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# Administrative Law--Continental Can Co., Inc. v. State of Minnesota: A Cause of Action for Sexual Harassment by Coworkers

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## Administrative Law—*Continental Can Co., Inc. v. State of Minnesota*: A Cause of Action for Sexual Harassment by Coworkers

Sexual harassment<sup>1</sup> in employment, outlawed by Title VII of the Civil Rights Act of 1964,<sup>2</sup> became a prominent social and legal issue in the latter half of the 1970s.<sup>3</sup> Prior to the Minnesota Supreme Court's recent ruling in *Continental Can Co., Inc. v. State*,<sup>4</sup> however, Title VII was interpreted only to prohibit a male supervisor from demanding sexual favors from a female employee and conditioning the employee's employment status on her acceptance or rejection of his demands.<sup>5</sup> *Continental Can* upheld for the first time a cause of action against an employer for sexual harassment by co-employees, even though the harassment was not in the form of sexual demand<sup>6</sup> and although the employee's status of employment was not conditioned on her acceptance of any demands<sup>7</sup>. The plaintiff stated a claim under the antidiscrimination provisions of the Minnesota Human Rights Act,<sup>8</sup> which are substantially similar to the sex discrimination provisions of Title VII.<sup>9</sup> Because the Minnesota court looked to principles developed under Title VII to interpret the Human Rights Act,<sup>10</sup> the decision may be a harbinger of the cause of action for sexual harassment and removal of impediments to action under Title VII.<sup>11</sup>

In *Continental Can* a female employee of Continental Can Company, Willie Ruth Hawkins was subjected to repeated verbal and physical harassment by several male coworkers.<sup>12</sup> This harassment consisted of "explicit sex-

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1. "Sexual harassment" as used in this Note encompasses verbal and physical conduct that is sexually motivated and is directed towards non-soliciting employees. The definition includes sexual advances, comments, and physical contact of a sexual nature. Sexual harassment is distinguished from "harassment because of sex", which is not motivated by sexual feelings but is directed toward a person solely because of his or her gender. See text accompanying notes 70 to 74, *infra*.

2. Civil Rights Act of 1964, Title VII, §§ 701-716, 42 U.S.C. §§ 2000e-1 to -17 (1976).

The heart of Title VII is § 703(a), 42 U.S.C. § 2000e-2(a), which provides: "It shall be an unlawful employment practice for an employer—(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

3. The initial case validating this cause of action was *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *aff'd sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). For a discussion of the historical development of this cause of action, see text accompanying notes 28 to 44 *infra*.

4. — Minn. —, 297 N.W.2d 241 (1980).

5. See text accompanying notes 34 to 44 *infra*.

6. — Minn. at —, 297 N.W.2d at 249.

7. See text accompanying notes 12 to 22 and 34 to 44 *infra*.

8. MINN. STAT. ANN. §§ 363.01 to .13 (1966 & Supp. 1980). MINN. STAT. § 363.03-1(2)(c) (Supp. 1980) provides that it is an unfair employment practice "for an employer, because of . . . sex, to discriminate against a person with respect to his . . . compensation, terms . . . [or] conditions . . . of employment."

9. Compare note 2, *supra*, with note 8, *supra*.

10. "Principles developed in Title VII cases are instructive and have been applied by this Court when construing the Minnesota Act." — Minn. at —, 297 N.W.2d at 246.

11. See text accompanying notes 34 to 44 and 45 to 83 *infra*.

12. There were only two female employees in the entire plant, and both of them were harassed by male co-employees. Both complained of the verbal abuse, but only Hawkins was

ually derogatory remarks and verbal sexual advances," and one male employee "frequently patted [Hawkins] on the posterior."<sup>13</sup> Hawkins made her objections to this behavior known to both the harassing males and her supervisor. Hawkins refused to identify the harassers to her supervisor, and Continental took no action.<sup>14</sup> Rather, the supervisor responded that "there was nothing he could do and she had to expect that kind of behavior when working with men."<sup>15</sup>

Because of this lack of response, Hawkins felt she had to endure the abuse and made no further complaints until prompted by harassment six months later. While Hawkins was bending over at a machine, a male co-worker "approached her from behind and grabbed her between the legs."<sup>16</sup> She complained immediately to the plant manager, but no action was taken at that time.<sup>17</sup> Although the incident was formally investigated more than two weeks later, the investigation was not prompted by the harassment<sup>18</sup> but by other incidents of racial and personal violence at the plant<sup>19</sup> and ensuing pressure from community interest groups.<sup>20</sup> Hawkins refused to return to work after this incident until her safety was guaranteed.<sup>21</sup> No assurance was given by Continental, and Hawkins' employment was subsequently terminated.<sup>22</sup>

The Minnesota Supreme Court found that Continental had committed two employment violations of the Human Rights Act,<sup>23</sup> thereby constructively discharging Hawkins.<sup>24</sup> The first violation of the Act occurred when Continental took no action after Hawkins' initial complaint.<sup>25</sup> The second violation was caused by Continental's failure to take timely action after Hawkins' sec-

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actually physically abused. Hawkins was the only female discharged and thus the only one bringing suit. — Minn. at —, 297 N.W.2d at 244-45.

13. *Id.* at —, 297 N.W.2d at 244.

14. *Id.*

15. *Id.* at —, 297 N.W.2d at 246.

16. *Id.* at —, 297 N.W.2d at 244.

17. *Id.*

18. *Id.* at —, 297 N.W.2d at 244-45.

