SEXUAL HARASSMENT AND RACE: A LEGAL ANALYSIS OF DISCRIMINATION

*Judy Trent Ellis**

INTRODUCTION

The American workplace is highly sexualized, mirroring a society where sexual bantering and flirtation are commonplace. The problem of sexual harassment, however, goes far beyond such mutually agreeable contacts to situations where a woman is subjected to repeated and unwelcome sexual advances, derogatory statements based on her sex, or sexually demeaning gestures or acts. She is often made to feel degraded, ridiculed, or humiliated while she is working or threatened with adverse job consequences if she does not yield to sexual advances. The harassment takes an emotional, physical, and economic toll: women placed in this situation do not perform well on the job and often quit rather than continue to work in a threatening environment.

Although sexual harassment has existed in the workplace since women entered the work force, it is only now coming into public view as a significant legal problem. The identification of sexual harassment as an important issue coincides with the rapid increase of women in the work force and a concomitant upsurge of feminist activities throughout the country. Women are feeling less powerless and are encouraging each other not to accept the harassment previously considered an unavoidable part of a woman's worklife.

There has been an increasing awareness of sexual harassment in the workplace and growing testimony to its seriousness. Every United States Circuit Court of Appeals presented with this issue has held that sexual harassment violates Title VII of the 1964 Civil Rights Act.[1] In 1979 the Subcommittee on Investigations of the House Committee on Post Office and Civil Service held hearings on sexual harassment in the federal government. At the conclusion of the hearings, the subcommit-

* Attorney, Appellate Division, and former Special Assistant to the General Counsel of the Equal Employment Opportunity Commission. B.A., Oberlin College, 1962; M.A., Middlebury College, 1967; J.D., Northwestern University School of Law, 1972.

The author wishes to thank Dr. Nancy C. M. Hartsock, Barbara A. Bush, Esq., Joan Vermeulen, Esq., and Dr. Peggy Crull for their encouragement and their helpful comments on earlier drafts of this article.

This article was written by Ms. Ellis in her private capacity. No official support or endorsement by the United States Equal Employment Opportunity Commission or any other agency of the United States Government is intended or should be inferred.

1. Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Service Electric & Gas Co., 568 F.2d 1044 (3d Cir. 1977); Garber v. Saxon Business Products, 552 F.2d 1032 (4th Cir. 1977); *cf.* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (court accepts defendant's concession that a complaint of sexual harassment can state a cause of action under Title VII).

tee requested that the Office of Personnel Management issue a policy statement defining sexual harassment and declaring it a prohibited personnel practice. The subcommittee also requested that the Merit Systems Protection Board conduct a study of the scope of sexual harassment in the federal employment sector and that the Equal Employment Opportunity Commission (EEOC) improve its processing of sexual harassment complaints.[2] As a result of this new visibility, practices previously viewed as acceptable behavior are being redefined as unacceptable. The issue now has a name, and the parameters of what constitutes sexual harassment are being defined.

Sexual harassment is less an expression of sexuality than of power, whether real or desired. In this respect, it is analogous to rape and exemplifies the same "conscious process of intimidation."[3] There are several reasons why this expression of power is possible in the workplace. Continued job segregation and employment discrimination maintain a profile of the work force in which men are in positions of power and in positions to exploit that power. Women remain concentrated in the lower-paying, traditionally female occupations, comprising 80% of the country's clericals, 63% of the service workers, and 64% of retail sales workers.[4]

Although women comprised two-fifths of the work force in 1979, the median weekly earnings of female wage-earning and salaried workers was approximately 62% that of male workers.[5] In spite of civil rights legislation and the prominence of affirmative action, this differential has remained essentially unchanged since 1961.[6] Even within the same occupation groups, women's earnings rarely approach the earnings of men.[7] This disparity can be attributed, in part, to the record influx of women into the work force, many at entry-level, and to their decisions to choose traditionally female jobs. The fact remains that female earnings are low. The few statistics that exist concerning sexual harassment reveal that a large portion of the harassment that women experience is caused by their male supervisors.[8] The structure of the

2. *Sexual Harassment in the Federal Government: Hearings Before the Subcomm. on Investigations, House Comm. on Post Office and Civil Service*, 96th Cong., 2d Sess. 1 (1980) [hereinafter cited as *1980 Hearings*]. In September 1980, the agencies reported back to the House Committee regarding their compliance with those requests. *See* note 8 *infra*.

3. S. BROWNMILLER, AGAINST OUR WILLS: MEN, WOMEN AND RAPE 15 (1975).

4. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, TWENTY FACTS ON WOMEN WORKERS 1 (1979) [hereinafter cited as TWENTY FACTS].

5. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, EMPLOYMENT GOALS OF THE WORLD PLAN OF ACTION: DEVELOPMENTS AND ISSUES IN THE UNITED STATES 3, 10 (1980) [hereinafter cited as EMPLOYMENT GOALS].

6. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN MEN AND WOMEN 1 (1979) [hereinafter cited as EARNINGS GAP].

