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STUDENT SCHOLARSHIPS

SEXUAL HARASSMENT: DISCRIMINATION OR TORT?

Joanna Stromberg*

ABSTRACT

In this Student Scholarship Article, Joanna Stromberg argues that Title VII's discrimination approach is typically inappropriate for sexual harassment claims. Title VII claims are subject to a cap on compensatory and punitive damages, fail to offer relief against the harasser, and most importantly, fail to adequately account for the experience of sexual harassment. Title VII focuses on whether a plaintiff has been treated differently because of her membership in a particular group. Sexual harassment, on the other hand, is an act against the individual, rather than the group, and the act is performed usually for the harasser's own enjoyment. While discrimination is an employment practice, sexual harassment is the act of an individual employee. Although imperfect, tort law better addresses the harm of sexual harassment. The author argues that the best approach would be a hybrid between Title VII and tort law.

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I. INTRODUCTION

Sexual harassment claims in employment contexts are currently pursued largely through the anti-discrimination provisions of Title VII.[1] This avenue for redressing such claims began in 1976, with *Williams v. Saxbe*.[2] Before that time, victims sought relief from sexual harassment through claims of assault and battery, negligent hiring and/or retention, and intentional infliction of emotional distress.[3] These victims met with limited and inconsistent success, mainly because sexual harassment had not yet been accepted as a real workplace problem.

With *Williams*, however, sexual harassment came to be seen as a form of sex discrimination, and it is now rarely discussed as anything else.[4] Indeed, Title VII has several advantages for those pursuing sexual harassment claims, including a lower required threshold of harm than tort law and broad liability for

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000e-17 (2001).

2. 413 F. Supp. 654 (D.D.C. 1976).

3. *See, e.g.*, Skousen v. Nidy, 367 P.2d 248 (Ariz. 1962) (filing suit against employer for assault and battery based on repeated offensive touching and violent assaults). Even after *Williams*, some victims still seek relief from sexual harassment through tort. *See, e.g.*, Ford v. Revlon, 734 P.2d 580 (Ariz. 1987) (using theories of intentional infliction of emotional distress and assault and battery); Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099 (Fla. 1989) (using theories of assault and battery, intentional interference with emotional distress, and negligent hiring and retention); Retherford v. AT&T Comm. of the Mountain States, Inc., 844 P.2d 949 (Utah 1992) (using theories of intentional infliction of emotional distress).

4. *See* Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 379 (1998); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 346 (1990).

employers. However, as commentators have pointed out, Title VII has some distinct disadvantages for victims of sexual harassment.[5] For example, until 1991, no compensatory or punitive damages were available, only injunctive relief. Though compensatory and punitive damages are now available, they are subject to a cap that is based on the size of the business and is unrelated to the injury suffered.[6] Also, under Title VII, victims can sue the company employing the harasser, but they cannot sue the actual harasser as an individual,[7] which could have some cathartic value for many victims. Additionally, perhaps most importantly, there is a philosophical disconnection between many instances of sexual harassment and a discrimination model.[8] Title VII primarily addresses the unfairness that results from job applicants or employees experiencing a job differently from other applicants or employees because they are members of a group whose identifying trait is unrelated to that job. Sexual harassment, although sometimes an element of such discrimination, is fundamentally something else: it is remarks or conduct directed at an individual, not a group, usually for the harasser's enjoyment. Discrimination is an employment practice, which is reflected in the fact that Title VII creates liability for employers. In contrast, sexual harassment is the action of an individual employee for reasons unrelated to employment decisions or policies.

This Article argues that, contrary to the prevailing wisdom, Title VII is not the best way to pursue sexual harassment claims. Moreover, it is a poor fit with sexual harassment philosophically and doctrinally. However, tort law, the other available option, has its flaws as well, despite its closer definitional connection to the harm of sexual harassment. The Article suggests that there should be a sort of hybrid of the two, allowing tort-type relief and the ability to sue a co-employee harasser, but with a Title VII-like standard of harm and intent.

Part II outlines the Title VII rubric of sexual harassment as sex discrimination, beginning with definitions of the two most common forms of harassment: quid pro quo and hostile environment. This part then analyzes the cases through which sexual

5. *See generally* Hager, *supra* note 4 (advocating the curtailment of Title VII liability for employers); Paul, *supra* note 4 (critiquing Title VII as an appropriate means of recovery for victims of sexual harassment).

6. 42 U.S.C. § 1981a (2001).

7. *See* Hager, *supra* note 4, at 384. *See generally* § 2000e-2(a) (describing unlawful "employer practices").

8. *See* Hager, *supra* note 4, at 375, 379-80.

harassment came under the purview of Title VII, along with the standards set by the Equal Employment Opportunity Commission (EEOC) and the limits of liability and remedies under the Act. Part II further discusses the advantages and disadvantages of Title VII actions for sexual harassment, both to the victim and to society at large.

Part III analyzes possible theories of recovery under existing tort doctrines, along with their recognized standards of injury and liability, and available remedies. It then discusses the strengths and weaknesses of tort law as applied to sexual harassment.

Finally, Part IV offers the ideal doctrine under which to approach sexual harassment cases: the basic principles of tort law liability and remedies, but with the lowered Title VII intent and injury requirements combined with a somewhat broader liability for employers than vicarious liability principles of tort currently allow.

II. Sexual Harassment Under Title VII

Types of Sexual Harassment

The two most common forms of sexual harassment that courts have recognized under Title VII are quid pro quo sexual harassment and hostile environment sexual harassment. Quid pro quo sexual harassment[9] "occurs when submission to sexual conduct is made a term or condition of an individual's employment or when an individual's submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual."[10] Such demands may be made by any employee who has the authority to make decisions regarding the victim's conditions of employment, regardless of whether such employee is officially designated a supervisor. Quid pro quo sexual harassment is also known as "tangible harassment,"[11] due to the relatively tangible nature of the result of not complying with the

9. *See* Williams v. Saxbe, 413 F. Supp. 654, 656 (D.D.C. 1976) (finding that termination of the plaintiff simultaneously with her rejection of her supervisor's sexual advances "lends itself to an inference of sex discrimination").

10. Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 Law & Ineq. 213 (1994).

11. *See* Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. Pa. L. Rev. 1461, 1463 (1986) ("[q]uid pro quo or tangible harassment"); *see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (distinguishing between "'tangible loss' of 'an economic character'" and "'purely psychological aspects of the workplace environment'").

demand, such as termination, demotion, or failure to be hired or promoted.

"Hostile environment" sexual harassment[12] occurs when the workplace is so permeated by sexually offensive conduct that, regardless of any quid pro quo sexual harassment, the "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[13] For hostile environment harassment, courts often require a showing of a pattern of conduct, holding that a single incident is probably insufficient to alter the working conditions so as to become hostile or abusive.[14] Although these two types of sexual harassment seem self-evident today, such was not always the case.

Sexual Harassment Under the Title VII Landscape

During the first eleven years of Title VII's existence, sexual harassment was not recognized as a form of actionable sex discrimination. The statute provides that it shall be unlawful for an employer:

> to fail or refuse to hire or to discharge any 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.[15]

Before *Williams v. Saxbe*, "discrimination" in the statute was defined narrowly, pertaining only to policies or practices of the employer, and not conduct of individual employees, unless they were acting within the scope of their employment. For example, in *Corne v. Bausch & Lomb*,[16] a claim of sexual harassment based on unwelcome sexual advances made by a supervisor was held to be not actionable under Title VII because there was no

12. Hostile environment harassment was first recognized as a Title VII cause of action in *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (holding that racial and ethnic slurs were so offensive as to alter the working environment and prevent plaintiff from performing her job). Hostile environment sexual harassment was recognized by federal courts as a prohibited form of discrimination under Title VII beginning in the 1980s. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172 (D. Del. 1983).

13. *Meritor*, 477 U.S. at 65.

14. *Henson*, 682 F.2d at 904-05; Bundy v. Jackson, 641 F.2d 934, 943-46 (D.C. Cir. 1981)); Schoenheider, *supra* note 11, at 1469 (citing Katz v. Dole, 709 F.2d 251, 154-55 (4th Cir. 1983)).

15. 42 U.S.C. § 2000e-2(a)(1) (2001).

16. 390 F. Supp. 161 (D. Ariz. 1975).

discriminatory action by the employer.[17] An individual employee (albeit a supervisor) had engaged in the complained of behavior. Because the perpetrator's actions were not part of an employer policy, yielded no benefit to the employer, and bore no relationship to the scope of his employment,[18] the court found no Title VII discrimination.

The following year, however, in *Williams*, the District Court for the District of Columbia held that an employer violated Title VII where a supervisor had retaliated against the plaintiff for rejecting his sexual advances, even though the retaliation was not a policy of the employer.[19] This case was the first major ruling that sexual harassment fell within the scope of conduct prohibited by Title VII as a form of discrimination on the basis of sex. Consistent with the holding in *Williams*, in 1980 the EEOC issued Guidelines explicitly stating that sexual harassment constitutes discrimination because of sex.[20]

In 1986, the Supreme Court recognized hostile environment sexual harassment as a form of prohibited discrimination in *Meritor Savings Bank v. Vinson*.[21] The Court cited a Fifth Circuit case, *Rogers v. EEOC*,[22] and its holding that Title VII promises employees the right to work in an environment free of insult, intimidation and discriminatory conduct, and that the protections of Title VII are not limited to tangible aspects of employment.[23] The Court also referred to the EEOC Guidelines in extending this holding to recognize hostile environment sexual harassment as a form of prohibited sex discrimination under Title VII.[24] The Court also pointed out, however, that a mere insult or derogatory remark is not necessarily enough to make a case of hostile environment harassment; rather, the conduct must be so severe that

17. *Id.* at 163.

