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# Strategies for Combating Sexual Harassment: The Role of Labor Unions

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## STRATEGIES FOR COMBATING SEXUAL HARASSMENT: THE ROLE OF LABOR UNIONS

Ann C. Hodges\*

I. Introduction .....	184
II. Sexual Harassment in the Workplace .....	185
A. <i>The Nature and Scope of Sexual Harassment</i> .....	185
B. <i>The Persistence of Harassment</i> .....	189
C. <i>The Union's Role</i> .....	192
III. Taking Sexual Harassment Seriously .....	193
A. <i>Changing Workplace Demographics</i> .....	193
B. <i>The Divisiveness of Harassment</i> .....	197
C. <i>Sexual Harassment as Pretext</i> .....	199
D. <i>Arbitration and the Duty of Fair Representation</i> .....	202
E. <i>Union Liability</i> .....	204
1. <i>The Duty of Fair Representation</i> .....	204
2. <i>Title VII</i> .....	205
3. <i>Likelihood of Claims</i> .....	207
F. <i>The Effect on Productivity and Other Costs</i> .....	208
G. <i>The Downside of Active Opposition to Sexual Harassment</i> .....	209
IV. Taking the Right Steps .....	211
A. <i>Supporting Victims of Harassment</i> .....	212
B. <i>Education and Creation of Workplace Norms</i> .....	215
1. <i>The Workplace Culture</i> .....	215
2. <i>Training</i> .....	217
C. <i>Facilitating the Creation of Caucuses or Interest Groups</i>	

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<i>within the Union</i> .....	219
D. <i>Providing a Mediation Procedure for Harassment</i>	
<i>Complaints</i> .....	221
E. <i>The Role of the International Union</i> .....	223
F. <i>Overcoming the Obstacles to Eliminating Harassment</i> .....	224
G. <i>Thinking Outside the Box—Attacking Harassment in the</i>	
<i>Nonunion Workplace</i> .....	226
V. <i>Conclusion</i> .....	227

## I. Introduction

Sexual harassment is a major problem in today's workplace. The large number of charges filed with the EEOC annually and the results of workplace surveys demonstrate that harassment, with its devastating consequences for the target of the harassment and for workplace productivity and morale, is widespread and ongoing. Employer promulgation of harassment policies with complaint procedures, fueled by the Supreme Court's jurisprudence,<sup>1</sup> has not resolved the problem of workplace harassment. To combat legal liability, it is common for employers to establish draconian anti-harassment policies, which purport to proscribe even conduct that does not rise to the level of unlawful sexual harassment and to require severe penalties for violations of the policy. Despite such policies, sexual harassment persists. Harassed employees still decline to report harassment in large numbers, and even when reports are made, enforcement is often lacking. Further, the policies focus on preventing liability rather than creating a nondiscriminatory workplace.

The unionized workplace, despite its greater protections for workers in general, has not been immune from harassment. Indeed, some of the harassment horror stories emerge from unionized employers.<sup>2</sup> While some unions have effectively addressed harassment, others have been part of the problem rather than the solution. Unions, however, have the potential to address some of the problems that have resulted in the persistence of

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1. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

2. See, e.g., *Herrera v. IBEW Local No. 68*, 228 F. Supp. 2d 1233, 1244-45 (D. Colo. 2002) (describing repeated behavior over a two year period by co-employees, fellow union members and apprenticeship instructors during plaintiff's apprenticeship including writing sexual remarks on her work papers, imitating oral sex, mimicking an exotic dancer's routine, failing to train her, telling her women were not wanted, assigning her menial tasks, telling her to give fellatio lessons at the union hall and calling her "scurrilous names"); *EEOC v. Regency Architectural Metals Corp.*, 896 F. Supp. 260, 264 (D. Conn. 1995) (describing predominantly male workplace where union members and officials engaged in sexually explicit speech and conduct, including making penises out of various items, placing them in their groin areas and walking around; dropping their pants and mooning co-workers; and displaying nude pictures of women in the work area), *aff'd*, 1997 U.S. App. LEXIS 9570 (2d Cir.) (unpublished).

harassment despite legal and employer prohibitions.

The gendered nature of most unions may suggest great difficulty in convincing them to make ending sexual harassment a priority,<sup>3</sup> but unions ignore or participate in sexual harassment at their peril. Unions should be in the forefront of the battle against harassment. It is not enough to state official opposition to harassment; unions should take a proactive role in addressing the problem. Activism on the issue will not only assist in preventing unlawful behavior and improving the workplace climate, but also will help the union to grow its membership and use its resources to obtain greater benefits for all workers.

This article will discuss the role that unions do play and the role that they can play in eliminating workplace harassment. First, the article will discuss the problem of harassment in the workplace, documenting its frequency and analyzing its forms. Section II will include an examination of harassment in the unionized workplace. Section III will propose a number of reasons that unions should take the lead in addressing workplace harassment, some focused on workers' rights and others on union self-interest. Finally, in Section IV, the article will recommend several approaches for unions that desire to be in the vanguard of the movement to make the workplace welcoming and productive for all workers. This section will analyze the unique role that unions can play in overcoming the obstacles which have thus far prevented successful initiatives for eliminating workplace harassment.

## II. Sexual Harassment in the Workplace

### A. *The Nature and Scope of Sexual Harassment*

Sexual harassment in the workplace is a well-documented phenomenon. Catharine MacKinnon is widely credited with bringing both public and judicial attention to the problem.<sup>4</sup> While initially courts refused to acknowledge sexual harassment as sex discrimination,<sup>5</sup> in the 1970s, courts began to interpret Title VII's prohibition on sex discrimination to

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3. See generally Marion Crain & Ken Matheny, "Labor's Divided Ranks": *Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999) (discussing the gendered nature of the labor movement and its historic role in the exploitation of women in the workplace).

4. See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

5. See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975) *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977); *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd* 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D. N.J. 1976), *rev'd*, 568 F.2d 1044, 1045, 1048-49 (3rd Cir. 1977).

prohibit sexual harassment in the workplace.<sup>6</sup> The EEOC issued guidelines on sexual harassment in 1980,<sup>7</sup> and litigation began to grow.<sup>8</sup> Scholarly attention also focused on sexual harassment, both in the social sciences and the law.<sup>9</sup> Scholarship and surveys quickly revealed that litigated cases were only the tip of the iceberg. Only a very small percentage of individuals who reported being subjected to sexual harassment ever filed any sort of formal complaint.<sup>10</sup> EEOC charges alleging sexual harassment increased, however, when Congress amended Title VII in 1991 to permit compensatory and punitive damages and jury trials, creating the possibility of damages for hostile environment cases.<sup>11</sup>

Courts have recognized two forms of sexual harassment - quid pro quo and hostile environment.<sup>12</sup> In quid pro quo sexual harassment, job benefits are conditioned on employee submission to sexual advances by supervisors.<sup>13</sup> A hostile environment can be created by either co-employees, supervisors, or both, and consists of "severe or pervasive" verbal or physical conduct which creates an abusive work environment.<sup>14</sup> Social scientists have categorized harassment differently. A commonly used model classifies harassment into three categories - gender harassment, unwanted sexual attention, and sexual coercion.<sup>15</sup> Sexual coercion is

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6. See, e.g., *Miller v. Bank of America*, 600 F.2d 211, 212-13 (9th Cir. 1979) (finding a Title VII claim when an employer fired the plaintiff because she refused her supervisor's demands for sexual favors from "a black chick."); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978).

7. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1980).

8. Sexual harassment charges continue to be a significant portion of the EEOC caseload. See *Citing 'Disturbing' Trends in Discrimination, Chair Says EEOC Is Probing Retail Industry*, DAILY LAB. REP. No. 136 (July 16, 2004).

9. For excellent discussions of the need to take account of social science research in shaping the law of sexual harassment, see THERESA M. BEINER, *GENDER MYTHS AND WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005); Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 373-81 (2004).

10. Mindy E. Bergman et al., *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCHOL. 230, 230, 243 (2002); Sandy Welsh & James E. Gruber, *Not Taking It Any More: Women Who Report or File Complaints of Sexual Harassment*, 36 CAN. REV. SOC. & ANTHROPOLOGY 559, 560 (1999); Louise Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 121 (1995).

11. Civil Rights Act of 1991, Pub. L. 102-166, § 102, 105 Stat. 1072 (1991). The potential for damages and jury trials makes cases more appealing to attorneys for plaintiffs. See Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249 (2003).

12. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986).

13. *Id.*

14. *Id.*

15. Charles L. Hulin et al., *Organizational Influences on Sexual Harassment*, in *SEXUAL HARASSMENT IN THE WORKPLACE* 127, 136 (Margaret S. Stockdale ed., 1996).

equivalent to the legal category of quid pro quo harassment, while gender harassment consists of “insulting, misogynistic, and degrading remarks and behavior” which are typically sexualized.<sup>16</sup> Unwanted sexual attention is “unwelcome sexual behavior” which is not related to any job benefits or detriments.<sup>17</sup>

Data regarding sexual harassment reveal that it is a common workplace occurrence. The U.S. Merit Systems Protection Board has conducted several surveys on the incidence of harassment in the federal government. In the 1994 survey, 44% of women and 19% of men reported being subjected to workplace sexual harassment in the previous two years.<sup>18</sup> The survey reflected little change in the rates of reported harassment from the 1980 and 1987 surveys.<sup>19</sup> A number of other studies reflect reports of harassment by nearly half of working women in a variety of occupations.<sup>20</sup> Since 1994, the EEOC and state and local anti-discrimination agencies with which the EEOC has work-sharing agreements have received between twelve thousand and sixteen thousand charges alleging sexual harassment annually.<sup>21</sup> Between 1992 and 2003, sexual harassment charges increased by 29%.<sup>22</sup> In particular, charges filed by women of color skyrocketed during this time period.<sup>23</sup> The percentage of sexual harassment charges filed by males has steadily increased since 1992 to a high of 15% in fiscal year 2003.<sup>24</sup>

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16. *Id.*

17. *Id.*

18. U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges* 13 (1995) [hereinafter Merit Systems Protection Board].

19. *Id.*

20. Welsh & Gruber, *supra* note 10, at 560 (citing various studies); Hulin, *supra* note 15, at 135 (citing various studies); U.S. Merit Systems Protection Board, *supra* note 18, at 20 (reporting on studies of harassment outside the government).

21. U.S. EEOC, *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 - FY 2004*, <http://www.eeoc.gov/stats/harass.html> (last visited Feb. 20, 2006) [hereinafter “EEOC, Sexual Harassment Charges”].

22. See National Partnership of Women and Families, *Women at Work: Looking Beyond the Numbers 40 Years After the Civil Rights Act of 1964*, at 5 available at <http://app.nationalpartnership.org/docs/CRA%2040th%20Ann%20Report.pdf> (last visited Apr. 7, 2006.) The number of charges has decreased slightly in the last several years. There was a slight drop in fiscal year 2004 and another in 2005. See EEOC, *Sexual Harassment Charges*, *supra* note 21.

23. See National Partnership of Women and Families, *supra* note 22, at 6 (indicating 42% increase in charges filed by African-American women, 120% increase in charges filed by Hispanic women, 100% increase in charges filed by Asian/Pacific Islander women, and 114% increase in charges filed by American Indian/Alaskan Native women).

24. *Id.* The fiscal year 2004 total remained at 15%. See EEOC, *Sexual Harassment Charges*, *supra* note 21. As noted above, 19% of males reported harassment in the U.S. Merit Systems Protection Board study. Merit Systems Protection Board, *supra* note 18, at 13. In 1998, the Supreme Court held that Title VII encompasses same-sex harassment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

Research has identified both organizational factors and individual factors that make sexual harassment likely. Although young, unmarried women are the most likely to be harassed, harassment is not unique to those individuals.<sup>25</sup> Women in occupations in which gender makeup is unbalanced, either traditionally male or traditionally female occupations, are more likely to be harassed.<sup>26</sup> Sexual harassment occurs more often where there is cross-gender contact at work, particularly in blue collar occupations.<sup>27</sup> Not surprisingly, where the organizational climate is tolerant of sexual harassment, harassment is more likely to occur.<sup>28</sup>

While no form of sexual harassment is exclusive to any particular work environment, gender harassment more commonly occurs in work environments that have been traditionally male, such as construction, coal mining, and the uniformed services.<sup>29</sup> The sexual propositions that occur in those settings are often taunts rather than requests for sexual favors.<sup>30</sup> The harassment appears designed to preserve the male employees' masculinity, which is threatened by the ability of women to perform the work, and to put women back into their "rightful" place.<sup>31</sup> Sexual coercion more often affects women in traditionally female occupations.<sup>32</sup> In this situation, the woman in the traditional gender role is treated as a sex object, precisely because she is in her traditional role.<sup>33</sup> If she fails to comply, she can be put in her place through termination, denial of a promotion, or other workplace retaliation.<sup>34</sup> Both types of harassment involve the exercise of power, but in different ways and for different purposes.<sup>35</sup>

Sexual harassment has documented negative effects on those who are targeted, those who observe harassment, and the organization in which the harassment takes place. Harassment targets frequently suffer from increased absenteeism, lower productivity, reduced morale, and difficult interpersonal relationships with coworkers.<sup>36</sup> Often they experience

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25. Margaret S. Stockdale, *What we Know and What We Need to Learn About Sexual Harassment* in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 3, 7 (Margaret S. Stockdale ed., 1996).

26. *Id.* at 8.

27. *Id.*

28. *Id.* at 8 -10; Hulin, *supra* note 15, at 129-30.

29. Peggy Crull, *Searching for the Causes of Sexual Harassment: An Examination of Two Prototypes*, in *HIDDEN ASPECTS OF WOMEN'S WORK* 225, 230 (Christine Bose et al. eds. 1987).

30. *Id.* For stories of women in nontraditional occupations, which include many recitations of gender-based and sexual harassment, see JEAN REITH SCHROEDEL, *ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES* (1985).

31. Crull, *supra* note 29, at 234-35.

32. *Id.* at 229, 231.

33. *Id.* at 235.

34. *Id.*

35. *Id.* at 233.

