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UNEMPLOYMENT COMPENSATION BENEFITS: PART OF A BALANCED PACKAGE OF RELIEF FOR SEXUAL HARASSMENT VICTIMS

*Meri Arnett-Kremian**

Although sexual harrassment was once a topic discussed so rarely as to be almost taboo, it now is subject to much analysis. Books and articles in magazines and professional journals have helped define the parameters of the problem, treating it both as a sociological phenomenon and as a legal issue.[1] Articles discussing the legal aspects of sexual harassment tend to concentrate exclusively on the arsenal of litigation weapons available to a potential plaintiff, despite the fact that the vast majority of women who experience harassment will choose not to sue, and those who do will often wait years before they are compensated. Although sexual harassment is frequently a cause of women's unemployment, one avenue of relatively immediate, partial redress which has been commonly overlooked is unemployment compensation.[2]

This article reviews the comprehensive legal relief available to

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1. *See, e.g.*, C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979). *See also* Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1979, at 217; *Solving Your Problem: Sexual Harassment on the Job*, MADEMOISELLE, Oct. 1979, at 116; Somers & Clementson-Mohr, *Sexual Extortion in the Workplace*, THE PERSONNEL ADMINISTRATOR, Apr. 1979, at 23.

2. *But see Unemployment Compensation Benefits for the Victim of Work-Related Sexual Harassment*, 3 HARV. WOMEN'S L.J. 173 (1980) (focusing on unemployment compensation primarily in isolation from other remedies available to victims of sexual harassment; also discussing Title VII case law as it developed through early 1979).

sexual harassment victims whose claims are cognizable within the existing statutory and common-law framework.[3] To address a victim's need for interim financial relief after being fired or constructively discharged as a result of sexual harassment, this article advocates filing unemployment benefit claims. It sets forth the principles on which unemployment compensation should be made available to victims of sexual harassment and briefly examines the consequences of filing a claim for unemployment benefits and subsequently pursuing remedies based on common-law or statutory grounds. In order to effectively address the sexual harassment victim's need for comprehensive legal redress, it is necessary first to define the underlying problem, the reason for its existence, and the difficulties inherent in resolving it.

I. SEXUAL HARASSMENT: THE NATURE OF THE PROBLEM[4]

Sexual harassment in employment has been characterized as any attention of a sexual nature which has the effect of making a woman uncomfortable while performing her job, impeding her ability to work, or interfering with her employment opportunitites.[5] Spe-

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3. The discussion of legal theories is not intended to advocate one method, but rather to explain the foundations of each. Although the author would prefer to see victims of sexual harassment pursue any available federal and state law claims against employers who fail to prevent or remedy sexual harassment, it is recognized that, for many reasons, not all potential plaintiffs will elect to file charges or lawsuits.

4. Although sexual harassment has been a topic of public concern and debate for a relatively short period of time, it is known to have existed since the early 19th century. *See* THE FACTORY GIRLS 80-83 (P. Foner ed. 1977). In testimony before a House Subcommittee investigating sexual harassment in the federal government, one woman noted:

> From the early 19th century onward sexual harassment in the workplace has been one of those conditions which working women have learned to expect. . . . Early reactions to this workplace hazard were divided into individual and group response. . . . Those who saw sexual harassment as an individual problem (*i.e.*, one's personal bad luck) were inclined to suffer the abuse in silence. Those who saw it primarily as a "social" problem (*i.e.*, a method of driving women out of the labor force or of reinforcing their feelings of powerlessness) began organizing around the issue. In the forefront of those efforts were unions, protective associations and settlement house organizations. Out of these early organizing efforts came a drive for protective legislation for women workers which began even before the Civil War. The focus of the legislative drive was upon the physical and "moral" safety of female workers. However, the laws were later overturned and in the 1870's a second wave of agitation for protection legislation began again — this one surfacing periodically up until the present day.

Hearings on Sexual Harassment in the Federal Government Before the Subcomm. on Investigations of the Comm. of Post Office and Civil Service, 96th Cong., 1st Sess. 38, 39 (1979) (testimony of Mary Ann Largen, Director, New Responses, Inc.) (citations omitted).

5. *See Hearings Before Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. 465, 512 (1981) (testimony of Karen Sauvigne, Working Women's Institute) [hereinaf-

cific behavior encompassed by the term includes stares, physical contact, the telling of off-color stories and jokes which are degrading to women, the display of pornography, obscene gestures, innuendoes, direct propositions, and sexual assaults.[6] The harasser is commonly a manager or supervisor[7] but may also be a co-worker, client, or customer.[8]

Sexual harassment, whatever its form, is a coarse exhibition of power in the employment relationship. The harasser may use the leverage inherent in his superior employment status to demand a more or less explicit exchange; the woman must be sexually acquiescent or face employment retaliation ranging from a refusal to hire to outright firing. Other common sanctions include demotion, salary cuts, assignment of less favorable tasks, disciplinary layoffs, constant criticism, unwarranted reprimands, or unfavorable evaluations for inclusion in the woman's personnel file.[9] Alternatively, the offender may propose that the female employee trade sexual favors for employment benefits or greater job opportunities.[10]

In some cases, however, the harassment is not associated with specific penalties or promises of benefits.[11] Instead, a man or group of men may wage a form of psychological warfare, combining persistent innuendoes or minor assaults with a subliminal threat of forced sexual relations. In these situations, the "aggressor" never directly moves to consummate the sexual transaction at which he hints. He plays with his victim and apparently derives satisfaction

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ter cited as *Hearings*].

6. *Id.* at 519.

7. In sexual harassment cases pending in Equal Employment Opportunity Commission (EEOC) headquarters in 1981, 106 of the 118 cases for which substantiating evidence of harassment existed involved acts perpetrated by "supervisors or other management officials." *Hearings, supra* note 5, at 336, 342 (testimony of J. Clay Smith, Jr., Acting Chairman, EEOC).

8. *See* C. MACKINNON, *supra* note 1, at 28.

9. Plaintiffs have alleged a variety of sanctions. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (abolition of position); Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977) (demotion and termination); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (unwarranted reprimands, refusal of routine supervision which made job performance impossible, dismissal for poor work performance).

10. Regulations issued by the EEOC suggest that if a woman trades sexual favors for employment benefits, other workers may be able to complain that they suffered discrimination under Title VII. *See* 29 C.F.R. § 1604.11(g) (1982).

11. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Cummings v. Walsh Constr. Co., 561 F. Supp. 872 (S.D. Ga. 1983); Brown v. City of Guthrie, 22 FAIR EMPL. PRAC. CAS. (BNA) 1627 (W.D. Okla. 1980).

from his control of the situation and his victim's apparent discomfort. He does not seek explicit acceptance of his sexual overtures; he merely wants the woman to continue to tolerate his behavior.[12]

The lack of an identifiable sanction against the woman in this last, more diffuse, form of sexual harassment does not lessen its impact or seriousness. The constant stress of fending off advances combined with the fear that the situation may escalate, ultimately makes the woman's worklife unbearable. She is then forced to either quit or redouble her efforts to cope effectively with the situation. If she chooses to remain on the job, she cannot become visibly intolerant of the overtures. If she does, she may be fired for her "attitude problems" or her inability to get along with management or co-workers. Unless a woman is prepared to risk the embarrassment and scrutiny associated with exposing harassment, she may be unable to wage a successful legal action, given the legal system's reluctance to impose liability on employers whose fault lies in not having prevented sexual harassment.[13] Moreover, it appears that some courts deem it necessary to tolerate some level of sexual harassment in the workplace as an inevitable consequence of the proximity of persons of different genders.[14]

It is also obvious that, to some extent, our society facilitates the existence of sexual harassment by failing to condemn it. Research indicates that sexual harassment is so widespread that it is almost considered a behavioral norm.[15] Studies have shown that sexual harassment occurs across lines of age, race, class, occupation, sal-

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12. *See* Safran, *supra* note 1, at 217. According to MacKinnon, "[s]ince communicated resistance means that the woman ceases to fill the implicit job qualifications, women learn, with their socialization to perform wifelike tasks, ways to avoid the open refusals that anger men and produce repercussions. This requires playing along, constant vigilance, skillful obsequiousness, and an ability to project [a posture of openness to male sexual demands]." C. MACKINNON, *supra* note 1, at 44-45.

13. *See infra* notes 47-54 & 94 and accompanying text.

14. Early district court decisions rejected claims that any form of sexual harassment constituted gender-based discrimination cognizable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1981). *See, e.g.*, Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979); Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). These early decisions generally reflected a belief that women's complaints regarding harassment were more appropriately characterized as personal incidents or natural expressions of male and female sexuality than as discrimination based on sex.

15. *See Sexual Harassment and Labor Relations*, 107 LAB. REL. REP. (BNA) 23-30 (1981); Safran, *supra* note 1, at 217.

ary, and marital status.[16] Sexual harassment is an experience common to a large and diverse population of working women; therefore, it can be analyzed as a gender-based, systemic abuse worthy of legal attention as sex discrimination.[17]

The apparent systemic nature of harassment undercuts the supposition that it occurs because of sexual attraction, or a certain "chemistry" between two individuals.[18] Sexual harassment is, by definition, the antithesis of mutual attraction since the inherent coercion robs the woman of her ability to freely choose to enter into a relationship. The transaction lacks mutuality and the woman lacks the socially-ascribed power to force her disapproval to be taken seriously; therefore, she is generally powerless to combat its occurrence without the leverage of management intervention.

The mere existence of sexual harassment is predicated on an inequality of power between men and women in the workplace.[19] Interestingly, it is this basic inequality of power that allows sexual harassment to be both pervasive and invisible. Women typically work in secretarial, clerical and other support-role occupations where advancement, both in terms of wages and status, is dependent upon the good will of the supervisor instead of the quality of the work itself.[20] Because there is frequently no written job description for such jobs, bosses may be granted enormous latitude in structuring the conditions of a woman's employment and the nature of the work relationship. For example, employment superiority is often established in this culture through the use of familiarities which a subordinate must tolerate but cannot reciprocate.[21] Thus, to a certain extent, sexual harassment is unnoticeable because of its commonality. It is a near-ritual reflection of men's power over women in employment.

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16. *See Hearings*, *supra* note 5, at 518 (testimony of Karen Sauvigne, Working Women's Institute).

17. C. MACKINNON, *supra* note 1, at 27.

18. Since the individual behavior constituting sexual harassment may differ from traditional courtship behavior only in the critical element of reciprocity, sexual harassment acts are often mistaken by casual observers as evidence of a romantic liaison between two individuals.

19. C. MACKINNON, *supra* note 1, at 47-55. *See generally* C. BIRD, BORN FEMALE: THE HIGH COST OF KEEPING WOMEN DOWN (1970); S. DEBEAUVOIR, THE SECOND SEX (1952).

20. C. MACKINNON, *supra* note 1, at 29.

21. These include touching, teasing, informal demeanor, using first names or nicknames, and requesting personal information. Whether or not the familiarities become such an invasion of the woman's privacy and integrity that they constitute sexual harassment is a matter of perception, but it is clear that some level of familiarity by bosses is taken for granted.

