

COMMENTS

SEXUAL HARASSMENT, WRONGFUL DISCHARGE, AND EMPLOYER LIABILITY: THE EMPLOYER'S DILEMMA

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INTRODUCTION

Sexual harassment and wrongful termination are evolving and expanding areas of the law.¹ They are also fields that sometimes conflict, thus creating a difficult dilemma for employers.² When an employer learns that one of its employees is harassing another,³ the

1. See *Intlekofer v. Turnage*, 973 F.2d 773, 786 (9th Cir. 1992) (Wiggins, J., dissenting) (asserting that parameters of sexual harassment are unclear and constantly evolving); *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 427 (E.D. Mich. 1984) (stating that sexual harassment is new and unsettled concept under antidiscrimination law), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 237 (4th ed. Supp. 1985-1989) (stating that sexual harassment law is still developing); Barbara A. Brown, *Labor Law: Wrongful Discharge*, 1987 ANN. SURV. AM. L. 779, 805 (characterizing wrongful discharge law as developing and subject of widespread debate); Note, *Employer Opportunism and the Need for a Just Cause Standard*, 103 HARV. L. REV. 510, 510-16 (1989) [hereinafter *Employer Opportunism*] (discussing changes and developments in employment termination law that involve increased emphasis on job security for individual employees).

2. See Grace M. Kang, *Laws Covering Sex Harassment and Wrongful Dismissal Collide*, WALL ST. J., Sept. 24, 1992, at B1 (discussing conflict between federal sexual harassment law and requirement of just or good cause for discharge contained in some state laws and employment contracts). The Kang article provided the impetus for this Comment.

3. Ordinarily, the harassed, or victim, is female, while the harasser is male. This Comment therefore uses female pronouns to refer to the victim, or alleged victim, and male pronouns to refer to the harasser, or alleged harasser. See *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 n.19 (1st Cir. 1988) (declaring that "[m]ost reported harassment is of women by men"); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (observing that typical scenario involves male supervisor harassing female employee); SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK 3 (Dail A. Neugarten & Jay M. Shafritz eds., 1980) [hereinafter *SEXUALITY IN ORGANIZATIONS*] (noting that although men occasionally are subjected to sexual harassment, women are victimized more often); ELLEN J. WAGNER, *SEXUAL HARASSMENT IN THE WORKPLACE 2* (1992) (asserting that although both sexes can be harassers and victims of harassment, "the great majority of situations involve one or more male harassers and a lower-

employer often must choose between two courses of action, both of which have great potential for liability.⁴ The employer can discharge the harasser and risk a lawsuit or grievance for wrongful termination.⁵ In the alternative, the employer can take milder disciplinary action and risk a lawsuit by the victim if the harassment continues.⁶

Compounding the precarious nature of the employer's dilemma, the Senate confirmation hearings of Justice Clarence Thomas dramatically raised public consciousness of sexual harassment.⁷ As a

level female harassee" and concluding that "[s]he is therefore still very much a proper pronoun when sexual harassment is discussed").

Not only are fewer men than women sexually harassed, but those men that are harassed suffer fewer job-related consequences than female victims of sexual harassment. See Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 350 (1992) (noting statistics that show that male workers are less likely than female workers to quit or get fired after being sexually harassed). According to one study, fewer than one percent of male respondents had ever quit a job because of sexual harassment and none had ever been fired because of harassment. *Id.* at 350 (citing BARBARA A. GUTEK, SEX AND THE WORKPLACE: IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS (1985)).

4. See Kang, *supra* note 2, at B1 (stating that employers face risk of liability to both victim and harasser).

5. It is common for employees discharged for sexual harassment to file wrongful termination lawsuits and grievances. See, e.g., *Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685, 687-88 (7th Cir.) (upholding arbitration award of reinstatement for wrongful discharge grievant who was terminated for sexually assaulting female co-worker), *cert. denied*, 113 S. Ct. 304 (1992); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 841 (2d Cir. 1990) (vacating labor arbitrator's award of reinstatement to employee discharged for sexually harassing co-worker as contrary to public policy), *cert. denied*, 111 S. Ct. 1314 (1991); *Howard v. Department of the Air Force*, 877 F.2d 952, 956 (Fed. Cir. 1989) (rejecting wrongful termination claim of employee discharged for kissing, touching, and making sexual remarks to female co-workers); *Scherer v. Rockwell Int'l Corp.*, 766 F. Supp. 593, 603 (N.D. Ill. 1991) (rejecting claim of wrongful discharge where plaintiff had been discharged for sexual harassment), *aff'd*, 975 F.2d 356 (7th Cir. 1992); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 762 F. Supp. 1187, 1189 (M.D. Pa. 1991) (vacating arbitration award of reinstatement for wrongful discharge grievant who was terminated for sexually abusing customer's employee), *aff'd*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280, 281 (N.M. 1988) (affirming decision in favor of wrongful termination plaintiff discharged for sexual harassment), *cert. denied*, 490 U.S. 1109 (1989); *Shell Pipe Line Corp. v. Texas-Gulf Fed'n*, 97 Lab. Arb. Rep. (BNA) 957, 963 (1991) (Baroni, Arb.) (upholding discharge of complainant who was fired for sexual harassment); *Clover Park Sch. Dist. v. International Union of Operating Eng'rs*, 89 Lab. Arb. Rep. (BNA) 76, 88 (1987) (Boedecker, Arb.) (sustaining wrongful termination grievance of employee discharged for sexual harassment and ordering reinstatement with back pay); *Sugardale Foods Inc. v. Local 17A, United Food & Commercial Workers*, 86 Lab. Arb. Rep. (BNA) 1017, 1022-23 (1986) (Duda, Arb.) (reinstating complainant who was discharged for sexual harassment).

6. See, e.g., *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514-16 (9th Cir. 1989) (holding employer liable for sexual harassment committed by supervisors because employer failed to take adequate remedial action); *Lipsett*, 864 F.2d at 909 (holding that plaintiff presented sufficient facts to establish employer's liability for sexual harassment); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380-81 (W.D.N.C. 1988) (finding employer liable for sexual harassment committed by employees because supervisors took insufficient disciplinary action by placing warning letter in harasser's personnel file); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 785 (E.D. Wis. 1984) (holding employer liable to victim of sexual harassment where harassers did not respond to employer's warnings and other disciplinary actions).

7. See Jane Gross, *Suffering in Silence No More: Fighting Sexual Harassment*, N.Y. TIMES, July 13, 1992, at A1 (reporting that Anita Hill's accusation of sexual harassment against Supreme

result, growing numbers of women are aware of their right to a harassment-free workplace and are taking legal action to enforce that right.⁸ Thus, as more women file complaints, employers are potentially liable to increasing numbers of alleged victims of sexual harassment. In addition, the Civil Rights Act of 1991⁹ expanded the remedies available to sexual harassment plaintiffs, thereby increasing the extent to which employers may be liable to individual victims.¹⁰ The new potential for greater liability and the recent increase in the number of sexual harassment claims enlarge and intensify the dilemmas that employers face with respect to allegations of sexual harassment.¹¹

While the employer's risk of liability to victims of sexual harassment grows, the threat of a lawsuit by the discharged harasser also is

Court nominee Clarence Thomas directly increased public awareness of such misconduct).

8. See Carol Kleiman, *New Tacks Against Sex Harassment*, CHI. TRIB., Sept. 14, 1992, at C2 (stating that extensive media attention on sexual harassment has resulted in greater awareness among women of their rights and how to pursue them); Ron Nissimov, *Sex Harassment Filings Up Since Thomas Hearings*, HOUS. CHRON., July 19, 1992, (Business Section), at 1 (reporting that sexual harassment complaints filed with EEOC rose by 70% after Thomas confirmation hearings); Michelle Osborn, *More Victims Speak Out After Anita Hill Charges*, USA TODAY, Aug. 3, 1992, at 4B (claiming that more women are aware of illegality of sexual harassment and that complaints about harassment increased following Clarence Thomas' confirmation hearings).

9. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. and 2 U.S.C.).

10. Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a (Supp. III 1991). Prior to the Civil Rights Act of 1991, victims of sexual harassment had recourse to only equitable remedies. 42 U.S.C. § 2000(e)(5)(g) (1988) (establishing courts' remedial powers as "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate"). As a result, victims of sexual harassment who did not experience tangible economic loss were precluded from recovering monetary damages under title VII. See Sharon T. Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1615-17 (1990) (explaining that courts generally consider monetary damages to be legal, rather than equitable remedy, and stating that title VII provides no recovery for noneconomic injuries).

The Civil Rights Act of 1991 expanded the remedies for sexual harassment by allowing victims to recover compensatory and punitive damages. 42 U.S.C. § 1981a (Supp. III 1991). The 1991 Act, however, placed caps on the total amount of damages that courts may award to individual victims of sexual harassment. *Id.* § 1981a(b)(3). The statute established the caps in accordance with the size of the employer's business. The caps range from \$50,000 for employers with 15 to 100 employees, to \$300,000 for employers with more than 500 employees. *Id.* § 1981a(b)(3)(A)-(D). Critics of the 1991 Act argue, however, that the caps are arbitrary because they are based on the size of the employer's business rather than the severity of the harassment. See Judith Lichtman & Holly Fechner, *Almost There*, 19 HUM. RTS. Q., Summer 1992, at 16, 16 (discussing criticisms of Civil Rights Act of 1991). Critics also argue that the caps are discriminatory because they limit damages for gender discrimination only while damages for discrimination based on race or national origin, which are recoverable under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988 & Supp. III 1991), remain unlimited. Lichtman & Fechner, *supra*, at 18-19 (summarizing effects of caps on damages).

11. Cf. David A. Larson, *What Can You Say, Where Can You Say It, and to Whom? A Guide to Understanding and Preventing Unlawful Sexual Harassment*, 25 CREIGHTON L. REV. 827, 827 (1992) ("Employers must treat allegations of sexual misconduct more seriously now that juries have the authority to award both compensatory and punitive damages.").

increasing. Publicity about wrongful discharge litigation may have raised employees' awareness of their rights, and thus may have augmented the likelihood that a discharged employee will sue the employer.¹² Furthermore, claims for wrongful termination are meeting an increasingly favorable reception from judges and arbitrators as the law moves away from the traditional common-law doctrine, which allows termination of employment at the will of either the employer or the employee.¹³ Due to the rising number of

12. See Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 NEB. L. REV. 178, 184-85 (1988) (arguing that during 1980s media publicity about demise of "at-will" doctrine increased public consciousness of rights of discharged employees and resulted in greater number of wrongful discharge lawsuits).

13. The doctrine of employment at will "is a court developed doctrine drawn from a 19th century treatise on the subject of master and servant." *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1085 (Wash. 1984) (en banc) (citing H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (J.D. Parsons, Jr. ed., 1877)). The Wood treatise established the "American Rule" whereby contracts for employment of indefinite duration were terminable by either party at any time and for any reason. See *Brown*, *supra* note 1, at 780 (detailing origins of employment-at-will doctrine). The majority of American courts quickly adopted Wood's American Rule. *Id.* See, e.g., *Coppage v. Kansas*, 236 U.S. 1, 24 (1915) (adopting doctrine of employment at will but recognizing that employment contracts still may be enforced); *Adair v. United States*, 208 U.S. 161, 175 (1908) (affirming "the right of the employer, for whatever reason, to dispense with the services of [his or her] employe[e]"); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884) (holding that employers may dismiss employees "for good cause, for no cause, or even for cause morally wrong, without being guilty of legal wrong").

Since those early days, however, changing legal, social, and economic conditions have effected an evolution in the employment relationship. Today, the distribution of power between employers and employees, although not equal, is more evenly balanced. See *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (discussing evolution of employment relationship as analogous to development of property law which originally was based on ancient feudal relationships that courts now have abandoned as outdated and inapposite to modern reality); Tobias, *supra* note 12, at 181-84 (describing movement for change in employment termination law and noting public concern for employee protection against arbitrary and discriminatory discharge as well as judicial and state legislative responses to such concerns). Because of these changes, some courts have repudiated the employment-at-will doctrine in wrongful termination cases. See, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925-26 (Ct. App. 1981) (finding in favor of wrongful discharge plaintiff based on "form of estoppel" created by employee's long length of service and employer's regulation expressing policy of good faith and fair dealing); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (holding for plaintiff employee based on implied contractual provision requiring just cause for termination); *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153-54 (Ohio 1985) (recognizing promissory estoppel exception to employment-at-will doctrine where employee relied on employer's statements to his detriment); *Thompson*, 685 P.2d at 1088-89 (adopting exceptions to employment-at-will doctrine based on promissory estoppel and public policy considerations); see also *Employer Opportunism*, *supra* note 1, at 510-16 (reviewing judicially created exceptions to doctrine of employment at will based on public policy concerns and implied contract theories, and noting that commentators generally approve of such exceptions and recommend greater judicial and legislative reform to abolish employment at will); *infra* notes 102-15 and accompanying text (discussing history of employment at will and development of oppositional legal theory).

Wrongful termination plaintiffs also may receive favorable treatment from sympathetic jurors. See PAUL C. WEILER, *GOVERNING THE WORKPLACE* 60 (1990) (stating that in lawsuits between unemployed worker and "deep pocket" employer, juries are likely to "err on the side of finding the discharge to be improper, even where it really was not"); Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 843 (1991) (arguing that even employees with meritless claims may succeed in wrongful termination suits due to

wrongful discharge lawsuits and the movement to expand employee rights, employers face an increasing risk of liability to employees discharged for sexual harassment.

This Comment will explore the intersection of employer liability for sexual harassment and wrongful termination. Part I introduces the sources of employer liability: title VII of the Civil Rights Act of 1964 (title VII)¹⁴ and contractual, statutory, and common law requirements of just cause for dismissal. Part II discusses special problems surrounding union employees and labor arbitration in light of the differences between arbitration and trial. Part III evaluates existing theories for limiting employer liability. Finally, Part IV recommends protective measures by which employers can minimize their liability through measures including implementing policies for preventing and redressing sexual harassment, adopting special arbitration rules for sexual harassment discharge grievances, and stipulating in all employment contracts that sexual harassment is just cause for dismissal.

I. SOURCES OF EMPLOYER LIABILITY

A. *Sexual Harassment*

1. *Social context*

Sexual harassment is a serious problem in the American workplace.¹⁵ In fact, the majority of working women have experienced sexual harassment during their working lives.¹⁶ Most victims

sympathetic jurors).

14. 42 U.S.C. § 2000e (1988 & Supp. II 1990 & Supp. III 1991).

15. See *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (stating that sexual harassment "is a major problem in the workplace") (footnote omitted); Thomas I. Emerson, *Foreword to CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN* vii, vii (1979) (asserting that sexual harassment is "one of the most pervasive but carefully ignored features of our national life"); Ken Jennings & Melissa Clapp, *A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases*, 1989 LAB. L.J. 756, 756 (characterizing sexual harassment as "widespread insidious problem") (footnote omitted); SEXUALITY IN ORGANIZATIONS, *supra* note 3, at 57 (claiming that "[s]exual harassment may be one of the most pervasive problems facing working women. . . . [It] is centrally involved in the issue of women's equality").