36. Stockdale, *supra* note 25, at 4; Merit Systems Protection Board, *supra* note 18, at

depression and post-traumatic stress disorder.<sup>37</sup> In many cases, they either quit their jobs or are terminated for poor performance related to the stress.<sup>38</sup> Evidence indicates that employees in organizations that are tolerant of sexual harassment suffer from many of these same conditions, even if they are not themselves harassed.<sup>39</sup> Absenteeism, turnover, and lost productivity impose substantial costs on organizations.<sup>40</sup> Based on the reported data about sexual harassment and its effects, the Merit Systems Protection Board estimated that sexual harassment cost the government \$327.1 million in the two years covered by the reporting period.<sup>41</sup> Most of the cost was due to lost productivity, while the remainder was due to turnover and the use of sick leave.<sup>42</sup> In the private sector, estimates are that each Fortune 500 employer loses \$6.7 million per year due to sexual harassment.<sup>43</sup>

### *B. The Persistence of Harassment*

Despite the longstanding recognition of harassment as a major problem in the workplace, the data recited above indicate that harassment persists. While employers have instituted training of employees and supervisors and grievance procedures for harassment in response to the Supreme Court's decisions in *Ellerth* and *Faragher*,<sup>44</sup> these efforts have failed to eliminate harassment. Zero-tolerance harassment policies abound.<sup>45</sup> Analysis of these policies reveals two types.<sup>46</sup> The "absolutist approach," bars any conduct with sexual connotations, mandates discharge

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23-26; Kathy A. Hanisch, *An Integrated Framework for Studying the Outcomes of Sexual Harassment: Consequences for Individuals and Organizations*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES*, 174, 182, 183-84 (Margaret S. Stockdale ed., 1996).

37. Stockdale, *supra* note 25, at 4; Hanisch, *supra* note 36, at 181.

38. Stockdale, *supra* note 25, at 4; Merit Systems Protection Board, *supra* note 18, at 23-26; Hanisch, *supra* note 36, at 185.

39. Hulin, *supra* note 15, at 145-46 (finding that women in organizations tolerant of sexual harassment experienced negative psychological effects even when they were not personally harassed).

40. Hanisch, *supra* note 36, at 181-82, 183, 184, 185-86; Merit Systems Protection Board, *supra* note 18, at 26.

41. Merit Systems Protection Board, *supra* note 18, at 26.

42. *Id.*

43. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 *HARV. WOMEN'S L.J.* 3, 6 (2003)

44. *See infra* notes 104-05.

45. Margaret Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 *J. OF FORENSIC PSYCH. PRACTICE* 65, 66-67 (2003); Robert Perkovich & Anita M. Rowe, "What Part of 'Zero' Don't You Understand?": *The Arbitration of Sexual Harassment Discipline and 'Zero-Tolerance' Policies*, 36 *WILLAMETTE L. REV.* 749, 781 (2000).

46. Stockdale et al., *supra* note 45, at 67.



for sexual harassment, or both.<sup>47</sup> The other approach, termed “symbolic,” sends a clear signal that sexual harassment will not be tolerated, but leaves some flexibility in determining what constitutes harassment and what is the appropriate penalty for the particular conduct at issue.<sup>48</sup>

There are several problems with these policies. Most harassed employees still do not report harassment to their employers.<sup>49</sup> Where an absolutist policy is in effect, a woman, reluctant to report in any event, must report any act or statement, however minor, that might come under the policy.<sup>50</sup> If she fails to do so, she may risk dismissal of any formal claim later filed because of her failure to utilize the grievance procedure.<sup>51</sup> Filing complaints over minor incidents may create a backlash against women by other employees or by supervisors.

If the policy is perceived as too harsh or inflexible, not only will it discourage reporting, but it will encourage supervisors to minimize complaints, thereby effectively reconstructing the policy.<sup>52</sup> Managers may interpret harassment complaints as personality conflicts, take the side of the harasser rather than acting as a neutral investigator, interpret the policy in ways that create obstacles for complainants, or read the policy to narrow the scope of conduct covered.<sup>53</sup> By the actions of management and the reactions of employees, a policy against sexual harassment can be reshaped, looking very different in practice from what is written on paper.<sup>54</sup> Yet the paper policy may be used to defeat legal claims if the complaining employee has failed to avail herself of the procedure, despite the fact that she has been discouraged from using the procedure because of prior management responses. Indeed, the focus of the policy may be litigation prevention rather than a sincere effort to eliminate harassment, elevating form over substance.<sup>55</sup>

The alternative to the often under-enforced zero tolerance policy is a

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47. *Id.*

48. *Id.* at 68.

49. *Id.* at 70. *See supra* text accompanying note 10.

50. *Id.*

51. *Id.*

52. *See* Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 *LAW & SOC'Y REV.* 83, 100, 114 (2005) (reporting on study at university which showed that managers protected employer's interests by deflecting employee complaints even when they came within the broad definition of sexual harassment in the policy). *See also* Stockdale et al., *supra* note 45, at 73 (indicating that if the punishment is inflexible yet viewed as too severe, the manager may determine that improper conduct was not proven or did not rise to the level of harassment).

53. Marshall, *supra* note 52, at 100.

54. *Id.*

55. *See* Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 *EMP. RTS. & EMP. POL'Y J.* 1 (1999) (arguing that litigation prevention strategies can mask discrimination even where the employer's intent is to address discrimination).

policy which prohibits only sexual harassment that is sufficiently severe or pervasive to violate Title VII. This type of policy also creates obstacles to reporting and enforcement. First, there is a gap in protection, for some sexual harassment is clearly permissible. Second, the natural tendency not to report harassment may be exacerbated by a concern that it is not sufficiently severe to violate the policy. Fear of retaliation discourages reporting, and the Supreme Court held in *Clark County School District v. Breeden*, that an employee was not protected from retaliation for complaining about conduct that no reasonable person could believe constituted unlawful sexual harassment.<sup>56</sup> After an initial incident of harassment, the employee is faced with a catch-22. If she reports the harassment, she may be unprotected from retaliation because the incident is not severe or pervasive. Further, the employer may take no action because the harassment does not violate the policy.<sup>57</sup> Yet if she fails to report, the harassment may escalate, and she may be deemed to have unreasonably declined to avail herself of an opportunity to avoid harm. Alternatively, the employer may escape liability if it can claim to have no knowledge of the harassment.

In addition to anti-harassment policies, training has been a common response to the problem of sexual harassment. Yet evidence regarding the effectiveness of training programs is mixed at best.<sup>58</sup> While training may increase knowledge about sexual harassment and have some short-term effects on behavior, it is not clear that training affects the organizational climate, and in some instances, it may produce backlash.<sup>59</sup>

Despite the laudable attempt to encourage employers to eliminate harassment through prevention and internal complaint procedures, the evidence thus far suggests that often employer actions have greater success in defeating legal claims<sup>60</sup> than in ending harassment.<sup>61</sup> This is not to suggest that policies and training be eliminated. Rather, policies and training alone are not enough. Before determining whether unions can aid in making sexual harassment policies more effective, it is important to

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56. 532 U.S. 268, 271 (2001).

57. See Marshall, *supra* note 52, at 104-05 (describing incidents where supervisors declined to act because the reported conduct was not sufficiently serious even when the policy itself was broadly written).

58. Susan Bisom-Rapp, *An Ounce of Prevention is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 31-38 (2001) (detailing empirical research on the effectiveness of sexual harassment training and pointing out inconclusive nature of results).

59. *Id.* at 34-37.

60. Stockdale et al., *supra* note 45, at 71 (indicating that adopting a sexual harassment policy with a complaint procedure containing alternative reporting routes was a critical factor in achieving summary judgment for the employer).

61. *Id.* at 73, 75. Marshall, *supra* note 52, at 114, 118.

examine the role of unions in dealing with sexual harassment to date.

### C. *The Union's Role*

Professor Marion Crain has documented the woeful record of many unions in dealing with sexual harassment.<sup>62</sup> Although evidence reveals that predominantly male occupations, in which unions are more common, are associated with higher levels of hostile environment sexual harassment,<sup>63</sup> the union record of dealing with harassment is spotty. Professor Crain notes that the union's role in sexual harassment cases is often ignored by the courts, by scholars, and by the media.<sup>64</sup> In some cases unions are unresponsive to women's complaints about sexual harassment,<sup>65</sup> and in others, union officials become active participants.<sup>66</sup> Some union officials do take action to combat sexual harassment.<sup>67</sup> Even where union officials have some interest in stopping sexual harassment, however, they may be

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62. See Crain & Matheny, *supra* note 3, at 1546-51 (describing the union's decidedly mixed role in dealing with harassment at Mitsubishi); Marion Crain, *Women, Labor Unions and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995).

63. See *supra* text accompanying notes 16, 29-31; Crull, *supra* note 29, at 230.

64. Crain, *supra*, note 62, at 11.

65. Crain, *supra* note 62, at 11-13 (describing *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847 (D. Minn. 1993) and *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), both cases in which the unions were aware of the conduct the women complained of, yet took no action), *id.* at 33-4 (describing union derision and anger at female member's complaints of harassment); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5 (D. R.I. 2000) (denying summary judgment to union based on allegations of union's failure to file grievances despite knowledge of sexual harassment of the plaintiff); *EEOC v. Regency Architectural Metals Corp.*, 896 F. Supp. 260, 269 (D. Conn. 1995) (union found liable for failure to assist plaintiff in claim of sexual harassment, "in deference to the perceived desires of its male membership."), *aff'd*, 1997 U.S. App. LEXIS 9570, \*1, \*4 (unpublished).

66. *Herrera v. Int'l Bhd. of Elec. Workers Union, Local 68*, 228 F. Supp. 2d 1233 (D. Colo. 2002) (refusing to grant summary judgment for the union and the apprenticeship program that it co-sponsored based on allegations of sexual harassment by instructors, by co-employees, by union members, and by supervisors, which union and apprenticeship program officials failed to address despite numerous complaints); *Agosto v. Correctional Officers Benevolent Ass'n*, 107 F. Supp. 2d 294 (S.D.N.Y. 2000) (denying summary judgment based on allegations that union delegate not only failed to assist plaintiff in stopping sexual harassment but used his authority as a delegate to harass and encourage others to harass her); *Stair v. Lehigh Valley Carpenters Local Union No. 600*, 1993 U.S. Dist. LEXIS 8668 (E.D. Pa.) (union liable for sexual harassment for printing and distributing to employers and members calendars with pictures of nude women), *aff'd without opinion*, 43 F.3d 1463 (3d Cir. 1994).

67. See *McMenemy v. City of Rochester*, 241 F.3d 279, 281, 289 (2d Cir. 2001) (reversing lower court's dismissal of union treasurer's claim that he was unlawfully denied a promotion for investigating and helping to report a sexual harassment complaint by the union's secretary against the union president); Crain & Matheny, *supra* note 3, at 1546-51, 1602-04 (describing the union's limited, relatively ineffective, efforts to combat sexual harassment at Mitsubishi).

reluctant to pursue claims in which the harassment is perpetuated by other union members.<sup>68</sup>

### III. Taking Sexual Harassment Seriously

While it is certainly possible that the workplace and the class consciousness of workers and unions are so gendered that unions cannot effectively represent the interests of women,<sup>69</sup> there are many reasons for unions to take a fresh look at their approach to sexual harassment. Supporting or even tolerating harassment can be divisive and costly to the union. Moreover, the union can provide valuable support and assistance both to aid women who are harassed and to change the workplace culture to prevent future harassment. This is the first and foremost reason that unions should take sexual harassment seriously. It is the right thing to do. Protection from arbitrary and discriminatory actions is a primary reason that employees seek unionization and a primary purpose for unions. Yet clearly that has not been sufficiently motivating for many unions to take on sexual harassment as a major initiative. Therefore, set forth below are several arguments based on union self-interest that should create greater incentive for action.

#### A. Changing Workplace Demographics

While sexual harassment is not a problem unique to women, far more women than men experience workplace sexual harassment. Because of demographic changes in the workplace, union survival is dependent in part on appealing to the growing number of working women. Indeed, the AFL-CIO Executive Council recently approved a resolution aimed at increasing diversity throughout the labor movement and holding unions accountable

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68. See Crain & Matheny, *supra* note 3, at 1549-50 (noting that despite numerous complaints of harassment, the union filed only six grievances in eight years, all involving allegations of quid pro quo harassment by supervisors); Crain, *supra* note 62, at 34, citing Amy Kelley, Machinist, in ALONE IN A CROWD: WOMEN IN THE TRADES TELL THEIR STORIES 119, 125 (Jean R. Schroedel ed., 1985). Other women in Schroedel's book relate similar concerns about the union's lack of assistance in addressing sex discrimination. Schroedel, *id.* at 59-61 (story of Angela Summer, plumber describing union inaction in the face of sexual harassment), 171, 172 (story of Barbara Shaman, outside machinist detailing lack of union support for women's complaints of discrimination). Some women had positive stories about their unions, however. *Id.* at 223 (story of Kathy Baerney, telephone frameman detailing the union's support for her paid pregnancy leave), 186 (story of Linda Lanham, former Boeing machinist who was appointed a union organizer in the predominantly male union), 147 (story of Jo Ann Johnson, a painter whose union formed a women's committee but also noting that there were lots of women in the lower level union positions such as stewards but none in the higher level business representative jobs).

69. See Crain & Matheny, *supra* note 3, at 1602-05, 1614-16.

for meeting diversity standards.<sup>70</sup> This diversity initiative acknowledges the increasing role of women and people of color in the workplace. Between 1980 and 2000, the number of women over 25 in the work force increased from 33.2 million to 55.4 million.<sup>71</sup> At the same time, the number of men increased from 46.6 million to 63.1 million, a much smaller increase.<sup>72</sup> In the next 20 years the work force growth is projected to be smaller, with females increasing to 65 million and males to 72.9 million.<sup>73</sup> Despite the smaller projected growth, it is obvious that women are a much greater percentage of the work force than even 20 years ago. Seventy percent of women with school-age children are currently working.<sup>74</sup> White men are no longer the majority of the American work force.<sup>75</sup> Moreover, women hold a high percentage of jobs in the occupations and workplaces which account for the net job growth in the 1990s.<sup>76</sup>

It is axiomatic that in order to grow, unions must appeal to this growing segment of the work force. Furthermore, women are an increasing percentage of existing union members.<sup>77</sup> As of 2003, "union membership rates were higher for men (14.7 percent) than for women (11.4) percent, although the gap has narrowed considerably since 1983, when the rate was

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70. *AFL-CIO Executive Council Approves Plan, Budget to Increase Support for Organizing, Politics*, DAILY LAB. REP. No. 123, June 28, 2005, at A-10. In particular, the resolution seeks to diversify leadership and convention delegates. *Id.* At the AFL-CIO convention, the delegates approved the governance changes designed to increase diversity. *Delegates Re-Elect Officers by Acclamation, Approve 4 -Cent Increase in Per Capita Dues*, DAILY LAB. REP. No. 144, July 28, 2005, at AA-1; *AFL-CIO's Sweeney Angered by Defection of Dissident Unions as Convention Kicks Off*, DAILY LAB. REP. No.142, July 26, 2005, at AA-2.