19. There are some unexplained incidents attributed to racial tensions that occurred after the sexual harassment but before Hawkins left her job. Hawkins' car headlights were intentionally smashed in the company parking lot. Also, a male employee of Continental assaulted Hawkins in her home by threatening her with a gun in front of her children. This action was taken after Hawkins allegedly made a threatening call to the male employee's wife. *Id.*

20. *Id.* Hawkins and her husband and officials of Continental met after the violence to discuss these problems, but Hawkins refused to return to work. The Urban League and a community relations group met with Continental and threatened a boycott apparently because of the racial aspects of the incident. This meeting prompted the suspension of two male employees for six weeks. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at —, 297 N.W.2d at 250-51. Continental was found to have violated MINN. STAT. ANN. § 363.03-1(2)(c) (1966 & Supp. 1980). See note 8 *supra*.

24. — Minn. at —, 297 N.W.2d at 251. A constructive discharge occurs when an employer makes the employee's working conditions so intolerable that the employee is justified in resigning. Here the employee resigned to escape intolerable working conditions caused by illegal discrimination. Constructive discharge has been accepted in Title VII cases. See *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).

25. — Minn. at —, 297 N.W.2d at 250. Since the harassment was directed at Hawkins because of her gender, she was subjected to different conditions of employment because of her gen-

ond complaint.<sup>26</sup> Through its inaction Continental had conditioned Hawkins' employment on her adjustment to an intimidating work environment not suffered by male employees. Since Continental knew or should have known of these alleged acts of sexual harassment by coworkers and did not take timely and appropriate action, it discriminated against Hawkins by subjecting her to different working conditions in violation of the Human Rights Act.<sup>27</sup>

This was a case of first impression under the Human Rights Act, and the Minnesota court also found no Title VII cases on point.<sup>28</sup> Indeed, the cause of action under Title VII against an employer for a supervisor's rather than a co-worker's harassment is of recent origin, and in the initial cases brought under this theory the district courts rejected employer liability on several grounds.<sup>29</sup> Some courts found that supervisory harassment did not constitute gender based discrimination because the discrimination was based on refusal to engage in sexual relations rather than on gender.<sup>30</sup> Other courts viewed this type of conduct with a boys-will-be-boys attitude and held it would be unfair to hold the employer liable for the "personal proclivities" of a supervisor.<sup>31</sup> While courts gave other reasons for rejecting the cause of action,<sup>32</sup> the moti-

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der. Continental had a duty to correct this gender-based difference in conditions of employment once it had knowledge of it.

26. Continental did take action after the second complaint, including the suspension of two employees, but no formal investigation was conducted nor any affirmative action taken for three weeks. This action consisted of disseminating the company's anti-harassment policy to employees, and was motivated by a threatened boycott. Since the action was not timely, the Act was violated a second time. *Id.* at —, 297 N.W.2d at 250-51.

27. *Id.* at —, 297 N.W.2d at 251.

28. *See id.* at —, 297 N.W.2d at 246-48.

29. The victim of harassment was not totally without a legal remedy. The victim has recourse to the common law tort remedies, including battery, assault, and intentional infliction of emotional distress. For an excellent discussion of these remedies, see 64 MINN. L. REV. 151, 167-177 (1979). For mental anguish in North Carolina, see Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. REV. 435 (1980). The problem with these remedies is that the victim may have to recover from the harasser, who may be judgment proof. The victim may sue the employer of the harasser on a respondeat superior theory, but this imputation of liability will not be recognized unless the conduct is in the scope of employment. This is especially true of intentional torts. *See* W. PROSSER, *LAW OF TORTS* 464-467 (4th ed. 1971).

A victim may also be able to recover on a breach of contract theory. *See* *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), in which plaintiff alleged that rejection of her supervisor's advances led to her dismissal and the court awarded her back pay for breach of contract.

For a comparison of the procedural aspects of Title VII vis-a-vis common law remedies for harassment, see Seymour, *Sexual Harassment: Finding a Cause of Action Under Title VII*, 30 LAB. L. J. 139 (1979).

30. *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D. N.J. 1976), *rev'd*, 568 F.2d 1044 (3rd Cir. 1977). The lower court found no sex discrimination since Title VII was not intended to remedy a "physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley." 422 F. Supp. at 556. The upper court disagreed.

31. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), *vacated and remanded on other grounds*, 562 F.2d 55 (9th Cir. 1977).

32. *E.g.*, *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979) (lower court found no discrimination because the harassment was not company policy and plaintiff had not exhausted the in-house grievance procedure; *Barnes v. Train* 13 Fair Empl. Prac. Cas. 123 (D.D.C. 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (no inherent gender based discrimination, since a bisexual supervisor who made advances to both men and women would not be committing unlawful discrimination).

vating force behind its rejection apparently was a perception of sexual harassment as a personal relation between a man and a woman that did not affect the conditions of employment. Some courts were also concerned about a flood of litigation that might be brought by disgruntled female employees.<sup>33</sup>

The seminal case recognizing sexual harassment by a supervisor as gender-based discrimination for which an employer<sup>34</sup> could be liable was *Williams v. Saxbe*.<sup>35</sup> Since *Saxbe* the initial district court cases that rejected supervisor harassment as a cause of action have all been overruled or discredited,<sup>36</sup> and four circuit courts have acknowledged this cause of action.<sup>37</sup> The circuits have not agreed, however, on the necessary elements of the cause of action and have construed it more narrowly than the cause of action for other types of harassment proscribed by Title VII.<sup>38</sup>

One area of disagreement among the circuits is the correct theory of employer liability. In the earlier cases courts held that the plaintiff must allege and prove the employer had a policy of condoning sexual harassment,<sup>39</sup> and a recent case was dismissed because the plaintiff failed to allege this.<sup>40</sup> Other courts have found liability when the plaintiff alleged and proved that the employer had actual or constructive knowledge of the harassment and allowed it to continue.<sup>41</sup> A recent circuit court decision has eliminated the necessity of proving an employer policy or employer knowledge of the supervisor's act and has enunciated a standard of strict employer liability for the acts of a supervisor if that supervisor has the power to make employment related decisions and if the harassment was in fact related to the making of an employment related decision.<sup>42</sup>

Another area of disagreement is the extent to which the harassment must

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33. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D. N.J. 1976).

