Theories of Recovery for Sexual Harassment: Going beyond Title VII

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INTRODUCTION

It has been scarcely more than a decade since a court first recognized sexual harassment as a type of sex discrimination forbidden by title VII of the Civil Rights Act of 1964. The first case allowing such recovery was decided in 1976. Courts initially ruled that such cases were beyond the purview of title VII.

Prior to 1976, activities constituting sexual harassment could be cognizable as torts, but only if the particular circumstances of the harassment happened to fulfill the elements of a recognized tort cause of action. One early argument against recognition of sexual

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4. Because recovery could be had in tort, some early decisions refused to recognize sexual harassment as a form of discrimination covered by title VII. See Note, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. PA. L. REV. 1461 (1986).
harassment by males against females was that harassment could not be title VII gender discrimination because a woman could also harass a man, and homosexuals could harass members of the same sex. This argument was specifically rejected in Barnes v. Costle.\

As a practical matter, this meant that compensation was available only in the most egregious cases. For example, if physical abuse were involved, the victim could sue for battery and assault. In most instances, even if the commission of a tort could be proved, liability lay against the perpetrator only, not against the perpetrator’s employer. This reduced the likelihood that victims of sexual harassment would receive compensation. The availability of compensation was also limited by the doctrine of employment at will, which permitted an employer to discharge an employee without just cause.

Thus, the 1976 interpretation of title VII as forbidding sexual harassment granted important new protection to individuals in the workplace. In 1981, the further expansion of the concept of sexual harassment granted even more protection, with recovery available not only for the *quid pro quo* type of harassment recognized in 1976 but also for a harassing environment.

Unfortunately, title VII’s relatively meager remedies and its complex procedural requirements render it inadequate to fully compensate people who are injured by sexual harassment. As a result, many individuals complaining of sexual harassment have increasingly explored other tort, contract, and statutory causes of action instead of or in addition to their title VII claims. Many of these causes of action are common law torts that plaintiffs traditionally have relied upon in sexual harassment cases. Other causes of action involve new theories such as expanded intentional tort theories, the emerging law

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5. 561 F.2d 983, 990 (D.C. Cir. 1976). In a concurring opinion in *Barnes*, Judge MacKinnon argued that sexual harassment should be treated differently from other forms of discrimination because “sexual advances may not be intrinsically offensive . . . .” Sexual advances involve “social patterns that to some extent are normal and expectable.” Id. at 1001.


8. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). The *Bundy* court reached its conclusion by examining other types of title VII cases, in which discrimination was found because the employer created or condoned a substantially discriminatory work environment, whether or not the employees lost any tangible job benefits. Id. at 943-45. The court noted that expansion of the theory was necessary — otherwise, an employer could successfully harass an employee “by carefully stopping short of firing or taking any other tangible action against her in response to her resistance.” Id. at 945. Until *Bundy*, courts had held that plaintiff could not prevail against the employer unless submission to harassment was made a condition of employment. See, e.g., Walter v. KRGO Radio, 518 F. Supp. 1309 (D.N.D. 1981).
of wrongful discharge, and even RICO claims.

The purpose of this Article is to articulate and evaluate theories of recovery for sexual harassment outside of title VII. It initially reviews the development and expansion of the concept of sexual harassment. It then explores the reasons for a plaintiff to seek a cause of action outside of title VII. Finally, the Article presents a discussion of the application and advantages of each alternative theory of recovery.

THEORY AND DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is a form of sex discrimination.9 Both the Constitution and title VII have protected women from sex discrimination because of the traditional inequality of power between men and women in our society.10 This inequality of power is magnified in the employment context because of the employer's inherent power over the employee in the employment relationship.11 Furthermore, the work environment is typically male dominated.12

An employer who sexually harasses an employee abuses his power by taking advantage of it to subject workers to unwelcome sexual conduct.13 Economic power is used as coercion to force demeaning behavior on individuals.14 Such conduct, which has almost exclusively involved male harassment of females,15 at a minimum reduces

9. Sexual harassment claims were first viewed as a form of disparate treatment, or intentional discrimination. See, e.g., Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Henson v. City of Dundee, 682 F.2d 897, 905, 909 (11th Cir. 1982).
11. See id. at 1452. Sexual harassment can also occur in other settings such as in the classroom or in housing between landlord and tenant. Id. at 1451.
12. See id. at 1449 n.1.
15. In the first case of sexual harassment brought by a male against his female supervisor to reach a jury, the plaintiff won at trial. The award of $81,900 against the supervisor was reversed by the Seventh Circuit, however, because it found that title VII
workers to sex objects, reinforces sexual stereotypes, and assaults individual dignity. It can also force the worker to choose between leaving her job or tolerating the unwanted sexual behavior. Even if an overt choice is not required, the harassment can foster a sense of degradation that can lead to a loss of productivity and discourage the worker from trying to advance. Working in an environment of sexual harassment often causes physical problems as well.

Sexual harassment is defined by the Equal Employment Opportunity Commission (EEOC) as:

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

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Types (1) and (2) above comprise traditional sexual harassment, known as *quid pro quo* harassment, where submission is in some way tied to a job benefit or the job itself. Type (3) covers the harassing environment which later was recognized by the courts. The third form of harassment differs from the first and second not only because job benefits are not necessarily threatened, but also because the harassment can be committed by co-workers, and because it requires several acts over a period of time. In addition, the employer generally is vicariously liable for *quid pro quo* harassment, but

limits suits to those against the worker's employer. See Huebschen v. Dep't of Health and Social Servs., 716 F.2d 1167, 1170 (7th Cir. 1983).


17. Symptoms resulting from the tension and anxiety of working in a harassing environment range from insomnia, nausea, and nervous tics to depression and complete breakdowns. See Theory of Tort Liability, supra note 13, at 1464-65.

18. 29 C.F.R. § 1604.11 (1986).


20. See, e.g., Horn v. Duke Homes, 755 F.2d 599, 604-05 (7th Cir. 1985). "Every circuit that has reached the issue has adopted the [EEOC's] rule imposing strict liability on employers for acts of sexual harassment committed by their supervisory employees." Id. at 604.

[A] "company" is a legal form; it can "act" only through its duly-appointed agents. Where, as here, [a] supervisory employee is given absolute authority to hire and fire, and uses this authority to extort sexual favors from [subordinate] employees, the supervisor is, for all intents and purposes, the company . . . .

Courts have long used the doctrine of respondeat superior to impose liability on principles for the intentional torts of their agents.
many courts have held that the employer will not be held liable for "environmental harassment" unless it knew or should have known of the harassment, and did nothing to prevent it.21

This definition of sexual harassment is very broad, and encompasses not only the obvious demands for sexual favors in exchange for jobs, but more subtle forms such as the gaining of job advantages by a worker who has a sexual relationship with a supervisor to the detriment of a more qualified worker,22 harassing conduct by customers toward an employee that is tolerated by the employer,23 and

Id. at 605 (citation omitted).


Preventing sex discrimination in employment is too important a goal to turn upon the vagaries of what does not constitute a tangible job benefit, as distinguished from what is considered an intangible benefit such as psychological well-being at the workplace . . . . [Rather, Title VII provides] a statutory right to a job environment where none of the terms, conditions, or privileges of employment are adversely impacted by sex discrimination. Employer knowledge is not an element of [a hostile environment] Title VII sex discrimination [claim].

Id. at 83.

22. See King v. Palmer, 598 F. Supp. 65 (D.D.C. 1984), rev'd, 778 F.2d 878 (D.C. Cir. 1985). The district court found that plaintiff had made a prima facie case of sex discrimination by showing that a less qualified nurse was promoted over her and that the promoted nurse was engaged in a sexual relationship with the supervisor making the decision. Plaintiff lost at the trial level, however, because she was unable to present positive proof of a sexual relationship. The court indicated it would not rely on "rumor, knowing winks and prurient overtones or on inferences allowed in divorce law." Id. at 69.

23. See EEOC v. Sage Realty Corp., 507 F. Supp. 599, 604-06 (S.D.N.Y. 1981) (lobby attendant required to wear sexually revealing uniform suffered intangible harassment when passersby made comments, gestures, and propositions). But cf. EEOC Decision No. 85-9 (May 7, 1985; released June 11, 1985), 54 U.S.L.W. 2009 (July 2, 1985). Three employees of a women's clothing store were fired for refusing to wear swimsuits, a cover-up, and appropriate accessories as part of a swimwear promotion. Their refusal was based on their claims that these outfits were sexually revealing and would cause them to be embarrassed and subjected to offensive remarks and conduct. The EEOC found that since the women had not worn the outfits, they were never subjected to unwelcome sexual conduct, and thus did not fit within the Sage Realty Corp. precedent. The EEOC went on to examine whether the requirement alone constituted sexual harassment, and found it would if wearing the outfit would likely have resulted in being subject to unwelcome verbal or sexual activity. Based on testimony regarding prior male conduct in the store and in the areas surrounding the store, the EEOC determined that the women would not have been subjected to such behavior. The clerks testified that male customers, unlike female customers, complimented them on their attractiveness and commented favorably on their appearance in the clothes they wore at work. Men in the mall, particularly janitors, repeatedly would pass in front of the store and stare at the sales clerks, and some, primarily young men and high school boys, would knock on the glass panels to get the women's attention. The women testified that this conduct occurred regularly, and was disturbing to and interfered with their work, but that it was not vulgar and did not include sexually explicit remarks, references, or gestures. Thus, the EEOC concluded that the wearing of the outfit was unlikely to lead to unwelcome verbal or sexual activity.
conduc of co-workers that creates a “poisoned” psychological and emotional work environment.24

