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Carol Costello

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IDENTIFICATION OF THE DEVELOPING TRENDS IN SEXUAL HARASSMENT CASES IN THE HOSPITALITY INDUSTRY

A Thesis
Presented for the
Master of Science
Degree
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Megan E. Sampson
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ABSTRACT

The purpose of this research was to identify the developing trends of sexual harassment cases in the hospitality industry. The evolution of the court's definition of sexual harassment was noted, and settlements decided by the courts was reported. Recommendations to deter sexual harassment in the hospitality industry were made.

The sexual harassment cases were found in research journals housed at the University of Tennessee Law Library in Knoxville, Tennessee. The journals used were West's Federal Practice Digest, American Law Review, American Jurisprudence, American Law Reporter, and Corpus Juris Secundum. A West Law computer search and a Lexis computer search, also, were used to find sexual harassment cases. For the purpose of this study, the term hospitality industry referred only to hotels and restaurants.

Each case was read and summarized. The findings were reported chronologically to reveal any variations of the law which had occurred over time. The definitions and awards were noted, and recommendations for the future were made.

Examining the hospitality cases from 1980 to 1993, some trends were noted. One trend was the rise in the number of sexual harassment cases. Another was as time proceeded, the judgements were more likely to be for the plaintiff than the

defendant. The definition of what the courts consider to be sexual harassment and issues considered to be sexual harassment have increased. Employer liability has also increased over time.

Because the costs remain so high, employers need to stop sexual harassment. Employers need preventive programs. To establish a program, a company needs a clear, well-written anti-harassment policy and a well-defined procedure for receiving and investigating complaints. During training, employees need to be told what is considered to be sexual harassment, how to report it, and what steps will be taken to prevent sexual harassment. These methods can help to deter sexual harassment.

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Chapter I

Introduction

In 1980, the Equal Employment Opportunity Commission (EEOC) developed guidelines defining sexual harassment as a form of sexual discrimination and, therefore, a violation of Title VII of the Civil Rights Act of 1964. The EEOC guidelines state that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when 1) submission to such conduct is 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 a basis for employment decisions affecting such individual, or 3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment (Lewis & Johnson, 1991).

The Supreme Court has identified two types of sexual harassment. The first is quid pro quo or "tangible benefit loss", when an employee is expected to give in to unwanted sexual demands or suffer the loss of some specific job benefit. The second type of harassment is hostile work environment, in which the Supreme Court has

described as when there is no economic loss for the employee, but the employee is still a victim of discrimination because the unwanted sexual behavior creates a work environment that is hostile or abusive and can interfere with the victim's work performance (Lewis & Johnson, 1991).

The case of Meritor Savings Bank v. Vinson (477 U.S. 57) was the first time the U.S. Supreme Court addressed a hostile environment claim. The court held unanimously that the offensive conduct must be unwelcome and sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment (Galem, 1991).

The federal circuit court established a five-prong test to define a hostile environment. The conditions include: 1) the employee must belong to a group protected by Title VII, 2) the employee must be subjected to unwelcome sexual harassment, 3) the harassment complained of must be based on sex, 4) the harassment must affect a term, condition, or privilege of employment, and 5) the harassment occurs under the jurisdiction of a supervisor, for whose actions the employer is liable (Hamilton & Veglahn, 1992).

Until 1991, the only remedies for sexual harassment were limited to compensating the plaintiff for actual losses incurred, such as lost wages or promotions. The

courts could order an employee to be reinstated with or without back pay, award attorney's fees and court costs, issue an injunction forbidding certain practices by the employer, mandate the establishment of a grievance procedure, or require training sessions on prevention of sexual harassment. Under Title VII, no punitive damages were available.

Some plaintiffs have been successful in bringing a tort or contract action under common law. Tort claims are important because they allow the employee to increase the damages that might be recovered (Hamilton & Veglahn, 1992). With the advent of the Civil Rights Act of 1991, costs employers may be responsible for are even greater (Allen, 1992).

Because it is a personnel issue, sexual harassment is an area that the hospitality industry needs to address. If the hospitality industry does not understand the issues and implications of sexual harassment, the industry could encounter a dilemma in the future. The employer is generally held liable for sexual harassment when the employer possess decision making authority over the individual making the claim. The employer will generally be held liable for the actions of their employees when managers have knowledge of the harassment (Rauh v. Coyne, 744 F.Supp. 1186 (D.D.C. 1990)). Employers are also liable for failing to remedy or prevent a hostile work

environment for which the employer knew or should have known existed (EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989)).

These are just some of the circumstances of which hospitality managers need to be aware. If not prevented or corrected, the hospitality industry could be facing major law suits. Hospitality managers need to be cognizant of the legal aspects of sexual harassment in order to evaluate company policies on sexual harassment.

Objectives

The overall purpose of this study was to identify the developing trends of sexual harassment cases in the hospitality industry. The first objective was to note the evolution of the definition of what courts consider to be sexual harassment in cases dealing with the hospitality industry. The second objective was to note the evolution of settlements decided by the courts in cases dealing with the hospitality industry. The third objective was to use the information about sexual harassment definitions and settlements and to theorize how these will evolve in the future.

Chapter II

Review Of Literature

Since the passage of the Civil Rights Act of 1964, discrimination on the basis of sex has been unlawful in the workplace (Hamilton & Veglahn, 1992). Although sexual harassment in the workplace was present even before 1964, it is only within the last few years that the public has truly become aware of the problem. One event that caused nationwide awareness was Clarence Thomas's Supreme Court confirmation hearings. Anita Hill's allegations of sexual harassment against Clarence Thomas created a new awareness of and debate about the extent and nature of sexual harassment in the workplace. Another contributing event was the passage of the Civil Rights Act of 1991 which allows an employee who prevails in a sexual harassment case to recover damages. With chances of increased settlements, more individuals may be making sexual harassment claims (Aaron & Dry, 1992).

Frequency of Sexual Harassment in the Workplace

During the first quarter of 1992, total job discrimination complaints filed with the EEOC increased 14.3% from the previous year. Sexual harassment charges

filed with the EEOC increased 60% from the previous year. These figures were reported just six months after the Anita Hill-Clarence Thomas hearings (Reynolds, 1992). A year after the hearings, the EEOC reported a 50% increase in the number of harassment complaints from the previous year (Segal, 1992).

The National Association for Female Executives(NAFE) conducted a survey of 607 women. NAFE found that 60% of the women surveyed indicated that they had experienced sexual harassment. More than half of the women said that their companies still have not addressed the problem (Segal, 1992). Although the awareness is increasing, studies show that sexual harassment continues to be a problem.

There have been a number of studies investigating the frequency of sexual harassment at the workplace. In 1992, a study was conducted by Working Women magazine (Sandroff, 1992). Surveys were published in an issue of the magazine, with results based on a statistically representative sample of 9,680 readers' responses. The responses were analyzed by EDK Associates, a strategic-research firm in New York. The results indicated that women know what harassment is either by legal definition (54%) or by intuition (30%). More than 60% of those surveyed said that they had been harassed, and more than a third know a co-worker who has been sexually

harassed. The higher a woman was in the corporate hierarchy, the more likely she had been harassed.

It should be noted that only one out of four of the women had reported the harassment, and the vast majority of the women who were harassed, do not feel they can safely report the problem. Seventy-five percent of the women felt sexual harassment is an issue on a par with salary inequities, inadequate childcare, and prejudice against promoting women. More than 90% of the women thought their companies and government can do more to prevent and stop abuse.

Perhaps the most comprehensive study of sexual harassment was that done by the Merit System Protection Board (MSPB)(Ford & McLaughlin,1989). The subcommittee on Investigations of the Committee on Post Office and Civil Service of the U.S. House of Representatives asked MSPB to conduct a thorough and scientific investigation of sexual harassment in the federal workplace. In May 1980, over 23,000 men and women were surveyed. There was an 85% response rate. Survey results indicated that one out of every four federal employees was sexually harassed on the job over the previous 24 months. Women (42%) were more likely to be harassed than men (15%).

Sexual harassment was reported not to be just a one time event. Sexual harassment was repeated, often continuing for months. Most victims reported being

harassed by fellow employees more often than by supervisors. Most victims responded to sexual harassment by ignoring it but found that the situation did not improve. Those who did take formal actions (2 to 3%) found them to be helpful. Few victims talked about their experience with others.

It was estimated that the cost of sexual harassment to the federal government between May 1978 and May 1980 was $189 million (MSPB,1980). This was an estimate of the cost of job turnover, emotional stress, individual productivity, absenteeism, and work group productivity. The majority of the federal employees who had worked elsewhere felt that sexual harassment was no worse in the federal workplace than in state and local government or in the private sector .

In 1985, Barbara Gutek conducted a survey of working men and women in Los Angeles County (Gutek, 1985). The subjects, 827 women and 405 men, were interviewed by phone. These workers were asked to report harassment throughout their careers. For women reporting sexual harassment, 19.8% indicated insulting sexual comments, 16.2% complementary sexual looks or gestures, 15.4% insulting sexual looks or gestures, 3.6% non-sexual touching, 24.2% sexual touching, 10.9% expected socialization outside work with job consequences, and 7.6% expected sexual activity with job consequences. For

reported sexual harassment by men, 12.1% indicated insulting sexual comments, 8.1% complementary sexual looks or gestures, 9.6% insulting sexual looks or gestures, 3.5% non-sexual touching, 12.3% sexual touching, 7.4% expected socialization outside of work with job consequences, and 3.2% expected sexual activity with job consequence. Sexual harassment was evident in the workplace and did not differ greatly according to gender.

Frequency of Sexual Harassment in the Hospitality Industry

While it appears that the problem of sexual harassment in the workplace is extensive, there are many who claim that sexual harassment is as rampant in the hospitality industry as in any other (Seal,1991). In 1990, Martha Eller replicated the Gutek study and administered it to a population of hotel employees. The number of employees sampled was not stated. Hotel workers were asked to report harassment only on their current job. For women reporting sexual harassment, 40.4% indicated insulting sexual comments, 32.6% complimentary sexual looks or gestures, 28.1% insulting sexual looks or gestures, 16.9% non-sexual touching, 28.1% sexual touching, 6.7% expected socialization outside of work with job consequences, and 6.7% expected

sexual activity with job consequences. For reported sexual harassment by men, 17.8% insulting sexual comments, 13.3% complimentary sexual looks or gestures, 13.3% insulting sexual looks or gestures, 6.6% non-sexual touching, 8.9% sexual touching, and no men expected socialization outside of work with job consequences or expected sexual activity with job consequences.

Comparing the two studies, Eller (1990) found that more hotel employees experience more types of sexual harassment than do workers in society-at-large. The nature of hotel work may make an employee susceptible to sexual harassment. Within a hotel, there is a high degree of social contact. An employee must interact not only with other hotel employees but with suppliers and customers as well. The unusual hours of work and type of uniform required can potentially put an employee in a vulnerable position. The practice of only hiring the "pretty" people also can send out incorrect signals. Hotel managers need to be aware of these possible dangers, so they can avoid sexually harassing situations.

Costs Associated with Sexual Harassment

The legal and nonlegal costs of sexual harassment are astonishing. Prior to 1990, many sexual harassment lawsuits resulted in judgements or settlements of

thousands of dollars and legal fees of as much as $100,000 or more, win or lose (Frierson, 1989). On November 21, 1991, Congress enacted the Civil Rights Act of 1991. This Act provided rights and remedies not previously available under the Civil Rights Act of 1964. Compensatory and punitive damages and jury trials now are available for intentional violations of Title VII, the Americans with Disabilities Act of 1990, and Section 501 of the Rehabilitations Act of 1973. These are in addition to equitable remedies already allowed under the 1964 Act.

The new Act authorized the recovery of compensatory damages by a plaintiff when intentional employment discrimination had occurred. These damages include future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Punitive damages may be recovered against a non-governmental defendant when the plaintiff demonstrates that the defendant engaged in an intentional discriminatory employment practice with malice or in reckless disregard of federally protected rights.

The Act placed caps on total damage awards based upon the size of the employer. For employers with more than 500 employees on each of twenty or more calendar weeks in the current or preceding calendar year, total

damages are limited to $300,000. For employers with 201 to 500 employees, the damages may not exceed $200,000. For employers with 101 to 200 employees, the damages may not exceed $100,000. For employers with 15 to 100 employees, the damages may not exceed $50,000. The Act also provided for a jury trial if the complaining party is seeking compensatory or punitive damages, and prohibits the court from informing the jury of the existence of the damage caps (the Civil Rights Act of 1991; Allen, 1992).

Besides the cost of litigation, there are many hidden costs to sexual harassment (Terpstra & Baker, 1989). As the MSPB displayed, the non-legal costs of sexual harassment are staggering. A 1988 survey of 160 Fortune 500 companies showed an average loss of $6.7 million per year in decreased productivity, increased absenteeism, and higher employee turnover caused by sexual harassment (Sandroff, 1988; Frierson, 1989). Other hidden cost can be associated with increased stress and decreased work effectiveness (Terpstra & Baker, 1989). Sexual harassment can cause serious emotional and financial costs. Absenteeism and low employee morale can ultimately lead to the deterioration of the organizational climate. Because of its devastating effect on the victim's physical and psychological well-being, sexual harassment can be considered a health and

safety issue (Woods & Flynn, 1989).

Because sexual harassment is such a threat to society, companies need to understand what it is and put a stop to it. Once hospitality managers understand what courts consider to be sexual harassment, they can take some actions toward prevention. When costs to the hospitality industry are realized, managers will want to do everything possible to stop harassment. The key to reducing the cost of sexual harassment is not to ignore the problem (Frierson,1989).

What courts view as sexual harassment will affect the hospitality industry. Employment practices, training, evaluations, and other areas can all be influenced by the courts' rulings. Even if a hotel or restaurant never is brought to court, the settlements awarded by courts can still affect them. Insurance prices may increase if settlements increase. The hospitality industry will have to pay the price in order to protect itself. Hospitality managers must learn that the only effective method of dealing with sexual harassment is to eliminate it.

Chapter III

Methodology

This study will examine all sexual harassment cases brought against the hospitality industry. Because the EEOC guidelines, defining sexual harassment as a form of sexual discrimination, were developed in 1980, this study will research sexual harassment cases that occurred from 1980 to 1993. The cases were found in five research journals housed at the University of Tennessee Law Library in Knoxville, Tennessee. The journals that were the sources for the cases were West's Federal Practice Digest, American Law Review, American Jurisprudence, American Law Reporter, and Corpus Juris Secundum. Under the National Reporter System, cases were found in the Northwestern, Pacific, and Southeastern Reporters. Cases were found in both the Federal Reporter and the Federal Supplement. A West Law computer search and a Lexis computer search, also, were used to find sexual harassment cases.

Each case dealing with the hospitality industry was evaluated. For the purpose of this study, the term hospitality industry referred only to hotels and restaurants. These cases were read and summarized. Only sexual harassment issues were discussed. The courts'

decisions on the definition of sexual harassment was noted, and settlements decided by the courts also was noted.

The findings were reported chronologically with a brief summary of each case. This revealed any variations of the law which have occurred over time. In order to detect trends, it was important to note all the changes.

After the summaries, the topic of what constitutes sexual harassment was examined. Since the cases were written chronologically, the changes over the years could be identified. The definitions of what the courts consider to be sexual harassment were noted. Awards by the courts were also noted.

From the court rulings, trends were noted and projections were made concerning future judgements. This study will help the hospitality industry to better understand the law, so that they can prepare for it as well as adhere to it. Once trends were found, it was possible to make projections for future decisions. Recommendations were made for the hospitality industry regarding employment practices, training and evaluations to aide in the prevention of sexual harassment.

Definition of Terms

An Action -- a judicial proceeding whereby one party prosecutes another for a wrong done.

Appellant -- the party who requests that a higher court review the actions of a lower court.

Appellee -- the party against whom an appeal is taken.

Case at bar -- refers to the particular action before the court.

Collateral Estop -- the doctrine which recognizes that the determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings against each other.

Common Law -- the system of jurisprudence, which originated in England and was later applied in the United States, which is based on judicial precedent rather than legislative enactment.

Damages -- monetary compensation awarded by a court for an injury caused by the act of another.

Defendant -- the person against whom a civil or criminal action is brought.

Injunction -- a judge's order that a person do or, more commonly refrain from doing, a certain act.

Limine -- a motion requesting a court from allowing evidence which can be considered highly prejudicial.

Malice -- the state of mind which accompanies the intentional doing of a wrongful act without justification or excuses.

Motion -- a formal request made to a judge pertaining to any issue arising during the pendency of a lawsuit.

Plaintiff -- the person who brings a lawsuit against another.

Prima Facie -- at first view, on its face; not requiring further support to establish existence, validity, credibility, etc.

Remand -- to send back for further proceedings, as when a higher court sends back to a lower court.

Remedy -- the means employed to enforce or redress an injury. The most common remedy at law consists of money damages.

Respondent Superior -- when an employer is acting through the facility of an employee or agent and a tort liability is incurred during the course of this agency due to some fault of the agent, then the employer must except the responsibility.

Sanctioned -- a consequence or punishment for violation of accepted norms of social conduct.

Statutes of Limitations -- laws setting time limits after which a dispute cannot be taken to court.

Summary Judgement -- pre-verdict judgement rendered by the court in response to a motion by the plaintiff or the defendant, who claims that the absence of a factual dispute on one or more issues eliminates the need to send those issues to the jury.

Time barred -- a time barrier to the relitigating of an issue.

Tort -- a civil wrong which does not involve a contract. The elements of a tort are a duty owed, a breach of that duty, and the resultant harm to the one to whom the duty was owed.

Chapter IV

Case Summaries

The sexual harassment cases involving the hospitality industry were obtained from the law library. Each case was read and summarized. These are the summaries of the cases found.

Marentette v. Michigan Host, Inc. 506 F.Supp. 909 (E.D.Mich.1980)

An action was brought against an employer, Michigan Host, Inc., by a cocktail waitress and a restaurant waitress claiming violation of their civil rights. The waitresses alleged that the uniforms which they were required to wear subjected them to verbal and physical sexual harassment from the customers. Their complaint claimed that while the defendants, Michigan Host and Host International, had been made aware of the sexual harassment, neither of them took corrective action. The plaintiffs alleged that the male employees were not required to wear similarly revealing and sexual suggestive costumes. Claiming that the uniforms were not related to any proper job purpose, the plaintiffs sought injunctive relief and asked the court to award damages and costs against the corporate defendants as

compensation for the discriminatory conditions of employment under which they were required to work.