7. EMPLOYMENT GOALS, *supra* note 5, at 10.

8. MERIT SYSTEMS PROTECTION BOARD, SUMMARY OF PRELIMINARY FINDINGS ON SEXUAL HARASSMENT IN THE FEDERAL WORK FORCE, 96th Cong., 2d Sess. 11 (1980) (submitted to the Subcommittee on Investigations of the House Committee on Post Office and Civil Service).

work force reflects male dominance in society and puts men in a position to exploit that dominance.

Women are also harassed by male colleagues. Although not in positions of power in the employment context, they view themselves, as men, as having power *at least* over women; that power often is expressed through harassing behavior. This situation has been exacerbated by the extraordinary increase during the 1970's in the number of women in the work force.[9] At the same time, some men in the work force are experiencing personal pressure from the women in their families who are reacting in many different ways to the current surge of feminism. Often, the anger and frustration that they feel toward women cannot be expressed in their personal relationships and is displayed in the employment context. Incidents of harassment are thus likely to increase in the coming years.

Discussions of sexual harassment often advert to racial harassment cases and the general principles expressed in those cases. The references are, however, confusing and contradictory, and analogies are unclear. For example, there is a statement in the EEOC Guidelines on sexual harassment to the effect that the principles in the guidelines will also apply to cases of racial harassment.[10] On the other hand, in *Barnes v. Costle*, the court noted that sexual harassment cases differ from racial harassment cases.[11] The fact remains that although racial and sexual harassment cases are similar, they are also distinguishable. The relationship between the two, however, has not been carefully explored.

This article will examine both forms of harassment and attempt to clarify the nexus between them in order that sexual harassment issues be better understood. In particular, it will suggest that there are two analytical models for sexual harassment cases: (a) a *generalized harassment* model, which parallels racial harassment, and (b) a *sexual exploitation* model, which is analogous to rape. After discussing this analysis, the article focuses on sexual harassment as it applies to black women, a group that is uniquely vulnerable to sexual harassment, and that is caught in the interstices between sex and race. The article will further argue for the recognition of the category of sex-race discrimination, a recognition that will aid in the analysis and proof of cases of discrimination against black women.

SEXUAL HARASSMENT AND RACIAL HARASSMENT

As both racial and sexual harassment are both an expression of dominance and control by one group over another and a process of intimidation to maintain a certain social structure, they have the same

9. In 1975, there were 37 million women in the labor force; by 1979, the number had jumped to 43 million, greatly outpacing male gains in the labor force. EMPLOYMENT GOALS, *supra* note 5, at 3.

10. 29 C.F.R. § 1604.11(a) (1980).

11. 561 F.2d 963, 1001 (D.C. Cir. 1977).

underpinnings. The two forms of harassment are sometimes manifested in the same power statement: racial harassment often takes on sexual overtones, and sexual harassment often takes on racial overtones.[12] Sexual harassment has been carried to its extreme in the rape of black and white women; racial harassment has been carried to its extreme in the lynching and castration of black men. Power in society is demonstrated by who has sexual power over whom.[13]

Although both racial and sexual harassment stem from the exercise of power, there are important differences. The unique history of black-white relationships in this country and the unique character of male-female relationships have led to differing perceptions of discrimination. The history of enslavement has put black oppression into an easily identifiable and understandable category. For example, one outgrowth of the slave history was the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, which prohibited slavery, granted former slaves the right to vote, and guaranteed protection from state denials of due process or equal protection of the laws. While concerns over race discrimination have found expression in the Constitution, the Equal Rights Amendment still awaits ratification.

The opinions issued by the Supreme Court reflect society's divergent perceptions of racial and sexual discrimination. Classifications based on race are inherently suspect and subject to strict judicial scrutiny under the equal protection clauses of the Fifth and Fourteenth Amendments. Classifications based on sex, however, are not considered inherently suspect.[14] For example, Justice Powell, writing for the majority in *Bakke v. Regents of the University of California*,[15] explained the differences in the levels of scrutiny.

> [T]he perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. . . . [T]he Court has never viewed such classifications as inherently suspect or as comparable to racial and ethnic classifications for the purpose of equal protection analysis.[16]

As the Court noted in *Personnel Administrator of Massachusetts v. Feeney*,[17] when "classifications . . . in themselves supply a reason to infer antipathy, [r]ace is the paradigm."[18] To the extent that historical and

12. *See, e.g.*, DeGrace v. Rumsfeld, 614 F.2d 796, 800 (1st Cir. 1980), where one of the threatening notes left for a male worker stated, "Hey boy get your Black ass out before you don't have one"; for a discussion of the sexual harassment of black women, *see also* section of text entitled SEXUAL HARASSMENT OF BLACK WOMEN *infra*.

13. For further discussion of this point, *see* S. BROWNMILLER, *supra* note 3; A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR (1978); W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARDS THE NEGRO, 1550-1812 (1968).

14. Classifications according to race, alienage, and ancestry are inherently suspect. Only a showing of a compelling state interest will justify such a classification. *See generally* Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

15. 438 U.S. 265 (1978).

16. *Id.* at 303.

17. 442 U.S. 256 (1979).

18. *Id.* at 272.

social perceptions of sexual discrimination differ from perceptions of racial discrimination, sexual discrimination will not be viewed by the courts with the same degree of concern.