16. See W.B. Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, 40 ARB. J. 55, 55 (1985) (noting surveys which find that between 70% and 90% of working women have experienced sexual harassment at work); Kleiman, *supra* note 8, at C2 (reporting that recent government study showed that 85% of all working women have been sexually harassed). In 1988, a study of Federal Government workers determined that over 40% of female federal employees had experienced incidents of sexual harassment during the last two years. U.S. MERIT SYS. PROTECTION BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 11 (1988) [hereinafter MERIT SYSTEMS UPDATE]. The same study found that 14% of all male respondents indicated that they had experienced some form of unwelcome sexual conduct during the last

of harassment, however, never file charges against their harassers.¹⁷ Victims of sexual harassment may decide not to take formal measures to stop their harassment because of embarrassment, fear of retaliation, fear of being labeled as a troublemaker or complainer, doubt that formal measures will stop the harassment, fear that employers or co-workers will not take the victim's allegations seriously, and fear that others will blame the victim for inviting the harassment.¹⁸

The social, economic, and personal costs of sexual harassment are tremendous. Victims of sexual harassment often suffer physical, mental,¹⁹ and economic injury.²⁰ Sexual harassment also harms employers, who may experience financial loss from decreased productivity, increased use of sick leave, and increased job turnover.²¹

two years. *Id.* at 1-2.

17. See Kleiman, *supra* note 8, at C2 (reporting that only 6% of employed women file charges of sexual harassment). The 1988 study of sexual harassment in the Federal Government showed that only 5% of respondents, both male and female, who had been sexually harassed had taken formal action about the harassment. MERIT SYSTEMS UPDATE, *supra* note 16, at 23. Most of the victims of harassment that pursued formal action "viewed the actions they took as nonproductive." *Id.*

18. See MACKINNON, *supra* note 15, at 48-51 (characterizing fears shared both by women who do and do not complain as including fears that their complaints will be trivialized, that they will be viewed as unprofessional, and that men in their lives will believe that they "were asking for it"); WOMEN'S LEGAL DEFENSE FUND, SEXUAL HARASSMENT: LEGAL AND POLICY ISSUES 2 (1992) (discussing 1988 magazine survey identifying "fear of retaliation" as main reason for not reporting harassment); MERIT SYSTEMS UPDATE, *supra* note 16, at 28, fig. 3-5 (reporting victims' reasons for not formally reporting harassment).

19. See, e.g., *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989) (reviewing plaintiff's claim of severe depression resulting from sexual and racial harassment by supervisor); *Waltman v. International Paper Co.*, 875 F.2d 468, 472 (5th Cir. 1989) (discussing victim's hospitalization for depression allegedly caused by two years of harassment in hostile working environment); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) (stating that plaintiff suffered severe emotional injury as result of sexual harassment at work); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 375 (W.D.N.C. 1988) (discussing physical and emotional illnesses, including depression, anxiety, vomiting, chronic diarrhea, and seizures, suffered by plaintiff as result of sexual harassment by co-workers); see also MACKINNON, *supra* note 15, at 47-55 (discussing physical and emotional suffering experienced by victims of sexual harassment); Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, in SEXUALITY IN ORGANIZATIONS*, *supra* note 3, at 70 (reviewing survey of working women who had experienced sexual harassment and finding that 96% of respondents suffered emotional stress, including nervousness, fear, anger, and sleeplessness, while 63% experienced physical ailments resulting from stress, including headaches and nausea).

20. See Crull, *supra* note 19, at 69-71 (reporting results of survey showing that sexual harassment directly and indirectly damages women's economic security). Crull maintains that retaliatory or constructive discharge and denial of promotion directly impair economic security. *Id.* Indirect damage results from decreased productivity, reduced concentration, and health problems that require absence from work. *Id.*

21. See MERIT SYSTEMS UPDATE, *supra* note 16, at 39 (reporting that sexual harassment cost Federal Government \$267 million over two years, including costs of reduced productivity, sick leave, and replacing employees who left due to harassment); Kleiman, *supra* note 8, at C2 (asserting that employers who do not eliminate sexual harassment from workplace lose productive workers, impair relations with customers, incur legal expenses, and suffer reduced sales); Osborn, *supra* note 8, at 4B (noting results of 1988 study that estimated annual cost of

2. Legal context

a. Title VII

Although sexual harassment has existed since women entered the workplace, only recently have victims taken legal action against their harassers. The first lawsuits alleging sex discrimination in the form of sexual harassment did not enter the courts until the 1970s.²² As a result of its recent development, sexual harassment jurisprudence is relatively unsettled.²³ The U.S. Supreme Court has decided only one sexual harassment case,²⁴ and although some trends exist among the lower courts, there is a wide range of opinion.²⁵

Since the mid-1970s, victims of sexual harassment have sought relief under the theory that sexual harassment is sex discrimination and, therefore, is in violation of title VII.²⁶ Title VII provides in part that

sexual harassment to each Fortune 500 company at \$6.7 million, excluding litigation costs).

22. See generally DAVID P. TWOMEY, *EQUAL EMPLOYMENT OPPORTUNITY LAW* 22 (2d ed. 1990) (stating that first sexual harassment claims appeared in courts in mid-1970s); Gutek, *supra* note 3, at 335-36 (stating that sexual harassment gained "considerable attention" in mid-1970s); Nelson, *supra* note 16, at 55 (declaring that "sexual harassment exploded upon the national consciousness" in 1970s).

23. See MACKINNON, *supra* note 15, at 59-82 (summarizing sexual harassment cases that demonstrate wide range of judicial interpretation during evolution of sexual harassment law).

24. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (holding that "hostile environment" sexual harassment is violative of title VII). The Court recently heard arguments in its second sexual harassment case, *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993). *Harris* addresses the question of whether a plaintiff must demonstrate psychological injury to prove that harassment was sufficiently severe or pervasive to alter the conditions of employment or to create a hostile work environment. *Harris v. Forklift Sys., Inc.*, No. 3:89-0557, U.S. Dist. LEXIS 20115, at *13-*15 (M.D. Tenn. Nov. 28, 1990), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993). See also *infra* notes 54-57 and accompanying text (explaining that sexual harassment claim includes threshold question of severity and pervasiveness).

25. See MACKINNON, *supra* note 15, at 59-82 (showing trend in sexual harassment case law and noting different definitions that courts use for sexual harassment).

26. See *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (denying claim that sexual harassment was sex discrimination under title VII), *vacated*, 562 F.2d 55 (9th Cir. 1977). *Corne* was the first reported case involving a sexual harassment claim under title VII. MACKINNON, *supra* note 15, at 60.

In addition to title VII relief, some victims of sexual harassment may establish causes of action under state statutes and common law doctrines. Examples of these other legal avenues include: state statutes banning sex-based employment discrimination; tort claims such as battery, assault, and intentional infliction of emotional distress; criminal actions; and where the harasser is a government employee, constitutional equal protection claims. See BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 12 (1992) (discussing overlap between common-law actions and sexual discrimination actions); WOMEN'S LEGAL DEFENSE FUND, *supra* note 18, at 4-5 (discussing legal alternatives to title VII lawsuits); see also *Arnold v. United States*, 816 F.2d 1306, 1311-12 (9th Cir. 1987) (holding supervisor liable for battery for kissing and fondling employee); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205-06 (8th Cir. 1984) (recognizing plaintiff's claim for wrongful discharge where supervisor fired plaintiff for refusing sexual advances); *Ford v. Revlon, Inc.*, 734 P.2d 580, 585-86 (Ariz. 1987) (holding employer liable for intentional infliction of emotional distress for failing to remedy sexual harassment

it is unlawful for any employer²⁷ to discriminate on the basis of sex with respect to "compensation, terms, conditions, or privileges" of employment.²⁸ Because a harasser selects his victim because she is female and does not harass women and men equally,²⁹ the harasser discriminates on the basis of sex.³⁰ In 1986, the Supreme Court accepted the concept of sexual harassment as sex discrimination by holding that the two forms of sexual harassment recognized by the lower courts and the Equal Employment Opportunity Commission were actionable as sex discrimination under title VII.³¹

after victim complained).

27. "Employer" is defined as a person, which includes a business, with 15 or more employees. 42 U.S.C. § 2000e(b) (1988).

28. 42 U.S.C. § 2000e-2(a)(1) (1988). The full text of this section states:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Id.

29. See *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating that typical case involves male supervisor who makes sexual overtures only to female worker). According to the court in *Henson*, because the supervisor did not make sexual advances to male employees, it is "a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment." *Id.*; see also *MACKINNON*, *supra* note 15, at 182 (arguing that sexual harassment is discrimination based on sex because "[t]he behaviors to which women are subjected in sexual harassment are behaviors specifically defined and directed toward the characteristics which define women's sexuality: secondary sex characteristics and sex-role behavior"); *TWOMEY*, *supra* note 22, at 23 (discussing sexual harassment as sex discrimination, and citing leading case that holds that "[b]ut for her womanhood . . . [plaintiff's] participation in sexual activity would never have been solicited") (quoting *Barnes v. Costle*, 561 F.2d 983, 990 (D.C. Cir. 1977)).

Several courts and commentators have challenged the notion that sexual harassment is always discrimination based on sex. Such challenges are based on a theoretical supervisor that harasses men and women subordinates equally. See, e.g., *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (noting that sexual conduct equally offensive to female and male workers would not create title VII claim because sexes were treated alike), *cert. denied*, 481 U.S. 1041 (1987); *Henson*, 682 F.2d at 904 (hypothesizing existence of situations where supervisor makes sexual advances to both female and male workers and concluding that such cases would neither violate title VII nor constitute sexual harassment on basis of sex because men and women are treated alike); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 357-59 (1992) (using example of bisexual harasser to demonstrate that application of title VII to sexual harassment intolerably stretches statutory construction). But see *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (stating that "[o]nly by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination—where a bisexual supervisor harasses men and women alike") (citing *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977)).

30. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (stating that "without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"); *Henson*, 682 F.2d at 902 ("A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment.").

31. *Meritor*, 477 U.S. at 66.

Sexual harassment is defined legally as unwelcome³² sexual advances and other verbal³³ or physical conduct³⁴ of a sexual or sex-based nature³⁵ that alter the terms or conditions of the victim's employment. Thus, sexual harassment plaintiffs must establish three elements: (1) that the complained-of conduct was unwelcome;³⁶ (2) that the harassment was on the basis of the victim's sex;³⁷ and (3) that the harassment affected the victim's compensation or the terms, conditions, or privileges of her employment.³⁸ Plaintiffs must meet additional requirements depending on the type of sexual harassment that they allege.³⁹

The requirement that the advances or other sexual conduct be unwelcome is central to the definition of sexual harassment.⁴⁰ Conduct is unwelcome "in the sense that the [victim] did not solicit

32. See *id.* at 68 (stating that gravamen of sexual harassment claim is that alleged sexual advances were "unwelcome"). For a discussion of the "unwelcome" requirement, see *infra* notes 42-44 and accompanying text.

33. See, e.g., *Waltman v. International Paper Co.*, 875 F.2d 468, 470-71 (5th Cir. 1989) (finding that co-workers sexually harassed plaintiff by using public address system to direct obscenities and other lewd and suggestive comments toward plaintiff); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983) (explaining that harassment of plaintiff "took the form of extremely vulgar and offensive sexually related epithets addressed to and employed about" plaintiff). The court in *Katz* further noted that "[t]he 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.'" *Id.*; see also *Henson v. City of Dundee*, 682 F.2d 897, 899-901 (11th Cir. 1982) (finding that supervisor sexually harassed plaintiff and co-worker by "subject[ing] them to numerous harangues of demeaning sexual inquiries and vulgarities").

34. See, e.g., *Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685, 686 n.1 (7th Cir.) (explaining how co-worker approached victim from behind as she was working and grabbed her breasts), *cert. denied*, 113 S. Ct. 304 (1992); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417 (7th Cir. 1989) (stating that supervisor showed plaintiff racist pornographic pictures); *Waltman*, 875 F.2d at 471 (reviewing evidence of sexually explicit drawings, sexually oriented calendars on walls, co-worker sticking tongue in plaintiff's ear, and co-worker pinching plaintiff's breast).

35. Plaintiffs have been successful in sexual harassment lawsuits where the harassment complained of was sex-based, rather than sexual. See *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013-14 (8th Cir. 1988) (holding that calling plaintiff cruel nickname and urinating into gas tank of plaintiff's automobile constituted sex-based harassment and therefore was actionable sexual harassment despite lack of sexual nature); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (rejecting argument that sexual harassment must be in form of sexual advances or other conduct with sexual overtones). The court in *Hicks* held that "harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII." *Hicks*, 833 F.2d at 1415.

36. See *infra* notes 42-44 and accompanying text (discussing requirement that harassment be "unwelcome").

37. See *supra* notes 29-30 and accompanying text (noting that harassment must be sex-based).

38. See 42 U.S.C. § 2000e-2(a)(1) (1988) (defining unlawful employment practices for employers).

39. See *infra* notes 45-57 and accompanying text (discussing two forms of sexual harassment—quid pro quo and hostile environment).

40. See *supra* note 32 (noting central importance of unwelcome requirement).

or incite it, and in the sense that the [victim] regarded the conduct as undesirable or offensive."⁴¹ Thus, the determination whether conduct is unwelcome requires a subjective inquiry into the victim's perception of the alleged harasser's conduct.⁴² Because "unwelcome" is subjectively defined and therefore difficult to prove,⁴³ the courts look to the victim's conduct for objectively verifiable indicia of her subjective state of mind.⁴⁴

Under title VII, courts recognize two forms of sexual harassment: quid pro quo and hostile environment sexual harassment.⁴⁵ Quid pro quo sexual harassment occurs when the harasser makes an employment decision based upon the victim's submission to, or rejection of, his sexual demands.⁴⁶ Because it conditions an economic benefit on the victim's compliance with the harasser's sexual demands, quid pro quo harassment violates title VII by affecting the victim's compensation and the terms of her employment.⁴⁷ Thus, a plaintiff alleging quid pro quo harassment must show that her harasser withheld an employment benefit because she refused his

41. *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (citation omitted).

42. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68-69 (1986) (describing "unwelcomeness" requirement as whether alleged victim actually found conduct unwelcome); *Waltman v. International Paper Co.*, 875 F.2d 468, 484 (5th Cir. 1989) (Jones, J., dissenting) (stating that unwelcomeness requirement "lends a subjective component to the definition [of sexual harassment]") (footnote omitted); *Henson*, 682 F.2d at 903 (stating that definition of sexual harassment depends on plaintiff's perception of harasser's conduct as undesirable and offensive).

43. *Meritor*, 477 U.S. at 68 (noting difficulty of proving that conduct is unwelcome).