Both sides discussed the Title VII law as it applied to grooming codes, to dress codes, and to sex discrimination. The plaintiffs referred to the case of Equal Opportunity Commission and Margaret Hasselman V. Sage Realty Corporation, Inc. et al, (1980), from the Federal District Court in the southern district of New York. The district judge in that case held that the grooming cases and the haircut cases merely hold that nothing in Title VII prohibits an employer from making reasonable employment decisions based on factors such as grooming and dress.

The defendants referred to the case of Willingham v. Macon Telegraph Publishing Company, (1975). The defendants pointed out that most circuits have agreed with the Fifth Circuit's Willingham decision that dress codes imposed by employers which do not interfere with one's ability to gain employment or to advance equally with members of the other sex, do not violate Title VII.

The District Court agreed with the Southern District of New York that there is a difference between reasonable employment decisions based on factors such as grooming and dress, and unreasonable ones. This court believed that some forms of dress codes could violate, so the dress code falls within the provisions of Title VII.

This court believed that a sexually provocative dress code imposed as a condition of employment which subjected persons to sexual harassment could be a violation of Title VII. The District Court believed that both parties in this case overlooked the real and fundamental problem with the plaintiffs' Title VII cause of action.

As the case of EEOC v. Detroit Edison Co., (1975), pointed out, the relief provisions of Title VII do not specifically authorize an award of either compensatory or punitive damages for discrimination in employment practices. In Title VII cases, back pay is considered a form of restitution and not an award of damages. Since restitution is an equitable remedy, a jury is not required for the award of back pay. Under the language of Title VII, punitive damages are not considered to be equitable relief.

The District Court determined that the plaintiffs' Title VII cause of action must be dismissed as moot for the reasons that injunctive relief was no longer necessary and that back pay was not requested by the plaintiffs. The court dismissed the case.

Rogers v. Loews L'Enfant Plaza Hotel
526 F.Supp. 523 (D.D.C.1981)

A former employee brought action against employer and employer's parent corporations alleging that she was

subjected to physical and emotional harassment by her superiors. Claiming that defendants' conduct had deprived her of rights guaranteed under the Constitution and federal, local, and common law, the plaintiff sought monetary, declamatory and injunctive relief. The defendants motioned the court to dismiss the case.

In September, 1979, the plaintiff was hired by the defendant, James Deavers, as the Assistant Manager of a restaurant. Deavers, the restaurant manager, was the plaintiff's immediate supervision. The plaintiff alleged that after being employed a few weeks, the defendant began to make sexually oriented advances toward her, verbally and in writing. This harassment continued over a period of two months. The plaintiff was frightened and embarrassed by Deaver's actions, and she did not know how she could protect herself. She contended that she told him that she was not interested in him personally, and that his actions were distressful and unwanted. The plaintiff also received an abusive and violent telephone call from Deaver's wife, who had discovered a letter written by her husband to the plaintiff. The plaintiff urged Deaver to tell his wife that there was no relationship between them.

According to the plaintiff, the explicit sexual advances ceased at the end of November, but by then the employment atmosphere and working conditions had become

difficult and uncomfortable. The plaintiff claimed that Deaver's made it difficult for her to perform her job, like excluding her from employee meetings and using abusive language to belittle her in front of the other employees.

The plaintiff attempted to arrange a meeting with the defendant Randy Gantenbein, the food and beverage manager, who had the authority to resolve staff problems. The plaintiff stated that Gantenbein avoided her and for three weeks declined to meet her. Gantenbein met with the plaintiff in January, 1980, only after the hotel manager suggested it. After the plaintiff explained the situation, Gantenbein advised the plaintiff to be patient and to wait and see if the situation improved. In February, Deavers told the plaintiff that he would do everything in his power to see that she was fired. Gantenbein asked the plaintiff to move to an evening position, but she refused. After meeting with the plaintiff and her attorney, the hotel offered to transfer the plaintiff to a higher paying position as night Room Service Manager. This offer was rejected, and the hotel refused to transfer Deavers to a night position. The plaintiff filed a complaint against the defendants with the EEOC.

The plaintiff alleged that the defendant, Deavers, with the knowledge of the defendant, Gantenbein, and

other supervisory employees at the hotel willfully and with premeditation forced himself on her and attempted to force her either to submit to his harassment or lose her job. The plaintiff asserted that she had been severely damaged both mentally and physically by the conduct of the defendants. The plaintiff further claimed that the defendants engaged in tortuous conduct, specifically, 1) invasion of the plaintiff's right to privacy at her home, in her place of employment, and in her personal life; 2) infliction of extreme emotional distress; and 3) assault and battery. The plaintiff charged the corporate defendants with failure to exercise proper supervision and control over their employees, thereby causing the plaintiff injury and making the defendants jointly and severely liable to the plaintiff.

The defendants moved to dismiss the case on a number of grounds. They claimed that the plaintiff's complaint failed to state a claim upon which relief can be granted under Section 2000e-2(9) of Title 42 of the United States Code and Section 1-2512 (1) of the District of Columbia Human Rights Act and the complaint failed to state a claim upon which relief could be granted under the District of Columbia common-law principles of tort.

The plaintiff filed her complaints with the EEOC in March of 1980 and in August of 1981 the matter was still pending. Since the plaintiff had not received notice of

Right to Sue from the EEOC, the plaintiff chose not to bring her Title VII claim at this time. The court did not dismiss the Title VII claim. The court cannot dismiss a claim which does not exist. As to the claim under the D.C. Human Right statute, which is inextricably entwined with the Title VII claim, it was dismissed without prejudice.

Under common-law tort claims, the type of invasion of privacy applicable to this case falls within the rubric of intrusion. While not alleging that Deavers publicized specific information about her, the plaintiff did contend that he used abusive language and belittled her in front of other employees. Unlike other types of invasion of privacy, intrusion does not require as one of its essential elements the publication of the information obtained, but it does involve the obtaining of the information by improperly intrusive means. It was sufficient for the purposes of the motion to dismiss to find that invasion of the plaintiff's privacy, the intrusive telephone calls, violated of her rights, constituting a tort for which she could recover damages. The defendant's motion to dismiss the plaintiff's claim of invasion of privacy was denied.

To constitute the tort of assault, the apprehension must be one which would normally be aroused in the mind of a reasonable person and apparent ability and

opportunity to carry out the threat immediately must be present. The mental injury which results could include, for example, fright or humiliation. The plaintiff alleged that although she expressed to Deavers that his suggestions and advances were distressful and unwanted, he continued to engage in that conduct. In comprehending the plaintiffs pleading as required in a motion to dismiss, the plaintiff made adequate claims to defeat a motion to dismiss her assault cause of action.

To constitute the tort of battery, a defendant can be found liable for any physical contact with the plaintiff which is offensive or insulting, as well as physically harmful. Although intent is required, the most important aspect in such a cause of action is the absence of consent to the contact on the part of the plaintiff, rather than the hostile intent of the defendant. In this case the absence of consent was asserted. The allegations were sufficient to survive the motion to dismiss as to the battery claim.

The plaintiff's final tort claim was infliction of emotional distress, which can result from either intentional or negligent conduct. Since the plaintiff had alleged only intentional tortuous acts in her complaint, only intentional inflection of emotional distress was considered. The plaintiff contended that Deaver's suggestions and advances were unwanted, and even

when it appeared the hotel management knew of the problem, Deavers still persisted in his harassment. The plaintiff was frightened and embarrassed by Deavers, as well as from the conduct of the hotel management in response to the plaintiff's plight. The court found that there was a cause of action for intentional infliction of emotional distress.

The defendants moved to strike or dismiss plaintiff's request for compensatory and punitive damages, as well as, the request for a jury trial. The defendant's argument was based solely on restrictions for a Title VII action. The defendants claimed that the plaintiff was not entitled to a jury trial and damages under her common-law tort claim, but the defendant's motion to dismiss was denied.

The defendant's submitted evidence that the Loews Corporation, Loews Theaters, Inc., Loews Hotels, Inc., and Marcus Loews Booking Agency did not control the management of the employees at the hotel in question. The defendant's motion to dismiss those four defendants were granted.

Slayton v. Michigan Host, Inc.
332 N.W.2d 498 (Mich.App.1983)

An employee brought a discrimination action against her employer and supervisors. The plaintiff was employed

as a waitress by the defendant, Michigan Host, Inc. The defendants Vogel and Twill were her supervisors. Prior to this action, the plaintiff and other female employees sued the defendant, Michigan Host, in federal court, alleging that the work uniform requirement was discriminatory and subjected them to sexual harassment. This action was dismissed without prejudice.

The plaintiff then brought this present suit to court, alleging gender discrimination and harassment. She alleged that defendant, Michigan Host, forced her to quit her job in retaliation for her suit in federal court. She also alleged that defendants Vogel and Twill intentionally inflicted emotional distress upon her, and that they intentionally interfered with her contract of employment by forcing her to resign. The defendants moved for accelerated judgment, claiming that the court lacked subject matter jurisdiction over the controversy because the plaintiff's exclusive remedy was to seek compensation under the Workers Disability Compensation Act. The defendant's motion for accelerated judgment was granted, and the plaintiff appealed.

The plaintiff argued that the Legislature did not intend discrimination claims brought under the Elliott-Larsen Civil Rights Act to be heard by the Bureau of Worker's Disability Compensation but rather intended such claims to be brought in Circuit Court. The defendant

countered that the exclusive remedy provision of the Worker's Disability Compensation Act barred the plaintiff's suit in circuit court because the plaintiff's alleged injuries were covered by the Act.

The Worker's Disability Compensation Act provides that the right to recovery of benefits is provided the act shall be the employee's exclusive remedy against the employer, M.C.L. § 418.131; M.S.A § 17.237 (131). When an employee suffers a personal injury arising out of and in the course of employment, physical and mental disabilities are compensatable under the act, M.C.L. § 418.301; M.S.A. § 17.237 (301). If a plaintiff alleges both injuries covered by the act as well as injuries not covered by the act, he or she must pursue the Worker's Compensation Remedy for those injuries covered by the act (Cole v. Dow Chemical Co., (1982)).

The Court of Appeals held that the exclusive remedy provision of the Worker's Disability Compensation Act did not preclude an employee's civil action under the Elliott-Larsen Civil Rights Act. The court held that a victim of discrimination may bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which are caused by the discrimination. Such claims are not barred by the exclusive remedy clause of the Worker's Disability Compensation Act because they are

independent of any disability which might be compensatable under the act. The court stated that these types of injuries are the kind that the Elliott-Larsen Civil Rights Act was designed to protect against and to hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs.

For the plaintiff's claims against Vogel and Twill for intentional infliction of emotional distress, interference with the plaintiff's contract of employment, and interference with the plaintiff's advantageous business relations, the court held that the plaintiff should have the opportunity to arbitrate these claims at trial. The Circuit Court's judgment was reversed and remanded.

Slayton v. Michigan Host, Inc.
376 N.W.2d 664 (Mich.App.1985)

A waitress brought action alleging sexual discrimination and harassment against her employer and supervisors. The plaintiff claimed that the uniform requirement was discriminatory and subjected her to sexual harassment. The plaintiff further claimed that the defendants harassed her into quitting her job in retaliation for her filing a complaint with the EEOC.

Defendants brought a motion for accelerated judgement under GCR 1963,116(2), claiming that the

Circuit Court was without jurisdiction over the controversy because compensation under the Worker's Disability Compensation Act was the plaintiff's exclusive remedy. The trial court granted defendants' motion, and the plaintiff appealed.

The plaintiff raised several points of error on appeal. The plaintiff first argued that the trial court erred by receiving evidence of the uniforms required in other restaurants and by instructing the jury that such practices were relevant to the determination of whether the defendants had engaged in sexual discrimination.

The Court of Appeals stated that the crux of a sex discrimination action is that similarly situated persons have been accorded different treatment because of their sex. In order to establish a prima facie case of sexual discrimination, a woman must show that she was a member of a class entitled to protection under the statute and that for the same or similar conduct, she was treated differently than a man. Once a plaintiff establishes by the preponderance of the evidence that a prima facie case exists, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its actions. If the defendant is able to do this, the plaintiff then must be given the opportunity to prove by preponderance of the evidence that the reasons offered by the defendant were not its true reasons but were mere

pretext for the discrimination.

In this case, pictures of costumes worn by non-testifying waitresses in other restaurants not owned by the defendant were offered by defense counsel. The purpose was to show that it is a customary practice in the industry to require waitresses to wear scanty and revealing costumes. Concerning claims of sexual discrimination brought under title VII of the Civil Rights Act of 1964, federal courts have held that a reason based upon a desire to compete in the industry, or customer preference, is discriminatory on its face as merely reiterating the defendant's policy to impose the requirement on employees because they are females. The Court of Appeals found that a reason based upon the customary practices of the industry was similarly discriminatory on its face. It would be deviant to allow the customary practices of an industry to determine whether the discrimination was valid. The Court of Appeals held that this evidence was erroneously admitted.

The court referred to Flynn v. Libkie, (1981). In Flynn v. Libkie, the court believed that evidence of the customary usage and practice of an industry was totally irrelevant to the determination of whether such practice or custom was discriminatory. If it were otherwise, an employer in an industry replete with discriminatory practices could be found immune from liability because

such was the customary practice. The court was unconvinced that had the evidence of the customary practices of the industry and the disputed instruction been omitted, that the jury's verdict would not have been different. Therefore, the Court of Appeals reversed the jury's verdict and remanded this cause for a new trial.

In her complaint, the plaintiff claimed that the defendants retaliated against her for filing complaints with the EEOC and in federal court. During the trial the defendant read a letter sent by the National Labor Relations Board (NLRB) stating that its belief that further proceedings were not warranted. The Court of Appeals held that the introduction of evidence of the NLRB proceedings was a prejudicial error. The primary reason for this holding was that the evidence was irrelevant to the case at bar. The refusal to issue a complaint was not relevant to whether the defendant engaged in retaliatory conduct prohibited under the Act. The Court of Appeals reversed and remanded for a new trial on this basis.

The plaintiff, also, contended that the trial court erred when it would not allow the plaintiff to introduce in her case-in-chief testimony concerning the sexual harassment received by other waitresses when they were required to wear the sexually revealing uniforms. In deciding this issue, the Court of Appeals was guided by

federal law. In Vinson v. Taylor, (1985), the Court of Appeals for the District of Columbia held that such evidence was relevant to the determination of whether the employer had created an environment in which sexual harassment was pervasive for purposes of Title VII claim. The court further held that it was erroneous to exclude such evidence because the evidence could be critical to a plaintiff's case, for a claim of harassment cannot be established without a showing of more than an isolated incident of discriminatory intent.

The Court of Appeals believed the evidence sought to be admitted by the plaintiff was directly relevant to the question of whether, by imposing the uniform requirement, the defendant had created an environment in violation of the act. Therefore, it was in error to exclude it.

The trial court prohibited the plaintiff from pursuing damages prior to May, 1976. This date was determined by applying the three year period of limitations plus 20 months credit for the time during which the plaintiff's case was pending in federal court, to the time of the filing of the lawsuit on January 28, 1981. The Court of Appeals agreed with this aspect of the court's ruling. The court held that a victim of discrimination may bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish caused

by the discrimination. Such claims are not barred by the exclusive remedy clause of the Worker's Disability Compensation Act because they are independent of any disability which might be compensable under the act. These are the types of injuries that the Act was designed to protect against and to hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs. The court held that the plaintiff was entitled to seek recovery for those damages, physical, mental, or emotional, which she could prove were unrelated to the disability already compensated for by the redemption agreement.

Lui v. Intercontinental Hotel Corp. (Hawaii)
634 F.Supp. 684 (D.Hawaii 1986)

An employee brought action in state court, alleging sexual assault and battery, emotional distress, and constructive discharge due to sexual harassment by her supervisor. The complaint was moved to federal court.

The plaintiff alleged that the hotel's general manager committed multiple sexual assaults and batteries upon her and subjected her to sexual harassment during the plaintiff's working hours. As a result, the plaintiff was forced to resign her job. She failed to file a complaint with the Department of Labor and Industrial Relations within the ninety days specified by

Hawaii's employment discrimination law, Hawaii Rev. Stat. § 378-4. In the District Court, the plaintiff did not plead under this statute but instead alleged common law counts of sexual assault and battery, emotional distress, negligent hiring and constructive discharge.

The defendant moved to dismiss the case, arguing that ch. 378 constitutes the exclusive remedy for sexual harassment. The defendant referred to a section of ch. 378 that stated that the Department shall have jurisdiction over the subject of unlawful discriminatory practices. The court stated that the word "exclusive" was noticeably absent. This was merely a statement that the Department has jurisdiction over statutory claims. It does not say that common law claims no longer exist after the enactment of the statute. The court stated that ch. 378 was intended to provide remedies for employment discrimination beyond those that already existed, not at the expense of those that already existed. The District Court held that an employment discrimination statute did not bar common law claims.

The court examined the question of whether Hawaii's workers' compensation law was meant to encompass the intentional tort alleged here. The defendant argued that Hawaii Rev. Stat. ch. 386, was the plaintiff's exclusive remedy for assault and battery claims. The court reviewed the question of whether the statutory scheme was

meant to encompass the intentional tort alleged in this case. The general rule under Hawaiian law is that "an injury or death is said to arise in the course of employment when it takes place within the period of the employment when it takes place within the period of the employment, at place [sic] where the employee may reasonably be, and while he is fulfilling his duties or engaged in doing something incidental thereto." The court stated as long as the injury is causally related with any incident or condition of employment, then it was deemed to arise out of and in the course of the employment. The District Court held that worker's compensation was the exclusive remedy for an employee's assault or battery at the hands of a supervisor during working hours.

The final decision by the court was that the plaintiff's constructive discharge claim was barred. Hawaii recognizes the doctrine of an employee at will. The court ordered that the defendant's motion to dismiss be granted.

Langlois v. McDonald's Restaurants of Mich.
385 N.W.2d 778 (Mich.App.1986)

An employee brought claim for damages against her employer, alleging she was subjected to sexual harassment in connection with employment in violation of the

Elliott-Larsen Civil Rights Act. The Wayne Circuit Court granted the employers motion for a summary judgment, and the employee appealed.

