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NOTES

The Emerging Law of Sexual Harassment: Relief Available to the Public Employee

Sexual harassment¹ in the workplace is a widespread problem with no clear legal definition.² Usually committed by an employer or co-worker,³ the types of activity which constitute harassment range from a single encounter to continuous sexual tormenting.⁴ At the least, the victim is subjected to an unfavorable work environment; at the most, the victim can lose her job for refusing to acquiesce to sexual demands. Clearly, no individual should be forced to suffer such consequences as a precondition of employment.

A victim of sexual harassment has several avenues of relief available, depending upon the circumstances of the harassment and harm suffered by the plaintiff. Title VII⁵ recognized sexual harassment as illegal sex discrimination in the mid-1970s.⁶ State tort law has traditionally pro-

1 Sexual harassment refers to "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 1 (1979). In the employment context, the employer exerts influence over the employee due to his superior position. The employee is forced to tolerate sexual advances due to her fear of job loss. *Id.* at 2. Although females might be guilty of sexual harassment, this note is limited to the more prevalent scenario where females are the victims of the harassment.

2 The Equal Employment Opportunity Commission (EEOC) guidelines define sexual harassment as follows:

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.

29 C.F.R. §§ 1604-1611(a) (1985). Although not bound by EEOC guidelines, courts afford them great deference. *Henson v. City of Dundee*, 682 F.2d 897, 903 n.7 (11th Cir. 1982).

3 The employer can also be liable for the harassing activities of nonemployees, usually customers patronizing the place of business. Although these cases are less common, the EEOC expressly provides for liability "when the employer (or its agents and supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action." 29 C.F.R. § 1604(e) (1985). See Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574, 592-93 (1985).

4 Activity that amounts to sexual harassment can vary from verbal innuendos and abuses, to physical patting and touching, to outright demands for sexual relations. See C. MACKINNON, *supra* note 1, at 2.

5 42 U.S.C. §§ 2000e to e-17 (1982). Title VII provides in relevant part:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise 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

42 U.S.C. § 2000e-2.

6 *Williams v. Saxbe*, 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), *remanded sub nom.*, *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980). At the outset, only *quid pro quo* harassment claims were recognized. In this scenario, the employer conditions receipt of job benefits on the plaintiff's acquiescence to sexual advances.

vided recovery for harassment victims.⁷ Finally, sexual harassment is discrimination in violation of the equal protection clause of the fourteenth amendment,⁸ and actionable under 42 U.S.C. section 1983 (section 1983).⁹ The public employee,¹⁰ then, has an additional claim on constitutional grounds.

The unique factual scenarios of most sexual harassment claims make these cases difficult to adjudicate under any one existing theory. This note will analyze each of the claims available to the public employee, including the elements of each cause of action, possible remedies, and the current state of the law. Part I explains the problematic nature of a sexual harassment claim. Part II considers claims under Title VII. Part III analyzes state tort law relief. Part IV discusses the equal protection cause of action. Finally, Part V concludes that each of these remedies is inadequate and that clear state policy prohibiting sexual harassment in the workplace is necessary.

I. The Problem of Obtaining Relief for Sexual Harassment

Sexual harassment suits are problematic because male-female relationships are wrought with uncertainties. Courts face the burden of deciding when an overture is welcome and when it is harassment. The courts are ill-equipped to meet this challenge. In the simplest case, the employer approaches the employee with a demand that the employee engage in sexual relations with the employer, or lose her job. This demand is obviously sexual harassment and is illegal. However, rarely are the lines so clearly drawn.

See infra note 27 and accompanying text. Courts now recognize claims of hostile work environment, wherein the plaintiff is subjected to sexual harassment with no economic effect on her employment, such as job loss or denial of employment benefits. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986). *See also infra* note 33.

7 *See infra* notes 48-73 and accompanying text. *See also* Note, *supra* note 3, at 595-603.

8 The fourteenth amendment, in relevant part, provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

9 The relevant portion of 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities served by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. The federal cause of action for damages against state and local officials for constitutional deprivations "was designed to protect individuals against a misuse of power made possible only because the wrongdoer is clothed with the authority of state law." *Duchesne v. Sugarman*, 566 F.2d 817, 829 (2d Cir. 1977). The sexual harassment plaintiff, then, pleads a violation of federal constitutional rights, and asks for damages pursuant to § 1983. *See, e.g., Bohlen v. City of E. Chicago*, 799 F.2d 1180 (7th Cir. 1986).