"Proximity," the degree of distance which can be maintained within the two groups, also has an important bearing on society's perception of discrimination. Race and power can sometimes be dealt with in an abstract manner: one can be insulated from racial tensions by geography, social position, or wealth. Sex and power, however, are daily issues that are always perceived in an intimate and personal way. As a result, it is in the best interest of the dominant class in society that the magnitude of the sex-power problem remain obscure in order to maintain the status quo.

CATEGORIZATION OF HARASSMENT CASES

Because sexual and racial discrimination have underpinnings that are both different and the same, it is not surprising that the two forms of harassment are manifested in ways that are both similar and dissimilar. The categorization of harassment into a *generalized harassment* model and an *exploitative-harassment* model facilitates the analysis of racial and sexual harassment issues. *Equal Employment Opportunity Commission v. Murphy Motor Freight*[19] exemplifies the generalized harassment model in a racial discrimination case. Racial epithets were written on the walls of the plant, the black employee was isolated by his coworkers in the company lunch area, and his car tires were slashed. The district court found the company's working environment to be permeated with racial harassment and intimidation. *Brown v. City of Guthrie*,[20] on the other hand, presents a case of generalized sexual harassment. In that case, plaintiff's supervisor and colleagues (all police officers) subjected her to lewd comments and gestures, displayed pornographic pictures and made comparisons with her body, and replayed and commented upon video tapes of strip searches of female prisoners. A variation of this generalized harassment model occurs when an employer subjects a female employee to harassment by others who do not work with her. For example, in *Equal Employment Opportunity Commission v. Sage Realty Corp.*,[21] the female employee was discharged for refusing to wear a provocative and revealing costume during her employment as an elevator operator. The court held that this job requirement, which subjected the complaining employee to harassment by the public, constituted a term or condition of employment made unlawful by Title VII.

The pattern of generalized harassment which usually appears in all racial harassment cases does not appear in all sexual harassment cases.

19. 488 F. Supp. 381 (D. Minn. 1980).
20. 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).
21. [1981] 4 EMPL. PRAC. GUIDE (CCH) (24 Empl. Prac. Dec.) 19, 163 (S.D.N.Y. Jan. 29, 1981).

There is a model of harassment unique to sexual harassment, the exploitation-harassment model. This model involves pressure upon a woman for sexual favors with an implicit or explicit statement that noncompliance will jeopardize her employment situation.

This form of sexual harassment presents two basic problems in the public mind. One difficulty with the exploitation cases is that they lack a ready framework for analysis. The generalized sexual harassment cases can be dealt with much like the racial harassment cases. Women making an analogy to racial harassment can "bootstrap" claims of sex discrimination onto the racial analysis. Those claims might receive, therefore, the greater consideration that is given racial discrimination in the legal system.

Another problem is that the line between flirtation and sexual exploitation may be a subtle one. Exploitation is sometimes difficult for even women to recognize and more difficult to demonstrate to others. In the generalized harassment cases, either racial or sexual, a cause of action arises when an employee has been ridiculed, intimidated, or degraded because of his or her sexual or racial identity. In the exploitation cases, however, the normalcy of male-female sexual interaction and the "normalcy" of male aggression and dominance cloud the issue; courts are unsure if a cause of action is present. As the district court noted in *Barnes v. Costle*, plaintiff introduced evidence of an "inharmonious personal relationship" but not of a Title VII violation.[22] The exploitation cases also raise the fear that men engaged in harmless flirtation will somehow find themselves in violation of the law, victims of character assassination. It has been suggested, therefore, that charges of exploitation harassment be corroborated.[23]

The concerns raised about the legitimacy of sexual harassment complaints are similar to those raised about rape charges: (1) a fear of malicious prosecution and a concomitant need for corroboration; (2) a generalized feeling that sexual encounters are a "natural phenomenon" and that it is inappropriate to invoke the law to deal with them; and (3) the view that women somehow invite the unwanted sexual attention.[24] Therefore, in order to understand the fears and evidentiary problems raised by these similar issues, it is better to analogize exploitation cases to rape, rather than to the generalized harassment cases. It is useful to examine the well-reasoned decision in *Heelan v. Johns-Manville Corp.*,[25] an exploitation-harassment case, to see how the trial judge scrutinized the evidence in the case, assessing the credibility of the witnesses. The court held that "sexual harassment of female employees is

22. *See* note 1 *supra*.

23. *Sexual Harassment in the Federal Government: Hearings Before the Subcomm. on Investigation of the House Comm. on Post Office and Civil Service*, 96th Cong., 1st Sess. 11, 67, 110, 122-24 (1979).

24. C. MACKENNON, SEXUAL HARASSMENT IN THE WORKPLACE 47-48 (1979).

25. 451 F. Supp. 1382 (D. Colo. 1978).

gender-based discrimination which can violate Title VII."[26] The opinion is significant because it illustrates that sexual exploitation cases can be presented within the framework of Title VII.

