Analyzing Sexual Harassment in the Workplace

Herbert G. Keene, Jr.
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HERBERT G. KEENE, JR.*

I. INTRODUCTION

This article discusses the widespread problem of sexual harassment by approaching the topic in a unique way. Specifically, three different vignettes are presented, each of which contains a few scenes. These scenes are followed by an in-depth analysis of each situation. Since the law in the area of sexual harassment is still evolving, definitive bright line tests are nearly impossible to

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1 See BARBARA LINDEMANN & DAVID D. KADUE, PRIMER ON SEXUAL HARASSMENT 2 (1992) [hereinafter LINDEMANN & KADUE, PRIMER] (stating various studies have reported 50 to 80 percent of women have experienced sexual harassment on job, and harassment may be most widespread problem facing American women at work); see also Katherine S. Anderson, Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987) (stating sexual harassment of women in workplace is widespread and insidious problem).

2 See generally Kathleen A. Smith, Employer Liability For Sexual Harassment: Inconsistency Under Title VII, 37 CATH. U. L. REV. 245 (1987) (noting inconsistencies of evolution of law under Title VII); Anderson, supra note 1, at 1258 (noting recent development in evolving law under Title VII); Jennifer L. Vinciguerra, The Present State of Sexual Harassment Law: Perpetuating Post Traumatic Stress Dis-

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recite. This article instead attempts to enlighten and raise one's consciousness in the area of sexual harassment.

A. Sexual Harassment

Sexual harassment is conduct which falls under and is prohibited by Title VII of the 1964 Civil Rights Act. The Act was significantly amended in 1991. Title VII claims apply only to employers who have fifteen or more employees. Like other discrimination claims, Title VII claims are typically brought through and processed by the Equal Employment Opportunity Commission ("EEOC").

A complaint brought by an aggrieved employee triggers an

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3 42 U.S.C. § 2000e et seq. (1988); see Mary C. Dunlap, ed. Sex Discrimination in Employment: Application of Title VII (CLR Employment Law File, 1975) ¶ 3001 (noting unlawful discrimination under Title VII of Civil Rights Act of 1964 consists of any action, policy or practice of an employer, employment agency or labor organization, causing or contributing to unequal employment opportunity on account of race, color, sex, national origin, or religion).


5 42 U.S.C. § 2000e(b) (1988). The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day but the term does not include 1) the United States, a corporation owned by the government of the United States, an Indian tribe or any development or agency of the District of Columbia subject by statute to procedures of the Competitive Service, or 2) certain bona fide private membership clubs. Id.


7 See ARTHUR GUTMAN, EEO LAW AND PERSONNEL PRACTICES 7 (1993) (EEOC is an independent Federal Administrative Agency mandated by Title VII to focus on acts of discrimination against identifiable victims); MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 2000 (1988) (noting that EEOC has four major statutory functions: 1) investigation and conciliation of possible violations, 2) enforcement, 3) interpretation, and 4) implementation of enforcement procedures against federal employers).
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investigation by the EEOC. After a thorough investigation, the EEOC determines whether probable cause exists. Several courts have deemed evidence of such findings admissible.8

After a period of normally 180 days, a claimant then has a right to institute a Title VII action in Federal District Court.9 All remedies generally available under Title VII, such as compensatory and punitive damages, case discharge, and reinstatement with back pay, are also available in a sexual harassment case.10 These remedies are also available in constructive discharge cases—where an individual claims that his or her employment had become so intolerable that they had to quit.11

Sexual harassment is generally defined as unwelcome12 sexual attention, sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature.13 Sexual harassment is a violation of Title VII under either one of two legal theories: “quid pro quo”14 and “hostile environment.”15 Quid pro quo sexual harassment involves the commission of such conduct, which is made explicitly or implicitly a term of one's


11 There are four factors in determining whether a “quit” is a constructive discharge: 1) Was there illegal treatment of the plaintiff; 2) Was the resignation caused by the illegal treatment; 3) Was the treatment designed to force the employee to resign; and 4) If the employer had no desire to discharge the employee, were the actions reasonable. PLAYER, supra note 7, at 402.

12 See Meritor Savings Bank v. Vinson, 477 U.S. 57, 168 (1986) (holding that essential element of any sexual harassment claim is that alleged sexual advances were unwelcome); see also Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (holding “unwelcome” means that employee did not solicit or incite conduct, and regarded it as undesirable or offensive).


14 This phrase was coined from MACKINNON, supra note 13.

15 Professor Catharine A. MacKinnon is generally acknowledged as having first expressed this distinction. MACKINNON, supra note 13, at 32-47; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); PLAYER, supra note 7, at 249; LINDEMANN & KADUE, PRIMER, supra note 1, at 9.
Hostile work environment sexual harassment is conduct that is so pervasive and offensive that it creates an intimidating, abusive, and hostile work environment and unreasonably interferes with the victim's ability to perform his or her job. Although conduct does not need to be sexual per se to be deemed sexual harassment, it must be gender-based. Furthermore, Title VII protects both men and women from sexual harassment in the workplace.

To determine what constitutes an effective harassment policy a distinction must be made between common law claims and Title VII claims. With regard to Title VII claims, if there is an appropriate policy in effect, and it is promptly and effectively implemented when an alleged harassment situation arises, then normally, unless an upper-level manager is involved, it will constitute a defense. Nevertheless, an employer must demonstrate that such a harassment policy was promptly and effectively applied in that the employer addressed the individuals involved and took swift corrective, remedial action.

16 See 29 C.F.R. § 1604.11(a)(1), (2) (1994) (quid pro quo sexual harassment occurs when woman's submission to her supervisor's sexual demands becomes condition of her employment status).

17 See id. note 16, at § 1604.11(a)(3) (sexual harassment is actionable whenever it unreasonably interferes with work performance).

18 Behavior motivated by gender-based animosity usually takes on one of two forms: 1) hostile conduct of a sexual nature (gender baiting), or 2) nonsexual hazing based on gender. LINDEMANN & KADUE, PRIMER, supra note 1, at 75.


20 See 29 C.F.R. § 1604.11(f) (1994). An effective plan requires that the employer affirmatively raise the subject, expressing strong disapproval, developing appropriate sanctions, and informing employees of their right to file a complaint under Title VII. Id.; see also Brief for United States and the EEOC as Amici Curiae, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) (No. 84-1979). If an employer has a policy against sexual harassment and a procedure to resolve sexual harassment complaints, the employer should not be liable unless he has actual knowledge of sexually hostile environment. Id. But see Meritor Sav. Bank v. Vinson, 477 U.S. 57, 71 (1986) (mere existence of sexual harassment policy and procedure does not insulate employer from liability). By using the term "mere existence," however, the Supreme Court suggests that an appropriately designed sexual harassment policy may constitute a defense to the employer. Anderson, supra note 1, at 1270.

21 See, e.g., Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977). An employer must swiftly prevent or rectify situation to avoid being responsible for sexual harassment of employees. Id. at 460. For example, if an employee
cases, have granted summary judgment for employers who are able to prove they had effective harassment policies in place at the time of the complaint. 22

On the other hand, common law claims are not causes of action that arise under Title VII. 23 However, an employer can get a summary judgment or dismissal of a common law claim with the use of normal defenses. 24

Vignette #1: Close Quarters

Scene #1

ANN: Hello, Receiving Department. Yes. I am the manager. How can I help you? Okay, you have the address. Thanks. Bye.

OSCAR: Hey, I’m sorry I’m late.

ANN: Here we go again!

OSCAR: Oh, come on! It’s not such a big deal.

ANN: Listen, we had a deal. You said that you were going to stop being late and I wasn’t going to put it in your evaluation.

OSCAR: Well, if I show you why I was late, perhaps, you will forget all about it.