34. For theories of supervisor or coworker liability, see note 29 *supra* and materials cited therein.

35. 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

36. See notes 29 to 33 *supra*.

37. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Garber v. Saxon Business Products, Inc.*, 552 F.2d 1032 (4th Cir. 1977); *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); see also cases collected at *Annot.*, 46 A.L.R. Fed. 224 (1980).

38. See text accompanying notes 39 to 49 & 77, *infra*. This cause of action is more narrowly construed than other Title VII actions by requiring the fulfillment of different and more rigorous elements to state a prima facie case. Perhaps the reason for this more rigorous treatment of sexual harassment is that courts are dealing with conduct based on sexual role stereotyping. This type of conduct has traditionally been accepted, at least implicitly.

39. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 660, n. 8 (D.D.C. 1976), *aff'd in relevant part sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978) (employee must allege and prove employer's policy). *Contra*, *Heelan v. Johns-Manville*, 451 F. Supp. 1382 (D.C. Colo. 1978) (unnecessary to allege or prove such a policy).

40. *Ludington v. Sambo's Restaurants, Inc.*, 474 F. Supp. 480 (E.D. Wis. 1979) (must allege employer approved of the supervisor's actions or that the conduct reflected an employer policy).

41. See *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977) (allegation that employer allowed supervisor to harass); *Garber v. Saxon Bus. Prod., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (allegation of employer knowledge or acquiescence).

42. *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). See also *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977). This approach makes the employer strictly liable on an agency type

affect the conditions of employment. To be actionable under Title VII, harassment must affect the terms, conditions, or privileges of employment of the victim.<sup>43</sup> Although the necessary degree of effect is disputed, all the cases have held that there must be a nexus between the harassment and the victim's employment status.<sup>44</sup> The decision of the employee to accept or reject the harassment must affect her position in employment—she must accept to avoid getting fired or to gain a promotion or to avoid a transfer or demotion. This requirement has limited actionable harassment to actual demands by supervisors for sexual favors.

Thus far no court has found that the creation of a hostile work environment by sexual harassment affects the conditions of employment in violation of Title VII.<sup>45</sup> This has precluded the possibility of a cause of action for harassment by co-employees because fellow workers presumably lack the power to change the victim's employment status. For example, in *Pantchenco v. C.B.*

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theory. This has the advantage to the plaintiff of not having to prove consent of one's employer or constructive knowledge.

While the court in *Continental Can* declined to discuss this issue, the EEOC Guidelines impose strict liability on an employer for all sexually-motivated conduct of a supervisory employee. See 29 C.F.R. § 1604.11(c) (1980) (reprinted at note 50 *infra*). The imposition of strict liability expands the cause of action for harassment by eliminating the necessity of two judicially created elements—employer notice and proof of an employer policy condoning harassment. See text accompanying notes 38 to 44 *supra*. Very few if any employers have such a policy, and proving the existence of such a policy is almost impossible. The supervisor acts for the employer in carrying out the policies and practices of the employer, and thus his actions are the actions of the employer. The employer has a greater opportunity to control and direct the supervisor than it does other employees, and the imputation of a higher degree of responsibility is consistent with this relationship. The imposition of strict liability in this situation will prevent employers from claiming they had no knowledge of the harassment and from shifting liability to a judgment proof supervisor. See note 29 *supra*. It also removes the "one free shot" opportunity in which the supervisor doing the harassing is the only available conduit of notice to the employer. In *Vinson v. Taylor*, 22 Empl. Prac. Dec. 14,687 (D.D.C. 1980), the plaintiff was harassed and forced into sexual favors by her supervisor in order to maintain her status of employment. The supervisor was the manager of the facility where the plaintiff worked, and plaintiff had no mechanism to report this harassment to higher members of the corporation. The court denied the claim because of lack of employer notice: "It seems reasonable that an employer should not be liable in these unusual cases where notice to the employer must depend upon the actual perpetrator and when there is nothing else to place the employer on notice." *Id.* at 14,691. This in effect leaves a plaintiff who has been wronged without a viable remedy.

Employers of course oppose strict liability and complain that they will have to police the personal interactions of supervisors and employees. See note 50 *infra*. However, any kind of harassment based on the personal proclivities or prejudices of a supervisor necessarily involves interpersonal interaction. EEOC and court decisions have for some time imposed strict liability under Title VII for supervisory harassment based on race, religion, and national origin, as well as nonharassment areas of discrimination. See *Ostapowicz v. Johnson Bronze Co.*, 369 F. Supp. 522 (W.D. Pa. 1973), modified 541 F.2d 394 (3rd Cir. 1976) (discrimination because of sex); *Tidwell v. American Oil Co.*, 332 F. Supp. 424 (D. Utah 1971) (racial harassment); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977) (racial harassment); *Anderson v. Methodist Evangelical Hosp., Inc.*, 464 F.2d 723 (6th Cir. 1972) (racial harassment); *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (national origin); *Compston v. Borden*, 424 F. Supp. 157 (S.D. Ohio 1976) (religious harassment). The imposition of strict liability in this situation is an attempt to achieve consistency among the different types of discrimination suits under Title VII.

43. 42 U.S.C. § 2000e-2(a) (1964).

44. All the cases cited in notes 26 to 36 *supra* have stated this either implicitly or explicitly, but the cases on this subject have almost all dealt with a situation where a nexus existed.

45. This argument was made in *Tomkins*, *supra* notes 26 and 35, but was not considered by the upper court. The court found that sexual demands of a supervisor created a sex-based condition of employment.