Categorization of sexual harassment cases into a generalized model or an exploitation model facilitates legal analysis by providing a clearer understanding of the analytic relationship between sexual and racial discrimination cases. One can determine when legal analogies will be relevant and helpful. The following principles, developed in racial harassment cases, have been applied appropriately to both types of sexual harassment: (1) one incident of harassment generally does not rise to the level of a Title VII violation;[27] (2) harassment which is harmful to plaintiff's working environment may constitute a violation of Title VII.[28] Another principle that emerged in a broad-based sexual discrimination case holds that the existence of sexual harassment is probative on the existence of other kinds of sexual discrimination.[29] This last principle should be followed in all harassment cases.

Another developing concept is that when only one person complains of harassment, plaintiff's case is weakened.[30] The courts seem to be searching for a statistical pattern to support the individual claim of harassment. Repeated incidents of harassment are more probative in generalized harassment cases, where it seems unlikely that only one of a group would be singled out for harassment. Statistical evidence, however, is of limited value in the exploitation-harassment cases, where the selection of one female as a sex partner is not at all unlikely. As the Court of Appeals for the District of Columbia noted in *Barnes v. Costle*, a cause of action for sexual discrimination can be maintained under Title VII, even though no other individual of the same gender

---

26. *Id.* at 1388.

27. EEOC v. Murphy Motor Freight, 488 F. Supp. 381 (D. Minn. 1980) (racial harassment); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980) (sexual harrassment).

Where the harassment is of an extreme nature, however, more than one incident should not be required before the victim can seek the protection offered by Title VII. *See* Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 375-77 (1980).

28. Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1971) (racial harassment); Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980) (sexual harassment).

See also Bundy v. Jackson, — F.2d —, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981). The D.C. Circuit applied the *Rogers* "work environment" theory to a case of sexual harassment, holding that plaintiff need not prove that the harassment caused a tangible loss of job benefits to make out a Title VII violation, where the employer created or condoned a discriminatory work environment.

29. Dacus v. S. College of Optometry, 22 Fair Empl. Prac. Cas. 963 (D. Tenn. 1979); *see also* Bundy v. Jackson, — F.2d —, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981), where the court eased plaintiff's burden of proof on her claim of discriminatory denial of a promotion, as she had already proved that she was the victim of sexual harassment. *Id.* at 1165-68.

30. Edwards v. Foucar, Ray & Simon, Inc., 23 Fair Empl. Prac. Cas. 1644 (N.D. Cal. 1980) (racial harassment); Munford v. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977) (sexual harassment); Vinson v. Taylor, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980) (sexual harassment).

was mistreated in the same way.[31] Finally, another principle concerns the duration of the harassment before a complaint was lodged. When generalized harassment occurs over a long period of time, the court will permit, for purposes of liability, an inference that the employer knew or should have known of the harassment.[32] When, on the other hand, harassment of the exploitation type continues over a long period of time without notice to the employer, the courts will not infer notice. They presume that they are being presented with either a personal relationship that has soured or a mere annoyance.[33] Although both inferences seem appropriate to the kind of harassment presented, it is important to recognize that even when dealing with a personal relationship that has soured, a woman can be sexually harassed by someone with whom she has had a mutually desired relationship. If courts analyze the kind of sexual harassment with which they are confronted, they will be better able to apply the appropriate principles developed in both racial and sexual harassment cases.

REMEDIES FOR SEXUAL AND RACIAL HARASSMENT

Remedies for harassment must be developed to provide better protection to both women and minority men. No matter what kind of harassment they experience, it is rare that plaintiffs will be made whole, even though the courts have been granted full equitable powers under Title VII to fashion complete relief.[34] Some of the racial harassment cases present a unique pattern: a black male, who has been harassed over a period of time, physically attacks his tormentors in retaliation and is fired. Courts have uniformly held that an employer does not violate Title VII by discharging the black worker without discharging those who harassed him.[35] A comparable situation exists in sexual harassment cases, where the court finds discriminatory harassment, but refuses to reinstate the plaintiff due to the tensions and hostilities generated by the situation.[36] Two questions must be asked, however:

31. 561 F.2d at 993.
32. Croker v. Boeing, 437 F. Supp. 1138, 1194 (E.D. Penn. 1977). *But see* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (strict liability imposed on employer where supervisor harassed employee without knowledge of the employer); EEOC Guidelines, 29 C.F.R. § 1604.11(c) (1980) (employer is liable for acts of its agents whether acts were authorized or forbidden by the employer and whether the employer knew or should have known of those acts).

    See also J. VERMEULEN, EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL HARASSMENT BY SUPERVISORY EMPLOYEES (1981) (to be reprinted in 10 CAP. U. L. REV. — (1981)). Ms. Vermeulen argues that the elements of proof required for employer liability in a sexual harassment case under Title VII should not be more stringent than those in other Title VII cases and that the addition of tort concepts such as notice are not only unwarranted but unnecessary.
33. Bundy v. Jackson, 19 Fair Empl. Prac. Cas. 828 (D.D.C. 1980), *rev'd*, 24 Fair Empl. Prac. Cas. 1155 (D.C. Cir. 1981); *see* notes 28-29 *supra*. *See also* Vinson v. Taylor, 23 Fair Empl. Prac. Cas. 37 (D.D.C. 1980).
34. *See* Albemarle v. Moody, 422 U.S. 405, 418-21 (1975).
35. *See, e.g.*, Edwards v. Foucar, Ray & Simon, Inc., 23 Fair Empl. Prac. Cas. 1644 (N.D. Cal. 1980).
36. *See, e.g.*, Brown v. City of Guthrie, 22 Fair Empl. Prac. Cas. 1627 (W.D. Okla. 1980).