ANN: This better be good.

OSCAR: (showing an adult magazine picture) My latest. What

fails to investigate a complaint he is supporting the harassment because an absence of sanctions encourages abusive behavior. Id. at 466.

22 See, e.g., Tolbert v. E.I. Dupont De Nemours Co. & Stevens, 850 F.2d 693, 695 (6th Cir. 1988) (explaining complainant’s failure to file grievance and notify Dupont management of alleged sexual harassment was contributing factor in complainant’s failure to make satisfactory showing of harassment).

23 Common law theories of recovery for sexual harassment can take form of intentional infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, misrepresentation, breach of public policy, implied contract and covenant of good faith and fair dealing, tortious interference with contractual relations, and negligent hiring or retention. LINDEMANN & KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 351-52 (1992) [hereinafter LINDEMANN & KADUE, SEXUAL HARASSMENT].

24 See, e.g., Durham Life Ins. Co. v. Evans, 1994 WL 447406 (E.D. Pa.) (granting employer’s motion for summary judgment on sexual harassment claim which also took form of intentional infliction of emotional distress, defamation, breach of contract and collective bargaining agreement, and misrepresentation), aff’d, 99 F.3d 1169 (3d Cir. 1994).
do you think?
ANN: You wish you could get a woman like that.
OSCAR: What do you mean? This is my girlfriend.
ANN: Right!
OSCAR: Well, I've had nearly every woman in the department. What makes you think I couldn't have her?
ANN: Well, that's no big feat, considering the sleazy bimbos we have in this department.
OSCAR: Yeah, they may be bimbos, but some of them are pretty hot. I bet some of them could make it into this magazine.
ANN: Name one.
OSCAR: What about Margaret? Did you see what she had on today? It should be illegal. There's only so much a man can take.
ANN: Just perfect for you, buxom and brainless.
OSCAR: Ann, there are some things you don't need brains for.
ANN: Obviously, like working here!
OSCAR: (showing Ann another picture) Oh, this looks like Michelle from payroll.
BETH: (answering phone) Hello, Receiving.
ANN: Are there any guys in there?
OSCAR: Yeah, here's one. I wish I were he.
ANN: Wishing is about all you can do (takes magazine). Wait, I'll find you a date. Are there any personals?
OSCAR: I don't need personals, Ann.
ANN: Here is one for you (reading): Sultry and seductive. Sexy, twenty-three year old, white female seeking very generous man that will enjoy my full attention at a very private and discreet location.
OSCAR: It doesn't sound half bad. Maybe I'll be late again tomorrow.
BETH: (on phone) Look, let me call you back in a few minutes. Something has come up here.
(To audience) This has been going on ever since I joined this department. Ann and Oscar carry on with these explicit, sexual comments. I feel like I'm being called a bimbo. These com-
ments are upsetting and these conversations make it hard for me to concentrate on my work. It's hard for me to talk on the telephone. Can I file a complaint? Does this constitute sexual harassment?

Scene Analysis

This situation raises several issues. The first question is whether activity occurring in an office next to Beth can constitute sexual harassment as to her. Does the conduct have to be directed at her? Generally, the answer is that it does not have to be directed at the individual at all.\(^2\) If the conduct takes place in the work place, and the complainant, as a reasonable person,\(^2\) is offended by that conduct, it may well constitute hostile environment or work place harassment.\(^2\)

\(^{25}\) See \textit{Lindemann \& Kadue, Primer, supra} note 1, at 211 (EEOC supports hostile environment claim by employees who were not themselves specific targets of harassment); \textit{see also} \textit{Fisher v. San Pedro Peninsula Hospital, 214 Cal. App. 3d 590 (1989)} (recognizing nurse's sexual harassment claim against doctor whose offensive remarks and touchings were directed at other nurses but in complainant's presence). \textit{But see} \textit{Ross v. Double Diamond, 672 F. Supp. 261 (N.D. Tex. 1987)} (declining to consider sexual harassment claim of complainant who knew about her co-worker's mistreatment).

Although relatively few authorities squarely support the EEOC’s theory of third party claim of sexual harassment based upon environmental harassment directed at employees other than the complainant, cases do support the EEOC theory in \textit{dictum}. \textit{See, e.g., Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985)} (stating, in \textit{dictum}, that woman who was never herself the object of harassment might have Title VII claim if forced to work in atmosphere pervasive with harassment). \textit{See also Lindemann \& Kadue, Primer, supra} note 1, at 212 n.56.

\(^{26}\) In hostile environment cases, most courts have used a two-pronged standard to assess liability: (1) whether there was psychological harm and (2) whether a reasonable person in the complainant's position would have suffered that harm. David D. Kadue, \textit{Sexual Harassment at Work, C742 ALI-ABA 465, 483 (1992)}. The reasonable person standard is designed to prevent liability arising from the overreactions of a hypersensitive complainant. \textit{Id.}

Some courts consider the sex of the complainant in applying the reasonable person standard. \textit{Id.} at 485. Thus, a "reasonable woman" standard has developed. \textit{Id.; see, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991)} ("[W]e believe that women share concerns which men do not necessarily share .... [B]ecause women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior.").

\(^{27}\) There are two principal types of sexual harassment under Title VII: (1) \textit{Quid pro quo} discrimination and (2) hostile work environment harassment. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410, 1414 (10th Cir. 1993). \textit{Quid pro quo} is the more obvious form of sexual harassment and generally involves the offer of tangible employment benefits by an employer or supervisor in exchange for sexual favors from the subordinate employee. Jeffrey A. Gettle, \textit{Sexual Harassment and the}
Another issue raised by this scene is whether Ann, who seems to participate in the conduct, would be able to complain about it. The answer obviously is no. If she participates in the conduct, then the conduct is welcome as to her. If the conduct is welcomed, it is deemed consensual. By virtue of the EEOC and judicial authority, Ann would not have grounds for a complaint.

Is the conduct gender-based? The conversation was very gender-based—very anti-female. This, then, gives Beth the ability to file a harassment complaint.

Does the fact that Ann is a supervisor and engages in such conduct impute liability to her employer? The EEOC has set

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A threshold issue in any sexual harassment case is whether the conduct was welcome. Kadue, *supra* note 26, at 483. Unwelcome conduct is conduct that the recipient does not ask for and regards as offensive. *Id.*

See Mary F. Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 530 (1994). But see *Spencer* v. *General Electric*, 697 F. Supp. 204 (E.D. Va. 1988) (explaining pervasive sexual conduct can create hostile work environment for those who find it offensive even if targets of conduct welcome it); LINDEMANN & KADUE, *PRIMER*, *supra* note 1, at 44 (discussing Swentek v. USAir, 830 F.2d 552, 44 FEP Cases 1808 (4th Cir. 1987), where court held that complainant's use of foul language and sexual innuendo indicated that she welcomed such conduct; however, such use in consensual setting did not waive her right to complain of unwelcome harassment).


In order for the conduct to be deemed harassment, it must be based on gender. *See* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1557 (11th Cir. 1987) (stating hostile work environment sexual harassment claim must be based on sex in order to prove prima facie case).
forth a series of guidelines concerning employer liability. Generally, the EEOC and the courts have applied general common law agency principles to such situations. If Ann were a low-level supervisor, then liability would be imputed to her employer if her employer were found to be negligent. This standard is based on whether her employer knew or should have known of her conduct, and if so, what action it took in response to that knowledge. The acts of a managing agent or upper-level supervisor may more readily be imputed to the employer, and the employer may be held strictly liable for those acts. If Ann, as Vice President of the company, were engaged in such conduct, her company may be held strictly liable under EEOC guidelines.