*Dolge Co.*,<sup>46</sup> a female employee alleged that a male co-employee had harassed her physically and requested sexual favors. The court found no discrimination in the terms and conditions of her employment because the male employee could not affect her status in retaliation for her refusal of his request.<sup>47</sup> Similarly, in *Smith v. Rust Engineering Co.*,<sup>48</sup> a female engineer was subjected to sexual remarks and advances by a male coworker. The court stated that a Title VII claim required her to allege and prove that accession to these advances was an express or implied requirement for maintaining her employment status. The male employee could not affect her status, so this was considered a personal matter not covered by Title VII.<sup>49</sup>

Recently, the EEOC promulgated an amendment<sup>50</sup> to its Guidelines on

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46. 18 Fair Empl. Prac. Cas. 686 (D. Conn. 1977), *aff'd in relevant part*, 18 Fair Empl. Prac. Cas. (2d Cir. 1978).

47. The lower court stated there was a lack of evidence of this harassment, but that the claim "would not in any event constitute a Title VII violation" because it could not meet the nexus requirement of *Tomkins*. *Id.* at 689.

48. 18 Empl. Prac. Dec. 4783, 20 Fair Empl. Prac. Cas. 1172 (N.D. Ala. 1978).

49. *Id.* The court stated that Title VII was not for personal problems, but to remedy employment discrimination. This discrimination could only exist if the advances and remarks were tied to a change in working conditions, and that change had to be in the status of the employee.

50. Published in 45 Fed. Reg. 25,024, April 11, 1980, amended in 45 Fed. Reg. 74,676, published as the finalized Guideline in 29 C.F.R. § 1604.11 (effective November 10, 1980). The amended Guideline reads as follows:

*Sec. 1604.11 Sexual Harassment*

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.<sup>1</sup> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

<sup>1</sup> The principles involved here continue to apply to race, color, religion or national origin.

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

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

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

(e) An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission

Discrimination Because of Sex<sup>51</sup> stating the Commission's position on sexual harassment as a cause of action under Title VII. The Guidelines are interpretive only, and their exact effect cannot yet be determined.<sup>52</sup> The amendment broadly defines sexual harassment to include almost any verbal or physical conduct of a sexual nature. The cause of action has been expanded to cover situations where submission to the harassment is made an implicit or explicit term or condition of employment, is used as a basis for employment decisions, or substantially interferes with an employee's performance or creates a hostile work environment.<sup>53</sup> The amendment thus eliminates the strict nexus requirement and adopts an "atmosphere" test that makes both supervisor and co-employee harassment actionable. Under the new Guidelines the employer is strictly liable for harassment by supervisors and agents, regardless of notice or company policy; liability for acts of other employees hinges on the employer's actual or constructive knowledge and subsequent remedial efforts. The Guidelines call for liability for some acts of nonemployees and also speak to the issue of liability for "reverse" harassment.<sup>54</sup>

The expanded cause of action advocated by the new Guidelines is a logical extension of interpretations of Title VII in other areas. The EEOC has

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will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

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

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit. [Sec. 1604.11 reads as last amended by 45 Fed. Reg. 74676, effective November 10, 1980].

These are Guidelines on which public comment was accepted. Employers were strongly opposed to the amendment. The U.S. Chamber of Commerce cited the burdensome responsibility of employers policing the personal lives of supervisors, and stated that it is better to deal with these things voluntarily. All the employer comments expressed dislike of strict liability for supervisors, calling it "patently irresponsible." It was also commented that the concept of when an employer "should have known" is too vague for application and will lead to a multitude of groundless suits.

Women's groups and the U.S. Commission on Civil Rights supported the amendment, but requested more guidance as to what is actually sexual harassment. Some also favored strict liability for coworker harassment. See 104 LRR 148, June 23, 1980.

51. The EEOC has twice before promulgated Guidelines on Discrimination Because of Sex. The initial Guidelines were published in 1965, but were superseded by the 1972 Guidelines published in 37 Fed. Reg. 6836, April 5, 1972. The new section 1604.11, is the first pronouncement on harassment.

52. The EEOC has power to make regulations dealing only with procedural issues. This power is granted in § 713(b) of Title VII, 42 U.S.C. § 2000e-12(a). The guidelines do not have the weight of regulations or of law, but they are entitled to "great deference" according to the Supreme Court of the United States. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). However, the courts have not always followed the Guidelines, and the U.S. Supreme Court itself has not always abided by them. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

53. 29 C.F.R. § 1604.11(a)(1)-(3); see note 50 *supra*.

54. See 29 C.F.R. § 1604.11(e), (g). For a discussion of employer liability for harassment by nonemployees, see note 87 and accompanying text *infra*. For a discussion of "reverse" discrimination, see text accompanying note 87-88 *infra*.



consistently held in racial harassment cases that an employer has a duty to maintain a work environment free of discriminatory intimidation.<sup>55</sup> Several courts have also recognized that employment discrimination can be premised on the character of the work environment.<sup>56</sup> This sentiment was eloquently expressed in *Rogers v. E.E.O.C.*,<sup>57</sup> in which the court stated that the Title VII proscription of discrimination in the "terms, conditions, and privileges of employment . . . sweeps within its protective ambit the practice of creating a working environment heavily charged with discrimination."<sup>58</sup> Application of this atmosphere test in racial harassment cases indicates that Title VII protects an economic and a psychological interest in one's job,<sup>59</sup> both of which are threatened by harassment. If the employee has a right of equal access to employment opportunities, this right encompasses the right of that employee to pursue the opportunity in a non-discriminatory environment.

The court in *Continental Can*, influenced by the Guidelines and Title VII racial harassment cases, rejected the strict nexus requirement previously applied by federal courts under Title VII and adopted the hostile atmosphere concept.<sup>60</sup> The court stated that one purpose of the Human Rights Act is to protect females in the workplace from disparate treatment based on their gen-

55. *E.g.*, [1973] EEOC Dec. 4637, 4639 (1972) ("Title VII requires an employer to maintain a working environment free of racial and ethnic intimidation and insult.") *See also* [1973] EEOC Dec. 4056 (1969); EEOC Dec. 4302 (1970); 4 Fair Empl. Prac. Cas. 317 (1971); 4 Fair Empl. Prac. Cas. 852 (1972).