It is often very difficult for victims to expose their victimization to others. Because harassment is sexual in nature, victims tend to feel embarrassed and ashamed to have been singled out and humiliated. Since many women are economically compelled to work, a woman may feel compelled to remain silent because of the man's threatened retaliation if she exposes him. By choosing to remain silent, however, the woman ultimately pays a price which may include loss of self-esteem, psychosomatic illness, emotional breakdown, and isolation.[22]

Sexual harassment has economic as well as psychological costs. A 1979 Working Women's Institute study found that almost two-thirds of the women who experienced sexual harassment were fired or forced to quit their jobs as a direct result of it.[23] Thus, sexual harassment directly contributes to the concentration of women in low-status, low-pay jobs by increasing the turnover rate. Because they have less seniority than men, women are less likely to accrue the benefits commonly associated with job longevity, such as increased vacation time, eligibility for training programs, promotions, and qualification for participation in such fringe benefits programs as stock purchase and vested retirement plans.

Sexual harassment also has indirect economic consequences for female workers. One obvious consequence is the inhibition of women's career aspirations. Sexual harassment is sometimes used as an intentional weapon to keep women out of nontraditional occupations such as coal mining, shipbuilding, or construction. Not too surprisingly, these are occupations with much higher prevailing wages than those in jobs traditionally held by women.[24] Because it tends to reinforce the socially-ascribed "sex object" role, sexual harassment also diminishes the possibility that women will be perceived by men as valuable, contributing members of the workforce. In some cases, it may amount to a masculine reign of terror designed to force women to either stay within the boundaries of stereotypical feminine behavior and occupational choices or pay a heavy price.

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22. The data from a survey by the Working Women's Institute indicates that 78% of the respondents experienced anger, fear, alienation, humiliation, shame, embarrassment, and feelings of helplessness in the wake of harassment. *See* C. MACKINNON, *supra* note 1, at 47 (citing a 1975 Survey by the Working Women's Institute).

23. *Hearings*, *supra* note 5, at 513 (testimony of Karen Sauvigne, Working Women's Institute).

24. *Id.* at 514.

II. Overview of Legal Redress for Sexual Harasment through Litigation

A woman faced with persistent sexual harassment in her employment environment theoretically has several remedies available to achieve legal redress for her maltreatment. The remedy most commonly recommended is an action for sex discrimination under Title VII of the Civil Rights Act of 1964,[25] assuming that the employment falls within the purview of that statute.[26] Except in cases of discrimination in federal employment,[27] Title VII is not the exclusive remedy open to victims of sexual harassment. Other causes of action might be based on other federal statutes,[28] collective bargaining agreements,[29] traditional common-law contract theory,[30] or tort theories such as battery or intentional infliction of emotional distress.[31] In addition, some states have enacted legislation explicitly creating a civil cause of action for discrimination based on

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25. Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-16 (1981) (as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 (1972) (codified as amended at 42 U.S.C. §§ 2000e-2000g (1981)).

26. Prior to the 1972 amendments, Title VII applied only to employers with 25 or more employees and unions with 25 or more members. The amendments reduced the number of employees required for coverage to 15. Additionally, the amendments extended coverage to state and local governments, governmental agencies, educational institutions, political subdivisions, and departments and agencies of the District of Columbia (with the exception of elected officials, their personal assistants, and their immediate advisors). Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (1981) (amended in 1972 by Pub. L. No. 92-261 § 2(2)).

27. Title VII is intended to preempt all other statutory or common-law causes of action for employment discrimination against the federal government. The United States Supreme Court held in Brown v. General Servs. Admin., 425 U.S. 820, 832-33 (1976):

> The balance, completeness, and structural integrity of §717 are inconsistent with the petitioner's contention that the judicial remedy afforded by §717(c) was designed merely to supplement other putative judicial relief. His view fails, in our estimation, to accord due weight to the fact that unlike these other supposed remedies, §717 does not contemplate merely judicial relief. Rather, it provides for a careful blend of administrative and judicial enforcement powers.

28. *See* United Packinghouse Workers Int'l Union v. NLRB, 416 F.2d 1126 (D.C. Cir.) (NLRB has concurrent jurisdiction to deal with some forms of employment discrimination by virtue of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1964)), *cert. denied,* 396 U.S. 903 (1969); Woerner v. Brzeczek, 519 F. Supp. 517 (N.D. Ill. 1981) (cause of action for sexual harassment as sex discrimination based on 42 U.S.C. § 1983).

29. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (arbitration is concurrent alternative remedy for employment discrimination). *See also* Marmo, *Arbitrating Sex Harassment Cases,* 35 Arb. J. 35 (1980); White, *Job Related Sexual Harassment and Union Women: What Are Their Rights?* 10 Golden Gate U.L. Rev. 929 (1980).

30. *See generally* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (discussing breach of employment contract).

31. Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523 (D.D.C. 1981); Skousen v. Nidy, 90 Ariz. 215, 367 P.2d 248 (1961).

sex.[32] Others, through specific statutory provisions, regulations or executive orders, have made it clear that sexual harassment is a form of sex discrimination actionable under state law.[33]

An attorney advising a client who has experienced sexual harassment should explain each applicable form of action and encourage her to pursue such remedies if there is a reasonable chance of success on the merits and if the potential plaintiff is willing to undertake the suit. A client should be cautioned, however, that the process of waging a lawsuit is a lengthy one and that financial redress, even in a meritorious case, can take years to achieve.[34] Victims of sexual harassment frequently experience some period of unemployment; therefore, the attorney should explain that under most state employment compensation statutes a form of almost immediate, short-term financial relief is available to women who are fired or quit their jobs because of unreasonable treatment, including sexual harassment.

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32. *See, e.g.*, WASH. REV. CODE ANN. § 49.60.030(1) (Cum. Supp. 1983) (provides generally for the right to be free from discrimination on the basis of sex, including but not limited to, the right to obtain and hold employment without discrimination); *id.* at § 49.60.030(2) (provides for a right of action to recover damages and attorney's fees as well as injunctive relief for violations).

33. See, *e.g.*, Minnesota Human Rights Act, MINN. STAT. ANN. § 363.01(10a) (West Supp. 1983), which provides:

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accomodations or public services, education, or housing;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

See also Sexual Harassment and Labor Relations, supra note 15, at 17-20 & 67-72 (compiling state laws).

34. *See Hearings on Sexual Harassment in the Federal Government Before Subcomm. on Investigations of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 69 (1979) (statement of Diane Williams, plaintiff in Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978)).

A. *Statutory Remedies for Employment Discrimination Based on Sex*

1. Title VII as a Remedy

Sexual harassment involves treating women differently than men in the workplace; therefore, it is appropriate to attack the problem through employment discrimination laws. Although federal courts initially refused to classify sexual harassment as discrimination actionable under Title VII,[35] it is now established that a cause of action is cognizable under section 703 of the Act in some factual situations. The parameters of the cause of action remain in a state of flux. No consensus exists concerning the circumstances in which an employer will be held liable for the acts of supervisory personnel, co-workers, or non-employees.[36]

The early cases recognizing sexual harassment as actionable sex discrimination considered claims that plaintiffs had been deprived of a tangible job benefit because of their failure to acquiesce to sexual demands made by a supervisor.[37] Most courts insisted that employers would be held liable for sexual harassment by supervisors only upon proof that the employer had knowledge of the harassment and failed to remedy the situation promptly. For example, the Third Circuit Court of Appeals in *Tompkins v. Public Service Electric & Gas Co.*[38] held:

> Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status — evaluation, continued employment, promotion, or other aspects of career development — on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after learning of the harassment.[39]

Courts initially rejected the theory that Title VII could be violated where the sexual harassment created a hostile and discrimi-

35. *See supra* note 14.

36. Ferguson v. E.I. duPont de Nemours & Co., 560 F. Supp. 1172, 1198-99 (D. Del. 1983).

37. *See* cases cited *supra* note 9.

38. 568 F.2d 1044 (3d Cir. 1977).

39. *Id.* at 1048-49. *But see* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (holding that the employer without actual or constructive knowledge may be liable for sexual harassment by a supervisor even if the supervisor's conduct contravenes company policy under the doctrine of respondeat superior).

natory work environment even though no tangible job benefit was affected,[40] particularly where a co-worker was responsible. More recently, however, some courts have recognized that sexual harassment may amount to discrimination where the work atmosphere is made intolerable.[41] For example, in *Bundy v. Jackson*[42] the D.C. Circuit Court of Appeals recognized that the definition of actionable sexual harassment must be enlarged to include "discriminatory environment" cases.[43] The failure to legally recognize the discriminatory impact of harassment which poisoned the work environment would have left a number of victims without a remedy under Title VII. But more perniciously, it would have allowed supervisors to harass female employees without penalty under federal law as long as the sexual harassment was conducted with sufficient subtlety.[44]

In an effort to provide a conceptual framework for the treatment of sexual harassment and to encourage greater judicial consistency in the treatment of different forms of harassment, the Equal Employment Opportunity Commission (EEOC) published *Guidelines on Sexual Harassment* in November 1980. The guidelines define sexual harassment more broadly than it has previously been defined by most federal courts, and state:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual,

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40. *See, e.g.*, Clark v. World Airways, 24 FAIR EMPL. PRAC. CAS. (BNA) 305, 307 (D.D.C. 1980) (sexual harassment actionable under Title VII only when employer retaliates for rebuffed advances); Smith v. Rust Eng'g Co., 18 EMPL. PRAC. DEC. (CCH) ¶ 8698, at 4784 (N.D. Ala. 1978).

41. *See* Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981); Brown v. City of Guthrie, 22 FAIR EMPL. PRAC. CAS. (BNA) 1627, 1631 (W.D. Okla. 1980).

42. 641 F.2d 934 (D.C. Cir. 1981).

43. *Id.* at 943.

44. The *Bundy* court recognized that in effect:

> The employer [could] thus implicitly and effectively make the employee's endurance of sexual intimidation a "condition" of her employment. The woman then faces a "cruel trilemma." She can endure the harassment. She can attempt to oppose it, with little hope of success, either legal or practical, but with every prospect of making the job even less tolerable for her. Or she can leave her job, with little hope of legal relief and the likely prospect of another job where she will face harassment anew.

Id. at 946.

> or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[45]

The regulations recognize that sexual harassment may become a chronic, unbearable annoyance which makes continued employment unreasonably burdensome, even if keeping one's job is not technically tied to acceptance or rejection of a man's advances. Such a situation may arise when the male involved is a co-worker, client, or customer who lacks the power to directly affect a woman's retention, promotion, or assignments.[46]

In the fellow-employee situation, the EEOC regulations provide that the employer is liable for sexual harassment only where it knew or should have known of the offensive conduct and failed to take immediate, appropriate corrective action.[47] Thus, because a woman generally cannot rely on other workers to expose harassment, the regulations effectively mandate that a victim must complain to her employer in order to demonstrate in a subsequent lawsuit that her employer had knowledge of the offensive behavior but failed to remedy the problem. However, when the man engaging in harassment is in a position of power within the company, the regulations establish absolute employer liability "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."[48]

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45. EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a) (1982) .

46. However, it can also arise in the context of harassment by a supervisor or other management official. *See, e.g., Bundy* 641 F.2d 934.