Even employers of volunteer workers may be held liable if the volunteers are creating a hostile work environment or a quid pro quo. Liability depends upon how much control the em-

34 29 C.F.R. § 1604.11(c) (1994).
35 A standard of strict liability has generally been applied to quid pro quo sexual harassment. See Karibian v. Columbia Univ., 14 F.3d 773, 777 (2nd Cir.), cert. denied, 114 S. Ct. 2693 (1994). Such liability has attached even when the employer has policies prohibiting such conduct by its managers. Debra L. Raskin, Sexual Harassment in Employment, C108 ALI-ABA 141, 147-48; see Horn v. Duke Homes, 755 F.2d 599, 604 (7th Cir. 1985); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).

In Meritor, however, the Supreme Court suggested that employers would not automatically be liable in hostile environment claims. 477 U.S. at 72; see also Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (holding that "[s]trict liability is illogical in a pure hostile environment setting .... The supervisor does not act as the company; the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'"); cf. 14 F.3d at 780 ("employer is liable for the discriminatorily abusive work environment created by supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship.").
36 Karibian, 14 F.3d at 780 (stating where low-level supervisor does not rely on supervisory authority to carry out harassment, employer will not be liable unless negligent); see Lopez v. S. B. Thomas, Inc., 831 F.2d 1184, 1189 (2d Cir. 1987); Snell v. Suffolk County, 782 F.2d 1094, 1104 (2d Cir. 1986).
37 See 29 C.F.R. § 1604.11(c) (1994) (stating that employer should be liable in hostile environment case only if it had actual knowledge or victim had no reasonably available method for making her complaint known).
38 Id.
39 The EEOC takes the position that an employer is responsible for maintaining an environment free of sexual harassment, including harassment by non-employees. Id.; see also Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).
ployer has over those volunteers.\textsuperscript{40} If the employer controls the work setting, he will more likely be held responsible for the acts of volunteers.\textsuperscript{41}

Imputed liability leads to the question of whether the employer has a sexual harassment policy. Under EEOC guidelines, if an employer has a sexual harassment policy that is widely disseminated among employees and is uniformly and effectively enforced, liability could be precluded.\textsuperscript{42} Even if the employer learns of or should have learned of that conduct, assuming it is repeated and it is not an isolated incident, the employer might avoid liability if an effective policy is in place.\textsuperscript{43}

\textit{Scene \#2}

OSCAR: (taking back magazine) Let me see that. Let me see if there are some personals in here for you.

ANN: I've got plenty of guys. I don't need any help from you.

OSCAR: Here's one (reading): Serious or casual relationship. A twenty-seven year old, white male in search of that Victoria Secret model. A white female, age twenty to thirty who is willing to show me a good time. We can also explore and get to know each other.

ANN: Hey, kind of sounds like me.

OSCAR: I don't think so.

FRANK: (enters with a package and clipboard) Hey, do you want to sign for this.

OSCAR: Oh, over here. I was just trying to find Ann here a date. Check this out! Ann needs a little help with her social life.

FRANK: Hey, maybe I can help.

OSCAR: Maybe we can find you a date, Frank. (points to a picture) How about this one?

\textsuperscript{40} In determining liability for acts of a non-employee, the EEOC considers the extent of the employer's control and legal responsibility over the non-employee. 29 C.F.R. § 1604.11(e).

\textsuperscript{41} Id.

\textsuperscript{42} Id. at § 1604.11(f).

FRANK: Well, she's pretty hot. But actually, I already have my eye on someone.

OSCAR: Well, keep this warm for me. I have to take this package upstairs.

ANN: Take a look at this. Oscar claimed that he went out with her last night.

FRANK: She's pretty hot, but I bet she's nothing compared to you.

ANN: Sure Frank, like, you'll ever know.

FRANK: (moving closer) Come on, why don't we get a drink tonight.

ANN: (moving away) I've got to get back to work.

FRANK: Oh, come on. I hear the way you talk to Oscar. I bet you go out with lots of guys. What's wrong with me?

ANN: No, Frank. I just don't want to.

FRANK: Come on. What harm is there? Just one little drink.

ANN: (cornered against desk) We've been through this before and I'm not going through it again. I just don't want to go out with you.

FRANK: (putting his arm around Ann) Look, I'll tell you what. I'll be back tomorrow and maybe you will change your mind.

OSCAR: (returning with clipboard) Well, here it is.

FRANK: (grabbing clipboard and exiting) Oh! Okay Bud. Thanks.

ANN: (to audience) This guy gives me the creeps. He gets too close to me. He constantly touches me. He asks me out at least two or three times a week. I'd report him but he doesn't work for our company. I don't even know if this is sexual harassment. What can I do?

Scene Analysis

The first question is whether it makes any difference if the person engaging in the conduct is not employed by the employer. Perhaps surprisingly, the answer is no.\footnote{An employer may be liable for the harassment of its employees by nonemployees in either of two basic situations: (1) a job requirement that foreseeably sub-}
vendor is somebody who regularly comes to the employer’s premises, and the company either knows or should have known about the conduct, the company may be held liable.\textsuperscript{45} In order to avoid liability, an employer must demonstrate that it has in place an effective sexual harassment policy that the employee is aware of which provides avenues to file a complaint with the proper individuals within the company.\textsuperscript{46} In order to avoid liability, Ann’s employer must deal with the employer of the delivery man to see to it that the offending individual either no longer makes deliveries to that company, or does not regularly have contact with Ann.\textsuperscript{47}

The EEOC guidelines approach such situations in the same way.\textsuperscript{48} They state that an employer may be responsible for the harassment of an employee by a nonemployee in the work place where the employer or its agents or supervisory employees knew or should have known that the conduct was taking place and failed to take immediate and appropriate corrective action.\textsuperscript{49} In reviewing such cases, the Commission will consider, on a case-by-case basis, the extent of the employer’s control over the nonemployee,\textsuperscript{50} and any other legal responsibility that the employer may have with respect to the conduct of the nonemployee.\textsuperscript{51}

\textbf{B. The Nonemployee as Complainant}

It is not always required that a complainant demonstrate a

\textsuperscript{45} See Sparks v. Regional Medical Ctr. Bd., 792 F. Supp. 735, 738 n.1 (N.D. Ala. 1992) (noting 29 C.F.R. § 1604.11(e) makes employer liable for conduct of nonemployees as long as employer knew or should have known of conduct).

\textsuperscript{46} See Carmon v. Lubrizol Corp., 17 F.3d 791, 794-95 (5th Cir. 1994) (no liability given employer’s prompt investigation of sexual harassment charge).

\textsuperscript{47} “[H]arassment is to be remedied through actions targeted at the harasser, not at the victim .... Not only did the [defendant] have numerous counseling sessions with [plaintiff] in order to discuss how she could help stop the harassment, it forced [plaintiff] to work different shift schedules and actively sought to have her transferred to a different position.” Intlekofer v. Turnage, 973 F.2d 773, 780 n.9 (9th Cir. 1992) (emphasis in original).

\textsuperscript{48} 29 C.F.R. § 1604.11(e) (1994).

\textsuperscript{49} Id.

\textsuperscript{50} Id.