Perhaps the broadest interpretation of sexual harassment was applied in the case of McKinney v. Dole.25 Plaintiff McKinney filed various charges of age and sex discrimination, including sexual harassment. Among other allegations, she alleged that her supervisor pursued her into her office and when she attempted to leave, the supervisor prevented her from leaving by grabbing her arm and twisting it.26 The employer argued that this activity did not support a harassment claim since there were no sexual connotations to the incident.27 The court upheld plaintiff’s right to sue under the sexual harassment theory, holding that any harassment or other unequal treatment that would not occur but for the sex of the employee could, “if sufficiently patterned or pervasive, comprise an illegal condition of employment under title VII.”28 The McKinney holding goes a long way toward equating sexual harassment with other forms of sex discrimination, thereby robbing it of the usual requirement of some sort of sexual overtone. The court treated sexual harassment much the same as racial harassment has been treated in the racial discrimination context.29

As a result of the liberal interpretation given by the courts and the EEOC, it is sometimes difficult to recognize the line between acceptable and unacceptable sexually-oriented behavior in the workplace.30

It conceded, however, that this was a close judgment.

24. The first case to hold an employer liable for co-employee harassment was Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980). In Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), the court held that in order to hold the employer liable, the plaintiff must show that it knew, or should have known about the harassment, but failed to do anything about it. See also Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Ferguson v. E.I. du Pont Co., 560 F. Supp. 1172 (D. Del. 1983) (refusing to follow the EEOC guidelines deeming an employer liable regardless of whether acts were authorized or forbidden, or whether the employer knew or should have known of the sexual harassment).


26. Id. at 1132.

27. Id. at 1136.

28. Id. at 1138.


30. In the 1980 EEOC Guidelines, the Commission stated that it would “look at the totality of the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occur.” This was interpreted to follow case law holding that isolated incidents of flirtation, a vulgar remark, or a single request for a date, without proof of a pattern of harassment, merely reflects moral interaction between the sexes and is therefore not actionable. See, e.g., Clark v. World Airways, 24 Fair Empl. Prac. Cas. (BNA) 305 (D.D.C. 1980); Heelan v. Johns-Manville Corp., 451 F. Supp. 1382 (D. Colo. 1978). In Scott v. Sears, Roebuck & Co., 798 F.2d 210, 211-12 (7th Cir. 1986), the court found no sexual harassment where the only incidents were a request by the senior mechanic for the plaintiff to join him at a mall restaurant after work, and his winks and suggestions that he be allowed to give her a rubdown. These incidents were not so severe, debilatiting, or pervasive that they created a hostile environ-
Studies show, however, that sexual misconduct is common. In an early study conducted by Cornell University, seventy percent of the respondents reported experiencing some form of sexual harassment. More recent studies still show that a large number of working women are subjected to harassment in the workplace; however, despite the pervasiveness of sexual harassment, there have been relatively few suits. This may be partially the result of inadequacies of early tort and title VII remedies. The number of suits is likely to increase as these inadequacies are overcome.

LIMITATIONS OF SEXUAL HARASSMENT SUITS UNDER TITLE VII

Remedial Limitations

Early sexual harassment suits relied on findings of harmful or offensive touchings for success. The emotional harm caused by harassment generally went unrecognized and uncompensated, as did recognition that working in a harassing environment absent such touchings could be harmful. Thus, the broad sexual harassment definition of the EEOC was a big advance in protecting women in their jobs. This protection is of limited value, however, because of the remedial limitations contained in the Act. First, title VII remedies essentially are limited to tangible losses: reinstatement, back pay, lost employment benefits, and attorneys’ fees. Such remedies are meaningful only to employees who actually suffer losses under quid pro quo harassment. Even then, the advantages of returning to the prior harassing worksite are questionable. For victims of environmental harassment, injunctions and attorneys’ fees are the available statutory remedies. Compensatory and punitive damages are not available for either type of harassment. Thus, title VII does not compensate for the physical and emotional harms that arise from the harassment - harms that often overshadow the actual loss of job

32. See Sexual Harassment Claims, supra note 10, at 1451.
33. See Theory of Tort Liability, supra note 13, at 1466-67 n.55.
34. See 42 U.S.C. § 2000e-5(g).
35. Id.
benefits. Furthermore, since punitive damages are not available, the
deterrent effect of the law is limited. Second, title VII does not apply
to women who work for employers with less than fifteen employees.36
Finally, the very short statute of limitations for title VII claims
means that many women will attempt to obtain more meaningful
relief in a different forum.37

Limitations on Imposition of Liability

An unresolved issue is whether the employer can be held liable for
an employee's harassment of another employee absent the employer's
actual knowledge. The consensus of the lower courts, as well as the
EEOC, is that an employer can be held strictly liable for the sexual
harassment of its agents and supervisory employees.38 Most courts
and the EEOC, however, require actual or constructive knowledge
on the part of the employer before an employer may be held liable
for the acts of co-workers and nonemployees.39 Since an employee
can sue only her employer under title VII, such a limitation means
that many women effectively will be without a remedy for environ-
mental harassment injuries other than a remedy in tort. This proce-
dural limitation is compounded by women's particular reluctance to
complain to their employers about this type of harassment.40 The
"complaint requirement" also can be a special problem for employ-
ees who initially participated in, or did not object to, the activities
because they felt it necessary in order to keep their jobs. Not only do
these people face special evidentiary problems in showing the behav-
ior was unwelcome,41 but after the United States Supreme Court de-

36. Id. § 2000e(b) (an "employer" is "a person engaged in an industry affecting
commerce who has fifteen or more employees").
37. Id. § 2000e-5(e). The statute of limitations can be as short as 180 days in
states which do not have agencies enforcing fair employment laws.
38. The definition of a "supervisor" against whom strict liability is imposed is also
an open question. See, e.g., Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985)
(supervisors are those who are delegated the power to make employment decisions);
Vinson v. Taylor, 753 F.2d 141, 150 (D.C. Cir. 1985), reh'g denied en banc, 760 F.2d 1330
(supervisors are those who have even the appearance of a significant degree of influence
in vital job decisions). Even though the issue was raised in Vinson, the Supreme Court
chose not to define "supervisor" in Meritor. See Meritor Savs. Bank v. Vinson, 106 S.
Ct. 2399, 2407 (1986) (Justice Marshall, however, in his concurrence, argued for an
expansive reading of "supervisor." Id. at 2409-11).
40. Plaintiff Vinson, for example, did not complain to her employer even though
it had a grievance procedure. The Supreme Court found that failure did not automatically
bar her claim, for to file a grievance probably would have been futile. She would
have had to file it with the person who was harassing her. Meritor Savs. Bank, 106 S. Ct.
at 2399.
41. See EEOC Decision 84-1 (Nov. 28, 1983), 52 U.S.L.W. 2349 (Dec. 20,
1983). A machine operator told dirty jokes to fit in when she first went to work in a small
engineering firm where the owner also told such jokes; she later stopped. She could not
sue her employer after she stopped because she did not tell her employer she found his
cision in *Meritor Savings Bank v. Vinson,*\(^4\) they face the possibility of having their past sexual behavior introduced into evidence by the employer to show the conduct was welcome.\(^4\)

In *Meritor,* the plaintiff argued that the employer should be held

actions unwelcome. Simply ceasing to participate was not sufficient notice. While mere acquiescence may not mean that the conduct is welcome, active participation indicates that the activity is not unwelcome. Such activity raises an affirmative duty to notify later if it is unwelcome. The Commission found that two other co-workers who did not participate in using "dirty remarks" and telling "dirty jokes" were sexually harassed. See also *Loftin-Bogg v. City of Meridian,* 41 Fair Empl. Prac. Cas. (BNA) 532 (S.D. Miss. 1986) (Plaintiff was unsuccessful in her sexual harassment claim because she was unable to prove that the conduct was unwelcome. She had failed to tell any of her co-workers that she found the actions to be embarrassing, humiliating, or generally unwelcome. While initial participation in the conduct did not permanently bar a successful claim, plaintiff had to be able to identify with some precision a time when she told her co-workers or supervisors that such conduct would henceforth be considered offensive.). Although there is some evidence to the contrary, most courts agree that just because most female workers do not object to the harassing activities, the harasser is not excused merely by failure to object. Employers and employees are expected to know that harassing behavior is illegal, whether or not most employees tolerate, condone, or even participate in the activities.

Judges Bork, Scalia, and Starr, in the court of appeals decision in *Vinson,* vigorously dissented from the court's holding that plaintiff's capitulation to sexual advances did not preclude her from bringing a sexual harassment suit. They claimed that the holding prevented a supervisor from introducing evidence that his sexual advances were encouraged by the employee. Thus, they stated that the ruling means "that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it." *Vinson,* 760 F.2d at 1333. (Bork, J., dissenting). The Supreme Court later rejected this argument. See infra note 43.

42. 106 S. Ct. 2399 (1986).

