

1987

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Recommended Citation

McClain, Josephine Fagan and Garman, Mary S. (1987) "Sally Forth into Court - Procedures for the Sexual Harassment Case," *Land & Water Law Review*: Vol. 22 : Iss. 2 , pp. 501 - 522.

Available at: https://scholarship.law.uwyo.edu/land_water/vol22/iss2/16

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Sally Forth into Court—Procedures for the Sexual Harassment Case

In 1964, Congress passed Title VII prohibiting discrimination in employment on the basis of race, color, religion, national origin, and sex. One year later the Wyoming Legislature enacted its version in the Fair Employment Practices Act. This comment discusses the procedures necessary to pursue a case through the Wyoming Fair Employment Commission (WFEC), the Equal Employment Opportunity Commission (EEOC), or both.

Envision a quiet moment in the harried schedule of your law firm. Your secretary advises that Ms. Sally Forth¹ wishes to see you regarding a sexual harassment charge. Interested, you request she be sent in. Ms. Forth, you soon learn, is the proverbial svelte, long-haired, dark-eyed, mini-skirted, knockout.² You learn that Ms. Forth is employed by a private party who employs nine other people. Ms. Forth claims that her supervisor has asked that she have sexual relations with him, implying that, if she does not, her job is in serious jeopardy. His last demand was made nearly a month ago, but she adds he has also been making derogatory sexual remarks about her in front of the male employees.

Having listened to Ms. Forth, you believe a valid sexual harassment charge exists. You make a future appointment, explaining you will research her case. As she leaves your office, you open your Wyoming Statutes and turn to sections 27-9-101 to 27-9-108—the Wyoming Fair Employment Practices Act (WFEPA).³

WYOMING FAIR EMPLOYMENT PRACTICES ACT

The WFEPA created the WFEC,⁴ which receives, investigates, and adjudicates complaints that allege discrimination in employment.⁵ Section 27-9-105 states that it is a “discriminatory or unfair employment practice” for an employer “to refuse to hire, to discharge, to promote or

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1. The authors chose this name for its appropriate connotations regarding litigation. Indeed, it came as a surprise to discover that this name is also the name of a popular, syndicated comic strip. The authors intend no infringement between the Sally Forth in this Comment and that of the comics. Any resemblance is *purely* coincidental.

2. The authors are middle-aged and not so svelte ladies who have fought their share of sexual discrimination battles. The “ordinary woman,” as well as males, fight discrimination. The authors are aware, however, that females such as “Ms. Forth” are all too often either (1) employed because of their decorative value or (2) not employed because of the stereotype that brains and beauty do not exist together. “Ms. Forth” was selected to give the reader a personage and is not intended as a stereotype *per se*. Further, it is important to realize there is sexual discrimination that is not sexual harassment, such as refusal to hire because of pregnancy or even because one is not female, which might occur in some nursing or secretarial positions.

3. The Wyoming Fair Employment Practices Act of 1965, WYO. STAT. ANN. §§ 27-9-101 to -108 (1977 & Supp. 1986).

4. *Id.* § 27-9-103 (1977).

5. *Id.* § 27-9-104(a)(iii).

demote" an employee on the basis of sex.⁶ To be liable under WFEPA, an employer must employ two or more employees within Wyoming.⁷ At this point, you confirm your original perception that Ms. Forth has a cause of action under sections 27-9-102(b) and -105(b).

You turn to section 27-9-106, which outlines the Wyoming procedures to file a claim.⁸ You note two critical areas. First, you must advise Ms. Forth that she may either employ an attorney or proceed pro se;⁹ second, you must advise her that the claim must be filed within ninety days from the last act of discrimination.¹⁰

At this point the most important decision is whether to file, and it is probably advisable to assist her to file now or to send her to the Commission for the necessary papers to file pro se. There is a compelling reason for this—the statutory time limit is extremely short. Ms. Forth may have used much of her time deciding whether to seek a lawyer and then finding one who will take her case. Frequently, by the time a client has come to an attorney, the time limit has almost lapsed.

Having dealt with the time limit, you will need to explain to Ms. Forth that, if she retains you, attorney fees will not be awarded under the WFEPA. The only relief to which she is entitled is reinstatement, rehiring, upgrading her position with or without back pay, reference for employment, or restoration to membership in a labor organization.¹¹ It is important she understand that the potential cost of litigation may far exceed the relief she seeks.

6. *Id.* § 27-9-105(a)(i) (1977 & Supp. 1986).

7. *Id.* § 27-9-102(b) (1977) (definition of "employer"). That subsection provides: "Employer" shall mean the state of Wyoming or any political subdivision or board, commission, department, institution, or school district thereof, and every other person employing two (2) or more employees within the state; but it does not mean religious organizations or associations." A limitation of this definition was made in *Pfister v. Niobrara County*, 557 P.2d 735 (Wyo. 1976). There, the plaintiff maintained that the commissioners of Niobrara County were liable because the appointment statute read: "The sheriff . . . may, by and with the consent of the board of commissioners[,] . . . appoint one or more deputies . . ." *Id.* at 737. The court distinguished between a public employee and a public officer and held that the plaintiff did not have a cause of action in claiming sexually discriminatory conduct against the sheriff. Ignoring the definition of "employer" that clearly included public bodies, the court ruled that "the . . . Act has no application to the appointment of a deputy sheriff [because] it is aimed at an employer-employee relationship. . . . A deputy sheriff is an officer, not an employee; he is appointed, not hired." *Id.* at 738; see also *id.* at 742. Even though the court held that appointed officials are not "employees" under the Fair Employment Practices Act, it reserved for another day the question whether the Board of Commissioners could have been held liable if they were actually responsible for approving the sheriff's selection. *Id.* at 742 & n.9. The WFEPA interprets the holding more broadly: "The Wyoming Supreme Court has also stated that elected officials are exempt from the Act since there is no employer-employee relationship between an elected official and his/her appointee." WYO. DEP'T OF LABOR & STATISTICS, ANNUAL REPORT 1985, at 45 [hereinafter ANNUAL REPORT].

8. WYO. STAT. ANN. § 27-1-106 (1977).

9. *Id.* § 27-9-106(a).

10. *Id.*

11. *Id.* § 27-9-106(g). The Wyoming Supreme Court in *Werner v. American Sur. Co. of New York*, 423 P.2d 86, 88-89 (Wyo. 1967), held that, unless attorney fees are specifically provided by statute, they cannot be awarded in administrative hearings. The Commission has consistently recommended that it be allowed to award attorney fees to a complainant who brings an action in good faith. This will have to be done by the legislature.

A third point with which you must deal, but which is not specifically mentioned in the statute, is whether Ms. Forth has exhausted all possible efforts to resolve the problem with her employer, including talking to her supervisors, employer, or both. This may seem to be a minor matter, but the simple fact is that a court is not likely to be sympathetic to a plaintiff who cannot give an affirmative answer to the question: "Did you attempt to resolve this issue with your supervisor or employer?"

Proceeding on the basis that your knowledge and confidence have caused Ms. Forth to retain your firm, you explain that she can only go to court after attempting to resolve her problem administratively through the WFEC.¹² A complaint may, in fact, never be resolved or settled because the complainant withdraws the charge, the Commission lacks jurisdiction, the complainant refuses to cooperate, the complainant becomes unavailable or, after investigation, the compliance officer finds there is no evidence to support a charge of discrimination.¹³

If, after an investigation by the compliance officers, probable cause¹⁴ exists to support a valid sexual harassment complaint, the WFEC notifies the employer, who is invited to participate in a conciliation meeting. Hopefully, an agreement can be reached where the employer will discontinue discriminatory practices. This includes making the complainant

12. The WFEC has six compliance officers who receive complaints and who do the necessary investigation of the charges alleged. Since 1980, 784 discrimination complaints have been filed with the Commission. The 384 sex discrimination charges are broken down as follows:

Year	1980	1981	1982	1983	1984	1985	Total
Failure to hire	7	15	5	6	6	10	49
Discharge	17	27	38	42	25	23	172
Promotion denial/demote	5	3	2	6	8	4	28
Compensation	-	6	9	12	4	2	33
Probation/suspension/layoff/recall	1	9	8	8	5	6	37
Harassment	6	16	11	2	6	6	47
Reduction in hours	-	1	-	-	-	-	1
Terms/conditions and privileges	-	-	-	-	-	8	8
Other	-	-	3	3	2	1	9
Totals Each Year	36	77	76	79	56	60	384

1985 ANNUAL REPORT, *supra* note 7, at 49; 1984 *id.* at 48; 1983 *id.* at 54; 1982 *id.* at 50; 1981 *id.* at 62; 1980 *id.* at 54.