\textsuperscript{51} Id.
common law employment relationship to have standing to bring a sexual harassment charge under Title VII.\textsuperscript{52} Employment, in this context, is defined as a work setting, and the charge is that someone in that work setting is causing the harassment. Therefore, the fact that a complainant is not technically a common law employee will not necessarily divest such an individual from standing to bring a charge.\textsuperscript{53}

Vignette #2: The Sexual Harassment Complaint

\textit{Scene #1}

VICKIE: May I see Hugo?
SECRETARY: Do you have an appointment?
VICKIE: No.
SECRETARY: What is this about, honey?
VICKIE: I have a sexual harassment complaint.
SECRETARY: Hey, Hugo! There's a girl here with some sexual harassment complaint.
HUGO: Send her in. (laughing) What's your name?
VICKIE: Vickie.
HUGO: Hello Vickie, what's the problem?
VICKIE: Well, I wanted to make a complaint. I think it might be sexual harassment.
HUGO: You think it might be sexual harassment. You mean you don't know?
VICKIE: I'm pretty sure. Can I sit down?
HUGO: Yes, go ahead. All right, so who are we talking about.
VICKIE: Harry Henderson.
HUGO: Harry Henderson. You mean Harry, the VP of Marketing?
VICKIE: Yes.
HUGO: Holy Cow! You've really hooked yourself a big fish this

\textsuperscript{52} See Moylan v. Maries County, 792 F.2d 746, 749 (8th Cir. 1986) (explaining that plaintiff belonging to protected class under Title VII is "not usually disputed").

\textsuperscript{53} See id.
time. I hope you know what you are doing. Okay, so what do you say has happened?

VICKIE: Well, Harry comes to my department a lot when he goes to meetings with the CEO. It seems like everyday. Well, sometimes he just comes in and talks to me.

HUGO: Talks to you. Is that what this is about?

VICKIE: No. He keeps asking me out on dates. I feel like he stands too close to me. He touches me.

HUGO: He touches you? Where does he touch you?

VICKIE: Well, on my arm and on my back. He leaves me notes. He sends me E-Mails. He tells me how much he likes me. It's very distracting. I find it very hard to work.

SECRETARY: Oh, that's not so terrible honey. You should be flattered. Harry is a great catch.

HUGO: So, he keeps asking you out. Did you ever go out with him?

VICKIE: Well, he wouldn't leave me alone, so about a month ago I went out to dinner with him.

HUGO: Look, I'm a Human Resources man. You know, a couple months ago I went to a conference and this Philadelphia lawyer said that for an act to be sexual harassment, it must be unwelcome. If you went out with him it can't be very unwelcome, can it?

VICKIE: Well, I just did it so that maybe he would leave me alone. But, he didn't leave me alone. It has gotten worse. He's really good friends with my boss. My boss really respects him and I'm afraid that somehow this is going to hurt my career.

HUGO: Look, Vickie, everybody respects Harry around here. He's one of the best. Now, you've got every right to make your harassment complaint, but I have to tell you it's going to be a long, hard road ahead of you. Did Harry ever say that if you didn't go out with him, you'd be fired?

VICKIE: No.

HUGO: No. Did Harry every try to kiss you or grope you?

VICKIE: No.

HUGO: No. Did you ever talk to your supervisor about this?

VICKIE: Well, no.
HUGO: No. Well, you know that our sexual harassment policy says that you have to talk to your supervisor before you can do anything else. Are you sure you want to make a complaint?

VICKIE: Well, I guess so.

HUGO: (pauses) You know, I think I can get you a transfer to Salt Lake City. You wouldn't have to worry about Harry. Would you be interested in that?

VICKIE: Look, I just want it to stop. I don't necessarily want to go to Salt Lake City.

HUGO: Okay. Well look, I'll investigate the matter and get back to you. You can go.

VICKIE: Thanks.

Scene Analysis

There are probably a dozen or more things that occurred in this scene which ought not have occurred. The Salt Lake City transfer, of course, is not something that the employer should have suggested to someone who has walked in wanting to make this type of complaint. The cases are clear regarding adverse action by an employer against an employee who is filing a sexual harassment complaint. The issue arises as to whether or not the conduct of the interview itself constitutes sexual harassment because of the manner in which it was conducted. There is also the question of whether the interview was designed to encourage frank and open discussion. There was certainly no indication

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54 In Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1313 (7th Cir. 1989), the Seventh Circuit outlined the elements of a claim of retaliation: the plaintiff must prove that she (1) "engaged in statutorily protected expression; (2) she suffered an adverse action by her employer; and (3) there is a causal link between the protected expression and the adverse action." See EEOC v. Pizza Hut of Roanoke Rapids, Inc., 61 Fair Empl. Prac. Cas. (BNA) 1346, 1350 (E.D.N.C. 1992) (holding that plaintiff in sexual harassment action "establishes a prima facie case [of retaliation by] showing that she had engaged in protected activity, was subsequently fired, and that other employees committing similar offenses .... did not incur as severe a punishment.") , aff'd mem., 62 Fair Empl. Prac. Cas. (BNA) 160 (4th Cir. 1993).

55 The EEOC definition of sexual harassment includes situations where "submission to (the harassment) is made either explicitly or implicitly a term of an individual's employment." 29 C.F.R. § 1604.11(a) (1994). It is submitted that Hugo's conduct in the interview made Vickie's submission to the harassment an implicit term of her employment.

56 29 C.F.R. § 1604.11(f) (1994) states that "[a]n employer should take all steps
that the discussion was confidential or private, a secretary seated outside overheard the conversation and, in fact, took part in the conversation. The interviewer indicates that he has a very narrow notion as to what sexual harassment consists of by suggesting that perhaps touching a person's shoulder or back is not enough.

There is also the question of the adequacy of the interview. The interviewer is disbelieving, badgering, condescending, and does not encourage the complainant to tell her story. In fact, by his comments, the interviewer is really discouraging her. He tells her that she has a "long, hard road ahead." He asked no specific questions as to any of the incidents about which the woman attempted to complain. There was no indication that he would follow-up the interview in any substantial manner. He conducted it very offhandedly. To prevent such problems from occurring, a sexual harassment policy should include as a component some in-house training of sexual harassment interviewers. Without interviewer training, there is a greater potential for liability if the matter is litigated.

Scene #2

HARRY: Hugo, come on in.

HUGO: Hi Harry, how have you been?

HARRY: Pretty good. You said on the phone that we have a little bit of a problem. What's this all about?

HUGO: Well, apparently, you ruffled the feathers of some girl in Accounting.

necessary to prevent sexual harassment from occurring." It is submitted that this is accomplished by encouraging open discussion about sexual harassment and also by allowing this discussion to be confidential, which did not occur in the interview.  

57 See supra note 56.

58 While it may be necessary for the investigator to discuss the reported information with others, such discussion should be limited to those persons with a legitimate need to know. LINDEMANN & KADUE, PRIMER, supra note 1, at 164.

59 It may be enough to constitute harassment on the basis of sex for one to make unwelcome sexual advances such as those set forth in the vignette. See 29 C.F.R. § 1604.11(a) (1980).

60 See generally LINDEMANN & KADUE, PRIMER, supra note 1, at 162-66 (suggesting guidelines for investigation).

61 LINDEMANN & KADUE, SEXUAL HARASSMENT supra note 23, at 418, 429 (discussing importance of well-trained investigator).
HARRY: What do you mean? Who are we taking about?

HUGO: Do you know someone named Vickie?

HARRY: Vickie? Did she file a complaint?

HUGO: Yes. But don't worry about it. Our lawyers gave us a sexual harassment policy a couple of years ago and I just have to interview you. It's just a formality.

HARRY: Okay, I understand. You have your job to do and I have mine. You've always been very thorough and that's one of your good qualities. I'll make sure that your boss knows that when evaluation time comes around this month.

HUGO: Thanks Harry. You know that you can count on me.

HARRY: Well then, ask away.

HUGO: Look, I know that she is not in your department and it's no big deal, but let me just ask you, did you ask her out?

HARRY: Sure. And we went out. I thought it went really well. She always seems very nice when we talk and I think she's very attractive.

HUGO: Okay. Well, did she ever say that she wasn't interested in you?

HARRY: No. In fact, we've always had such a good time.

HUGO: Okay. So, you went out with her. How did it go?

HARRY: It went fine. Look, Hugo you've known me for a long time. Ever since you came to this company I've always tried to be a straight shooter with you. Vickie's cute and I really like her, but I certainly would never do anything inappropriate, or put someone in a bad position.