44. See *id.* ("The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome . . ."). It is important to distinguish "unwelcome" from "involuntary." A victim of harassment may voluntarily submit to sexual activity with her harasser without welcoming her harasser's advances. See *id.* (noting that "[t]he correct inquiry is . . . not whether her actual participation in sexual intercourse was voluntary," but rather if victim's conduct showed that sexual advances were not welcome); WAGNER, *supra* note 3, at 19-21 (defining "unwelcome" as unsolicited and offensive conduct to which victim may voluntarily acquiesce, and "involuntary" as undesirable conduct endured without submission).

45. See, e.g., *Meritor*, 477 U.S. at 65-66 (permitting action for hostile environment harassment under title VII); *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991) (stating that although legislative history provides little guidance in interpreting conduct, courts have defined two kinds of sexual harassment); *Tunis v. Corning Glass Works*, 747 F. Supp. 951, 958 (S.D.N.Y. 1990) (asserting that plaintiff may proceed under title VII for quid pro quo and hostile environment sexual harassment), *aff'd*, 930 F.2d 910 (2d Cir. 1991); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380 (W.D.N.C. 1988) (stating that U.S. Supreme Court explicitly recognized that sexual harassment can occur in two forms: quid pro quo and hostile environment).

46. See EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1992) [hereinafter EEOC Guidelines] (explaining that quid pro quo sexual harassment occurs when harasser uses victim's submission or rejection of sexual advances as grounds for employment decision); *MACKINNON*, *supra* note 15, at 32 (defining quid pro quo harassment as explicit exchange of sex for employment benefit).

47. See *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (holding that male supervisor's dismissal of female employee in retaliation for refusal of sexual advances constituted sexual discrimination because it "created an artificial barrier to employment which was placed before one gender and not the other").

advances or, in the alternative, granted such a benefit because she complied. For example, a woman whose supervisor says that he will promote her only if she has sex with him is a victim of quid pro quo harassment.⁴⁸

Hostile environment harassment occurs where the harasser's conduct "unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment."⁴⁹ By converting the victim's workplace into a hostile environment, this type of sexual harassment affects the conditions of the victim's employment in violation of title VII.⁵⁰ The harassment need not create any tangible economic detriment to be

48. See *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (stating that typical case of quid pro quo sexual harassment involves harasser using authority to compel subordinate to submit to sexual demands); see also *Barnes v. Costle*, 561 F.2d 983, 984-85 (D.C. Cir. 1977) (reviewing claim where supervisor fired plaintiff for rejecting sexual advances); *Miller v. Bank of Am.*, 418 F. Supp. 233, 233 (N.D. Cal. 1976) (reviewing plaintiff's claim that supervisor promised promotion if plaintiff were sexually cooperative), *rev'd*, 600 F.2d 211 (9th Cir. 1979).

49. EEOC Guidelines, *supra* note 46, § 1604.11(a)(3). Most courts have embraced this definition of hostile environment sexual harassment. See, e.g., *Meritor*, 477 U.S. at 65-66 (approving EEOC's definition of hostile environment sexual harassment and recognizing that hostile environment harassment violates title VII); *Ellison*, 924 F.2d at 876-78 (interpreting *Meritor* as recognizing hostile environment sexual harassment where offensive behavior unreasonably interferes with victim's work performance or creates abusive employment environment); *Henson*, 682 F.2d at 902 (recognizing hostile environment sexual harassment as gender discrimination). Indeed, a leading commentator describes this form of non-quid pro quo sexual harassment as something which "simply makes the work environment unbearable." MACKINNON, *supra* note 15, at 40.

Some courts require a showing that the effects of the harassment, rather than the harassment itself, were severe and pervasive. See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986) (holding that prima facie case of hostile environment sexual harassment exists only if plaintiff proves that "intimidating, hostile, or offensive working environment . . . affected seriously the psychological [sic] well-being of the plaintiff"), *cert. denied*, 481 U.S. 1041 (1987). Such a requirement, however, would withhold relief from a victim of hostile environment sexual harassment until she became psychologically debilitated, at which point relief might be too late. See *Ellison*, 924 F.2d at 878 (contending that victims need not suffer harassment until they are psychologically injured). This result seems completely contrary to the aim of title VII, which is to protect the psychological, as well as the economic, well-being of employees who suffer discrimination. See *Meritor*, 477 U.S. at 64 (asserting that "congressional intent [of title VII was] 'to strike at the entire spectrum' of gender discrimination, including psychological injury as well as economic loss") (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))); see also *Ellison*, 924 F.2d at 877-78 (arguing that court in *Rabidue* misinterpreted *Meritor* and holding that "Title VII's protection of employees from sex discrimination comes into play long before the point where victims of sexual harassment require psychiatric assistance").

50. See *Meritor*, 477 U.S. at 67 (stating that sexual harassment is actionable when it is "sufficiently severe or pervasive" to create hostile work environment by altering conditions of employment); see also *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 (E.D. Mich. 1984) (finding sexual harassment in violation of title VII where conditions of victim's employment were affected because of her sex), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The court in *Rabidue* emphasized the importance of the inclusion of the word "conditions" in the statute as evidence that sexual harassment is gender discrimination under title VII. *Rabidue*, 584 F. Supp. at 428. The court in *Rabidue* explained that "where a female employee is subject to sex harassment, she is subject to a condition of employment that is invidiously discriminatory as opposed to the conditions of employment of male employees." *Id.*

actionable.⁵¹ Because hostile environment harassment involves neither a threat to damage, nor a promise to improve, the victim's employment status, co-workers as well as supervisors can commit hostile environment harassment.⁵² For example, the U.S. Court of Appeals for the Fifth Circuit found that hostile environment sexual harassment existed where a woman's male co-workers continuously wrote sexual graffiti about her, propositioned her for sex, and displayed pornography in the workplace.⁵³

To prove a case of hostile environment sexual harassment, a plaintiff must show that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment or create an abusive working environment.⁵⁴ To determine whether the harassment meets the threshold requirement of severity or pervasiveness, the trend among the U.S. Courts of Appeal is to use a two-pronged analysis.⁵⁵ First, the court employs an objective test to

51. See *Meritor*, 477 U.S. at 64 (rejecting argument that plaintiff must show tangible economic loss in order to prove title VII violation). The Court in *Meritor* emphasized that "the language of title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment." *Id.* (quoting *Manhart*, 435 U.S. at 707 n.13 (citing *Sprogis*, 444 F.2d at 1198)).

52. Cf. Sally E. Barker & Loretta K. Haggard, *A Labor Union's Duties and Potential Liabilities Arising out of Coworker Complaints of Sexual Harassment*, 11 ST. LOUIS U. PUB. L. REV. 135, 141 (1992) (arguing that hostile environment harassment is predominantly between co-workers); Jonathan S. Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases*, 1986 LAB. L.J. 712, 713 (stating that co-worker harassment is primarily hostile environment sexual harassment because co-worker cannot grant or deny promotion or pay raise to another co-worker).

53. *Waltman v. International Paper Co.*, 875 F.2d 468, 476 (5th Cir. 1989).

54. See *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'") (alteration in original) (emphasis added) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

55. See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that trier of fact in hostile environment case should "adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances" and also consider whether plaintiff was actually offended), *cert. denied*, 481 U.S. 1041 (1987). The court in *Rabidue* was the first to adopt the two-pronged objective and subjective analysis, and the case is often cited by courts that subsequently adopted the test. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482-83 (3d Cir. 1990) (stating that plaintiff must show that reasonable person of same sex would find defendant's conduct harassing and that plaintiff actually perceived it as harassment); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) (applying two-part analysis considering effect of defendant's conduct on reasonable person and on plaintiff); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) (adopting *Rabidue's* two-part combined objective and subjective analysis).

The court in *Rabidue*, however, made several errors in applying the test. First, the court stated that consideration must be given to the "lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment." *Rabidue*, 805 F.2d at 620. Thus, *Rabidue* suggested that an employee cannot state a claim of sexual harassment if the work environment was hostile from the start of her employment. This limitation on hostile environment claims is contrary to the Supreme Court's finding that "[t]itle

determine whether the conduct in question would be sufficiently severe or pervasive to alter the employment conditions of a reasonable person in the same or similar circumstances.⁵⁶ The court then examines the plaintiff's subjective experience to discern whether the harassment actually altered the plaintiff's employment conditions.⁵⁷

b. The Equal Employment Opportunity Commission

To advance title VII's prohibition on employment discrimination, Congress created the Equal Employment Opportunity Commission (EEOC)⁵⁸ and vested it with the power to receive, investigate, settle,

VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65; see *Rabidue*, 805 F.2d at 626-27 (Keith, J., concurring in part and dissenting in part) (disagreeing with majority's consideration of prevailing work environment and suggestion that female employees assume risk of working in offensive environment and stating that "no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative").

Second, the *Rabidue* majority considered the complained-of sexually oriented posters "in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places" and finds their effect on the plaintiff's environment to be de minimis. *Rabidue*, 805 F.2d at 622. This analysis is faulty because it ignored the distinction between the workplace and other settings. While the subjugation of women may be commonplace elsewhere, title VII forbids it within the workplace. See 42 U.S.C. § 2000e-2(a)(1) (1988) (clarifying prohibition of employment practices that discriminate on basis of sex). In addition, the court in *Rabidue* erred by measuring the alleged harassment against a sexist norm rather than against the nondiscriminatory ideal implicit in title VII. See *Meritor*, 477 U.S. at 65 (interpreting title VII as creating right to discrimination-free workplace).

56. See, e.g., *Andrews*, 895 F.2d at 1482-83 (stating that court must consider effect of alleged harassment on objective reasonable person as one element of test for hostile environment); *Brooms*, 881 F.2d at 419 (identifying first part of two-pronged test as effect of defendant's conduct on reasonable person); *Rabidue*, 805 F.2d at 620 (describing first element of test as effect of alleged harassment on reasonable person in same circumstances).

Some courts and judges insist that the objective test consider the victim's gender because to do otherwise would perpetuate "ingrained notions of reasonable behavior fashioned by the offenders." *Rabidue*, 805 F.2d at 626 (Keith, J., dissenting); see also *Ellison v. Brady*, 924 F.2d 872, 878-79 (9th Cir. 1991) (measuring hostile conduct based on woman's perspective because male-biased reasonable person standard creates "risk of reinforcing the prevailing level of discrimination"). Similarly, courts that apply a one-prong objective test have adopted reasonable woman or reasonable victim standards in recognition of the inherent differences in the way that men and women may interpret the same encounter. See *Ellison*, 924 F.2d at 878-79 (adopting reasonable woman standard and stating that "[c]onduct that many men consider unobjectionable may offend many women"); cf. *Lipsett v. University of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988) (discussing conduct that male supervisor may find innocuous but that female subordinate may perceive as offensive and harassing).

57. See, e.g., *Andrews*, 895 F.2d at 1483-84 (emphasizing importance of subjective element of test for hostile environment sexual harassment); *Brooms*, 881 F.2d at 419 (describing second prong of "sufficiently severe or pervasive" test as "the actual effect upon the particular plaintiff bringing the claim"); *Paroline*, 879 F.2d at 105 (requiring plaintiff to show that harassment "interfered with her ability to perform her work or significantly affected her psychological well-being"); *Rabidue*, 805 F.2d at 620 (stating that in addition to proving impact of offending conduct on reasonable person, plaintiff must "demonstrate that she was actually offended by the defendant's conduct").

58. See 42 U.S.C. § 2000e-4(a) (1988) (creating EEOC and defining its composition).

and litigate title VII claims.⁵⁹ Congress chose "[c]ooperation and voluntary compliance" as the primary means of eliminating employment discrimination.⁶⁰ As a result, the EEOC has no direct enforcement powers; instead, it employs informal means to eliminate violative employment practices.⁶¹ To promote the extrajudicial resolution of title VII claims, the law requires complainants to file charges with the EEOC⁶² and prohibits initiation of a lawsuit in court before completion of the EEOC complaint process.⁶³ The ultimate power to enforce title VII rests with the federal courts.⁶⁴

Upon receipt of a harassment claim, the EEOC investigates the charges.⁶⁵ Where it finds reasonable cause to believe that the charge is true, the EEOC has the authority to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."⁶⁶ Should these informal methods fail, the EEOC may file a civil lawsuit against the employer in federal court.⁶⁷ If the EEOC decides not to file such a lawsuit, it grants the complainant the right to sue.⁶⁸ Only then may a complainant file a lawsuit against her employer.⁶⁹

59. *Id.* § 2000e-5(a) to (b).

60. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973) (discussing Congress' preferred methods of handling employment discrimination cases).

61. *See* 42 U.S.C. § 2000e-5(b) (endowing EEOC with power to utilize "informal methods of conference, conciliation, and persuasion" to end unlawful employment practices); *see also Alexander*, 415 U.S. at 44 (stating that by vesting EEOC with only informal enforcement powers and by placing ultimate enforcement power in federal courts, Congress designed title VII complaint process to promote settlement and discourage litigation).

62. *See* 42 U.S.C. § 2000e-5(e) (requiring that complainant file complaint with EEOC within 180 days after alleged unlawful employment practice).

63. *See, e.g., Alexander*, 415 U.S. at 47 (stating that prerequisites for bringing title VII claim in federal court are met when plaintiff files claim with EEOC and receives and acts on notice from EEOC of right to sue); *Movement for Opportunity & Equality v. General Motors Corp.*, 622 F.2d 1235, 1238-40 (7th Cir. 1980) (holding that to maintain suit against employer under title VII, plaintiff must file charges with EEOC and must receive letter of right to sue from EEOC); *Wells v. Sherwood Medical Indus., Inc.*, 549 F.2d 1170, 1171 n.1 (8th Cir. 1977) (holding that complainant can bring title VII action after she has filed charges with EEOC, has acquired right to sue from EEOC, and acts upon that right); *Local 179, United Textile Workers v. Federal Paper Stock Co.*, 461 F.2d 849, 850-51 (8th Cir. 1972) (holding that plaintiff pursuing lawsuit under title VII must file charges with EEOC and receive and act upon notice from EEOC of her right to sue).

64. *See* 42 U.S.C. § 2000e-5(g) (endowing courts with power to grant equitable relief to prevailing title VII plaintiff); *Alexander*, 415 U.S. at 44 (stating that "final responsibility for enforcement of title VII is vested with federal courts").

65. *See* 42 U.S.C. § 2000e-5(b) (explaining EEOC investigatory duties regarding complaints).

66. *Id.*

67. *Id.* § 2000e-5(f)(1).

