill v. BASF Wyandotte Corp.*, the court actually denied recovery to a sexual harassment plaintiff whose employer put forth "legitimate" reasons for her job loss even though the reasons given could be traced to the sexual harassment.[131]

2. Environmental sexual harassment.

Unlike quid pro quo plaintiffs, environmental harassment plaintiffs must show that the environment is intended to be hostile toward them as women, and not simply that an already offensive environment disproportionately impacts upon them as women. The result is an unstated requirement that the plaintiff be singled out in some manner for adverse treatment. For example, courts denied recovery in environmental harassment cases because the workplace atmosphere was equally offensive to all workers, male and female alike.[132] In one case, the court could not recognize the link between the hostile environment at work and the plaintiff's sex because the work atmosphere at the plant did not change as a result of the plaintiff's employment—it was offensive even *before* she started work.[133] Courts conclude that offensive working environments discriminate on the basis of sex only if created with the intent to offend a member of a protected group of workers; it is not enough that those environments simply exist. As one court noted, "[O]ff color remarks and innuendos are part and parcel of a

of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective, 82 Colum. L. Rev. 292 (1982).

131. 27 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Mich. 1981). The plaintiff was fired for an uncooperative attitude and declining work performance despite the sexual harassment she experienced that caused those problems.

132. The requirement that plaintiff show intentionally discriminatory harassment can also be seen in racial harassment cases under title VII. *Compare* Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982) (recovery granted because harassment was part of a converted pattern aimed at plaintiff) *with* Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) (recovery denied because the workplace atmosphere was generally obnoxious to all employees despite racist comments aimed at plaintiff).

133. Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1317 (D.N.J. 1983).

construction site environment and are to be expected."[134]

Although courts have held an offensive working environment can itself be illegal under title VII, they are still unwilling to find a particular workplace environment discriminatory unless it is created and maintained with the intention to offend. In environmental cases, in order to establish the requisite intent, plaintiffs apparently must be singled out as targets for harassment in scenarios which approximate the quid pro quo model.[135] Despite the unequal impact a sexist and hostile work environment has on women workers, courts are unwilling to assume intentional discrimination in environmental cases as they do in quid pro quo harassment. The potential advantages of the environmental theory are minimized by the courts' inability to understand that the harassing environment results from the same attitudes and perceptions about women workers present in quid pro quo sexual demands. In both quid pro quo and environmental harassment, women workers are harassed because of their sex.

C. *Harassment Affecting a Term or Condition of Employment*

This element is the heart of the prima facie case. A plaintiff must show a nexus between the sexual harassment and the employment context.[136] This can be done in one of two ways: either by showing direct employer retaliation following the plaintiff's reaction to harassment (quid pro quo) or by proving a pattern of conduct pervasive enough to alter working conditions and to interfere with an employee's psychological well-being (environmental sexual harassment).[137] Quid pro quo harassment causes a measurable

134. Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 878 (S.D. Ga. 1983).

135. *E.g.*, Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984) (recovery denied on other grounds); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Davis v. Western-Southern Life Ins., 33 Empl. Prac. Dec. (CCH) ¶ 34, 35 (N.D. Ohio 1984) (recovery denied on other grounds); Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983) (recovery denied on other grounds); Lamb v. Drilco, 32 Fair Empl. Prac. Cas. (BNA) 105 (S.D. Tex. 1983); Coley v. Consol. Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982); Robson v. Eva's Super Mkt., 538 F. Supp. 857 (N.D. Ohio 1982); Walter v. KFGO Radio, 518 F. Supp. 1309 (D. N.D. 1981).

136. Factually, the plaintiff's burden of showing the harassment was a term or condition of employment is satisfied when she establishes the causation requirement of the intent element of the prima facie case—that the refusal caused the economic injury (quid pro quo) or that the environment was intended to be hostile toward women or the individual plaintiff (environmental harassment). Analytically, these two elements of the plaintiff's case are distinct.

137. *See* Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982).

detrimental effect on a term or condition of employment such as a lost promotion, raise, or the job itself. Environmental sexual harassment affects the intangible condition of the quality of working life. A closer look at the application of these paradigms reveals that in both environmental sexual harassment and quid pro quo cases plaintiffs must show some type of material, quantifiable injury. The doctrinal rationales for requiring such evidence, however, differ considerably.

1. Quid pro quo sexual harassment.

Plaintiffs must satisfy a two-part test to prove quid pro quo sexual harassment affected a tangible job condition: 1) the plaintiff was otherwise entitled to the benefit she did not receive or not otherwise entitled to a detriment; and 2) the plaintiff's reaction to the sexual harassment caused the resulting loss of benefit or imposed detriment.[138] Both parts of the test are difficult to prove. The first part of the test requires a worker to establish her right to a particular employment benefit (or to be protected from an imposed penalty)—it asks an employee to prove her worth as a worker. This burden is a heavy one because employers can always assert other "legitimate" reasons to explain the adverse treatment the plaintiff received. These reasons range from subjective explanations that are difficult to refute, such as attitude, personality, and responsiveness to criticism, to more objective excuses, such as poor work record, high absentee rates, or business necessity.[139] Unless a plaintiff has an outstanding record and a "Pollyanna" personality, countering such pretexts is virtually impossible.[140] Even in situations where sexual harassment caused the high absenteeism or uncooperative attitude, courts have found the employer's action legitimate.[141]

Once the plaintiff successfully claims her right to the denied benefit, she still must prove she was deprived of that right because

138. *See* Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

139. *Compare* Hill v. BASF Wyandotte Corp., 27 Fair Emp. Prac. Cas. (BNA) 67 (E.D. Mich. 1981) (subjective explanation for terminating plaintiff) *with* Hall v. P.O. Thacker Co., 24 Fair Empl. Prac. Cas. (BNA) 1499 (N.D. Ga. 1980) (objective explanation).

140. *E.g.*, Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Mich. 1981) (plaintiff unable to overcome employer charge of uncooperative attitude and poor performance evaluations). *But see* Phillips v. Smalley Maintenance Servs., Inc., 711 F.2d 1524 (11th Cir. 1983) (employer discharge of plaintiff due to labor force reduction was a mere pretext as employer hired other employees with similar qualifications soon after layoff).