HUGO: I know Harry. I've never known you to be unfair to anyone. Just one question—you didn't grope her or anything did you?

HARRY: No, don't be silly. I would never do that kind of thing.

HUGO: Okay. Well, don't worry. I know you're a fair guy and we will work this thing out.

HARRY: Maybe I should talk to her. You know, just to let her know that she has nothing to fear from me. I'm just a big teddy bear.

HUGO: You know Harry, that's probably a good idea. You've always had a way with women.
Scene Analysis

The preceding scene raises several questions. Who will conduct the interview? Will the interviewer be properly trained to question one accused of sexual harassment? Does the person have a position of sufficient authority in the company to be taken seriously by the accused, even if, as in this scene, the accused is a high ranking officer? If not, some thought ought to be given to who will conduct the interview of a Vice President of Marketing if, in fact, there has been a serious allegation of sexual harassment.

There are also a series of issues to consider regarding whether the interviewer should be employed in-house or be unassociated with the company. Should attorney-client privilege apply to such conversations? Can it be utilized in the future if, in fact, the case proceeds? Or must an employer, as a matter of its defense, divulge the contents of the investigation? Generally, an employer must disclose what was learned during the course of the interview. Disclosure is used frequently to support whatever action is ultimately taken. It is generally not a good idea for outside counsel to get involved in the investigative stage in case they later become a witness should a lawsuit be filed.

The interview, as it appears above, was hardly a scathing examination. It was leading and not really designed to elicit the necessary information. The conduct of the interviewer did not induce the interviewee to take the matter seriously. The suggestion that the alleged harasser have further contact with the complainant is a very poor one. During the course of a sexual harassment investigation, the interview ought to be conducted without bringing the complainant and the accused together. There are some circumstances in which it may be permissible for both the complainant and the accused to meet together with a human resource officer in an effort to rectify the problem. However, such a solution is generally not advisable, and certainly not where the alleged conduct appears to be of a very serious nature.

See generally id. at 429-30 (discussing choice of appropriate investigator).

Id. at 431-32, 445. Allegations must inevitably be shared, to some extent, to facilitate the investigation. Id. at 445.

See generally LINDEMANN & KADUE, PRIMER, supra note 1, at 163-65 (suggesting how to conduct interview with complainant).
During the course of the above interview, some degrading comments were made about Vickie, the complainant. Furthermore, it is irrelevant that she and the accused are not in the same department because a Vice President of Marketing presumably has company-wide authority.\footnote{A person need not be the complainant's direct supervisor in order to be a "supervisory employee." See 29 C.F.R. \S 1604.11(c).}

There are several elements of an effective sexual harassment policy.\footnote{See \textsc{Lindemann} \& \textsc{Kadue}, \textsc{Primer}, \textit{supra} note 1, at 151-53 (suggesting guidelines for employers in developing and implementing effective sexual harassment policy); \textsc{Lindemann} \& \textsc{Kadue}, \textsc{Sexual Harassment}, \textit{supra} note 23, at 722 (providing sample anti-harassment policy).} The policy ought to be stated in simple, easily understood language, and should directly outline the prohibited conduct. Examples of intolerable conduct should be provided. Conduct such as offensive comments, obscene jokes, and the possession of obscene pictures or objects in the work place ought to be mentioned in advising employees as to what is prohibited. The policy should include a direct and conspicuous statement that the policy will apply to all employees, including supervisory, management and executive personnel.

The procedure for filing a complaint must also be simply spelled out. For example, consider the following excerpt from one company's anti-harassment policy:

Any employee who believes that he or she has been subject to harassment prohibited by this policy, has a responsibility to report the harassment as soon as possible to the immediate supervisor. If the harassment is being perpetrated by the immediate supervisor, then the employee may bring his or her complaint directly to the Human Resources Manager. If the Human Resources Manager is the source of the complaint, or where there are other compelling reasons which prevent bringing the problem to the attention of the Human Resources Manager, the employee must report the harassment directly to the President of the Company.\footnote{Cf. \textsc{Lindemann} \& \textsc{Kadue}, \textsc{Primer}, \textit{supra} note 1, at 151-53 (suggesting guidelines for employers in developing and implementing effective sexual harassment policy); \textsc{Lindemann} \& \textsc{Kadue}, \textsc{Sexual Harassment}, \textit{supra} note 23, at 722 (providing sample anti-harassment policy).}

The complainant must have an open avenue to make a complaint. Therefore, as above, any policy should provide an alternate avenue for seeking relief if the immediate supervisor is
The source of the sexual harassment. The policy should further briefly define how the investigation will proceed and should indicate that the information obtained will be held in confidence to the fullest extent possible. The policy should probably contain a statement to the effect that the information will only be passed to other individuals who have a "need to know." The policy should also provide that if the employee is dissatisfied with the handling of the investigation or its result, the employee could bring her complaint to a higher level within the company. In addition, the policy should clearly state that anyone who is found, after an appropriate investigation, to have engaged in harassment of another employee, an applicant for employment, or a visitor or a vendor, will be subject to disciplinary action, including termination. When dealing with an employee in a unionized or an organized setting, an employer must consider the provisions of the collective bargaining agreement and, perhaps, the employee's right to have representation at any disciplinary or investigatory proceeding. Finally, the policy should provide that anyone who brings a complaint in good faith will not be subject to adverse employment action. Similarly, any employees, including supervisors and managers, who retaliate against another employee for making a complaint of harassment will themselves be subject to disciplinary action, including termination.

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68 See, e.g., Yates v. Avco Corp., 819 F.2d 630, 635 (6th Cir. 1987) (suggesting that policy giving supervisor exclusive responsibility for receiving reports may discourage reporting and reduce employees' faith when supervisor is alleged harasser). Such cases of harassment by a supervisor are relatively common. See, e.g., Brooms v. Regal Tube Co., 881 F.2d 412 (7th Cir. 1989) (harassing supervisor was company's manager of human resources); Delgado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987) (complainant was harassed by head of naval Equal Employment Opportunity office).

Most sexual harassment policies are relatively brief—usually no more than three pages—and use simple and direct language. As mentioned earlier, when such a policy exists, the standard for holding an employer liable for harassment by a low level supervisor, a co-employee or a vendor who regularly visits the premises is one of negligence. The appropriate inquiry is whether the company knew or had reason to know of the activity that created the sexually hostile environment and failed to take prompt remedial action. Under case law and EEOC guidelines, an employer may avoid liability by showing that it had implemented a policy against sexual harassment and that its employees were aware that the company did not condone or tolerate such conduct. If the complainant had an avenue to complain and did not come forward, then it is less likely that the employer knew or had reason to know of the problem and therefore would not be in a position to rectify it. Thus, by implementing and utilizing an effective anti-sexual harassment policy, the employer is more likely to be viewed as not condoning or accepting this kind of activity and less likely to be held liable.

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70 See LINDEMANN & KADUE, SEXUAL HARASSMENT, supra note 23, at 416-17 (suggesting language should be clear to avoid misinterpretation).
71 29 C.F.R. § 1604.11(c); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982).
72 29 C.F.R. § 1604.11(d); Henson, 682 F.2d at 905.
74 See PLAYER, supra note 7, at 254-55 (discussing when harassment becomes act of “employer” who is then liable for sexually hostile environment created by another); LINDEMANN & KADUE, SEXUAL HARASSMENT, supra note 23, at 191 (stating that same general principles of employer liability apply whether harassment is from supervisors, co-workers, or nonemployees).
75 LINDEMANN & KADUE, SEXUAL HARASSMENT, supra note 23, at 191-92; see PLAYER, supra note 7, at 254-55 (discussing employer liability).
77 Meritor, 477 U.S. at 71 (quoting Brief for United States and EEOC as Amici Curiae 26).
C. The Broadening of Sexual Harassment Policies

The EEOC has pending proposed guidelines dealing with harassment on all the nondiscriminatory base, including religion, race, color and age. As a result, many employers today are broadening their sexual harassment policies to include all the nondiscriminatory basis. Diocesan institutions, however, will not have to include protections against religious discrimination in their policies. Certainly a church, being religiously uniform, will have the freedom to hire individuals based on religion. Diocesan institutions may, however, wish to elect to broaden their harassment policies to include all the nondiscriminatory base exclusive of religion.