71. David Ellwood, *How We Got Here, in GROW FASTER TOGETHER OR GROW SLOWLY APART, HOW WILL AMERICA WORK IN THE 21ST CENTURY?* 24-34 (2002) *reprinted in* Mark Rothstein & Lance Liebman, *EMPLOYMENT LAW* 82 (5th ed. 2003). *See also* Ruth Needleman, *Building Relationships for the Long Haul: Unions and Community-Based Groups Working Together to Organize Low Wage Workers*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 71, 72 (Kate Bronfenbrenner et al., eds. 1998) (noting the growing labor participation rates for women of color).

72. Ellwood, *supra* note 70, at 82.

73. *Id.* at 88.

74. MARK ROTHSTEIN & LANCE LIEBMAN, *EMPLOYMENT LAW* 92 (5th ed. 2003).

75. *Id.* at 91.

76. Needleman, *supra* note 70, at 72.

77. *See* Paul F. Clark, *BUILDING MORE EFFECTIVE UNIONS* 161 (2000) (noting that in 1986 34% of union members were women and by 1998 39% were women); *Unions: Women's Organizing Meeting Focuses on PACE, USW Rapid Response Program*, DAILY LAB. REP. No. 85, May 4, 2004, at A-1 (noting that women are the fastest growing membership group for both PACE and the United Steelworkers). *See also* Gregor Murray, *Steeling for Change: Organization and Organizing in Two USWA Districts in Canada* in *ORGANIZING TO WIN*, *supra* note 70, at 320, 326-30 (comparing two districts of the union and finding that the one that increased its membership and outpaced virtually all other districts increased the number of women members by 341 percent).

10 percentage points higher for men.”<sup>78</sup> While the labor movement as a whole has lost membership, the number of female members increased by one million between 1985 and 2003.<sup>79</sup> Many scholars and even unionists have criticized the labor movement for failing to organize effectively among the female work force.<sup>80</sup> While unions have made efforts to become more inclusive in recent years,<sup>81</sup> the power structure of most unions remains white and male.<sup>82</sup> Interestingly, research demonstrates that unions are significantly more likely to win elections in voting units which are predominantly composed of women and people of color, yet fewer organizing campaigns are conducted in such units.<sup>83</sup>

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78. *Decline in Membership Continued in 2003 To 12.9 Percent of Workforce*, DAILY LAB. REP. No. 13, Jan. 22, 2004, at AA-1.

79. Linda Chavez-Thompson, *Challenges and Prospects for Women in Unions*, PERSPECTIVES ON WORK, Summer 2005 at 4, 5. See also MARICK F. MASTERS, UNIONS AT THE CROSSROADS 50 (1997) (noting 12% increase in number of women union members between 1985 and 1995).

80. See *Data Show Unions Not Pushing to Organize Women in Professional, Clerical, Tech Areas*, DAILY LAB. REP. No. 50, Mar. 16, 2005, at C-2 (reporting on research and subsequent scholarly commentary indicating that organizing resources are not focused on women in professional and clerical positions); Crain & Matheny, *supra* note 3, at 1594-96; Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality & Labor Speech*, 82 GEO. L.J. 1903, 1942-46 (1994); Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI. KENT L. REV. 631, 645 (1985); Charles B. Craver, *The Vitality of the American Labor Movement in the Twenty-First Century*, 1983 U. ILL. L. REV. 633, 648-49; Roslyn L. Feldberg, *Women and Trade Unions: Are we Asking the Right Questions?*, in HIDDEN ASPECTS OF WOMEN'S WORK 299, 299-322 (Bose et al. eds., 1987); WOMEN AND UNIONS: FORGING A PARTNERSHIP 9-13, 69-84, 113-27 (Dorothy Sue Cobble ed., 1993).

81. See Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1784-85, 1829 (describing the AFL-CIO's recent initiatives to appeal to women, people of color, and immigrant workers, and to focus on social justice); Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY 99-128 (2001) (describing and analyzing successful and unsuccessful efforts to organize immigrant workers); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 581-82 (1992) (arguing that unions have appealed to women and people of color).

82. CLARK, *supra* note 76, at 163 (noting that the 5% of women in top leadership positions in unions in the 1950s and 1960s had increased to only 11% by 1994); Lois S. Gray, *The Route to the Top: Female Union Leaders and Union Policy*, in WOMEN AND UNIONS 378-93 (Dorothy Sue Cobble ed., 1993) (noting the relative lack of women in the top leadership of unions and analyzing reasons therefore); Crain, *supra* note 79, at 1944 (noting the underrepresentation of women in leadership and organizing positions, even in unions where women predominate); Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 653-55 (1983) (citing under-representation of women and people of color in union leadership positions).

83. Kate Bronfenbrenner & Tom Juravich, *It Takes More than House Calls: Organizing to Win with Comprehensive Union-Building Strategy* in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 19, 27-28, 32 (Kate Bronfenbrenner et al., eds. 1998).

Since almost half of working women have experienced harassment, a union that gives priority to the issue is likely to draw significant support from women.<sup>84</sup> Additionally, since women of color are a growing part of the work force and increasingly filing claims of harassment, a focus on the issue could increase the appeal of a union to this group of workers who are already more inclined toward unionization.<sup>85</sup> A campaign against sexual harassment could be a vital part of the AFL-CIO's plan to mainstream women's issues in order to enhance the viability of the labor movement.<sup>86</sup> The new Change to Win Coalition, created by several unions as an alternative to the AFL-CIO, offers another vehicle for a labor campaign against workplace harassment.<sup>87</sup> A systematic and visible approach to sexual harassment is likely to assist unions in organizing women. In addition, it will aid the union in maintaining active support from women in bargaining units already organized.<sup>88</sup>

In contrast, failure to address the issue will discourage women both from becoming active in the union and from supporting the union and existing officials. Such lack of support can damage the union, increasing the potential for decertification or change in leadership. Women may even create their own unions or similar support organizations to address the issues that are important to them.<sup>89</sup> At best, the union will lose potentially

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Win rates are particularly high (83%) where 75 % or more of the workers are women of color. Chavez-Thompson, *supra* note 78, at 4. See also *Public Perception of Unions Changing, Survey Taken After Dissident Split Finds*, DAILY LAB. REP. No. 163, August 24, 2005, at A11 (indicating that women view unions more favorably than men according to survey results).

84. Research by Kate Bronfenbrenner on factors affecting union success in representation elections established that union campaigns focusing on issues such as dignity, justice, discrimination and fairness were associated with higher success rates. Bronfenbrenner & Juravich, *supra* note 82, at 24.

85. See *supra* text accompanying notes 23, 70, and 82.

86. Chavez-Thompson, *supra* note 78, at 6.

87. The Change to Win Coalition was formed by several unions, four of which have now withdrawn from the AFL-CIO. See *SEIU, IBT Disaffiliate From AFL-CIO, Announce Plan to Set up New Federation*, DAILY LAB. REP. No. 142, July 26, 2005, at AA-1; *UFCW Becomes Third Union to Leave AFL-CIO in One Week*, DAILY LAB. REP. No. 146, Aug. 1, 2005 at AA-1.

88. Crain, *supra* note 62, at 36 (indicating that union support of women combating sexual harassment increases their support for the union and also their activism in the union).

89. Women electricians in New York formed their own organization of female union members to address the problem of pornography in the workplace which had been ignored by the union. Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT 365, 377 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). See *infra* notes 222-39 and accompanying text for discussion of identity caucuses within unions. A group of graduate students and faculty at the University of Rhode Island created an organization to reduce sexual harassment. See Bernice Lott & Lisa M. Rocchio, *Standing Up, Talking Back, and Taking Charge: Strategies and Outcomes in Collective Action Against Sexual Harassment*, in CAREER STRATEGIES FOR WOMEN IN ACADEME: ARMING ATHENA 249, 257-68 (Collins et al. eds., 1998). In Japan women are establishing

active members, which will weaken the union.<sup>90</sup> The increasing percentage of men who have undergone harassment<sup>91</sup> will also benefit from a union effort to reduce harassing behavior in the workplace.

Support from coworkers and unions is vital for women and men confronting harassment.<sup>92</sup> Despite its widespread nature, harassment is rarely reported.<sup>93</sup> In addition, most individuals who are harassed are not interested in filing complaints or litigating—they simply want the harassment to stop.<sup>94</sup> Coworker and union assistance may empower harassed workers to confront the harasser(s) and end the objectionable behavior without the need for formal complaint.<sup>95</sup> Union support can be crucial for workers in organizing or organized workplaces who are undergoing harassment. It may well make the difference between victory and defeat in a campaign or between a vital, active union and a weaker, less effective one.<sup>96</sup>

### B. *The Divisiveness of Harassment*

In order to maximize their power and resulting ability to negotiate effectively with the employer, the employees in the union must maintain solidarity. Solidarity does not preclude dissent, and indeed, the union's members will often disagree about issues. The union must manage those disagreements, giving voice to all workers, and unite the workforce behind

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their own unions to address sexual harassment because the male dominated unions have failed to do so. Yukido Tsunoda, *Sexual Harassment in Japan*, in DIRECTIONS IN SEXUAL HARASSMENT 618, 621-22 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

90. The strong union sympathies and activist tendencies of women workers are well documented despite the mythical argument that women are difficult to organize. Crain & Matheny, *supra* note 3, at 1593-94. The sense of empowerment that comes from union activism will make women strong supporters of the union and active members. Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 KAN. J.L. & PUB. POL'Y 26, 31 (1994).

91. See *supra* text accompanying note 24.

92. See *infra* text accompanying notes 178-83.

93. See *supra* text accompanying note 10.

94. See Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 82 (2000) (stating that individuals in universities who handled sexual harassment complaints reported in interviews that many complainants simply want harassment to cease); Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161, 164-65 (April 1990) (finding based on the author's experience as an ombudsperson dealing with approximately 6000 persons over 16 years that 75% or more of complainants just want harassment to stop); Carrie Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489, 2501 (1997).

95. See *infra* text accompanying notes 180-83.

96. For further discussion of the importance of union and coworker support for harassed employees, see *infra* text accompanying notes 178-201.



the initiatives that are deemed important to the majority, without alienating or closing out the minority on any issue. The ability of the union to manage this task will be a crucial determinant of its success.

Any employer or employee(s) desirous of weakening the union can do so by exploiting issues that divide the membership. Such divisiveness can also arise without any malevolent effort, if the interests of the membership are so divergent with respect to the terms and conditions of employment that no compromise is possible.

Harassment, with its devastating consequences for its targets, can easily divide a workforce. The sexual harassment suit at Mitsubishi provides a prime example. After a lawsuit alleging sexual harassment was filed against Mitsubishi by both the EEOC and private plaintiffs,<sup>97</sup> Mitsubishi shut down the plant for a day and provided transportation, free lunch, and a day off with pay to thousands of employees to demonstrate outside EEOC headquarters in Chicago.<sup>98</sup> At company instigation, the employees also collected money to pay for newspaper ads, wrote letters to the editor attacking plaintiff coworkers, and participated in a company phone bank to call congressional representatives.<sup>99</sup> These tactics generated worker anger and threats, along with increased harassment, in part because of employee fears of job loss which were exacerbated by the company's tactics.<sup>100</sup> Some suggested that the company actions were intentional efforts to undermine union solidarity at a time when company financial problems were imminent.<sup>101</sup> Such division cannot benefit the union.

Avoiding management exploitation of differences and promoting common interests is important in organizing as well.<sup>102</sup> Employees support unions where they find opportunities to share common interests with other employees.<sup>103</sup> Union organizers must demonstrate to employees that the union provides such an opportunity, building on natural alliances in the work force.<sup>104</sup> As in the case of already organized workplaces, management can exploit divisions to weaken and defeat the union. Harassment issues can provide that opportunity.

In order to represent the interests of their members effectively, and to continue to survive, unions must deal with employers from a position of

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97. The class action lawsuit involved hundreds of unionized women autoworkers who alleged sexual harassment by both coworkers and supervisors. Crain & Matheny, *supra* note 3, at 1546.

98. *Id.* at 1547.

99. *Id.*

100. *Id.*

101. *Id.* citing 1996 DAILY LAB. REP. (BNA) No. 78, at D-8 (April 23, 1996).

102. Roger D. Weikle et al., *A Comparative Case Study of Union Organizing Success and Failure: Implications for Practical Strategy*, in ORGANIZING TO WIN, *supra* note 70 at 197, 210.

103. *Id.* at 210-211.

104. *Id.* at 210.

strength. While unions may choose to establish cooperative relationships with employers when such cooperation benefits unions and their members, unions must enter into such relationships from positions of power as nearly equal to employers as possible. Unions will rarely be able to match large employers in financial resources; their power must come from an active and committed membership and the support that membership can generate from others. Thus, unions must take steps to confront issues that have the potential to divide the membership. Sexual harassment is one of those issues.<sup>105</sup>

### C. Sexual Harassment as Pretext

The risk of employer liability for sexual harassment by employees and supervisors has prompted employers to promulgate policies against sexual harassment which contain complaint procedures. Recent Supreme Court decisions have made creation of a complaint procedure for sexual harassment a significant element of the employer's defense.<sup>106</sup> In cases alleging a hostile environment, the employer may escape vicarious liability for the actions of its supervisors by establishing a two-prong affirmative defense:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.<sup>107</sup>

Where the alleged harassment was promulgated by a co-employee, employer liability depends on whether the employer took prompt and effective action to end the harassment once it knew or reasonably should

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105. Of course, confronting harassment can be internally divisive as well. See *infra* text accompanying notes 169-76. The union must convince the membership to unite behind the objective of eliminating harassment to prevent the employer from using harassment to divide the membership.

106. Burlington 524 U.S. 742, 765; Faragher, 524 U.S. 775, 807.

107. Burlington, 524 U.S. at 765.

have known of it.<sup>108</sup> This defense formulation also impels creation of an effective complaint procedure. Recent studies indicate that the overwhelming majority of employers have established policies against sexual harassment.<sup>109</sup>

In order to prevail on the defenses, the employer must take timely action to end harassment. Such action can take many forms, and may or may not involve disciplining the harasser(s). It is clear from existing law that the employer is not required to terminate the harassers.<sup>110</sup> Yet termination of the harasser(s) is certainly an available action, and one which will end the workplace harassment by that harasser. Moreover, there is a trend toward adopting zero-tolerance policies, some of which mandate dismissal, although, as noted above, supervisors may manipulate the policy to avoid such harsh consequences.<sup>111</sup> Flexibility in responsive action gives the employer the power to decide whether termination or other discipline is appropriate.