18. *Id.*

19. *See* Williams v. Saxbe, 413 F. Supp. 654, 660 (D.D.C. 1976) (holding that Title VII prohibits the discriminatory imposition of a condition of employment by a supervisor, because that is then, in effect, the policy of the employer).

20. *See Meritor*, 477 U.S. at 65 (acknowledging that the EEOC Guidelines, while not controlling, are a source of informed judgment to which courts may look for guidance).

21. *See also* discussion *supra* note 12.

22. 454 F.2d 234 (5th Cir. 1971).

23. *Meritor*, 477 U.S. at 65-66.

24. *Id.* at 66 (citing Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

it alters the conditions of employment and makes the atmosphere abusive.[25]

Standards, Liability and Remedies

Since *Meritor*, both quid pro quo and hostile environment sexual harassment are recognized as prohibited discrimination on the basis of sex under Title VII. Title VII applies only to employers, not individual employees;[26] thus, a victim of sexual harassment may sue only her employer under the statute. In addition, it applies only to employers who have fifteen or more employees.[27]

As recommended by the EEOC in its amicus brief in *Meritor*,[28] employers consistently have been held strictly liable for quid pro quo sexual harassment.[29] The rationale for this standard is that an employment decision such as hiring or firing can be made and carried out only through the authority of the employer. Therefore, it is logical and reasonable to deem such decisions to be the employer's. In *Meritor*, the Court also addressed the issue of employer liability under Title VII for an employee's actions, suggesting that common law agency principles should determine liability.[30] Employers should be held strictly liable for quid pro quo sexual harassment because the harasser is acting in his or her capacity as an agent of the employer.

Standards of liability in hostile environment sexual harassment cases, however, vary. The Supreme Court in *Meritor* held that, consistent with common law agency principles, employer liability for hostile environment harassment should lie only when

25. *Meritor*, 477 U.S. at 65-66. The *Meritor* Court used "abusive" and "hostile" interchangeably. *Id.* at 66.

26. If an employee is acting as an agent of the employer at the time of the harassment, Title VII may apply to the employee/agent. An employee can be considered an agent of the employer if the employer has manifested consent to the employee that the employee "shall act on the [employer]'s behalf and subject to the [employer]'s control," and the employee has consented to act. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2001).

27. 42 U.S.C. § 2000e-(b) (2001).

28. *Meritor*, 477 U.S. at 71-72.

29. Although strict liability for quid pro quo sexual harassment was mentioned only as dicta in *Meritor* (because the case involved hostile environment sexual harassment), the Court cited without discussion the fact that "the courts have consistently held employers liable for the discriminatory discharge of employees by supervising personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions." *Id.* at 70-71 (citing Anderson v. Methodist Evangelical Hosp., Inc. 464 F.2d 723, 725 (6th Cir. 1972)).

30. *Id.* at 72.

the employer had knowledge of the harassment, or when the victim had no available means of bringing her complaint to the employer.[31] When the employer has a process for reporting sexual harassment complaints, and the victim makes use of the procedure, the employer is deemed to have knowledge, and failure to take action will buttress a finding of employer liability.[32] This standard for employer liability, combined with Title VII's applicability only to employers, makes it difficult for a victim of hostile environment sexual harassment to fully recover for her injury under Title VII if no complaint was brought under company procedure, since it is difficult to show that an employer had knowledge of what is often only individual interactions between the harasser and the victim.

Nonetheless, if it is a supervisor that creates the hostile environment, the employer may be held liable if the behavior in question was within the scope of the supervisor's employment. A finding that the behavior was within the scope of employment usually requires that the supervisor acted with the motive of serving the employer's interests, however mistaken his or her means of carrying out that motive may have been.[33]

Other courts have advocated more relaxed standards. An earlier Eleventh Circuit case, *Henson v. City of Dundee*, held that an employer would be liable if it "knew or *should have known* of the sexual harassment."[34] A later case in the same Circuit held that vicarious liability may be imputed to the employer when the harasser is "aided in accomplishing the harassment by the existence of the agency relationship,"[35] even if the employer did not have actual knowledge of the offensive conduct. Four of the Justices in *Meritor* even urged strict liability for hostile environment sexual harassment, arguing that an employer's responsi-

31. *Id.* at 71-72.

32. KATHARINE T. BARTLETT & ANGELA P. HARRIS, GENDER AND LAW: THEORY, COMMENTARY, DOCTRINE 519 (2d ed. 1998).

33. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 757 (1998).

34. Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (emphasis added). The court held that an "inference of knowledge or constructive knowledge" by an employer may be found where the plaintiff can show that she "complained to higher management" about the harassment or where she can show the "pervasiveness of the harassment." *Id.* at 905. In this particular case, the court found that the plaintiff made a prima facie showing of her employer's constructive knowledge by testifying that she had complained of the harassment to a manager (no action was taken by the employer in response to the plaintiff's complaint). *Id.* at 899, 905.

35. Faragher v. Boca Raton, 111 F.3d 1530, 1536 (11th Cir. 1997).

bilities extend to ensuring "a safe productive workplace"[36] and that the employer should therefore bear liability for any harassment that takes place.

The remedies for sexual harassment under Title VII are somewhat limited.[37] Originally under Title VII, recovery was restricted to equitable relief, in the form of reinstatement, back pay, and orders to cease the discriminatory practice(s).[38] No monetary damages were available. Under the 1991 amendments to Title VII, plaintiffs may seek compensatory and punitive damages in addition to the injunctive relief already available.[39] Punitive damages are available if the discrimination was engaged in with malice or reckless indifference toward the plaintiff.[40] Compensatory damages are available for both pecuniary and non-pecuniary losses.[41] However, compensatory damages are capped at between $50,000 and $300,000; the amount is based on the number of employees the defendant has, and bears no relation to the extent of the injury.[42]

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36. *Meritor*, 477 U.S. at 76 .

37. Although the standards for liability differ for the two types of sexual harassment, under Title VII both are subject to the same remedies.

38. Schoenheider, *supra* note 11, at 1472.

39. Pollard v. E.I. duPont de Nemours & Co., 532 U.S. 843 (2001); *see also* 42 U.S.C. §1981a-(a)(1), -(b)(2) (2001).

40. § 1981a-(b)(1), (2).

41. § 1981a-(b)(2). Pecuniary losses are monetary losses such as costs of medical or psychological treatment necessitated by the harassment, or lost wages from any work missed due to the harassment. Non-pecuniary losses are less easily monetized losses, such as physical or emotional pain.

42. Section 1981a-(b)(3) provides:

> The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000

§ 1981a-(b)(3).

Advantages of Title VII

There are several ways in which Title VII is more effective for sexual harassment victims than other liability theories are, particularly tort law. Title VII has lower intent and injury standards than applicable torts, allowing more victims to recover. The range of behavior that is actionable under Title VII, as suggested by the EEOC Guidelines, is broad, encompassing acts as varied as unwelcome touching, derogatory comments and display of obscene pictures. The conduct must simply reach the level of "offensiveness."[43] Furthermore, although most courts apply the reasonable person standard, men and women perceive such conduct differently,[44] and several courts have applied the reasonable woman standard in Title VII sexual harassment cases, finding conduct offensive when the reasonable woman (not the reasonable person) would do so.[45] Consequently, plaintiffs in sexual harassment cases have an easier time showing that the complained of conduct rises to the proscribed level under Title VII than they would under a tort theory. For example, intentional infliction of emotional distress ("IIED"), a tort claim frequently invoked in cases of sexual harassment, requires that conduct be so outrageous that a reasonable member of the community would be outraged upon hearing of the behavior.[46] Many forms of behavior that do not rise to the level of "outrageous" under tort law nonetheless meet the lower standard of offensiveness required by Title VII, especially when the reasonable woman standard is used in Title VII cases.

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43. Although few cases have defined "offensive," and many have used it interchangeably with "abusive" or "hostile," *see, e.g.*, Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991), one court has described the "offensive" conduct that forms the basis for most hostile environment sexual harassment claims as "unwelcome sexual touchings and comments," and focused on the fact that the plaintiff did not welcome the behavior, Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 453 (N.J. 1993).

44. *See* Teresa Godwin Phelps, *Gendered Space and the Reasonableness Standard in Sexual Harassment Cases*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 265, 266 (1998) (noting that "sociological and psychological studies show that women and men experience workplace behavior differently").

45. *Ellison*, 924 F.2d at 879; Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990), *cited in* Phelps, *supra* note 44, at 265; *Lehmann*, 626 A.2d at 453-54. A reasonable person standard and a reasonable woman standard, although not necessarily different, might differ insofar as women and men perceive social interactions differently; a reasonable woman might consider a remark or action to be offensive that a reasonable man (who is often used as the reasonable "person") might not. *See also* discussion *infra* notes 56-59 and accompanying text.

46. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965); *see also* discussion *infra* Part III.