56. *See Higgins v. Gates Rubber Co.*, 578 F.2d 281 (10th Cir. 1978) (affirming a finding that all workers had the right to work in an environment free from racial discrimination, and finding that the plaintiff stated a prima facie case under Title VII by alleging racial harassment by a supervisor). *See also* cases at note 58, *infra*.

57. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Rogers*, defendants had allotted customers of Hispanic origin to workers of Hispanic origin; a similar arrangement was made for Anglo customers and workers. This segregation undermined the morale of employees in a manner that deprived them of employment opportunities and was thus deemed to be illegal discrimination.

58. *Id.* at 238. Although this announcement may have been dictum in *Rogers*, several subsequent cases applied this concept. *See, e.g.*, EEOC v. Murphy Motor Freight Lines, Inc., 22 Empl. Prac. Dec. 15,607 (1979); DeGrace v. Rumsfield, 22 Empl. Prac. Dec. § 30,621 (1979); Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); United Transportation Local 974 v. Norfolk & W. R.R., 532 F.2d 336 (4th Cir. 1975). *But see* Dickerson v. U.S. Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977); Anderson v. Methodist Evangelical Hospital, Inc., 4 Fair Empl. Prac. Cas. 33 (W.D. Ky. 1971), *aff'd*, 464 F.2d 723 (6th Cir. 1972).

59. The economic interest of an employee is threatened by harassment when the employee is constructively discharged, or when the employee would be better off economically but for the harassment or the employee's reaction to the harassment. An employee's psychological interest in his or her employment relates to the quality of the work environment. The atmosphere concept gives the employee the right to work in an environment free from discrimination or harassment. The employee may be subjected to such psychological or emotional stress that he or she is forced into a constructive discharge. For a discussion of constructive discharge, see note 23, *supra*.

60. — Minn. at —, 297 N.W.2d at 249:

We hold that the prohibition against sex discrimination in Minn. Stat. § 363.03, subd. 1(2)(c) (1978) includes sexual harassment which impacts on the conditions of employment when the employer knew or should have known of the employees' conduct alleged to constitute sexual harassment and fails to take timely and appropriate action (footnote omitted). To determine whether actionable sex discrimination exists in a given case, all the circumstances surrounding the conduct alleged to constitute sexual harassment, such as the nature of the incidents and the context in which they occurred, should be examined. In addition, the facts alleged to constitute notice to the employer of the employee's conduct as well as the circumstances surrounding those facts should be

der. Although this type of disparate treatment is more easily seen and perhaps more opprobrious when a supervisor conditions an employee's status on her accession to sexual demands, female employees also suffer disparate treatment when their employment is conditioned on adapting to a work environment replete with sexually motivated remarks and conduct. When this conduct is directed solely at females because they are female, they experience a working environment different from that of male employees. While the status of the female is not affected, her employment is conditioned on working in an environment polluted by harassment aimed only at women.<sup>61</sup> Finally, the work atmosphere is as easily affected by coworkers as by supervisors.<sup>62</sup>

The court held Continental liable because it failed to take timely and appropriate action after it knew or should have known of the harassment by the co-employees.<sup>63</sup> In refusing to impose strict liability on Continental Can for the co-employees' conduct, the court relied on the nature of the relationship between employer and employee, and between employees, in an industrial setting. It is impossible for an employer to control all the actions of employees,<sup>64</sup> but the court stated that an employer must do its best to achieve a work environment as comfortable for females as for males. To meet his duty, the employer must take immediate and appropriate action whenever it has knowledge of sexual harassment. The court held the employer to the reasonable man standard, and closed a potential loophole by holding that the employer's knowledge of the harassment could be actual *or* constructive.<sup>65</sup>

The court found Continental to have violated the provision of the statute prohibiting "an employer, because of . . . sex . . . to discriminate against an employee with respect to his . . . terms . . . [or] conditions . . . of employment."<sup>66</sup> In finding a violation of the Act, the court necessarily found that Continental discriminated against Hawkins. The court did not, however, discuss the issue of whether intent was a necessary element of a finding of discrimination. Under Title VII, there are two basic theories of discrimination: disparate impact,<sup>67</sup> which requires no intent for an ultimate finding of discrim-

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considered. Finally, the timeliness and appropriateness of the employer's response, if any, to the conduct complained of should be examined.

61. *Id.* at —, 297 N.W.2d at 248.

62. *Id.*

63. *Id.* at —, 297 N.W.2d at 250. The court declined to decide the standard of liability for supervisor conduct.

64. *Id.* at —, 297 N.W.2d at 249.

65. *Id.* Actual knowledge by the employer requires the complainant to notify someone who represents the employer, i.e., a supervisor, about the conduct. There is no help offered in the Guidelines or in *Continental Can* as to when the employer "should know" of the harassment. The standard appears to be the "reasonable man" standard used in negligence cases, which is a factual standard to be determined by looking at all the circumstances.

This type of constructive knowledge may be found if an employer fails to set up an effective grievance procedure. If an employee is stymied in her attempt to give notice or file a complaint of harassment by lack of a viable grievance procedure, the employer may be held to have constructive knowledge of the harassment.

66. MINN. STAT. ANNOT. § 363.03-1(2)(c) (West 1966). Compare *id.* with § 703A of Title VII, 42 U.S.C. § 2000e-2(a) (1964).

67. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Griggs* was the seminal case in enunciating the disparate impact theory of employment. This theory is usually applied to situa-

ination, and disparate treatment,<sup>68</sup> which does require an ultimate finding of intent to discriminate. The acts in *Continental Can* fall under the disparate treatment theory, because they constitute an employment practice that is not facially neutral; thus, defendant's discriminatory intent must be proved.