13. Interview with Laurie Seidenberg, Attorney, Laramie, Wyo. (Oct. 28, 1986) (former member of WFEC) [hereinafter Seidenberg Interview]; *see also* 1985 ANNUAL REPORT, *supra* note 7, at 46-47; 1984 *id.* at 45-46; 1983 *id.* at 50; 1981 *id.* at 54-55; 1980 *id.* at 52 (not discussing want of jurisdiction).

14. The WFEC's 1985 Annual Report uses the term "reasonable cause". 1985 ANNUAL REPORT, *supra* note 7, at 47. The WFEC Rules, however, use the term "probable cause". *Rules of Practice and Procedure before the Wyoming Fair Employment Commission concerning Discrimination Complaints Filed and Hearings Held Pursuant to the Fair Employment Practices Act of 1965* §§ 8.d., e(1) (1982) [hereinafter WFEC Rules]. The last filing in the Office of Wyoming Secretary of State of the WFEC's rules (chs. IV-VI of the rules of the Dep't of Labor & Statistics) was in Jan. 14, 1986. WYO. SECRETARY OF STATE, INDEX OF ADMINISTRATIVE RULES AND REGULATIONS OF WYOMING STATE AGENCIES 33 (current as of Dec. 31, 1986) [hereinafter ADMIN. RULES INDEX].

whole.¹⁵ If a settlement can be reached, the Commission prepares a written agreement. Under a typical agreement, (1) the Commission will review compliance with the agreement; (2) the complainant agrees not to sue if the employer complies; (3) the employer agrees not to retaliate; and (4) there will be a time frame in which compliance must take place.¹⁶ The settlement may also include an agreement of confidentiality.¹⁷

Complainant's relief under the agreement may include back pay, restoration of all fringe benefits, an apology, clearing the complainant's record, a letter of recommendation, or all of these. Reinstatement is available, but few complainant's seek such relief.¹⁸ The attorney should be aware that the Commission does not have the authority to negotiate away the rights of the complaining party.¹⁹ This provides a check on any WFEC inclination to settle a claim too quickly to the detriment of the complainant.

The Commission tries to settle complaints, hence avoiding hearings or litigation. Judging from the settlement rate, they are successful.²⁰ This is not difficult to understand. Visualize explaining to Ms. Forth that the

15. Making the complainant whole means putting Ms. Forth in the position she would have been had there been no discrimination. *WFEC Rules*, *supra* note 14, § 5.r ("MAKE WHOLE"); see also WYO. FAIR EMPLOYMENT COMM'N, COMPLIANCE OFFICERS MANUAL, Session [sic] VI, at 1, 4-9 (n.d.) [hereinafter WFEC MANUAL]. The *Manual* is available in the WFEC office and is a very large, looseleaf compilation of internal procedures, photocopies of cases and statutes, and a host of other materials.

16. WFEC MANUAL, *supra* note 15, Sess. IV, at 1.

17. There are cases where the terms of the settlement are to be expressly kept confidential and are not to be released to the press or the public. Interview with Mary Elizabeth Galvan, attorney, Laramie, Wyo. (Oct. 28, 1986) [hereinafter Galvan Interview]; see also *WFEC Rules*, *supra* note 14, § 8.f(1). Also, all investigations done by the WFEC are confidential concerning the employee making the charge and the employer. Disclosure may only come as per the Wyoming Department of Labor and Statistics Rules and Regulations. WFEC MANUAL, *supra* note 15, division labelled "Confidentiality," at 195-204. The latter source purports to set out ch. XXVIII of the Rules and Regulations of the Wyo. Dep't of Labor & Statistics. The "Rules" have not been filed in the Secretary of State's office under that chapter number as of Dec. 31, 1986. ADMIN. RULES INDEX, *supra* note 14, at 33. There is a filing by the Department for Chapter VIII (entitled "Information Practices") on April 26, 1977. Chapter VIII's rules are not set out in the Department's 1982 publication, which ends with ch. VI. The Office of Information Practices sent some 'promulgated' rules to the Commissioner of Labor on Jan. 13, 1977, which may be those of the April 1977 filing. See Letter to Vernie E. Martin, Commissioner of Labor, Wyo. Dep't of Labor & Statistics, from Scott W. Leatherbery, Information Practices Officer, Wyoming Office of Information Practices (Jan. 13, 1977), reproduced in WFEC MANUAL, *supra* note 15, division labelled "Confidentiality" (copy of letter on file at Land & Water Law Review office). Nonetheless, the WFEC has its own disclosure rules. *WFEC Rules*, *supra* note 14, § 8.

18. See WYO. STAT. ANN. § 27-9-106(g) (1977); *WFEC Rules*, *supra* note 14, §§ 8.e(2)(a) (backpay), -(d) (other "affirmative action"); 1985 ANNUAL REPORT, *supra* note 7, at 47; 1984 *id.* at 46; 1983 *id.* at 51; 1981 *id.* at 58; Seidenberg Interview, *supra* note 13; WFEC MANUAL, *supra* note 15, Sess. VI, at 2 (further suggesting that, even if complainant does seek back pay and reinstatement, the WFEC may not grant the relief once discrimination is found).

19. WFEC MANUAL, *supra* note 15, Sess. VI, at 2.

20. See *supra* note 12 (chart). Of 784 total discrimination complaints filed, close to sixty percent were settled formally or informally. We presume that the remainder were dropped either from inadequacy of the charge or, perhaps, because of plaintiff's failure to follow up the charge. 1985 ANNUAL REPORT, *supra* note 7, at 46 (25 of 111 filed but no further action taken); 1984 *id.* at 45 (28 of 97); 1983 *id.* at 50 (13 of 118); 1982 *id.* at 48 (18 of 113 reached formal proceedings, statistics unavailable for informal or administrative resolutions); 1981

statute does not provide for attorney fees. Then explain your potential fees. Her employer will, in all likelihood, have an attorney handling his case. Even though she may prevail at a hearing or in court, her financial situation may lead her to settle, or even withdraw her complaint.²¹

The employer may also be interested in settlement. A public hearing may generate adverse publicity. The employer may find it more convenient to compensate Ms. Forth or to give her a letter of recommendation and send her on her way.²² If a complaint cannot be settled, the commission holds a public hearing.²³

You have decided Ms. Forth has a cause of action based on her claim that her boss threatened she would lose her job if she did not capitulate to his demands. This would constitute a discriminatory practice in that it would discharge an employee on the basis of sex. You also found WFEC had jurisdiction, as this is a private employer who employs two or more employees with the state, and the last discriminatory act was within ninety days. All efforts of conciliation have failed, and the WFEC has scheduled a public hearing.

Following the guidelines of the statutes, Ms. Forth's employer is given written notice requiring him to answer the complaint against him.²⁴ The Commission is required to prepare an official record, and "[i]nformal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default."²⁵

If at the hearing²⁶ the Commission finds the employer liable, a statement of findings of fact must be served by the Commission on the employer within six months. The terms of the finding are outlined in the statute and are parallel to those offered in the earlier attempts at settlement.²⁷ If the Commission finds the employer not liable, it must serve a

id. at 55 (23 of 124 filed but no further action taken); 1980 *id.* at 52 (33 of 135). Since 1980, there have been only six commission hearings. Five involved sex discrimination, and one involved race discrimination. 1983 *id.* at 51-52 (two sex); 1981 *id.* at 55-56 (two sex); 1980 *id.* at 50-51 (one sex, one race).