The level of intent required to find a violation of Title VII is also lower than a comparable tort theory. Torts that may cover the injury of sexual harassment are all intentional torts, and therefore require that the harasser either desire the tortious consequences of his actions, or be substantially certain that those consequences will occur.[47] Title VII, however, by eliminating an intent requirement, allows recovery even when a hostile working environment is an unintended result of offensive behavior. This advantage of Title VII captures the different perceptions of men and women regarding what is offensive and what is not. If a male employee engages in behavior that he deems merely amusing, but his female coworker finds offensive, Title VII liability may be found despite the fact that the male employee did not intend his behavior to offend or harass.

Title VII also provides for broader employer liability than tort law. Under *Meritor*, employers are held strictly liable for quid pro quo sexual harassment. It is much more difficult to find employers liable under the common law principles of agency that are applied in tort cases. Common law principles of agency[48] will sometimes hold an employer responsible for similar kinds of harassment, since a supervisory employee is usually acting within the scope of his employment and on behalf of the employer when he makes hiring, firing or promotion decisions. However, if an employer has a policy prohibiting such harassment, the employee may be found to be acting on his own, without even the implied authority of the employer; and thus the employer will be free of liability. Compare this with Title VII, under which it is irrelevant whether a quid pro quo harasser is acting within or outside of his scope of employment, with or without the employer's approval.

In the case of hostile environment sexual harassment, agency principles would preclude employer liability in a tort claim if the harasser was acting outside the scope of his employment, or if the employer did not know about the offensive conduct. Title VII, however, depending on the jurisdiction, may impute vicarious liability to the employer if it should have known of the harassment,[49] or if it is the harasser's agency relationship

47. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

48. *See* discussion *infra* Part III.

49. *See* Yates v. Avco Corp., 819 F.2d 630, 636 (6th Cir. 1987) (holding that constructive notice of harassment is sufficient to find employer liability).

to the employer that facilitates the harassment.[50] It is usually easier for a plaintiff to show that an employer should have known about an employee's conduct than that the employer actually knew of it, because employers ostensibly are responsible for, and have an interest in, supervising their employees, but do not watch over every action or remark. Some jurisdictions, although they would permit a finding of employer liability only if the harasser was acting within the scope of his employment, apply an interpretation of "scope of employment" that is broader than the standard usually used in tort cases. Under this interpretation, scope of employment, and therefore employer liability, may be found for a wider range of behavior than under the narrower tort definition.[51] Justice Marshall and the three other Justices joining in his concurring opinion in *Meritor* would even permit a finding of strict liability in cases of hostile environment sexual harassment.[52] This would relieve plaintiffs of the burden of proving that their employers knew or should have known about the harassment.

This broader interpretation of liability gives employers an incentive to implement programs and procedures to prevent and respond to sexual harassment. Foreseeing that they may be held liable for harassment of which they have no actual knowledge, employers may be spurred to implement sexual harassment sensitivity programs and detailed complaint procedures, and to take disciplinary action against harassers after even one complaint in order to prevent future occurrences. In addition, employer liability under Title VII may be the most efficient way of combating sexual harassment in the workplace because "employers are in the best position to carry the burden," through educating employees, providing avenues for redressing problems, and holding employees responsible for their actions through disciplinary measures.[53]

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50. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958), *cited in* Burlington Indus. v. Ellerth, 524 U.S. 742, 758, 765 (1998).

51. *See* Burlington Indus. v. Ellerth, 102 F.3d 848 (Ill. 1996), *vacated by*, Janson v. Packaging Corp. of Am., 123 F.3d 490 (Ill. 1997) (en banc) (harasser stared at plaintiff's breasts and legs, occasionally touched her, and made sexual comments and innuendoes; the behavior was found to be within the scope of his employment when it occurred in the workplace, during working hours, and directed toward an employee over whom he had authority); *see also Burlington*, 524 U.S. at 765.

52. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 76 (1986).

53. Erin Ardale, *Employer Liability for Sexual Harassment in the Wake of* Faragher *and* Ellerth, 9 CORNELL J.L. & PUB. POL'Y 585, 586, 596 (2000).

Perhaps the most controversial question concerning which avenue should be used to pursue a sexual harassment claim is the doctrinal fit of Title VII's anti-discrimination goals with the nature of sexual harassment. Several commentators have argued that sexual harassment does not logically fit within the paradigm of discrimination, either under Title VII or theoretically, primarily because sexual harassment is usually directed toward a particular individual, rather than a group, and can rarely be characterized as an employer's policy.[54]

However, sometimes sexual harassment really is discrimination, even considering the arguments set forth above. When sexual harassment "operates to maintain the sexual stratification of the workplace and to keep women from knowledge and money,"[55] then Title VII is doctrinally appropriate. Catharine MacKinnon argued that sexual harassment is per se a means of asserting male power and entrenching the structure of male dominance in society.[56] Even if this is an overly broad assertion, it may well apply in some cases. Teresa Godwin Phelps posits that some workplaces are gendered spaces, in that they are dominated in numbers by either males or females.[57] In such a workplace, a member of the non-dominant gender will be especially conscious of his or her gender, becoming particularly sensitive to remarks about that gender and sexuality, and quite likely perceiving such remarks as more threatening than he or she would in a neutrally gendered or self-gendered atmosphere.[58] Phelps

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54. This point will be discussed further in Part III. *See, e.g.*, Hager, *supra* note 4, at 379 (arguing that harassing conduct of a sexual nature toward an individual is often very different from contempt toward a group); Helen Lafferty, *Is Sexual Harassment Sex Discrimination? Still an Open Question*, 7 CIRCLES: BUFF. WOMEN'S J.L. & SOC. POL'Y 21, 23 (1999) (arguing that "viewing sexual harassment as sex discrimination is philosophically incorrect within the framework of Title VII "); Paul, *supra* note 4, at 346-53 (arguing that neither quid pro quo sexual harassment nor hostile environment sexual harassment conforms to the disparate treatment model of discrimination because harassment typically is directed toward an individual, and not just any member of a group).

55. Phelps, *supra* note 43, at 283.

56. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 174-75 (1979), *cited in* Paul, *supra* note 4, at 347 (describing MacKinnon's position).

57. *See* Phelps, *supra* note 44, at 282.

58. "Neutrally gendered" refers to environments that include both men and women in approximately equal or nearly equal numbers, while "self-gendered" refers to environments that consist of workers who are mostly or all of the same gender as the person in question who is perceiving the behavior. *See id.* at 282 (describing an example in which a male nurse works in a primarily female nursing station in a hospital, and is therefore hypersensitive to remarks about male sexuality and derog-

goes on to argue that workers of the dominant gender may well be afraid on some level of the entry of the other gender into the field, because it may create more applicants for the number of jobs available, thereby reducing job availability or driving down wages.[59] The workers of the dominant gender, as they realize the effect that their remarks about gender and sexuality have on their coworker, will continue to use that type of behavior as a means of cementing their dominance in the field.[60]

Phelps' model of the gendered workplace seems to apply quite readily to a case like *Robinson v. Jacksonville Shipyards*,[61] in which women formed a very small minority in a workplace dominated in numbers by men,[62] and each of the women who testified had been harassed at a time when she was the only woman in a group of men.[63] The male workers made insulting remarks concerning women (notably, that the men did not like working with women), and remarks that were generally sexual in nature.[64] The court found that a reasonable woman in that workplace (i.e., the person especially sensitive to her gender because of the dominance within the workplace of the other gender) would find the environment hostile.[65] *Zabkowicz v. West Bend Co.*[66] is another example of a case that fits within this gendered space model. A female plaintiff complained of coworkers in a mostly male factory exposing body parts, using sexual innuendo and sexually explicit language, and displaying sexually derogatory pictures.[67] The court held not only that the plaintiff had undoubtedly been subject to such harassment because of her sex, but moreover that the sexually offensive conduct and language would have "failed entirely in its [sic] crude purpose had the plaintiff been a man."[68] The court implied that a man in that

atory remarks about men in general, while the women with whom he works "are largely oblivious to the fact that they are female").

59. *Id.*

60. *Id.*

61. 760 F. Supp. 1486 (M.D. Fla. 1991).

62. The workplace involved in this case was a shipyard, engaged in shipbuilding and ship repair work, including the following departments: "shipfitting, sheetmetal, electrical, transportation, shipping and receiving, carpenter, boilermaker, inside machine, outside machine, rigging, quality assurance and pipe." *Id.* at 1492.

63. Phelps, *supra* note 44, at 273-74 (describing the facts of the case).

64. *Id.* at 274.

65. *Id.* at 275.

66. 589 F. Supp. 780 (E.D. Wis. 1984).

67. *Id.* at 782-83.

68. *Id.* at 784.

workplace would not have been subjected to similar harassment in the first place because he would not have been offended by it, depriving the harassers of their very reason for engaging in such behavior.[69]

In cases such as *Robinson* and *Zabkowicz*, it seems clear that sexual harassment can indeed operate as a form of discrimination. As such, Title VII's antidiscrimination model is doctrinally appropriate. When the harassment in a gendered space operates to make the women (or men) in a workplace feel that their presence there is not being tolerated, merely because they are women (or men), then the situation is properly called discrimination because of sex, which is precisely what Title VII prohibits.