The plaintiff based her claim of sexual harassment on a single incident which occurred on March 17, 1982. She worked at a fast food restaurant owned by McDonald's Restaurants of Michigan. The "first assistant", Forney, verbally and physically harassed the plaintiff. The plaintiff informed her swing manager of the occurrence, and he told her to forget it. The plaintiff reported the incident to the police. An investigation later conducted by the defendant's personnel led to Forney's discharge on March 22, 1982.

The plaintiff later learned that Forney had harassed other employees. She testified that management was aware of the prior incidents but did not act to prevent their recurrence. The plaintiff's claim of sexual harassment was based upon the Elliott-Larsen Civil Rights Act M.C.L. § 37.2101 et seq.; M.S.A. §3.548(101) et seq., which, like Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e et seq., prohibited employers from discriminating against a person on the basis of sex regarding the term, condition, or privilege of employment. The definition of sexual harassment is unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when: (1)submission

to the conduct of communication is made a term or condition either explicitly or implicitly to obtain employment, (2) submission to or rejection of such conduct or communication by the individual is used as a factor in decisions affecting such individual's employment, (3) the conduct or communication has the purpose or effect of substantially interfering with an individual's employment, creating an intimidating, hostile, or offensive environment.

The court referred to Henson v. City of Dundee, (1982) which outlined five elements which must be established in order to recover damages for a claim of sexual harassment under Title VII. The elements are (1) the employee belongs to a protected group, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based on sex, (4) the harassment complained of affected a term, condition, or privilege of employment, and (5) respondeat superior.

The plaintiff admitted that she was not subjected to quid pro quo sexual harassment. She claimed that she was entitled to damages because of a hostile work environment. The court stated that the mere fact that sexual harassment occurred did not justify recovery under a hostile work environment claim. The severity of the harassment becomes the issue.

To state a claim under Title VII, the sexual

harassment must be sufficiently pervasive that it alters the conditions of employment and creates an abusive working environment. A single incident encountered by the plaintiff in addition to her continued employment for nine months after the incident, established as a matter of law that no hostile environment existed. The plaintiff failed to allege facts which would allow recovery under a hostile work environment discrimination claim.

The court agreed that Forney was appropriately terminated as a result of his contemptible behavior and should have faced criminal responsibility for his actions, but that was not the issue in this case. The court had to determine whether the Elliott-Larsen Civil Rights Act provided the plaintiff with an avenue for recovering monetary damages from her employer due to Forney's actions. Based on the lack of severity and pervasiveness of the conduct, the act does not allow such a remedy.

The plaintiff argued that the court should not focus simply on the incidents to which she was subjected, but rather that the incident should be considered in conjunction with the incidents which allegedly occurred between Forney and other co-workers. The court would have accepted the plaintiff's argument if the events had an effect on the plaintiff's psychological well-being as

it pertained to the work environment. The plaintiff admitted that she did not become aware of the other incidents of harassment until Forney had been fired. The court concluded that the plaintiff could not rely on incidents of sexual harassment of which she was unaware to establish that she was subjected to a hostile work environment for purposes of the Elliott-Larsen Civil Rights Act. The defendant's motion for summary judgement was affirmed.

Seib v. Elko Motor Inn, Inc.
648 F.Supp. 272 (D.Nev.1986)

The plaintiff brought a Title VII sexual harassment action against her former employer and her former supervisor. In March of 1984, the plaintiff brought charges to the EEOC. The plaintiff alleged that Sullivan, her former supervisor, sexually harassed her, forcing her to leave her job. On April 4, 1985, after receiving her notice of the right to sue from the EEOC, the plaintiff filed a complaint in the District Court against Thunder-Lion Enterprises, Inc. (Thunder-Lion) and Sullivan.

In her claim, the plaintiff stated that she was sexually harassed and Thunder-Lion was liable because it sanctioned Sullivan's actions and was indifferent to the plaintiff's complaints. Sullivan moved for dismissal of the plaintiff's claims against him. He claimed that

because he was not a named respondent in the EEOC's charge and that the plaintiff failed to state a proper claim under Title VII because she sought damages unavailable under that statute, the claims against him should be dismissed.

Because the complaint failed to state a proper claim under Title VII, the court agreed with the defendant. The only forms of relief available under Title VII are injunctive or declaratory relief, reinstatement, back pay and any other equitable relief that the court deems appropriate. Since Sullivan no longer worked for Thunder-Lion, the need for declaratory or injunctive relief against him was moot. Also, individual defendants cannot be held liable for back pay. The court held that no Title VII claim could be made against Sullivan and, therefore, the plaintiff's first cause of action against him was dismissed without leave to amend. Although the plaintiff may suffer the inconvenience of pursuing separate lawsuits, she did not claim that the state courts could not provide her with an adequate remedy or that her claims would be time-barred. In fact, the plaintiff filed an action against Sullivan in Nevada courts. The motion to dismiss the complaint against Sullivan was granted.

Highlander v. K.F.C. Nat. Management Co.
805 F.2d 644 (6th Cir.1986)

A terminated employee brought action against her employer, alleging sexual harassment under Title VII. The United States District Court for the Southern District of Ohio entered a judgment in favor of the employer, and the employee appealed.

On February 1, 1982, a district training manager, Kosisko, physically harassed the plaintiff and a co-worker. He was inebriated at the time. The next day both women reported the incident to Van Winkle, the plaintiff's co-manager. When Van Winkle informed them that he intended to report the incident immediately, the plaintiff stressed that she did not want to make a big deal of the event. The Plaintiff later transferred to Kentucky. Before moving, the plaintiff reported the Kosisko incident to her new manager, Altieri, who immediately notified the area manager, Hatem, and the human resources manager, Allgeier. Allgeier promptly conducted an investigation of the accusations. In mid-February of 1992, the plaintiff alleged that Altieri propositioned her, but she did not report it for three months. Altieri denied the charges. In May of 1982, the plaintiff phoned her company's president, Lavo, and complained about the alleged sexual harassment, her failure to receive a promotion, and the misconduct of the

employees. At a meeting attended by Allgeier, Lavo, the plaintiff, and her husband, the plaintiff submitted a written memorandum documenting her charges. Lavo reopened the Kosisko investigation and initiated an inquiry into Altieri's conduct. As a result of the investigation, Kosisko was demoted with an annual salary reduction of $2,000. The conclusion of the investigation was that the evidence was insufficient to justify any disciplinary action against Altieri.

During the first six months of 1982, the plaintiff was formally disciplined on seven occasions for her unsatisfactory work performance. She received five written reprimands and one suspension. She was terminated on June 17, 1982 for absenteeism and failure to comply with the company policy of requiring medical verification for her unannounced and frequent absences. The plaintiff filed her sexual harassment charges against her employer. When the district court entered judgment for the defendant, the plaintiff appealed.

The Circuit Court has recognized that Title VII provides relief for quid pro quo sexual harassment and hostile or offensive work environment (Rabidue v. Osceola Refining Co., (1986)). Quid pro quo sexual harassment is when an employee is compelled to choose between giving in to sexual demands and forfeiting job benefits. In a quid pro quo action, the employee bears the burden of proof to

support the charges that submission to the unwelcome sexual advances of supervisory personnel was an express or implied condition for receiving job benefits or that a tangible job detriment resulted from the employee's failure to submit to the sexual demands of supervisory employees. (Henson v. City of Dundee, (1982)).

To prevail on a quid pro quo claim of sexual harassment, a plaintiff must assert and prove (1) that the employer was a member of a protected class; (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee's submission to the unwelcome advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to a supervisor's sexual demands results in tangible job detriment; and (5) the existence of respondent superior liability (Henson v. City of Dundee, (1982)). In a quid pro quo sexual harassment action, an employer is held strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, dismissal, and discipline under the theory of respondent superior.

In the current case, the Court of Appeals concluded that the plaintiff failed to prove a case of quid pro quo, because the alleged harassment was induced by the

plaintiff's suggestion that she and Altieri meet in a bar to discuss her opportunities for promotion and because, subsequent to the alleged sexually offensive statements, both the plaintiff and her husband indicated that the plaintiff placed no serious implications upon Altieri's conduct. The record was totally devoid of any evidence that demonstrated the plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity suggested by Altieri. The plaintiff, herself admitted that her performance was adversely affected by her inability to respond to the high business volume at the new location and failed to present any evidence linking the transfer to Altieri's alleged misconduct. The Court of Appeals concluded that the District Court did not err in determining that the plaintiff did not prevail on her quid pro quo sexual harassment claim.

The plaintiff's cause of action charging a sexually hostile work environment must be evaluated within the five part test. (Rabidue v. Osceola Refining Co., (1986)). A plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a

sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that seriously affected the psychological well-being of the plaintiff; and (5) the existence of respondent superior liability (Meritor Savings v. Vinson, 477 U.S. 57).

The court in the Rabidue case also noted that, unlike quid pro quo sexual harassment claims which may be predicted upon a single incident of sexual harassment, hostile environment claims are characterized by varied combinations and frequencies of hostile sexual exposures. Thus, in an action alleging a hostile work environment, the plaintiff has the burden of demonstrating that the injury resulted not from a single isolated or offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency (Rabidue v. Osceola Refining Co., (1986)).

The Court of Appeals concluded that the plaintiff failed to demonstrate that she was offended in any significant way by the asserted incidents and that the incidents, if in fact they occurred, had the effect of unreasonably interfering with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment that seriously affected her

psychological well-being. Accordingly, the court concluded, that the plaintiff failed to carry her burden of proof that she was exposed to sexual harassment in the form of a hostile or offensive working environment. For these reasons the judgment of the District Court was affirmed.

Ebert v. Lamar Truck Plaza
715 F.Supp. 1496 (D.Colo.1987)

Former female restaurant employees brought action alleging sexual harassment. The action arose out of the plaintiff's employment at the Lamar Truck Plaza (LTP), a 24 hour full service restaurant. LTP management hired the plaintiffs in May 1984, when the restaurant opened. Each of the plaintiffs either resigned or was terminated by late November 1985. The plaintiffs claimed that during the period from approximately June of 1984 through May 1985, the LTP working environment was permeated with sexual hostility. The defendants denied that the plaintiffs were harassed because of their sex or that working conditions were altered by the allegedly hostile atmosphere.

The plaintiffs claimed that LTP management engaged in conduct and commentary which created an offensive and hostile working environment. The Supreme Court has held that conduct of a sexual nature which creates such an

environment is actionable (Meritor Savings Bank v. Vinson, 477 U.S. 57). The court looked at the five point test to determine if a prima facie case had been established.

The plaintiffs claimed that the use of vulgar language and various instances of physical harassment created an abusive environment. The court found that the plaintiffs failed to establish that the alleged harassment was based on their sex, and have failed to show that the environment at LTP was the kind of pervasively hostile environment which is actionable under Title VII. The defendants presented evidence that vulgar language was used by a number of LTP employees-including some of the plaintiffs.

The evidence showed that such language was directed indiscriminately at both male and female coworkers. Several witnesses testified that the language used was typical of that used in the restaurant business. The plaintiffs have not established that the alleged harassment was so pervasive as to alter working conditions and create an abusive working environment. The specific instances of the use of foul language and the alleged unwelcome touching reported by the witnesses at trial were actually sparse.

The District Court found that the defendant responded properly and promptly to all reported

incidents. One employee testified that when she complained to the manager about the behavior, he spoke to the offending party in a timely manner. In the courts view, the defendant dealt expeditiously and efficiently with a difficult and admittedly sometimes uncomfortable working environment. The plaintiffs simply did not demonstrated the existence of a pervasive sexually hostile atmosphere. They did not shown that LTP management created or condoned an environment which significantly and adversely affected employees because of their sex. They did not establish that the conduct complained of occurred because of their sex, and did not show that the alleged harassment affected the working environment significantly. The judgment was for the defendant.

Moody v. Westin Renaissance Co.
413 N.W.2d 99 (Mich.App.1987)

An employee brought a civil rights action against her employer, alleging the employer failed to take appropriate action to restrain the conduct of a co-employee who had been sexually harassing the plaintiff. The employer moved for declaration of rights, seeking a ruling that a prior Michigan Employment Security Commission (MESC) referee's determination in favor of the plaintiff was not dispositive on the issues of liability

in the present case. The defendant appealed that the trial court's ruling that the MESC referee's determination was conclusive as to the issue of liability in the instant action.

The plaintiff was employed from, January, 1982 until May, 1983. She claimed that during that time she was subjected to sexual and emotional harassment by a fellow employee, Sills. The plaintiff allegedly informed management about the sexual harassment, but nothing was done. On May 3, 1983, when Sills physically harassed her and made treats against her safety, the plaintiff quit her job and sought unemployment benefits.

Since she voluntarily quit her job, the MESC determined that the plaintiff was ineligible for benefits. The plaintiff appealed the decision. Following a hearing, the referee's determination of ineligibility was not appropriate since the plaintiff left her job for a good cause attributable to her employer. The defendant did not appeal that determination, but did appeal the decision of the trial court that the earlier MESC referee's determination was conclusive as to the issue of liability. The defendant argued that determination of a MESC referee cannot be used to collaterally estop a party from litigating issues of liability in a subsequent sex discrimination suit.

The question presented in the present case was

whether a determination by a MESC referee can be used in a subsequent civil action involving a claim of sexual harassment to collaterally estop the defendant from litigating the issue of its tort liability. The Court of Appeals agreed with the cases that held unemployment compensation determinations do not act as collateral estopped in subsequent civil actions (Ferris v. Hawkins, (1983)). The Court of Appeals held that the referee's determination did not collaterally estop employment rights. The Circuit Court's decision was reversed.

Cremen v. Harrah's Marina Hotel Casino
680 F.Supp. 150 (D.N.J.1988)

A former employee brought action under Title VII of the Civil Rights Act against her employer and also asserted tort claims against her former employer for battery and intentional infliction of emotional distress based upon sexual assault by her supervisor. The plaintiff was hired on April 23, 1984. On May 2, 1984, she was asked by her supervisor to report to his office after her shift. After arriving, the supervisor allegedly sexually assaulted the plaintiff. The next day the plaintiff telephoned Harrah's Affirmative Action Officer, Pridgen, who had given an orientation talk during training about sexual harassment. Pridgen reportedly advised the plaintiff that if she wanted to

speak to him about the incident, she would report to his office when she returned to work.

On May 4, 1984, the plaintiff reported to Pridgen's office. According to the plaintiff, Pridgen ask about the incident, and then asked whether she wished to file a verbal or written complaint. The plaintiff was told that a written complaint would have to be brought to the attention of Morris' Supervisors and a verbal charge could be resolved informally between Pridgen and Morris. The plaintiff opted for the verbal complaint.

Allegedly, the harassment continued both at work and at the plaintiff's home. Upset by the continuing harassment and dissatisfied by Harrah's response to the matter, the plaintiff contacted her union shop steward on May 19, 1984, and on May 27, 1984, Morris was suspended from employment. The plaintiff was told that Harrah's had received other complaints of incidents of sexual harassment involving Morris.

On July 30, 1984, the plaintiff filled a charge with the EEOC alleging that Harrah's had denied her rights under Title VII by reason of her sex. After receiving her right to sue letter from the EEOC, the plaintiff commenced this action on December 19, 1984. In an amended complaint filed January 10, 1985, the plaintiff, in addition to asserting a Title VII violation, also brought an intentional infliction of emotional distress.

Harrah's moved for summary judgment on the plaintiff's Title VII and pendening tort claims. The court denied the motion. Harrah's, then, sought to dismiss or, receive a summary judgment on the plaintiffs pendening state claims, contending that the plaintiff's alleged injuries are exclusively compensatable under the Worker's Compensation Act. The defendant, citing that the New Jersey courts have historically applied very liberal interpretations of the wording of the act, argued that the plaintiff's alleged injuries were compensatable only under the provisions of the Worker's Compensation statue, and cannot support actions sounding in the state tort law.

The court believed that the real difficulty lied not in determining whether the plaintiff's injuries were covered by the New Jersey Law of Worker's Compensation. The New Jersey courts have consistently held that the Worker's Compensation Act is to be constructed liberally so as to bring as many cases as possible within its coverage (Marshall v. Force Machinery Co., (1973)). The New Jersey courts employ a very liberal test for determining whether an incident arose out of employment for the purposes of worker's compensation. The positional risk analysis requires only that the employment in some fashion physically facilitated the occurrence of the incident (Briggs v. American Biltrite,

(1977)). Under this approach, assaults by co-workers have been held compensatable even if the subject of the dispute is unrelated to the work, if the work of the participants brought them together and created the relations and conditions which resulted in the fight. (Martin v. J Lichtman & Sons, (1964)). Applying these views to the present case, the plaintiff's claimed injuries stemming from the alleged sexual assault and harassment were fully compensable under the provisions of the New Jersey's Worker's Compensation Act.

Generally, when an employee's injury fall within the coverage of the worker's compensation law, the employee is barred from seeking further legal redress from an employer or co-worker. There is an exception in the provisions of the act. Employment related intentional wrongs are not exclusively covered under the worker's compensation scheme, but rather remain cognizable at common law. This exception required the court to consider whether allegations of sexual assault and, more broadly, sexual harassment, should be considered allegations of intentional wrongs.

The New Jersey Supreme Court in Millison v. E.I. duPont deNemours & Co., (1985) refined and clarified the test for determining within an employment related incident what qualifies as an intentional wrong for the purpose of removing the exclusivity clause of the

Worker's Compensation Act. In Millison, the court felt that the legislature could not have intended that worker's compensation would insulate actors from liability outside the boundaries of the act for all willful and flagrant misconduct short of deliberate assault and battery. This new approach ended the necessity of proving that the employer possessed a subjective intention to inflict deliberate injury. In its place, the court substituted the less stringent requirement of showing that an employer's actions were substantially certain to cause the complained of harm.

In Millison, the court also held that in determining which episodes or incidents rise to the level of actionable intentional wrongs, the courts must examine not only the conduct of the employer, but also the context in which that conduct takes place. Millison settled the issue of employee liability for the intentional wrongs of co-workers and supervisors. In response to the argument that the intentional wrong exception of N.J.S.A. 34:15-8 applied only to co-workers and not to employers, thus rendering worker's compensation still the sole remedy in actions against an employer, the court stated that the intentional wrongs of an employer as well as those of co-workers fall outside of the boundaries of the compensation act. Whenever the employer is a corporation, the employer can act only

through its employees, so actions taken by certain corporate officers and supervisors are actions taken by the corporate employer.