21. See 1982 ANNUAL REPORT, *supra* note 7, at 48; Interview with Charles A. Rando, WFEC Compliance Supervisor, Dep't of Labor & Statistics, Cheyenne, Wyo. (Oct. 29, 1986).

22. In a sexual harassment case, employers might not want their spouses to know what has been going on at work, which is a humorous proposition only if you are not one of the spouses.

23. WYO. STAT. ANN. § 27-9-106(b) (1977). That subsection provides that "[i]f the commission determines that circumstances warrant, it shall [require the employer] to answer the charges at a hearing before the commission." In practice, after an investigator determines that probable cause of a "discriminatory or unfair labor practice" exists, the WFEC mandates that the investigator resolve the matter before a hearing using "a conference, conciliation, or persuasion." *WFEC Rules*, *supra* note 14, § 8.e(1). Only if these attempts fail does the WFEC send formal notice of public hearing to the employer. *Id.* § 8.e(4).

24. WYO. STAT. ANN. § 27-9-106(b). Actually an informal, pre-investigation notice should already have been sent to the employer. *WFEC Rules*, *supra* note 14, §§ 7.h, 8.a. The procedures for the notice are set out in *id.* § 10.

25. WYO. STAT. ANN. § 27-9-106(f); see *WFEC Rules*, *supra* note 14, § 11 (very similar language); see also *id.* §§ 7.h, 8.a to .e; *supra* notes 23-24 (pre-hearing informal disposition).

26. Hearing procedures are set out in *WFEC Rules*, *supra* note 14, § 12.

27. WYO. STAT. ANN. § 27-9-106(g). The *Rules'* wording is less one-sided, speaking of both parties, though they do not specify the time period. *WFEC Rules*, *supra* note 14, § 14.

statement of its findings of fact on the complainant and dismiss the charge.²⁸ We assume that the Commission, at the public hearing, found on behalf of your client, Ms. Forth.

Ms. Forth's employer has the right to petition the district court for review²⁹ of the Commission's order within thirty days after the hearing.³⁰ Jurisdiction will lie in the county where the alleged discrimination took place.³¹ The review is conducted as a bench proceeding and is based solely on the administrative record.³² If requested, however, written briefs and oral arguments are appropriate.³³ Additional, material evidence may be presented, if good cause can be shown why it was not presented at the Commission hearing.³⁴

We shall assume the district court finds in Ms. Forth's favor. Her employer now has the right to appeal the Commission's finding to the Wyoming Supreme Court.³⁵ Ms. Forth now faces what the WFEC has referred to as the "[c]onservative reputation of Wyoming courts on discrimination matters."³⁶ This may, in fact, be an unfair assessment of the Wyoming Supreme Court. Except for one minor discrimination issue,³⁷ there has been no sex discrimination case before the Wyoming courts for ten years. One 1976 case,³⁸ however, involving a woman who applied for a teaching position, is important.

Plaintiff Shenefield applied for a high school teaching job in 1972. She was told the job involved teaching English and speech, with some possible drama duties. The principal of the school told Shenefield that he was really looking for a man. Shenefield contacted the superintendent of the school district, who told her that a man, a newly graduated teacher who had done his student teaching at the school, had been hired. Shenefield filed a complaint with the WFEC.³⁹

28. WYO. STAT. ANN. § 27-9-106(h); see *WFEC Rules*, *supra* note 14, § 14.

29. WYO. STAT. ANN. § 27-9-107(a). There is no procedure to petition the WFEC for rehearing, although such a right exists if the Commission dismisses the charge informally before the hearing. *WFEC Rules*, *supra* note 14, § 9.

30. WYO. STAT. ANN. § 27-9-107(b); see *WFEC Rules*, *supra* note 14, § 15.a.

31. WYO. STAT. ANN. § 27-9-107(b).

32. *Id.* § 27-9-107(f). The record on review is to be a transcription of stenographic notes taken at the WFEC hearing. *Id.* § 27-9-106(f); *WFEC Rules*, *supra* note 14, § 15.b. The petitioner bears the cost of transcription. *WFEC Rules*, *supra* note 14, § 15.b (using the term "appellant"). The court, however, has statutory authority to order "subsequent corrections or additions to the record when deemed desirable." WYO. STAT. ANN. § 27-9-107(d).

33. WYO. STAT. ANN. § 27-9-107(f).

34. *Id.* § 27-9-107(e).

35. *Id.* § 27-9-108. As, of course, would Ms. Forth, had she lost. Appellate procedures are identical to any other civil appeal. *Id.*

36. 1983 ANNUAL REPORT, *supra* note 7, at 52.

37. *Allen v. Safeway Stores Inc.*, 699 P.2d 277 (Wyo. 1985). This case involved alleged sex discrimination on the part of Safeway, but the major issue concerned the requirements necessary to prevail on "[a] tort action premised on violation of public policy". The court ruled that two factors were required: (1) a well-established public policy had been violated and (2) there was no other remedy. *Id.* at 284 (quoting *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052, 1055 (E.D. Pa. 1977)). In *Allen*, the other remedy was the WFEP. *Id.*

38. *Shenefield v. Sheridan County School Dist. No. 1*, 544 P.2d 870 (Wyo. 1976).

39. *Id.* at 872-73.

At the hearing, the principal denied that Shenefield had been discriminated against because of her sex. He said he used the following factors in not hiring her: she would have to commute between Buffalo and Big Horn; she had had several jobs; her salary expectations were too high;⁴⁰ she was not able to coach; and he said he found her to "be a 'pushy demanding type of person.'"⁴¹ His reasons for hiring the man were that he knew him; he got on well with the faculty; he knew the system; and the principal knew what kind of job he could do.⁴² Shenefield contended that she never had the chance—indeed, it was never brought up—to discuss the commuting, her previous jobs, the higher salary, or the coaching duties. The Commission found in favor of Shenefield and awarded her back pay.⁴³

The district court found no substantial evidence of discrimination and reversed the WFEC.⁴⁴ The Supreme Court affirmed,⁴⁵ saying it was up to the school board, not the WFEC or the courts, to award teaching positions.⁴⁶ The WFEC exists only to determine whether an applicant has been denied a position because of sex, race, creed, color, national origin or ancestry. "[The Commission] does not sit to determine which of two—or 20— applicants is best qualified to fit the special demands of the school district."⁴⁷ Hiring the less expensive personnel does not constitute sex discrimination.⁴⁸ *Shenefield* is the precedent for the Wyoming courts' conservative reputation in sex discrimination cases.

The attorney who tries a sexual harassment case in Wyoming is in uncharted territory. Whatever the attitude of the Wyoming Supreme Court, the fact remains that it has not heard a sexual discrimination case for ten years. There is little to indicate how the court might hold today. To discern appropriate guidelines for such cases, you must turn to the federal cases. As these federal holdings rely on Title VII, you realize the need to look first at that Act.⁴⁹

TITLE VII

Congress passed Title VII of the Civil Rights Act of 1964 to provide equal employment opportunities for classes against which, historically, employers discriminate. One protected class is sex.⁵⁰ Congress' 1972

40. Her education entitled her to a salary of at least \$9,310. The man was hired at \$6,650. *Id.* at 873.

41. *Id.*

42. *Id.*

43. *Id.* at 872, 873.

44. *Id.* at 872.

45. *Id.*

46. *Id.* at 874.

47. *Id.*

48. *Id.* at 875.

49. Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

50. The legislative history suggests that the addition of the prohibition against sex discrimination was a last ditch effort to prohibit passage of Title VII. According to 110 CONG. REC. 2484-92 (daily ed. Feb. 8, 1964), Representative Smith was an opponent of Title VII,

amendments to Title VII⁵¹ evince a clear congressional intent to eliminate discrimination based on sex. The congressional committee responsible for the amendments said it believed that "women's rights are not judicial diversions. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."⁵²

Looking at the applicable statutes, one of the first differences noted between Title VII and state statutes is the definition of employer. While the WFEPA requires that an employer have two or more employees,⁵³ Title VII requires 15 or more.⁵⁴ The term "employee" does not include those elected to public office or those appointed by an elected person.⁵⁵ A second major distinction is the time allowed for filing. While Wyoming allows ninety days from that date of the last discriminatory act to file a claim,⁵⁶ Title VII allows 180 days.⁵⁷

Under Title VII, it is discriminatory for an employer to hire, fire, promote, demote, limit, segregate, or classify any employee on the basis of sex.⁵⁸ The statute provides for affirmative action, including reinstatement and back pay.⁵⁹ Back pay may not be awarded for more than the prior two years.⁶⁰ Unquestionably, one of the most welcome aspects is found in 42 U.S.C. § 2000e-5(k): "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" ⁶¹

DISPARATE TREATMENT

There are five major cases interpreting the federal statutory system.⁶² *McDonnell Douglas Corp. v. Green*⁶³ is important because it was the first case to lay down the elements necessary to establish a prima facie case

and his amendment was a futile attempt to defeat the bill. The House of Representatives adopted the amendment without a hearing by a vote of 168 to 133. *See also* Hesse & Hubble, *Women in the Workplace*, 24 WASHBURN L.J. 574, 580 (1985) (INCORRECTLY CITING THEIR SOURCE AS 110 CONG. REC. 2577-82 (1964)).

51. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972).

52. H.R. REP. NO. 238, 92d Cong., 1st Sess. 5 (1971), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2141.

53. This may vary from state to state, but Wyoming requires two or more employees under WYO. STAT. ANN. § 27-9-102(b) (1977).

54. 42 U.S.C. § 2000e(b) (1982).

55. *Id.* § 2000e(f).

56. WYO. STAT. ANN. § 27-9-106(a) (1977).

57. 42 U.S.C. § 2000e-5(e) (1982); 29 C.F.R. § 1601.13(a)(1) (1986). If the state has created a qualifying "706 agency", then the complainant can file as late as three hundred days. 42 U.S.C. § 2000e-5(e); 29 C.F.R. § 1601.13(a)(3); *see also infra* notes 185-186 and accompanying text (briefly describing the value of 706 agencies).

58. 42 U.S.C. § 2000e-2(a) (1982).

59. *Id.* § 2000e-5(g).

60. *Id.*

61. *Id.* § 2000e-5(k).

62. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

63. 411 U.S. 792 (1973).

of disparate treatment. It is this case on which later discrimination cases, including sexual harassment cases, have built. *McDonnell* provided the necessary requirements to establish a case of discrimination under Title VII. To meet the *McDonnell* test employees must prove they are a member of a racial minority or some other protected class, they were qualified for and applied for the job sought, they were rejected, and the position remained open.⁶⁴ It is not difficult for an employer to construct a pretext to fire any employee. That is, it is easy to claim the employee was not discriminated against because of her sex, but because of lack of qualifications, inappropriate salary requests or other nondiscriminatory reasons. To deal with this problem, *McDonnell* liberally permits plaintiffs to introduce evidence to establish the claim that they were fired for refusal to submit to harassment, but under a pretext of a nondiscriminatory basis. This liberal allowance is vital in order to counter the ease by which an employer can construct a pretext showing a nondiscriminatory reason for firing the employee.⁶⁵

QUID PRO QUO HARASSMENT

One court discussed the classification of quid pro quo harassment for the first time in *Barnes v. Costle*.⁶⁶ In *Barnes*, the director (a black man) of the Environmental Protection Agency hired a black woman. Barnes maintained that, during her employment interview, she was promised a promotion within ninety days. She further maintained that, shortly after her employment, the director asked her to accompany him to "social activities." He also demanded sexual favors.⁶⁷ She claimed that after her refusal, the director and his agents began a conscious campaign to belittle and harass her, strip her of her duties, and finally, abolish her position in retaliation for her refusal.⁶⁸

After attempting to informally resolve the conflict, Barnes filed a pro se complaint, alleging that the "director sought to remove her from his office when she refused to have an after-hour affair with him."⁶⁹ The appeals examiner heard the complaint, found no evidence of racial discrimination, and excluded evidence of sexual discrimination.⁷⁰ Barnes procured private counsel and appealed the case to the Civil Service Commission. On review, the Commission upheld the agency's finding of "no racial

64. See *id.* at 802. The case involved a black man who was not rehired by McDonnell Douglas Corp. McDonnell claimed they did not rehire the man because of illegal and disruptive activity by him after he was fired. Respondent maintained that the firing, and failure to rehire, were racially motivated. *Id.* at 801.

65. Vermeulen, *Preparing Sexual Harassment Litigation Under Title VII*, 7 *WOMEN'S RTS. L. REP.* 331, 341 & nn.83- 85 (1982) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)), as explaining that *McDonnell* allows this liberality.

66. 561 F.2d 983 (D.C. Cir. 1977), *rev'g* *Barnes v. Train*, 13 *Fair Empl. Prac. Cas.* (BNA) 123 (D.D.C. 1974) (No. 1828-73). This first sexual harassment claim was brought in 1974 under Title VII, which was ten years after its enactment.

67. *Barnes*, 561 F.2d at 985.

68. *Id.*

69. *Id.*

70. *Id.*

discrimination" and refused to reopen the case on the grounds of sex discrimination, saying that "the appellant's allegations did not bring the case within the purview of the commission regulations implementing Title VII."⁷¹ The petition for review was then filed in the district court with allegations of sexual discrimination in violation of Title VII and the fifth amendment. The court granted summary judgement in favor of the employer, saying that the request of the supervisor for an after-hour affair was not prohibited conduct contemplated by the Equal Employment Opportunity Act of 1972.⁷² The district court noted that the appellant based her case on the fact that she had been "discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor."⁷³ The court explained that, although the supervisor's conduct might have been less than desirable, it was not discriminatory, but rather evidence of an "inharmonious personal relationship."⁷⁴

Barnes appealed to the District of Columbia Circuit Court of Appeals. Overturning the district court's opinion, the court of appeals said that it could not accept the analysis of the lower court. "But for her womanhood . . . her participation in sexual activity would have never been solicited . . . Put another way, she became the target of her supervisor's sexual desires because she was a woman, and was asked to bow to his demands as the price of holding her job."⁷⁵ The court further found nothing to indicate that "employment conditions summoning sexual relations between employees and superiors are somehow exempted from the coverage of Title VII."⁷⁶ Effectively holding that quid pro quo sexual harassment is illegal—that is, you do these sexual favors and I'll improve your conditions or status—the court of appeals reversed the lower court decision.⁷⁷

Barnes is important to the lawyer's arsenal for another reason. *Barnes* carefully pointed out that Title VII protects "individuals." If Barnes had been employed in a workplace with several women, and was the only individual who suffered sexual harassment, she nonetheless would have had a right to bring a harassment claim.⁷⁸ Familiarity with the EEOC Guidelines is essential to understanding the following case law.

EEOC GUIDELINES

Despite Title VII and holdings similar to *Barnes*'s, sexual harassment causes of action are still hard to bring and harder to win. Sexual harassment was viewed as conduct which "served only to satisfy the personal drives of the supervisor" and, therefore, outside the scope of the super-

71. *Id.* at 986.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 990.

76. *Id.* at 994.

77. *Id.* at 995.

78. *Id.* at 993.

visor's employment.⁷⁹ The employer was rarely found liable except on a theory of respondeat superior.⁸⁰

One theory behind the reluctance of courts to consider harassment cases was that such behavior simply did not qualify as the type of discrimination foreseen by the drafters of Title VII.⁸¹ The courts are reluctant to hold an employer liable for the unauthorized actions of its employees.⁸² In an apparent attempt to add substance to Title VII, the EEOC issued its *Final Guidelines on Sexual Harassment (Guidelines)*.⁸³ The *Guidelines* remove any lingering doubt whether sexual harassment is a cause of action, and they enumerate standards for making out such a claim.