10 For purposes of this note, a person is a "public employee" if her employer acts under color of state law for purposes of § 1983. *See supra* note 9. Examples include employees of state agencies, public schools and municipalities.

The employer might actually believe his advances are welcome, negating the intent sometimes necessary for tort recovery.¹¹ If the employee acquiesces initially and becomes sexually involved with the employer, courts might find that the plaintiff voluntarily participated, and thus cannot recover for sexual harassment. The facts of *Vinson v. Taylor*¹² illustrate the case where an employee initially acquiesced to her employer's advances.

In *Vinson*, the plaintiff began work as a teller at the bank where the defendant was a manager. The plaintiff's relationship with the defendant started when he asked her to dinner, and during the meal suggested that they engage in sexual relations. Although she refused at first, the plaintiff later acquiesced. Their sexual relationship lasted over the next several years, during which time the defendant became increasingly aggressive and the plaintiff was forced into many sexual encounters against her will. The plaintiff also described episodes during this period when the defendant harassed her by fondling her breasts and buttocks in front of other employees. The bank eventually discharged the plaintiff for excessive use of leave.¹³

Clearly such behavior is sexual harassment on its face.¹⁴ However, because the court found that the plaintiff voluntarily engaged in a sexual relationship with the defendant, the court found no illegal sexual harassment.¹⁵ The court refused to acknowledge the plaintiff's motive for entering the relationship: Although she was not physically forced into the relationship, she did not invite her employer's advances. She participated in the relationship because of her fear of her employer and his position of power over her.¹⁶ This basic problem of ascertaining what behavior is consensual male-female interaction and what is harassment can lead to inadequate recovery for the victim.

II. Title VII

Title VII of the Civil Rights Act of 1964¹⁷ makes sex discrimination in employment illegal. It was not until 1976 that a federal court recognized sexual harassment as a form of sex discrimination under Title VII.¹⁸ The Supreme Court acknowledged a cause of action under Title VII for sexual harassment for the first time in 1986 in *Meritor Savings Bank*

11 See Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. CENT. L.J. 113, 155 (1983).

12 22 Empl. Prac. Dec. (CCH) ¶ 30,708 (D.D.C. 1980). Capital City Federal Savings and Loan Association, a codefendant, subsequently became Meritor Savings Bank. Meritor was the petitioner in the appeal to the Supreme Court. *Meritor Sav. Bank v. Vinson*, 106 S. Ct. 2399 (1986).

13 22 Empl. Prac. Dec. (CCH) ¶ 30,708, at 14,687-88.

14 See *supra* note 1.

15 22 Empl. Prac. Dec. (CCH) ¶ 30,708, at 14,692-93.

16 At trial, the plaintiff testified that she agreed to have sexual relations with her employer only because she feared he would dismiss her from her job if she failed to do so. *Id.* at 14,688. Ultimately, in *Meritor*, the Supreme Court held that the correct inquiry is whether the "respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." 106 S. Ct. at 2406.

17 See *supra* note 5.

18 *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

v. Vinson.¹⁹ Until that time, lower courts defined the parameters of the Title VII action.²⁰

The plaintiff must consider certain characteristics of a Title VII cause of action before determining whether this claim would provide relief. Initially, Title VII prohibits discrimination by an *employer*.²¹ An employer is strictly liable for the acts of supervisory personnel when the supervisor uses his power to extort sexual favors from his employee by threatening her job (either explicitly or implicitly) if she does not comply. However, the employer will not be liable for the acts of plaintiff's supervisor or coworkers in creating a harassing atmosphere unless the plaintiff shows the employer had knowledge (actual or constructive) of the discrimination, and that the employer failed to take appropriate remedial action.²² The discrimination must affect a term or condition of employment to be actionable under Title VII.²³

Remedies under Title VII are extremely limited. The plaintiff may be reinstated to her job, and receive back pay and attorney's fees.²⁴ Some courts award nominal damages in circumstances where no other relief is available under the Title, presumably to provide the plaintiff with a means of paying attorney's fees.²⁵ However, most courts have held that damages are not available under Title VII.²⁶ Title VII does not explicitly provide for compensatory or punitive damages.