43. Plaintiff Vinson had intercourse with her supervisor 40 or 50 times over a period of several years, but testified that such activity was "unwelcome"; she only acquiesced for fear of losing her job. The district court found that such action was voluntary and therefore not actionable. *Vinson v. Taylor,* 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980). The Supreme Court, partially following the appeals court reasoning, found that the voluntariness of Vinson's submission was not the issue. Instead, the focus should be on whether plaintiff indicated that the advances were unwelcome. In making this determination, the Court held that plaintiff's manner of dress and speech could be considered.

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In *Priest v. Rotary,* 98 F.R.D. 755 (N.D. Cal. 1983), the court held that a worker's sex life could not be used as evidence. In *Priest* a waitress sued when her employer fired her for refusing his demands for sexual favors. The owner claimed she was the sexual aggressor, and that he fired her for trying to pick up male customers. To support this argument he sought her detailed sexual history including the name of each sexual partner during the past ten years. A California federal district judge blocked the request because permitting such disclosures could intimidate, inhibit, or discourage sexual harassment claims. Sexual harassment plaintiffs appear to require special protection from this sort of intimidation and discouragement. The judge noted that rape victims used to face similar attacks on their moral character. *Id.* at 757-62.
strictly liable for work-related sexual harassment of its supervisors. The defendant argued that in a hostile environment case, the employer should not be held liable unless put on notice of the harassment. The EEOC, in contradiction of its own guidelines, argued for modifications of both positions. The Court left the issue of employer liability for a future decision and refused to adopt any of these approaches, noting that Congress must have meant to put some limits on employer liability for the acts of its employees, but did not necessarily intend for absence of notice to insulate the employer from liability. While refusing to spell out guidelines, the Court did reject per se strict liability for environmental harassment cases, and implied that absence of notice could be a defense in some cases. The standard may come to be one of agency law, under which decisions would have to be made on a case-by-case basis. However, Justices Marshall, Brennan, Blackmun and Stevens, in concurrence, argued strongly for strict liability, advocating per se strict liability for all forms of sexual harassment.

The issue of employer knowledge as a prerequisite to liability is not confined to title VII cases. It presents potential problems in suits brought under the equal protection clause, as well as in suits involving other theories discussed below.

**Equal Protection Causes of Action**

Sexual harassment suits based on the equal protection clause are of recent origin. In 1981 the District Court for the Northern District of Illinois first recognized that claims of sex discrimination are cognizable under the equal protection clause of the fourteenth amendment. Taking note of this fact, and finding that plaintiff's fellow police officers intentionally treated her differently because of her sex, the court allowed plaintiff to sue under section 1983 of the Civil Rights Act. In a later case, another court found that by 1979, before any court had decided the issue, it was clear that the equal

44. Meritor, 106 S. Ct. at 2408. The EEOC argued that a supervisor's actions should be imputed to the employer in the *quid pro quo* context when a supervisor exercises authority actually delegated to him. In the harassing environment context, the EEOC argued that when an employer has an express policy against sexual harassment and procedure specifically designed to resolve sexual harassment claims, and the employee does not use this procedure, the employer does not have notice, and should not be held liable. See Nelson, *DOJ Brief Departs From Guidelines on Harassment*, Legal Times, Jan. 27, 1986, at 1, col. 2.
45. Meritor, 106 S. Ct. at 2408.
46. Id. at 2408-09.
47. Id. at 2409-11.
49. Id. at 519-20. The court found that the sexual advances would not have been made to the plaintiff had she been a male. She was allowed to sue her superiors who engaged in acts entirely unrelated to a legitimate government objective.
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protection clause protected people from sexual harassment.50

Since sexual harassment is a form of sex discrimination,51 and sex discrimination has been cognizable under the equal protection clause since the Supreme Court decision in Reed v. Reed52 in 1971, it is not surprising that the courts have recognized such suits. What is surprising is that there has been little litigation of sexual harassment claims under this theory. Discrimination claims are more limited under the Constitution than under title VII because only acts of intentional discrimination are cognizable under the Constitution; however, this should not affect sexual harassment claims. By definition, actions that would constitute sexual harassment are intentionally discriminatory.

One possible problem in this regard, however, is whether an employer can be held liable for a sexually harassing environment of which the employer had no knowledge. As noted above, the courts in title VII cases are split regarding vicarious liability without knowledge of a harassing environment, but the majority opinion is that liability should not ensue. It is even less likely that liability without knowledge would be assessed under the equal protection clause because the plaintiff would have difficulty showing the requisite intent without knowledge.

Judge Posner, in a concurrence in Bohen v. City of East Chicago,53 took such a limited interpretation. In Bohen, a fired employee of the City of East Chicago Fire Department sued on the basis of sexual harassment and sex and national origin discrimination under

50. Estate of Scott v. de Leon, 603 F. Supp. 1328, 1332 (E.D. Mich. 1985). This ruling allowed suit by the estate of a woman who committed suicide at least in part due to sexual harassment. The court found that the equal protection clause forbids intentional discrimination against a woman because of her sex by a person acting under color of state law. It found that common sense as well as case law under title VII indicated that sexual harassment was the sort of invidious discrimination which was forbidden. Id. at 1332.

51. "Creating abusive conditions for female employees and not for males is discrimination . . . . Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men." Bohen v. City of East Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986). The court cited Davis v. Passman, 442 U.S. 228, 234-35 (1979), for holding that the equal protection clause contains a "federal constitutional right to be free from gender discrimination" that does not "serve important governmental objectives" and is not "substantially related to those objectives." Bohen, 799 F.2d at 1185. The court further noted that all district courts except the court it was reviewing, when faced with the issue, had held that sexual harassment by a state employer was sex discrimination violative of the equal protection clause and actionable under 42 U.S.C. § 1983. Id.

52. 404 U.S. 71 (1971).

53. 799 F.2d 1180, 1189-92 (7th Cir. 1986).
both title VII and the equal protection clause of the fourteenth amendment. Judge Posner noted that Bohen could successfully sue the city under the equal protection clause because the city knew of the harassment and did nothing. He characterized the employee's claim as a claim for failure to protect against harassment, not of sexual harassment, because she was not suing the employees who harassed her. 54

Interpretations by other courts in a slightly different context show a similar reluctance to read the law expansively to allow such suits. In Huebschen v. Department of Health and Social Services, 55 for example, the court restrictively interpreted plaintiff's cause of action. 56 Huebschen, one of the first suits brought by a man for sexual harassment, was brought under 42 U.S.C. § 1983. David E. Huebschen was demoted after rejecting the sexual advances of Jacqueline Radner, an assistant director in the Wisconsin Bureau of Social Security Disability Insurance. 57 The jury awarded him $114,600 in damages against Radner, plus $81,900 against Radner's superior who approved the demotion, and $8,000 in back pay. On appeal the Seventh Circuit disallowed the claim, finding that Radner was not an "employer" and that title VII allowed suit only against employers. 58 Thus, the court found that no legal basis existed for a section 1983 suit based on title VII when Huebschen could not directly sue Radner under title VII. 59 This opinion concurred with earlier decisions of the Second and Fifth Circuits, which found that enforcing title VII through section 1983 gives plaintiffs no greater substantive rights than they would have if they had proceeded directly under title VII. 60

Since employees cannot sue their co-employees under the equal protection clause, and will be unlikely to be able to sue their employer unless the employer had knowledge of the harassing environment, victims of a sexually harassing environment are unlikely to be successful under this theory.

While substantive rights cannot be greater under a constitutional claim than under title VII, damages may be. In Bohen v. City of East Chicago, the plaintiff lost on all counts in the district court. 61 On appeal, the district court opinion was reversed in part, the court of appeals finding that sexual harassment is compensable as a viola-

54. Id. at 1189.
55. 716 F.2d 1167 (7th Cir. 1983).
56. See id. at 1170-72.
57. Id. at 1169.
58. Id. at 1170.
59. Id. at 1170-71.
60. See $25,000 sex harassment award to male worker is overturned, 70 A.B.A. J., Jan. 1984, at 131, col. 2.
tion of the equal protection clause, and the case was remanded for determination of damages. The court found plaintiff's claim compensable even though she did not lose her job as a result of the sexual harassment.62 Plaintiffs suing under sections 1981 and 1983 generally can get greater damages than would be available under title VII. They can also avoid some of the complex procedural requirements and time limitations involved in a title VII action. Thus, there are incentives for plaintiffs to bring sexual harassment claims under these sections. Similar advantages also prompt plaintiffs to sue in tort.

**Nonstatutory Causes of Action**

**Traditional Tort Causes of Action**

Traditional tort causes of action provided the only avenue of legal redress for the victims of sexual harassment before title VII was interpreted to ban this type of discrimination. Various tort causes of action remain attractive to plaintiffs, despite their opportunity to proceed under title VII. When the facts of a case fulfill the elements of one of the intentional torts, the plaintiff can obtain a far more lucrative remedy than is possible under title VII. In contrast to the equitable remedies available to the successful plaintiff under title VII,63 the successful tort plaintiff may recover compensatory damages that include damages for pain and suffering or emotional distress and, in appropriate cases, punitive damages.64 Other substantial advantages of tort actions over title VII actions include longer statutes of limitations, less complex (or at least, more familiar) procedures, and the availability of jury trial.65

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62. 799 F.2d at 1182.
63. See supra notes 33-37 and accompanying text for discussion of remedies available under title VII.
65. See B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 739-40 (2d ed. 1983). In fact, one of the few economic advantages of title VII over a tort action is that the successful plaintiff's attorney's fees will be reimbursed under title VII. Id. at 528-29, 1466-1511. In a tort cause of action, the "American rule," which requires each

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This bounty does not await every victim of sexual harassment, however. Sexual harassment is not yet cognizable as an independent tort.\footnote{66} The likelihood of compensation depends on the plaintiff's ability to prove all of the elements of an existing cause of action that may not be well suited to the types of interests and injuries involved in a sexual harassment suit. In this sense, traditional tort law is a narrow avenue of redress.