Although the court did not discuss the requisite intent for discrimination under the Act, proving this intent under Title VII does not seem difficult. If an employer knew or should have known of the sexual harassment, he or she would perforce know that the victim was being subjected to differing conditions of employment. By failing to correct this condition after having knowledge of it, the employer's intent is to let the discriminatory condition remain and thus to subject the employee to discriminatory terms or conditions of employment.<sup>69</sup>

The expansion of "conditions of employment" to include the work environment is a logical step in eradicating harassment. This concept of atmosphere as a condition of employment had already been applied to Title VII cases of discrimination by harassment because of sex but which lack any sexual connotations.<sup>70</sup> For example, in *Macey v. World Airways*<sup>71</sup> the first female electrician ever hired by the airline met resistance from the male employees. The male employees resented her intrusion and responded with disparaging remarks and a refusal to help her learn the job. The court held this type of harassment violative of Title VII because it imposed disparate working conditions on the female.<sup>72</sup> In a similar fact situation, the EEOC stated that "Title VII requires an employer to maintain a working environment free of sex-based discrimination."<sup>73</sup> Sexual harassment, like harassment of a female in-

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tions where a facially neutral employment practice has a disparate impact on a protected group. Although there is no overt discriminatory intent by the employer, he is liable for the discrimination that is the result of his practices. In justifying this theory, the court stated "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Id.* at 432.

68. Disparate treatment refers to the traditional concept of discrimination involving different treatment for different persons, groups, races, etc. This type of discrimination is not unlawful unless declared so by statute; it also requires that the defendant have an actual intent to discriminate, i.e., an intent to treat one person or group differently from another. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

69. Intent is often very difficult to prove by direct evidence, but it can be inferred from the conduct and other circumstances, surrounding an act. See *Anderson v. Methodist Evangelical Hospital, Inc.*, 4 Fair Empl. Prac. Cas. 33 (W.D. Ky. 1971) *aff'd*, 464 F.2d 723 (6th Cir. 1972). Once a plaintiff demonstrates a prima facie case under the *McDonnell Douglas* approach, an inference of discrimination is raised "because we presume these acts if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The prima facie case operates to eliminate all the legitimate reasons for differential treatment and puts the burden on the defendant to rebut the inference.

70. See definition at note 1, *supra*.

71. 14 Fair Empl. Prac. Cas. 1426 (N.D. Cal. 1977).

72. *Id.* at 1428. The male employees resented Macey's presence in the formerly all male workplace and, in an effort to impede her progress, refused to help her. One male employee refused to help her because she was a "woman being paid as much as the men." Her complaints were met with the response of "that's what you have to expect when you work with men." Macey was discharged, allegedly for absenteeism, but the court found that the discharge was in retaliation for filing a complaint with the EEOC concerning the harassment. *Id.* at 1428-30.

73. [1973] EEOC Dec. 4511, 4512 (1971). A female employee was demoted three days after

truder in a "male" job,<sup>74</sup> is harassment based on gender. To require a nexus between harassment and status in the former situation and not the latter makes an employer's liability dependent upon the content of the harassment. This is contrary to the purpose of the Human Rights Act and Title VII, both of which seek to eliminate disparate treatment based on certain features of the victim. This purpose is best achieved by examining the feature causing the discrimination (the victim's gender) and the effect of the discrimination (disparate treatment) rather than focusing on the content of the harassment.<sup>75</sup>

The nexus test does, however, have several advantages over the "polluted atmosphere" test. To be actionable under Title VII or the Human Rights Act, harassment must have some employment consequence.<sup>76</sup> These consequences are more easily seen, and the proof more quantifiable, when the harassment takes the form of a supervisor conditioning status on accession to demands. Employment consequences flowing from a change in the working atmosphere are harder to measure.<sup>77</sup> Also, the nexus requirement limits lawsuits to cases of harassment by persons in positions of power, whereas the adoption of the atmosphere test will probably generate more harassment suits. However, difficulties of proof and overcrowded dockets are insufficient reasons to deny relief if an injury has occurred.

The Guidelines recognize the difficulty of determining when harassment has sufficient employment consequence to be actionable and adopt a case-by-case method of looking at the "totality of the circumstances."<sup>78</sup> This approach is of little use when dealing with a concept as vague as "atmosphere." The case law dealing with this is minimal, but some guidance can be gleaned from cases of racial harassment and sexual advances. These cases indicate that the

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assignment to a job formerly performed only by males. The EEOC found that her inability to perform the tasks was due to male employees' harassment and failure to help her learn, which amounted to unlawful sex discrimination. *Id.* at 4511.

74. See text accompanying notes 70 to 73, *supra*.

75. None of the courts dealing with instances of racial harassment have required this connection between status and harassment for the harassment to be actionable. Furthermore, there is no such requirement contained in either the Human Rights Act or Title VII. This expansion of conditions of employment to include the work environment addresses much of the harassment in the workplace. Most harassment, verbal and physical, undoubtedly does not reach the level of sexual demands. Although a coworker has no power to affect a victim's status, and thus no power to enforce sexual demands, a coworker can harass in other ways. If the harassment affects the victim's performance or work environment, it should be actionable. To require the nexus between status and harassment denies recovery for discrimination in many situations.

76. The harassment must cause discrimination in the terms, conditions, or compensation of employment. See notes 2 & 8, and text accompanying notes 43 & 44, *supra*.

77. Courts have discussed this issue in two cases dealing with the atmosphere concept. In *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), the court stated that a hostile working environment was discrimination in the terms or conditions of employment. However, the plaintiff would have to prove an environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of the harassed workers. *Id.* at 238. This is a standard so high that it hardly could be met by harassment of any nature.