(1) Who generated the tensions and hostilities?; and (2) Who is being asked to pay for the creation of the tense situation with loss of employment? These two situations are not identical. Clearly, physical attacks cannot be tolerated on the job; however, in both situations, the person who was harassed pays for defending his or her rights by losing a job. Our courts should structure a more equitable outcome.

Cases of racial or sexual harassment inevitably generate enormous amounts of anger and tension; reinstatement could always be denied for that reason. This outcome, however, is basically unfair. The person discriminated against loses a job, while the person who violated the law remains employed. A backpay award is often inadequate to recompense a plaintiff or to deter future harassment. Especially in recessionary times, workers will not dare to complain about harassment, if they fear they will win on the principle but lose employment. The best remedy is to reinstate the discriminatee at his or her previous job in a nonharassing situation.[37] If this is not possible due to an unavoidable, close working relationship with the harassing individual, then the harassing individual should be moved to a different part of the company. If transfer of the harassing individual is not possible, then the discriminatee should be offered a comparable job in another part of the company. Finally, if for some reason (for example, size of the company) reinstatement is not possible at all, the employer should be required to give "front pay" to the discriminatee. Front pay, a sum of money sufficient to provide time for him or her to find comparable employment,[38] should be added to the backpay award. Its payment would come closer to compensating the discriminatee for loss of a job and would create more incentive for the employer to eliminate harassment from his work force.

In racial harassment actions there have been several cases in which the employer disciplined or fired the harasser because of his conduct.[39] Comparable action by employers is appropriate and necessary in cases of sexual harassment. Aggressive use of the court's equitable powers is

37. *See, e.g.*, Kyriazi v. Western Electric Co., 476 F. Supp. 335 (D.N.J. 1979), where the court ordered reinstatement in spite of intense sexual harassment and protracted litigation.

38. *See* Fitzgerald v. Sirloin Stockade, — F.2d —, 22 Fair Empl. Prac. Cas. 262 (10th Cir. 1980) (front pay appropriate remedy where reinstatement is impractical due to hostility between parties); EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203 (2d Cir. 1977), *cert. denied*, 434 U.S. 920 (1977) (plaintiff denied reinstatement due to erosion of necessary trust and confidence, but granted one year's salary as front pay to give her time to find comparable employment). *But cf.* Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975) (Lumbard, J., dissenting) (front pay inadequate remedy for unconstitutional discharge of homosexual teacher; only reinstatement is sufficient to vindicate her rights and deter future unconstitutional action).

39. Harberson v. Monsanto Textiles Co., 17 Fair Empl. Prac. Cas. 99 (D.S.C. 1976) (employer discharged white Ku Klux Klan member for making racially derogatory remarks); Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975) (employer suspended white employee for saying "nigger"). In Continental Can v. Minnesota, — Minn. —, 297 N.W.2d 241 (1980), although the employer in a sexual harassment case did suspend the harassing employee for six weeks, this action was taken only after the Urban League threatened to boycott the company.

also required. In a recent racial discrimination case,[40] for example, the court found that although the employer had failed to renew plaintiff's contract because of her race, there was no point in reinstating her in a hostile work environment pervaded with racism. At that point, the court determined that the plaintiff had standing "not only to seek reinstatement, but to seek to be reinstated in a workplace where all people are treated with decency and respect."[41] Instead of denying plaintiff reinstatement, the court imposed a race-conscious hiring goal on the employer. This was based on its finding that "as the environment approaches a fairer racial representation, the degree of racism tends to diminish."[42] This creative use of the court's powers gives meaning to the equitable concept of "complete justice."

Without adequate remedies, it will be impossible to eliminate discrimination or to protect those who complain about harassment. In the area of judicial remedies, the law of racial harassment and sexual harassment should develop in tandem.

SEXUAL HARASSMENT OF BLACK WOMEN

Sociological and Mythological Bases of Harassment

Black women have a unique position in American history and mythology which makes them extremely vulnerable to sexual harassment. That position has been defined by the history of slavery and by the social and psychological framework that made slavery possible. The sexual exploitation of black women began during slavery, when they were available to white men as sex objects and unable to seek protection from black men. They were both sexually accessible and unprotected. Exploitation continued during the post-slavery era. Part of the mythology created to support this exploitation portrayed the black woman as "loose," exemplifying promiscuity and sexual abandon.[43] Black women are still perceived as more promiscuous than white women. The white man who makes sexual demands on a black woman often sees his power aggrandized by associating the sexual exploitation to a period in history where a master-slave relationship was possible.[44] Black men, who are still forbidden to defend themselves actively,[45] are also forbidden to come to the defense of black women who are being harassed.[46] Black women, thus, are denied both the real and the sym-

