Sexual Harassment of Working Women: The EEOC Guidelines — Panacea or Placebo

Motivated by both personal and economic needs, American women are entering the work force in record numbers. In their struggle to achieve equality of opportunity in employment, women have sought and received legislative and administrative support from government. The United States Congress has enacted legislation which establishes for women a framework of protection against gender-based discrimination in the workplace. Sexual harassment is one form of gender-based employment discrimination which has long existed in the workplace and for which there now exists a remedy at law. Only recently, however, has it been the subject of discussion in legal literature.

The Equal Employment Opportunity Commission (EEOC), recognizing that sexual harassment has become a significant aspect of employment discrimination, recently issued guidelines on sexual harassment in the workplace. The guidelines are indicative of

2. Some suggested definitions of sexual harassment are found at note 79 infra.
3. See generally C. MacKinnon, Sexual Harassment of Working Women (1979). The author offers extensive data to show that this long-existing problem is widespread. She analyzes sexual harassment from a sociological as well as a legal point of view and finds that much of the sexual harassment of women in the workplace is traceable to women's lack of social and economic power.
   (a) Harassment on the basis of sex is a violation of Sec. 709 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or
conduct which the EEOC recognizes as violative of federal law.  

implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization [hereinafter collectively referred to as “employer”] is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions (sic) performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

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

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

(g) Other Related practices: Where employment opportunities or benefits are granted because of an individual’s submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.
This comment will discuss the development of a cause of action based on sexual harassment in the workplace. Attention will be focused on the statutory basis of a cause of action and the interpretation of the statute as reflected in the case law. Analysis of the EEOC guidelines will focus on their content and public reaction thereto, the extent to which the guidelines reflect case law, and possible effects on future litigation.

Statutory Basis for a Cause of Action Under Title VII

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (EEOA) guarantees that workers shall not be subject to certain illegal practices by employers. The original draft of the 1964 legislation did not contain a prohibition against discrimination on the basis of sex. This provision was added shortly before passage of the bill and was not the subject of legislative hearings. The legislative history accompanies...

7. For a discussion of the legal force of the guidelines see note 73 and accompanying text infra.
9. Both men and women can be victims of sexual harassment in the workplace. However, because the vast majority of victims of this conduct are women, the analysis herein contained will focus on sexual harassment of working women.
11. It shall be an unlawful employment practice for an employer -
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
The courts have applied the sex-neutral provision of this statute in a number of employment contexts. See note 23 infra. See also, Diaz v. Pan American Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971):
The amendment adding the work 'sex' to 'race, color, religion and national origin' was adopted one day before House passage of the Civil Rights Act. It was added on the floor and engendered little relevant debate. In attempting to read Congress' intent in these circumstances, how-
ing the EEOA reveals that Congress considered gender-based employment discrimination a significant problem. The House Report states that “discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.”13 All artificial, arbitrary and unnecessary barriers to employment which operate invidiously to discriminate on the basis of an impermissible classification are prohibited by the Act.14

Traditionally, victims of sexual harassment have had to seek redress through criminal prosecutions,16 collective bargaining agreements,14 and such common law civil actions as contract17 and tort.18 Title VII provides these victims with an additional avenue of relief. However, it was not until more than ten years after passage of the 1964 Civil Rights Act that suit for sexual harassment was instituted under Title VII. The courts now recognize this cause of action and have developed a significant body of case law.

THE CASE LAW

A. Establishing A Cause of Action

One of the first cases to assert a cause of action for sexual harassment under Title VII was Corne v. Bausch and Lomb, Inc.,19 decided in 1975. The plaintiffs were clerical workers who alleged that their supervisor subjected them to repeated verbal and physical sexual advances. The complaint stated that the conduct of the supervisor constituted sex discrimination and that working cond-

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tions became so intolerable that they were forced to resign. With no sexual harassment cases on which to rely, the court in Corne cited cases dealing with other aspects of gender-based employment discrimination, such as inequality in the availability of fringe benefits and inequality in the treatment of married females as compared with married males. From these cases the court determined that gender-based discrimination is actionable only when it is the result of company policy and the employer derives some benefit from the discriminatory practice. In holding that plaintiffs Corne and DeVane did not have a cause of action the court concluded

20. 390 F. Supp. at 162. Plaintiffs alleged that the repeated verbal and physical sexual advances by a male supervisor toward them and other female employees created a "sex discriminatory condition and a limitation that tends to deprive the women of equal employment opportunities." In this case, as in many of the early sexual harassment cases, the court, perhaps because of discomfort with the subject, described the conduct complained of only in very general terms. Specific actions of the supervisor which formed the gravamen of the complaint were not reported.