A. *Quid Pro Quo*

The elements of a Title VII cause of action vary according to the type of discrimination suffered. A Title VII plaintiff can bring what is called a *quid pro quo* claim. In such a case, an "explicit exchange" takes place: "[T]he woman must comply sexually or forfeit an employment

19 106 S. Ct. 2399.

20 See, e.g., *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

21 42 U.S.C. § 2000e-2 (1982) (emphasis added).

22 In *Henson*, the plaintiff was a dispatcher for the police department. She alleged that the chief of police subjected her to sexual harassment. The plaintiff testified at trial that she had complained to the town manager of the police chief's activity. The manager did nothing to restrain the police chief and even suggested that a liaison would be mutually beneficial. 682 F.2d at 905 n.10. Based on this evidence, the court found that the city had knowledge of the harassment.

The court also discussed the difference between the standards of employer liability for (1) acts of supervisors in denying job benefits and (2) coworkers in creating an unpleasant work environment. In the former case, when the supervisor acts, he "is acting within at least the apparent scope of the authority entrusted to him by the employer." *Id.* at 910. Thus, strict liability applies. However, a coworker can create a harassing work environment while completely outside his authority. For this reason, the court noted that a coworker's conduct cannot be imputed to the employer without the employer's knowledge (actual or constructive) of the behavior. *Id.*

23 See *supra* note 5.

24 The statute provides in relevant part:

[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

42 U.S.C. § 2000e-5(g).

25 See, e.g., *Katz v. Dole*, 709 F.2d 251, 253 n.1 (4th Cir. 1983); *Henson*, 682 F.2d at 905.

26 *Andrew v. Anheuser-Busch Co.*, 728 F.2d 989, 992 n.2 (8th Cir. 1984); *Bundy v. Jackson*, 641 F.2d 934, 946 n.12 (D.C. Cir. 1981); *DeGrace v. Rumsfeld*, 614 F.2d 796, 808 (1st Cir. 1980).

benefit."²⁷ The plaintiff thus suffers a detriment to her job status as a result of the discrimination—either by losing her job or being denied a promotion or benefit.²⁸ In the common scenario, the plaintiff is fired after refusing the employer's sexual advances.²⁹ The employer is normally the perpetrator of the discrimination in a *quid pro quo* claim, because he is the only party with the power to affect the plaintiff's employment.³⁰

Quid pro quo claims are analyzed pursuant to traditional Title VII principles outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*.³¹ The analysis emphasizes the motive of the employer; in order to prevail on the merits, the plaintiff must prove that the employer intentionally discriminated against her.³²

B. Hostile Work Environment

A hostile work environment claim is also available under Title VII. Courts fashioned this claim after recognizing that not every discrimination case encompasses the denial of a specific employment benefit.³³ In these cases, the plaintiff is subjected to sexual advances and suggestions sufficient to create an unpleasant work environment.³⁴ Either coworkers, supervisors or employers create the harassing environment.³⁵

The crux of the plaintiff's claim is that she is subjected to this environment merely because of her sex. The discrimination, thus, adversely affects women as a class.³⁶ The *McDonnell Douglas* test, when applied to *quid pro quo* harassment cases, focuses on the denial of specific employment benefits because of the employee's sex.³⁷ The test is modified to

27 C. MACKINNON, *supra* note 1, at 32.

28 See, e.g., *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (plaintiff discharged for refusing to cooperate in sexual liaison with her employer).

29 *Williams v. Saxbe*, 413 F. Supp. 654, 658 (D.D.C. 1976).

30 See Note, *Employer Liability for Coworker Sexual Harassment Under Title VII*, 13 N.Y.U. REV. L. & SOC. CHANGE 83, 86 (1984).

31 411 U.S. 792 (1973). The plaintiff must prove the following elements to establish a prima facie Title VII case:

- (1) that he [the plaintiff] is a member of a ["protected class"];
- (2) that he applied for and was qualified for a job for which the employer was seeking applicants;
- (3) that, despite his qualifications he was rejected; and,
- (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

32 See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981). See also Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1455 (1984).

33 The first case to recognize a hostile work environment claim was *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). Several supervisors regularly propositioned the plaintiff, requesting that she go to motels and on vacations with them. In emphasizing the importance of recognizing this claim under Title VII, the court held that without this cause of action "an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance . . ." *Id.* at 945.

34 By creating an unpleasant work environment, the employer alters a condition of employment—"the psychological and emotional work environment." *Id.* at 944.