Because of this flexibility and the employer's duty to eliminate harassment, the employer can easily use sexual harassment as a pretext for termination for other reasons.<sup>112</sup> Union activists can be targeted for termination, and the termination will likely be upheld unless the union can prove that others who have engaged in similarly serious harassment have

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108. E.E.O.C. Guidelines on Discrimination, 29 C.F.R. § 1604.11(d) (2002); *see also* Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001) (explaining that employer liability for coworker harassment arises when the employer “knew or should have known about the conduct” and failed to take “prompt corrective action that is ‘reasonably calculated to end the harassment’”); Berry v. Delta Airlines, Inc. 260 F.3d 803, 812 (7th Cir. 2001) (explaining that an employer incurs liability for sexual harassment if it “knew or should have known of the problem” and failed to take “prompt remedial action”); White v. New Hampshire Dep’t of Corr., 221 F.3d 254, 261 (1st Cir. 2000) (stating that employer liability for coworker harassment is triggered if the employer “knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action”); Mikels v. City of Durham, 183 F.3d 323, 332 (4th Cir. 1999) (stating that employers shall be held liable for co-employee harassment if they “fail[], after actual or constructive knowledge, to take prompt and adequate action to stop it”); Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293-94 (3rd Cir. 1999) (explaining that if an employer knew or should have known of the coworker harassment, it will be held liable for failing to take prompt and appropriate measures to stop the harassment).

109. Grossman, *supra* note 43, at 19 & n.90 (citing 1999 Society for Human Resources Management Survey finding that 97% of employers have a written policy against sexual harassment and survey by Human Resources Executive finding that 95% of responding employers had sexual harassment policy).

110. Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (“We do not think all harassment warrants dismissal . . . .”); Barrett v. Omaha Nat’l Bank, 726 F.2d 424, 427 (8th Cir. 1984) (“The law does not require ONB to fire Day and Legenza [accused harassers].”).

111. *See supra* text accompanying notes 52-54.

112. The suggestion that sexual harassment can be used as a pretext for termination for other reasons is not to minimize the seriousness of harassment, but rather to note that the seriousness with which harassment allegations are perceived by employer representatives may vary based on other factors. *See infra* notes 111, 112.

not been terminated.<sup>113</sup> A search for cases on Lexis revealed more than thirty cases involving allegations that discipline or discharge for sexual harassment was actually a pretext for union or other protected activity under the National Labor Relations Act.<sup>114</sup> It is probable that many similar cases have been either settled prior to trial or withdrawn or dismissed during or after investigation by NLRB regional offices.

Because sexual harassment is an effective pretext for termination for other reasons,<sup>115</sup> it is in the interest of the union to discourage sexual harassment. The risk is present in both organizing situations and workplaces where the union already represents the employees. In either case, the union can challenge the termination, either through an unfair labor practice charge or a grievance under an existing union contract.<sup>116</sup> Such processes are lengthy, however, and often costly.<sup>117</sup> In an organizing campaign, discharge of an activist can have devastating consequences for the campaign.<sup>118</sup> A strong and vocal policy against sexual harassment can

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113. See *Goodman Forest Industries*, 299 N.L.R.B. 49 (1990) (finding sexual harassment was a pretext where employer engaged in disparate treatment of sexual harassment claims); *Simmons Industries, Inc.*, 321 N.L.R.B. 228 (1996) (finding disparate punishments for sexual harassment warranted and thus not violative of the Act).

114. See, e.g., *Krystal Enterprises, Inc.*, 2002 N.L.R.B. Lexis 365 (finding discharge for sexual harassment pretextual because the sexual harassment policy was repeatedly violated and not enforced); *Smithfield Foods, Inc.*, 2001 N.L.R.B. Lexis 437 (finding discharge for sexual harassment pretextual where no other employee had been discharged for a first offense and company acknowledged that action was not dischargeable offense); *Fixtures Mfg. Corp.*, 332 N.L.R.B. 565 (2000) (finding that although union activity motivated discipline of two employees for harassment, the employer proved that they would have been disciplined in the absence of the unlawful motivation because they violated the harassment policy and thus the discipline was lawful) and cases cited *supra* note 111 and *infra* note 113.

115. For a particularly egregious example, see *PPG Indus.*, 337 N.L.R.B. 1247 (2002), where the Board upheld an administrative law judge's dismissal of a complaint against a union activist who was given a final warning for shouting at a female employee as he drove by on a forklift, "They're f--king you, they're screwing you, you need to sign one of my [union authorization] cards." *Id.* at 1247 (Liebman, dissenting). As noted by Member Liebman in dissent, no reasonable person would find this to be sexual harassment, yet the Board upheld the administrative law judge's decision which found that the sole motivation of the employer was the employee's violation of the harassment policy and accordingly, there was no violation of the Act. *Id.* Indeed the administrative law judge went so far as to castigate the General Counsel for pursuing the complaint. See *PPG Indus.*, 1999 N.L.R.B. LEXIS 581, at \*32-33.

116. See *supra* text accompanying notes 110-13 and *infra* text accompanying notes 116-17.

117. Where there is an existing contract, the Board is likely to defer the case to arbitration, thereby imposing the cost on the union. See, e.g., *Olin Corp.*, 268 N.L.R.B. 573 (1984); *United Technologies Corp.*, 268 N.L.R.B. 557 (1984); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1080 (1955) (all dealing with deferral of unfair labor practice charges to negotiated arbitration procedures). See Section IID *infra* for further discussion of arbitration of cases involving discharge for sexual harassment.

118. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization*

assist the union in avoiding these consequences.

*D. Arbitration and the Duty of Fair Representation*

The cost of sexual harassment for unions includes the cost of representing nonsupervisory harassers who grieve discipline and employees who complain about sexual harassment. When both the harasser and the target are members of the bargaining unit, the union faces a potential conflict of interest because it owes representation obligations to both.

Bargaining unit members who are discharged for sexual harassment will typically have little remedy other than a grievance under the just cause provision of the collective bargaining agreement;<sup>119</sup> thus, they are likely to file a grievance. Data on arbitrations reveals that many such grievances are arbitrated.<sup>120</sup> Several studies have analyzed arbitrators' decisions in such cases. A 1988 study found that in the majority of cases, arbitrators concluded that employers met their burden of proving just cause for discipline.<sup>121</sup> Another study found that discharge was regularly upheld where the employee had been warned previously, where the harassment took place over a long period of time, where the employee had a poor work record, or where there were aggravating circumstances.<sup>122</sup> A third study found that arbitrators upheld the penalty imposed by employers in quid pro quo cases and cases in which the harassment was found to be severe or pervasive, if the employer proved that the harassment occurred.<sup>123</sup> Where the hostile environment did not rise to the level sufficient to violate Title VII, however, the arbitrators applied the seven tests of just cause frequently used by labor arbitrators to determine whether to uphold discipline.<sup>124</sup> Thus, arbitrators are applying Title VII standards in determining whether to uphold discipline of harassers.<sup>125</sup>

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*Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983).

119. Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1, 12 (1999).

120. A 1985 study found a total of sixty-four published arbitration cases challenging discipline for sexual harassment between 1958 and 1985, relying on earlier studies for the time period between 1958 and 1981. W. B. Nelson, *Sexual Harassment, Title VII and Labor Arbitration*, ARB. J., Dec. 1985, 55, 61-62. The overwhelming majority of cases involved discharge. *Id.* Given the substantial increase in the number of Title VII cases since 1985, it is likely that the number of discharge arbitrations has increased similarly.

121. William A. Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, ARB. J., Dec. 1988, at 31, 40.

122. Jonathan Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases*, 37 LAB. L.J. 712, 715 (1986).

123. Mollie H. Bowers et al., *Just Cause in the Arbitration of Sexual Harassment Cases*, DISP. RESOL. J., Nov. 2000 - Jan. 2001, at 40, 42.

124. *Id.*

125. In addition to the studies cited previously, see Grossman, *supra* note 43, at 67-68 (citing studies demonstrating the influence of sexual harassment law on arbitration

While employer discipline is often sustained by arbitrators, when arbitrators do overturn the discharge and reinstate harassers, employers frequently appeal to the courts on public policy grounds. A study of federal cases involving public policy challenges to arbitral reinstatement awards found that approximately 10% of the cases involved employees terminated for sexual harassment.<sup>126</sup> Approximately half of the awards were overturned.<sup>127</sup>

Each case arbitrated by the union represents a substantial expense which must be taken from the union treasury. In 2004, the average cost for a labor arbitrator's time and expenses was \$3541.62.<sup>128</sup> In addition, there are costs for a transcript of the hearing if one is used, lost time for any union representatives and witnesses who attend the hearing, and attorneys' fees if legal representation is employed. If the case is appealed to the courts, legal representation is essential, and the costs to the union escalate. Thus, defending harassers in the grievance and arbitration procedure represents a substantial investment for unions, one which often does not pay off in terms of success in overturning discipline.

As noted above, harassment situations involving co-employees create potential conflicts of interest for unions when both employees are in the same bargaining unit. While targets of sexual harassment rarely file grievances,<sup>129</sup> a decision to represent a disciplined harasser directly opposes the interests of a union member who is the target of harassment.<sup>130</sup> A decision about whose interests to represent will create hostility at best and, at worst, a duty of fair representation and/or a Title VII claim.<sup>131</sup> As Professor Alleyne notes, when sexual harassment grievances overwhelmingly involve representation of male accused harassers rather than female targets, it creates "a public relations dilemma for unions" and a perception that the union is, at best, indifferent to the interests of women.<sup>132</sup>

While unions must make difficult decisions when interests of

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decisions).

126. Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 96, 100 (2000) (finding 13 of 138 cases involved discharges based on sexual harassment). Since fifty-four of the cases in the study preceded 1988 and the sexual harassment cases were all decided after that date, the percentage in recent years is even higher. *Id.* at 96.

127. *Id.* at 117 (finding six of the awards were overturned and seven upheld).

128. LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, *ADR IN THE WORKPLACE* 21 (2d ed. 2005) (citing data from the Federal Mediation and Conciliation Service).

129. See Nelson, *supra* note 117, at 61-62; Alleyne, *supra* note 116, at 2.

130. Alleyne, *supra* note 116, at 2.

131. *Id.*, at 2, 4-5; Mary K. O'Melveny, *Negotiating the Minefields: Selected Issues for Labor Unions Addressing Sexual Harassment Complaints by Represented Employees*, 15 THE LAB. LAW. 321, 325-26 (2000). See further discussion of potential union liability in Section III E, *infra*.

132. Alleyne, *supra* note 116, at 2.

bargaining unit employees conflict,<sup>133</sup> and liability will not attach if the union's actions are not arbitrary, discriminatory, or in bad faith, union efforts to prevent harassment are likely to have a much better payoff.

### *E. Union Liability*

#### 1. The Duty of Fair Representation

Not only are the costs of arbitration significant, but also the potential for a legal claim against the union is considerable. The duty of fair representation requires the union to represent all employees in the bargaining unit without discrimination or arbitrary treatment.<sup>134</sup> A duty of fair representation claim can be brought in court or before the NLRB.<sup>135</sup> A harassed employee can file a duty of fair representation claim based on the union's failure to pursue a grievance over harassment or based on the union's defense of an alleged harasser. While the union can lawfully decline to pursue a grievance which it investigates and deems nonmeritorious,<sup>136</sup> its decisions on harassment grievances can be challenged as discriminatory.

In *Agosto v. Correctional Officers Benevolent Association*, the court denied the union's summary judgment motion, finding that the plaintiff could proceed to trial on her claim that the union breached its duty of fair representation and violated Title VII by failing to process her grievance over sexual harassment.<sup>137</sup> Although the union contract did not contain an express prohibition against sexual harassment and there existed a separate employer anti-harassment policy with enforcement procedures, the court rejected the union's claim that it had no basis for a grievance.<sup>138</sup> Further, the court also denied summary judgment to the union on the plaintiff's claim that the union was liable for creating a hostile work environment.<sup>139</sup> The court concluded that where the employee offered evidence that would

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133. For example, in a promotion case, one bargaining unit employee might file a grievance claiming entitlement to a position received by another bargaining unit employee, thus creating conflicting interests requiring the union to make a decision as to whose interests to pursue.

134. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

135. *Id.*

136. *See, e.g., Greenslade v. Chicago Sun-Times, Inc.*, 112 F.3d 853, 867 (7th Cir. 1997)(finding that union did not breach duty of fair representation by failing to pursue grievance of employee transferred after accusation of harassment as it thoroughly investigated grievance and determined it was without merit); *Eichelberger v. N.L.R.B.*, 765 F.2d 851, 857 (9th Cir. 1985) (affirming N.L.R.B. decision that union did not breach duty of fair representation by failing to file grievance over sexual harassment deemed non-meritorious).

137. 107 F. Supp. 2d 294, 306 (S.D.N.Y. 2000).

138. *Id.* at 305-06.

139. *Id.* at 309.

allow a factfinder to conclude that the union knew that the employee's union delegate not only failed to respond to her request for assistance in eliminating harassment, but also participated in the harassment, the union could be held liable for breach of the duty of fair representation and Title VII.<sup>140</sup>

## 2. Title VII

The union's potential liability is not limited to duty of fair representation claims. Any action that violates the duty of fair representation is also likely to violate the union's obligations under Title VII, which prohibits discrimination by unions.<sup>141</sup> Under Title VII, the union can neither discriminate in the processing of sexual harassment grievances by treating male grievants more favorably, nor refuse to process sexual harassment grievances to avoid antagonizing the employer or to cater to the preferences of the male membership.<sup>142</sup> While mere failure to remedy employer discrimination has not been found unlawful, where the union has some control over the workplace, liability may attach.<sup>143</sup>

A similar argument succeeded in defeating a union's summary judgment motion in *Herrera v. IBEW Local No. 68*.<sup>144</sup> Herrera filed claims against the union, the union-employer joint apprenticeship training program, and two employers, alleging sexual harassment and discrimination during her apprenticeship. She asserted that she was harassed in the classroom and on the job site by apprenticeship instructors,

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140. *Id.* at 308.

141. *See* EEOC v. Pipefitters Ass'n Local Union 597, 334 F.3d 656, 661 (7th Cir. 2003); Agosto, 107 F.Supp. 2d at 305; Marquardt v. Lodge 837, Int'l Ass'n of Machinists, 26 F.3d 842, 853 (8th Cir. 1994).