An additional potential problem is whether liability can be imposed on the employer for an intentional tort committed by its employee. Because an employee is likely to be victimized by a supervisory employee rather than the employer, and the supervisory employee may not be able to respond in damages, a victory in court could be hollow unless the plaintiff can succeed in establishing liability on the part of the employer. This may be accomplished by proving that the employer had knowledge of the harmful situation, but did not act to remedy it,\footnote{67} by establishing that the supervisory employee had been placed in a position in which he had a peculiar opportunity and incentive to commit the tort, or that the employee's conduct was foreseeable as being within the range of responsibilities entrusted to him by the employer.\footnote{68}

Yet a further problem concerns whether a tort claim arising from sexual harassment in employment is foreclosed by the exclusivity provisions of workers' compensation statutes. Although very few courts have considered this question, it appears that tort actions arising from sexual harassment are not likely to be governed by the exclusivity provision of workers' compensation statutes.\footnote{69}

Another threshold issue for potential plaintiffs in the military is whether a woman in the service who is sexually assaulted may sue the Army. In 1984, the Army won two cases on the ground that the injuries were not "incident to service." Suit was dismissed in Stubbs v. United States, 593 F. Supp. 521 (N.D. Ark. 1984), aff'd, 744 F.2d 58 (8th Cir. 1984), cert. denied, 471 U.S. 1053 (1985), a suit brought by the sister of a woman who committed suicide after allegedly being assaulted by her sergeant. Stubbs, a private in basic training, was ordered to last minute latrine duty where she was fondled by her sergeant and told that her discipline would be much worse if she refused his advances. In a previous suit brought by a woman who was gang-raped in an Army barracks, the Army's claims service ruled that her suit for damages was barred by the \textit{Feres} doctrine,
Intentional Infliction of Emotional Distress

Almost all states now permit recovery of damages for extreme misconduct that results in severe emotional distress. The Restatement (Second) of Torts states that a person is subject to liability for resulting emotional or physical harm if he "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." The crucial elements that must be established are that the defendant behaved in an extreme and outrageous way toward the plaintiff and that the plaintiff suffered severe emotional distress as a result.

Because this cause of action may provide a remedy for the intangible harm that can result from sexual harassment, it is one of the more promising tort causes of action. The chief threat to the maintenance of a claim premised on infliction of emotional distress is that the extreme and outrageous conduct element is a matter of personal judgment that requires some sensitivity on the part of the factfinder to the nature of sexual harassment. According to the Restatement, the standard for the outrage requirement is that the actor's conduct should be of such a nature that it would arouse the resentment of an average member of the community and lead him to exclaim, "Outrageous!"

The traditional rule was that it was not extreme and outrageous to solicit sexual favors, because "there is no harm in asking." Even in the more traditional cases, however, hounding the object of one's attentions could fulfill the outrage requirement.

Recent sexual harassment cases that have reached the appellate
courts on motions to dismiss or motions for summary judgment have shown much greater sensitivity to harassment. In Rogers v. Loews L'Enfant Plaza Hotel, the plaintiff, an assistant manager of a hotel restaurant, alleged that her supervisor made written and verbal sexual advances to her, pressing notes into her hand while she was busy at work, leaving them in menus that she was distributing to restaurant patrons, and leaving them in her purse without her knowledge.

Although the plaintiff rebuffed these overtures, her supervisor touched her, pulled at her hair, and made continuous advances and sarcastic, leering comments about her personal and sexual life. Later, the supervisor began to retaliate against the plaintiff by excluding her from staff meetings, refusing to cooperate with her, and belittling her in front of the staff. After unsuccessfully seeking redress from her employer, the plaintiff filed suit based on title VII and several tort theories. The court found that the plaintiff's complaint alleged facts and circumstances that exceeded mere insults, indignities, and petty oppression. If proved, stated the court, defendant's conduct would be construed as outrageous.

Other intentional infliction of emotional distress cases arising out of sexual harassment in employment have emphasized the outrageous nature of the abuse of power by an employer or supervisory employee. In a society that increasingly abhors the abuse of power and expresses that abhorrence through a variety of legal principles aimed at curbing such abuses, it is not surprising that courts would be willing to venture that a jury might cry "Outrageous!" at the type of conduct alleged by Ms. Rogers and other similarly situated employees.

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76. Id. at 525.
77. Id. at 526.
78. Id.
79. Id. at 527.
80. Id. at 531.
81. See also Stewart v. Thomas, 538 F. Supp. 891 (D.D.C. 1982). Cf. Hooten v. Pennsylvania College of Optometry, 601 F. Supp. 1151 (E.D. Pa. 1984) (plaintiff complained of a pattern of harassment and hostility based on her gender, but not sexual harassment; court held that the defendants' acts may have been oppressive, but they did not rise (or fall) to the level of extreme outrage that was represented in cases of sexual harassment. Id. at 1154-55.).
82. See, e.g., Lucas v. Brown & Root, Inc., 736 F.2d 1202, 1206 (8th Cir. 1984); Shaffer v. Nat'l Can Corp., 565 F. Supp. 909, 915 (E.D. Pa. 1983). See Restatement (Second) of Torts § 46 comment c (1965): "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."
Assault and Battery

When an employee has been touched and physically threatened with unwelcome contact, she may have an action for battery, assault, or both.\textsuperscript{83} Assault occurs when a person, acting with intention to cause harmful or offensive contact, causes another to experience imminent apprehension of such contact.\textsuperscript{84} Battery, on the other hand, occurs when the defendant actually brings about the harmful or offensive contact while acting with intent to cause either battery or assault.\textsuperscript{85}

Physical behavior that accompanies some harassment, such as the hair pulling that was alleged in the Rogers case, unwelcome caresses,\textsuperscript{86} grabbing,\textsuperscript{87} and even rape,\textsuperscript{88} fits within the elements of battery. Nonverbal conduct (alone or in combination with verbal conduct) that threatens offensive sexual conduct can constitute assault, even if no contact actually occurs.

Words alone, however, are insufficient for both assault and battery.\textsuperscript{89} Thus, a pattern of sexual harassment can be extremely harmful to nonphysical interests of the plaintiff, yet may not be actionable as an assault or battery if the harassment has not involved physical contact or the threat of imminent physical contact.

Invasion of Privacy (Intrusion Upon Solitude)

The tort of invasion of privacy includes a number of distinct theories, among them intrusion upon solitude. The Restatement describes intrusion as the intentional intrusion, "physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."\textsuperscript{90} Although this language is quite broad, many courts have limited intrusion to conduct akin to a trespass into private areas from which one should be excluded,\textsuperscript{91} although the trend appears to be...
moving away from this position.92
Several recent decisions involving sexual harassment indicate,
however, that if the Restatement formulation of intrusion is used,
intrusion may be an apt cause of action for many victims of sexual
harassment. Persistent and unwelcome telephone calls have been
held to be an invasion of privacy, at least in cases involving debt
collection.93 In Rogers, the court held that the plaintiff had stated a
claim for invasion of privacy by alleging that her supervisor had re-
peatedly called her at home and at work and made leering comments
about her personal and sexual life to her.94
In Phillips v. Smalley Maintenance Services, Inc.,95 the Supreme
Court of Alabama, on a certification from the Eleventh Circuit, ap-
plied the intrusion theory of invasion of privacy broadly so as to
cover many patterns of sexual harassment. In Phillips, the principal
owner of the business that employed the plaintiff as an “overhead
cleaner” repeatedly called the plaintiff into his office and, after lock-
ing the door, questioned her in detail about her personal and sexual
life and demanded that she perform sexual acts with him.96 The
court held that it was not necessary that the defendant invade some
physically defined space or area as opposed to one’s personality or
psychological integrity.97 Rather, the defendant’s examination of the
plaintiff’s private concerns and his intrusion and coercive sexual de-
mands constituted a wrongful intrusion that would be actionable no
matter where they occurred. The court had little trouble concluding
that this intrusion was offensive, noting that the defendant, who was
aware that the plaintiff was dependent on her income, rendered the
plaintiff an “economic prisoner.”98 The court further noted that
under the relaxed standard for proximate cause applied to inten-
tional torts, the defendant was responsible to the plaintiff for the
treatment of the severe emotional problems that were proximately
caused by his intrusion.99
One common element of sexual harassment cases appears to be
the harasser’s intrusive demands and questioning of the victim. Fun-
damentally, all quid pro quo sexual harassment is an intrusion into
privacy. Through a pattern of sexual harassment, the person who
possesses power over the employment relationship seeks to intrude