Under the *Guidelines*, sexual harassment includes unwelcome sexual advances, favors, and verbal or physical conduct when such action is a condition of employment, a basis for promotion, demotion, or similar employment decisions, and such conduct unreasonably interferes with work performance or conditions.⁸⁴ An employer is held responsible for "its acts and those of its agents and supervisory employees".⁸⁵ It is irrelevant whether the employer knew or even approved of the acts.⁸⁶ An employer is responsible for harassment of an employee by a fellow employee if the employer knew or should have known of the action unless it takes "immediate and appropriate corrective action."⁸⁷

HOSTILE ENVIRONMENT HARASSMENT

Before the *Guidelines*, courts had found sexual discrimination only in cases where the plaintiff suffered financial detriment, such as loss of employment or position. Subsequent decisions, possibly a direct result of the *Guidelines*,⁸⁸ have held that not all discrimination lies in activities which threaten job position or security. The importance of *Bundy v.*

79. Comment, *The Significance of the Vinson Decision on Corporate Employees*, 12 J. CONTEMP. L. 163, 165 (1986) (citing *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975)).

80. *Id.* at 165 & nn.18-19 (citing *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Miller v. Bank of Am.*, 418 F. Supp. 233 (N.D. Cal. 1976), *rev'd*, 600 F.2d 211 (9th Cir. 1979)).

81. *Id.* at 167; *see also Tomkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553 (D.N.J. 1976), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975); *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

82. Comment, *supra* note 79, at 165; Hesse & Hubble, *supra* note 50, at 588.

83. 29 C.F.R. § 1604.11 (1986) (adopted in 45 Fed. Reg. 74677 (1980), which sets forth the EEOC's reasons).

84. *Id.* § 1604.11(a).

85. *Id.* § 1604.11(c).

86. *Id.*

87. *Id.* § 1604.11(d). The EEOC states its position clearly: "Prevention is the best tool for the elimination of sexual harassment. An employer should take all necessary steps to prevent sexual harassment from occurring. . . ." *Id.* § 1604.11(f).

88. *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981). The court discussed the *Guidelines* as further support for its ruling that the plaintiff had been subjected to sexual harassment. *Bundy* was decided a mere two months after the EEOC published the *Guidelines*. *Compare id.* (decided Jan. 12, 1981) with 45 Fed. Reg. 74677-78 (1980) (promulgated Nov. 8, 1980).

Jackson,⁸⁹ lies in its holding that sexual harassment that affects the psychological and emotional atmosphere of the work environment is discriminatory whether or not it actually affects job promotion or security. In *Bundy*, the plaintiff was hired as a vocational rehabilitation specialist at a rating of GS-4 with the District of Columbia Department of Corrections. She advanced steadily and, in fact, achieved a rating of GS-9 one year after she filed her formal complaint of harassment.⁹⁰

Bundy was repeatedly, sexually harassed by fellow employees and supervisors. Several men propositioned her, asking her to have sexual relations in their apartments, motel rooms, and, in one instance, on a trip to the Bahamas. When Bundy complained to the men's supervisor, she was told "any man in his right mind would want to rape you."⁹¹ He then proceeded to request that she have a sexual affair with him. The district court seemed to believe that "even Bundy took a casual attitude toward . . . unsolicited sexual advances . . . implying [they] did no harm to female employees."⁹² Nonetheless, the district court itself seemed to believe sexual harassment did not violate Title VII.⁹³

Bundy had not been fired, had not been denied a promotion, and, in fact, advanced after making her complaint. Therefore, the court seemed to believe she had not suffered any detriment.⁹⁴ The court of appeals recognized that *Barnes* limited suit to when the plaintiff was economically hurt; therefore, as long as the employer stops "short of firing the employee or taking any other tangible action against her," the plaintiff would be bereft of a cause of action.⁹⁵ *Bundy* extends the *Barnes* rationale and allows an action when the environment of the workplace is emotionally damaging, even though the plaintiff is not economically damaged.

The court then looked at the issue of liability, using Title VII and the *Guidelines*. The court of appeals read the *Guidelines* as reaffirming an employers's liability for discriminatory acts by supervisory employees, whether or not the employer knew or should have known of the acts. Additionally, the *Guidelines* affirm employer liability for sexual harassment by fellow employees, and even non-employees, if the employer had notice of such conduct.⁹⁶ Remanding to the district court in favor of Bundy, the court of appeals suggested the district court enjoin Bundy's employer from further sexual harassment.⁹⁷

89. 641 F.2d 934, 947 (D.C. Cir. 1981).

90. *Id.* at 939.

91. *Id.* at 940.

92. *Id.* at 941-42.

93. *Id.* at 942.

94. *Bundy*, 641 F.2d at 942. An early case, *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), ruled that indirect race discrimination is illegal because it constitutes "a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees. As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees." *Id.* at 239 (cited in *Bundy*, 641 F.2d at 944).

95. *Bundy*, 641 F.2d at 945.

96. 29 C.F.R. § 1604.11(e) (1986).

97. *Bundy*, 641 F.2d at 948.

After holding that a plaintiff may have a cause of action for sexual harassment whether or not she has lost tangible benefits, the court of appeals looked at the test for a prima facie case as enunciated in *McDonnell*.⁹⁸ The court required less than the original *McDonnell* formula, requiring only a showing that the plaintiff was a victim of sexual harassment and had been denied a promotion for which she had applied and had a reasonable expectation of receiving.⁹⁹ The court distinguished this test from *McDonnell's*, saying it would not require plaintiff "to show . . . that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the time she was denied a promotion."¹⁰⁰ The court indicated that, presented with a prima facie case, the employer must show, by clear and convincing evidence, that the employee did not meet legitimate promotion criteria.¹⁰¹

PRIMA FACIE HARASSMENT

Henson v. City of Dundee,¹⁰² reaffirms the proposition that hostile work conditions constitute sexual harassment. *Henson's* value to the attorney rests in the standards laid down for a prima facie harassment case. The case speaks to both quid pro quo and hostile environment harassment.

Henson concerned a female dispatcher in the city police department. She and a co-worker were harassed by a continual barrage of "demeaning sexual inquiries and vulgarities" for the two years she worked for the police department.¹⁰³ After being suspended for violating a previously unenforced policy,¹⁰⁴ she resigned in anticipation of dismissal. *Henson* sued on both sexual harassment theories—hostile environment and quid pro quo harassment. The court of appeals reversed the district court's dismissal of the plaintiff's case and said, "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest racial epithets."¹⁰⁵ *Henson* sued on both sexual harassment theories—hostile environment and quid pro quo.

The court established standards for a hostile environment harassment case. The employee must belong to a protected group¹⁰⁶ and must have been the victim of unwelcome conduct of a sexual nature.¹⁰⁷ The plaintiff must show that, "but for" the gender of the plaintiff, there would have been no harassment.¹⁰⁸ It must be shown that a "term, condition, or privilege" of employment was affected to a pervasive degree.¹⁰⁹ If the

98. *Id.* at 950; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

99. *Bundy*, 641 F.2d at 953.

100. *Id.*

101. *Id.*

102. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

103. *Id.* at 899.

104. *Id.* at 899-900. She had brought food into the dispatch room.

105. *Id.* at 902.

106. *Id.* at 903.

107. *Id.*

108. *Id.* at 904.