141. *E.g.*, Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Mich. 1981).

of her response to the sexual harassment.[142] Misconceptions about sexual harassment surface at this stage of the inquiry as courts again attempt to distinguish between demands and more benign requests for sex. Frequently, courts dismiss sexual harassment claims with a reassuring observation that the harasser's acts were not a *condition* the plaintiff had to meet; all would have gone smoothly had she simply refused.[143] This response assumes men and women occupy equal roles in sexual and economic relationships. This assumption is incorrect. Male sexual dominance is accepted by many[144] and regarded as biologically "natural"[145] by others; male economic control is also a fact despite growing recognition of the need for women to work.[146] To refuse a male supervisor's[147] demand for sex means confronting his power on both of these fronts and facing the probability that the subtle harassment or unassuming request will escalate to more blatant and serious actions.[148] Courts do not acknowledge the difficulty of refusal. Consequently, if the harasser does not couple his sexual demands with some explicit indication of a job-related threat, the demands will not be considered a term or condition of employment, regardless of the social reality which gives those demands meaning and force.[149]

2. Environmental sexual harassment.

For environmental sexual harassment to affect the term or condition of employment described as "psychological well-being,"[150] "it must be sufficiently pervasive so as to alter the condi-

142. *See supra* text accompanying notes 128-131 (discussion on causation).

143. *E.g.*, Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305 (D.D.C. 1980) (found advances were not a condition of employment although the harasser was president of the company and it was plaintiff's first week of work).

144. Members of the Moral Majority and the New Right clearly hold philosophies which favor continued male dominance. *See, e.g.*, William Goodman Jr. & James Price, Jerry Falwell, An Unauthorized Profile at 133-40 (1981).

145. *See, e.g.*, MacKinnon, *supra* note 5, at 90-92; Sandra Tangri, Martha Burt & Leaner Johnson, *Sexual Harassment at Work: Three Explanatory Models*, 38 J. Soc. Issues 33, 35-37 (1982).

146. *See supra* note 31.

147. This could just as easily apply to male co-workers, but this scenario is not contemplated by the courts in the quid pro quo model. *See supra* notes 69-71 and accompanying text.

148. *See, e.g.*, Advocacy, *supra* note 2; Merit Systems, *supra* note 10, at 63-74.

149. In Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981), the court explicitly acknowledged the difficulty and futility of requiring a plaintiff to prove her resistance to sexual advances. The court noted: "She might be able to contrive proof of rejection by objecting to the employer's advances in some very visible and dramatic way, but she would do so only at the risk of making her life on the job even more miserable." *Id.* at 946.

150. *See, e.g.*, Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *accord* Henson v. City of Dundee,

tions of employment and create an abusive working environment . . . sufficiently severe and persistent to affect seriously the psychological well being of employees."[151] In *Bundy v. Jackson*,[152] the District of Columbia Circuit was the first federal court to accept the environmental theory. The court's stated rationale was to provide relief for sexual harassment victims who had to endure generalized abuse, rather than submit to particular sexual demands as a condition of employment.[153]

Because the harassment must be "pervasive," both the quantity and quality of harassment are critical factors in environmental sexual harassment cases. Whereas one encounter may be sufficient to establish quid pro quo harassment if an employee's refusal sparks retaliation, environmental sexual harassment by definition cannot be a "lone incident."[154] Although the exact quantum of harassment necessary to trigger the protection of title VII is unclear, recent case law suggests courts rely on certain factors to determine the acceptable level of harassment.

Most common, courts measure the *frequency* and *duration* of the harassment. Harassment becomes a "term or condition" of employment when it is "standard operating procedure"[155] or part of a history or pattern of offensive treatment.[156] In such cases, the alleged harassing comments, remarks, and behavior occurred on a daily basis[157] for long periods of time.[158] Sexist and abusive statements, or even unwanted touching and requests for sex, will not support recovery under the environmental sexual harassment the-

682 F.2d 897 (11th Cir. 1982); Carroll v. Talman Fed. Sav. & Loan, 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980).

151. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

152. 641 F.2d 934 (D.C. Cir. 1981).

153. *Id.* at 945.

154. Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1177 (M.D. Pa. 1982).

155. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

156. *See, e.g.*, Downes v. Federal Aviation Administration, 775 F.2d 288 (Fed. Cir. 1985); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D Tenn. 1981).

157. Generally, daily harassment occurs when regular contact between the harasser and plaintiff is necessary to fulfilling workplace responsibilities. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (plaintiff was dispatcher, and harasser was immediate supervisor); Davis v. Western-Southern Life Ins., 33 Empl. Prac Dec. (CCH) ¶ 34, 35 (N.D. Ohio 1984) (plaintiff was insurance sales representative, and harasser was associate sales manager); Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982) (plaintiff was switch bill and supply clerk, and harasser was assistant manager and immediate supervisor).

158. *E.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (two year period); Brown v. Guthrie, 22 Fair Empl. Prac. Cas. (BNA) 1627 (D. Okla. 1980) (one-year period).

ory if occurring infrequently.[159]

Some courts consider the *severity* of the harassment a relevant criterion, but consider "severe" only situations where the harasser demands sex and uses implicit physical (as opposed to economic) force to reinforce his power. If the harassment is severe enough, courts overlook the quantity requirement. For example, in *Robson v. Eva's Super Market*,[160] the plaintiff's supervisor grabbed her, pulled at her blouse, and patted her buttocks. In *Robson*, the court allowed recovery despite the relatively isolated occurrence of the harassment primarily because the factual scenario mirrored a quid pro quo case.[161] As in the typical quid pro quo scenario, one man directed explicit sexual advances to the plaintiff. Unlike a quid pro quo case, however, the plaintiff's objection to the treatment did not lead to direct or immediate economic loss. In cases like *Robson*, the most immediate threat to the woman is physical. A few courts have recognized that verbal harassment can be as threatening as physical punishment,[162] but generally it is not considered severe enough to bypass the imposed quantity requirements.

The severity, duration, or frequency of the harassment ostensibly determines the courts' factual assessment[163] of whether the harassment is a term or condition of employment. A close examination of patterns of recovery in environmental cases reveals that quid pro quo sexual harassment doctrine[164] and traditional legal assumptions about what constitutes legally recognizable harm[165] also affect the analysis. On the one hand, courts have held harassing behavior itself violates title VII; on the other hand, they have looked to its quantifiable and tangible effects on work to deter-

159. Recovery was denied in Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981).

160. 538 F. Supp. 857 (N.D. Ohio 1982).

161. *Id.* at 864.

162. As one court commented: "The words used were ones widely recognized as not only improper but as intensely degrading, deriving their power to wound not only from their meaning but also from the 'disgust and violence they express phonetically.'" Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983) (quoting C. Miller & K. Swift, Words and Women 109 (1977)).