68. *Id.*

69. *See id.* (withholding notice of right to sue until after EEOC declines); *see also supra* note 63 and accompanying text (reviewing cases that discuss complainant's right to pursue civil suit against employer for title VII violation).

c. *EEOC guidelines on sexual harassment*

In 1980, the EEOC published sexual harassment guidelines⁷⁰ that established sexual harassment as a violation of title VII,⁷¹ defined sexual harassment,⁷² and outlined principles for employer liability.⁷³ According to the EEOC guidelines, employers are strictly liable for sexual harassment committed by their "agents and supervisory employees" regardless of the employer's knowledge or lack of knowledge of the harassment.⁷⁴ By imposing strict liability for harassment committed by supervisors and agents, the guidelines adhere to "the general standard of employer liability with respect to agents and supervisory employees" and are consistent with title VII case law.⁷⁵

With respect to harassment among co-workers, the guidelines prescribe employer liability where the employer has actual or constructive knowledge of the harassment.⁷⁶ The employer may escape liability by showing that it "took immediate and appropriate corrective action" in response to the harassment.⁷⁷ The "appropriate action" requirement is ambiguous and confusing for employers.⁷⁸ In response to requests for clarification received during the comment period following publication of the proposed guidelines, however, the EEOC deferred further definition of the requirement to the courts for future case-by-case determinations.⁷⁹

The EEOC guidelines are merely advisory. Title VII authorizes the EEOC to promulgate procedural regulations.⁸⁰ The guidelines on

70. EEOC Guidelines, *supra* note 46, § 1604.11.

71. EEOC Guidelines, *supra* note 46, § 1604.11(a).

72. EEOC Guidelines, *supra* note 46, § 1604.11(a) (defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" that interfere with individual's employment conditions).

73. EEOC Guidelines, *supra* note 46, § 1604.11(c)-(d) (describing conditions under which employers are liable for supervisors' acts of sexual harassment).

74. EEOC Guidelines, *supra* note 46, § 1604.11(c).

75. Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,676 (1980) (codified at 29 C.F.R. § 1604.11 (1992)).

76. EEOC Guidelines, *supra* note 46, § 1604.11(d) (outlining conditions under which employer is liable for sexual harassment among employees).

77. EEOC Guidelines, *supra* note 46, § 1604.11(d).

78. See Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,676 (1980) (discussing response to publication of proposed guidelines and stating that EEOC received numerous requests for clarification and further definition of "appropriate action").

79. See *id.* ("What is considered to be 'appropriate' [and, therefore, sufficient to insulate employer from liability] will be seen in the context of specific cases through Commission decisions.").

80. See 42 U.S.C. § 2000e-12 ("The Commission shall have authority from time to time to issue, amend, or rescind suitable *procedural* regulations to carry out the provisions of this subchapter.") (emphasis added).

sexual harassment are not procedural and therefore are not authorized by Congress to have the force of law.⁸¹ The guidelines are thus "not controlling upon the courts";⁸² rather, they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."⁸³

3. *Judicial stance on employer liability*

The Supreme Court has not definitively resolved the issue of employer liability for sexual harassment.⁸⁴ In *Meritor Savings Bank v. Vinson*,⁸⁵ however, the Court rejected strict liability for sexual harassment committed by supervisors in favor of some undetermined version of agency liability.⁸⁶ With regard to harassment between co-workers where the harasser is not an agent of the employer, the

81. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 & n.20 (1976) (discussing EEOC guidelines on employment policies relating to pregnancy and childbirth and according them less weight than regulations that have force of law). The Court in *Gilbert* noted that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title," other than procedural regulations, and that "courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law." *Id.*

82. *Id.* at 141-42 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

83. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1985) (quoting *Gilbert*, 429 U.S. at 142 (quoting *Skidmore*, 323 U.S. at 140)). Although the Court in *Meritor* relies on the EEOC guidelines throughout its opinion, the Court painstakingly avoids reference to its proclamation in *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1970), that EEOC guidelines are "entitled to great deference." Instead, the Court in *Meritor* quotes *Griggs* in its characterization of the guidelines as an "administrative interpretation of the act by the enforcing agency . . ." *Meritor*, 477 U.S. at 65 (quoting *Griggs*, 401 U.S. at 433-34). The quoted phrase is only the first half of a sentence in the *Griggs* opinion that is directly relevant to the discussion in *Meritor*. The complete sentence reads: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs*, 401 U.S. at 433-34 (emphasis added). By this omission, the Court expresses its approval of the guidelines, but deliberately stops short of adopting them. Had the Court adopted the guidelines, the issue of employer liability would be nearer to a resolution. Justice Marshall, who concurred in the judgment but wrote separately, viewed the guidelines as deserving great deference and relied on them to resolve the issue of employer liability. *Meritor*, 477 U.S. at 74-78 (Marshall, J., concurring). See *infra* note 86 (discussing Justice Marshall's concurrence).

84. See *Meritor*, 477 U.S. at 72 (declining to issue definitive rule on employer liability).

85. 477 U.S. 57 (1986).

86. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (holding that lower court "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors"). The Court in *Meritor* arrived at this conclusion by inferring legislative intent from the language of the statute: "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.* (citation omitted). The Court in *Meritor* further interpreted the statutory language as suggesting that Congress intended "courts to look to agency principles for guidance" in deciding employer liability, and that lack of notice "does not necessarily" protect an employer from liability for sexual harassment. *Id.*

Justice Marshall concurred in the judgment but wrote a separate opinion addressing the question of employer liability, which he believed the majority improperly left unresolved. *Id.* at 74. On this issue, Justice Marshall stated that the EEOC guidelines are deserving of "great deference." *Id.* (citing *Griggs*, 401 U.S. at 433-34). Justice Marshall further stated that he would adopt the guidelines because they follow title VII and general federal labor law. *Id.* at 75.

majority in *Meritor* was silent. Since *Meritor*, the U.S. Courts of Appeal that have considered employer liability have had difficulty developing a standard for employer liability.⁸⁷

Although the courts are not bound to follow the EEOC guidelines,⁸⁸ many lower courts have found the guidelines useful and have turned to them for guidance on employer liability for sexual harassment.⁸⁹ In fact, the trend in most courts is to hold employers liable for failing to remedy or prevent sexual harassment of which the employer knew or should have known.⁹⁰ Similarly, many circuit courts have held employers liable where they had actual or constructive knowledge of the harassment and failed to take prompt remedial action.⁹¹

Some courts have defined appropriate remedial action as action "reasonably calculated to end the harassment."⁹² This standard, while intended to further define employer liability, provides the

87. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515 (9th Cir. 1989) (reviewing status of case law regarding employer liability for sexual harassment and stating that courts of appeal have been unable to develop clear standards since *Meritor*); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 900-01 (1st Cir. 1988) (endeavoring to extract employer liability rule from *Meritor*); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988) (noting ambiguity of existing employer liability rule).

88. See *supra* note 81 and accompanying text (discussing guidelines' lack of congressional authorization and effect on guidelines' status as legal authority).

89. See *Henson v. City of Dundee*, 682 F.2d 897, 903 n.7 (11th Cir. 1982) (stating that many courts have found EEOC guidelines on sexual harassment valuable in resolving issue of employer liability); see also *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (stating that EEOC guidelines "have been influential with the courts, which are fond of paraphrasing the formula" for employer liability established in guidelines).

90. *Hacienda Hotel*, 881 F.2d at 1515-16; see, e.g., *Hall*, 842 F.2d at 1016 (holding employer liable for hostile environment sexual harassment by nonsupervisory employee because employer had actual knowledge of sexual insults and should have known of other incidents); cf. *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1421-22 (7th Cir. 1986) (holding in racial harassment case that employer is liable if it has reason to know that one of its employees is being harassed by others on basis of race, sex, religion, or national origin and employer does nothing to end harassment).

91. See, e.g., *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (stating that employer would be liable where prompt remedial action did not follow realization of sexual harassment); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (noting that plaintiff in title VII sexual harassment case must prove that employer knew or should have known of harassment and failed to take immediate and appropriate corrective action); *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (asserting that employer is liable if it does not take prompt, adequate action after receiving actual or constructive notice of sexual harassment); *Henson*, 682 F.2d at 905 (establishing employer liability where employer does not remedy sexual harassment shortly after learning of it or after employer should have known that it existed); *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) (applying EEOC guidelines, including provision allowing employer to escape liability by taking immediate and appropriate corrective action).

92. *Katz*, 709 F.2d at 256. The court in *Katz* held that an employer may rebut a plaintiff's showing of employer liability by "pointing to prompt remedial action reasonably calculated to end the harassment." *Id.*; see also *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991) (stating that employer's action must be reasonably calculated to end harassment and must persuade individual harassers to discontinue sexual harassment).

employer with little practical guidance in handling a harassment situation as it occurs. The courts often focus on the success or failure of the action in stopping the harassment when reviewing an employer's actions to determine if the employer should be held liable.⁹³ The courts find that the employer's actions were remedial or reasonably calculated to end the harassment where the actions actually stopped the harassment.⁹⁴

Employers do not share the courts' retrospective vantage. Instead, they must endeavor to predict the harasser's response to their disciplinary action. By focusing on the success of the remedial action, the reasonably calculated and prompt remedial standards may encourage the employer to administer the harshest of punishments.⁹⁵ Permanently removing the harasser from the workplace is the only action that is certain to end the harassment; therefore, it is a sure way of satisfying the requirement and avoiding employer

93. See *Davis v. Tri-State Mack Distribs., Inc.*, 981 F.2d 340, 343 (8th Cir. 1992) (noting fact that harasser's conduct was more offensive after meetings with supervisor as evidence that employer failed to take remedial action); *Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir. 1992) (stating that "[a]ction is 'corrective' only if it contributes to the elimination of the problem," and interpreting title VII as requiring employer to intervene promptly and effectively to end sexual harassment); *Ellison*, 924 F.2d at 882 (holding that reasonableness of employer's remedy depends on its effectiveness in ending harassment and that court, in determining adequacy of remedy, may consider its deterrent effect); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990) (holding employer liable because it failed to remedy harassment); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (identifying fact that harassment ended after employer took remedial action as especially important in determining whether employer's actions were sufficient to avoid liability to victim); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987) (finding employer not liable to victim by relying in part on fact that no further complaints were filed after employer reprimanded harasser); *Foster v. Township of Hillside*, 780 F. Supp. 1026, 1039 (D.N.J.) ("Courts that have decided the issue, have placed great weight on whether the harassment ended after remedial steps were taken."), *aff'd without opinion*, 977 F.2d 567 (3d Cir. 1992); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1531 (M.D. Fla. 1991) (stating that employer can defend itself against liability by showing that remedial action succeeded in ending harassment); *LINDEMANN & KADUE*, *supra* note 26, at 195 (discussing whether employer's actions were sufficient to rebut employer liability and stating that factual question whether sexual harassment ended is particularly important). But see *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989) (stating that "a court should not focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed"). For criticism of the *Brooms* approach, see *Ellison*, 924 F.2d at 882 n.17 (stating that *Brooms*' reasonable employer test "runs the risk of reinforcing any prevailing level of discrimination by employers and fails to focus directly on the best way to eliminate sexual harassment from the workplace").

94. See *supra* note 93 and accompanying text (discussing judicial approach to determining whether employer actions are remedial or reasonably calculated to end harassment).

95. Cf. Becky Leamon, Note, *Employers' Liability for Failure to Prevent Sexual Harassment: Paroline v. Unisys Corp.*, 55 MO. L. REV. 803, 815 (1990) (stating that case holding employer liable for failing to prevent sexual harassment may cause employers to discharge harassers after only one incident of harassment to protect themselves against future liability).

liability.⁹⁶ As a result of such action, however, the employer may find itself the defendant in a wrongful discharge lawsuit or arbitration.⁹⁷

B. *Wrongful Termination*

1. *Social context*

Like sexual harassment, wrongful termination of employment can be devastating to the employee. For most working people, jobs are a primary source of identity, self-esteem, and social life.⁹⁸ Loss of employment, therefore, often causes psychological distress⁹⁹ and economic hardship.¹⁰⁰ Recognition of the damaging effects of discharge from employment provides some of the impetus for the movement to abandon the doctrine of employment at will and for the development of a cause of action for wrongful termination.¹⁰¹

2. *Legal context*

a. *Employment at will*

The traditional common-law rule of employment at will allowed employers, absent a written contract stating otherwise, to discharge employees for good cause, bad cause, or no cause.¹⁰² The rule was

96. See *Intlekofer*, 973 F.2d at 786 (Wiggins, J., dissenting) (arguing that requiring employer to meet excessively stringent requirement to avoid liability will result in employer punishing alleged harassers who are not guilty and will expose employer to risk of lawsuit by alleged offender).

97. See *supra* note 5 and accompanying text (listing cases where employees discharged for sexual harassment sued their employers for wrongful discharge). Employees discharged for sexual harassment also may sue their employer for various tort claims, such as defamation and intentional infliction of emotional distress. See *Barker & Haggard*, *supra* note 52, at 142 (observing that stigma associated with discharge for sexual harassment prompts accused individuals to sue their employers for defamation and intentional infliction of emotional distress).

98. See Tobias, *supra* note 12, at 181 (relating importance of employment to sense of identity, self-esteem, and social life); *Employer Opportunism*, *supra* note 1, at 511 (arguing that employment provides workers with both economic and personal well-being); see also WEILER, *supra* note 13, at 3 (describing importance of jobs to individuals' social, psychological, and economic well-being).

99. See Tobias, *supra* note 12, at 181-82 (describing psychological and social suffering of discharged employees).

100. See Tobias, *supra* note 12, at 181-82 (discussing effects of termination of income and benefits, and noting that discharged workers will have difficulty obtaining future employment).

101. See WEILER, *supra* note 13, at 49 (noting that one component of argument for abandonment of employment at will attacks employer's ability to destroy employee's personal and financial stability).

102. See Brown, *supra* note 1, at 780 (stating that employment at will allowed termination of employment by either party at any time and for any reason); John P. Hoel, Note, *Labor Arbitration and State Wrongful Discharge Actions: Due Process or Remedial Double Dipping*, 1989 J. DISP. RESOL. 179, 184 (stating that in late 19th century, courts upheld discharge from employment

based on the laissez-faire theory of economics, prevalent in the late nineteenth and early twentieth centuries, that held employment at will necessary to economic efficiency.¹⁰³ Laissez-faire economics, however, assumed that employers and employees had equal bargaining power, an assumption that modern courts and commentators recognize as false.¹⁰⁴ By the middle of the twentieth century, the doctrine of employment at will was in decline and scholars and employee-rights advocates were calling for its abolition.¹⁰⁵ The courts assisted the movement by creating exceptions to the traditional common-law doctrine¹⁰⁶ based on public policy,¹⁰⁷ contract theo-

regardless of whether termination was for good cause, bad cause, or no cause); see also *supra* note 13 and accompanying text (discussing employment-at-will doctrine and evolution of its repudiation).

103. See Brown, *supra* note 1, at 780 (claiming that economic freedom central to laissez-faire theory precluded any legal restrictions on employment terms, including constraints on termination of employment, and concluding that employment at will was natural result of such economic beliefs); Tobias, *supra* note 12, at 179 (maintaining that laissez-faire theory promoted notion that economic efficiency required employers to have freedom to discharge employees at will); *Employer Opportunism*, *supra* note 1, at 510 (stating that employment at will rests on principle of economic freedom).