109. *Id.*

employer is to be held responsible, it must also be shown that it knew or should have known of the harassment, and failed to take corrective action.¹¹⁰

The standards for quid pro quo harassment were set out with only subtle differences. Again, the plaintiff must be a member of a protected group, must have been the recipient of unwelcome sexual advances, and must be able to show the "but for" relationship.¹¹¹ Here, however, the plaintiff must also show that the harassment affected tangible aspects of employment, that is, that the plaintiff was economically affected.¹¹²

Under the *Henson* guidelines, the employer is held strictly liable for the actions of a supervisory employee in quid pro quo harassment.¹¹³ The court carefully discussed the necessarily different interpretations of the respondeat superior claims. In the hostile environment situation any employee, regardless of hierarchical position, may harass another employee.¹¹⁴ A supervisor in such a case acts outside his authority, and "[h]is conduct cannot automatically be imputed to the employer any more so than can the conduct of an ordinary employee."¹¹⁵ Quid pro quo harassment is an entirely different situation. A supervisor who hires, fires or demotes, or promotes a subordinate, does so within at least the apparent scope of the authority entrusted to him by his employer. Therefore, "his conduct can fairly be imputed to the source of his authority."¹¹⁶

SUPREME COURT HOLDING

Meritor Savings Bank v. Vinson,¹¹⁷ is the first United States Supreme Court decision to hold that discrimination by sexual harassment is illegal under Title VII. Plaintiff Vinson's first contact with Taylor, her supervisor, was in 1974 when he gave her an application for employment. She worked at the bank for four years, advancing steadily on her own merit. In 1978, she was dismissed by the bank for excessive use of sick leave.¹¹⁸

110. *Id.* at 905. It is arguable whether the WFEPA supports a hostile environment claim. Hostile environment harassment hinges on Title VII's "terms, conditions, and privileges" language. The problem in Wyoming is the wording of WYO. STAT. ANN. § 27-9-105(a) (1977 & Supp. 1986). Subsection (a)(i) provides that it is a discriminatory and unfair practice to "refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation" on the basis of sex. *Id.* § 27-9-105(a)(i) (emphasis added). "Compensation" implies that the statute protects workers only from tangible, economic detriment, e.g., quid pro quo harassment. Subsection (a)(ii), however, states that it is also a discriminatory and unfair practice "to discriminate in matters of employment". *Id.* § 27-9-105(a)(ii) (emphasis added). Since "employment" is more extensive than mere "compensation," the second subsection should protect worker from discrimination in the broader, 'environment' situation, i.e., hostile environment harassment.

111. *Henson*, 682 F.2d at 909.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 910.

116. *Id.*

117. 106 S. Ct. 2399 (1986).

118. *Id.* at 2402.

At that point, she sued the bank for sexual harassment, seeking injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.¹¹⁹

Vinson estimated that during her employment she had intercourse with Taylor forty or fifty times. She "testified that Taylor fondled her in front other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions."¹²⁰ Vinson testified she initially refused Taylor's advances, but later submitted out of fear for her job. Due to this fear, she did not report him to his superiors.¹²¹ Taylor denied all the allegations and responded that Vinson's accusations were made "in response to a business-related dispute."¹²² Meritor Bank said it did not know of Taylor's behavior, and maintained the behavior was unauthorized.¹²³

The district court found for Taylor. It did not decide whether there was a sexual relationship, but the court indicated that if there was, it "was a voluntary one having nothing to do with her continued employment at [the bank] . . ." ¹²⁴ The district court dismissed the issue of quid pro quo harassment, and did not address the issue of hostile environment harassment.¹²⁵

The district court also discussed the issue of employer liability, even though it held that Taylor had not violated Title VII. The court concluded that the bank would not have been liable for Taylor's actions. Its decision hinged on two factors: (1) Meritor Bank had an express policy against discrimination, and (2) neither Vinson nor any other employee had lodged a complaint against Taylor.¹²⁶

The court of appeals reversed.¹²⁷ Referring to *Bundy*,¹²⁸ the court noted the two types of harassment—hostile environment per *Bundy*, and quid pro quo per *Barnes*.¹²⁹ Based on the belief the district court had not considered the hostile environment theory, it remanded for that determination.¹³⁰ Further, the court discussed the issue of voluntary consent. The appeals court said that, if a woman consented to sexual harassment out of fear for her job, her consent was not voluntary.¹³¹

The court of appeals also reversed the lower court's ruling on employer liability.¹³² The court held the employer strictly liable for actions of its

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2403.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Vinson v. Taylor*, 753 F.2d 141, 152 (D.C. Cir. 1985).

128. *Id.* at 145. *Bundy* was tried while *Vinson* was on appeal.

129. *Id.* at 144-45.

130. *Id.* at 145, 152.

131. *Id.* at 146. This is analogous to a number of rape statutes, which indicate that, if a woman submits out of fear, she has not in fact consented.

132. *Id.* at 147.

supervisors, relying on Title VII's definition of employer and the *Guidelines*.¹³³ The court said that a supervisor is an agent of his employer for the purposes of Title VII.¹³⁴ Even if the supervisor lacks the authority to hire and fire, the mere appearance of authority enables him to "impose on employees."¹³⁵ Meritor appealed the decision to the Supreme Court.

The Supreme Court first dealt with the issue of harassment. The Court acknowledged that in the majority of decisions, the focus had been on the "tangible, economic barriers,"¹³⁶ of quid pro quo harassment—in other words, the real, financial effect felt by the employee who lost her job or position. The Court pointed out, however, that Title VII is not limited to this type of discrimination, but also encompasses hostile environment harassment.¹³⁷ The statute prohibits sexual discrimination that affects the "terms, conditions, or privileges of employment."¹³⁸ This broad wording encompasses the entire range of discrimination, from the lost job or promotion to the workplace that is difficult to work in due to harassment. Additionally, the Court pointed to the EEOC *Guidelines* which specifically say sexual harassment is discrimination when it has "the effect of unreasonably . . . creating an intimidating, hostile, or offensive working environment."¹³⁹ Elsewhere the Court has commented that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."¹⁴⁰

The *Meritor* Court further said that the harassment must be significant. For example, a single racial or ethnic slur is not harassment; the harassment must be severe, pervasive, and alter the environment of the workplace.¹⁴¹ The Court affirmed the appellate court's finding of a hostile environment.¹⁴² The Supreme Court agreed the record showed no quid pro quo harassment. The lower court's error was in not considering the effect of the harassment on the working environment.¹⁴³

The Court summarily dispensed with the issue of voluntariness. Acknowledging the sensitive nature of the question of whether the sexual conduct was unwelcome or even existed and that the issue "presents difficult problems of proof and turns largely on credibility determinations," the Court ruled "voluntariness" should not be the focus.¹⁴⁴ "The

133. *Id.* at 149-50.

134. *Id.* at 150.

135. *Id.* The section of the *Guidelines* that the court of appeals referred to is 29 C.F.R. § 1604.11(a) (1984) (identical to 1986 version of 29 C.F.R.). See *Vinson*, 753 F.2d at 150 n.68.

136. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399, 2404 (1986).

137. *Id.* at 2404.

138. *Id.* at 2405; 42 U.S.C. § 2000e-2(a) (1982).

139. *Meritor*, 106 S. Ct. at 2405; 29 C.F.R. 1604.11(a) (1985) (identical to the 1986 version of 29 C.F.R.). Compare *Rogers v. EEOC*, 454 F.2d 234, 236 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), where, in a Title VII action, a nurse claimed that, as an American with a Spanish surname, she was mistreated by seven Caucasian co-workers and that she was segregated from Caucasian patients.

140. *Rogers*, 454 F.2d at 238.

141. *Meritor*, 106 S. Ct. at 2406.

142. *Id.* at 2409.

143. *Id.* at 2404.

144. *Id.* at 2406.

correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."¹⁴⁵

The Court, however, ruled that in a hostile environment situation, the employer is not automatically liable for the actions of a supervisory employee.¹⁴⁶ While its holding does not initially seem to comport with the *Guidelines*,¹⁴⁷ its reasoning, however, demonstrates that the decision is within the *Guidelines*. The Court explained that, in the hostile environment situation, the supervisory employee is not necessarily acting within the scope of his authority, and the employer should not be liable for his actions, unless the employer has been put on notice of the discriminatory behavior.¹⁴⁸ To reach this decision, the Court relied on general principles of agency. Referring to the EEOC's amicus brief, the Court said the employer is liable for the harassing employee's actions of which it knows nothing only when that employee is acting as an *agent* of the employer.¹⁴⁹ This is easily reconciled with subsection (c) of the *Guidelines*.¹⁵⁰ The Commission will decide whether an individual is in a supervisory or agency capacity.¹⁵¹ Reading the two sections together, it seems clear that Congress, as the Court found, "evinces an intent to place some limits on the acts of employers for which employers under Title VII are held to be responsible."¹⁵²

The Court specifically declined to address the issue of employer liability in a quid pro quo situation.¹⁵³ Justice Marshall, however, in a separate concurrence,¹⁵⁴ stated his belief that an employer should be held strictly liable for *any* sexual harassment by a supervisory employee.¹⁵⁵ His concurrence is also based on an agency principle—the appearance of authority.¹⁵⁶ Additionally, an employer who knows he is strictly liable for the actions of his supervisors will double his guard against such behavior.