Applying the principles developed in Millison to the present case, and taking all of the plaintiff's allegations as true, this court found that the incidents were sufficiently flagrant and constituted intentional wrongs. This entitled the plaintiff to pursue her actions for battery and intentional infliction of emotional distress. The defendant's motion for a dismissal or alternatively the summary judgment as to the plaintiff's claims for battery and intentional infliction of emotional distress was denied.

Valdez v. Church's Fried Chicken, Inc.
683 F.Supp 596 (W.D.Tex.1988)

An employee brought action alleging assault under the state law and sexual harassment under Title VII against her co-worker and employer. The plaintiff alleged that her "team leader", Estrada, verbally and physically harassed her. There were three main harassment incidents, and one was an attempted rape. This was the first case in which damages were awarded.

Her employer, Church's, objected to the plaintiff's presentation of the assault claim at the trial on the grounds that the claim was not specifically raised in the

plaintiff's forth amended complaint or in the pretrial order. In terms of the issues presented by the assault claim, which are different from the Title VII claim, the court invited the parties to submit extensive post-trial briefings on a variety of issues, and the parties did so. In this case, there can be no findings of unfair surprises or lack of notice of the assault claim. The court found that it would be unjust to eliminate half of the plaintiff's case for the failure of her attorney to properly plead the assault claim.

Under Texas law, a defendant is guilty of civil and criminal assault when he intentionally or knowingly causes physical contact with another when he knows or should reasonably believe that the other person will regard the contact as offensive or provocative (Moore's Inc. v. Garcia, (1980)). The accounts of the three incidents which were given by the plaintiff in her deposition and her trial testimony were not completely consistent. Despite the inconsistencies, the court found that the plaintiff was sexually assaulted by Estrada at least one time and that the advances were unwelcome. The court found that Estrada did sexually assault the plaintiff and was liable for assault under Texas law.

The general rule in Texas is that liability of a corporation for the assault of its employees is not binding unless the assault was to assist in the

corporation's business (Tiena Drilling Corp v. Detmar, (1984)). In this case, there was no testimony that Church's authorized Estrada to use any force in the performance of his duties. The court found that the defendant, Church's, was not liable for any actual damages the plaintiff may have suffered. Since the court determined that the plaintiff is not entitled to recover any actual damages against Church's, it followed without question that the plaintiff could not recover punitive damages from that defendant.

A plaintiff may recover punitive damages from an assault only where there is a finding of malice on the part of the defendants. Acts done with gross indifference to the legal rights of others such that they amount to wanton intentional acts without just cause are malicious under the law. Where a tort is committed intentionally and has the outrageous character associated with a crime, an award of punitive damages is permitted (Prosser & Keeton, Law of Torts § 2 (5th Ed.1984)). Since the court found that Estrada attempted to rape the plaintiff, an award of punitive damages was warranted under the facts of this case.

Because most of the damages the plaintiff seeks to recover are for mental anguish and psychological injury, it is more difficult to calculate the damages. A plaintiff may recover for seven separate items of

damages: 1) physical injuries from the assault; 2) mental anguish from the assault; 3) injuries arising from a diagnosed condition of post-traumatic stress syndrome; 4) the cost of prior and future counseling; 5) loss of earning capacity in the past and in the future; 6) aggravation of marital difficulties; or 7) aggravation of general anxiety and depression. The plaintiff did not testify that she had received any physical injuries from the assaultive conduct of Estrada. The plaintiff's description of the incidents and their effects on her focused on psychological rather than physical injuries. The court found that the plaintiff was not entitled to an award for physical injuries.

The plaintiff did provide testimony about the mental anguish she suffered as a result of the assaultive conduct of Jerry Estrada. Texas courts recognizing that a female plaintiff can recover mental anguish damages from a sexual assault, even when there is no physical contact by the defendant. The court found that the plaintiff should recover $10,000 in damages for mental anguish.

According to Dr. Rodriguez, a psychiatrist, the plaintiff suffered from post-traumatic stress syndrome. In the doctor's opinion, the plaintiff's prognosis was very poor and she would need psychiatric care for the rest of her life. Dr. Rodriguez saw the plaintiff on

four occasions at a cost of $250. Up until the trial, the plaintiff incurred $2,700 in expenses for the costs of her regular sessions with Ms. Healy, a clinical social worker. The court found that 100% of Dr Rodriguez's services were necessary for treating the plaintiff and found that 75% of the costs of Ms. Healy's treatment should be recoverable as damages for the plaintiff. The court found that any award of medical expenses for the future beyond one year would be too speculative. The court found that the defendant Estrada was liable for $5,200 to cover the plaintiff's future medical expenses.

The next issue considered was the plaintiff's claimed inability to work after her experiences at Church's. After being terminated from Church's, the plaintiff held five other jobs, which she quit because she could not work around men. Since the plaintiff was able to perform on the job before the incidents and was unable to work after the incidents, the court found that the plaintiff's job disability was caused by the defendant's conduct. From the plaintiff's testimony, the court estimated that the plaintiff earned approximately $14,000 from April 1985 until December 1987. The court estimated that had the plaintiff been able to hold down a full-time employment at church's during this period, she would have earned approximately $12,000. Since the plaintiffs actual earnings exceeded what she would have

earned absent the disability, the court found that the plaintiff was not entitled to any awards of damages for past employment disability.

Next, the court determined that if the plaintiff were able to maintain full-time employment in the next year, she would earn approximately $7,000. The court believed that awarding the full amount would give the plaintiff an unjustified windfall because her actual earnings exceeded what she would have earned at Church's by approximately $2,500. The court found that the plaintiff was entitled to an award of $4,500 to cover future employment disability.

The court found no award was appropriate for any aggravation of the plaintiff's martial difficulties. The court was similarly disinclined to make any damage award for aggravation of the plaintiff's general anxiety and depression. The total of the damages was $46,525. In addition, the plaintiff was entitled to prejudgment and post-judgment interest on the damage award.

The next issue was the Title VII claim for sexual harassment. To establish quid pro quo this court referred to the Henson v. City of Dundee case that was mentioned previously. Church's argued that the plaintiff was terminated for absenteeism rather than sexual discrimination. The court found that the plaintiff failed to rebut the proffered reason for termination.

The court found that the plaintiff termination from Church's was for legitimate rather than discriminatory reasons.

On the issue of a hostile work environment, the court referred to the Meritor Savings Bank v. Vinson case. Because the court had determined that the defendant Estrada sexually assaulted the plaintiff on at least one occasion and this harassment included an attempted rape, the court found that the plaintiff's psychological well-being was significantly affected and that she had satisfied this element of her hostile work environment claim.

Throughout this case the credibility of many of the witnesses was slight. The plaintiff even lied about critical facts. In the area of hostile work environment the court was faced with many inconsistencies. The court found, however, that the testimony of Hernandez, the assistant manager, was by far the most credible of all the witnesses. Hernandez testified that the plaintiff approached him once and complained that Estrada was overworking her. Allegedly, she did not mention sexual harassment. The court accepted this testimony. The court found the evidence was insufficient to impute liability on Church's for the sexual harassment of Estrada. Because neither the plaintiff nor Estrada no longer worked for Church's, the court agreed with the

defendant that the plaintiff's request for injunctive relief was moot. For all the foregoing reasons, the court found that the plaintiff was not entitled to any relief against Church's for her Title VII claims of sexual harassment.

Presidential Hotel v. Canal Insurance Co.
373 S.E.2d 671 (Ga.App.1988)

In a third-party complaint, a hotel sought damages against its insurer for its refusal to defend the hotel and pay any loss which the hotel might sustain in an action brought by the hotel's former employees. The employees sought monetary and mental damages for sexual harassment, fraud, and implied contract claims. The Superior Court entered a summary judgment in favor of the insurer and the hotel appealed.

When three employees brought suit against the defendant, the defense of the plaintiff's lawsuit was tendered to the Canal Insurance Company (Canal) by the hotel. Canal denied coverage. Like the majority of liability insurance policies, the policy to the hotel required Canal to defend claims of liability, even if those claims prove groundless. The policy covered bodily injury or property damage claims resulting from an occurrence. It was argued that the plaintiff sought damages for bodily injury, and, therefore, the liability

was covered under the policy. In this regard, the hotel points out that the plaintiff was seeking compensation for personnel injuries (Staggs v. Wang, 185 Ga.App. 310,311, 363 S.E.2d 808, Supra).

In an insurance policy, the term bodily injury pertains to physical injury to the body not nonphysical, emotional, or mental harm (West American Ins Co. v. Bank of Isle of Wight, (1987)). The plaintiffs sought monetary and mental damages. They did not seek damages for actual physical harm. The policy issued by Canal covered damages for bodily injuries resulting from an "occurrence." An occurrence was defined as an "accident ... which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Intentional acts are not covered under the policy (George Farm Bureau, etc., Ins. Co. v. Meriwether, (1983)). Given the allegations of intentional conduct, it could not be said that any resulting bodily injury to the plaintiff's was unintended. The assertions of liability by the plaintiffs did not fall with the policy's definition of an "occurrence." The Court of Appeals found that the trial court did not err in granting Canal's motion for summary judgment. The judgment was affirmed.

Continental Insurance Co. v. McDaniel
772 P.2d 6 (Ariz.App.1988)

The Superior Court of Maricopa County entered a summary judgment in the insurer's favor declaring that comprehensive business policy issued to an employer did not cover alleged torts arising from the employer's sexual harassment of employees. The employer appealed.

The Court of Appeals reviewed the same points of "occurrence" and intent as the Presidential Hotel v. Canal, (1988). The court concluded that there was no coverage for intentional acts, wrongful under the law of torts, because contractual intent and public policy coincide to prevent an insured from acting wrongfully knowing his insurance company will pay the damages. In the opinion of the Court of Appeals, the trial court's judgment denying coverage upon filing the proper affidavits, was affirmed. Continental was awarded attorney's fees on appeal.

Ebert v. Lamar Truck Plaza
878 F.2d 338 (10th Cir.1989)

An employee and former employees brought action against their employer, alleging violation of the Title VII. The United States District court for the District of Colorado entered a judgment in favor of the employer.

The employees appealed. Details of this case were explained earlier (see page 46).

Previously, the district court found that the use of foul language and the alleged unwelcome touching were actually sparse and not pervasive. The court found that when complaints were made, the management took appropriate corrective action. The question was whether the District Court's finding was clearly erroneous. The Court of Appeals concluded it was not. The judgment was affirmed.

EEOC v. Hacienda Hotel
881 F.2d 1504 (9th Cir.1989)

An employment discrimination action was brought to trial. The United States District Court for the Central District of California entered a judgment in favor of the plaintiffs. The defendant appealed. In the initial case, the general manager, Godoy, the Executive Housekeeper, Castro, and the Chief of Engineering, Nusbaum, were accused of sexually harassing the plaintiffs. The verbal abuse was constant and severe. The Court of Appeals reviewed the District Court's factual findings with respect to the employee's sexual harassment claims.

Hacienda raised three challenges to District Court's conclusion that it was liable for sexual harassment in

which its employees engaged. First, Hacienda argued that the sexually harassing conduct in which Castro and Nusbaum were proven to have engaged was not sufficiently severe or pervasive to be actionable under Title VII. The Appellant also contented that it could not be held liable for the acts of Nusbaum and Castro of which it had no notice. Finally, Hacienda argued that its policy against discrimination and its internal grievance procedures should shield it from liability for sexual harassment.

There was no dispute in this case that the acts of sexual harassment occurred, and that they were unwelcome. The contested issue was whether the harassment was sufficiently "severe or pervasive" to alter the terms and conditions of the claimants' employment and to create a sexually hostile work environment. Upon review of the evidence, the Court of Appeals agreed with the District Court's conclusion that the complaints were subjected to severe and pervasive sexual harassment that seriously affected the working environment and altered the terms and conditions of their employment.

The court referred to a pre-Vinson case, Miller v. Bank of America, (1979). The District Court declared that the Ninth Circuit has a rule of respondent superior under which employers are liable for intentional sexual harassment in which supervisory personnel engaged in the

course of their employment, even when such conduct violates company policy. Applying that standard, the court held that Hacienda can be held liable for employees' acts of sexual harassment.

The court noted that the prevailing trend of the case law seemed to hold that employers were liable for failing to remedy or prevent a hostile or offensive work environment of which management level employees knew, or in the exercise of reasonable care should have known (Hall, 842 F.2d 1015). The Court of Appeals found that the district court did not err in concluding that the appellant could be held liable for Castro's and Nusbaum's conduct.

The appellant's argument that the complaints failed to pursue intentional remedies under the appellant's general nondiscrimination policy could quickly be dismissed. In Vinson, 477 U.S. 72, 106 S.Ct at 2408, the Supreme Court rejected a similar argument. The court stated that "the mere existence of a grievance procedure and a policy against discrimination coupled with [an employer's] failure to invoke that procedure," does not necessarily insulate an employer from liability.

Hacienda argued that the District Court erred in awarding back pay to three of the employees because they were undocumented alien workers. Hacienda also challenged the court's calculations of the back pay

awards, arguing that the District Court used the wrong mathematical formula, failed to take into account periods in which the employees were unable to work, and did not reduce the awards for the employee's failure to mitigate their damages. The Court of Appeals stated that the District Court assumed that Title VII applied to the undocumented aliens who were subjected to various forms of discrimination. The District Court did not err in concluding the employees were entitled to back pay, despite their status as undocumented aliens. The Hacienda's argument about incorrect mathematical formula in computing back pay was meritless. The District Court's use of the Commission's formula was not an abuse of discretion. The Court of Appeals saw no reason to disturb the back pay awards entered by the District Court. The judgment of the District Court was affirmed.

Kirkland v. Brinias
741 F.Supp. 692 (E.D.Tenn.1989)

The employees brought a Title VII action, alleging sexual harassment in the workplace. The case went before the court for a trial, without intervention of a jury. The plaintiffs claimed that due to unwelcome sexual advances, propositions, threats, and physical contact by the busboy, Hijer, the working conditions of the restaurant were offensive and intimidating. The

plaintiffs claimed that the harassing behavior was condoned and encouraged by the owner. Both plaintiffs sought compensation in terms of back pay.

In deciding this Title VII case, the court discussed the Rabidue case, (1986), showing the four things that the plaintiff must prove. For the first step, which is proof of unwelcome sexual harassment, the court was satisfied that unwelcome sexual advances, request for sexual favors, and verbal and physical conduct of a kind likely to be offensive to any reasonable person working under similar circumstances, was, at least occasionally, a problem for the women.

Neither plaintiff testified to any psychological damage caused by their employment or that they were unable to carry on with their work. Neither proved that any actual damages as a result of Hiker's behavior had occurred. The plaintiffs did not expressly complain of sexual harassment to the employer. They did not believe the defendants would be sympathetic, and both felt that the defendants were fully aware of what was going on in the restaurant.

There was no question that the plaintiffs were subjected to sexual harassment on the job. Unlike typical harassment cases, the unwelcome behavior came from a subordinate, not a supervisor. Although the court found some misconduct was of a sexually offensive nature,

there was no hint that it had any harmful effect on the plaintiffs. Both plaintiffs quit their jobs because they felt that their employers were unwilling to listen to their side of an issue. Neither quit as a direct result of any overtly sexual conduct. The evidence was overwhelming that both plaintiffs were well able to handle the situation. They were both capable and outspoken women. If they needed help from management, they would not have hesitated to ask for it. The judgment was entered on behalf of the defendants.

Rauh v. Coyne
744 F.Supp. 1181 (D.D.C.1990)

A discharged employee brought action against her employer for alleged sexual discrimination. The employee and employers brought motions in limine. The defendants filed a motion regarding the admissibility of several categories of evidence,and the plaintiff filed an opposition.

Regarding the subsequent acts of sexual harassment, the defendants sought to bar testimony of complaints of sexual harassment at the defendants' establishment that were made after the plaintiff was removed. The complaints occurred within 15 months after the plaintiff's dismissal. The defendants, also, pointed out that the manager who allegedly was involved in the

harassing incidents with the plaintiff, Coyne, was not the same person accused of the later incidents. Coyne was at his same position and had ultimate decision making authority. The District Court ruled that the harassing incidents, as long as they were not remote in time, would be admitted. The motion was denied.

The defendants, also, requested a ruling in limine that testimony from colleagues and friends of the plaintiff, concerning her job performance before and after her employment at the defendants' establishment would not be admissible. The plaintiff believed that the evidence was both probative of the credibility of the defendants' articulate reasons for her discharge and was not inadmissible as general character evidence under Rule 404(a) of the Federal Rule of Evidence. The courts stated that Rule 404(a) provided evidence of a person's trait of character which was not admissible for the purpose of providing action consistent on a particular occasion. If the court accepted the plaintiff's proposal, the trial would be unnecessarily complicated and would simply confuse the issue and increase unjustifiable expense and delay (Federal Rules of Evidence 102, 403). The court ruled that the plaintiff's jobs were not comparable. The District Court ruled that the evidence would not be admitted.

The plaintiff moved to preclude all but eight of the

defendants' witnesses from testifying at trial. The defendants opposed the motion. Following the close of discovery, the defendants submitted a pretrial statement which listed sixteen additional witnesses. Because discovery had closed, the plaintiff was precluded from deposing the new witnesses, and she requested that the defendants be prejudged from using them at trial. The District Court granted this request, and the decision was so ordered.

The plaintiffs served requests for the production of documents on the defendants, and the defendants filed objections. There was a motion to compel with briefs from both sides. The plaintiffs sought the documents relating to an investigation of alleged misconduct by the defendant, Wlodawsky. The defendants asserted that these papers were protected by the attorney because of client and work product privileges. The court agreed. The materials, concerning the defendants' investigation of Wlodawsky, were protected.

The plaintiff requested the documents based on the assertion that they had a "compelling need" for them. The court rejected their request, since the plaintiffs were free to question all the individuals interviewed. Although it was more convenient for the plaintiffs to get the information from the defendants, the convenience did not out weigh the attorney-client or work product

privilege.

Brammer v. Human Rights Commission
394 S.E.2d 340 (W.Va.1990)

A former employee filed a complaint with the West Virginia Human Rights Commission, alleging she had been unlawfully discharged in retaliation for her efforts to end sexual harassment in her workplace. A hearing examiner found the employer liable as alleged and awarded back pay and incidental damages. The Commission affirmed the hearing examiner's recommended decision but reduced the back pay and incidental damage awards. The employee appealed the award reductions. The employer appealed the finding of liability.