104. See WAYNE N. OUTTEN & NOAH A. KINGSTEIN, *THE RIGHTS OF EMPLOYEES* 28-29 (1983) (arguing that employment at will rests on assumption that discharged employee will easily find other employment, stating that modern society recognizes hardships caused by loss of employment, and concluding that assumption that employers and employees have equal bargaining power is fallacious); 9A *INDIVIDUAL EMPLOYMENT RTS. MANUAL* (BNA) § 505:2 (1991) (describing argument that freedom of contract—basis for laissez-faire theory—does not exist amid modern economic reality of widely disparate bargaining powers between employers and employees); Alfred W. Blumrosen, *Employer Discipline: United States Report*, 18 *RUTGERS L. REV.* 428, 432-33 (1964) (attributing judicial renunciation of employment at will to discontinuation of “judicial policy decision to free capital for industrial expansion” and to judicial response to changed expectations of contracting parties); *Employer Opportunism*, *supra* note 1, at 510-11 (stating that in recent decades commentators have argued that reality of unequal bargaining powers between employers and employees requires abolition of employment at will).

105. See Tobias, *supra* note 12, at 183 (discussing movement to abolish employment at will during 1960s); see also WEILER, *supra* note 13, at 49 & n.6 (stating that arguments against employment at will and in favor of protection against unfair dismissals emerged in law review articles in late 1960s).

106. See Blumrosen, *supra* note 104, at 432-33 (observing movement away from employment-at-will doctrine and nascent willingness of courts to interpret facts and circumstances surrounding employment contract in manner antithetic to employment at will); Tobias, *supra* note 12, at 183 (arguing that judiciary responded to public opposition to employment at will by creating exceptions); *supra* note 13 and accompanying text (listing cases in which courts fashion exceptions to employment at will).

107. See, e.g., *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973) (finding wrongful discharge where employer terminated plaintiff for filing worker’s compensation claim, and reasoning that permitting such termination would undermine public policy underlying worker’s compensation legislation); *Nees v. Hocks*, 536 P.2d 512, 514-16 (Or. 1975) (allowing plaintiff discharged for serving jury duty to recover for wrongful discharge based on public policy exception to employment at will, and relying on “societal interests” in having citizens serve on juries” as source of public policy); *Harless v. First Nat’l Bank*, 246 S.E.2d 270, 275-76 (W. Va. 1978) (granting recovery to plaintiff discharged for reporting employer’s violation of state law to authorities because termination undermined public policy established by violated law); see also Hoel, *supra* note 102, at 185 (discussing landmark public policy exception case in which employer discharged employee for disobeying instructions to commit perjury when

ries,¹⁰⁸ and the covenant of good faith and fair dealing.¹⁰⁹

In addition to the common-law exceptions to employment at will, collective bargaining agreements, individual employment contracts, and state legislation protect some employees from groundless discharge. Beginning in the 1930s, union collective bargaining agreements have required just cause for termination.¹¹⁰ Today, just cause provisions are standard in collective bargaining agreements.¹¹¹ Government employees possess similar protection from termination without just cause.¹¹² All fifty states and the District of Columbia now recognize causes of action for wrongful termination based on one of the above-mentioned provisions or theories.¹¹³ One state has

testifying before state legislature) (citing *Petermann v. International Bhd. of Teamsters, Local 396*, 344 P.2d 25, 26-27 (Cal. Ct. App. 1959)).

108. Courts have inferred contractual provisions requiring just cause for termination. See *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 926 (Ct. App. 1981) (holding employer liable for wrongful termination where plaintiff based claim on implied contractual covenant of good faith and fair dealing); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (asserting that contractual provision requiring just cause for termination may be inferred from employee's legitimate expectations based on employer's stated policy); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280, 284 (N.M. 1988) (noting that several jurisdictions have imposed implied contractual duty on employers after employers told employees that they would only terminate for just cause), *cert. denied*, 490 U.S. 1109 (1989); see also Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1828-29 (1980) (noting that some commentators have analogized at-will employment contract to boilerplate contract containing unconscionable terms and explaining that analogy rests on disparate bargaining powers of parties and "take-it-or-leave-it basis" on which employment is usually offered).

109. See, e.g., *Cleary v. American Airlines, Inc.*, 168 Cal. Rptr. 722, 725-26 (Ct. App. 1980) (recognizing cause of action for wrongful termination based on covenant of good faith and fair dealing implied by longevity of satisfactory service by employee); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (holding that written contract for employment at will contained implied covenant of good faith and fair dealing and that termination in bad faith was breach of employment contract); *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (concluding that termination of employment in bad faith is contrary to interests of economic system and public good); see also OUTTEN & KINGSTEIN, *supra* note 104, at 34 (discussing covenant of good faith and fair dealing and its use as exception to employment at will).

The covenant of good faith and fair dealing is inherent in all contracts. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Accordingly, this covenant imposes on all parties a duty of "[g]ood faith performance or enforcement of a contract [and] emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." *Id.* § 205 cmt a. But see *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983) (refusing to recognize general duty of good faith and fair dealing in all contracts).

110. See Delmendo, *supra* note 13, at 832 (discussing history of just cause concept and stating that union collective bargaining agreements began including just cause provisions in 1930s).

111. See Tobias, *supra* note 12, at 180 (stating that most labor agreements contain specific just cause provisions).

112. See Delmendo, *supra* note 13, at 831 (stating that government employees, like union employees, enjoy protection from employment at will).

113. See Brown, *supra* note 1, at 779, 781-82, 787-88 (reviewing theories under which states have allowed wrongful termination actions).

even enacted legislation requiring cause for termination of employment¹¹⁴ and several other states have proposed similar legislation.¹¹⁵

b. Just cause

Just cause is a vague requirement for which no uniform, judicially established meaning exists.¹¹⁶ Some courts define just cause as "a fair and honest cause or reason,"¹¹⁷ "a good reason,"¹¹⁸ or a reason that is not arbitrary, capricious, unjustified, or discriminatory.¹¹⁹

Decisions vary as to whether dismissal for sexual harassment constitutes termination for just cause. In one case, for example, a district court judge considered a male employee's sexual comments to a female customer regarding his wife's body to be an adequate basis for discharge.¹²⁰ In another case, an arbitrator held that a

114. MONT. CODE ANN. §§ 39-2-901 to -914 (1991). The Montana law defines good cause as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." *Id.* § 39-2-903(5). Puerto Rico also has a just cause statute. P.R. LAWS ANN. tit. 29, § 185a (1985). The Puerto Rican statute enumerates six situations that constitute good cause, two of which are relevant to sexual harassment. *Id.* § 185b(a)-(f). These two situations are those in which "the worker indulges in a pattern of improper or disorderly conduct" and where the worker is guilty of "repeated violations . . . of the reasonable rules and regulations established for the operations of the establishment, provided [that] a written copy thereof has been timely furnished to the employee." *Id.* § 185b(a), (c).

115. See Me. S.B. 230, 116th Leg., 1st Sess. (1993) (requiring good cause for termination of employee who has worked for employer for over one year); Mo. H.B. 236, 87th Leg. Assembly, 1st Sess. (1993) (declaring discharge wrongful if it is not for good cause and employee has completed probationary period); Nev. A.B. 343, 66th Leg., Reg. Sess. (1993) (requiring good cause for termination of employment); N.H. H.B. 513, 153d Leg. Sess., Reg. Sess. (1993) (prohibiting certain employers from terminating certain employees without good cause); N.M. H.B. 914, 41st Leg., 1st Sess. (1993) (creating procedures for termination of employees, including written notice of just cause); N.Y. A.B. 3535, 215th Gen. Assembly, 1st Sess. (1993) (requiring good cause for termination of alien employees who are legally restricted from other employment); Wash. H.B. 1023, 53d Leg., Reg. Sess. (1993) (requiring good cause for termination of employee close to pension or other benefit qualifications); see also *Employer Opportunism*, *supra* note 1, at 515 n.20 (stating that California, Colorado, Connecticut, Michigan, New York, and Pennsylvania have considered legislation similar to Montana's just cause statute).

116. See Delmendo, *supra* note 13, at 831 (arguing that courts have not clearly defined "just cause"); *Wrongful Discharge: A Panel Discussion*, 6 LAB. LAW. 319, 320 (1990) [hereinafter *Panel Discussion*] (discussing argument that just cause is flexible, elusive, and manipulable concept).

117. *Pugh v. See's Candies, Inc.*, 250 Cal. Rptr. 195, 212 (Ct. App. 1988); *Baldwin v. Sisters of Providence, Inc.*, 769 P.2d 298, 304 (Wash. 1989); see also Delmendo, *supra* note 13, at 833 (citing *In re Freightliner Corp.*, 95 Lab. Arb. Rep. (BNA) 302, 307 (1990) (Tilbury, Arb.)).

118. *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280, 282 (N.M. 1988), *cert. denied*, 490 U.S. 1109 (1989).

119. See *Trans World Airlines, Inc. v. Beaty*, 402 F. Supp. 652, 658 (S.D.N.Y. 1975) (stating that "discharge for cause is generally defined as a discharge for some reason which is not arbitrary and capricious") (citing *International Auto Sales & Serv., Inc. v. General Truck Drivers Union*, Local 270, 311 F. Supp. 313, 315 (E.D. La. 1970)), *aff'd*, 542 F.2d 1165 (2d Cir. 1976).

120. See *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 762 F. Supp. 1187, 1189 (M.D. Pa. 1991) (characterizing offensive remarks as unacceptable employee conduct constituting grounds for discharge), *aff'd*, 969 F.2d 1436 (3d Cir. 1992).

sexual assault was insufficient grounds for termination.¹²¹ These extreme examples illustrate the root of the employer's quandary; employers cannot rely on prior judgments for guidance.

The nature of wrongful termination actions further complicates the employer's position. Because the questions of fact involved in sexual harassment cases often are difficult to prove and depend on the parties' credibility,¹²² it is easy to establish a *prima facie* challenge to a job dismissal for alleged sexual harassment. To state a claim for wrongful termination, the employee need only deny that he committed the act of sexual harassment of which he was accused.¹²³

II. SPECIAL PROBLEMS SURROUNDING UNION EMPLOYEES AND LABOR ARBITRATION

In addition to containing just cause provisions, union collective bargaining agreements usually require that disputes be resolved through grievance procedures and, if these fail, through arbitration.¹²⁴ Thus, arbitrators generally decide wrongful termination cases involving union employees, while judges and juries decide similar cases involving nonunion employees. The difference in forum may produce inconsistent outcomes in similar cases.

In most cases, labor arbitrators review charges of sexual harassment only after the alleged harasser contests his discharge or other form of discipline.¹²⁵ In these situations, the arbitrator must first determine

121. See *Chrysler Motors Corp. v. International Union*, 959 F.2d 685, 686-87 & n.1 (7th Cir.) (discussing arbitrator's decision that discipline milder than discharge was suitable for worker who grabbed co-worker's breasts), *cert. denied*, 113 S. Ct. 304 (1992).

122. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (stating that whether complained-of conduct was sexual harassment "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").

123. See *Delmendo*, *supra* note 13, at 843 (arguing that mere denial of conduct for which employee was discharged is sufficient to pursue claim of wrongful termination). The discharged employee, however, may confront some practical obstacles to pursuing a wrongful termination suit. See *Tobias*, *supra* note 12, at 190 (stating that for most nonunion employees, bringing suit is "too cumbersome, expensive, and time consuming"). For instance, if the employee is not a member of a union, he will need to find an attorney to represent him in his claim. *Id.* In addition, obtaining representation may prove difficult if the employee does not have the financial resources to pay attorney's fees. See *id.* (arguing that litigation is too expensive for nonunion workers and that lawyers will not take wrongful discharge cases on contingency fee basis because amount of recovery does not merit work required).

124. See FLORIAN BARTOSIC & ROGER C. HARTLEY, *LABOR RELATIONS LAW IN THE PRIVATE SECTOR* 350 (2d ed. 1986) (stating that almost all collective bargaining agreements provide for grievance procedures and arbitration for resolution of disputes arising under labor agreements); JOHN J. KENNY, *PRIMER OF LABOR RELATIONS* 87 (23d ed. 1986) (stating that disputes arising under union contracts usually are resolved through grievance procedures and arbitration); OUTTEN & KINIGSTEIN, *supra* note 104, at 153 (noting that most collective bargaining agreements contain arbitration provisions).

125. See EDITORIAL STAFF, *BUREAU OF NAT'L AFFAIRS, GRIEVANCE GUIDE* 110 (7th ed. 1987) [hereinafter *GRIEVANCE GUIDE*] (indicating that in arbitration, grievances of employees

whether the discharged employee did in fact commit sexual harassment.¹²⁶ Because higher proof requirements,¹²⁷ relaxed rules of evidence,¹²⁸ and freedom from stare decisis¹²⁹ distinguish arbitration from trial, the employers' findings of sexual harassment often do not withstand the arbitrators' review.¹³⁰

A. Rules of Evidence

Unlike courts, arbitrators are not bound by state and federal rules of evidence¹³¹ and have substantial discretion in setting the burden of proof¹³² and in swearing in witnesses.¹³³ Arbitrators can, and often do, exercise discretion in determining the necessary amount of proof.¹³⁴ Arbitrators decide the quantum of proof on a case-by-case basis; this practice helps explain the inconsistencies between judicial

discharged for committing sexual harassment are more common than grievances of employees suffering sexual harassment); ELKOURI & ELKOURI, *supra* note 1, at 237-38 (stating that arbitrations involving sexual harassment usually are grievances challenging discharge of harassing co-worker); Monat & Gomez, *supra* note 52, at 715 (maintaining that most arbitrations involving sexual harassment are not sex discrimination grievances but rather are just cause grievances in which alleged harasser contests his discharge); Nelson, *supra* note 16, at 61 (stating that overwhelming majority of arbitration cases involving sexual harassment are complaints by disciplined alleged male harasser).

126. See GRIEVANCE GUIDE, *supra* note 125, at 110 (stating that consideration of just cause for discipline begins with determination of whether employee's conduct was sexual harassment).

127. See *infra* notes 131-48 and accompanying text (discussing variable and often elevated standards of proof in sexual harassment discharge arbitrations).

128. See KENNY, *supra* note 124, at 91 (stating that arbitrators may decide whether or not to follow federal rules of evidence).

129. See ELKOURI & ELKOURI, *supra* note 1, at 120 (stating that principle of stare decisis does not fully apply to arbitration). Arbitrators warn against reliance on prior arbitral decisions because the overwhelming majority of published arbitral decisions are written by inexperienced arbitrators while the vast body of decisions by experienced arbitrators goes unpublished. *Id.*; see also WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 138 (2d ed. 1986) (stating that stare decisis does not apply to arbitration); *infra* notes 150-63 (discussing absence of stare decisis in arbitration and resultant problems for employers defending discharge of employee for sexual harassment).