In Corne it was further alleged that administrative personnel knew or should have known of the supervisor's conduct and therefore the employer was liable for the conduct. See notes 47-63 and accompanying text infra for discussion of the doctrine of respondeat superior.


22. The court stated:

It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.

390 F. Supp. at 163-64.

In determining that the supervisor's conduct was personal in nature and not of benefit to the company the court stated:

Certainly no employer policy was here involved; rather than the company being benefited in any way the conduct of (the supervisor), it is obvious it can only be damaged by the very nature of the acts complained of.
that the behavior of the supervisory employee was nothing more than a personal proclivity, peculiarity or mannerism. The supervisor was merely satisfying a personal urge.\textsuperscript{23}

In \textit{Heelan v. Johns-Manville Corp.},\textsuperscript{24} decided in 1978, it was held that a plaintiff need not prove that conduct constituting sexual harassment is a policy or practice of the employer in order for such conduct to be actionable.\textsuperscript{25} The court held, however, that a nexus must exist between the conduct complained of and the terms or conditions of employment.\textsuperscript{26} The court found that a two year pattern of sexual demands had developed into a term or condition of employment.\textsuperscript{27} The court held that plaintiff’s firing was in retaliation for her refusal to submit to the sexual demands of her supervisor. The court found the employer liable for the supervisor’s conduct because even though Ms. Heelan had complained about the offensive conduct on several occasions to a high management official, no corrective action was taken.\textsuperscript{28} The dismissal, therefore, constituted a violation of Title VII,\textsuperscript{29} and the employee

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\item \textsuperscript{23} The court stated:
\begin{quote}
[T]here is nothing in the Act which could reasonably be construed to have it apply to “verbal and physical sexual advances” by another employee, even though he be in a supervisory capacity where such complained of acts or conduct had no relationship to the nature of the employment.
\end{quote}
\textit{Id.}
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\item \textsuperscript{24} 451 F. Supp. 1382 (D. Colo. 1978).
\item \textsuperscript{25} To demand that a plaintiff prove a company-directed policy of sexual discrimination is merely to extend a claim for relief with one hand and take it away with the other. In no other area of employment discrimination do the courts require such proof.
\item \textit{Id.} at 1389.
\item \textsuperscript{26} 451 F. Supp. at 1388.
\item \textsuperscript{27} During the early months of her employment plaintiff received superior job performance evaluations and was promoted several times, with concomitant increases in salary. When her supervisor began to demand sexual relations and plaintiff rebuffed his advances, the promotions stopped and Heelan was fired two years after the harassing conduct began. \textit{Id.}
\item \textsuperscript{28} Heelan reported supervisor Consigli’s conduct to Isabelle Dienstbach, a corporate vice president and administrative assistant to the president, on several occasions but no corrective or even investigative action was taken. After receiving notice of termination Heelan again spoke with Dienstbach who directed plaintiff to speak with Francis May, an executive vice president and Consigli’s immediate supervisor. May declined to take any action. \textit{Id.}
\item \textsuperscript{29} The court held:
\begin{quote}
Under the facts of this case, the frequent sexual advances by a supervisor do not form the basis of the Title VII violation that we find to exist.
\end{quote}
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was entitled to relief.  