35 See Note, *supra* note 30, at 86.

36 The claim thus differs from the *quid pro quo* claim, in which the plaintiff alleges discrimination affecting her as an individual. See Note, *supra* note 32, at 1456.

37 See *id.* See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

address hostile environment claims.³⁸ The focus becomes the employee's subjection to an intolerable work environment which she is forced to endure solely because of her sex. The plaintiff bears the initial burden of proving discrimination against a protected class. The defendant may rebut this evidence with evidence of a nondiscriminatory purpose. Finally, even if the defendant meets his burden, the plaintiff can prevail with proof of nondiscriminatory alternatives.³⁹

A crucial issue in any hostile work environment action is the standard of liability of the employer for the acts of his employees.⁴⁰ In *Meritor Savings Bank v. Vinson*,⁴¹ the Court held that an employer is not strictly liable for the acts of his employees.⁴² After setting this limit, the Court failed to enunciate other guidelines for determining employers' liability. Instead, the Court determined that lower courts should "look to agency principles for guidance in the area."⁴³ The courts have not reached a consensus as to when an employer may be held liable for the acts of his employees in a hostile work environment claim.⁴⁴

Title VII does not provide adequate relief for the victim of sexual harassment. The fortunate plaintiff will be awarded reinstatement, back pay and attorney's fees.⁴⁵ Rarely will a return to the workplace provide relief for the person who has suffered serious and ongoing sexual harassment in that atmosphere.⁴⁶ If the plaintiff has been discharged for cause, regardless of whether she endured harassment in the workplace, she cannot recover damages pursuant to Title VII. The reality of inadequate Title VII recovery illustrates that the objective of Title VII—to eliminate

38 The elements of a hostile work environment claim are:

- (1) The employee belongs to a protected group.
- (2) The employee was subject to unwelcome sexual harassment.
- (3) The harassment complained of was based upon sex.
- (4) The harassment complained of affected a "term, condition, or privilege" of employment.
- (5) respondeat superior.

Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982).

39 See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1159-60 (1976).

40 Under Title VII, only an employer is liable for discrimination. See *supra* note 5. Thus, the plaintiff in a hostile work environment claim must allege respondeat superior in order to hold the employer liable for the actions of the employees who created the hostile environment. See *supra* note 38.

41 106 S. Ct. 2399 (1986). See *supra* notes 12-16 and accompanying text.

42 106 S. Ct. at 2408.

43 *Id.*

44 Since *Meritor*, two courts that have addressed the issue of employer liability have adopted the rule that the employer is liable if he knew or should have known of the harassment and failed to take prompt remedial action. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986); *Volk v. Coler*, 638 F. Supp. 1555, 1557-58 (C.D. Ill. 1986).

It is unclear from the *Volk* opinion whether the court intended for this standard to apply only to cases involving harassment by supervisors (*Volk*), or also to coworker cases. The court in *Rabidue* limited the holding to cases involving harassment by coworkers. 805 F.2d at 621 n.6. Neither court offered guidance as to under what circumstances an employer "should have known" that harassment had taken place.

45 See *supra* note 24.

46 See, e.g., *Meyers v. I.T.T. Diversified Credit Corp.*, 527 F. Supp. 1064, 1067 (E.D. Mo. 1981) (The plaintiff was subjected to several sexual overtures by her supervisor, leading the plaintiff to request a transfer to another location. The court noted that the relationship between the plaintiff and the defendant was very strained.).

discrimination in the workplace⁴⁷—has been frustrated in this area. Employers are not likely to take steps to provide a harassment-free environment unless faced with the possibility of liability at law for damages. Equitable remedies alone will not make the sexual harassment victim whole.

III. State Tort Law

Prior to the passage of Title VII, and subsequent acceptance by the courts of a claim under Title VII for sexual harassment,⁴⁸ the main relief available to the plaintiff was under principles of common law tort.⁴⁹ Generally the victim of sexual harassment can sue for assault,⁵⁰ battery,⁵¹ intentional infliction of emotional distress,⁵² tortious interference with contractual relationships,⁵³ or invasion of privacy.⁵⁴ A federal court can exercise pendent jurisdiction in order to adjudicate the state law claim brought in conjunction with a Title VII claim.⁵⁵

Tort recovery focuses on remedying injury to a personal interest, whether physical or emotional.⁵⁶ Title VII focuses on eliminating discrimination in employment.⁵⁷ This difference in emphasis and the possibility of both compensatory and punitive damages⁵⁸ make tort recovery more well-suited in theory to compensating the victim of sexual harassment for the injury actually suffered.⁵⁹

However, the context in which most sexual harassment cases arise shows the inadequacy of the tort action. Battery claims require contact with the plaintiff.⁶⁰ Assault requires the plaintiff's imminent apprehension of harmful or offensive contact.⁶¹ These theories are useful where

47 In *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), the Court stated that the purpose of Title VII "was to achieve equality of employment opportunities . . ."