92. See, e.g., Pearson v. Dodd, 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S.
(1932). See also Housh v. Peth, 165 Ohio St. 35, 133 N.E.2d 340 (1956).
94. 526 F. Supp. at 528.
95. 435 So. 2d 705 (Ala. 1983).
96. Id. at 707.
97. Id. at 711.
98. Id.
99. Id. at 712.
upon the victim and interfere with what is a very private decision on
the victim’s part: the decision when, where, and with whom he or she
will have a personal rather than a business relationship. If other
courts demonstrate the willingness to apply the intrusion theory so
liberally, intrusion could become the dominant tort cause of action
for redressing sexual harassment.100

Intentional Interference with Contract

When sexual harassment by a third party (such as a fellow em-
ployee or supervisor) threatens a plaintiff’s employment, the em-
ployee may be able to obtain compensation for intentional interfer-
ence with his or her employment contract.101 Success under this
cause of action requires a showing that the plaintiff had a contract-
tual relationship and that the defendant maliciously and without jus-
tification procured the plaintiff’s discharge.102

Although this cause of action has been successfully used in sexual
harassment cases,103 several sticking points prevent it from being
widely applicable in such cases. First, the majority view is that it

100. A related issue that has been raised is whether a plaintiff who claims sexual
harassment can demand that her identity be protected, and successfully sue if her iden-
tity is revealed. In Koster v. Chase Manhattan Bank, 93 F.R.D. 471 (S.D.N.Y. 1982),
the New York district court held that widespread and somewhat sensational coverage of
a sexual harassment suit brought by a former employee against the bank and a former
bank official was not sufficient “good cause” under the Federal Rules of Civil Procedure,
rule 26(c), to warrant a broad protective order prohibiting dissemination of information
obtained during discovery even though defendant’s reputation might be injured. Id. at
480-81. While the court would not issue the order at that point in the lawsuit, it did note
that some material gained through discovery might later be appropriate for a narrowly
drawn protective order. Id. at 482.

The court protected the victim’s privacy in Jennings v. D.H.L. Airlines, 101 F.R.D.
549 (N.D. Ill. 1984), when the airline sought to gain discovery of her files from her
psychologist. Jennings was fired after a physical fight with a co-worker, and later sued
her employer, alleging it allowed male workers to harass her and interfere with her work.
Her employer had earlier told her to see a psychologist, which she had done. The psy-
chologist told a manager that Jennings had a “socialization problem,” and the company
sought discovery of the psychiatrist’s files to disprove her claim. Id. at 550. The court
found that the company could get the information it needed from its personnel records
and Jenning’s co-workers. Id. at 551.

101. See generally W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION:

102. Id. at 194.

1981) (employee stated claim against individual defendants for tortious interference);
ers maliciously interfered with plaintiff’s employment contract); Tash v. Houston, 74
Mich. App. 566, 254 N.W.2d 579 (1977) (employee discharged when she spurned sexual
advances of supervisor stated cause of action for tortious interference with employment).
does not apply to the discharge of employees at will. Second, this theory does not permit liability on the part of the employer because the essence of the wrong is that a third person interferes with the employer-employee relationship. Third, it requires proof of economic harm and does not redress psychic harms.

**Tort and Contract Actions for Wrongful Discharge**

An employee who is actually or constructively discharged from employment as a result of sexual harassment may have a cause of action under a tort or contract theory of wrongful discharge. Wrongful discharge theories that protect employees at will emerged, for the most part, within the past decade. They include breach of implied contract, public policy tort, and breach of the implied covenant of good faith and fair dealing. No single theory is accepted by every state, although a number of states recognize two or more theories.

Any of these theories might be implicated by a discharge that flows from a pattern of sexual harassment. The plaintiff might have an express or implied contract for continued employment, in which case discharge in retaliation for her refusal to capitulate to sexual harassment would be a breach of contract. This could be true even when the source of the employee's right to job security is found in employee literature or handbook rather than in an express contract.

Even without express or implied promises of continued employment, discharge resulting from sexual harassment could be actionable under the two more open-ended causes of action. Under the public policy theory, the employer commits a tort if he discharges an employee for a reason that violates an independent public policy. As a condition of recovery under this cause of action, courts demand that a plaintiff demonstrate some precise public policy, preferably a relatively specific one contained in a statute, that was violated by

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105. See Theory of Tort Liability, supra note 13, at 1480.
106. Id.
112. See, e.g., Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505
the discharge.

In a sexual harassment case, the plaintiff would be able to point to title VII or a state fair employment practices act as concrete evidence of the public policy against sexual harassment and sex discrimination. In *Lucas v. Brown & Root, Inc.*, however, the Court of Appeals for the Eighth Circuit premised the plaintiff's public policy tort claim on the public policy manifested by the statute criminalizing prostitution. It stated that a "woman invited to trade herself for a job is in effect being asked to become a prostitute," and that the plaintiff should not be penalized for refusing to do what the law forbids. As the *Lucas* case indicates, a sexual harassment plaintiff may be able to point to public policy expressed in a number of sources that would be violated by her discharge. She may be able to identify criminal statutes that forbid adultery, fornication, or non-consensual sexual activity, for example, or public policies demonstrated in constitutional provisions, statutes, or case law that protect the sanctity of marriage. She also may premise her case on the argument that she was discharged for exercising a legal right: that of resisting unwelcome sexual advances. In short, a victim of sexual harassment should not have any difficulty persuading a court that a public policy was violated by harassment that has culminated in her discharge.

Breach of the implied covenant of good faith and fair dealing is another cause of action that also could apply in cases of discriminatory discharge arising from sexual harassment. Under this theory, an extracontractual duty is imposed on an employer to deal with the employee in good faith. The employer who discharges an employee in bad faith, frustrating her reasonable expectations, can be held liable for damages. Courts have found bad faith in cases in which the employer discharged the employee for an ulterior motive not re-
lated to the employee's job performance.\textsuperscript{119}

One of the earliest cases permitting a discharged employee to recover damages because of a bad faith discharge was a sexual harassment case, \textit{Monge v. Beebe Rubber Company}.\textsuperscript{120} In Monge, a press machine operator refused to date her foreman and was discharged for her resistance. On appeal, the New Hampshire Supreme Court noted that the employer's right to run his business as he sees fit must be balanced against the public interest in maintaining employment.\textsuperscript{121} Discharges that are motivated by bad faith, malice, or retaliation constitute a breach of contract.\textsuperscript{122} \textit{Lucas}, as well, was premised partially on breach of the implied covenant of good faith and fair dealing. The court there stated that "it is an implied term of every contract of employment that neither party be required to do what the law forbids."\textsuperscript{123}

Unfortunately, relatively few jurisdictions have been willing to apply the implied covenant of good faith and fair dealing to employment contracts.\textsuperscript{124} In a jurisdiction that does recognize this theory, however, a discharge arising from sexual harassment would provide ample grounds for recovery.\textsuperscript{125}


\textsuperscript{120} 114 N.H. 130, 316 A.2d 549 (1974).

\textsuperscript{121} \textit{Id.} at 133, 316 A.2d at 551.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{Lucas}, 736 F.2d at 1205.

\textsuperscript{124} See Mallor, supra note 65, at 467.

\textsuperscript{125} Another issue surrounding wrongful discharge arising from sexual harassment is whether it is wrongful to discharge or discipline the alleged perpetrator. Is allowing sexual harassment in the classroom "immoral conduct" sufficient to support dismissal of the teacher? In Ross v. Robb, 662 S.W.2d 257 (Mo. 1983), the Missouri Supreme Court found that a vocational teacher could be fired who allowed and encouraged male members of his class to sexually harass the only female member, failed to discipline the class, and engaged in such behavior himself. It upheld the finding of the school board that he was unfit to teach. \textit{Id.} at 260. In another case, a "bartender leader" at an officer's club challenged his dismissal for sexually harassing female subordinates because they had not taken their complaints to an EEOC counselor first. The court upheld the Air Force's right to apply a regulation that authorized dismissal for a deliberate second offense of sex discrimination, and recommending dismissal for a third offense. Hostetter v. United States, 739 F.2d 983, 986 (4th Cir. 1984).

In French v. Mead Paper Corporation, No. 83-3745 (S.D. Ohio), \textit{aff'd}, 758 F.2d 652 (6th Cir.), cert. \textit{denied}, 106 S. Ct. 68 (1985), the court concluded that a male supervisor employee who was fired for sexually harassing female employees did not state a claim for gender-based discrimination under title VII. The questions presented in the petition for certiorari were: (1) Does a male employee have the same protections under title VII of 1964 Civil Rights Act as a female employee in a case involving alleged sexual harassment? (2) Does mere allegation by a female employee constitute a legitimate, non-discriminatory reason under title VII to insulate her employer against liability in a sex discrimination case? In another case, three male supervisors fired for sexual harassment were unsuccessful in suits based on abusive discharge, intentional infliction of emotional
DOES TITLE VII PREEMPT TRADITIONAL TORT OR WRONGFUL DISCHARGE ACTIONS?