In order to sustain a cause of action for sexual harassment a plaintiff must show that there were employment ramifications flowing directly from the complained of conduct. Even when an employee has been subjected to conduct which clearly constitutes sexual harassment there can be no action against the employer for gender-based discrimination absent a showing of interference with the employment relationship. A case was dismissed for failure to state a cause of action when employment ramifications arose not at the time of the harassing conduct but some time thereafter. In Cordes v. County of Yavapai, a female employee refused the sexual advances of a male employee, but her refusal did not result in any action against her which interfered with her job performance. When the male employee later became a supervisor and retaliated against her by refusing to reappoint her, that action was held not to constitute a violation of Title VII because the granting of sexual favors was not a term or condition of employment. The court held that while the supervisor's conduct was petty and deplorable, plaintiff's claim failed because there was no allegation that he would have reappointed her if she had granted the requested sexual favors.

Significantly, termination of plaintiff's employment when the advances were rejected is what makes the conduct legally objectionable. Receptivity of repeated sexual advances by a high level supervisor was inescapably a condition of the plaintiff's continued employment. The termination of plaintiff's employment as a retaliatory measure when advances were rejected are within the purview of Title VII.

451 F. Supp. at 1390.

30. Plaintiff was found to be entitled to back pay and lost employment benefits. 451 F. Supp. at 1391.


33. Plaintiff was employed as a legal secretary in the Yavapai County Attorney's Office. Defendant Billy Hicks became the Yavapai County Attorney in January 1977. Sometime before assuming office defendant Hicks harassed the plaintiff, attempting to persuade her to commit adultery. Plaintiff refused. Shortly after assuming office Hicks terminated plaintiff's employment.

34. The court stated:

Absent an allegation that defendant Hicks would have reappointed the plaintiff in January 1977 if she would then have granted sexual favours,
Although the court will dismiss a suit when ramifications arise subsequent to harassment, retaliatory action contemporaneous with the alleged discriminatory conduct is a basis for a cause of action under Title VII. When an employee refused to submit to a supervisor's sexual demands she received unwarranted reprimands, her job-related ideas and suggestions were not considered and she was dismissed. That dismissal was actionable under Title VII.\textsuperscript{36} When an employer eliminated a job as a retaliatory measure against a woman who refused to acquiesce in her supervisor's sexual advances, the retaliatory conduct was actionable under Title VII.\textsuperscript{36}

Actual termination of an employee is not necessary to sustain a cause of action under Title VII. Constructive discharge\textsuperscript{37} permits the defendant did not impose a present condition of employment in a sexually discriminatory manner.

17 Fair Empl. Prac. Cas. at 1227.

\textsuperscript{35} Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976) rev'd on other grounds \textit{sub nom} Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978). Plaintiff received positive job performance evaluations at the beginning of her employment. When her supervisor made sexual advances which she refused, plaintiff began receiving negative evaluations which were used to justify her dismissal. Plaintiff contended that any decline in the level of her job performance was directly attributable to her supervisor's conduct in refusing to keep her apprised of information essential for her job performance and creating an atmosphere in which the sexual pressure exerted on her interfered with her ability to do her job. Here, as in other cases, the court does not report specific actions of the supervisor which form the basis of plaintiff's claim of sexual harassment.

On remand, the District Court, in a memorandum opinion, found a cause of action under Title VII. This decision was based on records of the first trial and the administrative agency. Again, the court was not specific about actions of the supervisor. The fact that it was generally known within the agency that the supervisor against whom plaintiff complained was having an affair with another woman subordinate was cited by the court as one piece of evidence tending to prove that "it would be natural for an assumption to develop in the minds of women such as the plaintiff that submission to the advances of Mr. Brinson (the supervisor) would smooth the path to promotion." Williams v. Civiletti, 487 F. Supp. 1387, at 1389 (D.D.C. 1980).

\textsuperscript{36} Barnes v. Costle, 561 F.2d 893 (D.C. Cir. 1977) rev'g Barnes v. Train, 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974). The court held that the elimination of plaintiff's job was in fact an act of discrimination because the record contained no indication that positions of any other employees were similarly eliminated. 561 F.2d at 989.