Defects of Title VII

Several commentators have noted that the most serious flaw in Title VII is the logical and philosophical dissonance between sexual harassment and sex discrimination. Ellen Frankel Paul takes an individual rights perspective in criticizing the categorization of sexual harassment, particularly hostile environment sexual harassment, as Title VII prohibited discrimination.[70] She argues that typical non-harassment, disparate treatment discrimination cases involve "policies of corporations or . . . practices of key personnel" that affect individuals because they are members of a protected group.[71] Compare this, however, with both types of sexual harassment cases, in which harassing behavior is directed at a specific individual for a variety of reasons (desire, hostility, proximity) that hardly comports with company policy, and most likely is connected to the victim and harasser personally. Paul describes "an essential attribute" of discrimination that is missing from sexual harassment: "that any member of the scorned group will trigger the response of the person who practices discrimination."[72] A harasser, on the other hand, will direct his behavior toward a particular individual. In fact, sexual harassment cases brought under Title VII typically involve single plaintiffs, rather than multiple plaintiffs who are members of a scorned group.

69. *Id.*
70. Paul, *supra* note 4, at 335.
71. *Id.* at 349.
72. *Id.*

Mark McLaughlin Hager argues similarly that sexual harassment is more an invasion of personhood than a general contempt for an entire gender.[73] He distinguishes between a discriminator who harbors ill feeling toward women in general, and the harasser who instead suffers from a "combination of erotic fixation and insufficient moral self-restraint,"[74] or between a male supremacist and a creep.[75] In advocating a theory of recovery for sexual harassment under tort law, he describes a tortious injury as an impermissible type of treatment, which is an invasion of personhood (i.e., sexual harassment), while "discrimination bespeaks an impermissible reason or excuse for [the treatment]:"[76] contempt for the gender (i.e., sex discrimination).

Several commentators point out that the conception of sexual harassment as a form of discrimination presents a serious problem in cases of bisexual and heterosexual same-sex harassment.[77] They point to the fact that some courts have held that heterosexual male-female and homosexual harassment should be considered sex discrimination because in such cases, the victim was singled out for sexual advances or physical contact because of desire or sexual attraction on the part of the harasser, which would not have happened if the victim was of the other sex. In other words, "but for" the victim's sex, he or she would not have been subject to the harassment.[78]

However, this very attempt to justify the conceptualizing of sexual harassment as discrimination highlights a serious flaw when this reasoning is applied to cases of heterosexual same-sex harassment and bisexual harassers.[79] In *McWilliams v. Fairfax County Board of Supervisors*,[80] the court held that harassment of

73. Hager, *supra* note 4, at 379.

74. *Id.*

75. *See id.* at 386 (describing Senator Bob Packwood and his pro-woman voting record and allegations of sexual harassment against him; suggesting that Packwood was not a male supremacist, but merely a creep).

76. *Id.* at 383.

77. *See* Lafferty, *supra* note 54, at 38-39 (discussing the problem of the same-sex heterosexual harasser); Paul, *supra* note 4, at 351-52 (discussing the problem of the bisexual harasser).

78. *See, e.g.*, Wrightson v. Pizza Hut of Am., 99 F.3d 138 (4th Cir. 1996); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), *cited in* Lafferty, *supra* note 54, at 34; Joyner v. AAA Cooper Transp., 597 F. Supp. 537 (M.D. Ala. 1983); Wright v. Methodist Youth Servs., Inc., 511 F. Supp. 307 (N.D. Ill. 1981).

79. *See* Lafferty, *supra* note 54, at 38-39 (discussing the problem of the same-sex heterosexual harasser); Paul, *supra* note 4, at 351-52 (discussing the problem of the bisexual harasser).

80. 72 F.3d 1191 (4th Cir. 1996).

a heterosexual male by other heterosexual males was not sex discrimination, because sexual desire was absent. The harassment could have been directed toward women too, and therefore the plaintiff was not subjected to harassment because of his sex.[81] Similarly, "in the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[82] Curiously, then, an unwelcome sexual advance made toward a woman by a heterosexual man, or toward a man by a homosexual man, would be sexual harassment, but the *exact same action* done by a heterosexual person toward someone of the same sex, or a bisexual employee toward people of both sexes, would not be sexual harassment, because the requisite sexual attraction would be absent. However, as Ellen Frankel Paul points out, Title VII is supposed to prohibit certain actions, independent of any personal characteristics of the perpetrators.[83] As currently applied to cases of sexual harassment, Title VII prohibits those actions only when they are performed by perpetrators with the "correct" personal characteristics. This seeming inconsistency is evidence of a theoretical obstacle to considering sexual harassment as discrimination on the basis of sex.

Title VII also suffers from less philosophical defects. The flaw perhaps most important to plaintiffs is the limited amount of relief available. If a violation of Title VII is found, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . , with or without back pay . . . , or any other equitable relief as the court deems appropriate."[84]

Although compensatory damages may be awarded for both pecuniary and non-pecuniary losses, they are often far less than sufficient to fully compensate for the injury. As well as attempting to eliminate harassment, Title VII also purports to make a victim of such harassment whole again. However, with such a

81. *See* Lafferty, *supra* note 54, at 40 (describing the facts and holding of *McWilliams*).

82. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *see also* Henson v. City of Dundee, 682 F.2d 897, 897 n.11 (11th Cir. 1982).

83. *See* Paul, *supra* note 4, at 351-52 (arguing that the rule of law means that culpability should be determined by actions and not characteristics of perpetrators).

84. 42 U.S.C. § 2000e-5(g) (2001).

limited amount of compensatory damages available, it is far from certain that this can happen.[85]

In addition, the original relief provision of Title VII ruled out any award of punitive damages, limiting the incentive employers had to actively prevent sexual harassment. Even now, under the amendment, punitive damages are subject to the same combined cap as compensatory damages are, and it is therefore unlikely that the limited amount available will serve to both fully compensate victims of sexual harassment and also provide sufficient deterrent incentive to employers.[86] Despite the fairly broad liability of employers under Title VII, their economic responsibility may in many cases be limited to back pay, which they would have paid anyway if there was no sexual harassment, and a low damages cap.[87]

Moreover, the equitable remedies allowed by the statute are themselves unlikely to be effective. If sexual harassment has occurred in the workplace, whether quid pro quo or hostile environment, it is likely that severe animosity will exist between the plaintiff and the harasser if the plaintiff returns to work, such that reinstatement may cause more problems than it solves.[88] Such injunctive remedies "vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degrada-

85. *See, e.g.*, Bridges v. Eastman Kodak Co., 68 Fair Empl. Prac. Cas. (BNA) 1587, (S.D.N.Y. 1995) (awarding one plaintiff—who was subjected to "foul, violent and sexist language," and to whom her supervisor exposed himself—$11,214.64 in back pay and $20,000 in compensatory damages, but subtracting $11,214.64 for failure to mitigate damages, for a total of only $20,000).

86. Moreover, punitive damages are only available where the employer (not the harasser) acted recklessly or maliciously. *See* Steinhoff v. Upriver Rest. Joint Venture, 117 F. Supp. 2d 598, 604 (E.D. Ky. 2000) (in Title VII cases, "for punitive damages liability, we look not to the discriminatory behavior of rank and file employees or even low-level supervisors, but only to persons who are 'managerial agents.'"). Since many hostile environment sexual harassment cases do not involve a harasser's use of the employer's authority and, therefore, it is only the harasser who acted maliciously or recklessly, it is thus likely that, in many hostile environment cases, punitive damages will not be available. *See, e.g.*, Splunge v. Shoney's, Inc., 97 F.3d 488, 491 (11th Cir. 1996); Patterson v. PHP Healthcare Corp., 90 F.3d 927, 943 (5th Cir. 1996).

87. *See, e.g.*, Cooke v. Stefani Mgmt. Serv. Inc., 250 F.3d 564, 566, 568 (7th Cir. 2001) (considering jury award of $7500 in back pay and lost benefits and $10,000 in punitive damages "fairly meager," but still finding no employer vicarious liability and therefore reversing decision on award of punitive damages).

88. Schoenheider, *supra* note 11, at 1474. One of the equitable remedies explicitly available under Title VII is reinstatement. 42 U.S.C. § 2000e-5(g).

tion, and the cost of psychiatric care."[89] The available equitable remedies focus on the victim as a member of a protected class, rather than as an individual who has been injured.

Another serious problem with Title VII protection against sexual harassment is that employers face a high degree of liability for injunctive relief, which often requires burdensome affirmative measures and ongoing monitoring. Insofar as quid pro quo sexual harassment is concerned, a strong incentive to prevent it may be warranted, since such harassment is done through the employer's own hiring, firing, retention and promotion authority. The employer may be best able to implement measures that will be effective because of the employer's direct control over policies and practices regarding hiring, firing, retention and promotion.

However, insofar as hostile environment sexual harassment is concerned, such liability has an overly deterrent effect on employers, spurring them to implement not only complaint procedures, but also overly restrictive preventive programs. If employers are open to liability for acts (such as conversation, display of pictures, rough language, etc.) over which they have no direct or precise control or knowledge (especially in a very large company), and which are part of employees' everyday interaction, employers may see an incentive to overpolice the workplace. Since "humor, spontaneity, flirtation, rough language, anger, provocative dress and actual romance among workers all spell potential trouble for employers,"[90] smart employers who wish to prevent any possibility of sexual harassment will seek to restrict all of these behaviors. Although employees are not guaranteed First Amendment freedom of speech in a private workplace, public policy and libertarian concerns warn of restricting too much the type of conduct allowed in the workplace.[91] Chilling personal expression should be neither one of the goals of Title VII nor one of its effects.