163. Both case law and the EEOC guidelines provide for a case by case determination of whether alleged conduct constitutes sexual harassment, depending on the record as a whole and the totality of the circumstances. 29 C.F.R. 1604.11(b) (1985); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

164. In particular, there is a requirement that plaintiff suffer tangible and quantifiable harm.

165. The law has been slow to protect interests that when damaged are hard to repair economically or to measure in definite and quantifiable ways. This pattern is slowly changing as evidenced by relatively recent developments in tort (intentional infliction of emotional distress) and contract (promissory estoppel) law.

mine if the behavior is the kind of harassment which, standing alone, qualifies as discrimination.[166] In cases where plaintiffs have successfully shown environmental harassment to be a term or condition of their employment, they either quit their jobs because of the harassment[167] or suffered such mental and emotional duress that their ability to function effectively dropped signficantly.[168]

The type of evidence required to prove that environmental sexual harassment is a condition of employment places these plaintiffs in the same posture as those with quid pro quo claims. When the legal doctrine is stripped away, it becomes clear women are losing their jobs because of sexual harassment, whether they quit or get fired. Although environmental sexual harassment theory was designed to broaden the types of sexist treatment prohibited by title VII, its potential is limited by the "quid pro quo-colored lenses" the courts persist in wearing. In an effort to balance employers' obligations and women workers' rights, courts have returned to the traditional indicium of harm: tangible evidence of loss or suffering that deserves compensation. As a result, the main difference between environmental sexual harassment and quid pro quo harassment boils down to who grows tired of the harassment first: in quid pro quo cases, the employer fires or demotes the worker, and in environmental sexual harassment cases, the worker quits of her own accord or has an emotional breakdown.

The most important contribution of *Bundy v. Jackson* [169] to judicial understanding of sexual harassment was a new conception of terms and conditions of employment. In acknowledging the right to psychological well-being as an employer-owed obligation,[170] the *Bundy* court implicitly recognized that two separate

166. See Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149 (M.D. Pa. 1982); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981), for cases where plaintiff's job performance remained stable, leading to the conclusion that the environment was not sufficiently offensive to be illegal. *See also* Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1317 (D.N.J. 1983); Hill v. BASF Wyandotte Corp., 27 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Mich. 1981).

167. *E.g.*, Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982); Robson v. Eva's Super Mkt., 538 F. Supp. 857 (N.D. Ohio 1982). In these cases, the courts examined plaintiff's case in light of standards governing constructive discharge, i.e., were working conditions so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. *See, e.g.*, Held v. Gulf Oil, 684 F.2d 427 (6th Cir. 1982); Rosado v. Santiago, 651 F.2d 114 (1st Cir. 1977); Jacobs v. Martin Sweets Co., 550 F.2d 364 (6th Cir. 1977), *cert. denied*, 431 U.S. 917 (1977).

168. *See* Lamb v. Drilco, 32 Fair Empl. Prac. Cas. (BNA) 105, 106 (S.D. Tex. 1983) (plaintiff's earlier outstanding performance as quality assurance inspector declined because of verbal and physical harassment by her supervisor).

169. 641 F.2d 934 (D.C. Cir. 1981).

170. *Id.* at 944-45.

power systems merge to create the problem of sexual harassment—male dominance over women[171] and economic control of owners, supervisors, and managers over workers.[172] By recognizing that sexual harassment discriminates against women workers even without tangible job losses, environmental sexual harassment theory gives legal meaning to a social reality familiar to women: men harass and create barriers for women in the work place by virtue of male power alone. The economic insecurity of women *in general* [173] coupled with male control and dominance *in general* create sexual harassment, which is a condition of employment to its victims.

Environmental sexual harassment theory represents an important advance in legal analysis of sexual harassment because it recognizes the *dual* origins of the discrimination—sexual power and economic power—and accepts that women have the right to work free from the abuses of both.[174] Despite the growing focus on tangible evidence of the effects of environmental harassment, the doctrine still contemplates a view of compensable injury drawn from the experiences of working women. It begins to clarify the confusion about what type of conflict sexual harassment truly represents.[175]

D. Employer Liability for the Harassment

In title VII employment discrimination cases, courts generally apply the common law theory of respondeat superior to determine employer liability: employers are strictly and vicariously liable for discriminatory acts of supervisory personnel that are within the scope of employment.[176] The traditional title VII standard for scope of employment is broader than at common law be-

171. *See supra* notes 30-34 and accompanying text.

172. *See supra* note 46.

173. *See* MacKinnon, *supra* note 5, at 9-23. In addition to lower wages, less skilled job classifications, and higher rates of unemployment, women workers who maintain families face more serious economic difficulties than their male counterparts. *See, e.g.*, Dep't of Labor, Bureau of Labor Statistics, Bulletin No. 2168, Women at Work: A Chartbook at 27 (1983) (35% of families maintained by women were in poverty; 7% of families maintained by married couples). Dep't of Labor, Women's Bureau, Facts About Women Heads of Households and Heads of Families 7 (1979) (median income for female-headed families in 1977 was $7,765; comparable figure for male-headed families was $17,517).

174. *See* Morgan v. Hertz Corp., 542 F. Supp. 123, 128 (W.D. Tenn. 1981) (injunction issued to prevent supervisors from making vulgar comments about sex because female employees had the right to work free from such abuse).

175. *See supra* part I.

176. Although these courts refer to this standard of liability as strict liability, it should not be confused with the tort law standard of strict liability which creates liability in the absence of fault. *See* Prosser, *supra* note 105, at 75.

cause the legislative aim of the statute is to prevent and prohibit discrimination, not punish employers. In *Griggs v. Duke Power Co.*,[177] the Supreme Court noted that the primary objective of title VII was prophylactic: "It was [designed] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[178] To enforce the compensatory purpose of title VII's provisions, courts impose stringent obligations on employers.[179]

Until recently, courts have not found liability in sexual harassment cases under traditional title VII respondeat superior theory for two primary reasons. First, courts characterize sexual harassment as outside the scope of the harasser's employment.[180] Courts believe that the harassing behavior stems from the individual's sex drive, rather than from a desire for greater control on the job.[181] For example, one case contrasted sexual harassment by an employee with an automobile accident by noting "the injury to the pedestrian [in a car wreck] is not caused because of an attempt by the driver to gratify *his own desires*."[182] The courts must be referring to the sexual desires it assumes a harasser seeks to fulfill.