Therefore, the conduct of a manager or a low level supervisor, while it may be imputed to the company as knowledge, may not result in the imposition of liability if the company responds properly to seriously address the problem. If an employee chooses not to take advantage of available procedures, the employer should not bear the responsibility. The policy needs not only to be promulgated, it needs to be promulgated widely among all employees. Furthermore, there ought to be some periodic training for supervisory personnel. If and when a situation arises, it must be dealt with seriously and the policy needs to be effectively applied. What courts look for is "immediate and appropriate corrective action." Again, the first step is to create the policy; the second step is to apply it promptly and effectively, with appropriate action corresponding to the facts of the case.

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80 Merriman & Yang, supra note 78, at 112-13.
81 Meritor, 477 U.S. at 71 (quoting Brief for United States and EEOC as Amici Curiae 26).
82 29 C.F.R. § 1604.11(f). A number of employers require employees to submit written acknowledgement of receipt and understanding of the respective employer's policy against sexual harassment. Lindemann & Kadue, Sexual Harassment, supra note 23, at 419.
83 29 C.F.R. § 1604.11(d); see Swentek v. USAir, 830 F.2d 552 (4th Cir. 1987) (finding remedial action sufficient where employer issued written reprimand); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) (stating employer response less than twelve hours after employee's complaint constituted prompt remedial action).
Vignette #3: The Office Paramour

Scene #1

SAM: Marketing Department, Good Morning. How can I help you? Yes. Well, you will need to talk to my boss, Barbara, about that, hold on please. (to Barbara) Barb, you'll need to handle this.

BARBARA: Who is it?

SAM: It's Accounting. I submitted an expense voucher that needs your approval.

BARBARA: What was it for?

SAM: Expenses.

BARBARA: Oh, okay. I'll take the call here. Hello, this is Barbara. Yes, go ahead and approve it. Yes, I've seen it, I just forgot to sign it. Okay, sure. Goodbye. (to Sam) It's all taken care of.

SAM: Thanks babe. What's on the menu for dinner tonight?

BARBARA: Is your wife working late again?

SAM: Yep!

BARBARA: Why don't you come to my place for dinner?

SAM: Okay. Should I dress for dinner?

BARBARA: (laughing) Okay. Come next door, I have to hand out some new assignments. I've got one that I think is going to get you a lot of recognition around here.

SAM: Cool!

BARBARA: Okay, folks! I have some new assignments. Sam, you get the Acme account; Joe you get the Green Bush account; and Jill you get the Waste Water account. I want your summaries by the end of today. No questions asked. No excuses.

SAM: Oh, this is great. I can't believe it.

JILL: (to Joe) He can't believe it. No, I can't believe it. I can't believe that I have been begging for that assignment for weeks, and Sam walks in the door, with no experience, and snags it right out from under me. I have been successfully handling assignments like that for five years. I can't believe this.

JOE: Well, you know the deal. Lover boy gets it all, the boss and
the best assignments.

JILL: It's disgusting. He gets the best assignments just because he's having an affair with Barbara, and I have to put up with it. All of their lovey-dovey exchanges all day long. It's inappropriate and it makes me sick. I try to do good work and get good assignments so that I can be promoted. Sam walks in the door and gets the best accounts. What kind of morality does this company have that lets its supervisors wreck homes and commit adultery? Just knowing it makes me so mad that I can hardly work. I think it is sexual harassment.

Scene Analysis

The question presented by this scene is: Is it sexual harassment for a supervisor to carry on a romantic liaison with a subordinate and then favor that subordinate in the assignments given to him or to her to the disadvantage of the other employees?

Religious employers can obviously terminate employees for religious reasons under many broad circumstances. This could be one of those situations. However, in a commercial setting, this action is not, according to the courts and the EEOC, a case of sexual harassment. Isn't it obvious that the female supervisor is favoring one individual to the disadvantage of the other employees? Unfortunately, the EEOC and the courts do not see it this way, and have stated that if this action is an isolated instance of favoritism toward a paramour or one with whom the

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84 42 U.S.C. § 2000e. Religious organizations may discriminate with respect to employment of individuals of a particular religion. PLAYER, supra note 7, at 211.

85 See Miller v. Aluminum Co. of America, 679 F. Supp. 495 (W.D. Pa.), aff'd mem., 856 F.2d 184 (3d Cir. 1988). In Miller, plaintiff was treated less favorably than her co-worker, who was having an affair with their manager. Id. The court held that a Title VII claim had not been established because plaintiff was not treated less favorably because she was a woman, nor, conversely, would she have been treated more favorably had she been a man. Id. See also DeCintio v. Westchester County Medical Center, 807 F.2d 304 (2d Cir. 1986), cert. denied, 484 U.S. 825 (1987) (holding that administrator's promotion of woman he was having an affair with was unfair, but did not violate Title VII with respect to male employees). But see King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985). In King, plaintiff claimed that she had been denied a promotion that went to a less qualified co-worker engaged in a sexual relationship with their superior. Id. Although the issue of whether Title VII applied to preferential treatment was not specifically raised on appeal, the court assumed that Title VII is violated whenever sex is, without legitimate justification, a substantial factor in the employment decision. Id.
supervisor has a romantic liaison, it does not constitute sexual harassment because it is not gender-based. It is not discrimination against all men or discrimination against all women; it is merely the favoritism of one individual employee. If this favoritism is repeated with a number of different people over a period of time, however, the result will differ. That kind of conduct can, and frequently will, result in sexual harassment against men or against women, as the facts may demonstrate. The case of the isolated office romance, in and of itself, does not give rise to sexual harassment against other employees in that department who admittedly are disadvantaged in their work assignments. The EEOC's position is that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a paramour, friend, or even a spouse in the same work place, may be unfair, but it does not discriminate against women or men in violation of Title VII since there is no real gender discrimination.

Scene # 2

Barbara: (on phone) No. No. Listen to me! I want that project by noon tomorrow. I don't care. You promised it to me by yesterday and I still don't have it. Okay. Well, I'll tell you what; you have until noon tomorrow. Tell him he better do it or he's going to have to deal with the consequences. Bye.

Oh, hi Sam, come right on in.

SAM: Hi, this is the summary report from last week. I'm sorry, I

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86 See Miller, 679 F. Supp. at 501; DeCintio, 807 F.2d at 307.
87 See Bellisimo v. Westinghouse Elec. Corp., 764 F.2d 175, 180 (3d Cir. 1985) (holding that discharge of female employee is violation of Title VII only if it is done on basis that would not result in firing of male employee), cert. denied, 475 U.S. 1035 (1986); Benzies v. Illinois Dep't of Mental Health, 810 F.2d 146, 148 (7th Cir.), cert. denied, 483 U.S. 1006 (1987) (holding that denial of promotion to woman is not violation if motivated by personal or political favoritism or grudge).
88 See Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986). In Priest, the defendant gave preferential treatment to those female employees who favorably reacted to his sexual advances, and he disadvantaged those who reacted unfavorably. Id. The court found a Title VII violation in part because defendant's conduct implied that benefits would be conditioned on an employee's endurance of his sexual advances or conduct. Id. at 581.; Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988).
89 See generally LINDEMANN & KADUE, PRIMER, supra note 1, at 244.
90 42 U.S.C. § 2000e; see also DiCintio, 807 F.2d at 308.
don’t have this week’s work quite done yet.