47. 29 C.F.R. § 1604.11(d) (1982). This treatment is consistent with judicial treatment of racial discrimination by co-workers. *See* Chudacoff, *New EEOC Guidelines on Discrimination Because of Sex: Employer Liability for Sexual Harassment Under Title VII,* 61 B.U.L. REV. 535, 545-46 (1981).

48. 29 C.F.R. § 1604.11(c) (1982). This imposition of vicarious liability is consistent with the holding in Miller v. Bank of America, 600 F.2d 211, 213 (9th Cir. 1979), but at variance with the actions taken by most courts when confronted with the issue of sexual harassment. One commentator has argued:

> [C]ourts have uniformly found, except in sexual harassment cases, that any discriminatory act committed by an employee in his or her authorized capacity falls within the employment scope. . . . As in the common law, lack of employer knowledge has not barred imposition of vicarious liability. Nor have courts precluded vicarious liability because an employer had a policy against discrimination. . . . Although employers do not ordinarily authorize supervisors to harass other employees, they do authorize supervisors to oversee employees in their daily work and to make specific hiring, firing, and promotion decisions. In Title VII actions, vicarious liability does not hinge on whether the employer authorized the specific unlawful employment practice or

Whether the courts will ultimately adopt the liability scheme set forth in the EEOC guidelines is unknown. The Delaware District Court in *Ferguson v. E.I. duPont de Nemours & Co.*[49] expressly rejected the guideline that creates vicarious liability for employers in the hostile environment case involving supervisory personnel. Instead, it substituted the earlier *Tomkins*[50] standard, which imposed liability only where the employer had actual or constructive knowledge of the harassment and failed to implement remedial action. The court stated that the EEOC guidelines impose too onerous a burden and that employers should not be held liable if they seek to alleviate hostile environments by methods such as strict and prompt remedial measures and strictly enforced, well-known company policies.[51] The Fourth Circuit Court of Appeals in *Katz v. Dole*[52] adopted a similar standard, stating that the plaintiff must show that the employer failed to effectuate prompt remedial action upon learning of the harassment; however, in order to rebut the plaintiff's proof and avoid liability under Title VII, the court held that an employer on notice of sexual harasment must do more than indicate the existence of an official policy against such harassment.[53] Thus, where an employer's supervisory personnel manifest unmistakable acquiescence in or approval of the harassment, the burden on the employer seeking to avoid liability is especially heavy.[54]

Although the parameters of a Title VII action are clearly unsettled, for women whose experiences can be reduced to claims cognizable in the existing conceptual framework, Title VII provides a relatively comprehensive legal remedy. Although recovery often takes years to achieve, a wide variety of relief is available to successful plaintiffs. Title VII compensatory awards aim to make the victims of illegal discrimination whole, insofar as it is possible to do so. Lost pay, lost pension rights, lost benefits, or lost seniority

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whether it benefitted from the practice. Liability is premised on whether the employer authorized the act of hiring, firing, or supervising; it is this authorization which establishes the agency relationship and which results in imputation of the supervisor's unlawful employment practice to the employer.

Chudacoff, *supra* note 47, at 540-42.

49. 560 F. Supp. 1172 (D. Del. 1983).

50. *See supra* notes 38-39 and accompanying text.

51. *Ferguson*, 560 F. Supp. at 1198-99.

52. 31 FAIR EMPL. PRAC. CAS. (BNA) 1521 (4th Cir. 1983).

53. *Id.*

54. *Id.* at 1524.

must all be rectified, if they result from illegal discrimination.[55]

Although a court could order reinstatement in constructive discharge or termination cases, it will generally decline to do so because the situation has usually been rendered intolerable by the intense hostility which develops between the parties.[56] Where a plaintiff has tried, but failed to obtain suitable employment, she may be entitled to claim back pay dating from her resignation or firing; however, she must prove that she was unable to find comparable employment despite due diligence.[57] Where a sexual harassment victim continues to work for the same employer, it may be appropriate for the court to fashion injunctive relief.[58] In addition, a plaintiff's attorney may collect reasonable fees from the defendant to the extent that the plaintiff prevails.[59]

Title VII is not without practical problems and disadvantages, however, as a remedy for sexual harassment victims. For example, harassment by non-employees can interfere with an individual's work performance as completely as harassment by co-workers or supervisors, but it is more difficult for an employer to control such conduct by outsiders. Although the EEOC guidelines suggest that in some factual situations the courts might impose liability, federal courts are likely to be reluctant to impose liability upon employers where there is no practical ability to control the behavior of non-employees.[60] Such reluctance would leave some harassment victims

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55. *See* Thompson v. Sawyer, 678 F.2d 257, 290 (D.C. Cir. 1982). Among the items that courts have included in their awards are interest, overtime, vacation pay, medical benefits, and pension benefits that would have accrued to the plaintiff during the relevant time period. *See, e.g.*, Meyers v. ITT Diversified Credit Corp., 527 F. Supp. 1064, 1070 (E.D. Mo. 1981).

56. *See* Brown v. City of Guthrie, 22 FAIR EMPL. PRAC. CAS. (BNA) 1627, 1634 (W.D. Okla. 1980).

57. *Id.*

58. For example, in Morgan v. Hertz Corp., 542 F. Supp. 123 (W.D. Tenn. 1981), the court held that addressing sexually indecent comments to female employees was a form of sexual harassment and discrimination prohibited by Title VII of the Civil Rights Act of 1964 and that an injunction should be issued against the employer, its agents, servants and employees, restraining them from making these kinds of comments. The court was explicit as to the kind of comments it meant to proscribe. It said, "By [the making of sexually indecent comments] the Court means remarks such as 'Did you get any over the weekend?'" *Id.* at 128.

59. Brown v. City of Guthrie, 22 FAIR EMPL. PRAC. CAS. (BNA) at 1634.

60. Indeed, most courts are reluctant to hold an employer liable even for the conduct of its supervisors unless it had direct or constructive knowledge of the offensive conduct and failed to remedy it promptly and effectively. It is patently obvious that employers have more control over the conduct of supervisory personnel and employees than it has over customers and vendors, but as a practical matter, a sexual harassment victim will find the

without a remedy under Title VII. Other women have no remedy under Title VII because they work for employers with fewer than fifteen workers, which the statute prescribes as the minimum number of employees necessary in most instances to give the federal court jurisdiction to hear a Title VII action.[61]

2. State Law Actions for Discrimination

Women who have experienced sexual harassment can also file sex discrimination claims against employers under applicable state civil rights laws.[62] There are fewer cases that rely on state law violations, but there may be persuasive reasons to file a state law action. In some cases, the state civil rights act will cover employers with fewer than fifteen employees,[63] thus affording statutory coverage in cases involving small businesses not covered under Title VII. In addition, state anti-discrimination statutes may provide more comprehensive remedies than those awarded under Title VII. For example, the state of Washington allows a plaintiff to recover damages for psychological harm suffered.[64]

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experience debilitating regardless of the source. At least one court has implicitly recognized this, imposing liability on an employer who discharged a female employee who refused to wear a revealing uniform that could reasonably be expected to, and which the employer knew did, in fact expose her to sexual harassment when worn on the job. The court commented:

> The Court does not question an employer's prerogative to impose reasonable grooming and dress requirements on its employees, even where different requirements are set for male and female employees, when those requirements have a negligible effect on employment opportunities and present no distinct employment disadvantages. The prerogative to impose reasonable grooming and dress requirements, however, as this Court ruled in denying defendants' motion for summary judgment, does not mean that "an employer has the unfettered discretion . . . to require its employees to wear *any* uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative."

EEOC v. Sage Realty Corp., 24 FAIR EMPL. PRAC. CAS. (BNA) 1521, 1529 (S.D.N.Y. 1981) (quoting EEOC v. Sage Realty Corp., 22 FAIR EMPL. PRAC. Cas. (BNA) 1660, 1664 (S.D.N.Y. 1980) (motion for summary judgment)).

61. *See supra* note 26 and accompanying text.

62. *See, e.g.*, MINN. STAT. § 363.03 (Supp. 1983) (unfair discriminatory practices); WASH. REV. CODE ANN. § 48.60.030(1) (1981); WIS. STAT. ANN. § 111.31 (West 1982-83).

63. *See, e.g.*, D.C. CODE ANN. § 6-2201 (1981) (prohibits discrimination in virtually all employment, since the threshold for coverage is one employee). *See also* Maryland Human Relations Act, MD. ANN. CODE art. 49B, §§ 14-18 (1979). Virginia, unlike Maryland and the District of Columbia, has no statewide fair employment practices act.

64. In Ellingson v. Spokane Mortgage Co., 19 Wash. App. 48, 573 P.2d 389 (1978), the court held that actual damages recoverable under WASH. REV. CODE ANN. §48.60.030 (1981) include, but are not limited to, out-of-pocket losses, recovery of wage differential, and compensatory damages for mental anguish and emotional distress.

Cases predicated on state anti-discrimination statutes have yielded mixed results to date. In *Fletcher v. Greiner*,[65] a New York court held that no statutory cause of action was stated where a woman engaged in sexual intercourse with her employer because she feared her employment would be terminated if she refused to acquiesce.[66] The court held that the statutory protection of the anti-discrimination provisions could be afforded only where submission to sexual advances constituted a condition of employment and where the plaintiff had refused to submit.[67] By contrast, in *Continental Can Co. v. State*,[68] the Minnesota Supreme Court held that the state human rights act was violated where the employer had knowledge that a woman's co-workers were committing verbal and physical sexual harassment which made the employment environment intolerable to the victim, yet failed to take prompt and appropriate remedial action.[69]

It should be noted that if an attorney contemplates filing an action under state anti-discrimination statutes with related claims under tort and contract theories, the breadth of coverage afforded by state law should be carefully examined. In some recent cases, courts have held that a common-law claim of wrongful discharge cannot be maintained where state statutory remedies exist to protect employees from such abuses.[70]

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65. 106 Misc. 2d 564, 435 N.Y.S.2d 1005 (N.Y. Sup. Ct. 1980).

66. *Id.* However, the court found that there was more involved in the parties' relationship than sexual intercourse motivated by the woman's fear of termination. She had engaged in sexual intercourse with her employer for 14 years and had gotten a divorce from her husband because she was in love with her employer and hoped to marry him. *Id.*

67. *Id.* It is interesting to note that when the plaintiff refused to continue sexual relations, the employment was indeed terminated. It might be argued that, once a refusal to engage in sexual relations is made, if an employment consequence flows from the refusal, there is an actionable *quid pro quo* harassment claim.

68. 297 N.W.2d 241 (Minn. 1980).

69. The court cited the EEOC guidelines on sexual harassment by co-workers in its discussion of relevant authority. *Id.* at 248. The court noted:

> One of the purposes of the Act is to rid the workplace of disparate treatment of female employees merely because they are female. Differential treatment on the basis of sex is more readily recognizable when promotion or retention of employment is conditioned on dispensation of sexual favors. It is as invidious, although less recognizable, when employment is conditioned either explicitly or impliedly on adapting to a workplace in which repeated unwelcome sexually derogatory remarks and sexually motivated physical contact are directed at an employee because she is a female. . . . When sexual harassment is directed at female employees because of their womanhood, female employees are faced with a working environment different from the working environment faced by male employees.

Id.