Second, sexual harassment is not officially proposed or promulgated by company policy, unlike some other types of employment discrimination. In a sex discrimination suit based on unequal wages, the employer's role is typically to set the wage rate. The legal issue thus centers on whether those wage rates are acceptable.[183] In contrast, the employer's role in most sexual harassment actions, at least initially, is indirect,[184] for example, maintaining an organization which allows sexual harassment to exist by virtue of a male-dominated, hierarchical structure.[185] Many courts have simply been unwilling to impose liability solely

177. 401 U.S. 424 (1971).

178. *Id.* at 429-30.

179. *See* Vermeulen, *supra* note 77, at 504.

180. *Id.* at 510-11.

181. For discussion concerning men who harass—their profiles and their reasons—see Alliance Against Sexual Coercion, Men Who Harass (1981); Merit Systems, *supra* note 10, at 57-62; MacKinnon, *supra* note 5, at 163-64.

182. Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 38, 42 (D.D.C. 1980) (emphasis added), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986).

183. *See* Equal Pay Act of 1963, 29 U.S.C. § 206 (1982).

184. The employer's role is indirect, in contrast to a later and more "direct" role such as refusing to investigate or adequately respond to allegations of sexual harassment.

185. *See* Tangri, Burt & Johnson, *supra* note 145, at 37-40.

on that basis.[186]

The courts' confusion about the employer's role (as opposed to the harasser's role) in causing or allowing sexual harassment has resulted in the uneven and unpredictable use of three different rules for employer liability: 1) liability based on respondeat superior as utilized in the title VII context;[187] 2) liability for supervisors' acts unless the employer has a policy against sexual harassment, no knowledge of the harassment, and acts to remedy the discrimination immediately upon notice;[188] and 3) no liability unless plaintiff shows the employer knew or should have known about the harassment *and* failed to take prompt action to prevent and stop it.[189] Courts rely primarily on the first and third of these rules.[190] Recent case law reveals an emerging consensus as to

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186. As one court noted: "Title VII is directed at acts of employment discrimination and not at individual acts of discrimination. Therefore, individual acts of sexual harassment by employees of a defendant employer are not actionable, unless they are in some manner, whether actively or tacitly, sanctioned by the employer or constitute an official policy of the employer." Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 483 (E.D. Wis. 1979). *But see* Horn v. Duke Homes, 755 F.2d 599, 604-05 (7th Cir. 1985) (court rejected defendant's argument that sexual harassment is an individual act rather than the employer's act because the individual's identity is merged with the employer to create the legal concept of "employer"; analysis applied only to harassment by supervisor).

187. Title VII respondeat superior provides that employers are vicariously liable for discriminatory acts of supervisory personnel that are within the scope of employment. For application of this standard to quid pro quo harassment, see Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985); Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703, 710 (8th Cir. 1984); Henson v. City of Dundee, 682 F.2d 897, 908 (11th Cir. 1982); Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1981); *cf.* Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977) (court noted that the employer could overcome this "strict liability" by acting to correct the sexual harassment when notified).

188. *E.g.*, Bundy v. Jackson, 641 F.2d 934, 943 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977) (MacKinnon, J., concurring).

189. This standard has been applied primarily in environmental sexual harassment cases. *See, e.g.*, Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Davis v. Western-Southern Life Ins., 33 Empl. Prac. Dec. (CCH) ¶ 34,235 (N.D. Ohio 1984); Ferguson v. E.I. duPont de Nemours, 560 F. Supp. 1172 (D. Del. 1983); Lamb v. Drilco, 32 Fair Empl. Prac. Cas. (BNA) 105 (S.D. Tex. 1983); Ukarish v. Magnesium Elektron, 31 Fair Empl. Prac. Cas. (BNA) 1315 (D.N.J. 1983); Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 649-50 (E.D. Mich. 1982); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985) (circuit court adopted standard of strict liability), *aff'd on other grounds sub. nom.* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399 (1986) (Supreme Court rejects strict liability standard). For application of this standard to quid pro quo claims, see Craig v. Y & Y Snacks, 721 F.2d 77 (3d Cir. 1983); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983).

190. The second standard has only been used in two cases, both in the D.C. Circuit. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). No court has applied this standard since the ruling in Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

which standard should govern in a particular case: respondeat superior "strict liability" should apply in quid pro quo cases,[191] and the third test, which frequently provides immunity to employers, in environmental sexual harassment cases.[192]

The Supreme Court's recent decision in *Meritor Savings Bank v. Vinson* [193] does not resolve this confusion about which standard of employer liability is applicable to the two types of sexual harassment. The Court did not delineate a clear test for employer liability for environmental harassment, and did not discuss liability for quid pro quo harassment at all. The majority opinion stops short of issuing a definitive rule on employer liability and instead briefly discusses the factors that might be relevant to liability. The discussion in *Meritor* does, however, support the emerging consensus about the proper standards for liability.[194] This section examines the application of these standards and critiques the stated rationales for applying different standards of employer liability to the two types of harassment.

1. Quid pro quo sexual harassment.

In *Henson v. City of Dundee*, the court held that an employer is strictly liable for all quid pro quo harassment by its supervisors.[195] Before *Henson*, only two courts[196] had adopted the strict liability standard despite general title VII law and the EEOC guidelines[197] favoring strict liability. Basing its holding on traditional title VII authority and public policy, the *Henson* court noted that "[t]he modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination

191. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986) does not address liability for quid pro quo harassment. For examples of the strict liability standard applied to quid pro quo cases, see Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); *accord* Horn v. Duke Homes, 755 F.2d 599 (7th Cir. 1985) (court held strict liability is correct standard for quid pro quo harassment by supervisors); Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703 (8th Cir. 1984) (court held district court did not abuse discretion in applying respondeat superior strict liability standard for quid pro quo harassment); Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1981); Barnes v. Costle, 561 F.2d 983, 993 (D.C. Cir. 1977). Although this represents a clear trend in quid pro quo employer liability standards, it is not absolute. Courts which deviate from this trend tend to impose the third test, knowledge and failure to act, in all cases. *See* cases cited *supra* note 187.

192. See *supra* note 189 for examples of this standard applied to environmental harassment cases.

193. 106 S. Ct. 2399 (1986).

194. See *infra* notes 201-203 and accompanying text for a discussion of *Meritor*'s treatment of employer liability.

195. 682 F.2d 897, 910 (11th Cir. 1982).

196. Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

197. 29 C.F.R. § 1604.11(c) (1985).

in employment will be made if the corporate employer is able to hide behind the shield of individual employee action."[198] Since *Henson*, some courts continue to apply the more lenient test of no liability without knowledge and failure to act, although these courts state in dictum they would have utilized *Henson*'s strict liability standard if the more lenient standard they applied had barred plaintiff's recovery.[199]

There is no reason to assume the *Henson* strict liability standard for quid pro quo harassment will change based on the Supreme Court's decision in *Meritor Savings Bank v. Vinson*.[200] The issue presented to the Court in *Meritor* specifically dealt with liability for a hostile environment created by a supervisor, and the Court's comments thus apply only to that limited scenario.

2. Environmental sexual harassment.

The standard for employer liability in environmental harassment cases is not as clear as the standard in quid pro quo cases. Although courts disagree on what the standard should be, a consensus exists on what the standard should *not* be: courts uniformly reject respondeat superior as a test for liability in environmental harassment. In *Meritor*, the Supreme Court rejected the District of Columbia Court of Appeals' holding that employers should be liable for environmental harassment by supervisors regardless of the employer's knowledge. The majority of the Court thus held that employers are not always automatically liable for their supervisor's environmental sexual harassment.[201].

It is important to note that four Justices joined in a concurring opinion[202] that rejects the notion of two different standards of employer liability for two types of harassment, and holds that no justification exists for a special rule to be applied only in environ-

198. 682 F.2d at 909 (quoting Tidwell v. American Oil Co., 332 F. Supp. 424, 436 (D. Utah 1971)).

199. *E.g.*, Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80-81 (3d Cir. 1983); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983).

200. 106 S. Ct. 2399 (186).

201. Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2408 (1986).

202. Justice Marshall authored the concurrence with Justices Brennan, Blackmun, and Stevens joining. Justice Stevens wrote separately that he saw no inconsistency between the majority and concurring opinions. This author respectfully disagrees with Justice Stevens in that regard. While Marshall's concurrence holds that *all* supervisory acts of sexual harassment should be imputed to the employer, the majority holds that the D.C. Court of Appeals erred in holding that liability is automatically imputed.

mental harassment cases.[203] As such, the concurring Justices would automatically impute liability to the employer for *all* sexual harassment. The significance of the concurrence in *Meritor* is unknown. The majority of the Court did not adopt a "definitive rule on employer liability,"[204] but explicitly rejected the notion that employers are automatically liable for their supervisor's sexual harassment. Thus, the concurrence, at best, reflects a trend the Court might adopt in the future; it does not represent the current state of the law.

Prior to *Meritor*, the various courts of appeals applied a test in environmental harassment cases which presumed no liability unless a plaintiff shows employer knowledge of the harassment *and* a failure to act.[205] *Meritor* may alter this standard as the majority held that "absence of notice to an employer does not necessarily insulate that employer from liability."[206] The Court suggested that lack of notice may not insulate employers who have no policies, procedures, or practices that both encourage victims of harassment to come forward and provide responsive solutions to victims' complaints. Thus, the *Meritor* Court acknowledges the difficult position of sexual harassment complainants and places some of the burden on the employer to create an environment that makes employer knowledge more, rather than less, likely.

Despite the Court's recent holding in *Meritor*, it is important to analyze the pre-*Meritor* requirements for employer liability. First, the holding of *Meritor* may be limited to situations where the harasser is also the employee's supervisor and the sole representative of the employer available to hear the victim's complaints. Second, the *Meritor* Court does *not* hold that employer knowledge of the harassment is unimportant; rather, the Court merely holds that lack of knowledge is not dispositive. The Court still concurs with prior precedent holding that strict liability does not apply, and that employer knowledge and failure to act are primary considerations in determining employer liability for environmental harassment.

a. Employer knowledge of the harassment.

The primary factor influencing employer liability is employer

203. *Meritor*, 106 S. Ct. at 2411.

204. *Id.* at 2408.

205. *See* cases cited *supra* note 189. *See also* Horn v. Duke Homes, 755 F.2d 599, 603 n.2, 606 n.9 (7th Cir. 1985) (in dictum the court rejected respondeat superior for environmental harassment).

206. 106 S. Ct. at 2409.

knowledge—either actual or constructive—of the harassment.[207] Courts have not explicitly considered whose knowledge is sufficient to bind the employer.[208] Analysis of case law reveals the only clear test yet developed: the plaintiff must inform someone other than the harasser.[209] Some courts have held that complaints to company presidents and shift managers provided actual knowledge;[210] other courts determined that complaints to chief sales officers, district managers, and bank branch managers did not.[211]

Employer liability based solely on the harasser's knowledge would approximate the respondeat superior standard of liability which has been rejected in environmental cases. Requiring actual knowledge by someone other than the harasser, however, produces the ironic result of disadvantaging those employees who are unfortunate enough to be harassed by top level supervisors.[212]

When the plaintiff has not lodged a complaint with a supervisor, courts focus on whether the employer *should have known* of the harassment. A finding of constructive knowledge depends on the extent of harassment, the same criterion plaintiffs must meet to prove the harassment was a term or condition of their employment.[213] The test asks if the sexual harassment is so widespread that a reasonable employer in the defendant's shoes would know about it.[214] Other factors which influence a finding of constructive

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207. *E.g.*, Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).

208. For a discussion of whose knowledge might constitute employer knowledge, see Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172, 1198-99 n.62 (D. Del. 1983).

209. The *Meritor* decision suggests that a plaintiff may be relieved of some obligation to inform the employer of harassment if the perpetrator of the harassment is the only reasonably available employer representative. 106 S. Ct. at 2409.

210. *E.g.*, Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 426 (8th Cir. 1984) (bank vice-president), *aff'g* 584 F. Supp. 22 (D. Neb. 1983); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (air traffic control center manager); Bundy v. Jackson, 641 F.2d 934, 940 (D.C. Cir. 1981) (department supervisor); Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 648 (E.D. Mich. 1982) (shift manager); Robson v. Eva's Super Mkt., 538 F. Supp. 857, 860 (N.D. Ohio 1982) (company president).

211. Davis v. Western-Southern Life Ins. 33 Empl. Prac. Dec. (CCH) ¶ 34,235 (N.D. Ohio 1984) (district sales manager); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. 1980) (bank branch manager); Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480, 482 (E.D. Wis. 1979) (district office manager).

212. The higher up in the company hierarchy the harasser is, the harder it will be for the employee to go above him and expect to be believed or supported in her complaint. It is unrealistic to expect lower level employees to take top management on, one-on-one, and win.