During her employment, the complainant was sexually harassed by the employer's management personnel. She, also, witnessed two assistant managers harassing other female employees. The complainant reported the events to her immediate supervisor, the general manager, who reported them to his supervisor, the vice-president of operations. The general manager recommended that the complainant be fired because she did not get along with the two male assistant managers, whom she had accused of harassment. The complainant was not discharged at that time, but one of the two assistant managers was dismissed.

After three months, the complainant reported that the other assistant manager was still harassing employees. This time the general manager did not tell his supervisor, but the vice-president of operations found out about the incidents through the employees. After investigating, the vice-president of operations discharged three managerial personnel, the general manager for failure to handle the situation, the assistant manager who was originally accused of harassment, and the complainant for "spreading rumors" about the sexual harassment.

The complainant filed a complaint with the West Virginia Human Rights Commission, alleging that she had been unlawfully discharged in retaliation for her efforts at ending sexual harassment. She claimed her discharge was in violation of W.Va.Code, 5-11-9(i)(3)[1981]. The commission's hearing examiner found that the employer was liable and awarded the complainant $31,231.94 for back pay and $15,000 for incidental damages for humiliation. The commission affirmed the recommended decision but without explanation, reduced the back pay award to $14,800 and the incidental damage award to $2,500.

Addressing the issue of liability, the court followed the principles set forth in Frank's Shoe Store v. West Virginia Human Rights Commission, (1986). This case addressed the unlawful retaliatory discharge under

the West Virginia Human Rights Act, W.Va.Code 5-11-1. The complainant has the burden to prove by a preponderance of evidence (1) that the complainant engaged in protected activity; (2) that the complainant's employer was aware of the protected activities; (3) that the complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motion); and (4) that the complainant discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. The harassing examiner found that the complainant was unlawfully discharged because of her attempt to stop the sexual harassment. The employer's reasons for dismissal were found to be pretextual for the unlawful retaliatory discharge. The commission adopted those findings.

Addressing the issue of damages, the Supreme Court of Appeals observed that the commission properly limited the award of incidental damages to $2,500 in accordance with Bishop Coal Co. v. Salyers, (1989). In absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not to have acted illegally but regularly in a lawful manner (Perry v. Miller, (1989)). The record in this case did not indicate the precise manner in which the commission, the hearing examiner, or the complainant calculated the amount of back pay. The court stated that they could not

hold there was an error, so the commission's order as to the liability and damages was affirmed.

Rauh v. Coyne
744 F.Supp. 1186 (D.D.C.1990)

Discharged employees brought actions against their employers and a supervisor arising out of a supervisor's alleged sexual assault of the employees and the employees' subsequent discharge. The defendants filed a motion for partial dismissal or to strike the plaintiff's, Bottalico, claim for reinstatement, back pay, and compensatory and punitive damages, resulting from her termination.

Under the District of Columbia Human Rights Act of 1977, D.D.Code §§1-2556(a), the aggrieved party must either file an administrative complaint or bring civil action in court, but not both. The plaintiffs filed administrative claims before beginning the instant action, and the defendants asserted that the complaint should be dismissed. After the motion was filed, the plaintiffs withdrew their administrative claims and amended their complaint. The Human Rights Act provides that if an administrative complaint has been withdrawn, the complainant maintains all rights to bring a suit (Section 1-2556(a)).

The plaintiff, Bottalico, alleged that the

defendant, Wlodawsky, sexually assaulted her on one occasion and made sexually harassing remarks to her numerous other times. Bottalico claimed that when her supervisor, Immesghen, reported the incidents to management, the supervisor was fined. According to the complaint, Wlodawsky, created a hostile work environment. Because they were his superiors, the Coyne defendants were liable for the actions.

The Coyne defendants argued that they did not know and had no reason to know of the harassing actions. The defendants stated that they could not be held liable. The court found this to be untrue.

Since the allegations in the complaint must be taken as true for the purpose of a motion to dismiss, they provided an ample basis of showing that the Coyne defendants had reason to know of the harassment, and that they were negligent in not discovering and preventing the harassment. According to the plaintiff, management did not make any substantial effort to investigate the allegations. The hotel did not even have a written policy on sexual harassment until after the lawsuit was filed.

Although the defendants rely on the "reason to know" test, this will not automatically exempt an employer from liability. For a hostile work environment claim, employers have been held liable when the harassing

employee had decision-making authority or the authority to alter the plaintiffs' employment status (Huddleston v. Roger Dean Chevrolet, (1988). Wlodawsky had this authority.

The defendants maintained that Bottalico failed to state a claim for constructive discharge, which must allege facts to indicate that the employer deliberately made the working conditions intolerable and drove the employees to resign (Katradis v. Dav-El of Washington, D.C., (1988)). The court stated that the allegations against Wlodawsky provided ample basis for a reasonable juror to conclude that the Coyne defendants made working conditions intolerable and drove the plaintiffs to resign.

Immesghen and Davis alleged that they were fired when they reported the harassment. The defendants claimed that as a matter of law those allegations were not sufficient to claim intentional infliction of emotional distress. The defendants claimed that they protected the plaintiffs from Wlodawsky rather than retaliating against them. The defendants maintained that they should not be held liable because Wlodawsky's actions were not within the scope of employment and not a part of an effort to further the employers interests.

The court stated that even if true, this would not be a proper basis for granting a motion to dismiss. Even

if Wlodawsky's actions were outside the scope of his employment, the defendants would still be liable if they were negligent in supervising him. If he was aided in perpetrating the harassment by the existence of an agency relationship, the defendants could be held liable. Because of the employee at will doctrine, the wrongful discharge claim was dismissed.

The defendant, Wlodawsky, filed a separate motion to dismiss the charges. He asserted that Bottalico's assault claim must be dismissed for lack of jurisdiction. The District Court stated that it did have federal question jurisdiction over the Title VII claim and pendent and ancillary judgement over all other claims. The defendant, also, asserted that his assault on Bottalico was insufficient to claim intentional infliction of emotional distress. The defendant maintained that Bottalico could not obtain damages for mental anguish because she did not suffer any physical injuries. The court stated that while the District of Columbia had long employed this rule in negligence actions, Wlodawsky did not cite a single decision extending it to intentional tort cases. The court ordered that Wlodawsky's motion to dismiss be dismissed.

The plaintiffs' motioned the court to dismiss Wlodawsky's counterclaim of malicious prosecution, libel, and slander. In order to maintain a malicious

prosecution claim, the underlying criminal action must first have terminated in the plaintiffs favor. By his own deposition, the defendant showed that the action did not end in his favor. The charge of libel required publication of a written statement. The defendant failed to allege that the plaintiff made defamatory writings of any kind. The District Court ordered that the motion to dismiss Wlodawsky's counterclaim be granted.

Hamlin v. Western National Mutual Insurance Co.
461 N.W.2d 395 (Minn.App.1990)

A former employee, who had entered into a Miller-Shugart settlement of sexual harassment claims against her employer, sued to recover under the employer's multi-peril policy. The District Court granted the insurer's motion for summary judgement. The plaintiff appealed.

On November 27, 1985, the appellant filed a sexual harassment complaint with the Minneapolis Department of Civil Rights against her former employer and the Camden Family Restaurant (Camden). Camden informed it's liability insurer, Western National Mutual Insurance Co. (Western), of the claim. After investigating, Western determined that no coverage existed. The appellant and Camden entered into a stipulation and Miller-Shugart confession of judgement for $50,000, allowing the

appellant to recover only from Camden's liability insurance policy.

Western's coverage of Camden included a multi-peril policy containing two liability insurance endorsements. Each endorsement had a separate insuring provision. The first insured against claims for "bodily injury or property damage", and the second provided coverage for personal injury claims. Western, also, wrote an umbrella policy for liability exceeding $500,000.

The appellant wanted to determine if the polices covered the damages for her mental injuries from the sexual discrimination. Because she claimed only mental injuries and not bodily injuries, and because she did not assert a claim for defamation, disparagement, libel, slander, or invasion of privacy, the claims were not covered by the policy.

As in the case of Morris v. Weiss, (1987), if the language of an insurance policy is ambiguous, it must be construed in favor of finding coverage. Western's policy defined bodily injury as "bodily injury, sickness, or disease." The prevailing view was that the language was not ambiguous and did not include mental harm. Some jurisdictions found that this definition was ambiguous, but those courts declared coverage only when the mental anguish manifested itself in some physical consequence (Levy v. Duclaux, (1976)). The court concluded that the

definition of bodily injury was unambiguous and excluded mental injuries.

The endorsement covering personal injuries was limited to damages arising out of a variety of listed torts, including liable, slander, and invasion of privacy. The appellant premised her damages only on sexual harassment and discrimination. In Nicholas v. American Employers Insurance Co., (1987)), the court held that an identical "personal injury" definition did not cover a suit for sexual harassment damages, even if the sexual harassment complaint had related some defamatory matter, because damages would be awarded as a result of the discrimination, not as a result of the defamation. The Court of Appeals agreed with that reasoning.

The appellant argued that even if coverage failed under the general multi-peril policy, the umbrella policy should provide some primary coverage. However, the parties stipulated that only the multi-peril policy was in issue in this declaratory judgement suit. The Court of Appeals affirmed the trial court's determination that bodily injury did not include mental injury, and the language in the separate umbrella policy could not alter this result.

U.S.EEOC v. Gurnee Inn Corp.
914 F.2d 815 (7th Cir.1990)

The EEOC brought action, alleging that the former employer had engaged in sexual harassment. The United States District Court for the Northern District of Illinois entered judgment in favor of the EEOC. The employer, Gurnee, appealed.

The EEOC sought injunctive relief and back pay with prejudgement interest for the victims of the food and beverage manager's, Tinsley's, harassment. Eleven female former employees testified against Tinsley, establishing that he engaged in a pattern of sexual harassment during his entire tenure at Gurnee. The District Court concluded that Tinsley had sexually harassed the complaining witnesses and that Gurnee was aware of Tinsley's conduct but did nothing to correct it. The court found that Gurnee was liable for Tinsley's behavior and for the resulting hostile work environment and constructive discharges.

Gurnee asserted that the injunctive relief ordered by the District Court was improper because only Tinsley had engaged in the discriminatory conduct, and he did not work for Gurnee any longer. The Court of Appeals agreed with the District Court. The court concluded that in this case the discrimination resulted not only from Tinsley's actions but from Gurnee's continued toleration

of the actions. Gurnee did not have an anti-discrimination policy or a grievance procedure through which the employees could complain of sexual harassment. Tinsley's manager, who the District Court concluded knew of the harassment but did nothing to stop it, was still employed by Gurnee. It was because of these deficiencies that the injunctive relief was necessary.

For back pay awards, once the claimant established the amount of damages, the employer must demonstrate that the claimant failed to mitigate those damages (Flamingo v. County of Kane, (1990)). To prevail, the employer must prove the claimant was not reasonably diligent in seeking other employment, and that with reasonable diligence there was a reasonable chance to find comparable employment (United States v. City of Chicago, (1988)).

Gurnee maintained that the claimants in this case failed to mitigate their damages. Gurnee alleged that the claimants did not seek other employment, following their constructive discharge. Gurnee did not produce any evidence concerning the availability of comparable jobs. The Court of Appeals agreed with the District Court that Gurnee failed to carry its burden and, thus, rejected the mitigation defense.

Gurnee, also, attacked the back pay awards to four of the complainants, who left Gurnee more than two years

before the EEOC filed the charges. Gurnee claimed that back pay awards could not be accrued from a date more than two years prior to filing. The District Court did not award any damages for periods prior to February 25, 1983. That was the day the complaint was first filed with the EEOC. The court awarded back pay damages for periods of unemployment after February 25, 1983. To the four complainants who were constructively discharged prior to the date and testified that they would have remained at Gurnee if there had not been any harassment, the court declared that they could receive the same awards. The Court of Appeals agreed.

Gurnee challenged the District Court's award of compounded prejudgment interest. Title VII authorizes prejudgment interest as a part of the back pay remedy in suits against private employers (Loeffler v. Frank, (1988)). The decision to grant or deny an award of prejudgment interest lies within the discretion of the District Court and relies upon how easily ascertainable, the amount of damages is (Donnelly v. Yellow Freight Sys., (1990)). The Court of Appeals stated that in this case, since Gurnee did not dispute the EEOC's damage figures (back pay - $42,713.59), the damage amounts were easily ascertainable. The District Court did not abuse its discretion in awarding prejudgment interest. The payment of interest was $15,959.64. The District Court's

judgment was affirmed.

Evans v. McDonald's Corp.
936 F.2d 1087 (10th Cir.1991)

An employee brought Title VII sex discrimination and retaliation claims, and pendent state claims against the franchisor. The United States District Court of the Northern District of Oklahoma granted summary judgment against the employee on Title VII claims and dismissed pendent state claims. The employee appealed.

The plaintiff managed two restaurants during her term with McDonald's. The plaintiff alleged that she was sexually harassed by a corporate consultant, McMahan. The plaintiff filed a complaint with the EEOC and the Oklahoma Human Rights Commission (OHRC). The following month, Allen, the franchise owner, sold his franchises to McDonald's Corporation. Although almost every other employee was retained, McDonald's did not retain the plaintiff. The plaintiff amended her EEOC/OHRC complaint to allege a retaliatory discharge. On appeal, the plaintiff argued that a summary judgment was inappropriate because the determination of whether the defendants were her employers was a question of fact. She also contended that the Circuit Court erred in failing to consider her claim for retaliatory failure to hire and her claim that McDonald's acquired liability for

this suit by purchasing Allen's franchises. The plaintiff did not appeal the District Court's dismissal of her pendent state law claims.

The Court of Appeals held that under no plausible legal theory were the defendants the employers of the plaintiff. The plaintiff conceded that under either common law or the "economic realities" test, the defendants were not her immediate employers (Broussard v. L.H.Bossier, Inc., (1986)). The plaintiff urged the court to consider cases in which the courts have found that two entities' activities, operations, ownership, and management were sufficiently interrelated to be perceived as a single employer for the purposes of Title VII (McKenzie v. Davenport-Harris Funeral Home, (1987)). In this case, the courts struggled with the definition of employer under Title VII and turned to a test promulgated by the National Labor Relations Board. Under this test, the factors to be considered were (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

The Court of Appeals stated that even if it assumed the existence of an interrelation of operations, the record indicated no common management, no centralized control of labor relations, and no common ownership or financial control. The court concluded that the

defendants could not be consolidated with Allen's franchises as one employer for Title VII purposes.

The plaintiff claimed that control was the key issue in determining an employer/employee relationship. The Court of Appeals stated that in this case, McDonald's did not exert the type of control that would make it liable as an employer under Title VII. The record indicated that McDonald's did not have control over Allen's labor relations with his franchise employees. McDonald's did not have financial control over Allen's franchises. Outside the control over conformity to standard operational details inherent in many franchise settings, McDonald's only real control over Allen, was its power to terminate his franchises.

Originally the plaintiff characterized her dismissal as a retaliatory discharge. This was based on the promise that McDonald's was her employer. She attempted to change her theory, arguing that even if McDonald's was not her employer, it ought to be liable for failure to hire. This new theory was presented just two weeks before the scheduled trial date, in her response to McDonald's motion for summary judgment. The Court of Appeals said that the District Court did not err in refusing the new claim.

The plaintiff contended that McDonald's Corporation brought liability for this suit when it purchased the

franchise. This issue was not raised in any manner before the plaintiff's response to McDonald's summary judgment motion. For these reasons the Court of Appeals held that summary judgment for the defendants was affirmed.

Dept. of Civil Rights v. Silver Dollar Cafe
469 N.W.2d 42 (Mich.App.1991)

A former employee filed a complaint with the Department of Civil Rights, alleging sexual harassment by the employer. A hearing referee concluded that the plaintiff had been sexually harassed and that she was entitled to $2,660 in back pay and $30,000 in compensatory damages. The Civil Rights Commission (CRC) adopted the referee's recommendations, and the defendants appealed. The court affirmed the finding of sexual harassment and the award of back pay, but reduced the amount of compensatory damages to $4,515. The Department of Civil Rights appealed on the plaintiff's behalf.

The reason the court reduced the amount of compensatory damages was that the court believed that the referee's award was so excessive that it was an obvious disguise for an award of punitive damages. The court reached that conclusion despite the referee's repeated acknowledgement that punitive damages were not permitted and that the award was to compensate the plaintiff for

the extreme humiliation and distress that she had suffered.

The appeal challenged only the reduction of damage award. The Court of Appeals found that substantial evidence was presented regarding the issue of mental and emotional distress of the plaintiff. The Court of Appeals concluded that the court's negative finding in this regard and the substitution of its determination of damages were clearly erroneous. The court reversed the opinion and ordered that the CRC's award of compensatory damages be fully reinstated.

Lane v. Ground Round, Inc.
775 F.Supp. 1219 (E.D.Mo.1991)

A restaurant employee brought suit against her former employer for sexual harassment. The defendant motioned the court for a summary judgment.

The plaintiff claimed that her general manager, Gallagher, sexually harassed her from January 1985 until about June 1988. In June of 1988, Gallagher was promoted to the regional director. Occasionally he would return to the restaurant, and sit at the bar, which made the plaintiff feel uncomfortable. The plaintiff never complained about Gallagher to either the regional director or the human resources department. She felt the company knew of Gallagher's actions because he was

threatened with another lawsuit during her employment. The plaintiff was afraid that she would be fired if she complained. When she was fired, the plaintiff filed a charge of discrimination with the EEOC and with the Missouri Commission on Human Rights (MCHR).

The basis for the employer's motion for summary judgment was that (1) any claims of sexual harassment or discrimination that may have arisen before September 26, 1988, were barred under Title VII and the Missouri Human Rights Act (MHRA), because the plaintiff failed a timely charge of discrimination with respect to any such claims and failed to bring suit not later than two years after the alleged acts, as required by the MHRA, Mo.Rev.Stat. §213.111.1 and (2) for any claims of sexual harassment or discrimination that may have arisen from September 26, 1988, there was no record of any harassment or discrimination rising to the level of a violation of either statutes.