130. See Jennings & Clapp, *supra* note 15, at 757 (reviewing published arbitration decisions involving grievances of discharges for sexual harassment and finding that arbitrators reduced or revoked employer's discipline of grievant in majority of cases). But see GRIEVANCE GUIDE, *supra* note 125, at 111 (stating that many arbitrators, relying on EEOC guidelines, have upheld employers' punishment of harassers).

131. See KENNY, *supra* note 124, at 91 (stating that arbitrators have great discretion regarding rules of evidence); see also GOULD, *supra* note 129, at 138-39 (noting that arbitrators do not follow judicial rules of evidence).

132. See ELKOURI & ELKOURI, *supra* note 1, at 174-75 (discussing fact that arbitrators impose different quantum of proof for different types of cases).

133. See *infra* note 148 and accompanying text (explaining that arbitration witnesses need not testify under oath).

134. See ELKOURI & ELKOURI, *supra* note 1, at 174-75 (reviewing variable quantum of proof required by arbitrators); see also *infra* note 139 (discussing arbitrators' choice of higher evidentiary standard in sexual harassment cases).

and arbitral decisions¹³⁵ and among individual arbitral decisions.¹³⁶

In wrongful termination cases, the burden of proof is on the employer to show that the alleged sexual harassment occurred and that such harassment was just cause for termination.¹³⁷ The degree of proof needed to sustain this burden, however, is unclear.¹³⁸ Some arbitrators simply require that employers prove their cases by a preponderance of the evidence,¹³⁹ the same standard used by courts in most civil suits¹⁴⁰ and in all title VII litigation,¹⁴¹ and by arbitrators in other disciplinary cases.¹⁴² Other arbitrators, out of apparent concern for the serious effects that termination for sexual harassment has on the discharged employee,¹⁴³ adopt a higher standard of proof and require employers to prove their cases by clear and convincing evidence¹⁴⁴ or beyond a reasonable doubt.¹⁴⁵

135. See ELKOURI & ELKOURI, *supra* note 1, at 174-75 (noting that arbitrators will select quantum of proof necessary to prove various offenses based on their perceptions of criminality and seriousness and degree of sanction imposed).

136. See Monat & Gomez, *supra* note 52, at 715 (explaining that while some arbitrators find sexual harassment to be grounds for discharge, others hold that such result is too severe).

137. See Monat & Gomez, *supra* note 52, at 715 (stating that employer has burden of proof in discharge arbitrations, but noting that in reality, burden shifts to victim of harassment in discharge cases).

138. See ELKOURI & ELKOURI, *supra* note 1, at 239 (finding that employer's burden of proof in arbitration of sexual harassment termination cases is unresolved).

139. See, e.g., *Shell Pipe Line Corp. v. Texas-Gulf Fed'n*, 97 Lab. Arb. Rep. (BNA) 957, 959 (1991) (Baroni, Arb.) (applying both preponderance of evidence standard and clear and convincing evidence standard); *Western Lake Superior Sanitary Dist. v. Minnesota Arrowhead Dist.*, Local 96, 94 Lab. Arb. Rep. (BNA) 289, 294 (1990) (Boyer, Arb.) (applying preponderance of evidence standard); *Clover Park Sch. Dist. v. International Union of Operating Eng'rs*, Local 286, 89 Lab. Arb. Rep. (BNA) 76, 79 (1987) (Boedecker, Arb.) (applying preponderance of evidence standard).

140. See EDWARD W. CLEARY ET AL., *MCCORMICK ON EVIDENCE* § 339, at 956 (3d ed. 1984) (stating that preponderance of evidence standard is generally used in civil litigation).

141. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-55, 258 (1989) (holding that title VII claims require proof by preponderance of evidence and rejecting lower court finding that such claims must be proved or defended with clear and convincing evidence).

142. See ELKOURI & ELKOURI, *supra* note 1, at 239 (stating that some arbitrators do not distinguish sexual harassment from other types of misconduct and apply preponderance of evidence standard to cases involving all types of misconduct).

143. See *Clover Park Sch. Dist. v. Int'l Union of Operating Eng'rs*, Local 286, 89 Lab. Arb. Rep. (BNA) 76, 79 (1987) (Boedecker, Arb.) (arguing that in hearing to determine validity of sexual harassment charges, "[t]he grievant is on trial not only for his job, but his reputation and his community standing as well"); *Hyatt Hotels Palo Alto v. Hotel, Motel, Restaurant Employees & Bartenders Union*, Local 19, 85 Lab. Arb. Rep. (BNA) 11, 14-15 (1985) (Oestreich, Arb.) ("Considering the seriousness of the moral charges and their impact on the Grievant's ability to find comparable employment elsewhere, the Arbitrator holds that the degree of proof must be 'beyond reasonable doubt.'").

144. See, e.g., *Shell Pipe Line Corp. v. Texas-Gulf Fed'n*, 97 Lab. Arb. Rep. (BNA) 957, 959 (1991) (Baroni, Arb.) (stating that arbitrator usually raises standard of proof in sexual harassment discharge cases to clear and convincing evidence standard); *Colonial Sch. Dist. v. Colonial Transp. Ass'n*, 96 Lab. Arb. Rep. (BNA) 1122, 1124 (1991) (DiLauro, Arb.) (concluding that burden of proof for sexual harassment discipline case is clear and convincing evidence); *Sugardale Foods Inc. v. Local 17A, United Food & Com. Workers*, 86 Lab. Arb. Rep. (BNA) 1017, 1020 (1986) (Duda, Arb.) (stating burden of proof for discharge for sexual harassment

Given the problems of proof intrinsic to many sexual harassment complaints,¹⁴⁶ employers that might prevail in court might fail to meet the arbitrators' higher standards.¹⁴⁷

Incongruous results may also arise from arbitrators' discretion regarding the swearing in of witnesses. Except where required by state statute, witnesses in arbitration need not testify under oath.¹⁴⁸ The absence of an oath requirement is critically important in sexual harassment cases, where the only evidence often is the testimony of the alleged victim and the harasser.¹⁴⁹ Where the parties are not under oath, the usual deterrence against false testimony does not exist as it does at trial. Thus, employees discharged for unwitnessed acts of harassment lack the fear of perjury to prevent them from falsely denying the charges. Moreover, the absence of an oath requirement may invite grievants to solicit false witnesses to corroborate their denials.

B. *Stare Decisis and Arbitral Precedent*

Another factor distinguishing labor arbitration from judicial review of wrongful termination claims is the principle of *stare decisis*. Unlike judges, arbitrators are not required to follow precedent.¹⁵⁰ In

as "clear and convincing" evidence).

145. See *King Soopers, Inc. v. United Food & Com. Workers Union, Local 17*, 86 Lab. Arb. Rep. (BNA) 254, 258 (1985) (Sass, Arb.) (establishing quantum of proof as beyond reasonable doubt in recognition of potential damage to grievant's marriage, relationship with his children, community standing, relationships with other employees, and social stigma attached to sexual harassment).

146. See Alex Kozinski, *Foreword* to LINDEMANN & KADUE, *supra* note 26, at v, vii (arguing that "[c]harges of sexual harassment, like those of rape, child molestation and spousal abuse, can raise some of the most difficult problems of proof in the law, because some of the most egregious conduct . . . occurs in private, with the participants doubling as the only witnesses"); Monat & Gomez, *supra* note 52, at 714 (stating that because sexual harassment often occurs when there are no witnesses, proving that it occurred often is problematic).

147. See *supra* notes 144-45 and accompanying text (discussing arbitrators' use of clear and convincing and beyond reasonable doubt evidentiary standards in sexual harassment cases based in part on stigma that attaches to such accusations); see also *supra* note 141 and accompanying text (noting that title VII claims must only be proved by preponderance of evidence standard).

148. See KENNY, *supra* note 124, at 91 (noting that neither arbitrator nor witness is required to take oath unless required by state statute). In practice only a small number of states actually require arbitrators and witnesses to be sworn in. OWEN FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 151 & n.1 (1973). But cf. KENNY, *supra* note 124, at 91 (stating that "[a] majority of states have some type of provision for the swearing of witnesses, but not all make it compulsory upon the parties").

149. See Kozinski, *supra* note 146, 1t vii (stating that nature of sexual harassment results in alleged victim and harasser being only witnesses who can testify).

150. See, e.g., BARTOSIC & HARTLEY, *supra* note 124, at 351 (stating that arbitral decisions in prior disputes between parties and arbitral decisions involving similar issues but different parties are not binding precedent unless bargaining agreement states otherwise); ELKOURI & ELKOURI, *supra* note 1, at 120 (noting that arbitration is not bound by *stare decisis*); GOULD, *supra* note 129, at 138 (explaining that *stare decisis* does not apply to labor arbitration).

addition, because few arbitration decisions are published, there is scant precedent to which arbitrators can refer.¹⁵¹ Those opinions that are published are predominantly the decisions of less experienced arbitrators;¹⁵² arbitrators are therefore warned not to rely on these opinions.¹⁵³ Furthermore, even the small percentage of published opinions decided by experienced arbitrators are of questionable use as precedent in sexual harassment cases because many arbitrators are unfamiliar with the requirements of title VII.¹⁵⁴

An arbitrator's freedom from stare decisis and the unavailability of reliable published opinions prevents employers from using prior cases as guides when disciplining union employees.¹⁵⁵ Without a means

151. See ELKOURI & ELKOURI, *supra* note 1, at 117 (stating that less than five percent of all arbitral awards are published and that Bureau of National Affairs publishes only one of every 12 arbitration decisions submitted for publication). The former policy of the National Academy of Arbitrators (NAA), an association that admits arbitrators based on the number of cases they have decided, was to prohibit arbitrators from requesting the permission of parties to publish the opinion until after issuing the opinion. *Id.* This policy may have reduced the number of cases that NAA members published. *Id.*

152. See ELKOURI & ELKOURI, *supra* note 1, at 117 (stating that NAA policy requiring arbitrator to issue opinion before requesting parties' permission to publish it resulted in small percentage of published opinions by experienced arbitrators).

153. See Peter Seitz, *The Citation of Authority and Precedent in Arbitration (Its Use and Abuse)*, ARB. J., Dec. 1983, at 58, 60 (warning against relying on prior decisions because overwhelming majority of published arbitral decisions are written by inexperienced arbitrators).

154. See GOULD, *supra* note 129, at 143 (stating that arbitrators often do not know requirements of employment discrimination law). Gould also presents a number of reasons why "the arbitration process has had considerable difficulty in coping with employment discrimination." *Id.* at 142. Among these reasons is an inherent conflict of interest experienced by arbitrators in discrimination cases. *Id.* at 143. Employers and unions have control over selecting arbitrators, either during the formulation of the collective bargaining agreement or after the case to be arbitrated has arisen. *Id.* at 143-44. According to Gould, arbitrators with reputations for favoring nondiscriminatory employment practices often are not chosen. *Id.* In addition, because the party accused of discrimination has the power to help or hinder the arbitrator's career (by selecting the arbitrator in the future, recommending the arbitrator to others, or criticizing the arbitrator), the arbitrator in a discrimination case has an inherent conflict of interest. *Id.* at 143. Arbitrators "must necessarily be responsive to the interests of those who appoint them—labor and management—and not necessarily to those of third parties Arbitrators, like other people, are not often likely to bite the hand that feeds them." *Id.*

The problems surrounding arbitrators' application of antidiscrimination law is just one example of the much larger issue of arbitral review of cases involving legal issues as opposed to contract interpretation. See ARNOLD M. ZACK & RICHARD I. BLOCH, *LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION* 30-31 (1985) (discussing argument that legal issues outside labor agreement are beyond arbitrators' expertise and that arbitrators are not, and are unlikely to become, capable of deciding such issues). The ability of arbitrators to decide issues involving "external law" (i.e., legal issues outside the scope of the bargaining agreement), and the propriety of arbitrators attempting to decide such issues, are the subjects of wide debate among labor law experts. See BARTOSIC & HARTLEY, *supra* note 124, at 353 ("[O]ne of the most pressing unresolved issues is the extent to which an arbitrator in deciding a case may or should apply 'external' law, such as . . . Title VII of the Civil Rights Act"); ZACK & BLOCH, *supra*, at 29-32 (discussing debate over external law and views of commentators who believe that extending arbitral jurisdiction beyond union agreement will undermine parties' regard for individual arbitrators and arbitration process as whole).

155. See *supra* notes 152-53 and accompanying text (discussing arbitrators' ability to depart from prior decisions and lack of reliable precedent).

to predict whether a discharge could withstand a wrongful termination claim, the employer may be wary of discharging even egregious offenders and instead may take some milder disciplinary action. Consequently, where the milder disciplinary action fails to stop the sexual harassment, a court may hold the employer liable to the victim of the harassment.¹⁵⁶

The differences between arbitration and trial are likely to have the greatest effects on employers that employ both union and nonunion employees.¹⁵⁷ Employers who are cognizant of the difficulties they may face in arbitration, as opposed to at trial, may discipline union harassers less severely than nonunion harassers.¹⁵⁸ This result would both convey mixed messages to employees regarding the employer's treatment of harassment and fail to deter potential harassers.¹⁵⁹ Furthermore, inconsistent treatment of employees would create a double standard in violation of the principle of good faith and fair dealing,¹⁶⁰ which is an implied provision of most contracts.¹⁶¹ Finally, disparate punishments may lead to disruptive tensions between union and nonunion employees,¹⁶² and may prompt union employees to believe that they can sexually harass female co-workers with relative impunity.¹⁶³

156. See *supra* notes 84-94 (discussing judicial standards for employer liability for sexual harassment).

157. Cf. S. Richard Pincus & Steven L. Gillmann, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of the "At Will" Doctrine?*, 59 CHI-KENT L. REV. 1007, 1014-15 (1983) (discussing disparate outcomes of similar cases brought in court by nonunion employees and in arbitration by union members).

158. This conclusion is extrapolated from the disparate processes of review available to union and nonunion employees. See LINDEMANN & KADUE, *supra* note 26, at 403-10 (discussing differences and relationship between union collective bargaining, which mandates arbitration process, and judicial review, which is recourse for nonunion employees); see also *infra* note 159 (discussing impact on other employees of lenient punishments imposed on harassers).

159. Cf. *Intlekofer v. Turnage*, 973 F.2d 773, 778 (9th Cir. 1992) (stating that discipline of harasser must correct harassment and deter potential harassers); *Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters*, 762 F. Supp. 1187, 1189-90 (M.D. Pa. 1991) (discussing impact that lenient treatment of harasser has on other employees, such as sending message that sexual harassment claims are not taken seriously, failing to deter future harassers, and inhibiting victims from complaining), *aff'd*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992).

160. See Tobias, *supra* note 12, at 187 (explaining that major aspect of duty of good faith and fair dealing is requirement that like cases be treated alike).