40. Taylor v. Jones, 495 F. Supp. 1285 (E.D. Ark. 1980).
41. *Id.* at 1294.
42. *Id.*
43. G. LERNER, BLACK WOMEN IN WHITE AMERICA 149-50, 163-64 (1972).
44. In *Continental Can*, one harasser of a black woman co-worker made frequent references to a movie about slavery and told her that "he wished slavery days would return so that he could sexually train her and she would be his bitch." Continental Can v. Minnesota, — Minn. —, 297 N.W.2d at 246.
45. *See* text accompanying note 35 *supra*.
46. The court noted in Continental Can v. Minnesota, — Minn. —, 297 N.W.2d 241 (1980), that it was denying plaintiff reinstatement and reducing her backpay by half due to two incidents

bolic protection of black men. The history of slavery still marks black women as sexually available, sexually promiscuous, and unprotected by black men.

The second factor that makes black women susceptible to harassment also emanates from the history of slavery and oppression: it is the economic vulnerability of black women. Fifty-three percent of all black women are in the work force. Compared to white men and women and black men, their median salary is the lowest.[47] In 1978, approximately one out of eight female workers was a head of a family; yet, one quarter of all black women workers were heads of households.[48]

More than half of the families headed by black women had incomes below the poverty level in 1977 (58%).[49] In addition, one-third of all black children under the age of eighteen are living in families headed by black women that are below the poverty level.[50] The highest unemployment rate for any group is for black female teenagers (41% in 1978); the highest unemployment rate for all adults is black women (11.1% in 1978).[51] Taken all together, these statistics portray a situation of despair and economic vulnerability. They indicate that black women are largely either looking for work or employed in marginal jobs, earning low wages. At the same time black women are very often the sole support of the family.[52] Sexual harassment takes on an even more sinister tone when the threat of losing a job is seen against this desperate background.

Statistics on the sexual harassment of black women are scarce. The one large-scale study of sexual harassment which asked questions relating to race was conducted by the Merit Systems Protection Board. In its initial report, the Board concluded that black and white women in the federal government suffer sexual harassment to approximately the same degree.[53] While this may be true in the federal sector, it should not be expanded to a general proposition covering the work force as a whole. The federal sector is unique in terms of the safeguards built into the system to protect the rights of the employees. For black wo-

---

which added to tensions and racial hostilities. *Id.* at 1816. Both incidents involved plaintiff's husband, a black man, when he took an active role in defending his wife.

Black women are also frequently sexually harassed by black men. To the extent that there are several groups of men who have power over black women, black women will be sexually vulnerable to all of them. Attitudes towards black women, attitudes which are shaped by the thoughts and behavior of the dominant group (white males), will come to be attitudes accepted by the culture as a whole. *Cf.* W. JORDAN, *supra* note 13, at 150.

47. TWENTY FACTS, *supra* note 4, at 1; EARNINGS GAP, *supra* note 6, at 20.
48. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ABOUT WOMEN OF HOUSEHOLDS AND HEADS OF FAMILIES (Dec. 1979); TWENTY FACTS, *supra* note 4, at 2.
49. WOMEN'S BUREAU, *supra* note 48, at 8.
50. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: CONSUMER INCOME, Ser. P-60, No. 124, Table 9 (1980).
51. TWENTY FACTS, *supra* note 4, at 8.
52. For further discussion of the unique situation of black women workers, *see* P. WALLACE, BLACK WOMEN IN THE LABOR FORCE (1980).
53. MERIT SYSTEMS PROTECTION BOARD, *supra* note 8, at 9.

men, these jobs are probably the best that they can find. In the private sector, black women, of all groups studied, were found to have the highest chance of working for the minimum wage or less.[54] Whereas the largest number of white working women are in clerical jobs, the largest number of black women are in service jobs. More than half of the household workers in the country are black.[55] Many service occupations, such as that of household worker, place black women in isolated, invisible jobs which have few, if any, built-in protections, jobs in which they are neither entitled to nor dare to ask for the minimum wage. These are positions in which women are vulnerable to both economic and sexual exploitation. In fact, a recent article in the *Washington Post* concerning the movement to professionalize household workers revealed that sexual harassment is chronic and commonplace.[56] Sexual harassment, like incidents of rape, is underreported due to the victim's feelings of embarrassment and impotence and also to the realities of her economic vulnerability.[57] To the extent that black women are even less powerful and more economically vulnerable than white women, the incidence of sexual harassment against black women will show gross underreporting.[58]

Legal Analysis

Courts, when confronted with an allegation of sexual harassment raised by a black women, often have grappled with the question of whether they were dealing with sex discrimination or race discrimination. This confusion is not surprising, as the legislative history of Title VII shows Congress' uncertainty with regard to treating black women as blacks or as women for purposes of the Act.[59] In *Miller v. Bank of America*,[60] plaintiff alleged that she was fired because she refused her supervisor's demand for sexual favors from a "black chick." Plaintiff alleged racial and sexual discrimination and filed suit under both Title VII and section 1981. The district court, however, dismissed the section

54. MINIMUM WAGE STUDY COMM'N, A DEMOGRAPHIC PROFILE OF MINIMUM WAGE WORKERS 10 (Sept. 1980).

55. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN PRIVATE HOUSEHOLD WORKERS: A STATISTICAL AND LEGISLATIVE PROFILE (1978).