213. *See supra* notes 150-175 and accompanying text; *see also* cases cited *infra* note 214.

214. *See, e.g.*, Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (constructive knowledge based on *pattern* of insults aimed at plaintiff); Henson v. City of Dundee, 682 F.2d 897, 899 (11th Cir. 1982) (constructive knowledge based on demeaning vulgari-

knowledge are the employees' positions in the workplace hierarchy and the number of women workers affected by the harassment.[215] Thus far courts have not considered the effects of other indicia on employer knowledge, such as the attitudes of employers which blind them to obvious and ongoing harassment.[216] Most likely, only plaintiffs who establish that environmental sexual harassment is a term or condition of employment through the duration and frequency measures[217] will be able to claim constructive knowledge by the employer.

b. Failure to act.

Courts indicate what an employer must do once it has knowledge of the harassment more clearly than what plaintiffs must do to impart knowledge. The few cases in which the knowledge hurdle was crossed, but the defendant was nevertheless relieved of liability for his acts, suggest two duties owed by employers: the duty to investigate and the concomitant duty to take immediate *and* effective action.[218] The type of investigation employers must conduct has received much less attention than the type of remedial action they must take. Employers must take both immediate and effective action. For example, one employer fired the harasser, but still incurred liability because the firing occurred more than two months after receiving knowledge of the harassment.[219] An-

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ties over two years); Davis v. Western-Southern Life Ins. Co., 33 Empl. Prac. Dec. (CCH) ¶ 34,235 (N.D. Ohio 1984) (no knowledge despite complaints because plaintiff did not explicitly term her treatment sexual harassment); Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 878 (S.D. Ga. 1983); Coley v. Consolidated Rail Corp., 561 F. Supp. 645 (E.D. Mich. 1982).

215. *E.g.*, Cumming v. Walsh Constr. Co., 561 F. Supp. 872, 876 (S.D. Ga. 1983) (top supervisors were involved in creating the harassing environment); Morgan v. Hertz Corp., 542 F. Supp. 123, 125 (W.D. Tenn. 1981) (harassing environment aimed at all female employees in Hertz location). *But see* Davis v. Western-Southern Life Ins., 33 Empl. Prac. Dec. (CCH) ¶ 34,235 (N.D. Ohio 1984) (no constructive knowledge despite fact that harasser was associate sales manager who harassed *several* female employees).

216. One employer expressed the following attitude concerning the environment at its workplace: "[O]ff-color remarks and innuendos are part and parcel of a construction site environment and are to be expected." Cummings v. Walsh Constr. Co., 561 F. Supp. 872, 878 (S.D. Ga. 1983).

217. As previously discussed, women who suffer from environmental harassment may be unable to prove the requisite duration and frequency of harassment. *See supra* notes 154-162 and accompanying text. To require such proof defeats the purpose of recognizing this type of harassment. *See supra* text accompanying note 153.

218. Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 426 (8th Cir. 1984) (employer not liable because it reprimanded harasser, and supervisor failed to intervene); Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172, 1199 (D. Del. 1983) (employer not liable because employer investigated claims, took action, and harassment stopped).

219. *See* Lamb v. Drilco, 32 Fair Empl. Prac. Cas. (BNA) 105, 106 (S.D. Tex.

other employer was liable despite policy statements and training programs to counter sexual harassment because its efforts were not effective at preventing the behavior.[220] In fact, the Supreme Court noted in *Meritor* that a general antidiscrimination policy that does not specifically address sexual harassment is not sufficient to alert employees to their employer's interest in correcting that form of discrimination.[221] Once plaintiffs trigger these employer obligations by either complaining about the harassment or enduring sufficient abuse to meet the constructive knowledge requirements, their right to work free from sexual harassment will generally be protected—either by successful, prompt employer action or by the courts.

E. Summary of Environmental Harassment Prima Facie Case

Courts assume that employers should not compensate women for environmental harassment unless the employer has actual or constructive knowledge of the harassment.[222] The requirement that the employer have knowledge of the harassment will frequently bar relief. This burden is compounded by the proof necessary to meet other elements of the prima facie case for environmental harassment. The plaintiff must prove the intensity or duration of the harassment was sufficient to alter the conditions of employment. In the majority of cases, the plaintiff must show tangible evidence of loss or suffering before courts will find the harassment altered the conditions of employment. The plaintiff must show an intent to discriminate. This element of the prima facie case requires the plaintiff to demonstrate she was singled out as a target for harassment. Placing these requirements on the plaintiff defeats the purpose of judicial recognition of environmental harassment: to allow recovery for psychological harassment that was legal under quid pro quo doctrine because it did not result in direct economic harm to the individual woman worker. In refusing to hold employers liable without a showing of an employer's actual or constructive knowledge of the harassing environment, courts have failed to recognize that women have a right to participate equally in their work environment.

1983) (termination of harasser not immediate enough despite only one day elapsing after it received corroborating evidence of plaintiff's allegations).

220. Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).

221. 106 S. Ct. at 2408-09.

222. Additionally, courts may compensate for such harassment if other unusual circumstances exist. *See supra* note 209.

IV. Judicial Explanations for Two Types of Sexual Harassment

The *Henson* court stated the justification for applying different liability standards in quid pro quo and environmental sexual harassment cases:

> The capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which the employer confers on that individual. When a supervisor gratuitously insults an employee, he generally does so for his reasons and by his own means. He thus acts outside the actual or apparent scope of the authority he possesses as a supervisor.[223]

Courts continue to approach sexual harassment as two distinct types of discrimination—environmental sexual harassment, which is not based on an abuse of workplace authority, and quid pro quo harassment, which can exist only when workplace authority is exercised. This approach rests on assumptions which are factually and legally dishonest.

The idea that environmental sexual harassment does not involve an abuse of economic authority stems from the judicial definition of environmental harassment. Courts define environmental harassment as that which does not result in economic loss and assume the harasser's ability to harm a woman's economic status, that is whether a harasser is a supervisor or co-worker, is irrelevant. This limited understanding of environmental sexual harassment ignores important realities. The reasons a supervisor harasses a worker and the means he uses are the same regardless of the type of harassment. Courts characterize environmental sexual harassment by a supervisor as an individual man harassing "for his reasons and by his own means"[224] and quid pro quo harassment as a supervisor using the employer's means to extort sexual favors. In fact, all acts of harassment by supervisors are affected and strengthened by the superior economic position that supervisors occupy. In both environmental as well as quid pro quo harassment, a supervisor's economic control shapes the meaning and force of his actions whether or not he flexes his economic muscle.[225] Thus, whenever a supervisor sexually harasses a woman worker, male power *and* workplace authority combine to provide

223. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982). Since *Henson*, other courts have relied on this explanation. *E.g.*, Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 650 (E.D. Mich. 1982).

224. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982).

225. Marshall's concurrence in Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2409 (1986), recognizes exactly this point. Unfortunately, that concurrence does not reflect a widespread judicial assumption. For further discussion of the significance of Marshall's concurrence, see *supra* notes 202-04 and accompanying text.

greater freedom to harass and fewer opportunities for women to resist.

Judicial inability to comprehend the economic coercion inherent in environmental harassment by supervisors is especially appalling given courts' increasing concern with *tangible* evidence of the effects of environmental sexual harassment in the form of declining work performance or a plaintiff's decision to quit her job.[226] The focus on environmental harassment's measurable impact on a woman's job undercuts the *Henson* court's rationale for a different standard in environmental sexual harassment cases. The focus reintroduces the importance of a harasser's control at the workplace and leaves recovery in all cases of co-worker harassment open to question.[227]

Closely related to the notion that a supervisor's abuse of workplace authority is irrelevant to environmental sexual harassment is the equally incorrect assumption that a harasser's abuse of workplace authority is *required* for quid pro quo harassment—that *only* supervisors can demand sex in exchange for economic security because only supervisors have economic chips for bargaining. This conception fails to recognize: 1) ways in which nonsupervisory male employees gain access to avenues of control; and 2) ways in which threats of physical force or coercion can lead to economic harm.[228]

Courts fail to recognize that male *and* economic power are *both* expressed in *both* types of sexual harassment. Even more important, women workers' economic status is significantly affected regardless of the source of power a harasser abuses. Supervisory harassment always poses a greater threat, but co-worker harassment is not unrelated to the power employers bestow on various workers within the company. Although environmental sexual harassment theory represents a tremendous advance in legal understanding of sexual harassment by recognizing that two aspects of power are actually involved in sexual harassment,[229] the advances it offers are undercut by the courts' inability to grasp the abuse of economic power inherent in environmental sexual harass-

226. See *supra* notes 163-68 and accompanying text for a discussion of the patterns of recovery in environmental harassment cases.

227. As one court noted: "[I]t is undisputed that there was no alleged relationship between the claimed sexual advances and remarks and any term or condition of employment. The male in question was a Cost Engineer, as was plaintiff, and was doing the same type of work." Smith v. Rust Eng'g Co., 18 Empl. Prac. Dec. (CCH) ¶ 8698, 8698 (N.D. Ala. 1978).

228. For a concrete example of this situation, see *supra* text following note 20.

229. *See supra* text accompanying notes 169-175.

ment and by the economic harm co-workers can cause in a quid pro quo-type scenario.

V. Implications of the Two-Type Model

Environmental sexual harassment theory developed from the need for a legal model that addressed the sexual harassment working women encountered. The theory met that challenge by focusing on the psychological well-being of women workers and by recognizing that men at all levels of the workplace hierarchy can, and do, harass women in ways that bar women's equal participation at work. Nevertheless, courts continue to make analytical distinctions between sexual harassment as a form of economic coercion (quid pro quo harassment) and harassment as sexual coercion (environmental harassment). Although both types of harassment are recognized as illegal treatment of women at work, the courts' failure to understand sexual harassment as an inextricable expression of both types of coercion produces troubling results. The advantages that environmental theory offers are undercut, and the schism between sexual harassment as women experience it and sexual harassment as the law defines it remains.

Analysis of a plaintiff's prima facie case under the environmental theory shows she must either prove facts which could support a quid pro quo claim (particularly with regard to the elements of intent and terms or conditions of employment), or she is left with an environmental claim that the employer may not be responsible for compensating. The dichotomy results because the distinction between quid pro quo and environmental harassment for both definitional and liability purposes rests on the type of power a harasser abuses—sexual or economic—rather than the injury a woman worker suffers. The focus on the type of coercion at issue is fundamentally unworkable because that distinction is irrelevant in the employment setting.

By juxtaposing the types of power in operation, the two-type model has clouded the most important issue. Courts' concern should be that harassment results from the second-class position women occupy in society and at work. Harassment perpetuates that status quo by marginalizing women's roles in the labor force and controlling women through threats of sexual force or physical violence. Whether a woman is fired for refusing to sleep with her boss or quits because of abusive treatment by co-workers, the net result is the same. She is still forced to leave her rightful place as a wage-earning member of society.

As a complex social phenomenon with multiple causes and

consequences, sexual harassment cannot be neatly categorized into two different types. No single criterion exists which distinguishes one type of sexual harassment from another. As evidenced by recent legal developments, drawing artificial lines renders the law unable to respond to sexual harassment as women experience it. Consequently, courts respond to sexual harassment claims in a mechanical and formalistic fashion. For example, one court commented: "Plaintiff's theory on her sexual harassment claim is somewhat unfocused. [She] appears to state a hostile environment cause of action yet clutters the environmental landscape with allegations of retaliation."[230] Courts fail to recognize that women's experiences do not fit into the black and white categories that currently define sexual harassment. Women's experiences are complex and "cluttered" with a myriad of circumstances.

VI. A New Approach to the Legal Treatment of Sexual Harassment

Instead of creating *types* of sexual harassment, courts should focus on the factors which truly influence harassment of women. To identify these factors, courts must acknowledge that sexual harassment is an abuse of sexual and economic power, not an expression of sexual desire. The judicial perception of sexual harassment must acknowledge that harassment excludes women from equal participation in the workplace, regardless of the type of power the harasser abuses or the specific injury the worker suffers. Once courts understand that abuse of power is at the heart of sexual harassment, legal assessment of the merits of plaintiffs' sexual harassment claims will properly focus on those aspects of the employment setting which exacerbate that power. Four categories are particularly relevant to this assessment: 1) the harasser's position in the workplace, both economically and personally; 2) the victim's status and history at work; 3) the treatment of women workers generally at that workplace; and 4) the history and policies regarding all types of employee grievances in the workplace.

The most obvious factor affecting the harasser's economic position in the workplace hierarchy is his status as a supervisor or manager. Whether a harasser is a supervisor or co-worker is important, but only because male supervisors enjoy an added dimension of power over women workers, not because male co-workers are without power over their female counterparts.[231] Other as-

230. Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172, 1197 (D. Del. 1983).