Additionally, overly restrictive policies may cause resentment in the workplace against those employees who are perceived as whistleblowers or the impetus for the restrictions. This concern would be ameliorated if sexual harassment were addressed by tort theories. Under such a regime, employees would

89. Holien v. Sears, Roebuck & Co., 298 Or. 76, 97 (1984), *quoted in* Schoenheider, *supra* note 11, at 1475.

90. Hager, *supra* note 4, at 407.

91. *See id.* at 407-08 (arguing that too much employer liability under Title VII will "drive employers to over-regulate the speech and conduct of their workers").

be responsible for monitoring their own behavior, adhering to the standard they believe is sufficient for avoiding sexual harassment claims against them.

Another serious flaw in Title VII is that a victim of sexual harassment may sue only her employer, and not the actual perpetrator of the harassment.[92] A victim may not have the opportunity to confront the harasser or hold him individually accountable for the harassing behavior. One commentator calls for individual culpability for an act society considers to be reprehensible.[93] Given that there is tort doctrine that forces individuals to take responsibility for their wrongs, harassers should face the consequences of their injurious actions. Some victims of sexual harassment will find a benefit emotionally and psychologically merely from facing their harassers in court, confronting the person who injured them.

Moreover, on a more practical level, even if a violation of Title VII is found, if the employer chooses not to seek indemnification from the individual employee or discipline him, the harasser faces no significant form of punishment, something many victims of harassment may desire. If we discard the notion that sexual harassment is a form of discrimination (a company policy), the justification for visiting liability solely on the employer loses its force. If the employer should not be held liable for the harasser's conduct, yet the victim feels the need for someone to be held responsible, the need to punish the wrongdoer emerges.

We might be able to gloss over these problems if Title VII were the only possible means of relief for a victim of sexual harassment. However, sexual harassment claims may be pursued through various tort theories, negating the method of bootstrapping sexual harassment to Title VII that has heretofore prevailed.

III. Sexual Harassment and Tort Law

To determine whether tort law can truly provide relief to sexual harassment plaintiffs, tort doctrine must be examined for

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92. *But see* Domm v. Jersey Printing Co., 871 F. Supp. 732, 738 (D.N.J. 1994) (holding that "supervisors who fall within the Tile VII definition of 'employer' and have sexually harassed an employee may be held individually liable for the sexual harassment").

93. Hager, *supra* note 4, at 384. Hager acknowledges that anti-discrimination law can be more useful when a whole society allows a behavior that mistreats a group and such a law is the only way to prevent such behavior. *Id.*

any precedent under which tort law has provided relief for similar conduct.

Possible Means of Tort Recovery for Sexual Harassment

In the late nineteenth and early twentieth centuries, women who were not employed sued perpetrators of what we now call sexual harassment under various tort theories based on the physical nature of the harassment, such as assault and battery, and indecent assault.[94] Damages were largely unavailable, however, for intangible injuries, including mental distress, unless the conduct had been "wanton" or intentional.[95]

In 1961 (still prior to Title VII), a court first acknowledged the need for relief for the emotional distress that results from sexual harassment. In *Skousen v. Nidy*,[96] a female trailer park worker brought suit against her employer for assault and battery based on repeated offensive touching and violent assaults. The woman was awarded both compensatory and punitive damages, upon the court's recognition that the emotional harm that results from sexual harassment should be compensated, and the harasser should be punished.[97]

More recently, sexual harassment claims have been pursued as suits for IIED, assault and battery, invasion of privacy, and negligent hiring and/or retention. The Restatement (Second) of Torts defines IIED as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . ."[98] Courts have required that plaintiffs show that

> (1) the defendant intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous and utterly intolerable in a civilized society; (3) the defendant's conduct was the cause of the plaintiff's distress; and (4) the plaintiff's emotional distress was so severe in na-

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94. *See, e.g.*, Liljegren v. United Rys Co. of St. Louis, 227 S.W. 925 (Mo. App. 1921) (assault); Hough v. Iderhoff, 139 P. 931 (Or. 1914) (assault and battery); Martin v. Jansen, 193 P. 674 (Wash. 1920) (indecent assault); *see also* Schoenheider, *supra* note 11, at 1466 n.35 (describing several early cases brought under these theories).

95. *See, e.g.*, *Martin*, 193 P. at 676.

96. 367 P.2d 248 (Ariz. 1961).

97. *See* Schoenheider, *supra* note 11, at 1477 (describing the facts and holding of *Skousen*).

98. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

ture that no reasonable person could be expected to endure it.[99]

The Restatement's comment on this section allows for the outrageousness of the conduct to arise from abuse of the actual or apparent authority of the harasser over the injured party.[100]

The standard of "extreme or outrageous conduct" is not quite clear. "Outrageousness" has been held to mean that the conduct must go beyond all bounds of decency.[101] Comment d in the relevant section of the Restatement requires that "the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[102] Courts have held that IIED will not provide recovery for injury based on a mere insult or slight indignity,[103] resulting in a widespread requirement of a pattern of repeated advances or sexually offensive speech, rather than finding liability for isolated incidents of such conduct.[104] There is no clear definition of what actions rise to the level of outrageousness, as compared to other intentional tort actions which define a particular type of conduct.[105]

In *Ford v. Revlon*,[106] the court held that the defendant employer could be held liable for IIED based on their inaction after the plaintiff reported incidents of sexual harassment both through the official company procedure and outside of it.[107] The court stated that it was outrageous for Revlon to "[drag] the matter out for months and [leave] Ford without redress."[108] In *Retherford v. AT&T Communications of the Mountain States,*

99. Jones v. Clinton, 990 F. Supp. 657, 676 (E.D. Ark. 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 46(1), cmt. d (1965).

100. RESTATEMENT (SECOND) OF TORTS § 46(1), cmt. e (1965).

101. Schoenheider, *supra* note 11, at 1481.

102. RESTATEMENT (SECOND) OF TORTS § 46(1), cmt. d (1965).

103. Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 690 (8th Cir. 1997); *Clinton*, 990 F. Supp. at 677.

104. *See* Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 135-40 (1990) (suggesting that the justification for requiring a pattern of harassment originated in the reluctance to find IIED liability for mere insults, and that a pattern of repeated "insults" was considered sufficiently outrageous to qualify).

105. For example: assault, false imprisonment, slander, malicious prosecution. *See* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 394 (1994) ("[T]here is no clear definition of the prohibited conduct."); Schoenheider, *supra* note 11, at 1481.

106. 734 P.2d 580 (Ariz. 1987).

107. *Id.* at 585.

108. *Id.*

Inc.,[109] the court held that a pattern of persecution by coworkers over a period of months was intolerable.[110] The court cited with approval Prosser and Keeton's characterization of sexual harassment in the workplace as "undoubtedly an intentional infliction of emotional distress."[111] The court in *Kanzler v. Renner*[112] expressly used the term "sexual harassment" to mean a broader range of conduct than that which is prohibited under Title VII, including touching (accidental or intentional), suggestive or derogatory remarks, or demands for sex.[113] The court pointed out the vagueness of a concept like outrageousness, and articulated factors which reveal probable outrageousness, including abuse of power, a pattern of harassment, and unwelcome touching.[114] Another court has taken into consideration the public policy violation inherent in sexual harassment.[115]

The standard of intent required for IIED encompasses either desire that the conduct cause emotional distress, or the knowledge or substantial certainty that such distress will be caused.[116] Compare this with the standard under Title VII, where liability does not require intent at all. However, many courts have articulated the IIED standard as "knew or *should*

109. 844 P.2d 949 (Utah 1992).

110. *See id.* at 978 (holding that "allegations [of months of persecution] are sufficient to satisfy the objective conduct requirement of the tort of intentional infliction of emotional distress"). The coworkers' behavior in *Retherford* included obscene jokes, foul language, frequent discussion of sex and specific sexual encounters, comments about the plaintiff's appearance, and unwelcome sexual suggestions and invitations. After the plaintiff mentioned to her harassers that she was considering filing a sexual harassment complaint, the behavior escalated to more menacing actions like "threatening facial expressions," following the plaintiff around the office, and eventually, after she submitted a formal complaint, verbal statements implying or overtly threatening that the plaintiff would suffer and possibly be fired if she continued to pursue her complaint. *Id.* at 955-56.

111. *Id.* (citing W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 12, at 18 (Supp. 1988)).

112. 937 P.2d 1337 (Wyo. 1997).

113. *Id.* at 1342 n.3.

114. *Id.*

115. Howard Univ. v. Best, 484 A.2d 958, 986 (D.C. 1984) (distinguishing sexual harassment from mere "social impropriety" and discussing sexual harassment as conduct in the workplace that is based on outmoded stereotypes and male domination). The public policies that are violated by sexual harassment include infringement on others' personhood and civil rights and abuse of the economic power of coercion inherent in the employment relationship. *See* Schoenheider, *supra* note 11, at 1483.

116. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

have known,"[117] which could further expand liability. It is important to note, though, that intent, even malicious intent, does not necessarily elevate conduct to the level of outrageousness, if the behavior is not something an average member of the community would consider intolerable.

Another avenue of recovery for sexual harassment plaintiffs is assault and/or battery (although these two causes of action are often combined). Battery is defined by the Restatement as follows:

> An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.[118]

A cause of action for battery also lies if the contact actually caused is "offensive", rather than "harmful".[119] It is well accepted that "the intent which is an essential element of the action for battery is the intent to make contact, not to do injury."[120] Assault is similarly defined, except that the defendant need not actually cause physical contact, but merely the "imminent apprehension".[121] In one case, an employee defendant was found liable for assault and battery after grabbing the plaintiff and touching various parts of her body,[122] but mere verbal abuse alone typically will not support a cause of action for battery. However, if sufficiently threatening, verbal harassment alone may cause a plaintiff to fear imminent physical harm, and thus an assault claim may be easier to prove than battery for a victim of sexual harassment that consists only of verbal harassment. However, verbal sexual harassment, which consists merely of derogatory remarks and sexual innuendoes, and no threat (either express or implied) of physical contact, will probably be insufficient to support an assault claim.

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117. Jones v. Clinton, 990 F. Supp. 657, 677 (E.D. Ark. 1998) (emphasis added); *see also* RESTATEMENT (SECOND) OF TORTS § 46(1), cmt. d (1965).

118. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

119. *Id.* § 18.

120. Lambertson v. United States, 528 F.2d 441, 444 (2d Cir. 1976).

121. RESTATEMENT (SECOND) OF TORTS § 21 (1965); *see also* Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1105 (Fla. 1989) (Grimes, J., concurring) ("[T]he tort of assault does not require physical injury or even touching. Its minimal essence is putting the victim in fear of bodily harm.").

122. *See* Ford v. Revlon, 734 P.2d 580, 582, 584 (Ariz. 1987).

A third tort cause of action that might lie for sexual harassment cases is invasion of privacy, or intrusion, defined by the Restatement (Second) of Torts:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[123]

Some courts have taken a narrow interpretation of the tort of intrusion, requiring that the intrusion be physical, which would include acts like unwelcome touching.[124] Other courts have interpreted the tort more broadly, allowing a claim of intrusion when a supervisor intrudes into an employee's personal life.[125] For example, in *Rogers v. Loews L'Enfant Plaza Hotel*,[126] the court held that intrusion included a supervisor's making calls to and visiting an employee at home, even where the calls and visits were not always overtly sexual, but were unrelated to work, and persistent and unwelcome.[127] At least one court has even expanded the invasion of privacy tort to include intrusion into psychological/emotional solitude, holding that a supervisor's constant questions about the plaintiff's sex life and frequent sexual demands constituted intrusion.[128] It should be observed, however, that unless the sexual harassment includes either physical touching or unwelcome contact at home, it is unlikely that a cause of action for intrusion will stand.

Related Implications of Tort Liability

All of the causes of action outlined above would be brought directly against the perpetrator of the sexual harassment. It might also be possible, however, to implicate an employer in a tort sexual harassment case by means of common law principles of vicarious liability, under which the employer may be held liable not because of its own conduct, but because of its relationship to the harassing employee.

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123. RESTATEMENT (SECOND) OF TORTS § 652B (1965).

124. *See* Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983) (stating that if foremen's requests for sexual favors had been unwelcome, they would have constituted a cause of action for intrusion).

125. *See* Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 528 (D.D.C. 1981) (holding that plaintiff's personal life was "a sphere from which [she] could reasonably expect [her supervisor] should be excluded").

126. *Id.*

127. *Id.*

128. Phillips v. Smalley Maint. Servs., 435 So. 2d 705 (Ala. 1983).

Under the doctrine of respondeat superior, if an employee commits a tort within the scope of his employment, the employer may be held liable for that tort.[129] This principle holds for all torts, intentional or not, but only so long as they are within the scope of employment. The reasoning is that an employer's liability under respondeat superior "encompasses the apparent authority of the employee to engage in the wrongful acts."[130] Thus acts committed without that apparent authority are excluded from the doctrine.

Much commentary has been devoted to determining exactly how broad the scope of employment is. Traditionally, the scope of employment included actions committed when at work, in the workplace, and foreseeable in the nature of the enterprise.[131] One court reasoned that if an employee commits a tort that is foreseeable within the context of the particular business, it is reasonable to include the loss resulting from the tort in the employers' cost of doing business.[132] The doctrine has further developed to inquire whether the tort committed was required by the employee's duties, or incidental to them, or if it could reasonably have been foreseen by the employer.[133] Several courts have held that actions are within the scope of employment if they result or arise from pursuit of the employer's interests or from actions intended to benefit the employer, even if misguided or forbidden.[134]

On the other hand, it has been held that where the misconduct arises from personal dispute or malice, an employer will not be held vicariously liable, as "the risks are engendered by events unrelated to the employment."[135] In such a case, although the misconduct occurs at the place of employment and during work-

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129. Schoenheider, *supra* note 11, at 1489.

130. Wendy L. Kosanovich, Farmers Insurance Group v. County of Santa Clara: *Indemnity and Vicarious Liability in Sexual Harassment Cases*, 30 U.S.F. L. REV. 825 (1996).

131. *See generally* RESTATEMENT (SECOND) OF AGENCY §§ 217-232 (1958).

132. Rodgers v. Kemper Constr. Co., 124 Cal. Rptr. 143, 149 (Ct. App. 1975).

133. *See* Kosanovich, *supra* note 130, at 837 (describing the modern respondeat superior inquiry).

134. RESTATEMENT (SECOND) OF AGENCY § 230 (1958).

135. Farmers Ins. Group v. County of Santa Clara, 11 Cal. 4th 992, 1006 (1995). This case required the court to determine only issues of indemnification and vicarious liability as between an employer and an employee's insurance company, where it had been determined in an earlier lawsuit that the employee had engaged in sexual harassment. Therefore, this rejection of a bright-line rule had no bearing on the determination of whether sexual harassment had occurred.

ing hours, it is behavior not reasonably foreseeable in the course of doing business, and therefore the employer should not bear the risk or the loss.

Since employers rarely authorize their employees to commit intentional torts, courts have held that for intentional torts, the vicarious liability inquiry must consider not only the tortious act itself, but look rather at the whole of the employee's conduct.[136] Vicarious liability will attach if the tortious act was one in a series of other acts that were authorized by the employer.[137]

Recently the respondeat superior inquiry has included public policy as a factor; courts have looked at whether applying respondeat superior will have a deterrent effect, whether it will result in greater compensation to the plaintiff, and whether it will ensure equitable distribution of the cost of the injury among those who benefit from the tortious act.[138]

Several courts have addressed the question of whether sexual harassment in particular is properly considered within the scope of employment. One court has rejected a strict rule that sexual harassment may never be within the scope of employment,[139] despite characterizing sexual harassment as being of a personal nature, and therefore probably not within the scope of employment.[140] Because respondeat superior encompasses liability for acts that are committed with the intent of benefiting the employer's interests, the existence of an anti-harassment policy can be a factor in determining whether harassing behavior is within the scope of employment. If an employer has promulgated a policy prohibiting sexual harassment, and it has been sufficiently circulated among employees, the harasser will know that his conduct is not in the employer's interests.[141] Moreover, some

136. *See* Kosanovich, *supra* note 130, at 838 (describing the test for vicarious liability).

137. For example, vicarious liability might be found if an employer asked a supervising employee to observe and evaluate a subordinate's job performance and suggests to the subordinate ways to improve that job performance, and the supervisor, after observing and evaluating, made his "suggestions" about improving job performance in the form of lewd comments about the way the subordinate might dress in a sexier manner, or satisfy certain sexual desires of the supervisor.

138. *See* Kosanovich, *supra* note 130, at 838.

139. *Farmers*, 11 Cal. 4th at 1019 n.18.

140. *See id.* at 1005 (citing California case history holding that acts personal in nature will not give rise to vicarious liability under respondeat superior).

141. *See* Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L. REV. 589, 613.

courts have held that a reasonable employee could not think harassment would further his employer's goals.[142]

Generally, hostile environment sexual harassment has not been found to be within the scope of employment, and therefore employers can rarely be held vicariously liable.[143] Quid pro quo sexual harassment, however, is done by a supervisor with the apparent authority of the employer, and so seems more often to implicate respondeat superior. One court has held that "where an employee is able to sexually harass another employee *because of the authority or apparent authority vested in him* by the employer, it may be said that the harasser's actions took place within the scope of his employment."[144]

Vicarious liability is a means of holding an employer indirectly liable for an employee's tortious conduct. If respondeat superior cannot be invoked, however, a sexual harassment plaintiff may be able to sue the employer directly under a theory of negligent hiring, negligent retention, or negligent supervision. This tort occurs when an employer "is negligent in hiring or retaining an employee who is incompetent or unfit. Such negligence usually consists of hiring, supervising, retaining, or assigning the employee with the knowledge of his unfitness, or failing to use reasonable care to discover the unfitness."[145] The level of knowledge required to find negligent hiring/retention/supervision has varied. At least one court requires actual notice of harassing behavior to find employer liability,[146] while others have allowed a finding of negligent hiring/retention/supervision upon constructive notice.[147] Mark McLaughlin Hager has suggested that an intermediate standard "akin to reckless disregard or 'deliberate indifference' may be desirable."[148] In cases of sexual harassment, where previous complaints have been made about a harassing employee, a subsequent victim of the same harasser

142. *E.g.*, Hirschfeld v. N.M. Corr. Dep't, 916 F.2d 572, 576 (10th Cir. 1990).