\textsuperscript{37} In Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980) the court applied the definition of constructive discharge adopted in Young v. Southwestern Savings and Loan Association, 509 F.2d 140 (5th Cir. 1975) which held that:

The general rule is that if the employer deliberately makes an employee's
a finding of employer liability, and may be found when a supervisor's conduct creates an intimidating, hostile and offensive working environment. In Brown v. City of Guthrie, the court held that such conduct constituted an impermissible condition of employment. Constructive discharge may also be found when a supervisor fails to take timely action on a complaint of harassment. Constructive discharge is now a recognized basis for recovery under Title VII.

Until recently, in order to allege and prove that the conduct working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

509 F.2d at 144.

38. 22 Fair Empl. Prac. Cas. at 1631. In Brown, the conduct complained of included sexual advances, lewd sexual comments, innuendos and gestures, and other acts which were derogatory or downgrading to women.

The court also found that the person to whom plaintiff complained of the harassing conduct had received a similar complaint from a former woman employee and had taken steps to correct the situation. His failure to take any action in behalf of Brown was clearly a discriminatory act.

39. The court stated that "sexual harassment that permeates the workplace thereby creating an intimidating, hostile, or offensive working environment should be deemed an impermissible condition of employment." Id. at 1632.

40. In Continental Can Co. v. State of Minnesota, 22 Fair Empl. Prac. Cas. 1808 (Minn. Sp. Ct. 1980), a female employee had complained to her supervisor on several occasions about episodes of verbal harassment (sexual comments with racial overtones such as a white male co-worker saying to a black woman that he wished slavery would be reinstituted so he could "... sexually train her and she would be his bitch.") Id. at 1811. The incident which triggered litigation involved a male employee grabbing the woman between the legs. The woman immediately complained to her supervisor who failed to take any action on the complaint for sixteen days.

This case was decided on a state statute which is similar to Title VII:

Except when based on a bona fide occupational qualification, it is an unfair employment practice; ... (2) for an employer because of ... sex ... (c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading conditions, facilities, or privileges of employment.

Minn. Stat. § 363.03, subd. 1(2) (c) (1978).

41. One problem which occurs in the case of constructive discharge which is not an issue in the case of an overt dismissal is the ability of the women to successfully claim unemployment compensation benefits. Such benefits have been awarded in some but not all cases involving constructive discharge. For an extended discussion of this issue see Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment, 3 HARV. WOMEN'S L.J. 173 (1980).
complained of amounted to a term or condition of employment the plaintiff had to show injury to her employment situation, generally outright dismissal or constructive discharge.42 This requirement was modified in 1981 by a unanimous decision of the United States Court of Appeals for the District of Columbia. In Bundy v. Jackson,43 the court held, analogyzing to racial discrimination cases,44 that the sexually sterotyped insults and demeaning propositions to which plaintiff was subjected "illegally poisoned" the work environment.45 Bundy clearly established that Title VII is violated when the employer creates or condones a substantially discriminatory work environment, regardless of whether the complaining employee lost any tangible job benefit as a result of the discrimination.46

While a hostile, offensive working environment generally leads to the recognition of constructive discharge when an employee resigns, Bundy creates a new remedy when victims of sexual harassment choose not to resign. Under Bundy, the harassed employee has the right to initiate suit while still employed. This is of particular importance to women who like their job but for the harassing conduct, and who wish to advance within that particular organiza-

42. See generally text accompanying notes 5-12 supra.
44. The court specifically cited Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 (5th Cir. 1971), cert. denied 406 U.S. 957 (1972), for the principle that conditions of employment include the psychological and emotional work environment.
45. The court specifically held that "sexual harassment, even if it does not result in loss of tangible job benefits, is illegal sex discrimination." 24 Fair Empl. Prac. Cas. at 1163.
46. It must be noted that plaintiff Bundy did allege and prove that she had suffered monetary damage because of the employer's failure to promote her in retaliation for her refusal to acquiesce to the supervisor's sexual demands and was awarded back pay computed to take into account wrongfully delayed and denied promotions. The court held:
To establish a prima facie case of illegal denial of promotion in retaliation against the plaintiff's refusal of sexual advances by her supervisors the plaintiff must show (1) that she was a victim of a pattern or practice of sexual harassment attributable to her employer . . .; and (2) that she applied for and was denied a promotion for which she was technically eligible and of which she had a reasonable expectation.
Id. at 1167.