70. *See, e.g.*, Zywicki v. Moxness Prods., 31 FAIR EMPL. PRAC. CAS. (BNA) 1348 (E.D. Wis.

B. *Common-Law Remedies for Sexual Harassment*

1. Actions Based on Contract Theory

When a woman is fired or constructively discharged as a result of sexual harassment, she may be able to prevail with a claim that her employer, by its conduct, breached her employment contract. In essence, the plaintiff would be asserting that she was discharged in bad faith and that the employer had a duty to discharge her only in good faith.

Although this approach makes sense on an intuitive level, it has not necessarily been accepted by state courts. Most women, and indeed most workers, are employed under unwritten employment contracts of unspecified duration. These contracts are customarily considered "at will," which generally means that either party can terminate the contract for any reason unless a statute or collective bargaining agreement prevents termination under particular circumstances. Because such a rule leaves an employee at the mercy of an employer's whim, many state courts have modified or carved out exceptions to the "terminable-at-will" doctrine.[71]

One such exception was created by the New Hampshire Supreme Court in *Monge v. Beebe Rubber*.[72] The plaintiff in *Monge* sought to recover damages for breach of her at-will employment contract, asserting that she had been discharged primarily because of her refusal to date her foreman. The court reasoned that the employer's interest in running a business as it sees fit must be balanced against the interest of the employee in maintaining employment. The court held that "termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."[73]

Other courts have established protection for at-will employees by creating a cause of action where discharge of an employee violates a clear mandate of public policy.[74] Because it is generally ac-

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1983); Wolk v. Saks Fifth Ave., Inc., 31 FAIR EMPL. PRAC. CAS. (BNA) 858 (W.D. Pa. 1983).

71. *See generally* Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

72. 114 N.H. 130, 316 A.2d 549 (1974).

73. *Id.* at 133, 316 A.2d at 551.

74. Such an action is based upon a quasi-tort theory. *See, e.g.*, Parnar v. Americana Hotels, Inc., ___ Hawaii ___, ___, 652 P.2d 625, 631 (1982) (holding that an employer would

cepted that sexual harassment constitutes a form of sex discrimination, it would be reasonable to argue, in a case where the factual pattern clearly fits within the existing Title VII or applicable state law framework, that a discharge based on sexual harassment was a violation of public policy. As noted previously, however, if state fair-employment laws provide adequate protection and redress, a claim under a contract theory may be barred by some courts.[75]

Even in states where a contract claim would not be barred, one aspect of breach of contract claims should always be considered when making a decision regarding the remedies to pursue. Although sexual harassment generates significant emotional distress in victims, damages for mental suffering are almost universally held to be improper in contract cases.[76] For example, even the *Monge* court[77] disallowed damages compensating the plaintiff for emotional distress. Clearly, an award of "actual damages," which includes only objectively verifiable damages such as lost wages and seniority, fails to wholly compensate the victim for the subjective injuries she sustains, including fright, humiliation, sense of powerlessness, and emotional trauma.

2. Claims Based on Tort Theories

By its very nature, sexual harassment involves a personal harm caused intentionally by another person; therefore, it fits well conceptually into a tort framework. Depending upon the kinds of be-

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be liable in tort where his discharge of an employee violates a clear public policy).

75. *See supra* note 70 and accompanying text.

76. *See, e.g.*, Carpel v. Saget Studies, Inc., 326 F. Supp. 1331 (E.D. Pa. 1971) (denying emotional distress damages in a suit based on an ordinary commercial contract because the harm complained of was negligently inflicted). The court quoted the RESTATEMENT OF CONTRACTS § 341 (1932), as adopted by Pennsylvania law, which states:

> In actions for breach of contract, damages will not be given as compensation for mental suffering, except where the breach was wanton or reckless and caused bodily harm and where it was the wanton or reckless breach of a contract to render a performance of such a character that the defendant had reason to know when the contract was made that the breach would cause mental suffering for reasons other than mere pecuniary loss.

326 F. Supp. at 1334.

It seems unlikely that a court would hold that a breach of an employment contract involving sexual harassment was one in which the defendant had reason to know when the employment was entered into that harassment would cause mental suffering. The issue is not the reality of mental suffering, but the court's willingness to impose on defendants the knowledge that sexual harassment in employment (always) creates emotional trauma in victims.

77. *See supra* notes 72-73 and accompanying text.

havior constituting harassment, a complaint often may be framed for intentional infliction of emotional distress or assault and battery. Less commonly, a plaintiff might allege other tortious conduct, including intentional interference with contractual relationships, fraud and deceit, false imprisonment, slander, libel, and invasion of privacy.[78] These actions may be combined and waged concurrently with other actions, including Title VII claims.[79]

Tort actions for sexual harassment, unlike contract actions, afford the victim the opportunity to recoup damages based upon her emotional suffering. Tort remedies focus on the wrong done to an individual, attempting to compensate victims monetarily for both physical and psychological injuries attributable to the intentional

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78. For a more comprehensive discussion of some of these actions, see Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879 (1980) [hereinafter cited as *Practitioner's Tort Guide*].

79. In Guyette v. Stauffer Chem. Co., 518 F. Supp. 521 (D.N.J. 1981), the court discussed the test for pendent jurisdiction. It noted:

> The test for pendent jurisdiction, as set forth by the Supreme Court in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130 (1966), requires a two-step determination: first, whether the court has power over the state law claims; and second, whether the court in its discretion should entertain them. . . . A court has power if: (1) there is a federal claim with "substance sufficient to confer subject matter jurisdiction on the court;" (2) the state and federal claims "derive from a common nucleus of operative fact" and (3) "plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." . . .
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> If the power has been found to exist the court's discretion is guided by a number of factors. The [principal] justifications for the exercise of pendent jurisdiction are judicial economy, convenience and fairness to litigants; "if these are not present a federal court should hesitate to exercise jurisdiction over state claims." . . . Moreover, if "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought," the state claims may be left for state court resolution. A close relationship between state law claims and questions of federal policy creates a strong argument in favor of the exercise of pendent jurisdiction. Factors "independent of jurisdictional considerations," however, "such as the likelihood of jury confusion in treating divergent theories of legal relief," may warrant dismissal of the state claims. . . . Needless decisions of state law are to be avoided as a matter of comity. . . . The Supreme Court has held, however, that "it is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of those claims."

Guyette, 518 F. Supp. at 523-24 (citations omitted).

The *Guyette* court held that pendent state claims for assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, gross negligence, and intentional interference with contractual relations should not be dismissed in a Title VII proceeding, since evidence necessary to prove Title VII harassment violations overlapped that evidence necessary to prove the underlying state law torts to a significant degree. *Guyette*, 518 F. Supp. at 524-27.

or negligent conduct of the wrongdoer.[80] The defendant may also be liable for punitive damages in cases where his wrongdoing was especially outrageous and reprehensible.[81]

In general terms, a battery is committed when there is an intentional contact with a person's body and that contact was neither consented to nor privileged. As one commentator has noted:

> A cause of action for battery is established when it is shown that the man did some act "intending to cause a harmful or offensive contact or apprehension of a harmful or offensive contact" and a "harmful contact . . . directly or indirectly results." Contact with a woman's body which "offends a reasonable sense of personal dignity" is actionable. The contact itself need not cause physical injury. If the contact results in injury to a woman's feelings, a cause of action for battery is established. Actions such as grabbing a woman worker, attempting to kiss or embrace her, or touching parts of her body in a sexually suggestive manner constitute a battery.[82]

The tort of assault is closely linked with the concept of battery but may involve no actual contact. To constitute the tort of assault, a person's conduct must elicit in the victim a reasonable apprehension or belief that the person has the apparent ability and opportunity to carry out the threat immediately. The injury which results is psychological and includes fright and humiliation.[83]

The realities of sexual harassment fit well conceptually into the assault and battery framework. One difficulty inherent in successfully utilizing this theory, however, lies in convincing a jury that the man's actions were neither desired nor provoked by the victim. To find that a battery has occurred, the jury must be convinced that the touching was inflicted upon an unconsenting victim. Furthermore, the standard for measuring whether an assault has occurred is reasonableness, that is, whether the conduct would be "offensive to an ordinary person not unduly sensitive as to his dig-

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80. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-65 (4th ed. 1971).

81. *Id.* § 9, at 34-37. The defendant's liability for harm resulting from his conduct extends, as in most other intentional torts, to consequences which he did not intend, and could not reasonably have foreseen. This "take your victim as you find her" philosophy is founded in the belief that it is better for unexpected losses to fall upon the intentional wrongdoer than upon his innocent victim. *Id.* § 9, at 35.

82. *Practitioner's Tort Guide, supra* note 78, at 898-99 (quoting RESTATEMENT (SECOND) OF TORTS §§ 13, 19 (1977).

83. W. PROSSER, *supra* note 80, § 10, at 38-39.

nity."[84] A common reaction of third parties to allegations of sexual harassment is that the victim is overly sensitive to advances which were meant only in jest. Individual jurors may harbor similar reactions, making a verdict for the plaintiff difficult to win.

A similar subjective proof problem arises in actions for intentional infliction of emotional distress. This tort, as defined by the *Restatement (Second) of Torts*, allows recovery for emotional disturbance where the defendant's conduct has exceeded all possible bounds of decency and is regarded as intolerable in a civilized society.[85] Liability "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[86] The basic test for liability requires a plaintiff to demonstrate outrageous conduct by the defendant, undertaken with either the intent to cause or reckless disregard for the probability of causing emotional distress. Further, the plaintiff must suffer severe or extreme emotional distress which is actually and proximately caused by the defendant's outrageous conduct.

In some states, a victim can recover damages for intentional infliction of emotional distress without proving that she sustained a physical injury,[87] but other states require proof of some physical consequences.[88] However, as one commentator has noted:

> Where physical harm results from the acts of the defendant, a cause of action will be easier to establish. Physical harm includes the physical consequences of shock to the nervous system, bodily illness, and physical injury. A woman who has been subjected to sexual harassment may or may not suffer physical effects from the harassment. Even though her injuries may consist of unpleasant emotional reactions to the conduct unaccompanied by physical manifestations, she may recover for the intentional infliction of emotional distress. Emotional distress includes "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, [and] worry." Absent physical injury, a greater showing of outrageous behavior by the

84. *Id.* § 10 note 62, at 37.

85. RESTATEMENT (SECOND) OF TORTS § 46 comment d (1977).

86. Waldon v. Covington, 415 A.2d 1070, 1076 (D.C. 1980) (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d (1965)).

87. *See, e.g.*, Rogers v. Loews L'Enfant Plaza Hotel, 526 F. Supp. 523, 529-30 (D.D.C. 1981) (negligent infliction of emotional distress requires the existence of physical injury in the District of Columbia, but intentional infliction of emotional distress does not).

88. *See, e.g.*, Forde v. Royal's, Inc., 31 FAIR EMPL. PRAC. CAS. (BNA) 213, 214 (S.D. Fla. 1982) (allegations of intentional infliction of mental distress do not state a claim under which relief can be granted under the "impact rule" followed by Florida courts).

defendant is required.[89]

Comments amounting to verbal sexual harassment are generally not considered extreme and outrageous enough to constitute intentional infliction of emotional distress.[90] When such propositions are combined with a resultant physical injury or evidence of systematic harassment, however, a victim may be able to prove that the defendant had engaged in a course of conduct outrageous enough to amount to intentional infliction of emotional distress.