142. Marquardt, 26 F.3d at 853. *See also* EEOC v. Regency Architectural Metals Corp., 896 F. Supp. 260, 269 (finding union liable under Title VII for failure to pursue plaintiff's grievance challenging the requirement that she work next to a coworker who had raped her based on a "desire to cater to the prejudices of the members of Local 832"), *aff'd*, 1997 U.S. App. LEXIS 9570 at \*1, \*4; Dohrer v. Metz Baking Co., 1999 U.S. Dist. LEXIS 1201, \* 27-29 (N.D. Ill. Jan. 27, 1999) (denying union's summary judgment motion on plaintiff's Title VII claim based on union's failure to pursue plaintiff's grievances about sexual harassment and disability discrimination).

143. In EEOC v. Pipefitters Ass'n Local Union 597, employees who claimed racial harassment by their union were awarded \$155,000, where the union stewards, one of whom was also the site superintendent, failed to remove racial graffiti although sexual graffiti was quickly removed. *See supra* note 138, at 658. The Seventh Circuit reversed the decision, however, finding that the union could not be held liable for inaction. *Id.* at 661-63. Judge Rovner dissented from the panel decision finding that the union was not liable. *Id.* at 663. The EEOC unsuccessfully sought rehearing en banc, arguing that the union is responsible for a hostile work environment where it exerts control over the workplace. *See EEOC Requests En Banc Review of Decision Involving Union Liability for Workplace Bias*, 168 DAILY LAB. REP., Aug. 29, 2003, at A-7; 2004 U.S. App. LEXIS 18796.

144. 228 F. Supp. 2d 1233 (D. Colo. 2002).



co-employees, union members, and supervisors.<sup>145</sup> She complained to union stewards and other union officials, in addition to officials of the apprenticeship program, but no action was taken against the harassers despite the program's policy against harassment.<sup>146</sup> The court denied the union's motion for summary judgment, finding a genuine issue of fact regarding whether the union and the apprenticeship program were "in the matter together" in discriminating against plaintiff on the basis of her sex."<sup>147</sup> The court also denied the apprenticeship program's motion and found that the plaintiff alleged facts sufficient to establish that the harassment was so severe that she was constructively discharged from the program.<sup>148</sup> The potential liability for the union and the apprenticeship program, which was established by a contractual agreement between the union and the employer association, is significant.

The union may even be liable if a union official sexually harasses individuals who are not represented by the union. In a unique case, a union's motion for summary judgment was denied where it was sued by supervisors asserting that a union official created a hostile environment by engaging in racial and sexual harassment.<sup>149</sup> According to the supervisors, in some cases management did not discipline the union committeeman, and in others, the union insisted that the discipline be removed from his record as a condition of settling the union contract and avoiding a strike.<sup>150</sup> The court concluded that Title VII could be violated if the union required the company to settle the committeeman's grievances challenging discipline for harassment regardless of merit.<sup>151</sup>

While duty of fair representation claims cannot generate punitive damages,<sup>152</sup> both compensatory and punitive damages are available in sexual harassment claims under Title VII.<sup>153</sup> Although the damages are limited by statute,<sup>154</sup> juries outraged by blatant sexual harassment often

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145. *Id.* at 1238.

146. *Id.* at 1238-39.

147. *Id.* at 1238 (quoting *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1311 (10th Cir. 1980)).

148. *Id.* at 1246-47.

149. *EEOC v. Gen. Motors Corp.*, 11 F. Supp. 2d 1077, 1079 (E.D. Mo. 1998)

150. *Id.* at 1080.

151. *Id.* at 1082.

152. *See Int'l Bhd. Of Elec. Workers v. Foust*, 442 U.S. 42, 52 (1979).

153. *See* 42 U.S.C. § 1981a (2006).

154. *See* 42 U.S.C. § 1981a(b)(3) (setting forth caps on compensatory and punitive damages based on the number of respondent's employees); *Dowd v. United Steel Workers, Local 286*, 253 F.3d 1093, 1099-1100 (8th Cir. 2001) (rejecting union's argument that damage caps apply to its discrimination against bargaining unit members based on the number of employees employed by the union, which would have eliminated any damages, and suggesting that, like Title VII coverage, the caps should be applied based on the number of union members, a more accurate gauge of the union's resources). *Cf. Ferroni v. Teamsters, Chauffeurs & Warehousemen Local 222*, 297 F.3d 1146, 1151 (10th Cir. 2002)

award large damages to plaintiffs.<sup>155</sup> Thus, the cost to the union of losing such a case could be substantial.

### 3. Likelihood of Claims

Research data reveal that employees in unionized workplaces are more likely to take action to enforce legal rights.<sup>156</sup> Although many harassed women do not file legal claims, this data suggests that such claims are more likely in the unionized environment. Only one study looked at the filing of discrimination claims in the unionized workplace.<sup>157</sup> The study revealed that women were no more likely to file claims of gender discrimination than men, but that union activism was associated with increased filing of claims, as was single parent status.<sup>158</sup> As noted, with respect to other types of legal claims, various studies have concluded that union workers are more likely to enforce their rights. While none of the studies offers determinative evidence regarding the reasons that unionization is associated with greater enforcement activity, scholars postulate that union

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("There is no indication that a labor organization that is sued by an employee alleging discrimination in the employment relationship should be treated any differently than any other employer. We therefore conclude that the Union must meet the statutory definition of employer in order for there to be jurisdiction over Ferroni's discrimination claim, which concerns only the employer-employee relationship.")

155. See, e.g., *Federal Jury Awards \$1.5 Million to Harassed Des Moines Factory Worker*, DAILY LAB. REP. No. 85, May 4, 2004, at A-6 (reporting on jury verdict in sexual harassment case involving 30 to 50 incidents of verbal harassment and several assaults which went largely unaddressed by employer, but noting that award likely to be reduced to statutory limits).

156. See David Weil, *Employee Rights, Unions and the Implementation of Labor Policies*, PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASS'N 474, 476 (1993) (analyzing various studies and concluding that unions improve enforcement of various laws, including the Fair Labor Standards Act, OSHA, MSHA, certain provisions of ERISA, workers' compensation laws and unemployment compensation laws); John W. Budd & Brian P. McCall, *The Effect of Unions on the Receipt of Unemployment Insurance Benefits*, 50 INDUS. & LAB. REL. REV. 478, 488, 490-91 (1997) (finding that union employees are more likely than nonunion employees to receive unemployment compensation benefits); Barry T. Hirsch et al., *Workers' Compensation Reciprocity in Union and Nonunion Workplaces*, 50 INDUS. & LAB. REL. REV. 213, 218, 233 (1997) (finding union employees more likely to receive workers' compensation benefits); David Weil, *Enforcing OSHA: The Role of Labor Unions*, 30 INDUS. REL. 20, 26-34 (1991) (finding unions increase OSHA enforcement); Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 77 (1986) [hereinafter *Suit Filing*] (finding correlation between union activism and filing of lawsuits); Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, U. ILL. L. REV. 115, 134-36 (1981) (finding that both union activism and grievance filing were positively associated with filing of lawsuits and discrimination charges).

157. *Suit Filing*, *supra* note 153, at 75-76.

158. *Id.* at 76, 78-79. The study also looked at filing of duty of fair representation and breach of contract claims. *Id.* at 75-76.

status enhances the probability of benefit receipt and statutory enforcement because the union provides information about risks, rights, and benefits, represents the employees, and offers protection from retaliation.<sup>159</sup> While union representation of employees regarding legal claims will not likely be a factor in the filing of claims against the union, greater information regarding rights, and contractual protection from retaliation may make filing of Title VII or duty of fair representation claims against the union based on harassment more probable.

Accordingly, unions should not rest easy with the knowledge that most harassed individuals do not file legal claims. Moreover, with the increase in harassment claims generally, harassment claims against unions have grown as well.<sup>160</sup> The EEOC also appears to have increased its activity in bringing harassment claims against unions.<sup>161</sup> Of the six cases in which the EEOC sued unions,<sup>162</sup> five were decided since 1995.<sup>163</sup>

#### *F. The Effect on Productivity and Other Costs*

Sexual harassment can be expensive for an organization separate and apart from the direct cost of litigation and damages. Research demonstrates that sexual harassment can significantly reduce employee productivity.<sup>164</sup> Productivity loss should be of great concern to unions. Any cost to the employer decreases the employer's ability to pay greater wages and benefits to workers. Thus, the union's ability to negotiate better wages and benefits will be hampered by diminished employee productivity, as well as the cost of litigation, settlements, and damage awards in

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159. Hirsch, et al., *supra* note 153, at 217, 233; Weil, *supra* note 153, at 20-22; *see* Budd & McCall, *supra* note 153, at 487, 490-91.

160. A search of the Lexis database found forty-five harassment cases with union defendants. Thirty-two of the cases were decided in 1995 or after.

161. Enforcement of the prohibition against harassment is a priority of the EEOC. *See* U.S. Equal Employment Opportunity Commission, National Enforcement Plan, available at <http://www.eeoc.gov/abouteeoc/plan/nep.html> (last visited Feb. 20, 2006).

162. Another case brought by the EEOC was settled prior to decision in 2003. *See Settlements: EEOC Watch*, 21 EMPL. DISCRIM. REP., Dec. 21, 2003 at 759 (reporting on settlement of EEOC v. Reynolds Metals Co., No. 3:01-CV-317, a case alleging a sexually hostile work environment and asserting that the union and the employer discriminated against the plaintiff by imposing restrictions against both her and her alleged harasser, a male coworker, without adequate investigation of her harassment complaint.)

163. *See* EEOC v. Pac. Mar. Ass'n, 88 FEP Cases 366, 2002 U.S. Dist. LEXIS 2277 (D. Or.), *rev'd*, 351 F.3d 1270 (9th Cir. 2003), *reh'g en banc granted*, 367 F.3d 1167 (9th Cir. 2004); EEOC v. Int'l Ass'n of Firefighters, Local 109, 2000 U.S. Dist. LEXIS 21958 (S. D. Ohio 2000); EEOC v. Foster Wheeler, 1999 U.S. Dist. LEXIS 10993 (N.D. Ill. 1999), *rev'd sub nom.* EEOC v. Pipefitters Ass'n Local Union 597, 334 F.3d 656 (7th Cir. 2003); EEOC v. Gen. Motors Corp. 11 F. Supp. 2d 1077 (E. D. Mo. 1998); EEOC v. Regency Architectural Metals Corp., 896 F. Supp. 260 (D. Conn. 1995), *aff'd* 1997 U.S. App. LEXIS 9570 (2d Cir. 1997).

164. Hanisch, *supra* note 36, at 175, 181, 183, 184, 185, 187, 188, 190.

harassment cases. When the union's ability to deliver improved benefits to the employees is impaired, the employees will be less satisfied with their union representation.

Extensive research on the effects of unions has demonstrated that, in most settings, unionized businesses are more efficient and productive than nonunion businesses.<sup>165</sup> This productivity advantage enables unionized businesses to compete with nonunion businesses, even when wage and benefit costs are greater in the unionized setting.<sup>166</sup> It is important to unions to maintain this productivity advantage in order to enable the business to succeed and the employees to maintain high wage employment and better benefits. Specifically, one advantage of unionized workplaces is lower turnover, which results in greater productivity.<sup>167</sup> Sexual harassment, however, causes employees to leave the workplace, thereby increasing turnover and employer costs.<sup>168</sup> Thus, sexual harassment may negate or reduce one of the benefits of unionization to employers. Reduced productivity damages the employer and the union alike, for the union and the employees cannot prosper if the employer cannot compete.

Health care costs have become an increasing percentage of labor costs in recent years. Recent labor disputes which have focused on who pays this increasing cost have resulted in several large and long-lasting strikes.<sup>169</sup> Employees experiencing harassment report both physical and emotional health problems, which not only will affect productivity but also will add to the organization's health care costs.<sup>170</sup> It is in the interest of the union, as well as the employer and employees, to minimize health care costs to preserve benefits for all employees, a further reason to discourage and prevent sexual harassment.

### *G. The Downside of Active Opposition to Sexual Harassment*

Given the reasons set forth thus far, why is every union not taking active steps to prevent and remedy sexual harassment? First, there are

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165. RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 21-22 (1984).

166. FREEMAN & MEDOFF, *supra* note 162, at 43-60, 162-80.

167. FREEMAN & MEDOFF, *supra* note 162, at 22.

168. Hanisch, *supra* note 36, at 185.

169. See *California Settlement Maintains Most Health Care Benefits, Creates Two-Tier Wages*, DAILY LAB. REP. No. 40, Mar. 2, 2004, at AA-1 (describing settlement of 141-day work stoppage prompted by efforts to retain affordable health care benefits for workers); *Bargaining Will Remain Difficult Due to Economy, Health Costs*, DAILY LAB. REP. No. 18, Jan. 29, 2004, at S-39; *Kroger Reopens 41 Stores After Ratification Of New Contract; Closes Three Other Stores*, DAILY LAB. REP. No. 241, Dec. 16, 2003, at A-8 (noting that health care was the key issue in two-month strike); *Alltel Strike Ends as Workers OK Contract Requiring First-Ever Health Care Payments*, DAILY LAB. REP. No. 195, Oct. 8, 2003, at A-7.

170. Hanisch, *supra* note 36, at 181.

many demands on limited union resources, and combating sexual harassment may not be a priority for the union or its members. Empirical research demonstrates that men and women perceive harassment differently.<sup>171</sup> In a union in which either the membership or the leadership is predominantly male, behavior viewed by women members as harassing and unwelcome may be perceived as normal or acceptable to the majority, or to those deciding where to allocate resources. Because the issue of sexual harassment may generate controversy, the risk-avoiding union officer may conclude that it is best ignored or downplayed. However, due to the potential costs to the union of ignoring sexual harassment detailed above, it should instead be considered a high priority.<sup>172</sup> Prioritizing sexual harassment has the potential to preserve and increase union resources.

Nevertheless, the membership, particularly in predominantly male organizations, may actively oppose, or at least not actively support, an effective union campaign against sexual harassment.<sup>173</sup> In an organization in which the officers, and in fact the union itself, are elected, taking action counter to the majority interest is risky.<sup>174</sup> Union officers pushing an agenda that a majority of members oppose may lose their position in the next election. Worse yet, the union may face a decertification effort from disaffected members. The likelihood of such results will depend on the

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171. Grossman, *supra* note 43, at 31.

172. To the extent that the argument for unions to prioritize harassment is based on financial cost, it must be recognized that responding to harassment also imposes costs on the union. Representing harassed workers, conducting training, and creating a mediation program, *see infra* text accompanying notes 178-251, will require a financial commitment from the union. These costs, however, are more consistent with the union's purpose of representing workers and providing them with fairness and dignity in the workplace. By way of contrast, the costs of tolerating harassment, such as defending workers who harass others, defending and paying damages in Title VII and fair representation claims, and the inability to negotiate improved wages and benefits because of the cost of harassment to the employer, are contrary to the very essence of unions. The former costs benefit workers and the union in the long run, while the latter are lost.