48 See *supra* note 18 and accompanying text.

49 The plaintiff could also sue for breach of contract in certain circumstances. See Note, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 n.62 (1977). This note will not discuss the plaintiff's remedy in contract.

50 See *infra* notes 60-62 and accompanying text.

51 See *id.*

52 See *infra* notes 63-65 and accompanying text.

53 See *infra* notes 66-67 and accompanying text.

54 See *infra* notes 68-69 and accompanying text.

55 In order to invoke pendent jurisdiction, the plaintiff must plead a substantial federal question, and the federal and state claims must derive from a common nucleus of operative fact. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).

56 "Individuals wish to be secure in their persons against harm and interference, not only as to their physical integrity, but as to their freedom to move about and their peace of mind." W. PROSSER & W. KEETON, *PROSSER AND KEETON ON TORTS* 16 (5th ed. 1984).

57 See *supra* note 47.

58 W. PROSSER & W. KEETON, *supra* note 56, at 9-16.

59 See, e.g., *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983).

60 A battery occurs when the actor:

- (a) acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) an offensive contact with the person of the other directly or indirectly results.

RESTATEMENT (SECOND) OF TORTS § 18 (1965).

61 An actor commits an assault if:

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.

RESTATEMENT (SECOND) OF TORTS § 21 (1965).

the plaintiff has experienced or anticipated some physical contact.⁶² If the employer or coworker assaults the plaintiff verbally, or the plaintiff does not fear immediate physical contact, she cannot recover for either battery or assault.

In order to recover for intentional infliction of emotional distress, the plaintiff must prove that the defendant, by his extreme and outrageous conduct, caused the plaintiff severe emotional distress.⁶³ The problem with recovery for this tort is in determining what constitutes outrageous behavior.⁶⁴ If recovery depends upon the attitude in a particular jurisdiction as to what behavior is outrageous, a victim will not recover where the factfinder determines that sexual harassment is not outrageous conduct.⁶⁵

A claim of interference with contractual relations, the contract being between the plaintiff and her employer, only protects the plaintiff against the activity of a third party.⁶⁶ Thus, the plaintiff cannot recover against the employer directly, but is limited to recovery against a third party, such as a coworker, who has interfered with her relationship with her employer.⁶⁷ Such a cause of action is ineffective where recovery against the employer is imperative because he is in a position to encourage or tolerate sexual harassment.

Finally, the plaintiff in an invasion of privacy action must have an expectation of privacy or no tort has occurred.⁶⁸ A court might hold that the plaintiff only has an expectation of privacy as to her physical environ-

62 In *Rogers v. Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981), the plaintiff, an assistant manager of a restaurant, overcame a motion to dismiss assault and battery claims. She alleged that the defendant, her manager, committed an assault by placing notes to her inside menus which she gave to customers, causing her to fear harmful contact with the defendant. She also stated a claim for battery based on defendant's repeatedly touching her body and pulling her hair.

63 "[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

64 One commentator has argued that it is the economically coercive nature of sexual harassment in the workplace which makes this behavior outrageous. See Note, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1482 (1986).

65 In *Hooten v. Pennsylvania College of Optometry*, 601 F. Supp. 1151 (E.D. Pa. 1984), the plaintiff's claim for intentional infliction of emotional distress was based on belittling remarks made by her employer about her marital status and role as a mother. An extremely heavy work schedule forced her to commit errors. Due to these pressures, the plaintiff collapsed at work. Her supervisors ignored her, and refused to come to her assistance. Surprisingly, these facts were not sufficient to sustain a claim for intentional infliction of emotional distress. The court held that, "while creating an environment which is oppressive to function within is likely to cause distress it is not the type of action to arouse resentment, by the average member of the community, against the actor." *Id.* at 1155.