The limitations of a tort approach are both practical and philosophical.[91] Despite these limitations, tort actions should be pursued as well as actions based on a sex discrimination theory. If a woman is unable to invoke the provisions of Title VII and resides in a jurisdiction with no applicable fair employment practices laws, tort remedies may afford the most comprehensive relief available to her.

The primary practical limitations to tort actions involve the problems posed by state workers' compensation statutes and the traditional doctrine of respondeat superior. In states where workers' compensation is the exclusive remedy for most work-related injuries,[92] a plaintiff may not be able to sustain a cause of action

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89. *Practitioner's Tort Guide, supra* note 78, at 889 (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment j).

90. RESTATEMENT (SECOND) OF TORTS § 46 (1977).

91. Torts best redress injuries to one's person. . . . The tort remedy attempts to monetize physical and psychic damage to the person, sometimes including punitive damages representing outrage, rather than to formulate redress in terms of hiring, seniority, or promotion. . . . To the extent that tort theory fails to capture the broadly social sexuality/employment nexus that comprises the injury of sexual harassment . . . the personal approach on the legal level fails to analyze the relevant dimensions of the problem.

C. MACKINNON, *supra* note 1, at 88.

92. For example, California Labor Code § 3600 (West Cum. Supp. 1983) provides the basic standards for California Worker's Compensation. It states:

(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558 shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:

(1) Where, at the time of the injury, both the employer and the employee are the subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or

based on tort theory unless the pleadings are drafted to establish that the injuries are not within the scope of the workers' compensation provisions. However, one court has rejected the notion that workers' compensation statutes bar a sexual harassment victim's tort claims. The Georgia Supreme Court has held that sexual harassment is neither an accidental injury nor an occupational disease as defined by the workers' compensation statute and therefore, the claim should be brought in tort.[93]

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her employment.

(3) Where the injury is proximately caused by the employment, either with or without negligence.

(4) Where the injury is not caused by the intoxication of the injured employee.

(5) Where the injury is not intentionally self-afflicted.

(6) Where the employee has not willfully and deliberately caused his or her own death.

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

(8) Where the injury does not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment. The administrative director shall promulgate reasonable rules and regulations requiring employers to post and keep posted in a conspicuous place or places a notice advising employees of the provisions of this subdivision. Failure of the employer to post such a notice shall not constitute an expression of intent to waive the provisions of this subdivision.

In addition, California Labor Code § 3601(a) (West Cum. Supp. 1983) provides:

here the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against any other employee of the employer acting within the scope of his or her employment . . . .

93. Cummings v. Walsh Contr. Co., 31 FAIR EMPL. PRAC. CAS. (BNA) 930 (S.D. Ga. 1983).

It is well-settled in Georgia that mental trauma alone brought about solely by psychic stimulus is not compensable as an injury. . . . In this case, there is evidence neither of any physical injury precipitating the purported mental distress nor of any physical disability arising from the distress. The distress allegedly is due to the verbal insinuations, requests, and statements of . . . [supervisors]. The result has been embarrassment, anger, anxiety, and great worry, but with no accompanying physical distress.

With respect to the "occupational disease" theory, the case law is not quite as clear-cut, but still militates against defendant's position. . . . [M]ental illness [can] be classified as an occupational disease compensable under the statute if certain conditions [are] met.

. . . .

The type of emotional distress complained of . . . even if considered a disease (which is doubtful) is not compensable under workers' compensation. Although the majority of the incidents allegedly causing the disease occurred on the job, this type of distress is of a type to which the general public is exposed. Egregious, reprehensible conduct causing emotional trauma occurs both on and off job sites to workers and non-workers alike. There is nothing so peculiar about the construction trade and its working conditions that makes emotional distress a risk not found in everyday life. . . . Since plaintiff's emotional distress is not an "occupational disease" the workers' compensation statute is not applicable.

The second difficulty inherent in tort remedies lies in reaching the party most likely able to pay damages — the employer. The legal system is generally unwilling to hold an employer liable for conduct it did not actually commit. One commentator has noted that courts will not ordinarily "impute an intentional tort to an employer, unless the employer has specifically authorized the employee to perform the act. Since the likelihood that a corporate employer has specifically authorized acts of sexual harassment is small, the plaintiff will probably be limited to recovering from the supervisor alone."[94]

Employer liability may be imposed, however, where there is actual or constructive knowledge of harassment coupled with a failure to promptly correct the misconduct.[95] However, if the court determines that the employer is not liable for the employee's intentional conduct and if the co-defendant supervisor or coworker responsible for the acts of sexual harassment lacks property or financial resources, a court victory would be hollow.

III. Making A Case for Unemployment Benefits

Despite the availability of comprehensive legal remedies for sexual harassment, many women decline to pursue these remedies, even where the facts make it reasonably clear that a plaintiff's right to damages could be established. It is often less embarrassing to quit a position and find another job than to risk the public exposure that filing a charge with the EEOC or waging a lawsuit will entail.[96]

Some women can find a new job immediately and will decide that the incident does not justify the potential headaches of initiating an investigation. Other women will be fired for refusing to satisfy sexual demands and experience difficulty obtaining employment yet fail to pursue the appropriate common law and statutory

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Id. at 934-35.

An attorney representing a victim of sexual harassment should, therefore, fashion arguments like those made by the court in *Cummings* and refer to state law for support where applicable.

94. Seymour, *Sexual Harassment: Finding a Cause of Action Under Title VII*, 30 Labor L.J. 139, 141 (1979).

95. *Cummings*, 31 Fair Empl. Prac. Cas. (BNA) 930, 934 (S.D. Ga. 1983) (citing American Oil Co. v. McCluskey, 119 Ga. App. 475, 167 S.E.2d 409 (1969)).

96. *See* House Hearing on Sexual Harassment in the Federal Government, 96th Cong., 1st Sess., 96-57, at 7 (1979) (testimony of Donna Lenhoff, Women's Legal Defense Fund).

actions within the time limitations prescribed by law. The ease with which a woman will find a new position varies according to her field and background, of course, but it is likely that some period of unemployment will occur.[97] Because unemployment benefits are designed to compensate individuals who lose their jobs through no fault of their own, unemployment compensation benefits should be available to sexual harassment victims in all states.

Successful claimants receive a weekly benefit amount based on the amount of previous earnings during employment and governed by the state statute.[98] Payments begin as soon as the claimant receives a favorable determination regarding eligibility, even though the employer may appeal that determination.[99] The benefits continue weekly so long as the claimant remains unemployed and continues to actively seek employment, until the entitlement is exhausted. If the duration of unemployment is relatively brief, the claimant will receive benefits until she finds a new job. During this period, weekly benefit checks insure that the period of joblessness does not amount to a personal financial catastrophe.

Using unemployment compensation as a form of partial redress for the consequences of sexual harassment should not be viewed as an individual palliative for partially alleviating an aggrieved employee's anger, and thus relieving legitimate pressure for change in the employment environment. Although the primary benefit of a successful unemployment compensation claim is financial relief for the former employee, a collateral benefit is the employer's newly-created incentive to remedy the problem underlying the claim, since the firm's contributions to the benefit pool are experience rated.[100] Obviously, given this experience-based, proportionate con-

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97. This is particularly true during periods of high overall unemployment.

98. *See generally* DEPARTMENT OF LABOR, EMPLOYMENT & TRAINING ADMINISTRATION, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS (1983) [hereinafter cited as COMPARISON].

99. The holding in California Dept. of Human Resources v. Java, 402 U.S. 121 (1971), requires this result. The Supreme Court held that section 303(a)(1) of the Social Security Act was intended to mean that benefits must be paid at the earliest stage of unemployment when such payments are administratively determined to be due.

100. Generally, the funds to pay state unemployment claims are derived from employer contributions. The employer's percentage rates vary from year to year, depending on the amount of benefits paid to former employees during the previous year. This method is generally termed "experience rating." Under this system, an employer has an interest in challenging his former employee's claim for benefits since the rate of the employer's contribution may be reduced if few benefits are paid out of the state fund to his former employees. *See generally* NATIONAL EMPLOYMENT LAW PROJECT, LEGAL SERVICES GUIDE TO UNEMPLOYMENT COMPENSATION LAW AND ISSUES (1977).

tribution to the benefit pool, the impact of a successful unemployment compensation claim, and the resulting incentive, will be greater where the employer has a small number of employees. In addition, since businesses with fewer than fifteen employees are generally outside the purview of Title VII[101] the financial sting of increased premiums may be the only effective and relatively private means, short of litigation, of encouraging an employer to curb harassment.

Filing a claim for unemployment benefits does not preclude other forms of legal action against an employer and it should not be used as the sole weapon against sexual harassment in the workplace. If the situation warrants, an attorney should actively encourage clients to pursue the short-term relief of unemployment compensation as well as the more complete forms of legal redress available under Title VII, collective bargaining agreements, state common law, or applicable state anti-discrimination laws. Furthermore, a client must be encouraged to make a prompt decision regarding the remedies she wishes to pursue, so that she can take the necessary steps to establish her legal claim within the appropriate time limitations and begin to assemble crucial evidence to document the claim.[102]

A. *Establishing Eligibility for Benefits*

Most state laws provide a three-tiered process for eligibility determination in unemployment benefits cases. After a claimant files a claim, an initial determination of eligibility is made by a claims examiner based upon an interview with the claimant and written information supplied by the former employer.[103] Either the claimant or her employer may appeal the initial determination to a referee or a comparable appeals-board official at an evidentiary hearing.[104] If either party is dissatisfied with the referee's

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101. 42 U.S.C. § 2000e(b) (1981).

102. Section 706(e) of Title VII requires that a charge be filed within 180 days of the alleged violation unless the charge is filed with a state or local agency having jurisdiction to accept the charge. In the latter event, the time limitation for filing the charge with the EEOC is extended. In addition, each state defines the statutory time limitations for filing certain types of legal actions. In common law actions, this may be a period as short as one year following the occurrence of the wrongful event.

103. In some cases, information may be provided by the employer through telephone interviews with a claims examiner.

104. The evidentiary hearing is more informal than a trial but must conform to the requirements of due process. State statutes may provide specifically that the parties be af-

determination, an appeal can be taken to the state court having appellate jurisdiction.

Although there are minor variations in state unemployment compensation laws, to establish eligibility for benefits an unemployed worker must generally demonstrate that she:

(a) has filed a claim for benefits;

(b) has either (i) earned a specified amount of wages, or (ii) worked for a specified period of time, or, in some states (iii) both earned a minimum amount and been employed for the requisite minimum length of time;

(c) is able to work;

(d) is available for work, which may be defined in terms of registration for work with an employment office and a demonstrable active search for employment; and

(e) has observed the required waiting period, if the state imposes one.[105]

B. *Avoiding Disqualification From Benefits*

Even if the claimant can establish basic eligibility for benefits, there may be a partial or total disqualification from compensation during the period of unemployment. State laws generally provide that a claimant is disqualified from receiving benefits if she voluntarily left her employment without good cause, was discharged for misconduct, became unemployed as a result of a labor dispute, refused to accept suitable employment, or is receiving other remuneration such as dismissal pay, retirement pay, or worker's com-

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forded a reasonable opportunity for a fair hearing. *E.g.*, MD. ANN. CODE art. 95A, §7(e) (Cum. Supp. 1982). Witnesses are placed under oath and made subject to penalties for perjury. The burden of proof in unemployment compensation proceedings is on the claimant to demonstrate that she has met benefit eligibility requirements.