BARRA: Well, just get it to me whenever you can get it done.

SAM: Okay. Listen, there’s one other thing.

BARRA: Well, what is it? Why don’t you sit down?

SAM: Thanks.

BARRA: What’s the matter, Sam?

SAM: Well, I’ve been doing a lot of thinking about our relation-
ship. I found out some news recently. I know we’ve talked
about me leaving my wife and all. But I just found out she’s
pregnant and I just don’t think it’s right.

BARRA: What are you saying?

SAM: I’m saying, I think we should stop seeing each other.

BARRA: I can’t believe this. You can’t do this to me.

SAM: I’m sorry, but I’m going to be a father now. I can’t just
leave her with no income, being pregnant and all. I mean, the
picture’s changed. I’ve got more responsibilities now.

BARRA: I can’t believe this is happening. How do you expect
me to deal with this? How am I supposed to see you everyday?
Sam, please reconsider. There’s no way I can handle seeing you
everyday if you break up with me. Please reconsider.

SAM: What do you mean? You’re not saying you’re going to fire
me, are you?

BARRA: (looking at her watch) Oh, God. I’m late. I have to
go. Get that report to me by the time you leave today (runs
out).

SAM: (to the audience) I’m having an affair with my supervisor,
and now I want to break it off. I’m afraid I’m going to lose my
job if I do. I mean, what does she mean by, “There’s no way I
can handle seeing you every day if you break up with me.” I
break up with her and I get fired? Is this sexual harassment?
Can I make a complaint?

**Scene Analysis**

Sam voluntarily engaged in a relationship with his supervi-
sor; as in the old Latin phrase, he was *in pari delicto*. If he
breaks this off, and he is threatened with loss of his job, can he
successfully file a sexual harassment complaint? The answer is
probably, yes. If the threat to Sam is that unless he continues the relationship, he is no longer going to get the favored assignments, or he is not going get the raise to which he might otherwise objectively and fairly entitled to, then, perhaps, he is in a situation where he could file a complaint. What he would allege would be *quid pro quo* sexual harassment. One might ask whether his prior conduct plays some role in his complaint. The most important factor is that the complainant clearly indicated that he wished the relationship to end. Furthermore, the ramifications of the situation must be examined over a long period of time, and not telescoped within a matter of moments or days or weeks. Perhaps Barbara may take some adverse action against him a year down the road: she has not promoted him; she gave him the smallest raise in the department; she gave him the worst of the assignments that came up over the past year. If he could demonstrate that the reason for his treatment was because he discontinued the relationship, the EEOC will receive that complaint and will probably process it and find probable cause to believe that this individual, despite his prior conduct, has suffered discrimination. Once the employee clearly indi-

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91 *See* Babcock v. Frank, 729 F. Supp. 279, 287-88 (S.D.N.Y. 1990). Title VII has been held to protect against *quid pro quo* conduct whether or not the victim of harassment had a previous consensual sexual relationship with the perpetrator. *Id.* at 287.

92 *Id.* at 287.

93 *See* Shrout v. Black Clawson Co., 689 F. Supp. 774 (S.D. Ohio 1988) (holding that employee who terminated relationship with her supervisor will prevail on Title VII claim that supervisor attempted to compel her to submit to further sexual advances by withholding salary reviews).

94 *See*, e.g., Highlander v. K.F.C. National Management Co., 805 F.2d 644, 648 (6th Cir. 1986). In *Highlander*, the court listed five requirements needed to prevail on a *quid pro quo* claim of sexual harassment. They are: (1) that the employee was a member of a protected class; (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee’s submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee’s refusal to submit to a supervisor’s sexual demands resulted in tangible job detriment; and (5) the existence of respondeat superior liability. *Id.* at 648.

95 *See generally* LINDEMAN & KADUE, PRIMER, *supra* note 1, at 26 (stating that complainant must “clearly notify” superior-harasser that sexual advances are no longer welcome).

96 *See*, e.g., Boddy v. Dean, 821 F.2d 346 (6th Cir. 1987) (concluding that com-
cates that he is no longer prepared to continue to engage in that conduct, if the supervisor persists in pursuing the relationship or making him suffer for his decision, from the point the employee draws that line in the sand, he is being harassed on the job by his supervisor.

**Scene #3**

JOE: Hey Barbara. I saw an interesting article about our company in the paper today. I guess we're newsworthy.

BARBARA: Thanks, Joe. I'll take a look at it later.

JOE: Sure. I was thinking that since Sam quit and there's no one covering his accounts, things are slipping through the cracks. Is there any chance that I can get the Acme account?

BARBARA: I don't know Joe, we'll see.

JOE: So, are you free for a drink tonight? Toss back a cold one?

BARBARA: No, Joe. I don't think so.

JOE: Look Barbara, I know you're upset about Sam quitting and all. I guess that's the way the cookie crumbles. But, I thought maybe you might want to talk.

BARBARA: I don't think so, Joe. Why don't you get back to work.

JOE: Come on, I've seen you noticing me and I've been noticing you. Why don't we stop this charade.

BARBARA: I don't know what you're talking about. This is totally inappropriate. Just stop it!

JOE: Come on! Why don't we go out? It'll be fun.

BARBARA: (exasperated) Okay, look, one drink. Meet me downstairs at Harvey's Grill at 5:30 p.m. One drink, that's it.

JOE: Great! You won't regret this.

BARBARA: (to audience) I just did that to get him off my back. He's asked me out a couple of times, but I have no interest in seeing him. It's embarrassing. I feel like I've lost control over my department. I wanted to get rid of him, but in order to do that, I have to go to my boss. My boss already thinks that women are weak. If I go to him with this problem, he'll think that I am an ineffectual manager. He'll tell the people in charge

plainant is entitled to relief on claim that she was passed over for promotion because of negative input by supervisor she had formerly dated).
ANALYZING SEXUAL HARASSMENT IN THE WORKPLACE

and I'll never get promoted. What can I do?

Scene Analysis

Joe has seen what he believes it takes to get ahead in this company. Now that Sam has broken things off with Barbara, Joe decides to try his luck. The situation again involves a woman who is a supervisor trying to deal with others who are her subordinates. The first thing to keep in mind is that in a quid pro quo type of sexual harassment situation, the person who is attempting to engage in the offensive conduct needs to be the supervisor because that individual has to have some control over the terms and conditions of the other individual's employment in exchange for which the sexual favors or attention are being sought. In the situation at hand, it's the subordinate who is making advances to the supervisor. The EEOC and the courts will say that this cannot be a case of quid pro quo sexual harassment because Joe does not have the power to affect the job and the terms and conditions of Barbara's employment. In Scene #1, Barbara, as the supervisor, controlled the terms and conditions of Sam's employment. The situation here is reversed, and therefore the quid pro quo type of harassment is not present. That leaves the question of whether Joe's conduct is merely an isolated incident, or whether it is repeated over a period of time.