56. Wiener, *Careers: Standing Up for Household Technicians*, Washington Post, Sept. 30, 1980, at B-5.

57. *1980 Hearings*, *supra* note 2, at 96, 166 (testimony of Eleanor H. Norton and Ruth T. Prokop).

58. Many black women, nonetheless, have been active in protecting themselves against sexual harassment. It is interesting to note that although relatively few sexual harassment cases have been appealed through the courts, three of the five Circuit Courts of Appeals cases on sexual harassment were brought by black women; in several lower court decisions, the plaintiffs are identified as black. This activism is probably due both to the greater or more severe harassment visited upon black women and the black woman's long familiarity with discrimination and willingness to seek redress through the courts.

59. The legislative history of Titles VII and IX of the Civil Rights Act of 1964 can be found in H.R. REP. No. 914, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2401, 2408; S. REP. No. 872, 88th Cong., 2d Sess., *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2401, 2408.

60. 600 F.2d 211 (9th Cir. 1979).

1981 claim, stating that it was not a racial discrimination case and that plaintiff had conceded that only sexual discrimination was involved.[61] On appeal, the court found that plaintiff had made no such concession and reinstated her claim of racial discrimination.[62] In *Munford v. James T. Barnes & Co.*,[63] plaintiff alleged both sexual and racial discrimination, arguing that sociological studies showed that she was more likely to be a victim of sexual harassment because she was black. The district court granted a motion for summary judgment on the racial discrimination claim, allowing only the sexual discrimination claim to remain in the case.[64] In the *Continental Can* case,[65] although plaintiff alleged only sexual discrimination, the verbal abuse showed clear racial overtones. Finally, there is some indication that employees of agencies who investigate charges of harassment mislead black women on how to file their charges, based on the perception that one must choose either sex or race as a basis for the complaint.[66]

Because black women are often harassed due to both race and sex, they should not be foreclosed from defining discrimination against them in such terms. A representative of the Working Women's Institute, an independent resource and research center that is in the forefront of work on sexual harassment, stated that the majority of black women who come to the Institute with complaints of sexual harassment suspect that they are dealing with instances of sex-race discrimination. This is manifested either implicitly, so that the woman is unsure whether the harassment is racially or sexually motivated, or explicitly, where the harasser expressed his sexual interest in terms of her race.[67]

One district court has held that black women who filed a class action suit under both Title VII and section 1981 are not a special subcategory entitled to protection and that "they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended."[68] On appeal, the Eighth Circuit noted in dicta that it did not subscribe entirely with the district court's reasoning in rejecting the sex-race claim.[69]

---

61. 418 F. Supp. 233, 234 (N.D. Cal. 1976).
62. 600 F.2d at 212.
63. 441 F. Supp. 459 (E.D. Mich. 1977).
64. *Id.* at 466-67.
65. — Minn. —, 297 N.W.2d 241 (1980).
66. *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977), where the agency EEO officer advised plaintiff to file on the basis of race only.
67. Interview with Peggy Crull, Research Director of the Working Women's Institute, in New York City (Nov. 11, 1980).
68. Degraffenreid v. General Motors Corp., 413 F. Supp. 142 (E.D. Mo. 1976), *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977). The EEOC participated as *amicus curiae* in the *Degraffenreid* case on appeal, and argued that Title VII is available to eliminate all discriminatory practices in whatever form they appear, including race and sex discrimination against black women. The Commission has long supported the concept of sex-race discrimination. *See, e.g.*, EEOC Dec. No. 72-0679, [1971] EEOC Dec. (CCH) ¶ 6,324; EEOC Dec. No. 72-0320, [1971] EEOC Dec. (CCH) ¶ 6,294.
69. Degraffenreid v. General Motors Corp., 558 F.2d at 484.

The Fifth Circuit, on the other hand, has recognized the unique legal predicament of black women. Its opinion in *Jeffries v. Harris County Community Action Association*[70] states in part that "[r]ecognition of black females as a distinct protected subgroup for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females."[71] The court based its decision on the language of the statute and the legislative history, yet found its decision mandated by the holdings of the Supreme Court in the "sex plus" cases.

The "sex plus" cases involve employment policies that single out certain subclasses of women for discriminatory treatment, for example, women with children, married women, and pregnant women. The court reasoned that it would be illogical to hold that although an employer could not discriminate against a "sex plus" subgroup, he would be free to discriminate against the black female subgroup. As the court stated, "[t]his would be a particularly illogical result, since the 'plus' factors in the former categories are ostensibly 'neutral' factors, while race itself is prohibited as a criterion for employment."[72]