The court in *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55 (E.D. Pa. 1977) denied a cause of action for a discriminatory atmosphere because it is almost impossible to prove: "Such a nebulous concept—that of 'atmosphere'—is not susceptible to any accepted method of proof in a court of law." *Id.* at 74.

78. 29 C.F.R. § 1604.11(b) (1980).

conduct must be sexually (or racially) motivated, and must reach the level of unwelcome harassment.<sup>79</sup> A single instance, or sporadic or inadvertent conduct, should be insufficient to pollute the work environment.<sup>80</sup> Also, the plaintiff must be adversely affected by the harassment and not take it as a joke or mere inconvenience prior to the lawsuit.<sup>81</sup>

The court in *Continental Can* held that employer liability was conditioned on having actual or constructive knowledge of the harassment.<sup>82</sup> In adopting a standard of liability based on an employer's actual or constructive knowledge of the harassment the court turned to cases on racial and national origin harassment<sup>83</sup> and the EEOC Guidelines,<sup>84</sup> both of which employ this standard. If an employer's liability is extended to co-employee harassment, then this standard of liability, rather than the strict liability standard used in cases of supervisor harassment, is fair to the employer. An employer cannot control directly every whim or defect of character of its employees, and strict liability would impose an impossible duty on the employer. Conversely, an employer cannot totally disclaim the acts of its employees committed in the workplace. Once apprised of discriminatory conduct, the employer's duty to remedy the situation immediately is not burdensome and comports with sound personnel management.

Although employers and the EEOC differ on remedies and bases of liability,<sup>85</sup> the Guidelines and the decision in *Continental Can* signal a growing awareness of sexual harassment and an attempt to remedy the problem.<sup>86</sup> The case and the Guidelines expose the employer to large potential liability. The exact scope of employer liability is still clouded by some unanswered issues.

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79. See *Smith v. Amoco Chemicals Corp.*, 20 Fair Empl. Prac. Cas. 724 (S.D. Tex. 1979) (proof that plaintiff's foreman had made a pass at her did not reach the level of harassment); *Caridis v. Kansas City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977) (casual ethnic slurs insufficient to constitute national origin discrimination).

80. *Winfrey v. Metropolitan Utils. Dist.*, 467 F. Supp. 56, 60 (D. Neb. 1979) (single incident of racial slur insufficient to constitute discrimination); *Crocker v. Boeing Co.*, 437 F. Supp. 1138, 1191 (E.D. Pa. 1977) (same). See *Friend v. Leidinger*, 446 F. Supp. 361, 382-83 (E.D. Va. 1977) *aff'd*, 588 F.2d 61 (4th Cir. 1978) (racial slurs and comments do not reach level of harassment); *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177, 1186 (W.D. Pa. 1973) (court discusses level of national origin harassment needed to be actionable).

81. See *Bundy v. Jackson*, 19 Fair Empl. Prac. Cas. 828 (D.D.C. 1979) (harassment fully proved, but plaintiff did not take it seriously and there was no effect on conditions of employment).

82. — *Minn. at —*, 297 N.W.2d at 249 (1980).

83. See *Friend v. Leidinger*, 446 F. Supp. 361 (E.D. Va. 1977) *aff'd* 588 F.2d 61 (4th Cir. 1978) (racial harassment); *Dickerson v. U.S. Steel Corp.*, 439 F. Supp. 55 (E.D. Pa. 1977) (same); *Crocker v. Boeing Co.*, 437 F. Supp. 1138 (E.D. Pa. 1977) (same); *Howard v. National Cash Register*, 388 F. Supp. 603 (S.D. Ohio 1975) (same); *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973) (national origin harassment).

84. 29 C.F.R. § 1604.11(d) (1980).

85. See note 50 *supra*.

86. One state has recently passed a discrimination-in-employment statute that incorporates almost verbatim the EEOC Guidelines. See Connecticut's Human Rights and Opportunities Act, CON. GEN. STAT. ch. 814c, § 46a-60(8) (Cum. Supp. 1981). Almost all states have these anti-discrimination statutes, although some are so vague, see N.C. GEN. STAT. ART. 49, §§ 143-416.1 to .3 (1977), and some are so inclusive of the discrimination they outlaw, see COLO. REV. STAT. tit. 24, art. 34, that it will be difficult to successfully advance a cause of action for harassment creating an intimidating workplace.

The biggest unknown is what will be considered sexual harassment. The display of pornographic pictures and telling of "dirty jokes" would seem to pollute the atmosphere, as would lewd gestures. The use of sexual terms in banter among co-workers, or even in private conversations that the "victim" necessarily overhears because of the nature of the workplace, may also rise to the level of harassment although there are potential first amendment problems in this application. A more difficult question is whether the wearing of provocative clothing could constitute sexual harassment. For example, the wearing of some revealing or sexy clothing may be "unwelcome . . . physical conduct of a sexual nature" that interferes with an employee's work or creates an offensive working environment.<sup>87</sup> Future courts will have to take into account the frailties and sensitivities of individual employees when deciding if the above situations and others that arise are employment consequences fairly chargeable to the employer.

Another cloudy aspect of employer liability is in the area of "reverse" harassment. This situation arises when a qualified employee loses a promotion or other competitive employment opportunity to a co-employee who has provided sexual favors in return for receiving the benefit. The losing employee has not been harassed in the usual sense of the word, but has suffered employment consequences because of sexually based favoritism on the part of the decision maker. The EEOC Guidelines provide for employer liability to the losing employee in this situation if the request is made by the employer; there is no discussion of liability if the request is made by a supervisor who is successful and makes an employment decision based on his success.<sup>88</sup> Also, the Guidelines do not state whether the employer's successful request must be unwelcome for the losing employee to recover, nor whether the losing em-

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87. See 29 C.F.R. § 1604.11(a)(3) (1980). This situation obviously is not traditional, overt harassment, but it may impact on the work environment so as to meet the definition of harassment in § 1604.11(a), *supra*. This application also distinctly raises the issue of whether the harassment requires intent by the harasser, i.e., whether the wearing of revealing clothing must be done with the intent of committing an unwelcome physical act of a sexual nature.