A victim of sexual harassment who attempts to file a state tort or contract action in addition to or instead of a title VII action may be confronted with an argument that title VII should foreclose her state actions that arise from the same set of facts. The defendant might

distress, and breach of the employment contract. Johnson v. Int'l Minerals & Chem. Corp., 40 Fair Empl. Prac. Cas. (BNA) 1651 (S.D.S.D. 1986). The employees were accused of participating in the harassment of two women who were under their supervision. The women were among the first women hired at the plant, and there were very few women in the facility. They were subjected to, among other things, pinching and bruising of their breasts, forcible attempts to kiss and fondle them, lewd remarks, and “snuggies.” (This involved a maneuver whereby one grabs another person’s underpants and jerks the underpants up). Id. at 1652. After enduring the harassment for some time, they filed a complaint with the Wyoming Fair Employment Commission and the EEOC. They ultimately settled their claim with the employer (IMC). Subsequent to the settlement, IMC conducted its own investigation, and concluded that the three supervisors were guilty of the harassment and discrimination charges. The supervisors were fired. Other employees who had also been accused were not fired after the investigation. The court found that the supervisors were employees at will, and recognized that many jurisdictions had carved out public policy exceptions to this doctrine. However, there were no such public policy exceptions applicable to this case. Likewise, even if an implied covenant of good faith and fair dealing were to be recognized, it was not breached in this case, for IMC acted in good faith by conducting a thorough investigation prior to making the decision to discharge the plaintiffs. The court found that there was no express or implied contract to be breached. On the defamation allegation, the court found that there was no support except the conclusory statements of the plaintiffs, and in any event, truth was a defense. Defendants were not liable for intentional infliction of emotional distress because they did nothing outrageous. Indeed, they acted reasonably in all respects. The court ordered further briefs on the issue of attorney's fees for IMC, and on IMC's claim for contribution and indemnity for the amount it had to pay the two women in settlement of their claim.

In Downes v. Federal Aviation Administration, 775 F.2d 288 (Fed. Cir. 1985), the plaintiff, a federal aviation inspector, was accused of both quid pro quo and environmental sexual harassment, and was demoted. The demotion was upheld by the Merit Systems Protection Board. On appeal the Court of Appeals for the Federal Circuit reversed the demotion because sexual harassment had not been adequately proved. The evidence supporting the quid pro quo harassment was a statement of a female employee that “Fin [Downes] has asked me if I have ever thought about trading favors to get ahead in the agency. He’s also said, ‘Boy, if I had a body like yours, I’d really go places.’” The court found there was no request for sexual favors or retaliation for denial in this statement, and therefore no quid pro quo sexual harassment. Id. at 292. The court further found that plaintiff had not created an intimidating, hostile, or offensive work environment because his actions had not been sufficiently pervasive or offensive. There had only been five incidents over three years, and some of those were “trivial,” such as his reference to one employee as “the Dolly Parton of the office.” These did not interfere with any employee's psychological well being, and all but one female employee signed a petition supporting him as a manager. Id. at 295. The latter reasoning is somewhat in conflict with Priest v. Rotary, 634 F. Supp. 571 (N.D. Cal. 1986), in which a waitress stated a title VII claim against her employer for sexual harassment even though some of her co-workers tolerated and did not object to being sexually harassed by the employer.
assert that the complex procedural mechanism for obtaining compensation under title VII and its limited remedies reflect a deliberate policy choice made by Congress about the proper way in which to redress sex discrimination, and that the legislative will would be thwarted by state tort and contract remedies that permit a plaintiff to bypass the procedural and remedial limitations of the statute.\footnote{126}{See, e.g., Crews v. Memorex Corp., 588 F. Supp. 27, 29 (1984).}

The defendant might also argue that the public policy against sexual harassment, as a species of sex discrimination, is already vindicated by title VII, rendering state tort and contract theories arising from the same facts duplicative.\footnote{127}{See, e.g., Greene v. Union Mut. Life Ins. Co., 623 F. Supp. 295, 299 (D. Me. 1985).} Finally, the defendant might argue that the more general action is foreclosed by the availability of a specific action designed to redress sex discrimination.\footnote{128}{See the argument made by the defendant in Stewart v. Thomas, 538 F. Supp. 891, 894-95 (D.D.C. 1982).}

The language and history of title VII indicate that Congress did not intend it to foreclose state remedies. The statute specifically states that it does not "exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State."\footnote{129}{42 U.S.C. § 2000e-7.}

Nevertheless, in cases involving discharge as a result of a general type of sex, race, or age discrimination, the majority of courts that have considered the issue have held that wrongful discharge actions based on the public policy contained in the remedial statute (title VII or the Age Discrimination in Employment Act) are foreclosed by the existence of the remedial statute.\footnote{130}{See Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975); Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974); Mallor, Discriminatory Discharge and the Emerging Common Law of Wrongful Discharge, 28 Ariz. L. Rev. 651, 665-68 (1986).}

Of great importance in these cases is the fact that the courts perceive the interest violated in cases of discriminatory discharge to be identical with the interest addressed and remedied by title VII. This is demonstrated by the fact that a number of courts have permitted a plaintiff to maintain an implied contract cause of action\footnote{132}{See, e.g., Cory v. SmithKline Beckman Corp., 585 F. Supp. 871 (E.D. Pa. 1984). See also Frazier v. Colonial Williamsburg Found., 574 F. Supp. 318 (E.D. Va. 1983) (employee maintained both title VII action and implied contract action).} or a traditional tort cause of action, while denying the plaintiff’s right to maintain a wrongful discharge action.\footnote{133}{See, e.g., Cory, 585 F. Supp. at 875; Shaffer v. Nat’l Can Corp., 565 F. Supp. 909 (E.D. Pa. 1983).}
Although most courts have rejected the availability of wrongful discharge actions, a sizable body of case law remains in which discriminatorily discharged employees have been permitted to maintain such actions.\textsuperscript{134} Perhaps it is significant that several of these cases have involved plaintiffs who were the victims of sexual harassment.\textsuperscript{135} In both the \textit{Lucas} case and \textit{Holien v. Sears, Roebuck \& Company},\textsuperscript{136} the courts struggled to distance the plaintiff's wrongful discharge actions from the public policy against sex discrimination found in title VII. The \textit{Lucas} court based its opinion on the public policy against prostitution,\textsuperscript{137} while the \textit{Holien} court viewed the plaintiff's discharge as a retaliation against her for exercising a legal right.\textsuperscript{138} More to the point, the court in \textit{Holien} commented that:

Title VII fail[s] to capture the personal nature of the injury done to a wrongfully discharged employee as an individual and the remedies provided by the statutes fail to appreciate the relevant dimensions of the problem. Reinstatement, back pay, and injunctions vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care. Legal remedies as well as equitable remedies are needed to make the plaintiff whole.\textsuperscript{139}

Even if title VII does not foreclose a wrongful discharge action, exclusivity provisions in state fair employment legislation might do so.\textsuperscript{140} For example, in two recent sexual harassment cases, \textit{Wolk v. Saks Fifth Avenue, Inc.}\textsuperscript{141} and \textit{Shaffer v. National Can Corporation},\textsuperscript{142} language of the Pennsylvania Human Relations Act (PHRA)\textsuperscript{143} was interpreted to supplant the plaintiffs' claims based


\textsuperscript{135} See Lucas v. Brown & Root, Inc., 736 F.2d 1202 (8th Cir. 1984); Holien, 298 Or. 76, 689 P.2d 1292. But see Wolk v. Saks Fifth Avenue, Inc., 728 F.2d 221 (3d Cir. 1984); Shaffer, 565 F. Supp. 909.

\textsuperscript{136} 298 Or. 76, 689 P.2d 1292 (1984).

\textsuperscript{137} See Lucas, 736 F.2d at 1205.

\textsuperscript{138} Holien, 298 Or. at 76, 689 P.2d at 1292.

\textsuperscript{139} Id. at 99, 689 P.2d at 1303.

\textsuperscript{140} Most states have antidiscrimination statutes, some of which are considered broader than title VII. Minnesota's Human Rights Act, for example, was interpreted in Continental Can Co. v. Minnesota to require an employer to curb sexual harassment among co-workers before a similar ruling had been made under title VII. MINN. STAT. ANN. § 363.03 (West 1966 & Supp. 1987).


\textsuperscript{141} 728 F.2d 221 (3d Cir. 1984).


\textsuperscript{143} PA. STAT. ANN. tit. 43, § 962(b)(Purdon Supp. 1982) provides in part that:
on the public policy theory of wrongful discharge.\textsuperscript{144}

Plaintiffs have fared much better under traditional tort causes of action than under wrongful discharge actions. In \textit{Shaffer}, for example, the court held that Ms. Shaffer's wrongful discharge claim was foreclosed, but permitted her to maintain a claim for intentional infliction of emotional distress.\textsuperscript{148} The court based its decision on the fact that "the interests sought to be protected by the PHRA and this tort are fundamentally different."\textsuperscript{149} Whereas the statute effectuates the state's interests in eradicating targeted forms of discrimination, the tort of intentional infliction of emotional distress vindicates the personal interest of freedom from intentionally imposed mental anguish. Because the interests protected are so different, the court concluded that the legislature could not have intended the statute to supplant the tort cause of action.\textsuperscript{147}

Similarly, in \textit{Stewart v. Thomas},\textsuperscript{148} the court held that plaintiff's assault, battery, and intentional infliction of emotional distress allegations were not subsumed by title VII because they were based on different interests.\textsuperscript{149} The court, however, stated that any emotional injuries that resulted from her stressful work situation would be foreclosed as having been remedied by title VII, but any emotional injuries that were a direct result of the defendant's assaultive behavior could be compensated through her tort claim.\textsuperscript{150} This approach of apportioning a single human being's emotional damage between two closely related traumas may be unworkable, but it at least opens the door for the plaintiff to prove her case.