Note must be taken of the fact that Bundy involved a civil service employee. Civil service promotions are generally related to time in service. It is not yet clear how this part of the decision will be applied to private sector employment cases.
tion. Such a remedy also relieves the employee of the burdens of unemployment and reemployment.

B. Finding the Employer Liable

Once a valid cause of action has been established, liability must be allocated. The conduct prohibited by Title VII is a type of tort\(^47\) for which an employer may be held liable under the doctrine of *respondeat superior*.\(^48\) The liability of employers for the actions of their employees has become an essential component of sexual harassment suits.

The spirit of the common law maxim *qui facit per alium facit per se*\(^49\) has been adopted by modern commentators.\(^50\) Knowledge on the part of the employer of discriminatory conduct will generally permit a finding of liability.\(^51\) To sustain a cause of action for sexual harassment under Title VII it is not necessary to show that the employer has actual knowledge of the offensive conduct. Employer's constructive knowledge of the supervisor's conduct has been held to be sufficient.\(^52\) However, that section of the EEOC guidelines which favors the finding of liability predicated on employer's constructive knowledge has drawn sharp criticism.\(^53\)

In the 1976 case of *Miller v. Bank of America*\(^54\) the district court refused to hold the employer liable for sexual advances made

\(^{47}\) Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979). "Title VII and § 1981 define wrongs that are a type of tort, for which an employer may be liable."


\(^{50}\) "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) Of Agency § 219 (1957).

\(^{51}\) "A person has notice of a fact if he knows the fact, has reason to know it, should know it, or has been given notification of it." Restatement (Second) Of Agency § 9 (1957).

\(^{52}\) Stringer v. Pennsylvania Dept. of Community Affairs, 446 F. Supp. 704 (M.D. Pa. 1978), holds an employer liable for a supervisor's conduct when the employer has actual or constructive knowledge of the offensive behavior and the employer fails to take steps to ameliorate the situation. The reported cases do not inform the question of what, if any, factual showing must be made to support an allegation of constructive knowledge on the part of the employer. Cf. Tomkins v. Public Service Electrical & Gas Co., 568 F.2d 1044 (3d Cir. 1977).


\(^{54}\) 418 F. Supp. 233 (N.D. Cal. 1976).
by a supervisor toward an employee. In reversing, the court of appeals found the supervisor's conduct imputable to the employer. Under the doctrine of respondeat superior the conduct of the employee was charged to the employer based on constructive knowledge. The court also held that exhaustion of grievance procedures within the organization was not a prerequisite to the initiation of a Title VII action in the federal courts. By so finding, the court reinforced the principle that constructive knowledge is a sufficient basis for finding an employer liable.

An employer may be found liable under Title VII for the conduct of its employees without proving that sexual harassment reflects a policy or continued practice of the employer. It was held in Rinkel v. Associated Pipeline Contractors, Inc. that a claim under Title VII was valid where the complaint alleged sex discrimination based on a denial of plaintiff's request for a promotion or transfer after she refused to submit to the sexual demands of a

55. The court found that the supervisor's advances were isolated, personal activities and that the bank had a policy of discouraging sexual advances by supervisors toward employees. As evidence to support this finding the court noted that the bank's Employee Relations Department could handle complaints such as Miller's. The court found a policy of affirmatively disciplining employees found guilty of harassing conduct but there is no evidence in the opinion that any employee had actually been disciplined for such conduct. Id.

56. 600 F.2d 211 (9th Cir. 1979).

57. The court concluded that:

respondeat superior does apply here, where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote, or at least to participate in or recommend such action, even though what the supervisor is said to have done violates company policy.

Id. at 212.

In considering the legislative intent of Title VII the appellate court held that there is no basis for the defendant's assertion that the statute did not intend that an employer be liable for the acts of an employee:

Most employers today are corporate bodies or quasi-corporate ones such as partnerships. None of any size, including sole proprietorships, can function without employees. The usual rule, that an employer is liable for the torts of its employees, acting in the course of their employment, seems to us to be just as appropriate here as in other cases, at least where, as here, the actor is the supervisor of the wronged employee.