173. As noted above, gender harassment is more likely to occur in work environments that have been traditionally male, such as construction and mining. *See supra* text accompanying note 29; *Citing 'Disturbing' Trends in Discrimination, Chair Says EEOC Is Probing Retail Industry*, DAILY LAB. REP. No. 136, July 16, 2004, at A-1 (noting significant portion of EEOC charges alleging harassment in the construction industry). In addition, sexual harassment often occurs where there is cross-gender contact in blue collar occupations. *See supra* text accompanying note 27. Each of these settings typically has a relatively high percentage of union membership. *See Union Trends: A Ten Year History* 5-6, BNA PLUS (2002).

174. The union may be decertified by a majority of the employees. For a review of N.L.R.B. decertification election procedures and how decertification works, see 1 THE DEVELOPING LABOR LAW 499-586 (Patrick Hardin & John E. Higgins, Jr. eds; 4th ed. Vol. 1, 2001); National Labor Relations Act, 29 U.S.C. § 159 (c)(1)(A)(ii) (2000). Also, union officers must face reelection every three to five years, depending on what body the officer serves. *See* Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481 (a),(b), and (d) (2000).

level of resistance. In those workplaces where sexual harassment most needs to be addressed, it is likely that a substantial portion of the union membership may object to a campaign to end harassment. The more pervasive and serious the harassment, the more likely it is that at least some employees are participants or at least do not oppose it. Empirical studies confirm that harassment is most likely to occur in environments that have an organizational climate tolerant of harassment.<sup>175</sup> In such an organization, employees may enjoy, and indeed prefer, such a climate.

Gender harassment<sup>176</sup> more typically occurs in traditionally male organizations and seems to be directed at women integrating such settings, perhaps in an attempt to preserve the masculine nature of the work, and thus the male employees' own sense of their masculinity.<sup>177</sup> In addition, male employees may work in a sexualized environment, complete with horseplay and sexual talk, and may seek to preserve that environment over the objections of women who enter into it.<sup>178</sup> If male employees perceive that female workers pose a threat to their masculinity or their comfortable and preferred work environment, they are highly unlikely to endorse efforts to eradicate harassment. Furthermore, they are likely to oppose union officials who target sexual harassment. Thus, the dilemma for many well-intentioned union officials<sup>179</sup> is whether to confront sexual harassment over the objections of many male members or to walk the line without rocking the boat too much, trying to satisfy all members or at least alienate none. The result is likely to be half-hearted and ineffectual efforts which address the harassment issue.

Even if the union's efforts at preventing and remedying sexual harassment are weak, the employer's approach may not be, for the employer can defeat liability by establishing and enforcing a policy against sexual harassment. Accordingly, the union will have to confront employer efforts to discipline employee harassers as well as potential legal claims for its own failure to address the problem.

#### IV. Taking the Right Steps

Despite opposition from some members, active efforts by the union to combat sexual harassment make sense for the reasons set forth above. In addition, unions can increase the effectiveness of employer efforts to eliminate sexual harassment. The union's approach must take account of

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175. Hulin, *supra* note 15, at 129-31, 145, 147.

176. *See supra* text accompanying note 16.

177. *See supra* note 31. *See also* Grossman, *supra* note 43, at 35-36 (citing studies documenting the prevalence of harassment of women working in traditionally male jobs).

178. *See* Crain, *supra* note 62, at 37-38.

179. Officials who are not well-intentioned may actively participate in or encourage harassment.

member opposition, however, and attempt to defuse it. Ideally, union efforts should focus on preventing and halting harassment, rather than simply remedying harassment that has already occurred. Such endeavors will provide the most benefit to workers and the union.<sup>180</sup> This section will detail various possible approaches for unions that desire to reduce workplace harassment.

### *A. Supporting Victims of Harassment*

Perhaps the most obvious action that the union can take is to support the targets of harassment and assist them in whatever formal or informal action they choose to take in an effort to end the offensive behavior.<sup>181</sup> One might ask why the union should not simply refer a harassed employee to the employer's complaint procedure or to the Equal Employment Opportunity Commission ("EEOC") to file a charge against the employer.<sup>182</sup> Such a referral provides an avenue for relief for the employee and avoids taking on the responsibility for ending sexual harassment. As noted previously, however, most women who are harassed do not make formal complaints. They prefer to end the harassment without the need for such action. Thus, support for informal efforts will aid more women, while often helping the harassers to avoid serious discipline as well. The union has valuable resources to assist targets of harassment, including power, information, and access to potential witnesses.

Advice for individuals suffering from sexual harassment consistently includes a recommendation to seek support from others.<sup>183</sup> Data suggest that effective support improves an employee's ability to respond capably to harassment.<sup>184</sup> Individual responses are often either substantively ineffective or more difficult to undertake and sustain.<sup>185</sup> Thus, support

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180. This does not mean, of course, that the union should ignore complaints of harassment that has already occurred, but rather that the primary focus should be prevention.

181. See *infra* Section IVC for a discussion of the role that internal union caucuses might play in support and advocacy and Section IVD for a discussion of the use of mediation to resolve sexual harassment disputes.

182. See 42 U.S.C. § 2000e-5 (2006) (setting forth statutory procedure for filing a charge with the EEOC).

183. See, e.g., GINNY NICARTHY, ET. AL., YOU DON'T HAVE TO TAKE IT!: A WOMAN'S GUIDE TO CONFRONTING EMOTIONAL ABUSE AT WORK 281-319 (1993); ELLEN BRAVO & ELLEN CASSEDY, THE 9 TO 5 GUIDE TO COMBATING SEXUAL HARASSMENT 81-87, 122-131 (1992); Lott & Rocchio, *supra* note 88, at 256-57.

184. Joy A. Livingston, *Responses to Sexual Harassment on the Job: Legal, Organizational and Individual Actions*, 38 J. SOC. ISSUES 5, 18 (1982).

185. See Crain, *supra* note 79, at 1938; Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insurance Against the Harms of Sexual Harassment in DIRECTIONS IN SEXUAL HARASSMENT*, *supra* note 88, at 247, 258-61 (suggesting that individual litigation may not be the most effective way to combat sexual harassment and offering ideas for collective strategies).

from coworkers and the union can play an important role in halting sexual harassment and empowering women (and men) who suffer from harassment to respond effectively.<sup>186</sup>

In addition to providing a sounding board and emotional support, the union can provide assistance to the employee in determining how best to resolve the problem. Experienced and trained union stewards can be an invaluable asset in making such decisions.<sup>187</sup> Where the harassment is perpetuated by other union members, the union may be able to facilitate a resolution that ends the harassment without ending the career of the harasser(s),<sup>188</sup> taking care, of course to comply with all legal duties to all members.<sup>189</sup> Should the harassed employee choose to institute formal action, union officials can aid the employee in navigating the employer's procedure, the contractual grievance procedure, or the EEOC procedure.

Some evidence suggests that employer procedures suffer from flaws that discourage utilization. The management officials responsible for enforcement have the incentive to protect management interests. Thus, they may take sides with the alleged harasser in their investigation, fail to act when the complainant is less powerful than the accused, or create obstacles for complainants in pursuing their claims.<sup>190</sup> Internal officials may also reinterpret complaints as personality conflicts rather than unlawful harassment.<sup>191</sup> In response to these management actions, employees recast the procedure, combining with management to render it ineffective.<sup>192</sup>

Where the employer's procedure has become ineffective, unions can encourage employees to use the union-negotiated grievance procedure as a substitute. While it is not common for sexually harassed employees to use the collective bargaining agreement's grievance procedure, most agreements prohibit discrimination and harassment. The few cases that have reached arbitration demonstrate that labor arbitrators can address and remedy complaints of sexual harassment.<sup>193</sup> In *South Peninsula Hospital*,

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186. See Crain, *supra* note 79, at 1938-39 (describing successful confrontation of supervisor by group of twenty seamstresses, six of whom had been harassed by the supervisor).

187. See BRAVO & CASSEDY, *supra* note 180, at 126-27 (discussing training for union officials).

188. As noted previously, most employees want only to stop the harassment and rarely focus on punishing the harasser(s). See *supra* text accompanying note 92.

189. See *supra* text accompanying notes 126-130 for discussion of conflicts of interest and the union's legal obligations.

190. See Marshall, *supra* note 52, at 100.

191. Grossman, *supra* note 43, at 62-63.

192. Marshall, *supra* note 52, at 117.

193. In light of the increased use of arbitration in the nonunion environment for legal claims, see COOPER, et al., *supra* note 129, at 595, an increasing number of arbitrators are likely to be familiar with sexual harassment issues. See also Jean R. Sternlight, *Creeping Mandatory Arbitration: is It Just?*, 57 STAN. L. REV. 1631, 1639-40 (2005)(discussing the



the arbitrator found that an employee had been constructively discharged as a result of her supervisor's abusive and harassing conduct, which, while not sexual, was analogized to sexual harassment.<sup>194</sup> She was reinstated with full back pay and benefits. Although the employer had verbally reprimanded the supervisor, the failure to follow up with monitoring or reassurance to the employees under his supervision, particularly after he threatened to fire anyone who spoke to the union, was inadequate to end the harassment.<sup>195</sup>

Similarly in *El Paso Electric Company*, the arbitrator found an employer liable for hostile environment sexual harassment, effectively applying the legal elements of the claim.<sup>196</sup> The arbitrator required the company to compensate the grievant for her medical costs and lost wages due to absence from work, but denied punitive damages because the company transferred the employee and disciplined the harasser immediately upon learning of the harassment.<sup>197</sup> The contractual grievance procedure is not a substitute for litigation, as compensatory and punitive damages are generally not available unless specifically negotiated by the union.<sup>198</sup> It can, however, provide remedial relief to harassed employees<sup>199</sup> and may have significant advantages over the employer-created procedure, as the final step in the process is typically a neutral arbitrator rather than a management official. Additionally it is generally quicker and less expensive than litigation.<sup>200</sup>

The union can protect employees who complain of harassment from retaliation,<sup>201</sup> a common result of sexual harassment complaints and a

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number of employers requiring employees to arbitrate employment disputes).

194. 116 LAB. ARB. (BNA) 487 (Landau, 2001).

195. Again, the arbitrator applied the standards for employer liability under sexual harassment law. 116 LAB. ARB. (BNA) at 496.

196. 109 LAB. ARB. (BNA) 1086 (Allen, 1998).

197. *Id.* at 1092, 1093.

198. *See Union Camp Corp.*, 104 LAB. ARB. (BNA) 295, 301-02 (Nolan, 1995) (rejecting union's request for damages for pain and suffering of employees sexually harassed by supervisor and noting that punitive damages are not available in labor arbitration).

199. *See supra* text accompanying notes 191-95; *Union Camp Corp.*, 104 LAB. ARB. at 300, 301 (ordering employer to keep the harassing supervisor away from the grievants and to prevent future misconduct by the harasser).

200. Unions should be cautious about waiving employees' rights to litigate statutory claims. At present, only the Fourth Circuit has found such waivers based on language in the collective bargaining agreement. *See Safrit v. Cone Mills Corp.*, 248 F.3d 306, 308-309 (4th Cir. 2001). *See also Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (holding that any union waiver of employees' right to litigate statutory claims must be clear and unmistakable but not deciding whether the union can effectuate such a waiver); Ann C. Hodges, *Protecting Unionized Employees Against Discrimination: The Fourth Circuit's Misinterpretation of Supreme Court Precedent*, 2 EMP. RTS. & EMP. POL'Y J. 123 (1998).

201. Since most collective bargaining agreements require just cause for discipline, disciplinary retaliation can be challenged as a violation of the contract. *See COOPER, et. al, supra* note 129, at 279-80 (indicating that 92% of collective bargaining agreements provide

reason that so few victims initiate complaints.<sup>202</sup> In addition, the union can aid the employee in making her case of harassment by locating other witnesses and persuading them to testify, or by providing evidence of prior instances of harassment from institutional memory.<sup>203</sup> Union involvement in sexual harassment complaints, whether formal or informal, can help to identify patterns of harassment and press for resolution, avoiding the problem of repetitive harassment that continues because complaints are treated individually rather than systemically.<sup>204</sup>

The union can play an important role in remedying complaints of harassment by employees. Equally important, and perhaps more so, is prevention of future harassment and changing the culture of the organization to one that does not tolerate harassment.

## *B. Education and Creation of Workplace Norms*

### 1. The Workplace Culture

Where an organization is perceived as more tolerant of sexual harassment, harassment is more likely to occur.<sup>205</sup> If the employer and the union make clear to employees, both formally and informally, that harassment will not be tolerated in the organization, it is likely to reduce the incidence of harassment.<sup>206</sup> Leadership is crucial in signaling to

that employees may be disciplined or discharged only for “cause” or “just cause” and arbitrators often read such provisions into contracts that do not contain them). There may be contractual bases to challenge other retaliation by the employer. *See, e.g.,* Champion Int’l Corp., 105 LAB. ARB. (BNA) 429 (Fullmer, 1995) (ordering employer to return transferred employee to her former classification and shift because she was transferred after complaint of sexual harassment, although employer claimed the transfer was non-disciplinary resolution of dispute between two employees and based on seniority). Retaliation by members of the union may be remedied by informal sanctions as well as formal sanctions available under the union’s constitution. *See* THE DEVELOPING LABOR LAW 217-31 (Patrick Hardin & John E. Higgins, Jr. eds. 4<sup>th</sup> ed. 2001).

202. *See* Fitzgerald et al., *supra* note 10, at 122 (explaining based on empirical research that fear of retaliation is one explanation for victims’ failure to report harassment and documenting actual retaliation); Chamallas, *supra* note 9, at 374-76 (discussing the role of fear of retaliation in failure to report and the incidence of actual retaliation).

203. *See* Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 396 (2004).

204. *See* Chamallas, *supra* note 9, at 379-80.

205. *See* Hulin, *supra* note 15, at 131-35, 147 (summarizing research about links between harassment and organizational climate and finding a correlation between reports of harassment and perceived tolerance for harassment in research among graduate students and employees of a public utility); Lott & Rocchio, *supra* note 88, at 254 (citing research finding that social norms in the work place, including authoritative statements from management condemning harassment, reduce the incidence of harassment).