Judge Randall differed from the majority of the panel on what she called "combination discrimination." She stated first of all that there was no legal authority to support a "combination discrimination" claim.[73] Nevertheless, one can find several examples in which courts have found a cause of action for combination discrimination.[74] Secondly, Judge Randall argued that the factual differences between sex-plus discrimination and combination discrimination preclude the use of the "sex plus" analysis in combination cases.[75] The "sex plus" analysis is helpful, however, for it requires that courts carefully examine Congress' proscriptions and give full credit to those proscriptions. Congress did not say explicitly that discrimination on the basis of "sex plus," for example, marital status, would violate Title VII, but courts have developed a "sex plus" theory of discrimination that has found widespread acceptance. What Congress did say, however, and quite explicitly, is that neither discrimination on the basis of race nor on the basis of sex will be allowed. Courts must heed this mandate and must eliminate

70. 615 F.2d 1025 (5th Cir. 1980).
71. *Id.* at 1034.
72. *Id.*
73. *Id.* at 1034-35 n.7.
74. Payne v. Travenol Laboratories, 416 F. Supp. 248 (N.D. Miss. 1976), *rev'd and vacated in part on other grounds, aff'd in part*, 565 F.2d 895 (5th Cir. 1978), *cert. denied*, 439 U.S. 835 (1978) (certification of class of black females alleging sex-race discrimination); Griffiths v. Hampton, — F. Supp. — (D.D.C. 1976) (court has authority to fashion appropriate relief to black female who alleged sex-race discrimination); Logan v. St. Luke's Hospital, 428 F. Supp. 127 (S.D.N.Y. 1977) (black female established prima facie case of racial and/or sexual discrimination); Collins v. City of Los Angeles, 18 Fair Empl. Prac. Cas. 594 (C.D. Cal. 1978) (statistics are insufficient to show that black female was terminated because of racial and/or sexual discrimination); Vuyanich v. Republic National Bank of Dallas, 409 F. Supp. 1083 (N.D. Tex. 1976) (court suggests evidence of termination of black female "smacks of sexual as well as racial discrimination," *id.* at 1089).
75. 615 F.2d at 1033-34.

these kinds of discrimination whether they appear as an individual claim or in a combined form.[76]

Another example clarifies the issue. Title VII has been interpreted to prohibit discrimination on the basis of "sex plus" age, for example, in the airline stewardess cases.[77] As age discrimination is no longer a "plus," but has its own statutory basis in the Age Discrimination in Employment Act,[78] discrimination on the basis of sex-age is now combination discrimination just as is sex-race discrimination. Could one now argue that sex-age cases are entitled to less protection than before? Such a conclusion would make a mockery of Congressional intent to accord age discrimination even greater protection. Judge Randall's view of sex-race claims would do the same. Finally, Judge Randall cites the evidentiary problems involved in proving discrimination against a subgroup of females.[79] However, forcing a plaintiff to choose between sexual or racial discrimination ensures that the evidence selected will be both inappropriate and insufficient to prove the case. Once the nature of the discrimination has been analyzed properly, proving discrimination against black women as a group should be no more difficult than proving discrimination against women with children or women over forty.

It is important for courts and practitioners to understand that black women often experience discrimination because of sex-race; it is even more important that black women understand this fact. Without a clear understanding of the underlying cause of whatever discrimination is taking place, the discriminatee will not be able to focus attention and investigation in a helpful way. Black women are in a unique position: they may face discrimination based on race, sex, or sex-race. A clearer understanding of the existence of black women as a discrete group and acceptance of this third category as a real possibility will make discrimination against black women easier to identify and eliminate.

CONCLUSION

This article has attempted to clarify the nature of sexual harassment by looking at it through the lens of race. In the process, the article has shown that although sexual and racial harassment share many of the same psychological and sociological underpinnings, the unique nature

76. In Franks v. Bowman, 424 U.S. 747 (1976), the Supreme Court noted that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to *prohibit all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . ." *Id.* at 763 (emphasis added).

77. EEOC Dec. No. 66-5762, [1968] EEOC Dec. (CCH) ¶ 6,001 (violation of Title VII to require stewardesses to resign or accept reassignment at age 32); EEOC Dec. No. 70-38, 2 Fair Empl. Prac. Cas. 165 (1969) (violation of Title VII to require discharge of motorbus hostesses who reach age 32); EEOC Dec. No. 70-167, [1969] EEOC Dec. (CCH) ¶ 6,076 (requiring stewardesses to resign at age 32 violates Title VII).

78. 29 U.S.C. §§ 621-634 (1976), *as amended by* the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189.

79. 615 F.2d at 1034-35, 1035 n.7.

of the male-female interaction makes sexual harassment a more complicated issue. To the extent that these similarities and differences are understood, a clearer picture of the nature of sexual harassment emerges. In order to provide clarity, the article has discussed two analytical models for sexual harassment cases: (a) a generalized harassment model that is analogous to racial harassment, and (b) a sexual exploitation model that is analogous to rape. By adopting these suggested models, courts will be able to identify more clearly relevant evidentiary matters, legal issues, and appropriate remedies.

Finally, this study has explored the unique situation of black women facing sexual harassment in the work force and has shown that they are often exploited because of their sex and race. Recognition that black women are a distinct group in American society and that sex-race discrimination in employment exists is the first step in eradicating that discrimination.

Discrimination in this country takes subtle, varied, and changing forms. It is all, however, a totality. To the extent that we can grasp the essence of discrimination, we can identify and eliminate its many manifestations.