Let us return to our very patient Ms. Forth and the day of the initial interview. We will presume that Ms. Forth delayed before deciding that she wanted to file a complaint against her supervisor and/or that you were the third lawyer she went to before you took her case. Her supervisor clearly threatened her job tenure if she did not agree to his suggestion of an

145. *Id.*

146. *Id.* at 2408.

147. The *Guidelines* state that an employer "is responsible for its acts and those of its agents and supervisory employees . . . regardless of whether the employer knew or should have known of their occurrence." 29 C.F.R. § 1604.11(c) (1986).

148. *Meritor*, 106 S.Ct. at 2408.

149. *Id.*

150. 29 C.F.R. § 1604.11(c) (1986).

151. *Id.*

152. *Meritor*, 106 S. Ct. at 2408.

153. *See id.* at 2408.

154. *Id.* at 2409 (Marshall, J., concurring). Justice Marshall's concurrence was joined by Justices Brennan, Blackmun, and Stevens. Justice Stevens also joined the majority opinion. *Id.* at 2411.

155. *Id.* at 2410.

156. *Id.*

afternoon rendezvous. However, his last threat was 105 days ago. Ms. Forth has no cause of action, at least for sexual harassment. Her hesitancy took her beyond the statutory time limit of ninety days.¹⁵⁷

Suppose the scenario is the same as in the preceding paragraph, with the single exception that Ms. Forth's employer hires seventeen people other than Ms. Forth. While she cannot bring a claim in Wyoming because it is now untimely,¹⁵⁸ the EEOC has jurisdiction. The claim is less than 180 days old,¹⁵⁹ and fifteen or more persons are employed.¹⁶⁰ An examination of EEOC procedures is in order.

Wyoming FEPC and EEOC procedures are virtually the same. The initial differences have already been encountered—the number of employees to obtain EEOC jurisdiction and the difference in statutory time limits for filing complaints. Having determined that Ms. Forth will file an EEOC claim,¹⁶¹ you should now consider filing state claims under pendent jurisdiction. Several tort claims co-exist with sexual harassment claims, including intentional infliction of emotional harm, assault and battery, negligence, tortious interference with a contractual relationship, and defamation.¹⁶² Should the harassment claim fail, Ms. Forth's suit is thus not irreparably compromised. Further, bringing the additional charges in good faith may enhance the prospects of settlement. Title VII claims have certain distinct advantages. An employer cannot fire an employee who files under Title VII.¹⁶³ Equally important, attorney fees are available for Title VII actions.¹⁶⁴

Under Title VII, remedies are purely compensatory and only include back pay, reinstatement, and restoration of benefits, as well as attorney's fees.¹⁶⁵ State tort claims allow potentially greater recovery because punitive damages can be awarded,¹⁶⁶ yet the WFEC believes it can award nei-

157. WYO. STAT. ANN. § 27-9-106(a) (1977).

158. *See id.*

159. *See* 42 U.S.C. § 2000e-5(e) (1982); 29 C.F.R. §§ 1601.13(a)(1), -(2) (1986).

160. 42 U.S.C. § 2000e(b) (1982); *see* 29 C.F.R. § 1601.2 (1986).

161. The procedures for filing a charge with the EEOC and for post-filing procedures are set out generally in 42 U.S.C. § 2000e-5 (1982) and specifically implemented at 29 C.F.R. §§ 1601.6 to .29 (1986).

162. Galvan Interview, *supra* note 17; Hesse & Hubble, *supra* note 50, at 595; Vermeulen, *supra* note 65, at 337. A good reason to bring pendent state claims is that Title VII actions are not heard by a jury. Once empaneled, the jury may render an advisory opinion if the judge desires. The client who wishes a jury could also file a 42 U.S.C. § 1983 (1982) civil rights action along with a state action and the Title VII action.

163. 42 U.S.C. § 2000e-3(a) (1982) makes it unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has made a charge, testified, assisted, or participated" in a hearing of this nature. No comparable provision exists in the WFEPA.

164. *Id.* § 2000e-5(k) (1982).

165. *Id.* § 2000e-5(g). Regarding attorney fees before the WFEC, *see infra* note 167.

166. The Wyoming Supreme Court has yet to rule directly upon the question of punitives. *See generally* Spurlock v. Ely, 707 P.2d 188 (Wyo. 1985) (actual issue was recognition of a tort of intentional infliction of emotional distress); Beardsley v. Wierdsma, 650 P.2d 288, 289-92 (Wyo. 1982) (issue was whether punitives are permissible in an emotional distress tort action). The court has held that punitives are not available until (1) the plaintiff has shown that the defendant's conduct amounts to aggravation, outrage, malice or willful and wanton misconduct, *Waters v. Trenckman*, 503 P.2d 1187 (Wyo. 1973), (2) the jury determines that punitives should be awarded, *Campan v. Stone*, 635 P.2d 1121 (Wyo. 1981), and

ther punitives nor attorney fees.¹⁶⁷ Punitives have an additional value beyond compensating the victim. An employer may be more likely to take notice of, and correct the situation creating, sexual harassment charges if he is faced with paying punitive damages.¹⁶⁸

Having filed a charge, the plaintiff may not sue until she has received a Right to Sue notice. A Right to Sue notice is almost never denied¹⁶⁹ and is typically issued at one of five points: (1) at the request of the charging party after 180 days,¹⁷⁰ (2) prior to 180 days but after the EEOC determines that it will probably not be able to complete its processing of the charge within the 180 day limit,¹⁷¹ (3) when the EEOC has found probable cause of a violation but has decided against bringing a civil action in its own name,¹⁷² (4) when the EEOC has reached a conciliation agreement to which the aggrieved person is not a party,¹⁷³ and (5) after the EEOC has

(3) defendant's financial condition permits the jury's award, *see* *Adel v. Parkhurst*, 681 P.2d 886 (Wyo. 1984). In *Scott v. Fagan*, 684 P.2d 805 (Wyo. 1984), an employee sued his employer and received punitives for the employer's failure to contribute to the state unemployment compensation fund. The court reversed because the evidence of the employer's financial condition was insufficient to support the punitives award. Even if the court should rule that punitives are permissible in court actions of this sort, they might as a practical matter be awarded merely to reimburse attorney fees. In an administrative action before the WFEC, however, the Commission is begrudging in its interpretation of its statutory authority to award either punitives or attorney fees. *See infra* note 167.

167. The Commission believes that, because WYO. STAT. ANN. § 27-9-106(g) (1977) does not expressly permit punitives, it therefore cannot award them. In other words, it believes that an award of punitives exceeds its statutory authority. It uses a similar reasoning to shackle its ability to award attorney fees. Again, based on the specific wording of § 27-9-106(g) (or rather its lack) and (2) a Wyoming Supreme Court reversal of a WFEC decision that included an award of attorney fees, the Commission concludes that such awards are beyond its authority. Interview with Charles A. Rando, WFEC Compliance Supervisor, Dep't of Labor & Statistics, Cheyenne, Wyo. (Apr. 2, 1987).