Id.

58. The court cited McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), for the principle that while Congress has established certain preconditions to the initiation of suit under Title VII, use of the employer's personnel procedures is not one of those preconditions. 600 F.2d at 214.

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senior management official. The court did not find persuasive the employer’s allegation that the supervisor’s actions were his own and not an expression of company policy. In this case the employer had actual notice that the employee was harassed by her supervisor and the employer refused to take any remedial action.

An essential element of the doctrine of respondeat superior is the requirement that the employee with whose conduct the employer is charged is acting within the scope of his employment. The early cases found that sexually offensive conduct by a supervisor was a personal act done outside the scope of his employment.

A recent case, however, held that when a supervisor takes discriminatory action against an employee which is within the scope of the supervisor’s duties and responsibilities, the action is to be imputed to the employer.

An affirmative duty of an employer to investigate allegations of sexual harassment was found in Munford v. James T. Barnes & Co. The court ruled that the employer tacitly supported the discriminatory behavior of a supervisor by ratifying an employee’s dismissal without investigating her allegations of sexual harassment. The court reasoned that the absence of sanctions for such behavior would encourage the continuation of such conduct.

One court held that in order to recover under Title VII victims of unwelcome sexual advances in the workplace have the burden of refusing the advances and reporting the offensive conduct to the employer. Further, an employee who voluntarily submits to her supervisor’s sexual advances cannot later claim that she did so only out of fear of reprisal. The aggrieved employee may also be required to report the harassing conduct to the appropriate authorities within the organization. However, in Miller v. Bank of America the Court held that exhaustion of grievance procedures

60. Id. at 225.
61. Id. at 226.
63. Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) where the court held the bank liable for supervisor’s firing of a female employee after she refused to acquiesce to his sexual demands because the bank had given the supervisor authority to hire, fire, discipline or promote.
65. Id. at 466.
67. Id. at 41.
68. 600 F.2d 211 (9th Cir. 1979).
within the organization was not a prerequisite to the initiation of a Title VII action in the federal courts.69

An employer may avoid liability for the harassing conduct of its employees if several conditions are met: a clear showing that the conduct complained of was neither authorized nor acquiesced in by the employer; the employer has expressly disapproved of the conduct; and the conduct ended after the employer received the employee’s complaint.70 All of these elements must be proved to relieve the employer of liability.

**ANALYSIS OF THE GUIDELINES**

In issuing the guidelines on sexual harassment in the workplace the Equal Employment Opportunity Commission intended to emphasize its concern for the problem of sexual harassment, specify types of conduct which constitute sexual harassment and encourage employers to take affirmative steps to prevent the occurrence of this conduct. Interim interpretive guidelines were published on April 11, 1980.71 The guidelines took effect upon promulgation of the interim rules. However, the EEOC solicited and received comments from the public, and in their final form the guidelines are somewhat revised.72

While the sexual harassment guidelines are interpretive rather than legislative rules,73 courts may find them persuasive.74 Notwithstanding the fact that courts have the power to substitute

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69. *Id.* at 214.
   defendant's express disapproval of the type of sex discrimination alleged is evidenced not only by the contents of the rule book distributed to its employees, but also by the fact that when plaintiff threatened to report her supervisor's misconduct, the misconduct abruptly subsided.
Id. at 8343.
72. For text of final interpretive guidelines see note 6 *supra*.
   The guidelines were adopted in their final form by the EEOC on September 23, 1980 but were not published in the Federal Register until November 10, 1980. Time to accomplish interagency coordination necessitated the time lag. 45 Fed. Reg. 74,677 (1980).
73. "A legislative rule is the product of delegated legislative power to make law through rules. An interpretive rule is any rule an agency issues without exercising delegated legislative power to make law through rules." K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 7:8 (2d ed. 1978).
74. See notes 93-105 and accompanying text, *infra*. 
their judgment for that of the administrative agency, the interpretation of the issuing agency is often adopted judicially.\textsuperscript{76}