161. See *supra* note 109 and accompanying text (discussing cases holding that most employment contracts contain implied covenant of good faith and fair dealing).

162. See MAURICE S. TROTTA, *HANDLING GRIEVANCES: A GUIDE FOR MANAGEMENT AND LABOR* 58-59 (1976) (stating that employees resent receiving more severe discipline than co-workers who commit same offense and warning that supervisors who discipline employees inconsistently can create trouble).

163. See *supra* note 159 (citing cases discussing importance of employees' perceptions regarding employers' treatment of harassers as deterrent to potential harassers).

III. EXISTING APPROACHES TO LIMITING EMPLOYER LIABILITY ARE INADEQUATE

A. *Punishment Proportional to Severity of Harassment*

Several courts that have reviewed wrongful termination claims by employees discharged for sexual harassment have held that employers should design discipline to be proportional to the severity of the offense.¹⁶⁴ This approach is sound in theory, and can fashion just results,¹⁶⁵ but sometimes fails in application. *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*¹⁶⁶ illustrates the problems in applying the proportionality test.¹⁶⁷ In *Chrysler*, the court upheld an arbitral decision to reinstate a discharged employee who approached a female co-worker from behind and grabbed her breasts.¹⁶⁸ The arbitrator held that the offense was not serious enough to merit dismissal,¹⁶⁹ explaining that only "extremely serious offenses, such as stealing or striking a foreman" justify summary discharge.¹⁷⁰

164. See, e.g., *Intlekofer v. Turnage*, 973 F.2d 773, 779 (9th Cir. 1992) (stating that appropriateness of remedy depends on seriousness of offense, among other considerations); *Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685, 688 (7th Cir.) (upholding arbitrator's decision requiring discipline to be related to seriousness of employee's proven offense), cert. denied, 113 S. Ct. 304 (1992); *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991) (finding that not all acts of sexual harassment warrant discharge and that employer should impose discipline proportional to severity of harassment); *Waltman v. International Paper Co.*, 875 F.2d 468, 479 (5th Cir. 1989) (stating that appropriateness of remedy depends in part on severity of harassment); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307, 309 (5th Cir. 1987) (finding that employer took prompt remedial action in response to sexual harassment and that employer's action was "assessed proportionately to the seriousness of the offense").

165. See, e.g., *Waltman*, 875 F.2d at 479-81 n.4 (reversing summary judgment for employer because factual question existed regarding sufficiency of employer's actions in light of severity of harassment); *Dornhecker*, 828 F.2d at 309 (holding that employer's response was appropriate because it was in proportion to seriousness of harassment).

166. 959 F.2d 685 (7th Cir.), cert. denied, 113 S. Ct. 304 (1992).

167. The court in *Chrysler* quoted an arbitration decision in which the arbitrator stated that: Under the principle of just cause, extremely serious offenses, such as stealing or striking a foreman, usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline. Less serious infractions call not for discharge for the first offense, but for some milder penalty aimed at correction. *Chrysler*, 959 F.2d at 688.

168. *Id.* at 686 n.1.

169. See *id.* at 686 (stating arbitrator's finding that dismissal of employee who grabbed breasts of co-worker was not "just cause" for discharge). The arbitrator also faulted the employer for not considering mitigating circumstances, such as the harasser's work record, as indicators of his capacity for rehabilitation. *Id.*; see *infra* notes 182-89 and accompanying text (discussing problem of considering good work record as mitigating severity of punishment).

170. *Chrysler*, 959 F.2d at 688; see also ELKOURI & ELKOURI, *supra* note 1, at 176-77 (identifying extremely serious offenses meriting discharge as including stealing and striking foreman, and distinguishing such offenses from less serious ones such as lateness and absence without permission).

The *Chrysler* case demonstrates the gravest problem with the proportionality standard: it allows the reviewing body to substitute its own judgment of the seriousness of the harassment for the actual severity experienced by the victim.¹⁷¹ Such a result conflicts with the subjective inquiry used to determine whether sexual harassment in fact occurred.¹⁷² The threshold question for determining whether a particular act is sexual harassment—whether the act was unwelcome—is determined from the perspective of the affected woman.¹⁷³ When determining whether sexual harassment is severe or pervasive enough to be actionable, the courts again consider the subjective experience of the victim as well as how a reasonable person would feel in the same circumstances.¹⁷⁴ As one court has stated, to do otherwise would “systematically ignore the experiences of women.”¹⁷⁵ In view of the importance of the victim’s subjective experience, allowing the judge or arbitrator to inject his own determination of severity into the disciplinary equation undermines the purpose and spirit of title VII.¹⁷⁶

In addition, where judges and arbitrators determine the severity of the harassment, instead of adopting the victim’s perspective, their personal opinions shape the outcome of cases, thus resulting in inconsistent verdicts.¹⁷⁷ In *Chrysler*, the arbitrator simply did not consider the employee’s assault of a co-worker to be a serious

171. In *Chrysler*, the alleged harasser approached a female co-worker from behind and grabbed her breasts. *Chrysler*, 959 F.2d at 686 n.1. The Court of Appeals for the Seventh Circuit referred to the act as a sexual assault. *Id.* at 687. The arbitrator, however, did not share the court’s appreciation of the seriousness of the offense. Instead, the arbitrator associated the act with petty offenses such as lateness and absence. *Id.* at 688.

172. See *supra* notes 40-44 and accompanying text (discussing unwelcomeness threshold requirement and subjective standard for determining whether conduct is sexual harassment).

173. See *supra* notes 40-44 and accompanying text (explaining that unwelcomeness of harasser’s actions is determined by subjective standard based on victim’s perceptions). Some courts have modified the subjective standard to protect employers from liability to hypersensitive female employees who may perceive harassment where others would not. See *Ellison v. Brady*, 924 F.2d 873, 879 (9th Cir. 1991) (holding that standard for sexual harassment allegations is one that “reasonable woman would consider sufficiently severe or pervasive” to create hostile working environment).

174. See *supra* notes 55-57 and accompanying text (discussing trend among courts of appeal to apply two-prong test for severity or pervasiveness, one prong of which is actual subjective experience of victim).

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

176. See *Ellison*, 924 F.2d at 881 (stating that Congress enacted title VII to eliminate sexual stereotypes and “sense of degradation which serve to close or discourage employment opportunities for women”) (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1483 (3d Cir. 1990)).

177. See *infra* note 178 and accompanying text (discussing unpredictable role that arbitrator’s personal opinion plays in deciding cases).

offense.¹⁷⁸ Another arbitrator may have found the offense to be extremely serious, akin to theft or striking a foreman.¹⁷⁹

Using a purely subjective standard to determine severity, however, is also unacceptable.¹⁸⁰ Such an approach would require the employer to accommodate abnormally sensitive employees who perceive harassment when others would not.¹⁸¹ Moreover, a purely subjective standard would both deprive employers of a clear standard for future sexual harassment cases and result in different punishments for similar acts, depending on the victim's reaction.

B. Punishment Based on Work Record of the Harasser

Arbitrators frequently refer to the harasser's work record as a mitigating factor when evaluating the appropriateness of disciplinary action.¹⁸² The idea that a good work record should be rewarded by a reduced penalty rests on the faulty theory that a good work record indicates that the harasser can be rehabilitated.¹⁸³ An employee

178. See *Chrysler Motors Corp. v. International Union, Allied Indus. Workers*, 959 F.2d 685, 686-88 (7th Cir. 1992) (noting that arbitrator equated sexual assault of female employee with lesser offenses not warranting termination). In reviewing the arbitral decision, the district court upheld the arbitrator's reliance on his personal opinion, stating that "[i]n the absence of any explicit provision, the arbitrator is free to bring 'his informed judgment to bear . . .'" *Id.* at 688 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41 (1987)). This is another example of how arbitration's freedom from stare decisis compounds the employer's dilemma. If the arbitrator had relied less on his own judgment and more on judicial or arbitral precedent, the outcome would have been more predictable and less affected by the arbitrator's opinions.

For another example of arbitrators allowing their personal opinions to influence the outcome of cases, see *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 762 F. Supp. 1187, 1189 (M.D. Pa. 1991), *aff'd*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992), where an arbitrator based his determination to order the reinstatement of a discharged employee partly on his opinion that the alleged sexual harassment victim was overweight and unattractive.

179. See Judy Mann, *Indefensible Distinctions*, WASH. POST, Oct. 9, 1992, at E3 (discussing *Chrysler* and criticizing similar outcomes as sexist double standard produced by predominantly white male judiciary).

180. Cf. *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting reasonable woman standard, rather than purely subjective standard, "[i]n order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee").

181. *Id.*

182. See *Chrysler*, 959 F.2d at 688 (stating that arbitrator decided appropriateness of punishment based on severity of offense and offender's employment record); *Howard v. Department of Air Force*, 877 F.2d 952, 956 (Fed. Cir. 1989) (stating that administrative law judge deciding employee's challenge to discharge for harassment weighed severity of offense against offender's employment record to determine whether discharge was appropriate penalty); see also ELKOURI & ELKOURI, *supra* note 1, at 178 (noting that "[a] recent study which examined the trends in arbitration awards involving discharge cases found that the prior work record of the grievant was the most commonly cited factor given consideration by arbitrators") (citing Ken Jennings et al., *The Arbitration of Discharge Cases: A Fourth Year Perspective*, 38 LAB. L.J. 33, 41 (1987)).

183. See Jennings & Clapp, *supra* note 15, at 762 (arguing that arbitrators generally uphold discharge actions where employees had poor performance records, but in other cases reinstate employees where good long-term performance records indicate that rehabilitation will succeed);

that has an excellent official work record may also have a long, undocumented history of harassment.¹⁸⁴ Furthermore, in traditionally male occupations, the harasser may not have worked with women for much of his career.¹⁸⁵ In both of these situations, the harasser's work record would not reflect his attitude toward women or his potential for rehabilitation.

The ill-founded concept of considering the harasser's work record when determining punishment may also have serious and disruptive consequences in the workplace. First, considering the offender's work record creates a double standard in which senior employees get lighter punishments than those with insufficient tenure to establish a strong work record.¹⁸⁶ Such a double standard creates a counterproductive message that management will tolerate sexual harassment by senior employees and will not treat sexual harassment seriously in general.¹⁸⁷ As a consequence, harassment by senior employees may increase, because senior employees will believe that they can harass with impunity.¹⁸⁸ Furthermore, complaints against senior employees may decrease as harassed employees become aware of the management's policy and feel inhibited from bringing complaints against senior employees. Thus, treating the harasser's work record as a mitigating factor would perpetuate the problem of sexual harassment in the workplace, and therefore would contravene federal antidiscrimination law.¹⁸⁹

see also *Hyatt Hotels Palo Alto v. Hotel, Motel, Restaurant Employees & Bartenders Union*, Local 19, 85 Lab. Arb. Rep. (BNA) 11, 16-17 (1985) (Oestreich, Arb.) (arguing that employee discharged for sexual harassment seemed to arbitrator, based in part on good work record, to be capable of rehabilitation).

184. See *Chrysler*, 959 F.2d at 686 (stating that after discharging employee for harassment, employer discovered that employee had committed four other acts of harassment). This is a very plausible scenario given the extremely low percentage of sexual harassment victims that report their harassment. See *supra* note 17 and accompanying text (discussing low number of victims that report sexual harassment).

185. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1491-93, (M.D. Fla. 1991) (involving female welder as plaintiff who was one of very few female skilled craftworkers in business described as "a man's world"); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 370-71 (W.D.N.C. 1988) (involving female truck driver as plaintiff); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 782 (E.D. Wis. 1984) (involving plaintiff who was one of only two female warehouse workers).

186. See *supra* note 182 (discussing decisions where arbitrators considered harasser's work record in determining accused harasser's punishment). If the employee is new to the workplace, the arbitrator has no work record to consider as a mitigating factor.

187. Cf. *Kleiman*, *supra* note 8, at C2 (reporting that company that discharged two high-level employees for sexual harassment conveyed message to all employees that sexual harassment would not be tolerated).

188. See *supra* note 182 (explaining that employees with longer work records face greater prospects of receiving reduced sanctions).

189. See 42 U.S.C. § 2000e-2(a)(1) (1988) (prohibiting employer discrimination based on "race, color, religion, sex or national origin").

C. Weigh Potential Liabilities

At least one expert suggests that employers weigh their potential liabilities and act to minimize their exposure to liability.¹⁹⁰ The expert who suggests this approach to the employer's dilemma assumes that dismissing the alleged harasser would expose the employer to the least liability because offenders often harass more than one victim.¹⁹¹ While single harassers have multiple victims,¹⁹² individual victims often have multiple harassers.¹⁹³ To encourage employers to discharge the outnumbered party would result in the continued exclusion of women from traditionally male-dominated occupations.¹⁹⁴

The liability minimization theory also fails because it assumes that liability can be predetermined and is proportional to the number of persons affected. Until recently, victims of hostile environment sexual harassment who did not experience any tangible economic loss could not recover damages for their suffering.¹⁹⁵ Under the old law governing recovery, a single harasser who created a hostile environment for multiple victims could recover more for wrongful discharge than all of his victims combined could recover for sexual harass-

190. See Kang, *supra* note 2, at B1 (statement of Richard T. Seymour, director, Employment Discrimination Project, Lawyers Committee for Civil Rights Under Law) (recommending that employers discharge alleged harasser and risk wrongful termination suit because harassers often have multiple victims who may inflict greater liability upon employer).

191. Kang, *supra* note 2, at B1.

192. See Howard v. Department of Air Force, 877 F.2d 952, 954 (Fed. Cir. 1989) (upholding discharge of employee found to be harassing three female co-workers).

193. See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1491-93 (M.D. Fla. 1991) (involving plaintiff who was continuously harassed by numerous male co-workers for 11 years); Tunis v. Corning Glass Works, 747 F. Supp. 951, 954 (S.D.N.Y. 1990) (involving plaintiff subjected to numerous anonymously posted pictures of nude women, whistles, and catcalls from multiple male co-workers), *aff'd*, 930 F.2d 910 (2d Cir. 1991); Llewellyn v. Celanese Corp., 693 F. Supp. 369, 371-74 (W.D.N.C. 1988) (involving female truck driver harassed by numerous male co-workers and customers); Zabkowicz v. West Bend Co., 589 F. Supp. 780, 782-83 (E.D. Wis. 1984) (involving plaintiff who was repeatedly harassed by four male co-workers).

194. See *supra* note 185 (discussing cases where female employees experienced harassment while working in traditionally male-dominated fields). Female harassment victims working in traditionally male-dominated professions often have multiple harassers. According to the liability minimization theory, the most cost-effective solution for the employer would be to eliminate the small number of women rather than the multiple male harassers. Such a result is socially undesirable as it would continue the exclusion of women from traditionally male jobs.