231. This is an important distinction given the commonly held judicial percep-

pects of workplace dynamics can affect a harasser's ability to wield power as much as his title or position in a chain of command. These factors range from the harasser's personality and image in the company to his age, length of service, marital status, appearance, and personal style.[232] All of these subjective factors combine to determine the force a particular harasser can exert over women in the workplace.

Along with the harasser's position in the workplace, courts must consider the plaintiff's status at work as well as her employment record.[233] The respect a woman worker has among her coworkers and supervisors, either because of her job classification and performance or her personal style, directly affects her ability to challenge unwanted sexual attention informally and through official channels.[234] Courts now require victims to make their discomfort with and dislike of the harassment known to both the harasser and the employer.[235] This requirement should not be retroactively imposed on all women workers without an evaluation of the particular risks a given worker faces in contesting the discriminatory treatment. The victim's status affects more than her ability to complain; it can also determine the validity an employer will give her claim. An employee with a negative work record is likely to face a very different response than one who is not considered a "troublemaker."[236] This must be considered by courts who penalize workers for failing to pursue grievances within their workplace.

Courts must also consider the particular characteristics of the workplace itself. Foremost, courts must examine the treatment of women in that workplace: the number of women employed

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tion that *only* supervisors have economic power sufficient to extort favors from women workers. *See supra* notes 18-19, 227 and accompanying text.

232. For a general discussion concerning the relationship between sexual harassment and the socioeconomic status of the harasser, see Susan Littler-Bishop, Doreen Seidler-Feller & Robert Opaluch, *Sexual Harassment in the Workplace as a Function of Initiator's Status: The Case of Airline Personnel*, 38 J. Soc. Issues 137 (1982).

233. These factors certainly affect the plaintiff's ability to prove certain elements of the prima facie case such as causation. If the plaintiff has a poor work record, it will be difficult to prove that the reason for her economic harm was sexual harassment. Courts must determine whether the plaintiff's poor work record is a result of the harassment. *See supra* text accompanying notes 138-141.

234. Each time an employee complains about a condition at work, she faces the possibility of being disbelieved, harassed, or pegged as a troublemaker. The strength of an employee's relations and position at work determine both how she might be received and how likely she is to grieve in the first place.

235. *See supra* notes 104-121 and accompanying text.

236. *See supra* note 234.

there,[237] the "clustering" of women in lower status positions, and any history of sex discrimination or complaints by women workers. Finally, courts should assess other workers' opportunities to pursue grievances about employment problems.[238] This entails an evaluation of company personnel policies and enforcement mechanisms:[239] are there established grievance procedures and if so, do employees utilize them; is there a management person designated to hear grievances; and who is that person and what are his or her skills and abilities? It is important, however, that the legal inquiry not fixate on rigid conceptions of each category. As courts review and consider plaintiffs' sexual harassment claims, these categories should guide, not limit, inquiries concerning the particular dynamics in operation at plaintiffs' workplaces.[240]

Consideration of these categories properly focuses the inquiry on the impact sexual harassment has on women workers rather than on the type of power the harasser abuses. These are the aspects of the employment setting which should form the parameters for judicial evaluation of sexual harassment claims. Rather than asking how the plaintiff behaves in response to the harassment or whether her work performance has notably declined, courts should examine the totality of plaintiff's situation at work to assess the impact of this discriminatory behavior.[241]

Judicial recognition that all sexual harassment, environmental and quid pro quo, involves both sexual and economic coercion would also undercut the current rationale for the two standards of employer liability.[242] The harasser's status as a supervisor or co-

237. A woman needs support to cope with sexual harassment on the job. The number of female co-workers present directly affects the woman's experience of harassment: how it affects work performance, how quickly or assertively a victim can/will express her discomfort, how safe it feels to complain.

238. These opportunities are affected not only by policies and procedures, but also by the atmosphere and spacial design of the workplace. Some questions to ask include: is there a sense of privacy and confidentiality; are workers allowed access to management personnel one-on-one; and is there a union.

239. If company policy includes a disciplinary provision, courts must look at how it has been enforced: is it a fair procedure, or have there been instances of management manipulating worker complaints to unfairly harass or discipline co-workers. *See* Gordon, *supra* note 2, at 10-11.

240. How sexual harassment operates in a particular employment setting will also vary tremendously depending on the type of business the company conducts, the geographic location of the workplace, the economic position of the company, and a host of other factors. Courts must be willing to rely on recently developed understandings of what sexual harassment represents and how various social dynamics influence its operation to probe each situation, uncovering the unique and relevant aspects of plaintiff's situation which allowed her to be victimized by sexual coercion.

241. *See supra* note 163.

242. *See supra* text accompanying note 223.

worker as only one of many factors which affect the harassment's impact on its victim should not be the basis for defining standards of liability. Once a plaintiff establishes unwanted sexual harassment by either a co-worker or supervisor, a rebuttable presumption should follow that her working conditions were adversely affected by the harassment.[243] The burden of proof should shift to the employer to show that the adverse consequences resulted from some other legitimate employment practice.[244] Only if the employer meets that burden should the plaintiff be required to prove the employer's stated reasons are pretextual. Assuming a plaintiff successfully established the causal link between the harassment and the negative work consequences, title VII principles of respondeat superior should determine employer liability.[245] As such, the employer would be liable unless it showed prompt *and* effective remedial action.[246] Plaintiffs should not be required to prove employer knowledge of a workplace phenomenon which affects the majority of working women.

Courts must do more than make piecemeal changes in the way they approach sexual harassment claims; they must recognize the impact sexual harassment has on women workers and come to grips with the institutionalized role it plays in the American work force today. Until the judicial mindset shifts to understand sexual harassment as a symptom of social norms and not an aberration, doctrinal changes will continue to fall short of providing new avenues of recovery for working women. Only a transformation in the legal approach to the problem of sexual harassment will pave the way for a new legal conception of the complex social tensions embodied in the experience of sexual harassment.[247]

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243. Rather than placing the initial burden of causation on the plaintiff, sexual harassment cases should proceed like other employment discrimination cases. Once the plaintiff makes an initial showing of discriminatory behavior, the connection of the behavior to the workplace consequences should be presumed unless the employer produces evidence to the contrary.

244. *See supra* note 125.

245. This is the standard theoretically applied in quid pro quo claims. *See supra* text accompanying notes 194-198.

246. Note that current case law has held true to the requirement of *prompt* and *remedial* action. *See supra* text accompanying notes 217-219.

247. *See supra* note 27.