Both Title VII and the MHRA limit the time within which charges of discrimination must be filed (42 U.S.C. § 2000e-5, Mo.Rev.Stat. §213.075.1 (1986)). The MHRA contains an additional limitations period requiring that the suit be filed no later than two years after the alleged act (Mo.Rev.Stat. § 213.111.1). Some courts have recognized an equitable exception to the limitation on the actionable period known as the continuing violation

theory (Waltman v. Int'l Paper Co., (1989)). To establish a continuing violation, the plaintiff must show that at least one incident of harassment occurred within the limitations period.

The court determined that Gallagher's occasional visits to the restaurant did not constitute harassment which would cause a reasonable person in that position to feel constantly threatened. Gallagher's visits did not affect the terms and conditions of the plaintiff's employment and were insufficient to establish a continuing violation. The court found that the pre-transfer harassment was outside the limitations period, and the visits by Gallagher after his transfer neither supported a continuing violations theory nor were they sufficient to support a hostile environment sexual harassment claim.

Determining discriminatory firing, Gallagher never fired the plaintiff. A different supervisor discharged the plaintiff, and he did so without any advice from Gallagher. The plaintiff failed to provide evidence of quid pro quo sexual harassment, specifically that her reaction to the alleged harassment affected tangible aspects of her compensation, terms, conditions, or privileges of employment. The plaintiff's firing was not sexual harassment. It can not serve as a continuing violation to bring the plaintiff's claim regarding

earlier discrimination within that exception to the limitations period. The District Court granted the defendant's motion for summary judgement.

Daum By Henderson v. Loric Enterprises
413 S.E.2d 559 (N.C.App.1992)

An employee brought action against the corporate employer and her supervisor, alleging intentional infliction of emotional distress and negligent hiring and/or retention of supervisor. The Superior Court entered a judgment in favor of the employee and an appeal was taken.

The plaintiff, a 15 year old, alleged that her new manager attempted to sexually molest her. Prior to being hired, the manager had sexually molested a 10 year old girl, and he had pled guilty to assault of a female. The manager indicated on his application to the defendant that he had been convicted of a crime, but the employer never questioned him about it. After being hired, the manager molested another female employee in a manner similar to the plaintiff. The employer moved the manager to another restaurant where he molested the plaintiff within two weeks of his transfer.

As a result of the sexual harassment and molestation, the plaintiff suffered severe mental distress and was diagnosed as having the permanent

psychological condition of Post-Traumatic Stress Disorder. The plaintiff's medical bills at the time of trial were $1,300. The plaintiff's evidence showed that her future medical expenses for continued psychiatric treatment will be approximately $22,000.

The jury found the manager guilty of inflicting severe emotional distress upon the plaintiff, and that the employer was negligent in hiring and/or retaining him as an employee. The jury awarded the plaintiff $1,300 in actual damages and no punitive damages. The plaintiff filed a motion for a new trial on the issues of actual damages. When the court denied the motion, the plaintiff appealed.

The plaintiff's sole argument on appeal was that the trial court erred in denying the plaintiff's motion for a new trial on the issue of damages. A court may award a new trial in the situation where the damages awarded by the jury were inadequate as a matter of law (Hinton v. Cline, (1953)). The plaintiff proved that she had suffered severe mental distress as a result of the intentional sexual harassment and molestation by the manager. When the jury awarded the plaintiff $1,300, they ignored the evidence of the plaintiff's pain and suffering and entered an inconsistent verdict not in accordance with the law. The Court of Appeals found that the error in assessing the damages did not affect the

entire verdict, and it was proper to order a partial trial on the issue of damages (Fortune v. First Union National Bank, (1988)).

Kennedy v. Fritsch
796 F.Supp. 306 (N.D.Ill.1992)

The plaintiffs were current or former waitresses employed by the defendant, Morton's of Chicago (Morton's). The plaintiffs alleged that while employed at Morton's, they were subjected to sexual harassment. The plaintiffs filed suit in 1990. They amended their complaint on March 12, 1991 to include counts for violations of Title VII of the Civil Rights Act of 1964 and conspiracy to violate Civil Rights under 42 U.S.C. § 1985(3), as well as supplemental Illinois law claims.

When Congress enacted the Civil Rights Act of 1991, the plaintiffs motioned the court for a leave to file a third amended complaint adding a request for compensatory damages and punitive damages to their Title VII claim. The issue for the court was whether section 102 of the act applied to cases filed prior to the enactment of the act or whether the act was only prospective.

A major point of contention in deciding whether the act applied retroactively was the question of what sort of presumption on this subject was given to acts of Congress by the courts. The two Supreme Court cases

addressing this issue conflict. In Bradley v. The School Board of the City of Richmond, (1974), the court held that all courts apply the law in effect at the time they rendered a decision, including statutory law, unless manifest injustice would result, or there was statutory language or legislative history to the contrary. In Bowen v. Georgetown University Hospital (488 U.S. 204,208, 109 S.Ct. 468,471, 102 L.Ed.2d 493), the court held that congressional enactments and administrative rules would not be construed to apply retroactively unless their language required that result.

The court needed to seek Congress' intent with regard to the retroactivity of section 102 as it applied to pending cases in District Court. To do this the court had to look at the statutory language of the act and its legislative history.

The plaintiffs pointed out that one of the stated purposes of the act was to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination. Where Congress acts to overrule the Supreme Court's interpretations of an existing statute, it is presumed to act retroactively (Ayers v. Allen, (1991)). The logic behind this presumption was that Congress was merely acting to clarify a legislative purpose in existence which the

court had misinterpreted.

The plaintiffs, also, pointed to language in section 402(b) and 109(c) of the act specifically restricting the application of the provisions of those sections to prospective cases. The plaintiffs argued that the logical implication of this language was that Congress intended the rest of the act to apply retroactively, otherwise the language would be redundant. The court stated that both sections 109 and 105 were meant to overrule prior Supreme Court decisions. The language that the plaintiffs pointed to was intended only to counteract the presumption of retroactivity which attached to those specific sections, and has no implications for the remainder of the act. The plaintiffs indicated language in section 116 of the act regarding the effect of the act on existing consent judgments or court ordered remedies. If Congress did not intend for the act to affect pending consent judgments or injunctive remedies, it raised the inference that it did not intend the act to apply to pending unresolved cases either.

The defendants contended that section 402(a), which states that the provisions of the act take effect on the date of enactment, except as otherwise stated, implied that the act was not to be applied retroactively. The court stated that this was not a reasonable

interpretation of the text. Setting the effective date of the act at enactment does not mean that the act will not apply to cases pending before enactment, but that the date the act will begin to apply to pending or future cases, will not be postponed to allow the parties time to prepare for the change in the law.

The defendants' best argument was that the 1990 version of the act, passed by Congress but was vetoed by the president, contained language explicitly applying the provision of retroactivity. Since this language was missing from the act when it passed, the defendants argued that it implied that Congress did not want the act to be retroactive. The court stated that there was no evidence that showed why Congress excluded the declaration of retroactivity. Likewise, the President's veto message to the Senate did not mention the retroactivity as one of the several incentives that should be omitted.

Like the statutory language, the legislative history of the act provided even less of an understanding of Congress' intent on the issue of retroactivity. The court did not find any evidence of retroactivity in the legislative history. The defendants insisted that if the court could not find clear statutory intent from the language or legislative history of the act, the court should abide by the post-enactment interpretation given

to the act by the EEOC.

In the courts opinion, the EEOC's interpretation of the act was not entitled to the action the defendants suggested, either as a matter of administrative law or on its own merit. This court concluded that Bowen was the appropriate presumption to apply. With all the differences of opinion, the Supreme Court must ultimately resolve the tension about this issue.

Delahunty v. Cahoon
832 P.2d 1378 (Wash.App.Div.3 1992)

The waitresses sued their employer for sexual harassment and unlawful retaliation, arising from alleged actions of their supervisor. The Superior Court of Yakima County entered a judgement on jury verdicts for the waitresses. The owner appealed. The five waitresses and one relief waitress sued the owners, the general manager, and the restaurant manager. The plaintiffs testified that the restaurant manager engaged in offensive sexual conduct toward them from April 7, the first day he worked, until April 17, when they established a picket line in protest.

Following the established procedure, the plaintiffs complained to their supervisors. One of the supervisors spoke with the restaurant manager about the complaints on April 14. On April 15, at the request of the general

manager, the restaurant manager met with the plaintiffs, apologized, and promised not to do it any more. The plaintiffs and customers testified that his harassment continued and that no effective action was taken by the general manager or owners to stop the harassment after they were told what was happening.

When it became evident to them no resolution was forthcoming, the plaintiffs met and decided to picket the restaurant. They went to the police department to ensure their planned picket was legal. They were referred to the prosecuting attorney's office, then to the Human Rights Commission, where they filed a complaint. They established a picket line across the street from the restaurant, and they were joined by other employees and customers.

The restaurant manager tendered his resignation shortly, thereafter, but it was not immediately accepted. He was sent home while the owner and general manager decided what to do. Both men approached the picket line and told the plaintiffs that they looked stupid and ridiculous. The owner threatened that he would make sure none of them would ever work in the town again. On April 18, the owner and general manager informed the picketers that the restaurant manager would no longer be working at the restaurant. When the plaintiffs asked if they could return to work, they were informed that the general

manager would let them know on April 21. Some of the plaintiffs entered the restaurant and confronted the owner and general manager, and they were told to leave. By April 20, the restaurant manager was terminated. The general manager did not let the plaintiffs know whether they would be reinstated. The picketing continued while the plaintiffs waited to see if they could return to work, until April 24 or 25 when it was discontinued.

On the advise of council, two of the plaintiffs received letters of reinstatement. One declined and the other received the offer too late to meet the acceptance deadline. All of the other plaintiffs found employment elsewhere.

The jury found that the restaurant manager sexually harassed each of the plaintiffs except Ms. Hellums. The jury awarded each plaintiff, except Ms Hellums, $7,500 for compensatory damages. The jury awarded each of the plaintiffs, including Ms Hellums, $15,000 for the issue of retaliation. The defendants appealed.

To establish a work environment of sexual harassment, an employee must prove (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms or conditions of employment, and (4) the harassment can be imputed to the employer (Glasgow v. Georgia-Pacific Corp., (1985)). The employer claimed that the plaintiffs failed to prove the

last two elements.

The employer argued that there was insufficient evidence that the harassment was sufficiently pervasive to alter the conditions of employment and create an abusive work environment. The court accepted the truth of the plaintiffs testimony and that of their witnesses. The evidence clearly supported a conclusion the harassment affected the terms and conditions of employment.

The liability for sexual harassment by a manager is imputed directly to an employer, but the liability of sexual harassment by a supervisor is imputed to an employer only if the employee shows that the employer authorized, knew, or should have known of the harassment, and failed to take reasonably prompt and adequate corrective action (Glasgow, 1985). The employer stated that the restaurant manager, Parker, was a supervisor not a manager, because he did not have independent authority to hire or fire the employees. All other parties testified that he was hired as a manager of the restaurant. They testified that he could independently hire and fire employees. Even if Parker was considered a supervisor, the employer knew of the harassing actions and took inadequate actions to rectify the situation.

The plaintiffs, also, claimed that they were fired in retaliation of their complaints. They must prove that

(1) they engaged in statutory protected opposition activities, (2) an adverse employment action was taken, and (3) a causal link between the former and latter (Allison v. Housing Authority of Seattle, (1991)). The employer claimed that the plaintiffs failed to prove those elements. The employer, also, claimed that the plaintiffs were not fired but quit.

To determine whether the plaintiffs' actions were protected, the court had to consider the setting in which the activities arose and had to balance the interest and motivations of the employees and the employer (Selbery v. United Pacific Ins, Co., supra, 45 Wash.App. 472, 726 P.2d 468). This situation left the plaintiffs with three choices. They could put up with the sexual harassment, find some effective means of opposing it, or leave the employment. Under these circumstances, the evidence supported a conclusion that their choice of effectively opposing the sexual harassment was protected. The evidence supported a conclusion that the employers replacement of the waitresses who refused to subject themselves to sexual harassment was unlawful retaliation.

On the matter of awards, the record disclosed nothing to suggest the jury was incited by passion to regard the defendant's case unfairly. The issue was reduced to the deficiency of the evidence to support the awards. The court found that there was competent

evidence each plaintiff suffered emotional distress as a result of being forced to find work elsewhere.

The plaintiffs requested reasonable attorney fees on appeal. A person injured by a discriminatory act may collect costs and reasonable attorney fees as a part of his or her recovery, together with actual damages (Blair v. Washington State University, (1987)). The judgement of the Superior Court was affirmed with the addition of legal fees.

Canada v. Boyd Group, Inc.
809 F.Supp. 771 (D.Nev.1992)

A female employee brought suit against her employer under Title VII for alleged hostile environment sexual harassment and asserted state law clauses of action for wrongful termination in violation of public policy and negligent supervision. The defendants' motioned for a summary judgement.

The plaintiff's first cause of action alleged the defendants created a hostile work environment. When a court determines whether a reasonable person would find the employment environment hostile, the required showing of severity of conduct varies inversely with the required showing of frequency of conduct (Ellison v. Brady, (1991)). The defendants repeatedly urged the court to note that no incidents of sexual harassment were alleged

to have occurred after the first two to three weeks of the plaintiff's employment. While the frequency and severity of the conduct were important factors to consider when assessing whether a hostile environment was created, ultimately, it was the effect or consequences of conduct on the working environment that had to be evaluated. Even if the defendants may not have considered the conduct to have been severe or frequent enough to be offensive under the Ellison case, the question was whether a reasonable person in the situation would consider the conduct severe and/or frequent enough to create an abusive working environment. The answer to that question was not sufficiently clear to warrant a grant of summary judgement in favor of the defendants.

The plaintiff's factual allegations did not rise to the level of quid pro quo. In Miller v. Bank of America, (1979), the court defined the essence of a quid pro quo allegation as a case in which a supervisor relied upon his authority to extort sexual consideration from an employee. In the case at bar, the plaintiff presented no evidence to support a claim that any supervisor used his authority to extort sexual favors from her. She offered no evidence of statements or actions by any defendant that indicated that the plaintiff's continued employment, or other employment benefits, were contingent on her granting sexual favors. The fact that the plaintiff

believed her manager treated her badly because she was unresponsive to him was not sufficient to support an allegation that the manager was using sex as a criterion for employment benefits. There was no evidence to suggest employment benefits were withheld from the plaintiff. The plaintiff claimed that she was subjected to sexually inappropriate conduct by the manager and that she was not allowed to leave early or have others work her shift. To some extent these could be considered employment benefits.

The court rejected the plaintiff's suggestion that the reasonable person standard would be used to determine quid pro quo harassment. Unlike hostile environment, for which the reasonable person test was developed, quid pro quo does not need a gender-conscious reasonable person test to determine whether a violation of Title VII had occurred. A civil rights violation occurs if an employer conditions employment benefits on the granting of sexual favors. No further evidence would be needed (Kauffman v. Allied Signal, Inc., Autolite Div., (1992)). The plaintiff failed to state a claim for quid pro quo sexual harassment, and the defendants motion for summary judgment as to quid pro quo was granted.

The court looked at the cases of Meritor and Ellison to determine the employers liability. In the case at bar, the defendants did not shield themselves from

liability by taking prompt and appropriate action. Because the defendants failed to present any evidence to support a finding that they took appropriate remedial action, they could only prevail in avoiding liability if they could prove that they neither knew, nor should have known of the alleged harassment.

The plaintiff set forth sufficient facts to demonstrate that there was an issue as to whether the defendants knew or should have known of the hostile environment. The defendants presented no evidence from which the court could infer that they took appropriate remedial action following the plaintiff's complaints. The defendants' motion for summary judgement on the issue of lack of knowledge was denied.

The plaintiff established a prima facie case of hostile environment sexual harassment. The plaintiff ultimately prevailed on her claim that she would be entitled to damages unless the defendants offered a successful affirmative defense, which they failed to do. The defendants' motion for summary judgement as to liability for back pay was denied.

The plaintiff sought redress in the form of back wages from two of the defendants in their individual capacity. The claim failed. The United States Court of Appeals for the Ninth Circuit held that individual defendants could not be held liable for back pay (Padway

v. Patches, (1982)). The defendants' motion for summary judgement as to individual liability for back pay was granted. The same was true for compensatory liability.

In Williams v. U.S. General Serv. Admin., (1990), the court held that damages for emotional distress were not available for a violation of Title VII. The Civil Rights Act of 1991 reversed that rule and now a plaintiff is permitted to collect compensatory and punitive damages if that plaintiff can demonstrate intentional discrimination on the part of a defendant. Section 1981a of the 1991 Civil Rights Act provides a plaintiff with the avenue though which he or she may seek damages. The Ninth Circuit Court of Appeals ruled that the act is to be applied retroactively (Fontaine Davis v. City and County of San Francisco, (1992)). The District Court found that the defendants' motion for summary judgement opposing the retroactive application of the act was denied.

The final charge was if the defendants were negligent in their supervision of management. The plaintiff failed to prove sufficient facts to evaluate the claim. In the plaintiff's response to the motion of summary judgement, there was no description of what the defendants did or did not do in response to the plaintiff's allegations except to state that the manager continued to work for the defendants for nine months

following the plaintiff's complaints. With no factual evidence upon which the court could rely, it was impossible to find a question of fact that needed to be resolved. The defendants' motion for summary judgement for this issue was affirmed.

Linebaugh v. Sheraton Michigan Corp.
497 N.W.2d 585 (Mich.App.1993)

An action was filed against an employer and co-worker, alleging defamation, sexual harassment, and intentional or reckless infliction of emotional distress as a result of the circulation of a cartoon drawn by the co-worker. The cartoon depicted the plaintiff and a male co-worker in a sexually compromising position. The Circuit Court granted a summary disposition for the defendants. The plaintiff appealed.

The plaintiff contended that the trial court erred in dismissing the defamation claim because the cartoon was actionable by its very nature. The Court of Appeals held that the summary disposition was improperly granted on the defamation claim. A drawing that imputes a lack of chastity to a female is actionable. Prior established case law suggested that lack of chastity could be imputed by reference to acts other than promiscuous sexual intercourse, such as sexual activity allegedly depicted by the cartoon at issue (Maciejewski v. Rychart, (1916);

Loranger v. Loranger, (1898)). The Court of Appeals was of opinion that the cartoon impacted a want of chastity to the plaintiff.