Section (a) of the guidelines defines sexual harassment as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.\textsuperscript{76}

This section has been criticized as being too vague;\textsuperscript{77} commentators have expressed a desire for greater specificity\textsuperscript{78} and have offered alternative definitions of sexual harassment.\textsuperscript{79} The principles

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\item[75.] In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the United States Supreme Court considered the question of how much weight was to be accorded EEOC interpretive guidelines informing § 703(h) of Title VII. This section discusses permissible testing procedures. Interpreting the intent of Congress in passing Title VII as "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." (Id. at 431). The court held that "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." Id. at 433-34.
\item[76.] Cf. General Electric Co. v. Gilbert, 429 U.S. 125 (1976), holding that interpretive guidelines are entitled to consideration in determining legislative intent. Skidmore v. Swift & Co., 323 U.S. 134 (1944) where the court held that "while not controlling upon the courts by reason of their authority, [interpretive rules] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. at 140.
\item[77.] 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(a)).
\item[78.] 45 Fed. Reg. 74,876 (1980).
\item[79.] The EEOC's definition of sexual harassment is disturbing to some management lawyers who say it is ambiguous and too broad. 'There is a dangerous vagueness to EEOC's attempt to get at verbal conduct,' said Alan Koral of Vedder, Price, Kaufman, Kammholz & Day in New York. 'There ought to be more guidance as to what kind of verbal actions are prohibited. If an employee goes around telling his male peers about his sexual exploits and that offends another worker, is that sexual harassment?' Huffman, \textit{Sex Harassment Regs Called Ambiguous}, \textit{Legal Times of Washington}, 2 (April 14, 1980).
\item[80.] National Organization for Women and the Working Women's Institute
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set forth in this section are not new. Case law has established that
a cause of action under Title VII exists when submission to sexual
advances is a term or condition of employment and when submis-
sion to or rejection of such advances is used as a basis for employ-
ment decisions.80 The final category in this section, which defines
sexual harassment as the creation of a hostile or offensive working
environment is a newly evolving principle.81

Section (b)82 provides that the court should examine the total-
ity of the circumstances to determine the existence of sexual har-
assment. This section provides no guidance for employers seeking
to conform to the spirit of the guidelines or for victims assessing
the probabilities that a contemplated suit will be successful.

The doctrine of respondeat superior is embodied in section (c).83 This principle is well established by case law analyzing claims
of gender-based employment discrimination.84 The case law, how-
ever, addresses only the issue of employer liability for the acts of
supervisors.

Liability for the acts of nonsupervisory personnel is an-
nounced in section (d).85 Historically, courts have refused to find
the employer liable for the actions of nonsupervisory personnel.86

urge the following definition:

Sexual harassment is any repeated or unwanted verbal or sexual ad-
varces, sexually-explicit derogatory statements, or sexually discrimina-
tory remarks made by anyone in the workplace which is offensive or ob-
jectionable to the recipient or which causes the recipient discomfort or
humiliation or which interferes with the recipient's job performance.

Levin and Brossman, Sexual Harassment on the Job: Title VII & EEOC to the
Rescue, 2 NATIONAL LAW JOURNAL 26 (June 2, 1980).

80. See text accompanying notes 24-34 supra.
81. See text accompanying note 46 supra. In Kyriazi v. Western Electric Co.,
461 F. Supp. 894 (D.N.J. 1978) a woman alleged that co-workers created a hostile
and offensive atmosphere by publically speculating about her virginity and plac-
ing an obscene cartoon on her desk. While this was a tort claim alleging interfer-
ence with plaintiff's right to work rather than an action under Title VII, the rec-
ognition of a cause of action flowing from the creation of a hostile and offensive
atmosphere by acts of sexual harassment is notable.
82. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(b)).
83. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(c)).
84. See text accompanying notes 47-63 supra.
85. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(d)).
1977), the court, in addressing the problem of racial harassment said, quoting
Acts of fellow employees are not usually bases of claims against the em-
ployer. Liability can only be premised on the employer's failure to take
The Minnesota Supreme Court recently addressed this issue and held an employer liable for the actions of nonsupervisory employees. In finding liability the court noted that the employer had failed to respond in a timely fashion when informed of the offensive conduct.