Outside of a jurisdiction in which a state employment discrimination statute has been interpreted expressly or impliedly to exclude any parallel common law action arising from the same facts, two strategies appear to be workable for plaintiffs. One is to premise a claim on some interest or public policy distinct from the public policy against sex discrimination. The other, which is related, is to distinguish sexual harassment from more generalized forms of sex discrimination. For example, the plaintiff could assert that the equitable remedies of title VII and most state fair employment practices acts vindicate only the public and individual interests of guar-

\textsuperscript{144} As to acts declared unlawful by section five of this act the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any action, civil or criminal, based on the same grievance of the complainant concerned.

In \textit{Wolk}, this statute was held to bar a public policy tort action even though the plaintiff had not invoked the statutory remedy. See 728 F.2d at 224.

\textsuperscript{145} \textit{Wolk}, 728 F.2d at 224; \textit{Shaffer}, 565 F. Supp. at 913.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} 538 F. Supp. 891 (D.D.C. 1982).

\textsuperscript{149} \textit{Id.} at 896-97.

\textsuperscript{150} \textit{Id.}
anteeing equality of opportunity in the workplace. These interests, however, are only a fraction of the interests offended by sexual harassment. Sexual harassment involves the violation of individual dignitary interests (interests that may or may not fit within the rubric of a traditional tort cause of action) and the public interest in controlling the abuse of power. The argument that sexual harassment is different from other forms of discrimination has merit and should be received favorably by courts.

CAUSES OF ACTION UNDER RICO

Another theory of recovery currently being explored by workers subjected to sexual harassment is the private civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO).\textsuperscript{151} Employees victimized by sexual harassment have begun to accuse their employers, co-workers, and union officials of "racketeering activity." Their motives for doing so are easy to discern, for the statute offers a federal forum, mandatory treble damages, and attorneys' fees to successful plaintiffs.\textsuperscript{152} Both cases in which plaintiffs have included RICO counts in conjunction with title VII and Civil Rights Act claims for sexual harassment have survived motions to dismiss and are pending in the federal district courts,\textsuperscript{153} and more such cases are certain to be filed.

Congress added RICO to the Organized Crime Control Act of 1970\textsuperscript{154} to cope with the perceived "infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."\textsuperscript{155} In so doing, Congress sought "the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies . . . ."\textsuperscript{156}

One of the new remedies created by Congress was a private right of action in favor of those who were injured in their "business or property by reason of a violation of section 1962," which contains the criminal provisions of RICO.\textsuperscript{157} Thus, the civil cause of action under RICO is based upon activities listed in RICO's criminal provisions.

\begin{itemize}
\item 151. 18 U.S.C. §§ 1961-68.
\item 156. Id.
\item 157. 18 U.S.C. § 1964(c).
\end{itemize}
Criminal RICO prohibits several different types of activity. It makes unlawful the use or investment of any income derived from a "pattern of racketeering activity" to acquire, establish, or operate an "enterprise" in interstate commerce,158 or to acquire or maintain an interest in such an enterprise through a pattern of racketeering activity.159 The provision used most frequently in labor and employment disputes provides that no person employed by or associated with an enterprise engaged in or affecting interstate commerce may conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity.160 Finally, section 1962 makes it unlawful to conspire to commit any of these offenses.161

The statute defines an "enterprise" as "any individual, partnership, or corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."162 This definition has been liberally construed by the courts to include both foreign and domestic corporations and labor organizations.163

A major problem which arises when RICO is used in the labor context, which would include actions alleging sexual harassment, is identifying a "person" distinct from the "enterprise" alleged in the complaint. It is sometimes difficult, if not impossible, to separate the defendant from the enterprise, which is usually a union or an employer.164 This problem can be avoided by suing individual union officers, corporate officials, or supervisors instead of the union or the company itself.165 This is the tactic which has been used in the two cases which have been filed to date.

This problem is in a sense the converse of the dilemma faced by the employer who is sued under title VII because of quid pro quo harassment committed by one of its employees against another employee. The employer generally will be vicariously liable for such conduct by its employees (although if the harassment is of the "harassing environment" type, the employer will not be held liable unless it knew or should have known of the harassment and did nothing to prevent it).166

RICO defines "racketeering activity" in very broad terms as any

158. Id. § 1962(a).
159. Id. § 1962(b).
160. Id. § 1962(c).
161. Id. § 1962(d); see 2 Civ. RICO Rep. (BNA) No. 29, pt. 2 at 1 (Dec. 24, 1986).
165. Id. at 8. As a practical matter, the union or corporation will often pay the judgment for the individual defendant.
166. See supra notes 20-21 and accompanying text.
act included on a long list of state and federal crimes,\textsuperscript{167} often referred to as “predicate acts.”\textsuperscript{168} The list of predicate acts includes state felonies such as murder, arson, bribery, and extortion;\textsuperscript{169} federal violations traditionally associated with organized crime involving gambling, extortion, and narcotics;\textsuperscript{170} and various acts of white collar crime, including securities, mail, and wire fraud.\textsuperscript{171} Three predicate acts involve labor and employee relations specifically: embezzlement of pension and welfare funds, illegal payments or loans to labor unions and bribery of union officials in violation of the Taft-Hartley Act, and embezzlement of union funds.\textsuperscript{172}

A “pattern of racketeering activity” is defined merely as two or more acts of racketeering activity committed within ten years of each other, as long as one of the acts occurred after the effective date of the Act.\textsuperscript{173}

Violations of RICO are punishable by maximum criminal penalties of a $25,000 fine, a twenty-year prison term, and criminal forfeiture of property,\textsuperscript{174} by civil remedies available to the United States government,\textsuperscript{175} and by private civil remedies for treble damages and attorneys’ fees.\textsuperscript{176} This private right of action accrues to “[a]ny person injured in his business or property by reason of a violation of section 1962.”\textsuperscript{177} Only economic damages to business or property are recoverable, not personal injuries, and the injuries must have been caused by a substantive RICO violation.\textsuperscript{178} However, this still represents a significant advantage over a title VII action in that these tangible economic losses will be trebled and recovered threefold under RICO.\textsuperscript{179}

In the first reported case dealing with the use of civil RICO as a remedy for alleged sexual harassment, the United States District Court for Massachusetts denied a motion to dismiss a complaint filed by a female construction worker against three union officials alleging

\textsuperscript{167} See Staer, Massumi & Skolnick, supra note 175, at 657.
\textsuperscript{168} See Nathan, Civil RICO, 29 PRAC. LAW. 11, 16-17 (Dec. 1983).
\textsuperscript{170} Id. § 1961(1)(A), (D).
\textsuperscript{171} Id.
\textsuperscript{172} Id. § 1961(1)(B), (C).
\textsuperscript{173} Id. § 1961(5).
\textsuperscript{174} Id. § 1963(a).
\textsuperscript{175} Id. § 1964(a).
\textsuperscript{176} Id. § 1966(c).
\textsuperscript{177} Id.
\textsuperscript{179} See supra notes 34-38 and accompanying text.
that their continued sexual harassment drove her from her job.\textsuperscript{180}

Rosa Elizabeth Hunt was employed as a carpenter's apprentice with the United Brotherhood of Carpenters and Joiners of America, Local 40 (Local 40).\textsuperscript{181} Hunt's agreement with Local 40 made the local responsible for finding employment for Hunt. The Perini Corporation employed Hunt from September 1981 until June 1983,\textsuperscript{182} at a construction site at Harvard Square, in Cambridge, Massachusetts.

While employed at the Harvard Square site, Hunt allegedly was sexually harassed and subject to sex discrimination on numerous occasions. She alleged that a fellow employee, William Freeman, committed assault and battery upon her. After she filed a criminal complaint against Freeman, union officials called Hunt to a meeting. The officials, Bryant and Weatherbee, Hunt alleged, took the opportunity to accuse her of being responsible for the assault. Moreover, they displayed sexually discriminatory intent toward Hunt, demanding that she withdraw her criminal complaint. Thus, coerced and intimidated, Hunt withdrew her criminal complaint against Freeman.\textsuperscript{183}

Furthermore, Hunt had, on a subsequent date, met with one of the officials (Weatherbee) present at the prior meeting to tell him of her continued subjection to sex discrimination and sexual harassment at the Harvard Square site. Weatherbee allegedly condoned these incidents; indeed, he refused to do anything to halt their future occurrence, even though his position as an officer of Local 40 enabled him to do so.

In March 1984, Hunt worked at a different construction site in Cambridge at Local 40's direction. Again, Hunt suffered from acts of sexual harassment and sex discrimination while employed at the new site, although she was employed by a different employer, the Ceco Corporation, a subcontractor to defendant Turner Construction Corporation.

On March 26 and 27, 1984, the shop steward of Local 40, Shaw, approached Hunt and tried to coerce her into purchasing raffle tickets for the so-called "Local 40 Political Action Fund." Shaw allegedly threatened Hunt with personal injury if she refused to buy the tickets. After leaving the worksite, frightened that she might be physically hurt or lose her job, Hunt contacted Weatherbee, hoping he would protect her against such threats.