What if the employee is in a workplace where he is forced to view nonemployees in offensive or sexually suggestive clothing? This is part of the larger question of the scope of employer liability for harassment by nonemployees. The Guidelines state that the employer may be liable for such harassment in the workplace where the employer knows or should have known of the conduct and fails to take immediate appropriate action; however, employer liability is conditioned on the extent of the employer's control and other legal responsibilities with respect to the conduct of such nonemployees. § 1604.11(e). This section again uses the vague standard of actual or constructive knowledge. Also, this issue of employer control over the nonemployee is a factual issue that will require some fine factual delineations. For example, if an independent contractor harasses an employee at the workplace, does the employer have the requisite control over the harasser to be held liable for harassment of any employee?

There are several cases that have held the employer liable for nonemployee harassment where the employer had little if any control over the nonemployee harasser. See, e.g., [1973] EEOC Dec. 4502 (1971) (Negro employee of a beauty shop was constructively discharged when she resigned because of racial harassment by customers); EEOC & Hasselman v. Sage Realty Corp., 78 Civ. 4607 (S.D.N.Y. 1980) (employer forced employee receptionists in a large building lobby to wear revealing outfits; the employer was held liable for sexual harassment of these receptionists by persons walking through the lobby).

88. See 29 C.F.R. § 1604.11(g) (1980).

ployee can recover if the employee getting the benefit suggested the sexual favor to the employer.

One further undefined issue is what constitutes timely and appropriate action by an employer sufficient to rebut liability once he has notice of the employee harassment. Some guidance in this area can be derived from the *Continental Can* decision and Title VII cases. "Timely" was interpreted in *Continental Can* to mean immediately, as soon as the employer knows or should know of the harassment.<sup>89</sup> Thus, an employer can take appropriate action but still be liable if he knew or should have known of the conduct so as to have acted sooner.<sup>90</sup> Several Title VII cases have also construed "timely" to mean immediately.<sup>91</sup>

"Appropriate action" is more difficult to determine because it depends on the differing facts of the harassment in each case. In *Continental Can* the employer did not know the identity of the harassing employees and thus took no action. In finding that Continental's failure to take action violated the Human Rights Act,<sup>92</sup> the court pointed to *Bell v. St. Regis Paper Co.*<sup>93</sup> as an example of appropriate action. There the employer, faced with unidentified harassers, disseminated its written antiharassment policy to all employees and took steps to placate the aggrieved employee.<sup>94</sup> Furthermore, when Continental learned the identity of the harassers in the second incident, the court indicated that appropriate action required an immediate investigation and an attempt to prevent further occurrences.<sup>95</sup> This could be accomplished by disciplining the offenders, informing everyone of the employer's disapproval, and transferring the victim or harasser to a different position. An employer cannot shrug off an allegation of harassment, but must investigate *all* allegations.<sup>96</sup>

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89. — Minn. at —, 297 N.W.2d at 250 (1980). Although the decision doesn't define "immediately" it appears to mean as soon as possible after receiving notice.

90. This constituted Continental's second violation of the Human Rights Act. *Id.* See note 26 and accompanying text *supra*.

91. See, *E.g.*, *Bell v. St. Regis Paper Co.*, 425 F. Supp. 1126 (N.D. Ohio 1976); *Howard v. National Cash Register Co.*, 388 F. Supp. 603 (S.D. Ohio 1975); *Fekete v. U.S. Steel Corporation*, 353 F. Supp. 1177 (W.D. Pa. 1973).

92. — Minn. at —, 297 N.W.2d at 250 (1980).

93. 425 F. Supp. 1126 (N.D. Ohio 1976).

94. *Id.* at 1128-36.

95. — Minn. at —, 297 N.W.2d at 250 (1980).

96. Since employers can reduce the extent of their liability by reducing sexual harassment, employers should seek to take preventive actions. The Guidelines take the position that prevention is the best method of elimination, and state that employers should take all steps necessary to prevent harassment. To accomplish this, the employer should develop a strong policy against harassment that expresses the employer's personal disapproval. This policy should be distributed in written form to all employees, and all employees must be made aware of it. Employees must be aware of the potential sanctions, and these sanctions must be sufficient to discourage harassment.

The employer should inform the employees of their right to bring a harassment action and how to go about doing so. A viable grievance procedure that allows the employer to acquire immediate notice is important in cases of employee harassment. If a victim is stymied in her attempts to give notice or file a complaint, the employer may be held to the "should have known" standard. Finally, the employer should have a means of reviewing all employment decisions made by its supervisors to detect possible harassment.

Unfortunately for the employer, preventive measures are no shield against liability. It is hoped that the measures will reduce harassment, but they cannot reduce liability if harassment

Despite the unanswered issues raised by *Continental Can*, it is a valuable decision because it provides an injured employee a viable form of redress. This decision and the new EEOC Guidelines greatly expand an employer's liability for acts of all its employees, and self interest should prompt employers to take all possible steps to prevent harassment. If harassment does occur, the employer will be motivated to remedy the situation rather than to take a resigned attitude. The court's decision and the new Guidelines also have the effect of making the cause of action for sexual harassment consistent with other Title VII harassment actions.<sup>97</sup> These developments are a victory for sexual equality in the workplace since female employees now have a remedy for harassment that provides them a reasonable chance of success in the workplace.

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occurs. If an employee does not get the message, the employer will be liable if he fails to take timely, appropriate action after notice; if a supervisor does not heed the warnings, the employer bears the brunt of the responsibility.

97. The Guidelines note this attempt for consistency under Title VII by stating: "The principles involved here continue to apply to race, color, religion or national origin." 29 C.F.R. § 1604.11, note 1 (1980).