206. The informal norms of the organization may be much more important than the formal norms in signaling to employees that harassment will not be tolerated. Chamallas, *supra* note 9, at 378, 381. The union may have an important role, although certainly not the

employees that sexual harassment is verboten.<sup>207</sup> Leaders must go beyond mere establishment of policy to modelling behavior that reduces power differentials between men and women in the organization, does not tolerate discrimination, and fosters commitment to elimination of harassment.<sup>208</sup> While declarations from management contain the force of the threat of discipline to discourage harassment, clear disapproval from the union, which indicates sanctions from peers, may be equally effective. Acting together, the union and management can alter the informal workplace norms that govern employee and supervisory behavior.<sup>209</sup>

One way for the union to change the workplace culture is to inform all employees that it will not grieve or arbitrate claims of unjust discipline when the grievant engaged in harassment and the penalty imposed is proportionate to the violation. While the union must take care to avoid breaching the duty of fair representation, if its decisions are based on the merits of the grievances, such a policy should survive challenge.<sup>210</sup> The policy sends a clear message that the union does not condone harassment.

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only one, in setting the informal norms.

207. See Stockdale, et al., *supra* note 45, at 74.

208. *Id.* Empirical research indicates that leadership commitment to ending harassment encourages reporting and increases satisfaction with the complaint process and the job. *Id.*

209. An example of a similar joint approach to changing workplace culture is union-management efforts to eliminate drug use. While many unions have opposed workplace drug testing, some have shifted their approach and joined with management to discourage drug use because of its impact on workplace safety. See Labor and Management Partnership; Sheet Metal Air Conditioning Contractors National Association, <http://www.sheetmetal36.org/LABOR%20AND%20MANAGEMENT%20PARTNERSHIP.htm> (last visited Feb. 19, 2006) (indicating that in 1999, the union approved a new drug testing program requiring initial testing of all members and continued random and cause testing, along with testing for apprenticeship applicants); West Virginia Construction Craft Laborers' Apprenticeship Program, available at <http://www.wvcc1.org/apprenticeship.htm> (last visited Feb. 20, 2006); Bridge, Structural and Reinforcing Iron Workers, Local No. 1, [http://www.iwlocal1.com/local\\_1\\_information.htm](http://www.iwlocal1.com/local_1_information.htm) (last visited May 2, 2005); Apprenticeship Programs with the Union Building Trades, available at <http://www.thehighschoolgraduate.com/editorial/AC/ACtrades.htm> (last visited May 2, 2005) (informing readers of apprenticeship opportunities with 15 different building trades unions which require applicants to be drug free because: "Number one, it's the law. Secondly, worksites can be dangerous enough without impairment due to drug abuse. Lastly, property owners and contractors along with the Union Building Trades maintain a zero tolerance for drug abuse among the workforce."); Management and Unions Serving Together Drug Testing Policy, available at [http://www.must.org/formsanddocs/mustdrugtesting\\_081204.pdf](http://www.must.org/formsanddocs/mustdrugtesting_081204.pdf) (last visited May 2, 2005) (detailing drug testing policy of an organization composed of unions and construction contractors in southeastern Michigan); MMC Chosen to Administer Substance Abuse Program, Promote Safety at Ohio Construction Sites, (Jan. 2003) available at <http://www.estetacomunications.com/NewsReleases/Cleveland.htm> (last visited February 20, 2006) (describing substance abuse program implemented by the Union Construction Industry Partnership (UCIP), a joint labor-management cooperative, to advance construction safety and implement a drug-free workplace).

210. See *supra* text accompanying note 133.

Increasing the numbers of women in predominantly male jobs is another method of decreasing harassment.<sup>211</sup> Practices that operate to exclude women or to discourage women from integrating into male jobs and workplaces form part of the culture that often results in harassment of those women who buck the system and enter the traditionally male environment.<sup>212</sup> Thus, the union can pressure the employer to examine its hiring, training, and promotion practices, and its performance evaluation standards, for discriminatory impact on women.<sup>213</sup> The union can also negotiate changes in those procedures or file grievances or EEOC charges on behalf of women discriminated against in violation of the collective bargaining agreement and the law. Because there are many practices that form part of the workplace culture that tolerates harassment, the remedy for harassment must address the entire culture.

## 2. Training

Many employers conduct sexual harassment training in order to beef up their potential affirmative defenses to liability for harassment.<sup>214</sup> While some employers train all employees, others limit training to selected employees, typically managers and supervisors who are in a position to limit employer liability through the administration of the complaint procedure or by controlling their own behavior and that of their subordinates.<sup>215</sup> The union can encourage the employer to include all employees in any training conducted.<sup>216</sup> Research to date, while limited, suggests that training may help prevent sexual harassment.<sup>217</sup> The gap in perceptions of men and women as to whether conduct is harassing appears to shrink after training, with men increasing their awareness as to what is sexually harassing behavior.<sup>218</sup> In addition, there is some evidence that training can reduce inappropriate behavior among men with a high likelihood to sexually harass.<sup>219</sup>

The union can also provide education to workers at conferences, union

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211. See *supra* text accompanying note 26.

212. See Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1842 (1990).

213. See *id.* (noting the impact of such practices on the job aspirations of women).

214. See *supra* text accompanying notes 44-45.

215. See *supra* text accompanying notes 104-05.

216. See BRAVO & CASSEDY, *supra* note 180, at 126-27.

217. Grossman, *supra* note 43, at 42-48.

218. *Id.* at 43, 45-47.

219. *Id.* at 47-48. But see Bisom-Rapp, *supra* note 58, at 31-37 (discussing inconclusive results of research on the effectiveness of training and questioning the effectiveness of training in making long term change in the work environment and likelihood of harassment).

meetings, and even one on one.<sup>220</sup> While those inclined to participate in sexual harassment, or at least not object to it, are unlikely to attend any formal educational program voluntarily,<sup>221</sup> brief educational segments at union meetings may have some effect. Alternatively, individual efforts by union officers or fellow members to educate union members about harassment in ad hoc conversations may also be effective. Multiple and varying educational endeavors provide a greater opportunity to reach more workers. Of course, union staff should also be trained, and such training can be compelled by the union as employer.

Education should include not only what is harassing behavior and how to deal with it, but why union members and staff should be concerned about harassment. Members should be aware of the risk of discipline, the cost to the union of defending harassers and prosecuting grievances for harassed employees, the union's potential liability for harassment, the importance of union and coworker support for individuals suffering from harassment, and the costs to the employer of harassment as they affect the union's ability to negotiate better wages and benefits for members. Appeals to self-interest are likely to have more effect than generalized polemics about legal or moral rights and wrongs. Workers should also be educated about the harm of harassment to victims, however.<sup>222</sup>

Union educational efforts may provide the opportunity to discuss the workplace atmosphere in general in a less adversarial setting. If workers are able to exchange ideas and express their feelings about the work environment, troubling behavior that falls short of the legal definition of harassment can also be addressed. The benefits may expand beyond sexual harassment to make the workplace environment one that is more comfortable for all workers. As Professor Vicki Schultz has pointed out, addressing sexual harassment does not entail sanitizing the workplace to remove any reference to sex or to limit all humor and levity.<sup>223</sup> Rather, unlawful sexual harassment is that which discriminates in the workplace on the basis of gender.<sup>224</sup> Union facilitated discussion about harassment and discrimination may contribute to a workplace that is more gender friendly without eliminating all mention of sex or straining all relationships between men and women.

Efforts to include women as a part of the union and to expose

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220. BRAVO & CASSEDY, *supra* note 180, at 126-27.

221. Unlike the employer, the union typically cannot mandate employee attendance at training, although some unions may require attendance at a certain number of union meetings to maintain membership in good standing.

222. For example, Dottie Jones of the UAW "personalizes the issue for male union members" by using a scenario that posits harassment of their daughter at college by a group of male students. See BRAVO & CASSEDY, *supra* note 180, at 126.

223. See Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

224. *Id.* at 2131-32.

members to one another as individuals and colleagues with similar interests and goals will help diminish the likelihood of coworker harassment and encourage coworkers to support others who are harassed by supervisors. This too is part of the educational effort. The more workers share common bonds, the more likely they are to make common cause. Indeed, education about sexual harassment may be an important step in changing the culture of unions to be more appealing to women.<sup>225</sup> Such efforts will pay off for the union not only in dealing with sexual harassment, but in all efforts that require solidarity and cooperation among members.

### *C. Facilitating the Creation of Caucuses or Interest Groups within the Union*

Recent scholarship relating to the labor movement and gender, race, and ethnicity has focused on the use of identity caucuses. Identity caucuses are informal networks of employees formed on the basis of gender, race or ethnicity.<sup>226</sup> Such organizations exist both across and within unions at the national level and, less often, at the local level, with a primary objective of enhancing the voice of their constituencies in the labor movement.<sup>227</sup> While some scholars have argued that these identity groups might serve a divisive function in the union,<sup>228</sup> others have urged unions to facilitate caucus formation.<sup>229</sup> Although caucuses cannot lawfully bargain with the employer,<sup>230</sup> a women's caucus within the union can play an important role in combating sexual harassment.<sup>231</sup>

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225. See Feldberg, *supra* note 79, at 299-322 (discussing the failure of unions to recognize and incorporate centrally women's culture and the resulting impact on trade union activism and membership of women).

226. See Ruben J. Garcia, *New Voices at Work: Race and Gender Identity Caucuses in the U.S. Labor Movement*, 54 HASTINGS L.J. 79 (2002); Crain & Matheny, *supra* note 3, at 1617-19; Michael Yelnosky, *Title VII, Mediation and Collective Action*, 1999 U. ILL. L. REV. 583, 613-21; Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 158-62 (1993).

227. Garcia, *supra* note 222, at 102-13,

228. See Molly S. Mcusic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1341, 1353-61 (1997).

229. Garcia, *supra* note 222, at 160-61, 163; Hyde, *supra* note 222, at 158-62.

230. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 57-58, 70-71 (1975) (holding that employer lawfully discharged employees who demanded that the company bargain with them regarding racial discrimination instead of the duly certified union representative).

231. Some years ago, Professor Marion Crain suggested that women's caucuses could play an important role in dealing with sexual harassment in the unionized workplace. Crain, *supra* note 62, at 61. While I follow Professor Crain's suggestion of sexual harassment as a focus for a women's caucus because of their likely interest and commitment to action, men too may have an interest in the issue and the caucus could be broadened to include men. Some unionists have suggested that the issue not be relegated to a women's group which may have little power and thereby send a signal that the issue is of little importance to the

As noted above, support from others is a primary factor in empowering individuals to deal with sexual harassment. First and foremost, a caucus could provide such support.<sup>232</sup> In addition to providing a forum for expressing feelings and obtaining validation,<sup>233</sup> a caucus can provide support and even representation for an employee through any informal and formal proceedings that occur as a result of the harassment. Even if no employee chooses to complain formally about harassment, a caucus could investigate and document sexual harassment and recommend and advocate for changes to reduce harassment. The caucus could plan and conduct training for the union members and staff, or work with the employer to tailor employer-provided training to the needs of the union membership and the particular problems in the workplace.<sup>234</sup> In many cases, employees will be more cognizant of the nature and scope of sexual harassment than the employer.

While caucuses typically have not been extensively involved in the grievance procedure,<sup>235</sup> the union could train and deputize caucus members to represent sexually harassed employees in the grievance procedure.<sup>236</sup> Employees may also bring sexual harassment complaints to any additional procedure set up by the employer to provide a defense to Title VII claims.<sup>237</sup> Again, caucus members could support and assist employees seeking to remedy harassment through the employer's complaint procedure. The caucus could educate employees about the necessity of utilizing the procedure to avoid losing any legal claim against the employer for harassment by supervisors by failing to make reasonable efforts to correct the harassment.<sup>238</sup>

Caucus members could be trained to assist employees with legal claims under Title VII or any state anti-discrimination law. Title VII requires employees to file a charge with the EEOC prior to initiating any legal action in court.<sup>239</sup> Trained caucus representatives could provide both moral support and expert assistance during the EEOC proceedings,

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union. BRAVO & CASSEY, *supra* note 180, at 125 (quoting Ruth Needleman, education director of the Service Employees International Union). To counteract this problem, the union's highest officers must signal a strong commitment to addressing sexual harassment.

232. For a discussion of the importance of support groups, *see* BRAVO & CASSEY, *supra* note 180 at 85-87.

233. It is important to reassure individuals who are subjected to harassment that it is not their fault and that they are not alone. *Id.* at 84-85.

234. *See supra* text accompanying notes 211-20.

235. Garcia, *supra* note 222, at 163.

236. As noted previously, the union grievance procedure may provide an effective remedy for sexual harassment. *See supra* text accompanying notes 190-97.

237. *See supra* text accompanying notes 104-107.

238. *See supra* text accompanying note 105.

239. *See* 29 U.S.C. Section 2000e-5(b), (f)(1).

including the investigation and any conciliation that occurs.<sup>240</sup> The union could also refer employees to attorneys with expertise and interest in representing employees in sexual harassment cases should the case proceed to litigation.<sup>241</sup> The caucus could also play a role in supporting and representing employees in any alternative procedure for dealing with sexual harassment claims.<sup>242</sup>

Where sexual harassment is a significant problem, women who suffer from harassment may initiate a support group or caucus even without instigation from the union.<sup>243</sup> Whether or not the group is a formal part of the union structure, the union should offer support, even if the group's membership is not exclusively composed of bargaining unit members. For all of the reasons discussed above, the union will benefit from supporting those who are fighting to eliminate harassment in the workplace.

#### *D. Providing a Mediation Procedure for Harassment Complaints*

As noted above, employers have a strong incentive to provide a complaint procedure for sexual harassment to avoid legal liability.<sup>244</sup> I have suggested elsewhere that unions and employers should negotiate a mediation procedure for noncontractual claims, including sexual harassment complaints.<sup>245</sup> Mediation, which can effectively address at least some sexual harassment complaints, provides an optional adjunct to the contractual grievance procedure, the employer's complaint procedure, or both.<sup>246</sup> Since most harassed individuals want to end the harassment without formal complaint, mediation may provide an attractive remedial alternative. Mediation offers several distinct advantages over litigation of sexual harassment claims.<sup>247</sup> The confidentiality of mediation allows the

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240. See 29 U.S.C. Section 2000e-5(b)(detailing EEOC investigation and conciliation procedures).

241. It is often difficult for individual plaintiffs with discrimination claims to obtain counsel. See Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 91 (2001); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 256, 288-89 (1994).

242. See *infra* text accompanying notes 240-51.

243. See *supra* note 88.

244. See *supra* text accompanying notes 104-07.

245. See Hodges, *supra* note 200.

246. Mediation or other informal procedures could also be used internally within the union membership to resolve harassment disputes between members. See *infra* text accompanying note 249.