Weatherbee refused to act. Hunt returned to the site on March 27, 1984, and met with Shaw and Turner Construction's superintendent, Dirksmeir. Shaw again threatened Hunt with physical harm, in Dirksmeir's presence, but Dirksmeir also refused to do anything to

\textsuperscript{181} Id. at 1098.
\textsuperscript{182} Id. at 1099.
\textsuperscript{183} Id.
help Hunt. Fearing for her safety, Hunt left, never to return to work as a Local 40 carpenter.184

On September 21, 1984, Hunt filed her lawsuit against three officials of Local 40, including Weatherbee and Shaw, and against Turner Construction and Dirksmeir. Her lawsuit included civil RICO claims, claims under the Civil Rights Act,185 and claims under the Landrum-Griffin Act,186 as well as pendent state claims alleging civil rights violations and civil conspiracy. Hunt filed civil RICO claims against Weatherbee and Bryant.187

Hunt alleged as predicate acts of racketeering activity Weatherbee and Bryant's coercion of Hunt to withdraw her criminal complaint against Freeman (obstruction of justice under state law), and Shaw's coercive attempt to force Hunt to buy raffle tickets for the Local 40 Political Action Fund (extortion prohibited by state law). Hunt contended that these two predicate acts showed a pattern of racketeering activity under the RICO statute.188

Ruling on the defendants' motion to dismiss the RICO claims, the court found first that Hunt properly alleged an injury to "business or property" as required by section 1964(c) of RICO. The court noted that in the antitrust context of the Clayton Act, "federal courts have frequently concluded that the loss of employment constitutes an injury to one's business or property,"189 and found no reason to apply a different rule where Hunt alleged "that the defendants' actions forced her out of her job as a carpenter and disabled her from pursuing such work in the future."190

The defendants argued that their alleged threats and coercion against Hunt to convince her to drop her criminal complaint were unrelated to their positions as officers of Local 40 and conferred no benefit upon the union. Therefore, they argued, there was no connection between this predicate offense and the "enterprise," or Local 40 — no showing of the "nexus" required to sustain a RICO claim.191

The court disagreed, noting that "there is a sufficient nexus between the predicate offenses and the enterprise if the defendant (1) is enabled to commit the predicate offense solely by virtue of his position

184. Id.
188. Id. at 1101.
189. Id.
190. Id.
191. Id. at 1102.
in the enterprise or his involvement in or control over its affairs, or (2) the predicate offenses are related to the activities of that enterprise." The court held that "surely it was only due to their positions of authority in the union that Weatherbee and Bryant had the opportunity and power to make a credible threat against Hunt," and that Hunt had indeed satisfied the requirements of alleging a sufficient nexus between the predicate acts and the affairs of Local 40.

The courts have used the same argument in finding that an employer is strictly and vicariously liable under title VII for quid pro quo discrimination committed by one of its employees against another; that is, that the authority granted to the supervising employee by the employer enables the supervising employee to extort sexual favors from subordinate employees.

Weatherbee and Bryant also contended that the incident involving the sale of raffle tickets did not qualify as a predicate offense because Shaw, the shop steward, may have been their agent, but acted in this instance outside the scope of his authority. The court found that it would be improper to dismiss Hunt's claim because if proved, her allegations might show "that Weatherbee, Bryant, and Shaw were acting together to maximize the proceeds for the Local 40 Political Action Fund, and that Weatherbee and Bryant sanctioned Shaw's extortionate acts to further this objective."

After the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Company*, Weatherbee and Bryant filed a supplemental brief. The brief argued that, assuming Hunt adequately had alleged two predicate offenses, those offenses did not constitute a "pattern of racketeering activity" within the meaning of RICO. An analogous argument often made under title VII is that proof of a "harassing environment" requires proof of many acts over a period of time. In the RICO case, Weatherbee and Bryant asserted that the two acts were simply "isolated incidents, occurring three years apart, [and] had no relationship to one another."

The court ruled that because Hunt "alleged that the two predicate acts were simply two examples of a prolonged pattern and practice of sexual harassment" and discrimination, made "specific allegations

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192. *Id.*
193. *Id.*
194. See supra notes 21 & 30 and accompanying text.
195. 626 F. Supp. at 1102.
196. *Id.* at 1103.
197. 473 U.S. 479 (1985). In that decision, the Supreme Court emphasized that while two predicate acts are necessary to constitute a pattern, they may not be sufficient to do so, saying that "[i]n common parlance, two of anything do not generally form a pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern . . . ." *Id.* at 496 n.14.
199. 626 F. Supp. at 1103.
of other instances of sexual harassment and discrimination directed toward her personally, and . . . alleged that Weatherbee and Bryant knowingly encouraged systematic discrimination against other female members of Local 40, "these allegations "may be sufficient to demonstrate a pattern of racketeering activity." Thus, the court denied the motion to dismiss the civil RICO claims.

Two months later, the United States District Court for New Jersey ruled that a plaintiff alleging sexual harassment had standing to sue under RICO. Plaintiff Arlene Acampora was the purchasing manager at the Penauken office of Boise Cascade's Office Products Division, where defendant James Tisony worked as the operations manager. Acampora alleged that Tisony was stealing from the company in violation of 18 U.S.C. § 659, which is one of the predicate offenses listed in the definition of "racketeering activity" found in the RICO statute. Acampora further alleged that she discovered Tisony's illegal racketeering activity and that because of her discovery of the thefts and the fact that she was female, Tisony sexually harassed her and eventually caused her to lose her job.

Tisony contended that Acampora's RICO claim should be dismissed because she did not properly plead the predicate acts, and that Acampora's alleged injury was not caused by the alleged pattern of racketeering. The court agreed that the plaintiff should be required to amend her complaint to fully allege violations of 18 U.S.C. § 659, and gave her twenty days to do so. The court then held that the plaintiff did indeed have standing to sue under RICO, finding that her allegations that her discovery of the defendant's illegal activity caused him to sexually harass her and ensure that she lost her job constituted a claim for "injury to business or property" by reason of Tisony's alleged violation of RICO.

Defendant Tisony's final contention was that the alleged racketeering activity was "not sufficiently connected to [his] participation in the conduct of the enterprise to state a RICO violation" because

200. Id. at 1103-04.
201. Id.
203. Id. at 67.
204. Id. at 68.
205. Id. at 67.
206. Id. at 67-68.
207. Id. at 68.
208. Id. at 68-69.
it "inured to his personal benefit and did not further the interests of the enterprise . . . ." 209 The court disagreed, reiterating the test enunciated by the Hunt court: that "one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise." 210 The court found that Acampora's complaint "sufficiently allege[d] that defendant Tisony [used] his position in the enterprise to engage in racketeering activity, and [that it therefore] state[d] a claim under RICO." 211

Three obvious disadvantages of suing under RICO emerge from this discussion. First, unlike tort law and title VII, RICO is an extremely complex compound statute, and many plaintiffs are unable to properly plead their RICO claims. Therefore, the RICO statute magnifies some of the procedural hassles encountered in title VII actions.

Second, RICO, like title VII, is less desirable than a tort action for the plaintiff who wishes to recover for emotional harms. RICO permits recovery only for economic injury to business or property (though this recovery is treble the plaintiff's actual losses), and no compensatory damages for the physical and emotional harms arising from the harassment may be recovered.

Finally, a plaintiff who has been the victim of a harassing environment would find RICO to be a rather futile gesture, for it would be extremely difficult to prove injury to business or property as the result of this environment unless the plaintiff were constructively discharged by the harassment.

CONCLUSION

Workers who have been subjected to sexual harassment have found both advantages and disadvantages in employing theories of recovery outside title VII. Discrimination claims are certainly cognizable under the Constitution's equal protection clause, but the victim of a harassing environment would be very unlikely to recover against her employer under this theory: it would be nearly impossible to show the intentional discrimination required for recovery under the Constitution if the employer had no knowledge of the harassing environment.

The traditional tort causes of action for sexual harassment offer the possibility of a far more lucrative remedy than is possible under

209. Id. at 69.
210. Id.
211. Id. at 70.
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title VII. The successful tort plaintiff may obtain compensatory damages for physical and emotional harm, and may in appropriate cases recover punitive damages as well. Other advantages of the tort theories over title VII include the availability of jury trial, a longer statute of limitations, and a more routine procedural framework.

One disadvantage of the tort causes of action in a sexual harassment context is the need to prove strict or vicarious liability of the employer for intentional torts committed by its employees. Another disadvantage is that sexual harassment provides no independent tort cause of action. Because many sexual harassment suits do not fit neatly into the pigeonholes provided by the existing causes of action, recovery under a tort theory may often be unlikely.

Finally, although the civil RICO cause of action does make possible a federal forum, and mandates the recovery of treble damages and attorneys’ fees, cognizable harms are limited to economic injuries to business or property. In this sense, RICO shares the disadvantage of employing title VII, in that only tangible economic losses will be compensated. However, civil RICO plaintiffs are, like title VII plaintiffs, able to impose strict or vicarious liability on the employer for the acts of its employees.

As the law of sexual harassment grows and develops, so will theories of recovery outside title VII. Although only the passage of time and accumulation of court decisions will flesh out the boundaries of these additional recoveries, it is already apparent that plaintiffs’ opportunities for recovery have expanded well beyond title VII, and will continue to expand.