143. *See* Hager, *supra* note 4, at 426.

144. Kerans v. Porter Paint Co., 575 N.E.2d 428, 432 (Ohio 1991) (emphasis added).

145. Thomas R. Malia, *Security Guard Company's Liability for Negligent Hiring, Supervision, Retention, or Assignment of Guard*, 44 A.L.R.4th 620, 622 (1986) (citation omitted).

146. *E.g.*, Ulrich v. K-Mart Corp., 858 F. Supp. 1087, 1094 (D. Kan. 1994).

147. *See* Beam v. Concord Hospitality, Inc., 873 F. Supp. 491, 503 (D. Kan. 1994) (an employer is negligent "when it hires or retains employees that it knows or should know are incompetent").

148. Hager, *supra* note 4, at 429.

may be able to sue the employer for negligent retention or supervision.

Regardless of the tort doctrine under which sexual harassment claims are brought, one important factor is the kind and amount of damages available, especially considering that the limit on damages is one of the flaws of Title VII. All torts allow for both compensatory and punitive damages to be awarded to the plaintiff. Compensatory damages are available for both pecuniary and non-pecuniary losses arising from the injury.[149] Non-pecuniary losses include physical harm that does not result in economic loss, and emotional harm.[150] Pecuniary losses include lost wages and harm to property.[151] Sexual harassment cases under tort law may result in compensatory damages for the wages that are lost upon constructive discharge or decreased during extended sick leaves (i.e., for physical or psychological harm resulting from the harassment), costs of treatment for the psychological harm of harassment or the physical manifestations of that harm, emotional distress resulting from the sexual harassment, physical pain and suffering, and possibly potential wages lost through a failure to advance or be promoted.

Punitive damages may also be awarded to a plaintiff if the tortfeasor acted with malice or reckless indifference toward the plaintiff.[152] In determining whether to award punitive damages and in what amount, courts may take into account the nature of the defendant's conduct and the nature and extent of the injury to the plaintiff.[153] In addition, the court may also consider the wealth of the defendant.[154]

One final implication of bringing sexual harassment claims under tort law is the interaction with workers' compensation statutes. In most states, workers' compensation is the exclusive remedy for injuries suffered in the course of employment or arising out of employment, barring common law tort suits against employers.[155] Workers' compensation laws generally provide less economic relief than common law tort suits, so it is usually to a sexual harassment plaintiff's benefit for the harassment they suf-

149. RESTATEMENT (SECOND) OF TORTS §§ 905-906 (1965).

150. *Id.* § 905.

151. *Id.* § 906.

152. *Id.* § 908.

153. *Id.*

154. *Id.*

155. Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 407-08 (1988).

fered to be considered outside the scope of their employment and therefore not subject to the workers' compensation exclusivity provision.

The test under workers' compensation statutes is similar to the scope of employment inquiry used for respondeat superior determinations, but focuses on whether the *plaintiff*, rather than the harasser, was within the scope of employment at the time of the injury. An employee's injury arises *in the course of* employment "if it occurs during the time and at the place of employment while the employee is engaged in employment-related activities," and the injury arises *out of* employment "if there is a causal connection between a risk of the employment and the employee's injury."[156] One court has held that an injury arises out of employment if the likelihood of the injury is "increased by the circumstances of the employment."[157] Where employers have promulgated policies prohibiting sexual harassment, such policies are sometimes considered prima facie evidence that injury resulting from sexual harassment did not arise out of or in the course of employment.[158] Otherwise, where no such policy is in place, the question as to whether the injury arose out of the employment is a factual question that must be decided on a case-by-case basis.

It is generally accepted that workers' compensation schemes were originally intended to compensate victims of accidents that resulted from negligence or a normal risk of employment.[159] Many courts have held, therefore, that non-physical injuries (particularly those resulting from non-physical stimulus) and injuries resulting from intentional torts are excepted from the exclusivity rules of workers' compensation statutes.[160] When sexual harassment is non-physical or does not result in physical symptoms or harm, or is considered an intentional tort, the claim may be sub-

156. Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?*, 11 HOFSTRA LAB. L.J. 141, 156 (1993).

157. Carlos M. Quinones, *The Sexual Harassment Claim Quandary: Workers' Compensation as an Inadequate and Unavailable Remedy*, 24 N.M. L. REV. 565, 570 (1994).

158. *See, e.g.*, Cox v. Chino Mines/Phelps Dodge, 850 P.2d 1038, 1041 (N.M. Ct. App. 1993).

159. Vance, *supra* note 155, at 159.

160. Deborah S. Brenneman, *Sexual Harassment Claims and Ohio's Workers' Compensation Statute:* Kerans v. Porter Paint Co., 61 U. CIN. L. REV. 1515, 1520 (1993); *see also* Vance, *supra* note 156, at 161.

ject to the same analysis as other non-physical injuries and intentional torts, and thereby escape the exclusivity provisions.

Intentional torts have been excepted largely because (1) an intentional tort can never be an accident and was not therefore contemplated in the enacting of workers' compensation statutes and (2) intentional torts are not an expected risk of employment.[161] Some courts require specific intent to injure in order for a claim to fall within this exception,[162] while other jurisdictions require willful and wanton misconduct,[163] and a few states require injuries that are substantially certain to happen.[164]

Non-physical injuries have been excepted because it is difficult to establish a causal connection to the employment when there is neither a physical injury nor a physical manifestation. Without a causal connection to employment, injuries cannot properly be considered to arise out of or in the course of employment.

There has been much debate regarding whether Title VII sexual harassment claims are barred by workers' compensation. However, if a sexual harassment injury is litigated under a tort doctrine such as IIED or assault and battery, it will probably not be barred by workers' compensation because it is based on an intentional tort, and often results in a non-physical injury. Moreover, sexual harassment is generally not considered an inherent or normal risk of employment.[165]

A strong argument that courts have relied on to except sexual harassment specifically from workers' compensation exclusivity provisions is one based on public policy. One court has stated

161. Vance, *supra* note 156, at 166.

162. *Id.*

163. *Id.*

164. *Id.* at 167.

165. However, it should be noted that this exception to the exclusivity rules is hardly universal. Some courts refuse to recognize an exception for sexual harassment claims unless it can be shown that the employer (rather than the coworker harasser) was acting intentionally. For example, in *Zabkowicz v. West Bend Co.*, 789 F.2d 540 (7th Cir. 1986), the United States Court of Appeals for the Seventh Circuit held that the Wisconsin workers' compensation statute applied to all "accidental" injuries arising out of employment, and that the Wisconsin courts had interpreted "accidental" broadly, to mean any result that the employer could not expect or foresee. *Id.* at 545. The court further held that sexual harassment by an employee was not something an employer could foresee. *Id.*; *see also* Wangler v. Hawaiian Elec. Co., 742 F. Supp. 1465, 1468 (D. Haw. 1990) (holding that emotional distress caused by sexual harassment at work was an injury within the meaning of the Hawaii workers' compensation statute because it was "precipitated by the circumstances of [the plaintiff's] employment").

that "the policy behind workers' compensation laws does not provide an adequate remedy" for sexual harassment victims.[166] Commentators have argued that the strong public policy against sexual harassment evinced by Title VII and similar state statutes would be undermined if sexual harassment was viewed as similar to industrial accidents.[167]

Benefits of Tort Law

As described above, common law tort doctrines provide several avenues to pursue sexual harassment claims. They all afford many of the same advantages to sexual harassment victims, beginning with what might be the most tangible benefit to plaintiffs' damages. Tort remedies provide greater damages to victorious plaintiffs, both compensatory and punitive, than Title VII does. Tort awards are not subject to the same caps that Title VII imposes, so victims of sexual harassment are more likely to be compensated fully for their emotional and physical suffering.

Moreover, far larger punitive damages awards are available under tort law, since the damages cap imposed by Title VII is a limit on punitive and compensatory damages combined. Larger punitive damages will result in greater deterrence to would-be harassers, who might find it less worthwhile to make vulgar jokes and aggressive sexual advances if they know they could be subject to large punitive damage verdicts in response.

Sexual harassment plaintiffs will also find it easier to prevail on a claim involving a single incident because, unlike Title VII, the tort of outrage or IIED does not require a pattern of misconduct to find liability.[168] Since a single incident of outrageous behavior arguably can be just as injurious as a continuous pattern of vulgar conduct, not requiring a pattern of conduct—usually

166. Quinones, *supra* note 157, at 565.

167. This argument differentiates between statutory law, which expressly articulates the public policy of the governmental body that has promulgated it, and the common law, which consists of courts' responses to disputes over time and does not necessarily, therefore, set forth a cohesive or deliberate policy decision. *See* Vance, *supra* note 156, at 190 ("To allow sexual harassment injuries to be compensable only under the workers' compensation system would not give effect to the strong policy against sexual harassment and other employment discrimination.").