195. See Swanson v. Elmhurst Chrysler Plymouth, Inc., 882 F.2d 1235, 1237 (7th Cir. 1989) (stating that because title VII provides for only equitable relief, "including back pay and reinstatement but not compensatory damages," court may not assess damages for noneconomic injuries), *cert. denied*, 493 U.S. 1036 (1990); Bradford, *supra* note 10, at 1613 (writing in 1990 that "under current judicial interpretations of title VII, a victim of hostile work environment discrimination may establish employer liability, and yet obtain no relief at all since the psychological and other intangible injuries that form the basis for the employer's liability receive no compensation").

ment.¹⁹⁶ Weighing the liabilities, therefore, would prompt an employer to allow the harassment to continue.

Now that victims of sexual harassment can recover compensatory and punitive damages, firing the outnumbered party may make more sense.¹⁹⁷ It remains a dangerous suggestion, however, because it encourages the dismissal of alleged harassers without thorough investigation. Weighing the liabilities thus creates opportunities for false accusations of harassment.¹⁹⁸ Furthermore, recovery for wrongful termination ranges from reinstatement¹⁹⁹ to recovery of future earnings.²⁰⁰ Due to the range of remedies, it is difficult for an employer to accurately predetermine the extent of potential liability for wrongful termination.

D. Remove Just Cause Provisions

Several commentators have suggested that employers remove just cause provisions from employment contracts as a way of avoiding liability for wrongful termination.²⁰¹ Simply omitting just cause as a written term of a contract will not necessarily protect the employer, however, because courts have demonstrated a willingness to find implied contractual provisions requiring just cause for dismissal.²⁰² Recognizing this phenomenon, one commentator recommends that employers require employees to sign statements releasing the

196. See *supra* notes 10, 195 (discussing situations prior to Civil Rights Act of 1991 in which sexual harassment plaintiffs won their lawsuits but were denied remedies because title VII only granted equitable relief). Where victims of sexual harassment suffered no tangible economic detriment, they could not recover any damages from their employers.

197. See *supra* note 10 and accompanying text (discussing Civil Rights Act of 1991 and changes in remedies available under title VII).

198. If employers do not carefully investigate claims of harassment, employees may make false accusations against unpopular co-workers. Because incidents of sexual harassment are rarely witnessed, the charges are difficult to prove or disprove. See *supra* notes 146, 149.

199. See *Panel Discussion, supra* note 116, at 325 (stating that when judges and arbitrators reinstate victorious wrongful discharge plaintiffs, employers usually buy out employee to avoid returning him to workplace).

200. See *Diggs v. Pepsi-Cola Metro. Bottling Co.*, 861 F.2d 914, 924 (6th Cir. 1988) (awarding "front pay," which is future earnings until retirement, to wrongfully discharged plaintiff); *Peterson v. Air Line Pilots Ass'n*, 622 F. Supp. 232, 236 (M.D.N.C. 1985) (holding that front pay can be appropriate remedy in wrongful discharge cases where reinstatement is inappropriate).

201. See *Brown, supra* note 1, at 808 (advising employers to avoid language that suggests guarantee of just cause for termination). But see *Delmendo, supra* note 13, at 843 (criticizing theory that employers can avoid wrongful termination lawsuits by removing just cause provision from employment contracts).

202. See *supra* note 108 and accompanying text (listing cases that have accepted implied contract theories in support of wrongful termination claims where employment contract contained no just cause provision); see also *Delmendo, supra* note 13, at 843-44 (arguing that employers cannot avoid termination disputes by omitting just cause provision from employment contracts because many such disputes involve implied promises to terminate only for just cause).

employer from liability for discharging the employee for any reason.²⁰³ Given the legal trend in opposition to employment at will, however, courts would likely find such waivers unconscionable.²⁰⁴

IV. RECOMMENDATIONS FOR EMPLOYERS

A. *Employers Should Institute Sexual Harassment Policies That Clearly Define and Proscribe Sexual Harassment*

Commentators and advocates have joined the EEOC in asserting that prevention is the employer's "best tool" for eradicating sexual harassment²⁰⁵ and thereby avoiding liability. To prevent sexual harassment among their employees, employers should adopt a strict, written sexual harassment policy that all employees can understand. The policy should define and provide examples of sexually harassing conduct and should state emphatically that sexual harassment is prohibited and is cause for discipline or discharge.²⁰⁶ Once an employer adopts a sexual harassment policy, the employer should disseminate copies of the policy throughout the workplace and instruct employees to read and retain them for future reference. Additional copies should be posted throughout the workplace.

203. Brown, *supra* note 1, at 808 ("The employer could ask the applicant to sign a statement such as the following: '... my employment and compensation can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or myself.'").

204. See Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1828-29 & nn.72-74 (1980) (noting that some commentators recognize disparity of bargaining power and absence of negotiation between workers and potential employers and analogize at-will employment contract to boilerplate contract containing unconscionable terms); see also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (stating that "[i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract"). In determining whether a contract is unconscionable, courts may look to the relative bargaining power of the contracting parties. See Note, *supra*, at 1828-29 (discussing argument that courts should consider relative bargaining power of employee and employer and should find at-will contracts unconscionable when employer's bargaining power is superior). Unequal bargaining power, however, is not determinative of unconscionability. RESTATEMENT, *supra*, at cmt. d. Rather, "gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party . . . may show that the weaker party had no meaningful choice" and that the contract was unconscionable. *Id.*

205. EEOC Guidelines, *supra* note 46, § 1604.11(f). The EEOC Guidelines state:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

Id.

206. See *infra* notes 217-20 and accompanying text (recommending that employment contract stipulate sexual harassment as just cause for discharge).

In addition to distributing the written policy, employers should discuss the sexual harassment policy at employee meetings. Such meetings would serve both to discourage harassment and to encourage victims of harassment to complain to management.²⁰⁷ Employers should also institute mandatory sexual harassment workshops and seminars aimed at specific groups of employees. These meetings would educate and sensitize employees to the issues surrounding sexual harassment and should convince employees of the employer's determination to prevent sexual harassment. Thus, the very act of holding special meetings to specifically address sexual harassment should deter potential harassers and encourage victims to lodge complaints.

The employer's policy should designate management-level employees who would answer employee questions and receive complaints of sexual harassment. An employer should designate at least two such employees: one woman and one man. Reporting sexual harassment can be embarrassing for the victim. Making available a person of the same gender may alleviate some of the embarrassment that prevents some victims from coming forward. Similarly, victims of sexual harassment may feel that a person of the same sex may be more sensitive or sympathetic to their situation than would a person of the opposite sex. Thus, by making available a person of the victim's gender, the employer might encourage increased reporting of sexual harassment.

After receiving a sexual harassment complaint, the employer must act quickly to investigate the complaint. To speed the process, the employer should already have in place an investigation procedure that can be implemented immediately upon receipt of a complaint. If the investigation confirms the complaint, the employer must discipline the harasser immediately.

Adopting a sexual harassment policy will not automatically shield the employer from liability to victims of harassment.²⁰⁸ Educating and sensitizing employees, however, may prevent potential harassers from becoming actual offenders.²⁰⁹ Thus, such a policy would help

207. The EEOC Guidelines state that employers should "affirmatively rais[e] the subject, expressing strong disapproval . . . informing employees of their right to raise and how to raise the issue of harassment under title VII." EEOC Guidelines, *supra* note 46, § 1604.11(f).

208. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72-73 (1986) (rejecting employer's claim that "mere existence of a grievance procedure and a policy against discrimination, coupled with [victim's] failure to invoke that procedure, must insulate [employer] from liability"); *Davis v. Tri-State Mack Distribs., Inc.*, 981 F.2d 340, 344 (8th Cir. 1992) (stating that mere existence of sexual harassment policy does not guarantee employer protection from liability to victim).

209. See *Tri-State Mack*, 981 F.2d at 344 (finding that if employer had sexual harassment policy, "perhaps [harasser] would not have engaged in the offending conduct").

limit the employer's liability for sexual harassment.²¹⁰

B. Arbitration Agreements Should Establish Rules for Discharge Proceedings Involving Sexual Harassment

To alleviate the problems surrounding arbitration of wrongful discharge claims by workers discharged for sexual harassment,²¹¹ employers of union members whose collective bargaining agreements contain arbitration clauses should negotiate explicit arbitration rules for discharge grievances involving sexual harassment. Such agreements should parallel the rules by which similar cases would be governed at trial. By eliminating much of the arbitrator's discretion, the employer would increase the predictability of arbitral cases. Furthermore, the employer would reduce the likelihood that union and nonunion employees would receive different treatment in similar cases.²¹²

The arbitration rules should specify that the employer must prove its case by a preponderance of the evidence, thus eliminating the arbitrator's power to determine the quantum of proof on a case-by-case basis.²¹³ By establishing a uniform burden of persuasion, the arbitration agreement will create greater consistency among individual arbitration cases and between cases decided by arbitrators and by courts. Moreover, the proposed arbitration agreement would balance the interests of the parties and ensure a fairer outcome than the current system. The proposed agreement would not switch the burden of going forward with the evidence, which would remain with the employer. Thus, the employee will not bear the more difficult burden of proving that he did not commit the harassment.²¹⁴ By allowing the employer to prove his case by a preponderance of the evidence and ensuring that the arbitrator will not assign some higher

210. See WILLIAM F. PEPPER & FLORYNCE R. KENNEDY, *SEXUAL DISCRIMINATION IN EMPLOYMENT* 52 (1981) (noting unlikelihood of employer liability where sexual harassment policy is in place, implementation procedures exist, and procedures are applied quickly and fairly).

211. See *supra* notes 124-63 and accompanying text (discussing special problems surrounding arbitration of wrongful discharge claims).

212. See *supra* notes 123, 157-58 (discussing inconsistencies between judicial review of cases involving nonunion employees and arbitration of cases involving union employees).

213. See *supra* notes 134-47 and accompanying text (discussing evidentiary standard used by arbitrators).

214. Despite the proof problems often encountered by employers in sexual harassment cases, it generally is easier to prove that something occurred than to prove that it did not occur. Cf. PAUL R. RICE, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* 193-95 (2d ed. 1990) (discussing problems surrounding proof of nonoccurrence).

standard, the proposed rule guarantees the employer a fair opportunity to prove its case.²¹⁵

The arbitration agreement also should require that all witnesses in sexual harassment discharge grievances testify under oath. By introducing the specter of perjury to the arbitration setting, the proposed rule would reduce the prospect of false testimony. Such control over the testimony of witnesses and parties is crucial in cases involving sexual harassment because these cases are often devoid of extrinsic evidence and are essentially credibility contests.

Finally, the arbitration agreement should bind the arbitrator to the legal precedent established by the courts of the jurisdiction in which the alleged harassment occurred. This provision, like the one establishing the level of proof, would ensure greater uniformity among sexual harassment discharge cases decided in arbitration and in court.

While inserting such provisions into arbitration agreements may reduce the informality for which arbitration is acclaimed,²¹⁶ the benefits outweigh this disadvantage. Requiring that arbitration mirror civil litigation with regard to the swearing in of witnesses, the quantum of proof, and the doctrine of stare decisis would alleviate some of the uncertainties that employers now face when disciplining employees for sexual harassment. Arbitration decisions would become more consistent, both with each other and with court decisions. Employers would thus be able to use prior cases to guide their treatment of sexual harassment. Moreover, the knowledge that challenges by union and nonunion employees would be decided similarly would enable employers to discipline all employees equally. Finally, many of the benefits of arbitration would not be affected. For example, parties would continue to avoid crowded judicial dockets, and they would still resolve their conflicts more quickly than if they went to trial.

C. Employment Contract Should Stipulate Sexual Harassment as Just Cause for Dismissal

To protect themselves against wrongful termination claims by discharged harassers, employers should include in all employment

215. See *supra* note 146 and accompanying text (stating that because of proof problems often attendant to sexual harassment cases, employers cannot meet higher burdens of persuasion imposed by some arbitrators).

216. See BARTOSIC & HARTLEY, *supra* note 124, at 351 (stating that grievance procedure and arbitration are valued for being informal, inexpensive, and expeditious means of resolving labor disputes).

contracts a provision specifying sexual harassment as just cause for dismissal. By designating sexual harassment as grounds for dismissal within the employment contract, the employer avoids the problems surrounding the vague common law definitions of "just cause."²¹⁷ In addition, such a contractual provision may deter potential harassers by conveying the message to employees that the employer considers sexual harassment a serious offense.

By defining sexual harassment as just cause for dismissal in employee contracts, an employer will strengthen its case should an employee discharged for sexual harassment file a wrongful discharge claim. Such a provision will thus reduce the employer's risk of liability to the discharged harasser. Furthermore, the presence of such a provision in the employment contract may dissuade discharged harassers from pursuing wrongful discharge claims, thereby reducing both the employer's risk of liability to harassers and its legal expenses in defending against such claims.

Stipulating sexual harassment as just cause for dismissal, however, should not increase the likelihood that an employer will discharge wrongly accused employees and minor offenders. In the absence of wrongful discharge claims, there remain many economic disincentives to prevent such unnecessary discharges.²¹⁸ Such disincentives include the cost of training a replacement worker, loss of training invested in the discharged worker, and damage to company morale.²¹⁹ Moreover, a reputation for unwarranted discharges will impede future recruitment efforts.²²⁰ Such economic disincentives to baseless discharges would protect the rights of accused harassers while the proposed contractual provision would protect the employer from unfounded wrongful discharge claims.

CONCLUSION

The current trends in sexual harassment and wrongful discharge law place the employer in a precarious position. If the employer fails to halt the harassment, it may be liable to the victim. If the employer

217. Cf. Delmendo, *supra* note 13, at 838 & n.62 (stating that where employer stipulates in employment contract conduct that will result in termination, stipulated conduct is per se just cause as long as employer's rule is reasonably related to maintaining workplace order).

218. Cf. WEILER, *supra* note 13, at 59 (arguing that "[e]mployers do not want to fire employees for no reason," because to do so creates economic loss for employer as well as for employee).

219. See WEILER, *supra* note 13, at 59 (stating that employer who unnecessarily discharges employee loses investment in employee and that such loss serves as disincentive to unnecessary firing).

220. WEILER, *supra* note 13, at 59.

ends the harassment by terminating the harasser, it may be liable to the harasser. The dilemma is especially difficult for employers of union employees, for whom disputes may be resolved under unpredictable arbitration rules. As awareness of sexual harassment grows, the employer's dilemma worsens.

Employers can limit their liability to employees by acting carefully when formulating employment contracts and by implementing effective sexual harassment policies. A well-designed and implemented sexual harassment policy will prevent some sexual harassment and will facilitate the discovery and correction of harassment that does occur. By adopting the proposed arbitration rules, employers can avoid the problems that accompany sexual harassment discharge grievances. Finally, by designating sexual harassment as just cause for dismissal, the employer will deter acts of sexual harassment and actions for wrongful discharge. Thus, while the employer's dilemma is difficult, it is not insurmountable.