For the corporate defendant, the Court of Appeals reached a different decision. The court could not say that the cartoon was drawn by the co-worker while he was working as an agent for the corporation, or that it was done in relation to a matter about which his duties as an agent required him to act. The Court of Appeals affirmed the trial court's grant of summary judgement to the corporate defendant on the plaintiff's defamation claim.

The court looked at the case of Langlois for the plaintiff's sexual harassment claim of hostile work environment. One of the elements of the sexual harassment claim was the necessity that the harassment was based on the complainant's gender. In the case at bar, the plaintiff did not demonstrate that the cartoon was gender-oriented or that the harassment was based on her gender. The cartoon allegedly depicted both the plaintiff and a male co-worker and therefore, was gender neutral. The cartoon could be considered equally offensive to both male and female employees. The court found that the trial court properly granted a summary disposition on this issue.

The plaintiff next argued that the trial court erred in dismissing the claims of intentional or reckless

infliction of emotional distress. The court stated that once having seen the cartoon, a reasonable fact finder could conclude that the depiction of the plaintiff engaged in a sexual act with a co-worker constituted conduct so outrageous in character and so extreme that it went beyond all boundaries of common decency in a civilized society. Many co-workers testified that the cartoon was offensive. The co-worker drawing the cartoon and pinning it up could constitute reckless behavior. The trial court erred in granting summary disposition on this claim.

Even if the co-worker was found to have intentionally inflicted emotional distress on the plaintiff, the employer would not be vicariously liable. An employer is liable only for acts of its employees committed within the scope of employment (McCalla v. Ellis, (1983)). The summary disposition was properly granted to the corporate defendant with regard to this claim.

Vainio v. Brookshire
852 P.2d 596 (Mont.1993)

A former employee filed a complaint with the Human Rights Commission (HRC) against her employer, alleging sexual harassment by her supervisor. A hearing examiner concluded that the plaintiff, Brookshire, was harassed by

her supervisor, Phillips. The examiner found that the owner at the Silver Slipper, Vainio, was liable for harassment. The Silver Slipper, Inc. was found not liable. The appellant filed exceptions with the HRC to the hearing examiners findings. The HRC issued an order affirming the hearing examiner's order. The appellant appealed the HRC's opinion and order to the District Court. A hearing was held, and the District Court issued an order affirming the HRC's opinion. The appellant appealed the District Court's order.

The appellant contended that § 49-2-506(1)(b) of the Montana Human Rights Act unconditionally denied Vainio's right to a jury trial. The Court of Appeals held that the Montana Human Rights Act did not unconstitutionally deny persons the right to a trial by jury (Romero v. J.& J. Tire (1989), 238 Mont.146,149, 777 P.2d 292,294)). Prior to the enactment of the Civil Rights Act of 1991, which created a statutory right to a trial by jury under Title VII, the appellant failed to prove beyond a reasonable doubt that the administrative contested case procedures under the Human Rights Act unconstitutionally denied Vainio's right to a jury trial. The Court of Appeals held that Vainio was not unconstitutionally denied a jury trial.

The appellant asserted that § 49-2-506(1)(b), MCA, which allowed the HRC to award damages in discriminatory

cases, constituted an unconstitutional delegation of authority by legislature. The appellant asserted that the HRC had the authority to award damages. Section § 49-2-506(1)(b), MCA, grants the HRC the discretion to award "reasonable" damages. Parties to contested cases have the right to judicial review of all HRC's orders. The HRC does not have the unbridled authority to award damages. The Court of Appeals held that § 49-2-506(1)(b), MCA, did not constitute an unlawful delegation of judicial and legislative powers.

The appellant asserted that Brookshire failed to name Vainio in her complaint to HRC as required. The Court of Appeals held that there was no requirement that a complaint, filed under this statute, must name the individual owner of a business. As a result of respondeat superior liability, a sexual harassment complaint need not specify acts committed personally by the employer. All that was needed to make Vainio subject to the administrative proceedings was for Brookshire to allege that Phillips, an agent of Vainio, committed unlawful sexual discrimination (EEOC v. Hacienda Hotel, (1989). The Court of Appeals held that the District Court did not err in concluding that Vainio was liable on the basis of respondeat superior.

The appellant argued that Brookshire's exclusive remedy for damages for emotional pain and suffering was

under the Worker's Compensation Act. This point has been discussed in many previous cases. The Court of Appeals held that sexual harassment was an intentional act not arising from an accident. The court held that the Worker's Compensation Act was not an exclusive remedy for Brookshire's claim.

The appellant argued that the HRC's award of $20,000 for emotional distress was clearly erroneous. The Court of Appeals disagreed. The District Court found that Phillip's conduct toward Brookshire included ardent physical harassment as well as verbal harassment. The statute provides that the HRC may order any reasonable measure to correct any harm. Emotional harm and distress damages were included. The award was not erroneous. The Court of appeals held that the District Court did not err in upholding the HRC's award of $20,000 in emotional distress damages.

The Court of Appeals concluded that compensatory damages for emotional distress were recoverable under § 49-2-506(1)(b), MCA and that either party had the right to demand a jury trial of that issue pursuant to article 11, § 26 of the Montana Constitution, which provided that the right of trial by jury is secured to all and shall remain inviolate.

When the Civil Rights Act of 1964 was amended in 1991 to allow for compensatory damages or punitive

damages, it was amended to provide that any party could demand a trial by jury if the complaining party sought compensatory or punitive damages (42 U.S.C. § 1981a(c)(1991)). Because the Federal Civil Rights Act did not provide general compensatory damages prior to 1991, the federal cases decided prior to the amendment that were relied upon by the majority were no longer instructive.

The Court of Appeals stated that a right to trial by jury was the most fundamental protection in the state as well as the country against tyranny by judges, legislators, bureaucrats, and other governmental officials. The court concluded that under the facts of the case, the appellant was denied that constitutional right and that Brookshire's claim should be remanded for a jury trial on the issue of compensatory damages.

McKenzie v. Cooper Levins and Pastko, Inc.
990 F.2d 1183 (11th Cir.1993)

The Cooper Levins Pastko corporation (CLP) appealed a District Court judgement, awarding $206,136.62 as reasonable attorney fees to recover $8,618.06 in back pay in a Title VII case. In December 1985, McKenzie brought suit against her employer, alleging sexual harassment and discharge from employment in violation of Title VII of the Civil Rights Act of 1964. The District Court ruled

in favor of the plaintiff. The court awarded her reinstatement, back pay, and reasonable attorney fees.

The judgement required the plaintiff's attorney to file an itemized statement listing services rendered and expenses incurred. The itemized statement was filed 23 months later. More than two years later, the District Court entered a final judgement awarding $206,136,62 to the plaintiff's counsel. In its accompanying Memorandum of Opinion, the court found the lodestar fee to be $98,810.50 and allowed $4,101.05 in expenses. The court enhanced the lodestar by $71,780.50 for contingency and enhanced the award by $31,444.57 to represent prejudgement interest for the period form March 30, 1989 to March 29, 1991.

CLP appealed the judgement, claiming the fee application was untimely, the fees were unreasonable, and the enhancement was improper. The Court of Appeals found that the motion was not too late.

CLP objected to the calculation of the lodestar by the court, arguing that the fee award was grossly excessive. The District Court found the number of hours expended and the rate requested to be reasonable. Despite skepticism, the Court of Appeals could not set aside the findings as erroneous (City of Riverside v. Rivera, (1986)).

CLP objected to the enhancement of the fee award.

The District Court enhanced the lodestar in order to compensate the plaintiff's attorney for contingency. In June 1992, the Supreme Court determined that enhancement for contingency is not permitted under Federal fee-shifting statutes (City of Burlington v. Dague, (1992)). The Court of Appeals reversed the contingency enhancement granted by the District Court.

Since the record was well developed, the Court of Appeals could determine the proper award without further findings by the District Court. The court affirmed the District Court's award of fees and expenses of $102,911.55, with prejudgment interest of $18,524.08, for a total of $121,435.63. This case was important because it warns employers of the high costs of liability involved in sexual harassment complaints, simply by noting how expensive attorney's fee can be.

Chapter V

Analysis of Judicial Decisions

The previous cases illustrated the changes in legal decisions. These changes occurred over time. Although a few of the hospitality cases dealt with common-law tort cases and civil suits, the majority of the cases were developed under the Civil Right Act of 1964. Most of the sexual harassment issues referred directly to Title VII of the Civil Rights Act of 1964. To bring a suit under Title VII, the plaintiff carries the burden of proof. Before a case is allowed, the plaintiff must prove that the five elements of the Henson, (1982), case occurred. The elements are (1) the employee belongs to a protected group, (2) the employee was subjected to unwelcome sexual harassment, (3) the harassment complained of was based on sex, (4) the harassment complained of affected a term, condition, or privilege of employment, and (5) respondent superior. In Slayton v Michigan Host, Inc., (1985),the court declared:

> Once a plaintiff establishes by the preponderance of the evidence that a prima facie case exists, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. If the defendant is able to articulate such a reason, the plaintiff must then be given the opportunity to prove by a preponderance of the evidence that the reasons offered

by the defendant were not its true reasons but were merely pretext for the discrimination.

Quid Pro Quo

There are two types of sexual harassment. One type is classified as quid pro quo. The court in Highlander, (1986), held that quid pro quo sexual harassment occurs when an employee is compelled to choose between giving in to sexual demands and forfeiting job benefits.

In Canada v. Boyd Group Inc., (1992), the courts added that there must be proof that submission to the unwelcome advances was a condition for receiving benefits or the employee experienced some tangible loss for failure to submit to the demands. A plaintiff's belief that he or she is being treated unfairly is not a strong enough case to win in court. The court also stated that quid pro quo does not need a gender-conscious reasonable person test to determine whether a violation of Title VII had occurred. A civil rights violation occurs if an employer conditions employment benefits on the granting of sexual favors. No further evidence would be needed.

Hostile Work Environment

The second type of sexual harassment is classified as a hostile work environment. The courts consider this to happen when there is no economic loss but the employee is still a victim of discrimination because the unwanted sexual behavior creates a work environment that is hostile or abusive and can interfere with the victim's work performance.

There are a couple of differences between the two types of harassment. One aspect of a hostile work environment claim that is different from a quid pro quo case is that the harassment can not be a one time incident. In Langlois, (1986), the court explained:

> However, the mere fact that sexual harassment has occurred will not justify recovery under a "hostile work environment" claim. Rather, the severity of the harassment becomes an issue.

Under Title VII, sexual harassment must be sufficiently pervasive that it alters the conditions of employment and creates an abusive work environment.

In the Canada case, (1992), the courts stated that the plaintiff must prove that she was affected by the hostile environment. If there were no ill effects, the plaintiff cannot win the case. It is the effect or consequences of conduct on the working environment that must be evaluated.

Another difference between the two types of harassment is that a hostile environment claim involves the reasonable person standard. The court considers if the conduct would be considered severe and/or frequent enough to create an abusive working environment to a reasonable person in the same situation. This requires showing that the severity of the conduct varies inversely with the required showing of frequency of conduct. While the frequency and severity of the conduct were important factors to consider when assessing whether a hostile environment was created, ultimately, it was the effect or consequences of conduct on the work environment that had to be evaluated.

Retroactivity of The Civil Rights Act of 1991

The Civil Rights Act of 1991 is the most recent development in the sexual harassment legistation. Currently, this is also the most controversial issue dealing with sexual harassment. All the courts have been divided on the issue of whether or not the Civil Rights Act of 1991 is to be applied retroactively. In Kennedy v. Fritsch, (1992), the court tried to determine if the act was to be retroactive. The court referred to the two Supreme Court cases dealing with the retroactivity of the act.

> In Bradley v. School Board of the City of Richmond, (1974), the court held that all courts apply the law in effect at the time they render a decision, including statutory law, unless manifest injustice would result, or there was statutory language or legislative history to the contrary. Conversely, the court held in Bowen v. Georgetown University Hospital, (1988), that congressional enactments and administrative rules would not be construed to apply retroactively unless their language required that result.

The court found that neither the statutory language nor the legislative history helped to determine this issue. The court chose to follow the Bowen case and agree that the Act was not meant to be retroactive.

Because of the added benefits provided in the Act, it is important to determine if the Act will be applied retroactively. The two hospitality cases dealing with this issue contradict one another. Even the cases mentioned by the courts when making their decisions held conflicting opinions. In 1992, the court in Canada held that the Act was meant to be applied retroactively. The court claimed that the Ninth Circuit court had ruled that the act was to be applied retroactively. Until it is decided, plaintiffs and defendants will vigorously argue that their view is the correct one. As the court in the Kennedy case pointed out, the Supreme Court must ultimately resolve the tension about this issue.

Worker's Disability Compensation Act

When an employee suffers a personal injury arising out of and in the course of employment, physical and mental disabilities are compensable under the Worker's Disability Compensation Act. The Worker's Disability Compensation Act provided that:

> The rights to the recovery of benefits as provided in this act shall be the employees exclusive remedy against the employer...Furthermore, if a plaintiff alleges both injuries covered by the act and injuries not covered by the act, he or she must pursue the workers' compensation remedy for those injuries covered by the act.

Many of the hospitality cases discussed the issue of whether the recovery of benefits provided by the act was an employee's exclusive remedy against an employer.

In Slayton v. Michigan Host, Inc., (1983), the court held that the exclusive remedy provision of the Worker's Disability Compensation Act did not preclude an employee's civil action under the Elliott-Larsen Civil Rights Act. Although certain elements of damages in a sex discrimination suit could be barred by the Act's exclusive remedy provisions, generally a nonphysical tort like sex discrimination falls outside of the scope of the Act. The court, citing Freeman v. Kelvinator, (1979), stated:

> The source of defendant's misconception is perhaps its belief that the injury

> which flows from discrimination is akin to mental injuries sustained by workers from compensable sources. It is not. The discrimination injury is unique. Its source is deliberate or inadvertent disregard by the employer of the fundamental rights of his employees.

The judge found that the victim of discrimination could bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish caused by the discrimination. These suits were not barred by the exclusive remedy clause of the Worker's Disability Compensation Act because the suits are independent of any disability which might be compensable under the Act.

In Slayton v. Michigan Host, Inc., (1985), the court also held that a victim of discrimination could bring a civil suit to recover for damages for any forms of mental anguish caused by the discrimination. The plaintiff could seek recovery for physical, mental, or emotional damages which he or she could prove were unrelated to the disability already compensated for by the redemption agreement.

Besides these state cases, there were two federal cases dealing with this issue. The first one was Lui v. Intercontinental Hotel Corp., (1986). The District Court's decision conflicted with the two previous cases. The court examined whether the Act was meant to encompass intentional torts. The general rule under Hawaiian law

is that:

> An injury or death is said to arise in the course of employment when it takes place within the period of the employment, at place [sic] where the employee may reasonably be, and while he is fulfilling his duties or engaged in doing something incidental there to.

The Hawaiian Supreme court had determined that if an injury could be causally related with any incident or condition of employment, then it is deemed to arise out of and in the course of employment. This even includes assault and battery at the hands of a supervisor during working hours. The District Court held that worker's compensation was the exclusive remedy for the plaintiff.

The New Jersey District Court's decisions on worker's compensation were consistent with the Michigan courts' rulings. The New Jersey courts employ a very liberal test for determining whether an incident is covered under the Worker's Disability Compensation Act. The only requirement is that the employment in some fashion physically facilitate the occurrence of the incident. Assaults by co-workers have been held compensable even if the subject of the dispute is unrelated to the work, if the work of the participants brought them together and created the relations and conditions which resulted in the fight. The court stated that generally when an injury falls under the coverage of the worker's compensation law, the employee is barred

from seeking further legal redress from an employer or co-worker. Considering New Jersey statutes, the court concluded:

> ...employment-related "intentional wrongs" are not exclusively covered under the worker's compensation scheme, but rather remain cognizable at common law. This exception requires us to consider a question of first impression: whether allegations of sexual assault and, more broadly, sexual harassment, should be considered allegations of "intentional wrongs".

In the case of Millison v. E.I. duPont deNemours & Co., (1985), the New Jersey Supreme Court refined and clarified the test for determining within an employment related incident what qualifies as an intentional wrong for the purpose of removing the exclusivity clause of the worker's compensation act. The court felt that the legislature could not have intended that worker's compensation would insulate actors from liability outside the boundaries of the act for all willful and flagrant misconduct short of deliberate assault and battery. This ended the necessity of proving that the employer possessed a subjective intention to inflict deliberate injury. Now, a plaintiff must show that the employer's actions were substantially certain to cause the complained of harm. In Millison, the court held that when determining which incidents rise to the level of actionable intentional wrongs:

> Courts must examine not only the conduct

> of the employer, but also the context in which that conduct takes place: may the resulting injury or disease, and the circumstances in which it is inflicted on the worker, fairly be viewed as a fact of life of industrial employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover only under the compensation act.

The question of employer liability also was answered in the Millison case. In deciding the issue of whether the intentional wrong exception of N.J.S.A. 34:15-8 applied only to co-workers and not to employers, and thus rendering worker's compensation still the sole remedy in actions against an employer, the court stated:

> We are convinced that the intentional wrongs of an employer as well as those of co-employees fall outside of the boundaries of the compensation act. Whenever, as here, the employer is a corporation, the employer can act only through its employees. So for practical purposes, actions taken by certain corporate officers and supervisors are actions taken by the corporate employer.

The court in the Cremen case found the injuries from the sexual assault and harassment were fully compensable under the provisions of the New Jersey worker's compensation act. Because the incidents which occurred were "sufficiently flagrant" to constitute an "intentional wrong", the claim was not barred under the exclusivity provision of the act. The District Court claimed that the employer could not use the worker's compensation statute to protect itself from liability for

the battery inflicted by one of the employer's supervisors.

Dress Codes

In Marentette v. Michigan Host, Inc., (1980), the plaintiffs claimed that the uniforms that they were required to wear subjected them to verbal and physical sexual harassment from the customers. The defendant relied upon the 5th Circuit Court's decision in Willingham v. Macon Telephone Publishing Co., (1975). The Willingham court held that dress codes imposed by the employer which do not interfere with one's ability to gain employment or to advance equally with members of the other sex, do not violate Title VII.

The District Court referred to the decision in the case of Equal Opportunity Commission & Margaret Hasselman v. Sage Realty Corporation, Inc. et al, (1980), which said some forms of dress codes could fall within the provisions of Title VII.

> The court believes that a sexually provocative dress code imposed as a condition of employment which subjects persons to sexual harassment could well violate the true spirit and the literal language of Title VII.