The referee or hearing officer does not make a determination on the merits of the claim at the close of the hearing. Instead, a written decision is mailed to the parties and their representatives, generally within three weeks of the hearing. If a party is dissatisfied with the referee's decision, in most states that party may appeal to the full appeal tribunal. Such an appeal is usually limited to a review of the evidentiary record made at the hearing, although in some states new testimony may be taken at the discretion of the tribunal. After this tribunal reaches a decision, any dissatisified party may seek state court review of the administrative decision. Judicial review is limited to the court's perusal of the evidentiary record previously assembled. Findings of fact made by the administrative agency are generally accepted by the court so long as there is substantial evidence to support them.

105. *See* COMPARISON, *supra* note 98.

pensation. The duration of the disqualification period, as well as the conditions for requalification, varies from state to state.[106]

Although statutory language governing disqualification is nearly identical in all states, these provisions have received varying interpretations from state administrative agencies and courts. For example, the actions that constitute "misconduct" or "voluntary quitting" in one state, may not in another. Despite the varying interpretations of state statutes, it is generally possible for a sexual harassment victim to establish her entitlement to unemployment compensation benefits in most states. To do so, she must offer proof which establishes that she had good cause to quit her job and was not discharged for misconduct. If an allegation is raised that she subsequently refused to accept suitable employment, she must be prepared to rebut the charge by showing that any employment she refused was not suitable.

1. The "Good Cause" Exception for Quitting

State unemployment compensation statutes usually provide that a claimant is ineligible, either totally or for a designated waiting period, for unemployment compensation if she quit her last job without good cause. Some statutes further require that the good cause be attributable to, arise from, or be connected with the conditions of that employment.[107]

This "good cause" requirement has been the subject of much litigation. Courts reviewing unemployment appeals decisions have generally applied an objective standard in determining what constitutes good cause. One state court articulated the standard as follows: "[t]o voluntarily leave employment for good cause, the cause must be one which would reasonably impel the average able-bodied worker to give up his or her employment. . . . The applicable standards are the standards of reasonableness as applied to the average man or woman, and not the supersensitive [person]."[108]

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106. A waiting period is a noncompensable period of unemployment in which the worker must have been otherwise eligible for benefits. Many states require a waiting period of one week before a person can become eligible for benefits. *See, e.g.*, R.I. GEN. LAWS § 28-44-14 (Cum. Supp. 1982). The waiting period can be waived in Georgia if the unemployment is not the fault of the claimant. Several other states waive the waiting period under specific conditions. *See* COMPARISON, *supra* note 98.

107. *See, e.g.*, MD. ANN. CODE art. 95A, § 6 (Cum. Supp. 1982).

108. *See* Uniweld Prods., Inc. v. Industrial Relations Comm'n, 277 So. 2d 827, 829 (Fla. Dist. Ct. App. 1973).

Because the courts have chosen an objective standard for review, it is impossible to classify a particular type of employer conduct as "good cause" per se, unless the state statute establishes that the existence of that particular set of circumstances provides "good cause."[109] In the absence of a specific statutory provision, the fact-finder must first consider the employer's behavior and the impact of that behavior on the claimant's working environment, and then determine whether the reasonable, able-bodied worker would give up her employment when faced with identical circumstances. If the decision-maker believes that the reasonable worker would continue to work despite harassment, then good cause is not established and benefits are denied.[110] If, on the other hand, the fact-finder concludes that the reasonable worker would feel compelled to leave her job and join the ranks of the unemployed rather than continue to endure such miserable working conditions, good cause for quitting is established and benefits are awarded.[111]

Implicit in the "average reasonable employee" approach is the assumption that the actual effect of the employer's or co-worker's behavior on the individual claimant is irrelevant. In practice, however, a finding of "good cause" is dependent on both the assumed reaction of the hypothetical reasonable employee and the good faith of the individual claimant. An employee who was not actually

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109. *See, e.g.*, MINN. STAT. § 268.09 (Supp. 1983), which states:

> An individual separated from employment under clauses (1), (2) and (3) shall be disqualified for waiting week credit and benefits until four calendar weeks have elapsed following his separation and he has earned four times his weekly benefit amount in insured work.
>
> (1) Voluntary leave. The individual voluntarily and without good cause attributable to the employer discontinued his employment with such employer. For the purpose of this clause, a separation from employment by reason of its temporary nature or for inability to pass a test or for inability to meet performance standards necessary for continuation of employment shall not be deemed voluntary.
>
> A separation shall be for good cause attributable to the employer if it occurs as a consequence of sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature when: (1) the employee's submission to such conduct or communication is made a term or condition of the employment, (2) the employee's submission to or rejection of such conduct or communication is the basis for decisions affecting employment, or (3) such conduct or communication has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment and the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Id. See also R.I. GEN. LAWS § 828-44-17 (Cum. Supp. 1982).

110. *Uniweld Prods.*, 277 So. 2d at 829.

111. *See, e.g.*, McCain v. Employment Div., 17 Or. App. 422, 522 P.2d 1208 (1974).

disturbed by the asserted mistreatment is not making a claim in good faith and cannot be awarded benefits, in spite of the fact that an average employee would have found the same conditions intolerable. Conversely, if a claimant presents evidence that highlights the impact of her particular mistreatment,[112] it will substantiate the conclusion that her claim has a good-faith basis, and the fact-finder will be more likely to find that the employee had good cause to quit her employment.

Whether a specific type of harassment constitutes good cause for quitting in states that do not classify sexual harassment as "good cause" per se cannot be stated categorically; however, an examination of decisions premised on such claims is helpful in determining how to frame and prove a claim for benefits. In general, a claimant filing for unemployment benefits has prevailed on one of two theories which are closely related.

First, most decisions awarding benefits have held that, under the facts and circumstances of the individual case, the claimant had established "good cause" for leaving her employment by showing that the harassment made the job intolerable. In *In re Scozzari,*[113] the claimant testified that her supervisor made sexually-suggestive remarks and engaged in suggestive conduct, which eventually caused her to develop nervous eczema. She finally quit her job when he sent her home during a meeting for no apparent reason. The employer claimed that Scozzari had been terminated for misconduct, but the Michigan referee held otherwise, stating that "the claimant [had] terminated her employment with good cause attributable to the employer [and that a] female employee should not be disqualified for benefits when she terminates her employment to avoid the sexual advances of a male supervisor."[114] Implicit in this decision is the belief that some behavior falls outside the normal give-and-take of employment relationships and the employee need not withstand abuse.

In another Michigan decision, *In Re Prince,*[115] the claimant testified that she was constantly criticized by her supervisor for five

112. For example, the claimant could present evidence of psychosomatically-induced physical illness.

113. Referee's Decision, Michigan Employment Sec. Comm'n, Appeal No. B78-53236 (May 28, 1978).

114. *Id.*

115. Referee's Decision, Michigan Employment Sec. Comm'n, Appeal No. B78-11452 (Oct. 25, 1978).

months after refusing to date him. She complained to his supervisors and sought a transfer to another department; however, the company did not rectify the situation. As a result of the stress associated with the harassment, she developed headaches, lost weight, and became extremely nervous. She quit her job and filed an unemployment compensation claim. The referee held that she was eligible for the benefits because she had terminated her employment for good cause attributable to the employer.[116]

The difficulty of making the necessary showing of good cause lies in convincing the fact-finder that frequent, unwelcome sexual advances make working conditions intolerable to female workers of ordinary sensitivity. The fact-finder's willingness to accept this premise seems to hinge on whether he or she views male sexual advances toward female employees as a personal matter arising from mutual sexual attraction, or as an inherently intolerable attempt to tie employment to sexual submission.[117] The *Scozzari*[118] and *Prince*[119] cases do establish, however, that a claimant can demonstrate that sexual harassment rendered her employment intolerable in the eyes of the reasonable worker by showing (1) that

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116. Although the case did not explicitly involve sexual harassment, a clerk typist was held to have had good cause for quitting her job in Associated Util. Servs., Inc. v. Board of Review, 131 N.J. Super. 584, 331 A.2d 39 (1974), because she had been verbally harassed and mistreated by her supervisor. She was subjected to frequent, undue scoldings during the day, and her supervisor called her at home late at night to "give her hell." The claimant testified that she told her supervisor that his behavior was upsetting her greatly, but he continued to intentionally harass her. The supervisor testified that he was satisfied with the overall quality of the claimant's work, although he frequently critized her. The court held that while mere dissatisfaction with working conditions not shown to adversely affect health or to be abnormal in some other way did not constitute good cause for leaving a job, intentional harassment of an employee was an abnormal working condition which furnished good cause for terminating one's employment. The fundamental question presented, according to the court, was whether the claimant had been subjected to intentional harassment by her supervisor, and thereby had experienced such intolerable and abnormal working conditions that the average employee would quit in the same circumstances, or whether she was overly sensitive to criticism arising in the normal course of employment. The court found that the appeals examiner had reached a reasonable conclusion in determining that good cause exists. *Id.*

The reasoning in this case supports a claims decision in favor of a sexual harassment victim, even in cases where a victim cannot demonstrate that she suffered physical illness or psychosomatic symptoms in response to the mistreatment. So long as she can demonstrate that the harassment was intentional and created intolerable working conditions that an average employee would not bear, she should prevail.

117. *See* Heelan v. Johns-Manville, 451 F. Supp. 1382 (D. Colo. 1978).

118. *In re* Scozzari, Referee's Decision, Michigan Employment Sec. Comm'n, Appeal No. B78-53236 (May 28, 1978).

119. *In re* Prince, Referee's Decision, Michigan Employment Sec. Comm'n, Appeal No. B78-11452 (Oct. 25, 1978).

she was harassed, (2) that she made complaints to management, and (3) that the harassment continued despite her complaints.[120]

It is important to emphasize, however, that the claimant must explicitly detail the basis of her complaint at the earliest possible opportunity. Any discrepancy in reporting the basis for a decision to quit a job may be interpreted as evidence that the claimant fabricated her story of harassment to establish good cause. Moreover, if an issue is not raised before a referee or hearing board, a court need not consider it.[121] Therefore, the attorney representing a client who has been the victim of sexual harassment should submit a fairly expansive hearing brief, in which information about sexual harassment is presented in addition to the facts of the specific case. In this way, the attorney can fashion a conceptual framework favorable to the client's position, which in turn gives the hearing examiner a basis for decision.

The second approach to framing a claim for benefits in sexual harassment cases involves emphasizing that the behavior constituting sexual harassment is illegal. Courts have held that the illegal practices of an employer may give an employee good cause for terminating employment.[122] Depending on the statutory definition of sexual assault in the state where the claim is filed, it may be possible to show that the offending male had violated criminal statutes.[123] Evidence of an employer engaging in such illegal behavior,

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120. *See also Associated Util. Servs.*, 131 N.J. Super. at 584, 331 A.2d at 39 discussed *supra* note 115.