168. *See* Retherford v. AT&T Comm. of the Mountain States, Inc., 844 P.2d 949, 975 (Utah 1992) ("[A] single outrageous incident, such as an egregiously vicious practical joke, results in immediate and easily identifiable emotional distress.").

necessary under Title VII—will allow more legitimate victims of sexual harassment to recover for their injuries.[169]

Although employers might be held liable for sexual harassment in some instances through vicarious liability principles, generally the nature of sexual harassment places it outside of the scope of employment. If it is difficult to hold employers liable for their employees' tortious conduct, then employers will face less risk of sexual harassment suits by victim employees. Thus, employers will have less incentive to excessively deter any conduct that might be construed as harassing. Therefore, it is less likely that employers will over-restrict workplace behavior and create a chilling effect on personal expression.[170] However, because vicarious liability is possible in some instances, employers will still have incentive to implement reasonable measures to prevent the most egregious types of harassment.

Another advantage of tort law for victims of sexual harassment is that it enables them to sue the harasser directly, rather than only the employer. Although not necessarily true of every plaintiff, many will benefit emotionally from being able to confront their harasser in court, facing with the authority of the law the very person who injured them in such a personal way.

The most significant reason to bring sexual harassment claims under common law tort doctrines rather than Title VII's statutory provisions is a doctrinal one. As discussed above in Part II, sexual harassment is a poor philosophical fit with the model of discrimination that Title VII was enacted to combat. Title VII best fits situations where an employer subjects a plaintiff to an artificial barrier to employment or advancement, based on the plaintiff's membership in a protected class. However, sexual harassment is most often not part of a company policy, not in an employer's perceived interest, and not authorized by an employer. Sexual harassment is a harm done to an individual person by another person, out of various motives (desire, hostility, convenience, insufficient self-restraint) but not usually due to a widespread policy of such treatment.

On the other hand, torts such as IIED and battery are not directed at a protected class; rather, they are aimed at an individ-

169. Although it may seem that eliminating the pattern of conduct requirement would allow more spurious claims of sexual harassment to go forward, the standard for outrageousness would limit this, since a single incident of arguably inoffensive conduct would be unlikely to rise to the level of "outrageous".

170. Hager, *supra* note 4, at 407-08.

ual. Tort theory is intended to make whole an individual who has suffered an injury. It does this by awarding monetary damages to compensate the plaintiff directly for the harm that has been done. As such, sexual harassment is more appropriately actionable under these theories than under a statute designed to eradicate overt discrimination against whole groups of people. When a harasser acts like a "creep," he should be sued in tort to compensate his victim for the injury he has inflicted; holding his employer liable for discriminating against a group of which the plaintiff happens to be a member is too far a stretch.

Drawbacks of Tort Theory

Despite all of the reasons to sue in tort discussed above, several disadvantages should be noted. One such concern is that because tort suits are against individual harassers, widespread societal change is unlikely to occur as a result.[171] The public policy against sexual harassment will be less well served by individual suits, even while the true aim of pursuing a sexual harassment claim will be better advanced. Similarly, because employers would face less liability under tort suits than under Title VII, they would have less incentive to try to prevent sexual harassment in their workplaces. However, as discussed earlier, the reduced incentive for employers to try to prevent sexual harassment leads to a reasonable balance of preventive policies and reporting procedures that lies between the overly restricted workplace and one in which the employer takes no steps at all to prevent sexual harassment. Additionally, where an employer has a sexual harassment policy in place that provides a way for employees to file complaints against harassing employees, the employer may be held liable for negligent retention or supervision of an employee against whom complaints have been made. Moreover, this flaw should be of secondary concern to the goal of holding individuals responsible for their conduct.

Some may worry that because individual co-employees rarely have deep pockets, suing individuals will result in verdicts that cannot be paid, and punitive damage awards that are inadequate (because courts may consider defendants' wealth as a factor in determining punitive damages). However, such a result

171. However, it is possible that should enough individual harassers face punitive damages, some degree of widespread change may occur through a deterrence mechanism.

may not leave sexual harassment victims any worse off than Title VII would, since Title VII damages are subject to a strict cap.

Perhaps the strongest criticism of torts as a means of satisfying sexual harassment claims is that the standard of misconduct is higher than that required for liability under Title VII. It is true that for a claim of IIED to succeed, the plaintiff must show that the complained of conduct is "outrageous" rather than merely "offensive." The outrageous standard has consistently been held to be rather high, disallowing claims based on "mere" insults or coarse jokes, as compared to the offensive standard, which can encompass derogatory remarks and the mildest of sexual advances if they are unwelcome. However, as discussed above, concerns about sexual harassment should not result in the overpolicing of the workplace or the restriction of personal expression. Raising the bar for misconduct may help prevent such a chilling effect by limiting the range of conduct that must be prevented.

IV. The Proposed System

As discussed above, both the Title VII anti-discrimination statute and common law tort theories have advantages and disadvantages for sexual harassment plaintiffs, as well as for society at large. Therefore, the best way to address claims of sexual harassment would be through a combined system, drawing on the benefits, both practical and theoretical, of each doctrine. This proposed system would combine the common law model of tort law with a standard of misconduct similar to that of existing Title VII jurisprudence.

The proposed system would begin from a basis of tort law, as the theory on which tort is based is closer to the nature of the injury suffered through sexual harassment than the anti-discrimination law that is usually applied. Tort law primarily addresses, and is designed to properly compensate for, harm perpetrated against an individual person, in a way that crosses the boundary of behavior from which the ordinary ("reasonable") person in the victim's position should expect to be protected. This is precisely the harm that is present in sexual harassment: the victim ordinarily would not expect to have to confront such behavior. The sexual nature of the conduct, while perhaps adding to the unreasonableness of being subjected to the harassment, is only incidental to the fact that the perpetrator is inflicting an injury on the victim. Yet it is the very element that often draws sexual har-

assment into the ambit of anti-discrimination law, forcing courts to fit personal affronts into a legal doctrine designed to apply to employment practices that treat groups of people differently than other groups.

In using tort as the basis for recovery, the most common and most effective cause of action for redressing claims of sexual harassment is IIED. IIED, unlike more physical torts like assault, requires no physical contact between the parties, only intentional action by the defendant. Additionally, IIED encompasses all of the psychological harm that results from sexual harassment, and can also include recovery for physical harm that is caused by emotional stress.[172]

In order for sexual harassment plaintiffs to effectively pursue their claims under an IIED cause of action, an appropriate standard of tortious conduct must be implemented; this is where some adjustment to the existing IIED cause of action is necessary. The current standard requires that conduct rise to a level that would cause a reasonable person to consider it outrageous. This standard often precludes recovery for ongoing incidents of harassment, no single one of which would be severe enough to be "outrageous," or mild sexual invitations and jokes that are merely unwelcome. The proposed system would allow a slightly lower standard of prohibited conduct in cases of sexual harassment, similar to the "offensiveness" standard for Title VII harassment claims. Although this lower standard, by delineating a broader range of prohibited conduct than tort law currently does, might create a correspondingly greater incentive for employers to restrict their employees' behavior, it would nonetheless result in less incentive for employers to overpolice the workplace than existing Title VII doctrine does, inasmuch as tort law provides for employer liability for employee actions only where the criteria for vicarious liability are found. This intermediate degree of employer intervention would be an acceptable one, encouraging employers to adopt reasonable measures to prevent harassment of their employees, while precluding the incentive to overpolice.

Other elements of existing tort law would serve sexual harassment plaintiffs well without any modification. Employer liability would be available where a harasser abused the authority

172. Certainly there might be physical injuries arising out of sexual harassment that might also be addressed through causes of action such as assault. However, tort suits often include more than one cause of action, and sexual harassment suits need be no exception.

of his position to engage in the harassment or where the employer knew of the harassment and did nothing to address it, through traditional principles of vicarious liability. At the same time, plaintiffs would also be able to sue their harassers directly, affording them some psychological relief from confronting the person that injured them. Moreover, the only limit on damages would be the jury's determination of the extent of the plaintiff's injury.

V. Conclusion

Both Title VII and common law tort doctrines have benefits and drawbacks for victims of sexual harassment who seek relief. Despite the defects of tort theory, it provides a better doctrinal fit for the nature of a sexual harassment injury. An individual harm committed by an individual employee is insufficiently and inappropriately redressed by a statute meant to prohibit discrimination by employers against groups. Title VII may in some cases provide more monetary relief when an individual defendant has meager economic resources, but that consideration should be balanced against the damages cap provided for by Title VII.

The existing IIED standard of outrageousness is more difficult to meet than the offensiveness required by Title VII, but that could be addressed by the courts in implementing the proposed doctrine. Several commentators have suggested a different standard of behavior for IIED cases that arise out of sexual harassment, advocating a standard more like the offensiveness standard of Title VII. This could retain the EEOC's definition of sexual harassment as conduct and language that are offensive, but import it into the more fitting rubric of torts. All of the other defects of tort theory as applied to sexual harassment are relatively minor, especially when compared with the flaws of Title VII, and the advantages significant.

However, it is important not to preclude Title VII recovery for sexual harassment entirely. As mentioned in Part II, sexual harassment sometimes really can be discrimination; and when it is, Title VII is perfectly appropriate. Rather, I would suggest that both avenues be available, with similar standards of misconduct, and that victims of sexual harassment be able to choose which of the two means of recovery is more appropriate for them.