The principle of employer liability for the acts of non-employees embodied in section (e) has not yet been litigated. Claims arising under this provision will be considered on a case-by-case basis. Knowledge, actual or constructive, on the part of the employer is a prerequisite for finding an employer liable for the harassing acts of non-employees.

In addition to addressing the question of employer liability for the acts of its employees and others, the guidelines also instruct employers to take affirmative steps to prevent conduct which constitutes a violation of Title VII. Section (f) represents a general admonition to employers to take steps to increase their employees' awareness of the problem of sexual harassment in the workplace. The Commission instructs employers to educate employees as to the kind of conduct which constitutes sexual harassment and the avenues of relief available to the victims of such conduct.

Cases Considering the Guidelines

The EEOC guidelines on sexual harassment in the workplace have come under judicial scrutiny in several recent cases. In Brown v. City of Guthrie the court cited the guidelines as indicia of current employment standards, and expressed the position that the guidelines are entitled to serious consideration.

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88. See note 40 and accompanying text supra.
90. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(e)).
91. See generally, notes 83-88 and accompanying text, supra.
92. See text accompanying note 105 infra.
93. 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(f)).
94. "The new guideline reaffirms the Commission's position that sexual harassment is an unlawful employment practice under Title VII." Id. at 1631.
95. Id., n.2.
Continental Can Co. v. State of Minnesota was decided on the basis of state law rather than Title VII, but the court noted that federal precedents were instructive. As such, the EEOC guidelines were accorded significant weight because they indicate the prevailing interpretation of prohibited employment practices.

Plaintiff in Clark v. World Airways, Inc. alleged that employer’s president’s sexual advances toward her created a term or condition of employment which was cognizable under Title VII. The court found no merit in Clark’s Title VII claim and dismissed the suit. In dicta the court stated that the EEOC guidelines were entitled to little consideration because of their interim status. No indication was given as to the weight which would be accorded the final guidelines.

The final guidelines on sexual harassment in the workplace were cited with approval by the court in the case of Bundy v. Jackson. The definition of sexual harassment set out by the EEOC was adopted by the court, and plaintiff’s employer was specifically instructed to undertake a program of prevention as delineated in section (f) of the guidelines.

96. 22 Fair Empl. Prac. Cas. 1808 (Minn. 1980).
97. See note 40 supra.
98. “Principles developed in Title VII cases by federal courts are instructive and have been applied by this Court when construing the Minnesota Act.” 22 Fair Empl. Prac. Cas. at 1812.
99. Id. at 1813.
101. Id.
102. Id. at 308.
104. Id. at 1162.
105. See 45 Fed. Reg. 74,677 (1980) (to be codified in 29 C.F.R. § 1604.11(f)).

In Bundy, the court issued the following instruction to plaintiff’s employer: Applying these Guidelines to the present case, we believe that the Director of the agency should be ordered to raise affirmatively the subject of sexual harassment with all his employees and inform all employees that sexual harassment violates Title VII of the Civil Rights Act of 1964, the Guidelines of the EEOC, the express orders of the Mayor of the District of Columbia, (footnoted omitted) and the policy of the agency itself. The Director should also establish and publicize a scheme whereby harassed employees may complain to the Director immediately and confidentially. The Director should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline.
CONCLUSION

To date there has been little judicial interpretation of the EEOC sexual harassment guidelines. It is therefore far from clear whether the guidelines will be adopted as the standard against which allegedly discriminatory conduct will be measured. In issuing the guidelines, the Equal Employment Opportunity Commission has emphasized its concern for the problem of sexual harassment in the workplace. Many provisions of the guidelines are restatements of case law but some of the provisions represent new interpretations of discriminatory conduct.

Sexual harassment in the workplace is and will continue to be a significant area of judicial activity. As the courts continue to decide employment discrimination cases based on claims of sexual harassment in the workplace, the impact of the EEOC guidelines will become more evident.

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