This reasoning, regarding punitives or fees, is unduly restrictive. First, the opinion that is the source of WFEC's trepidation seems to be *Shenefield v. Sheridan County School Dist.* No. 1, 544 P.2d 870 (Wyo. 1976). There the WFEC had awarded attorney fees, but the case was reversed on very different grounds. Indeed, the court mentioned attorney fees only once, and, even then, it mentions only that they were awarded. Second, the Commission's own rules support an arguable authority to award at least fees. Rule § 4.q provides that "the process to achieve a just resolution in a contested matter [includes] appropriate affirmative and/or other action designed to make the aggrieved party whole." *WFEC Rules*, *supra* note 14, § 4.q (emphasis added). Rule 4.r defines "make whole" as meaning "any form of relief which may be awarded by the Commission to place the Complainant as nearly as possible in the position he/she would have enjoyed had the [discrimination] not occurred." *Id.* § 4.r (emphasis added). Rule 3 further provides that "[t]hese rules and regulations shall be construed liberally to accomplish the purposes [of the WFEP] and [the] policies of the Commission." *Id.* § 3 (emphasis added). Reading these materials in conjunction with § 27-9-106(g), you should be able to argue, as Ms. Forth's attorney, that these rules implement the "affirmative action" language of the statute. Given this analysis, the Commission's erroneous reading of *Shenefield*, and the Commission's narrow interpretation of § 27-9-106(g), counsel may be able to pry fees (and perhaps punitives) from the WFEC.

168. Hesse & Hubble, *supra* note 50, at 597.

169. Interview with Jesse Vialpando, Fair Employment Officer, University of Wyoming, Laramie, Wyo. (Oct. 27, 1986).

170. 29 C.F.R. § 1601.28(a)(1) (1986).

171. *Id.* § 1601.28(a)(2).

172. *Id.* § 1601.28(b)(1).

173. *Id.* § 1601.28(b)(2).

dismissed the charge.¹⁷⁴ The Right to Sue notice authorizes the plaintiff to bring a civil action within 90 days after receiving the notice¹⁷⁵ and, if appropriate, advises here on how to do so.¹⁷⁶ It will also include a copy of the charge¹⁷⁷ and the Commission's decision.¹⁷⁸

The EEOC is principally interested in resolving disputes and settling claims. In this respect, the agency's interest may not always coincide with that of the complaining party. If the EEOC decides to pursue the claim, the "charging party may move to intervene"¹⁷⁹ to protect her interests. Intervention protects the injured party against a settlement that might only satisfy the EEOC.¹⁸⁰

The complaint is, of course, crucial. It must establish a prima facie case. The attorney should track the requirements outlined in *Henson*.¹⁸¹ In Ms. Forth's complaint, you must allege that she belongs to a protected group; that she was subjected to unwelcome sexual harassment from her supervisor; and that the harassment affected tangible aspects of her job. Ms. Forth should also claim she was in fear of losing her job if she did not acquiesce. She must claim that her employer knew, or should have known, of the harassment.¹⁸² Finally, you should allege that Title VII jurisdiction is satisfied, as the employer employs in excess of 15 people, and the 180 day limit has not passed.

If you discover that Ms. Forth quit her job because of the harassment, it is advisable to plead constructive discharge.¹⁸³ Anticipating a defense by the employer that the plaintiff was fired for good cause, the attorney should plead that the only reason for discharge was the plaintiff's refusal to submit to the supervisor's sexual harassment and demands.¹⁸⁴

The principal differences for a hostile environment versus quid pro quo harassment complaint are twofold. First, you must claim the employer knew of the harassment. This reinforces the importance of showing that Ms. Forth had attempted to resolve the issue at the workplace. If her em-

174. *Id.* § 1601.28(b)(3). The EEOC may dismiss a charge under *id.* § 1601.19 when the charge is untimely, there is no probable cause of a violation, the charging party fails to provide needed information or to otherwise cooperate.

175. *Id.* § 1601.28(e)(1).

176. *Id.* § 1601.28(e)(2). The EEOC may offer any assistance it deems necessary, even after it issues a Right to Sue notice. *Id.* § 1601.28(a)(4).

177. *Id.* § 1601.28(e)(3).

178. *Id.* § 1601.28(e)(4).

179. 42 U.S.C. § 2000e-5(f)(1) (1982); see also Vermeulen, *supra* note 65, at 334.

180. Galvan Interview, *supra* note 17.

181. See *supra* text accompanying note 105; see also Vermeulen, *supra* note 65, at 339-40.

182. It would seem that *Henson* and the strong concurring opinion in *Meritor* indicate an employer will be held strictly liable in a quid pro quo harassment case. Even though it appears that an employer is liable for the conduct of a supervisor who acts in a supervisory capacity, "it would be prudent to plead actual or constructive knowledge" of the employer. Vermeulen, *supra* note 65, at 340 (element number five). Pervasive harassment may give rise to constructive knowledge by the employer. *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982).

183. Galvan Interview, *supra* note 12. This would include a situation in which the working environment was so hostile the plaintiff was constructively forced to quit.

184. *Id.*

ployer can show that he had no idea that the harassment was occurring, and therefore, had no opportunity to correct the situation, *Meritor* holds Ms. Forth would have no cause of action. Second, the harassment need not have had economic effect. You should lay out clearly that the harassment, the sexual comments in front of the male employees, affected a "term, condition, or privilege" of Ms. Forth's employment. The nature of the incidents, the context in which they occurred, and specifically how they affected Ms. Forth should also be included.

Change the scenario one final time. Assume Ms. Forth has told you that it has been 210 days since the last act of discrimination. It would appear that she has no cause of action because the EEOC time limit to file is 180 days. However, under a cooperative arrangement with the EEOC,¹⁸⁵ states which have been designated "706 Agencies" may take cases for up to 300 days,¹⁸⁶ if those cases would have been under the concurrent jurisdiction of the EEOC. The WFEC is a 706 Agency and, as such, works in cooperation with the EEOC.

CONCLUSION

The attorney who handles a sexual harassment case must be prepared for an emotional battle. The victim may vacillate between an aggressive posture and one of reluctance and fear. It is important the attorney know all the related facts, including things a client might hesitate to describe or make public. No attorney likes surprises at trial, much less those his client gives him. Sexual harassment cases have been compared to rape trials.¹⁸⁷ The attorney must be prepared to support his client but also must make clear that the trial may be an emotional and stressful experience.

Sexual harassment cases are painful, in some instances perhaps even more so than the harassment suffered. However, the courts have gradually acknowledged the impact of sexual harassment both on the victim and on the workplace. With the recognition by the Supreme Court that

185. Under Section 709 of the Equal Opportunity Employment Act, the EEOC "may cooperate with State and local agencies [who deal with] fair employment practices". 42 U.S.C. § 2000e-8(b) (1982). The Commission may "engage in and contribute to the cost of research [and may] pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out [Title VII]." *Id.* Also, a continuing complaint of the Commission has been the lack of adequate funding for EEOC investigations, from both the state and the federal government, which hobbles its ability to resolve complaints quickly. It took an average of 141 days in 1981 to process a case. 1981 ANNUAL REPORT, *supra* note 7, at 56. In 1985, it was 144 days. 1985 *id.* at 46. However, it must be remembered that, by 1985, the statute had added aged and handicapped persons as protected classes. 1985 Wyo. Sess. Laws ch. 5, § 1 (codified at WYO. STAT. ANN. § 27-9-105 (Supp. 1986)) (handicapped); 1984 Wyo. Sess. Laws ch. 7, § 1 (codified at WYO. STAT. ANN. § 27-9-105 (Supp. 1986)) (age). Although the workload increased, the investigative staff has remained at six. "In essence, the Wyoming Fair Employment Commission has been caught between a situation of increasing statutory responsibilities and decreasing funds." 1985 ANNUAL REPORT, *supra* note 7, at 48.

186. This time extension has withstood challenge in the courts. *Mohasco v. Silver*, 447 U.S. 807 (1980); *Seredinski Clifton Precision Prod., Co.*, 776 F.2d 56 (3d Cir. 1985); *EEOC v. Ocean City Police Dep't*, 617 F. Supp. 1133 (D. Md. 1985).

187. Vermeulen, *supra* note 65, at 340.

sexual harassment is actionable under Title VII, perhaps more people will have the courage to fight back, and more attorneys will be willing to “fight the good fight.”

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