66 One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

67 See, e.g., *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978). The plaintiff alleged a pattern of conduct on the part of her coworkers and supervisors, including jointly agreeing to ridicule and harass her as a woman, which interfered with her contractual relationship with her employer, Western Electric. *Id.* at 950.

68 "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

ment.⁶⁹ As a result, invasions of one's emotional privacy—constant demands for sex or sexual teasing—might not be recognized as injuries.

The basic inadequacies of tort recovery are accentuated by the fact that, in most cases, intentional tort plaintiffs cannot recover against the employer for torts committed by an employee—the victim's coworker. The employer will be held vicariously liable for the acts of the employee only if the employee was acting within the scope of his employment when he committed the tort.⁷⁰ The verbal and physical sexual advances which constitute sexual harassment rarely fall within the scope of employment. As a result, the tort plaintiff cannot recover against the employer unless the employer himself has committed the tort.⁷¹

Tort law seems to fill one gap left by Title VII—the plaintiff can recover compensatory and punitive damages for harm to her personal, as opposed to employment, interests. However, the plaintiff in a sexual harassment suit could have problems pleading a prima facie case in several tort claims.⁷² The plaintiff might also be limited to recovery against the employee who committed the tort.⁷³ Consequently, recovery in tort presents as many problems as it solves for the victim of sexual harassment.

IV. Equal Protection

The public sector employee has an additional remedy not available to other employees: courts have recognized that sexual harassment violates the equal protection clause of the fourteenth amendment.⁷⁴ Because sexual harassment constitutes illegal sex discrimination, the plaintiff can bring an action for damages pursuant to 42 U.S.C. section 1983.⁷⁵ Recently, the Seventh Circuit Court of Appeals became the first federal appellate court to acknowledge a constitutional claim for sexual harassment.⁷⁶

At the core of any equal protection action is the claim that the plaintiff is being treated differently from others similarly situated. The female sexual harassment plaintiff is subjected to an oppressive work environment which her male counterparts are not forced to endure.⁷⁷

69 See, e.g., *Cummings v. Walsh Constr. Co.*, 561 F. Supp. 872, 884 (S.D. Ga. 1983).

70 Under the doctrine of respondeat superior, the scope of employment includes "those acts which are so closely concerned with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as a method . . . of carrying out the objectives . . ." *W. PROSSER & W. KEETON*, *supra* note 56, at 502.

71 See Note, *supra* note 49, at 136-37 n.62.

72 See *supra* notes 60-69 and accompanying text.

73 See *supra* notes 70-72 and accompanying text.

74 See *supra* note 8 and accompanying text.

75 See *supra* note 9 and accompanying text.

76 *Bohen v. City of E. Chicago*, 799 F.2d 1180 (7th Cir. 1986). In *Bohen*, the plaintiff was a dispatcher with the fire department. Her coworkers and supervisor subjected her to repeated acts of sexual harassment. On her first night of work, the plaintiff awoke to find her supervisor's hands pressed against her crotch. He constantly spoke to her in a lewd way, describing intimate sexual matters. He even forced her to leave the door open when using the bathroom. Her coworkers also subjected her to endless lewd conversation. *Id.* at 1183.

77 Finding an equal protection violation, the *Bohen* court asserted: "Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they were women." *Id.* at 1185.

The plaintiff must prove that the discrimination was intentional.⁷⁸ A single discriminatory act is sufficient to show intentional discrimination.⁷⁹ However, in the sexual harassment context, it is questionable whether one sexual encounter could ever constitute a denial of equal protection.⁸⁰ A plaintiff can also show the requisite intent by proving that the employer knew of the harassment caused by the employees and failed to protect the plaintiff.⁸¹

Courts apply an intermediate level of scrutiny to official action which classifies by gender in order to determine whether such classification is justified, and therefore, not a constitutional violation. The question is whether the classification serves important governmental objectives and is substantially related to achievement of those objectives.⁸² Although this standard does not rise to the level of strict scrutiny, courts should be unwilling to find sexual harassment justifiable under any test.⁸³ Classification by gender may be justifiable; harassment is not.

The employer has a valid defense if he can show that the discrimination is based on characteristics peculiar to the plaintiff, and not because of her membership in a particular class.⁸⁴ Therefore, the definition of the class being discriminated against is crucial.⁸⁵ If the plaintiff cannot show discrimination because of membership in this class, the cause of action is not cognizable under section 1983.