247. For a thorough discussion of advantages and disadvantages, see Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 156-63 (1999). See also Grossman, *supra* note 43, at 65-67 (discussing advantages and disadvantages of mediation of sexual



parties to achieve resolution without revealing more publicly what may be embarrassing details for both the victim and the harasser.<sup>248</sup> Early resolution of the dispute may stop the harassment and avoid prolonged trauma for the person harassed.<sup>249</sup> Where the harassment claim is the result of different views about appropriate language and conduct, mediation can provide education and understanding.<sup>250</sup> Mediation has the potential to empower the target of harassment, who has more control over the process and the outcome than in litigation.<sup>251</sup> The union or caucus can advocate for the employee in mediation to even the playing field and ensure that mediation does not become a method of litigation prevention that does not actually resolve the underlying problem.<sup>252</sup> Finally, mediation of harassment disputes between union members may enable resolution of the problem to the satisfaction of both, thereby benefiting the union which would otherwise be faced with an internal conflict.<sup>253</sup>

If the union and the employer agree to such a procedure, the union caucus representatives discussed above can provide support and representation for harassed employees in mediation. While some sexual harassment cases might be inappropriate for mediation, union or caucus representatives can assist employees in determining which disputes might be most appropriate for mediation, and when litigation is the more appropriate forum.<sup>254</sup> A truly effective mediation procedure for harassment

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harassment claims); Alleyne, *supra* note 116, at 16 (suggesting multi-party mediation of sexual harassment disputes in the unionized workplace); Bond, *supra* note 92 (advocating mediation of sexual harassment disputes); Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265 (2001) (advocating a mediation option for sexual assault cases at universities). For a contrary view, see Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?* 9 OHIO ST. J. ON DISP. RESOL. 27 (1993) (rejecting mediation as an appropriate forum for sexual harassment cases).

248. Harkavy, *supra* note 243, at 157. A mediated settlement may avoid further victimization that may result from a deposition or trial testimony of the complainant, where the harasser's attorney attempts to discredit or blame her, or to explore her psychological history to dispute her claim of damages. *Id.* at 158.

249. *Id.* at 157.

250. *Id.* at 160.

251. *Id.* at 160-61.

252. See Hodges, *supra* note 200, at 394-96 (discussing the importance of union advocacy in mediation); Chamallas, *supra* note 9, at 379-81 (discussing some drawbacks of reliance on internal procedures to resolve sexual harassment complaints and provide a liability defense for employers). Of course, the employee should be free to proceed in mediation without union representation if she so chooses. See Hodges, *supra* note 200, at 395-96.

253. See *supra* text accompanying notes 126-30.

254. Union representatives must make such recommendations based on objective nondiscriminatory criteria. See *supra* text accompanying note 131. Unions and caucus representatives can also monitor the process to insure that repeat offenders are not avoiding the consequences of harassment through sequential mediated settlements. See Kihnley, *supra* note 92, at 83-84. For further discussion of instances where mediation may not be appropriate, see Hodges, *supra* note 200, at 424-25.

claims might even help to provide a defense for the union accused of sexual harassment, if the employee unreasonably failed to utilize the procedure.<sup>255</sup> Thus, the mediation procedure can provide multiple benefits for the union, as well as the employer.

#### *E. The Role of the International Union*

Some local union officers may be unwilling or unable to institute the measures suggested as responses to sexual harassment. If a majority of the local membership is hostile, local officers will be reluctant to act even if personally sympathetic. Where the local union fails to act, the international union can step in to force local action.<sup>256</sup> The international union's distance from the personalities involved will enable more dispassionate review of the situation and recommendations for appropriate action. The international union may be better able to appreciate some of the benefits of preventing and halting sexual harassment. Where there are only a few recalcitrant locals, international mandates may pose little risk to the international officers. Widespread hostility, however, would require educational efforts by the international union to avoid membership retaliation.

In deciding what action to take with respect to affiliated locals, the international union should consider the possibility of its own liability. If there is an agency relationship between the two organizations, the international union may be liable for discriminatory action by the local union.<sup>257</sup> The courts will look to common law agency principles to determine whether an agency relationship exists.<sup>258</sup> The constitution and bylaws of the international union will be relevant, but more important is the actual relationship between the international and the local.<sup>259</sup> Among the factors considered are whether the local elects its own officers, whether the local hires and fires its own employees, whether the local maintains its own treasury, and what level of independence the local exerts over its daily

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255. See Hodges, *supra* note 200, at 433-34.

256. With rare exceptions, most local unions are affiliated with international unions. The relationship between the two is governed by the constitution and bylaws of the international union, which controls the authority that the international has to mandate action of the local union. See, e.g., *Laughon v. Int'l Alliance of Theatrical Stage Employees*, 248 F.3d 931, 933 (9th Cir. 2001) (detailing the scope of IATSE's authority over local unions as set forth in the constitution and bylaws).

257. See *Laughon*, 248 F.3d at 935; *Alexander v. Local 496, Laborers' Int'l Union*, 177 F.3d 394, 409 (6th Cir. 1999); *Rainey v. Town of Warren*, 80 F. Supp. 2d 5, 19 (D.R.I. 2000).

258. See *Laughon*, 248 F.3d at 935 (citing *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979)); *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1427-29 (D.C. Cir. 1988).

259. See *Laughon*, 248 F.3d at 935.

operations.<sup>260</sup>

The international union's liability may also be established by evidence that it was aware of discriminatory actions of the local and either authorized, instigated, supported, encouraged, or ratified them.<sup>261</sup> Depending on the relationship between the international and the local and the international's knowledge of discrimination, the international may have an affirmative duty to take steps to end discrimination by either the employer or the local union.<sup>262</sup> If there is any factual question about the relationship between the international union and the local union, the international will not be able to obtain a summary judgment ruling that it is not liable for any unlawful action by the local union.<sup>263</sup> The international union will face the expense of a trial and probably appeals, even if it ultimately prevails. Thus, action by the international union to combat sexual harassment may not only be in the union's long-term best interest, but also may be necessary to avoid its own potential liability for discrimination. Legal actions may ultimately force both local and international unions to take sexual harassment more seriously. A far wiser and less costly approach would be to act now to address the issue of sexual harassment, without legal prompting, in order to preserve and advance the interests of the union in expanding its appeal and its power.

#### *F. Overcoming the Obstacles to Eliminating Harassment*

Union activism offers the potential to overcome some of the obstacles that have thus far prevented successful campaigns to eliminate harassment in many workplaces. First, union support and creation of informal resolution mechanisms can encourage women to report harassment. The ability to resolve harassment quietly without retaliation may encourage some women who might otherwise remain silent about harassment to speak

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260. *Id.*

261. *Id.* at 935-37; Rainey, 80 F. Supp. 2d at 19; Alexander, 177 F.3d at 409.

262. *See, e.g.*, Laughon, 248 F.3d at 937-38 (rejecting argument that international union had an affirmative duty to search for and eliminate discriminatory conduct by local union in the absence of an agency relationship or awareness of local's discriminatory actions); Alexander, 177 F.3d at 409 (finding international union liable for race discrimination, stating "where an agency relationship exists, international unions are not only vicariously liable, they have an affirmative duty to oppose the local's discriminatory conduct"); Berger, 843 F.2d at 1428-29 (finding that cases discussing affirmative duty of international to eliminate discrimination confirm that such duty is dependent on the agency relationship between the international and the local); Macklin v. Spector Freight Sys. Inc., 478 F.2d 979, 989 (D.C. Cir. 1973) (union passivity at the negotiation table in the face of clear employer discrimination can violate Title VII); Wheeler v. American Home Prod. Corp. 19 FEP CASES (BNA) 143, 146 (N.D. Ga. 1979) (stating that "Title VII places an affirmative obligation upon umbrella labor organizations such as international unions to take reasonable steps to end discrimination").

263. *See* Rainey, 80 F. Supp. 2d at 21.

up. Well-trained union representatives may be able to resolve harassment issues without invocation of formal procedures. When formal procedures are necessary, the union can provide assistance and support, as well as an alternative to the employer's procedure if necessary. If managers discourage complaints that fairly come within the definition of harassment, the union can combat those attempts to rewrite the procedure. Further, the union can both press management and encourage targets to address harassment at its earliest stages, perhaps before it rises to the level of unlawful harassment. Stopping harassment early is of benefit to all—the target suffers less, the harasser avoids the most serious discipline, and the employer loses less productivity. With union protection from retaliation, employees may be more likely to step forward to stop even low-level harassment. The union can also facilitate employee caucuses and information sharing, both to support women who are targets and to ensure that systemic problems are not being swept under the rug with individual resolutions.

In addition to aiding in resolution of sexual harassment complaints, the union can help construct a workplace culture in which discriminatory harassment is not tolerated. Workplace culture is an important determinant of harassment. The culture is not only created by management, it is also shaped by the employees and the union. The union can affect, if not transform, the culture by actively campaigning against harassment. Pronouncements from union officials, training, speaking out directly to harassers, actively supporting women who complain, negotiating a procedure for mediation or other informal resolution, and refusing to defend harassers all will contribute to a climate that is intolerant of harassment. Further, in shaping the climate, unions can help create culture that is not sanitized of all references to sex or all romantic relationships among employees, but rather a nondiscriminatory culture of equality. Finally, as a clearinghouse of information about harassment, the union can identify and address systemic problems.

Unions are not the solution to all sexual harassment, of course. Unions represent less than 10% of the private sector work force and only about 37% of public sector workers.<sup>264</sup> They can help to reduce harassment in the union sector, however, among the employees they represent and even among those they do not. Their efforts may help expand the zone of representation, extending their influence beyond current boundaries, and may encourage other collective efforts to combat harassment.

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264. JOSEPH R. GRODIN ET AL., *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS I* (2004).

*G. Thinking Outside the Box—Attacking Harassment in the Nonunion Workplace*

The efforts of unions to combat harassment need not be limited to the unionized workplace. Because harassment is such a ubiquitous problem, unions might improve their image and increase their relevance by launching a major campaign to eliminate harassment in conjunction with existing organizations dealing with workplace rights.<sup>265</sup> Such a campaign could build on existing efforts to address harassment.<sup>266</sup> A coalition of organizations dedicated to ending harassment, which includes unions, could support collective efforts by workers battling harassment in particular workplaces, as well as legal action where necessary.

The labor movement would bring particular strengths to a coalition of anti-harassment organizations. Labor unions have experience organizing workers and representing them in grievance procedures. Their trained representatives know how to investigate, gather evidence, put together a persuasive argument, and resolve complaints. They have relationships with experienced attorneys interested in representing workers who want to take legal action. Additionally, unions are knowledgeable about effective tactics to place economic pressure on recalcitrant employers using boycotts, strikes, picketing, and publicity campaigns. Thus, a coalition that includes unions could provide education about rights, access to legal representation, and assistance in structuring collective responses to harassment. In addition, the coalition could collect data, engage in research designed to lead to policy changes, and support legislative change.

Unions are increasingly targeting resources to organizing.<sup>267</sup> Utilizing some of these resources for fighting against sexual harassment in nonunion workplaces may draw workers to the unions for assistance, providing an

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265. Potential partners include the following organizations: 9 to 5, National Association of Working Women, <http://www.9to5.org/rights/> (last visited Feb. 20, 2006) (describing campaign against sexual harassment); National Partnership for Women and Families, <http://www.nationalpartnership.org/Default.aspx?tabid=132> (last visited July 11, 2005) (describing efforts to combat sexual harassment); National Employment Law Project, <http://www.nelp.org/index.cfm> (last visited July 11, 2005) (advocating for the working poor); and National Organization for Women, <http://www.now.org/issues/wfw/summary.html> (last visited July 11, 2005) (describing NOW's Women-Friendly Workplace and Campus Campaign that targets sexual harassment). The coalition could include other organizations that have been established to combat harassment. *See supra* note 88.

266. *See supra* text accompanying note 261.

267. *See AFL-CIO Adopts Set of Reforms Focused on Organizing, Political Action*, DAILY LAB. REP. No. 143, July 27, 2005, at AA-2 (describing AFL-CIO's increased focus on organizing); *Split in AFL-CIO Said Likely to Generate Additional Organizing Drives, Union Activism*, DAILY LAB. REP. No. 144, July 28, 2005, at AA-2 (describing the Change to Win Coalition's focus on organizing and predicting an increase in organizing generally). Of course, the split in the labor movement will reduce the resources of the AFL-CIO.

opportunity for organizing more broadly.<sup>268</sup> While offering resources to women confronting harassment in unorganized workplaces will not necessarily draw those women into union membership, it offers a vehicle for making the transition.<sup>269</sup> The AFL-CIO's increasing support for immigrant rights offers a model that may guide the construction of an effective campaign against sexual harassment in the workplace.<sup>270</sup> Any coalition, however, should be open to exploring various ways to attack harassment, listening carefully to the women involved and responding to their needs and concerns. This model of organizing from the ground up, rather than the top down, may draw women to long-term commitments to the labor movement.

## V. Conclusion

Fighting against sexual harassment "fits squarely what unions are all about: promoting dignity, equality, and respect for all workers."<sup>271</sup> Despite that, unions have not been leaders in combating harassment. The gendered culture of most unions is a likely explanation for their failure to address effectively this very important issue of workplace dignity.<sup>272</sup> It is past time for unions to make serious efforts to eliminate workplace harassment. For many reasons, it is not just in the self interest of unions. It is the right thing to do. Further, unions can make a real difference, for their efforts can address some of the obstacles that have impaired employer attempts to eliminate harassment. I do not suggest that it is an easy task to take on the cause of harassment, at least in some unions. But if unions are not to become increasingly irrelevant, they must transform themselves into organizations that appeal to the workers of the twenty-first century. Taking sexual harassment seriously is a step in that direction. Those who believe in the dignity of workers and the importance of unions in our democratic society can only hope that unions will recognize their responsibility and step up to the plate.

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268. For an interesting analysis of the relationship of organizing and legal representation, see generally JENNIFER GORDON, *SUBURBAN SWEATSHOPS* (2005) (discussing the Workplace Project, a membership organization of Latino workers on Long Island that operated a legal clinic, and the challenges faced by the organization along with the debates about the appropriate role of the clinic in organizing workers).

269. *Id.* at 300-01. As Gordon notes, the relationship between legal representation of individuals and participation in collective action is complex and fraught with tensions. *Id.*

270. *Id.* Indeed, a campaign against sexual harassment might later expand to a campaign against all workplace harassment, dovetailing with the increased support for immigrant rights.

271. BRAVO & CASSEDY, *supra* note 180, at 122.

272. See *supra* text accompanying note 3.