The absence of complaints to management was crucial to a finding that the claimant left her job without good cause in two recent Pennsylvania cases. *See* Colduvell v. Unemployment Compensation Bd. of Review, 48 Pa. Commw. 185, 408 A.2d 1207 (1979) (holding that good cause for leaving a job arises only when the employer fails to take remedial action against the individuals it knows are subjecting the claimant to harassment). *Accord* West v. Unemployment Compensation Bd. of Review, 53 Pa. Commw. 431, 417 A.2d 872 (1980).

121. *See* Pianelli v. Unemployment Compensation Bd. of Review, 28 Pa. Commw. 496, 368 A.2d 1339 (1977) (sex discrimination claim raised for the first time on appeal need not be considered).

122. See Zinman v. Unemployment Compensation Bd. of Review, 8 Pa. Commw. 649, 305 A.2d 380 (1973), in which the claimant quit her job as an employment counselor because her employer's policy required that all telephone conversations with employers be recorded. The Pennsylvania trial court held that the claimant had a necessitous and compelling reason for terminating her employment, even though she had been personally exempted from complying with this policy after objecting to the employer that the practice was illegal. The court held that an employee who quits a job can establish good cause by showing that quitting was required by ordinary common sense and prudence to avoid being a party to, or a participant in, the employer's illegal practices. *Id.*

123. *See* WASH. REV. CODE ANN. § 9.79.190 (1977); WIS. STAT. § 940.225 (1980) (making both unwanted sexual contact and sexual intercourse criminal acts).

or failing to prevent such behavior by employees, should help convince the fact-finder that ordinary common sense would compel a female victim to terminate her employment to avoid further victimization.

In stating a claim, however, the attorney should always emphasize that sexual harassment is a form of illegal sex discrimination even where state statutes would construe the harassment as a kind of economically-coerced sexual assault. In reversing an Employment Appeals Board decision denying a claim for unemployment compensation, the Oregon Court of Appeals held that a female employee had good cause to terminate her employment where the evidence clearly established that she was grossly discriminated against in salary on the basis of sex.[124] Similarly, the California Court of Appeal held that the impact of federal and state anti-discrimination laws must be considered in determining unemployment compensation claims.[125] The court said:

> [W]here one's work is made intolerable over a period of time by the discriminatory acts of the employer . . . there is good cause for leaving employment. Assuring an individual employment benefits in such situations does insure them against the impact of leaving adverse working conditions not created by them and thus comports with the purposes of the unemployment insurance laws.[126]

These cases suggest that, in addition to asserting that sexual harassment made the work environment so intolerable that any reasonable woman would have quit, a claimant can in unemployment benefits by demonstrating that sexual harassment is a form

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124. Fajardo v. Morgan, 15 Or. App. 454, 516 P.2d 495 (1973) (reversing a decision by the Employment Appeals Board to deny plaintiff's claim for unemployment compensation).

125. Prescod v. Unemployment Ins. Appeals Bd., 57 Cal. App. 3d 29, 127 Cal. Rptr. 540 (1976).

126. *Id.* The California court wanted clear evidence of sex bias in this case. Moreover, in a subsequent case, the court made clear that discrimination forming the basis of the employee's decision to quit had to be present, rather than past, discrimination. *See* Morrison v. California Unemployment Ins. Bd., 65 Cal. App. 3d 245, 134 Cal. Rptr. 916 (1977). The *Morrison* court recognized that employer-employee relationships may deteriorate when an employee experiences discrimination because of her sex. One might predict that a female worker experiencing sexual harassment would suffer decreased productivity and might also display marked hostility because of her treatment. Indeed, the harassment might have such a debilitating effect on her morale and performance that the employer might have good cause to discharge her. In such a case, the employee's attorney should attempt to show that the sexual harassment provoked his client's behavior, and thus, set up a "good cause" defense to accusations that the discharge was warranted.

of sex discrimination under federal or state statutes.[127] Thus, in preparing a hearing brief, a claimant's attorney should refer to both the EEOC guidelines regarding harassment and the Title VII cases holding that sexual harassment is actionable sex discrimination.[128] Claimants relying on state anti-discrimination laws should naturally cite precedent classifying sexual harassment as discrimination under that state's statutes or similar statutes from sister states.[129]

In general, however, to prevail on the sex discrimination theory, a claimant must demonstrate that the discriminatory treatment exceeded mere verbal insults. Sex-based slurs, without additional evidence of discrimination based on sex, were held to be an insufficient foundation for good cause to terminate one's employment in *McCain v. Employment Division.*[130] In this case the claimant did not allege that she had been subjected to sexual innuendoes, propositions, or physical contact, although she did assert that she had good cause to quit her position because male employees referred to women by means of insulting terminology and degraded them by exhibiting lewd pictures and cartoons. The Oregon Court of Appeals disagreed, stating:

> Discrimination on the basis of sex is an unlawful employment practice. . . . This does not mean, however, that an employer's "sexist" attitude, by itself, is an unlawful employment practice or such other

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127. Such a discrimination-as-good-cause approach was successfully followed in a racial discrimination case, Taylor v. Unemployment Compensation Bd. of Review, 474 Pa. 351, 378 A.2d 829 (1977), which deserves close scrutiny because the method of racial harassment used, and the resulting employee reaction, bears a striking similarity to accounts of sexual harassment.

In *Taylor,* the Pennsylvania court held that the claimant had sustained his burden of showing that he had quit his job for good cause of a compelling nature. The court's analysis demonstrates an understanding of the detrimental effects of racial discrimination:

> The continuing racial tension created by such abuse caused appellant repeated humiliation and apprehension. These reactions were not mere whims, nor were they caused by any overly sensitive emotional condition on appellant's part. The humiliation and apprehension were emotions grounded in reality and were substantial burdens placed upon appellant's ability to do his job. The degrading and abusive effects of the repeated expressions of racial prejudice were cumulative in nature and ultimately created an employment condition which would have been intolerable to any reasonable person in similar circumstances.

Id. at ____, 378 A.2d at 834.

128. See *supra* notes 35-48 and accompanying text for a discussion of Title VII law.

129. See *supra* notes 62-69 and accompanying text for a discussion of state anti-discrimination actions.

130. 17 Or. App. 442, 522 P.2d 1208 (1974).

> cause as would constitute "good cause" for a female employee to quit. "Good cause" would exist only if this "sexist" attitude produced some actual discrimination, undue harassment, or other grievous cause of reasonable foundation, evidence of which must appear in the record.[131]

It is unremarkable that the court insisted that sexist attitudes alone do not establish good cause, since few employers have totally eradicated all traces of prejudice against women. What is remarkable about the *McCain* court's pronouncement is that it would find good cause only in the event that "this 'sexist' attitude produced some . . . *undue* harassment."[132] This phraseology implies that the court felt that some level of harassment of female employees is both natural and acceptable. Whatever the court meant to say, it is clear that to win benefits, at least in Oregon, a claimant must carefully document incidents which are more serious in nature than mother-in-law jokes and the posting of girlie calendars. Where a claimant can lay an evidentiary foundation documenting harassment, rather than the general existence of negative attitudes toward female workers, a court should find that she had good cause to quit her job.

2. Other Potential Disqualifications: Misconduct and the Refusal to Accept Suitable Employment

Sexual harassment victims may encounter other barriers, in addition to the "good cause" requirement, in their attempt to collect unemployment compensation, particularly in cases where the victim has been fired. The termination may occur after a woman refuses to respond to sexual advances or after she complains of harassment by a co-worker, client, or customer. Since most state statutes provide that a claimant is either temporarily or permanently disqualified from receiving benefits where she was discharged for misconduct connected with the employment,[133] an employer will often assert that the employee was fired for "cause" or misconduct. The standard of proof regarding misconduct varies from state to state. Some states require the employer to show only that the discharge was a consequence of the employee's misconduct in connection with the employment, while others require the

131. *Id.* at ____, 522 P.2d at 1210 (citations omitted).
132. *Id.* (emphasis added).
133. *See* COMPARISON, *supra* note 95.

employer to demonstrate "gross" misconduct.[134]

One additional hurdle impeding collection of unemployment compensation benefits is disqualification for refusal to accept suitable work. Most state statutes provide that such a refusal postpones payment of benefits for at least a period of time. In other states, a refusal of suitable employment necessitates a reduction in benefits according to a statutory formula.[135] The potential applicability of this type of disqualification may not be readily apparent, since most claimants are initially concerned only with the process of securing benefits. However, it is theoretically possible for an employer to rehire the claimant in an attempt to subvert her claim. Alternatively, she could be offered new employment in a company where other women have experienced sexual harassment. The unacceptability of requiring a sexual harassment victim to accept such an exploitative employment offer is obvious. A woman must not be forced to choose between having to work in an exploitative, intolerable environment or forfeiting her benefits. Such dilemmas must be resolved in favor of the claimant's health and well-being. Any employment with sexual harassment built into the job needs to be recognized as inherently unsuitable in nature, so that women workers can refuse a position without fearing a loss of benefits.

C. *Impact of Unemployment Claims on Other Remedies*

For the victim of sexual harassment, unemployment compensation has much to recommend it as a form of partial relief. The primary consideration, of course, is the swiftness with which the compensation becomes available. Once a favorable determination is made, the claimant begins collecting benefits immediately. Even though she may ultimately choose to pursue other forms of legal redress in addition to unemployment compensation, the woman's immediate concern with paying for her basic necessities is best addressed through the unemployment benefits system.

There are other advantages to utilizing unemployment compensation. For the unemployed victim, unemployment benefits represent a virtually risk-free antidote. If her claim for unemployment compensation is rejected, this rejection will have virtually no impact on subsequent Title VII sex discrimination claims against

134. *Id.*
135. *Id.*

the employer. Each Title VII trial is *de novo* and district courts give little or no weight to prior administrative decisions, particularly where the agency is not charged with determining the existence of discrimination.[136]

When a claimant succeeds in obtaining unemployment compensation, the award affects other forms of relief in various ways. The Colorado District Court in *Heelan v. Johns-Manville*[137] suggested that in calculating damages in a successful Title VII action, the court should reduce the amount of back pay owed to the plaintiff by the amount of unemployment compensation benefits collected during the period of joblessness associated with the sexual harassment incident. Some appellate courts have rejected this approach, holding that it is inappropriate for a trial court to make such a reduction.[138]

A Title VII award, however, could in some instances precipitate an attempt by the state to recoup unemployment benefits paid to the former employee, if the governing state statute provides for recoupment in the case of a successful action for damages. The Maryland statute, for example, provides that benefits may be recovered from a claimant "because [she] has received or has been retroactively awarded wages."[139] Relying on this provision, the Maryland Court of Special Appeals held in *Katsianos v. Maryland Employment Security Administration*[140] that unemployment benefits can be recouped if the claimant is awarded back pay through a settlement or through court-awarded damages. If such a statute exists in the state where a claim is made, the attorney advising a harassment victim pursuing unemployment benefits as well as back wages under a Title VII or a contract action should inform both the client and the court that, in order for the client to be made whole by an award of damages, no offset equivalent to unemployment compensation benefits paid should be made from back wages, given the state's right to recoup the value of benefits previously paid to the plaintiff from her award of damages. In states where no recoupment is provided for, the attorney should advise the client

136. *See, e.g.*, Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir. 1972) (district court refusal to admit into evidence EEOC records affirmed).