Another case that dealt with dress codes was Slayton v. Michigan Host, Inc., (1985). This court also believed that dress codes could be a violation of Title VII. The

defendant in this case claimed that the dress codes were the customary practice in the industry. The court stated that a defense of customary practice of an industry was insufficient to rebut a prima facie case of sex discrimination as a matter of law. The court further commented:

> Concerning claims of sex discrimination brought under Title VII of the Civil Rights Act of 1964, federal courts have held that a reason based upon a desire to compete in the industry, or customer preference, is discriminatory on its face as merely reiterating the defendant's policy to impose the requirements on employees because they are females. We find that a reason based upon the customary practices of the industry is similarly discriminatory on its face. Indeed, it is because history has taught us that customary practices often perpetuate discrimination that the civil rights legislation was enacted.

The court referred to Flynn v. Libkie, (1981), which dealt with the same issue of customary practices. The court in Flynn declared:

> We believe that evidence of the customary usage and practices of an industry is totally irrelevant to the determination of whether such a practice or custom is discriminatory. Were it otherwise, an employer in an industry replete with discriminatory practices could be found immune from liability because such was the customary practice.

This could be a very important issue for employers. In the cases involving insurance, none of the policies covered sexual harassment. In the case of Presidential Hotel v. Canal Insurance Co., (1988), the hotel's insurance policy, similar to most policies, required the insurer to defend claims of liabilities, even if those claims prove groundless. Because the injured party sought damages for bodily injury, the liability was covered under the policy. The court held that the term bodily injury in an insurance policy pertained to physical injury to the body and not nonphysical, emotional, or mental harm. The policy issued by the insurer covered damages for bodily injuries resulting from an "occurrence." An occurrence was defined as an "accident...which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." The court held that intentional acts were not covered by the policy.

In Continental Insurance Co. v. McDaniel, (1989), the court again ruled that the policy did not cover intentional acts such as sexual harassment. The court concluded:

> ...there is no coverage for an insured's intentional acts, wrongful under the law of torts, because contractual intent and public policy coincide to prevent an

> insured from acting wrongfully knowing his insurance company will pay the damages. [The defendant] may have to pay the damages resulting from his wrongful conduct if the trier of fact rejects his defence of consent, but [the insurer] is not obliged to indemnify him.

The third case that dealt with an insurer's liability was Hamlin v. Western National Mutual Insurance Co., (1990). In this case, the court stated that if the language of a policy was ambiguous, it must be construed in favor of finding coverage. The court found that in this case the language was not ambiguous and did not cover the sexual harassment.

Constructive Discharge

Many of the hospitality cases dealt with constructive discharge. Because of the nature of sexual harassment, especially in hostile work environment cases, many employees quit rather than stay in the hostile workplace. Many of the employees were fired when they reported the sexual harassment. In most cases a sexual harassment suit was not brought against a company until the employee either quit or was discharged. In Brammer v. West Virginia Human Rights Commission, (1990), the court referred to Frank's Shoe Store v. West Virginia Human Rights Commission, (1986). The court said:

> In an action to redress an unlawful

> retaliatory discharge under the West Virginia Human Rights Act, W. Va. Code, 5-11-1, et seq., as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

In Delahunty v. Cahoon, (1992), the court ruled that a plaintiff must use different steps to prove that they were fired in retaliation to their complaints. The plaintiff must prove that (1) they engaged in statutory protected opposition activities, (2) an adverse employment action was taken, and (3) a causal link between the former and latter (Allison v. Housing Authority of Seattle, (1991)). To determine whether the plaintiff's actions were protected, the courts also considered the setting in which the activities arose and had to balance the interest and motivations of the employees and the employers. In the Delahunty case, the court stated:

> The setting here left the waitresses with three choices: putting up with Mr. Parker's sexual harassment, finding some effective means of opposing it, or leaving their employment entirely. Under these circumstances, balancing their intentions with the responsibilities imposed by statute an the employer, the evidence supports a

conclusion their choice of effectively opposing the sexual harassment was protected.

In Rauh v. Coyne,(1990), the courts referred to a decision in Katradis v. Dav-El of Washington, D.C., (1988). It was determined that a claim for constructive discharge must allege facts to indicate that the employer deliberately made the working conditions intolerable and drove the employees to resign. It was important to note that in all states that employed an employee at will doctrine, the court claimed that it was the employer's right to terminate the employee.

Intentional Torts

One type of intentional tort that the hospitality cases discussed was invasion of privacy. In the case of Rogers v. Loews L'Enfant Plaza Hotel, the plaintiff claimed an invasion of the plaintiff's right to privacy at her home, in her employment, and in her person life. The type of invasion of privacy applicable in this case was intrusion. The District Court stated that unlike other types of invasion of privacy, intrusion does not require as one of its essential elements the publication of the information obtained. The main criteria is that the information was obtained by improperly intrusive means.

Libel and slander are two more issues that come under the confines of intentional torts. In Rauh v. Coyne (1990), the defendant filed a counterclaim of libel and slander. The District Court clarified that a claim of libel required the publication of a written statement. In a defamation claim the claimant must identify when, where, or to whom the statements were made. Without this evidence a complainant does not have a case.

The case of Linebaugh v. Sheraton Michigan Corp., (1993), also dealt with a defamation claim. In this case, the court decided whether a cartoon could be considered defamatory. The Michigan court held that a defamation claim, because of a cartoon, was actionable. The court held:

> The elements of a cause of action for libel are: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication.

The court found that a drawing that imputes a lack of chastity to a female was actionable. The court referred to Maciejewski v. Rychart, (1916), and Loranger v. Loranger, (1898) stating:

> Prior established case law suggests that lack of chastity may be imputed by reference to acts other than promiscuous sexual intercourse, such as the sexual activity allegedly depicted by the

cartoon at issue.

The other intentional torts discussed in the hospitality cases were assault and battery. To constitute the tort of assault, a case must have two elements. An apprehension must exist that would normally be aroused in the mind of a reasonable person, and there must be an apparent ability and an opportunity to carry out the threat immediately. The District Court in Valdez v. Church's Fried Chicken, Inc., (1988), stated that under Texas law, a defendant was guilty of civil and criminal assault when he or she intentionally or knowingly causes physical contact with another when he or she knew or should reasonably have known that the other person will regard the contact as offensive or provocative.

The District Court in Rogers v. Loews L'Enfant Plaza Hotel, (1981), also stated that from a tort of battery a defendant can be found liable for any physical contact with the plaintiff which was offensive or insulting, as well as physically harmful. The court remarked:

> Of primary importance in such a cause of action is the absence of consent to the contact on the part of the plaintiff, rather than the hostile intent of the defendant, although intent is required. The intent, however is only the intent "to bring about such a contact.

Source of Liability

Liability is an important issue when discussing sexual harassment claims. In Highlander v. K.F.C. Nat. Management Co., (1986), the District Court stated that the employer is held strictly liable for the conduct of supervisory employees having plenary authority over hiring, advancement, and discipline under the theory of respondent superior. In E.E.O.C. v Hacienda Hotel, (1989), the District Court also discussed respondent superior. Based on Miller v. Bank of America, (1979), the court said:

> ...the Ninth Circuit has ruled of respondent superior under which employers are liable for intentional sexual harassment in which supervisory personnel engage in the course of their employment, even where such conduct violates company policy.

The court also noted the prevailing trend of the case law. Employers were liable for failing to remedy or prevent a hostile or offensive work environment of which management level employees know, or in the exercise of reasonable care, should have known. The mere existence of a grievance procedure and a policy against discrimination coupled with an employer's failure to invoke that procedure will not necessarily insulate an employer from liability.

In Rauh v. Coyne, (1990), the District Court again

declared that employers could be held liable when the harassing employee had decision making authority or the authority to alter the plaintiff's employment status. The judge went on to say:

> Even if Wlodowsky's actions were outside the scope of his employment, the Coyne defendants would still be liable if they were negligent in supervising him or if he was aided in perpetrating the harassment by the existence of an agency relationship.

In Delahunty v. Cahoon, (1992), the Washington court gave a very precise explanation of when an employer would be liable. The liability for sexual harassment by a manager is imputed directly to an employer, but the liability of sexual harassment by a supervisor is imputed to an employer only if the employee shows that the employer authorized, knew, or should have known of the harassment, and failed to take reasonably prompt and adequate corrective action (Glasgow, 1985).

The court in Vainio v. Brookshire, (1993), discussed the issue of respondent superior. It was noted that the harassment did not have to be committed personally by the employer in order to be held liable. If an agent of the employer is found guilty of unlawful sexual discrimination, the employer would be liable on the bases of respondent superior. In this case, the employer was not named in the suit. The court held that because of respondent superior there was no requirement that a

complaint filed under this statute name the individual owner of a business.

In Linebaugh v. Sheraton Michigan Corp., (1993), when deciding the employer's liability, the Michigan court could not say that the cartoon in the case was drawn by the co-worker while he was working as an agent for the employer, or that it was done in relation to a matter about which his duties as an agent required him to act. The employer was not held liable. Referring to McCalla v. Ellis, (1983), the court concluded that even if the co-worker was found to have intentionally inflicted emotional distress on the plaintiff, the employer would not be vicariously liable. An employer is liable only for acts of its employees committed within the scope of employment.

When dealing solely with corporate defendants, there were a few differences in the courts' rulings. In Rogers v. Loews L'Enfant Plaza Hotel, (1981), the plaintiff charged the corporate defendant with failure to exercise proper supervision and control over their employees, thereby causing the plaintiff's injury and making the defendant jointly and severely liable to the plaintiff. The District Court held that four of the parent corporations were not liable because they did not control the management of the employees at the hotel in question.

In Valdez v. Churches Fried Chicken, Inc., (1988),

the District Court stated that the general rule in Texas is that the liability of a corporation for the assault of its employees is not binding unless the assault was to assist in the corporation's business.

The court discussed the liability of a franchisor in Evans v. McDonalds Corp., (1991). First the courts considered the definition of an employer under Title VII and turned to a test promulgated by the National Labor Relations Board. Under this test, the factors to be considered were (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. In this case the franchisor did not exert the type of control that would make it liable as an employer under Title VII. The only real control of the franchisor was the power to terminate the franchise, and this was not enough to be held liable.

Types and Limits of Damages

It is important to note not only court decisions regarding sexual harassment but also the types of damages that the courts have awarded. In Marentette, (1980), the District Court stated that the relief provisions of Title VII do not specifically authorize an award of either compensatory or punitive damages for discrimination in

employment practices. Back pay was considered a form of restitution and not an award of damages. Since restitution was an equitable remedy, a jury was not required for the award of back pay. The court noted that punitive damages were not considered to be equitable relief. The District Court in Roger, (1981), pointed out that although there are restrictions for awards under an Title VII action, a plaintiff is entitled to a jury trial and damages under common-law claims.

In Langlois v. McDonald's Restaurants of Mich., (1986), the court referred to Henson v. City of Dundee, (1982) which outlined five elements which must be established in order to recover damages for a claim of sexual harassment under Title VII. The elements are (1) the employee belongs to a protected group, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based on sex, (4) the harassment complained of affected a term, condition, or privilege of employment, and (5) respondeat superior.

The District Court in Seib v. Elko Motor Inn, Inc., (1986), discussed what awards were available under Title VII. The court stated:

> The only forms of relief available under Title VII are injunctive or declaratory relief, reinstatement, back pay and any other equitable relief that the court deems appropriate...It has also been held that an employee may not be held liable for back pay under Title VII.

In 1988, the Valdez case was the first major award for the plaintiff. The court held that when a tort is committed intentionally and has the outrageous character associated with a crime, an award of punitive damages is permitted. The District Court noted the seven separate items of damages for which a plaintiff may recover. They are: 1) physical injuries from the assault; 2) mental anguish from the assault; 3) injuries arising from a diagnosed condition of post-traumatic stress syndrome; 4) the cost of prior and future counseling; 5) loss of earning capacity in the past and in the future; 6) aggravation of marital difficulties; or 7) aggravation of general anxiety and depression.

In Valdez, although the plaintiff did not recover damages for physical harm, she did receive damages for mental anguish. Texas courts recognized that a female plaintiff can recover mental anguish damages from a sexual assault, even when there is no physical contact by the defendant. The court found that the plaintiff should recover $10,000 in damages for mental anguish. The total of the damages recieved was $46,525. In addition, the plaintiff was entitled to prejudgment and post-judgment interest on the damage award.

A plaintiff may recover punitive damages from an assault only where there is a finding of malice on the part of the defendants. Acts done with gross

indifference to the legal rights of others such that they amount to wanton intentional acts without just cause are malicious under the law. Where a tort is committed intentionally and has the outrageous character associated with a crime, an award of punitive damages is permitted (Prosser & Keeton, Law of Torts § 2 (5th Ed.1984)).

The case of U.S.EEOC v. Gurnee Inn Corp., (1990), provided important information regarding damages. In this case, the employer claimed that injunctive relief was improper because the manager who committed the harassment no longer worked for the employer. The court concluded that the discrimination resulted not only in the Food and Beverage manager's activities but from the employer's continued toleration of the actions. There was no anti-discriminatory policy or grievance procedure through which the employees could complain. The person in charge of the Food and Beverage manager, who knew of the harassment and did nothing about it, was still employed. All of these reason explained why the injunctive relief was necessary.

When determining the issue of back pay, the court held:

> Once the claimant establishes the amount of damages, the employer must demonstrate, as an affirmative defense, that the claimant failed to mitigate those damages...To prevail, the employer must prove "'both that the [claimants were] not reasonably diligent in seeking other employment, and that with the

> exercise of reasonable diligence there was a reasonable chance that the [claimants] might have found comparable employment.'"

The court also points out that Title VII authorizes prejudgement interest as a part of the back pay remedy in suits against private employers. The decision to grant or deny an award of prejudgement interest lies within the discretion of the District Court and relies upon how easily ascertainable is the amount of the damage.

In Delahunty v. Cahoon, (1992), the court mentioned the issue of attorney's fees. A person injured by a discriminatory act may collect costs and reasonable attorney's fees as a part of his or her recovery, together with actual damages. The importance of this statement can be seen in the last case, McKenzie v. Cooper Levins and Pastkok Inc., (1993).
In McKenzie, the award was $206,136.62 for attorney fees only. Employers need to worry not only about the amounts of damages awarded for harassing incidents but for the unbelievable costs of attorney fees.

The final issue, which will probably have the most affect on damage awards, is the Civil Rights Act of 1991. Because of this change in the law, compensatory and punitive damages are available as well as jury trials. There are caps to the awards, but the courts are not allowed to tell the jury that the caps are available. This could lead to outrageous awards granted by juries.

The court in Vainio, (1993) referred to the Civil Rights Act of 1991. The judge stated that either party had the right to demand a jury trial. The new act provides for a jury trial as well as compensatory and punitive damages.

Chapter VI

Recommendations

Examining the hospitality cases from 1980 to 1993, a number of trends can be noted. The first was the number of sexual harassment cases that have gone to trial. The number of cases after 1987 was more than double the number of previous cases. The number of sexual harassment cases obviously is on the rise, and this could mean that there is a greater likelihood that employers could be taken to court.

The courts seem to be constantly expanding the definition of what is sexual harassment. The decision of what qualifies as sexual harassment, what damages can be awarded, and who can be held liable are just some of the decisions courts have to make. There seem to be more issues that fall under the constraints of sexual harassment now than there were in 1980. This could more easily facilitate the chance of an employer being sued.

Another notable trend was the amount of the awards. As time proceeded, the judgements were more likely to be for the plaintiffs than the defendants. With the Civil Rights Act of 1991, the awards were even higher. With this Act, the plaintiff has the right to a jury trial. A plaintiff can get higher awards without having to bring a

civil suit. The right to a jury trial will influence the amounts employers will have to pay. With jury trials, an employer must worry about the deep pocket theory. This is where juries give large awards to the plaintiffs because the defendant is a big company. A jury would rather see that a person gets the compensation than some company. An employer will have to protect him or herself to prevent the payout of large settlements or awards.

An employer's liability is another issue that seems to have expanded. This issue has developed from an employer only being responsible for managerial employees who acted as an agent of the employer to an employer being responsible for all the employees. An employer is now responsible if they do not try to prevent or rectify a hostile environment. The "should have known" stipulation is an issue of which employers need to be aware. An employer can be held liable not only if they knew but if they should have known that a harassing action was taking place. It will be the jury who decides if an employer should have known that the sexual harassment took place.

Although it seems like there is not any hope for an employer who wishes to avoid costly litigation, there are some ways to prevent the litigation. In most of the cases, a suit was not filed until after an employee had quit or had been discharged. This illustrated that

employees want a harassment free workplace and if the employer will not provide it the courts will. If an employer can stop the harassment within the company, there would be no reason for an employee to take action.

There are a number of ways an employer can strive for a harassment free work place. The employer needs an anti-harassment policy. Everyone working for the employer needs to know about the policy. An employer has very little chance of winning in court without an anti-harassment policy. Simply having a policy will not shield an employer from liability. An employer must enforce the policy. An employer must have an internal complaint procedure. If there is way for an employee to let management know that harassment is occurring, the sexual harassment can be stopped before the situation gets out of control. It is important to have someone other than the immediate supervisor to receive the complaints. Because most of the sexual harassment victims are women, one of the people responsible for receiving the complaints should be a woman. Many times a woman would feel more comfortable discussing the harassment with another woman rather than a man. An employer should try to facilitate the reporting of sexual harassment complaints so the harassment can be stopped.

Training plays an important role in sexual harassment. Employees should be informed of the

employer's policies regarding sexual harassment. The employee needs to know what sexual harassment is and what steps to take to prevent it. Training is also important for the people receiving the complaints. These employees need to know the proper way to handle the complaints as well as knowing how to interview the complainant. Anyone reviewing a sexual harassment complaint needs to know the proper techniques to ensure that the complaints are dealt with promptly and fairly.

Once a complaint is made, an investigation should be carried out. Because of the personal issue, the investigation should be prompt and confidential. Once an investigation has been completed, correct action must be taken. Although none of these suggestions will guarantee that an employer will not be taken to court, they will help to diminish sexual harassment in the workplace. Every step should be documented. With the documentation, a strong anti-harassment policy, and a good grievance procedure, an employer should feel more confident if the employer was taken to court. The key to ending the liability is ending the sexual harassment.

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