The equal protection plaintiff can bring suit against a limited class of defendants. Section 1983 liability requires that the deprivation of the federal right occur under color of state law.⁸⁶ Private individuals can act under color of state law under certain circumstances and thus may be liable under section 1983.⁸⁷ A municipality may be liable under section 1983, but a municipality cannot be vicariously liable for the acts of its officers unless the plaintiff's injury occurs as a result of an established policy or law of the municipality.⁸⁸

78 *Batson v. Kentucky*, 106 S. Ct. 1712, 1719-21 (1986).

79 *Id.* at 1722.

80 The *Bohen* court attempted to define the scope of the equal protection right, stating: "[A] single, innocent, romantic solicitation which inadvertently causes offense to its recipient is not a denial of equal protection." 799 F.2d at 1186. The court gave several examples as to what might constitute a violation of equal protection. Each included "repeated" sexual advances, indicating that more than one encounter is needed before a court will find an equal protection violation. *Id.*

81 *Id.* at 1187.

82 *Craig v. Boren*, 429 U.S. 190, 197 (1976).

83 "The nature of the harm is such that there is virtually no scenario imaginable where sexual harassment is a necessary business practice or is substantially related to important governmental objectives." *Bohen*, 799 F.2d at 1187.

84 *Id.*

85 In *Hueschen v. Department of Health and Social Servs.*, 716 F.2d 1167 (7th Cir. 1983), the court found that the plaintiff was discriminated against because of past romantic involvement with the defendant. "Thus, the proper classification, if there was one at all, was the group of persons with whom the supervisor had or sought to have a romantic affair." *Id.* at 1172.

86 See *supra* note 9 accompanying text.

87 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

88 *Monell v. Department of Social Servs.*, 436 U.S. 658, 690-92 (1978). The Court held that municipalities could not be held vicariously liable under § 1983 solely on the basis of an employer/employee relationship. Liability is imposed only when "under color of some official policy, [the government] 'causes' an employee to violate another's constitutional rights." *Id.* at 692.

While the pool of defendants is limited, the scope of liability, once established, can be extensive. The plaintiff in a section 1983 action may recover both compensatory and punitive damages under section 1983.⁸⁹ Because the purpose of section 1983 is to compensate persons for injuries caused by the deprivation of constitutional rights, the rules of common law damages apply and the plaintiff is entitled to full compensation for his injury.⁹⁰

Section 1983 thus provides the most favorable recovery for the public employee in a sexual harassment case. The elements are easier to prove than the elements of most tort actions.⁹¹ Further, the possibility of recovering compensatory and punitive damages makes a section 1983 action more desirable than a Title VII claim, which affords only limited remedies.⁹² Unfortunately, the set of potential plaintiffs and defendants is restricted by the requirement that a defendant must act under color of state law and deprive the plaintiff of a constitutionally protected right.⁹³

V. Conclusion

For a sexual harassment plaintiff, none of the available means of relief provides adequate recovery for the harm suffered. The purpose of Title VII is to remove discrimination from the workplace,⁹⁴ yet damages are severely limited. In contrast, traditional tort law compensates the plaintiff for any actual injury suffered. Because of the unique factual setting of a sexual harassment action, however, the elements of a tort action for harassment are difficult to prove.⁹⁵ Finally, while an equal protection action has no such drawback as to remedies or proof of elements, only plaintiffs injured by an individual acting under color of state law can assert this claim.

The judiciary alone cannot remedy the problem of sexual harassment based on existing law. The problem of distinguishing mutual male-female interaction from sexual harassment⁹⁶ has confused the courts. In the case of the public employer, the states must recognize the problem and outline clear policy outlawing sexual harassment, in order to prevent such behavior. The first goal of any state policy should be to teach employees that sexual harassment in the workplace will not be tolerated. The state should notify all employees, subordinate employees as well as supervisors, that it intends to eradicate this discrimination.

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89 *Carey v. Phipus*, 435 U.S. 247 (1978).

90 *Id.* at 256-58.

91 *See supra* notes 60-69 and accompanying text.

92 *See supra* notes 24-26 and accompanying text.

93 *See supra* notes 8-10 and accompanying text.

94 *See supra* note 47 and accompanying text.

95 *See supra* notes 60-69 and accompanying text.

96 *See supra* notes 11-16 and accompanying text.