137. 451 F. Supp. 1382 (D. Colo. 1978).

138. Brown v. A.J. Gerrard Mfg. Co., 715 F.2d 1549 (11th Cir. 1983); Kauffmann v. Sidereal Corp., 695 F.2d 343, 346-47 (9th Cir. 1982); EEOC v. Ford Motor Co., 645 F.2d 183, 195-96 (4th Cir. 1981), *rev'd on other grounds*, 102 S. Ct. 3057 (1982).

139. MD. ANN. CODE art. 95A, § 17(d) (Repl. Vol. 1979).

140. 42 Md. App. 688, 402 A.2d 144 (1979).

that the amount of unemployment benefits awarded may ultimately be offset against damages awarded in breach of contract or Title VII cases. In either event, however, the client would receive the benefit of interim compensation during her period of unemployment.

Because tort actions, unlike contract and Title VII actions, focus on the emotional injury sustained by a plaintiff as a result of intentional or negligent wrongdoing, damages should be awarded in such an action without regard to the payment of unemployment benefits. The harm to the victim lies in the personal injury rather than in the economic losses resulting from a disturbance in the employment relationship.[141] It would appear, therefore, that seeking unemployment compensation would have no impact on later tort claims, although proof requirements of outrageous and offensive conduct by the harassing male and its impact on the victim would be similar for both unemployment and tort claims.

By contrast, a decision to seek unemployment compensation should benefit a person who later chooses to pursue a claim for breach of employment contract, since a successful claimant must demonstrate that she was available for and actively seeking suitable employment. Generally, an employee who is wrongfully discharged from her job has a duty to mitigate damages by finding substitute employment. Damages ultimately awarded are reduced by earnings from any employment she secures or could have secured with reasonable diligence during the period in which she would have been employed, but for the wrongful discharge. One advantage in seeking unemployment benefits lies in the fact that most states require that a claimant demonstrate an active search for employment in order to qualify for benefits. Ordinarily, the unemployment compensation claimant must document the contacts and the number of interviews with potential employers, and otherwise provide evidence that she is diligently seeking a suitable job. This evidence will be crucial in a later action for breach of employment contract to establish that the plaintiff sought alternative employment in an effort to mitigate damages.

In no event will the decision to seek unemployment compensation undermine or foreclose a decision to pursue other forms of legal action, whether such actions are based on federal or state anti-discrimination statutes, common-law contract theory, or tort

141. *See generally* W. PROSSER, *supra* note 80, § 32, at 8-14.

law. Thus, there is no reason to not seek unemployment compensation if a woman's unemployment is attributable to sexual harassment. The benefits merely close the financial gap created by unemployment until the woman is able to find a new job, win damages, or reach a settlement for her legal claim.

In some cases, the attorney may find that a victim's short-term financial needs are her only concern. In such an event, the client may choose only to seek unemployment benefits. In every case, however, the attorney has a duty to fully advise the client of her options, including a discussion of the advantages and disadvantages of each potential form of legal action. Statutes of limitation should be explained, and the victim should be cautioned not to become so engrossed in winning her unemployment claim that she forecloses other options by failing to make claims within the legally-prescribed time period. Claiming unemployment benefits does not toll the 180-day statute of limitations for filing sex discrimination charges with the EEOC, even where the benefits claim is explicitly based on sexual harassment. In those situations where the client has not yet decided whether to initiate a lawsuit against her former employer, she should be advised to take all necessary steps to preserve her right to sue. Indecision can be later remedied; stale claims cannot. By opting to claim unemployment benefits, however, the sexual harassment victim can secure short-term financial relief relatively quickly, and thus achieve some financial flexibility for making decisions regarding future legal actions and for finding a job in which she is hired for her ability, rather than for her appeal as a sex object.

IV. Conclusion: Recommended Changes in the Unemployment Benefit System

As more women file unemployment claims identifying sexual harassment as the cause of unemployment, state administrative agencies and courts will be forced to examine the level of indignity an employee must suffer before she can safely terminate her employment with some confidence that she had good cause for joining the ranks of the unemployed.[142] Officials must recognize that a wo-

142. *See Sexual Harassment and Labor Relations*, 107 Lab. Rel. Rep. (BNA) 17-20, 67-72 (1981). *See also* Wis. Stat. § 108.04(7)(i) (Cum. Supp. 1979); Mich. House Bill No. 4183 (Feb. 22, 1979); Mich. Employment Security Commission, Sexual Harassment as an Issue in Unemployment Compensation Adjudication (Feb. 23, 1979).

man's decision to quit her job in such circumstances is generally a last resort.[143]

A woman who has decided to quit a job under these circumstances should not be further victimized by disqualification from unemployment compensation benefits. Attorneys dealing with state unemployment officials must urge them to acknowledge the damaging effect sexual harassment has on a woman's ability to function in a job and to enlarge the definition of "good cause" to include cases where a woman quits her job to escape abuse. State agencies must address several related issues in dealing with such claims. First, sexual harassment must be defined broadly enough to encompass both the flagrantly outrageous as well as the more subtle forms of sexual harassment. In cases involving sexual harassment, the definition of "good cause" should include: (1) threatened or actual sexual contact which is not freely entered into and mutually agreeable; (2) coercion designed to make the employee enter into sexual contact with the initiator; (3) continuing or repeated episodes of abuse of a sexual nature including, but not limited to, graphic commentaries on the woman's body, descriptions of the employee characterized by sexually degrading words, sexual propositions, exhibitionism, descriptions of sexual acts with others, or the display of sexually offensive pictures or objects; and (4) the threat or insinuation that the victim's failure to cooperate sexually will adversely affect employment, wages, assignments, promotions, or other conditions of employment. A definition phrased this broadly is clearly warranted in view of the variety of methods by which men have chosen to harass women in the workplace.

Second, the attorney representing a harassment victim must stress to officials that sexual harassment may be practiced in the workplace by males other than a woman's superiors. The form of sexual harassment to which waitresses, saleswomen, and other service workers are most vulnerable is from customers or clients. A female worker should no more be subjected to abuse from her employer's customers than from her co-workers or supervisors.[144]

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143. Usually, a woman will fend off advances, hoping that persistant refusals will discourage the harasser. After it becomes apparent that she cannot prevent further harassment, she will quit if she can no longer tolerate the assault on her dignity and self-esteem.

144. *See Hearings on Sexual Harassment in the Federal Government Before the Subcomm. on Investigations of the Comm. of Post Office and Civil Service*, 96th Cong., 1st Sess. 23-27 (1979) (testimony of Barbara Somson, Assistant General Counsel, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC).

Thus, the attorney should argue that state standards for claims decisions should specifically allow full benefits for a woman who quits her job because of sexual harassment, regardless of whether the perpetrator was an employment superior, co-worker or client. Although it may seem unfair to charge an employer with increased premiums for unemployment claims which originated from the behavior of clients or customers over which the employer did not have effective control, the woman's claim for compensation should not be made dependent on the identity of the perpetrator of harassment if its occurrence made her job environment intolerable. If the employer has reason to know that sexual harassment of his employees is occurring and makes no attempt to curtail abuse, then the employer should be held culpable for the harassment through the unemployment benefits system.

Third, in appropriate cases, the attorney should argue that a claimant should not be required to complain to the employer when the complaint would be futile. Such situations would include cases where the employer participates in, condones, or tolerates offensive behavior. Under the *EEOC Guidelines on Sexual Harassment*,[145] employers are charged with the responsibility of preventing sexual harassment. If a claimant can demonstrate that she was sexually harassed by a supervisor or manager and quit in response to the mistreatment, she should qualify for unemployment benefits, even if she failed to pursue her grievance within the company.

As a practical matter, it might be easier for a claimant to demonstrate that a reasonable person would have felt compelled to quit in identical circumstances if she had complained to her employer regarding the harassment, and the complaint went unanswered. Where a complaint to the employer is found, as a policy matter, to be a justifiable threshold requirement incident to claiming benefits, a credible explanation for the claimant's failure to report sexual harassment to her employer should be strongly considered as a mitigating factor during the administrative decision-making process.

Administrative personnel in state unemployment compensation agencies should be given in-service training in dealing with sexual harassment claims so that these claims can be processed with a minimum of embarassment for the victim. Such training should include background information regarding the nature of sexual har-

145. *See supra* notes 45-48 and accompanying text.

assment, its effects on victims, and how claims based on such incidents fit into the unemployment compensation framework. In addition, it would be appropriate to include advanced interviewing-skills training for claims examiners and hearing officers, since claimants are frequently reluctant to detail the nature and extent of the harassment. Without skillful and sensitive interviewing, a claims examiner may fail to fully establish the validity of the compensation claim. State administrative agencies should also be sensitized to the needs of claimants who speak primary languages other than English, since it will be extraordinarily difficult for such a person to establish a claim when she faces a language barrier as well as the usual psychological barriers which make many women reluctant to expose sexual harassment as the reason for their unemployment.

Furthermore, regardless of the standard of proof required for an employer to prove "misconduct" as a justification for terminating an employee's employment, the attorney representing a harassment victim should emphasize that refusal of unwelcome sexual advances or complaining of harassment should never be construed as misconduct or insubordination, or as evidence that the female employee was the cause of a personality conflict.

Even in the case where an employee continues to work after experiencing sexual harassment, but reacts to the situation by becoming uncooperative and unproductive in her job, evidence of the underlying circumstances leading to the productivity decline or lack of cooperation should be accepted. Claimants must be given a fair opportunity to establish that they were subjected to sexual harassment on the job and that subsequent events, including termination, were precipitated by the harassment. Often a claimant can show a history of satisfactory work evaluations up to the time of her refusal of sexual advances in contrast to subsequent sharp criticisms of her later performance. Thus, when a claimant raises a claim of sexual harassment on the job, claims examiners must be alert to the necessity for closely scrutinizing an employer's charges of misconduct. In some cases, evidence of post-refusal decline in job performance might be manufactured by an unscrupulous firm in an attempt to justify discharging a recalcitrant employee. An attorney should point out evidentiary discrepancies to claims examiners and urge them to attempt to determine the cause of the discrepancies. Where the claims examiner determines that an employee was discharged for reasons other than those claimed by the

employer, the claimant should be awarded benefits.

Finally, the state standard for showing "good cause" in the context of sexual harassment should not require stress-induced physical illness as a condition to benefit approval. Although the impact of victimization can and often does produce physical symptoms, an agency should not require an employee to tolerate sexual harassment until she develops ulcers, debilitating headaches, colitis, or other stress-related reactions. Such a requirement is as pernicious as one which mandates that every claimant demonstrate a specific detrimental employment consequence resulting from refusal of sexual advances before she can prevail in a claim for unemployment compensation. "Sexual harassment plus" should not be the threshold test of reasonableness in the female worker's decision to terminate her employment. "Good cause" to quit a job should be found when sexual harassment makes a woman's work intolerable. When state agencies recognize this, utilization of unemployment compensation benefits will become a more common method of securing interim financial relief for women fired or constructively discharged because of sexual harassment.