Whether sexual advances constitute sexual harassment against Barbara, the supervisor, depends upon whether the conduct is so offensive that a reasonable person under the circum-

98 See PLAYER, supra note 7, at 252 (suggesting that to be actionable, possible effect of harassment must be to alter position of victim's employment).
99 See Donato v. Rockefeller Financial Servs., 65 Fair Empl. Prac. Cases (BNA) 1722, 1723 (S.D.N.Y. 1994) (holding quid pro quo sexual harassment is not actionable when sexual advances are made by non-supervisor); see also Karibian v. Columbia Univ., 14 F.3d 773, 777 (2nd Cir. 1994) (stating element of quid pro quo cause of action is harasser with actual or apparent authority to alter terms and conditions of victim's employment).
100 See Morgan v. Mass. Gen. Hosp., 901 F.2d 186, 187 (1st Cir. 1990) (affirming grant of summary judgment to defendant under Title VII where harassment was limited to few isolated instances); Ebert v. Lamor Truck Plaza, 878 F.2d 338, 339 (10th Cir. 1989) (holding "sparse" unwanted touching and use of foul language not sufficiently pervasive to support Title VII claim).
stances would be offended. In *Harris v. Forklift Sys.*, the Supreme Court stated that, in order for liability to ensue, it is necessary that not only a reasonable person in that setting be offended by the conduct, but also that the particular complainant be offended. In other words, both an objective and a subjective test are to be applied.

In Scene #2, we addressed the fact that Sam's wife is pregnant. Thus, a moral issue is raised and, under the analysis, is examined with respect to whether a reasonable person as well as the particular plaintiff would be offended by the conduct.

**D. General Guidelines for an Effective Client Interview**

When interviewing a possible victim of sexual harassment, it must obviously be asked when the harassment happened,

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101 See Cronin v. United Serv. Stations, Inc., 809 F. Supp. 922, 929 (M.D. Ala. 1992) (finding harassment of manager from subordinate sufficiently offensive to support Title VII claim); see also Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (stating hostile work environment may be created by supervisor, co-worker, or even stranger).


103 Although the Supreme Court in *Harris*, defined an objectively hostile or abusive work environment as one that "a reasonable person would find hostile or abusive," *Id.* at 370 (reaffirming Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986)), the circuits continue to debate over whether a "reasonable woman" standard would be more appropriate. See Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) (adopting reasonable woman standard stating objective reasonableness should be determined from perspective of person with "same fundamental characteristics" as victim); cf. DeAngelis v. El Paso Mun. Police Officers Ass'n., 51 F.3d 591, 594 (5th Cir. 1995), petition for cert. filed, 64 USLW 3103 (Aug. 7, 1995) (rejecting reasonable woman standard); see also Bonnie B. Westman, *The Reasonable Woman Standard: Preventing Sexual Harassment in the Workplace*, 18 WM. MITCHELL L. REV. 795, 805-09 (1992) (tracing development of reasonable woman standard and concluding that it would reduce sexual harassment and lead to greater equality in workplace). But cf. Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (suggesting that reasonable standard may actually perpetuate status quo).

104 *Harris*, 114 S. Ct. at 370. The Court stated that a plaintiff who is not offended has not had the terms or conditions of her employment altered, and thus, Title VII has not been violated. *Id.*

105 *Id.* The Court concluded that the two part test takes a "middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Id.*

106 In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court stated that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."" *Id.* at 68. Courts have used morality in addressing unwelcomeness. See Reed v. Shepard, 939 F.2d 484, 491 (7th Cir. 1991) (holding plaintiff who participated in lewd conduct was not sexually harassed.)
where it happened, and who was present when it occurred. It should be asked what exactly happened or what exactly was said from the time of the first word or gesture up through the end of the conversation or incident. Some good questions to ask would be: What conversation occurred before the incident? What acts took place during the incident? What was the incident? What response was made to the harasser when the offensive conduct occurred? What did you say to the harasser the next time you saw him or her? Was anyone else present on any occasion? Did you ever tell the harasser that you were offended by the conduct? If so, what did you say and do? Did you ever tell the harasser to stop? Did you ever specifically say that you felt the conduct constituted sexual harassment? Did you talk with anyone else about it? If you did, with whom did you speak, and when? Where were you, and what did that person say in response? Did you make any notes? Did you make any record of the incident? Do you know exactly when it occurred? Do you have a copy of your notes? Can you obtain one? What did you do after the offensive conduct occurred? And very importantly, when did you first learn of the sexual harassment policy and complaint procedure? To whom did you first report the conduct? If the individual did not use the procedure promptly, ask why. Did you ever do anything which you believe may have caused the harasser to believe that you would welcome or at least not be offended by the harasser's conduct? Did you send the harasser a card? Did you ever give the person a gift? What kind of social interaction have you had outside the office? Did you, the complainant, ever engage in profane language? Ever engage in other kinds of off color conversation with the alleged harasser? Did you ever invite the alleged harasser to go somewhere with you? And, what action do you want this company to take and why are you here today? It is suggested that the interviewer be the same gender as the complainant because there may be greater proclivity to be open and frank when discussing the matter.

E. Damages

By virtue of the 1991 amendments to the Civil Rights Act,
the common law remedies provide for greater compensatory and punitive damages than do those under the federal law. Under the common law, there is no specific action for "sexual harassment," albeit, there are several common law torts under which a complainant can bring action in order to seek redress. The federal courts in Pennsylvania and New Jersey are more liberal in allowing a complainant to bring the aforementioned causes of action to support a claim of sexual harassment. Since 1991, compensatory and punitive damages and attorney's fees have been available to a plaintiff prevailing under Title VII. Prior to 1991, many cases may have been treated lightly, but today, these cases have begun to be treated with a great deal of concern and much seriousness.

109 Section 102(b)(3) of the Civil Rights Act of 1991 provides that the sum total of compensatory and punitive damages is subject to a cap that varies with the size of the respondent, as follows:

<table>
<thead>
<tr>
<th>Number of Employees</th>
<th>Cap on Total Damages</th>
</tr>
</thead>
<tbody>
<tr>
<td>15-100</td>
<td>$50,000</td>
</tr>
<tr>
<td>101-200</td>
<td>$100,000</td>
</tr>
<tr>
<td>201-500</td>
<td>$200,000</td>
</tr>
<tr>
<td>more than 500</td>
<td>$300,000</td>
</tr>
</tbody>
</table>

110 See LINDEMANN & KADUE, SEXUAL HARASSMENT, supra note 23, at 351 (listing common law theories of recovery available to victims of sexual harassment in workplace: infliction of emotional distress, assault and battery, false imprisonment, invasion of privacy, defamation, misrepresentation, breach of public policy, implied contract and covenant of good faith and fair dealing, tortious interference with contractual relations, loss of consortium, and negligent hiring or retention).


113 The availability of attorney's fees to the prevailing party is part of the original Civil Rights Act of 1964, § 706(k), codified as 42 U.S.C. § 2000e-5(k). As part of the Civil Rights Act of 1991, § 2000e-5(k) was amended to include expert fees.

114 Prior to the inclusion of compensatory and punitive damages, supra note 112, victims of sexual harassment were limited to equitable remedies such as injunctions, backpay, and reinstatement. 42 U.S.C. § 2000e-5(g).

Attorney's fees can run up claims very quickly. In many instances, attorney's fees far outstrip the actual damages that a plaintiff can either seek or recover. Thus, a client that does not have a sexual harassment policy in place should be strongly encouraged to develop a policy, specifically tailored to that client. The client should understand that, under Title VII, sexual harassment is treated as sex discrimination and can lead to very large damage awards.

37 (Spring 1993) (suggesting that Title VII liability scheme is not sufficient deterrent to discrimination because it does not provide criminal liability).

116 See Cowa v. Prudential Ins. Co. of America, 935 F.2d 522, 527 (2nd Cir. 1991) (rejecting notion that award of reasonable attorney’s fees must be proportional to amount recovered by plaintiff).

117 Id. at 528 (upholding award of attorney’s fees in excess of $54,000 on damage award of $15,000); see also Stair v. Lehigh Valley Carpenters Local Union No. 600, 813 F. Supp. 1112 (E. D. Pa. 1993) (awarding over $83,000 in attorney’s fees despite plaintiff prevailing on only one of six counts and receiving only injunctive relief), aff’d without opinion, 43 F.3d 1463 (3d cir. 1994).