

The Federal Employee Advocate

EEOC Policy Guidance on Current Issues of Sexual Harassment.

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The Federal Employee Advocate is publishing here the EEOC's Guidance No. N-915-050 issued March 19, 1990 on Policy Guidance on Issues of Sexual Harassment. The law firm of Josh F. Bowers, P.C. has extensive experience representing Federal employees in sexual harassment cases.

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EEOC Policy Guidance on Current Issues of Sexual Harassment.

Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer - -

... 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[.]

In 1980 the Commission issued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment. See Section 1604.11 of the Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 ("Guidelines"). The Commission has applied the Guidelines in its enforcement litigation, and many lower courts have relied on the Guidelines.

The issue of whether sexual harassment violates Title VII reached the Supreme Court in 1986 in Meritor Savings Bank v. Vinson, 106 S. Ct. 2399, 40 EPD ¶ 36,159 (1986). The

Court affirmed the basic premises of the Guidelines as well as the Commission's definition. The purpose of this document is to provide guidance on the following issues in light of the developing law after Vinson:

- determining whether sexual conduct is "unwelcome";
- evaluating evidence of harassment;
- determining whether a work environment is sexually "hostile";
- holding employers liable for sexual harassment by supervisors; and
- evaluating preventive and remedial action taken in response to claims of sexual harassment.

BACKGROUND

A. Definition

Title VII does not proscribe all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment: only unwelcome sexual conduct that is a term or condition of employment constitutes a violation. 29 C.F.R. § 1604.11(a). The EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment." The Guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment," 29 C.F.R § 1604.11 (a) (1). "Quid pro quo harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," 29 C.F.R § 1604.11(a)(2).¹ 29 C.F.R. § 1604.11(a)(3).² The Supreme Court's decision in Vinson established that both types of sexual harassment are actionable under section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), as forms of sex discrimination.

Although "quid pro quo" and "hostile environment" harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a sexually hostile work environment results in her constructive discharge.³ Similarly, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply. "Hostile environment" harassment may acquire characteristics of "quid pro quo" harassment if the offending supervisor abuses his authority over employment decisions to force the victim to endure or participate in the sexual conduct. Sexual harassment may culminate in a retaliatory discharge if a victim tells the harasser or her employer she will no longer submit to the harassment, and is then fired in retaliation for this protest. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of section 704(a) of Title VII have occurred.

Distinguishing between the two types of harassment is necessary when determining the employer's liability (see infra Section D). But while categorizing sexual harassment as "quid pro quo," "hostile environment," or both is useful analytically these distinctions should not limit the Commission's investigations,⁴ which generally should consider all available evidence and testimony under all possibly applicable theories.⁵

B. Supreme Court's Decision in Vinson

Meritor Savings Bank v. Vinson posed three questions for the Supreme Court:

- (1) Does unwelcome sexual behavior that creates a hostile working environment constitute employment discrimination on the basis of sex;
- (2) Can a Title VII violation be shown when the district court found that any sexual relationship that existed between the plaintiff and her supervisor was a "voluntary one"; and
- (3) Is an employer strictly liable for an offensive working environment created by a supervisor's sexual advances when the employer does not know of, and could not reasonably have known of, the supervisor's misconduct.

1) Facts - The plaintiff had alleged that her supervisor constantly subjected her to sexual harassment both during and after business hours, on and off the employer's premises; she alleged that he forced her to have sexual intercourse with him on numerous occasions, fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and even raped her on several occasions. She alleged that she submitted for fear of jeopardizing her employment. She testified, however, that this conduct had ceased almost a year before she first complained in any way, by filing a Title VII suit, her EEOC charge was filed later (see infra at n.34). The supervisor and the employer denied all of her allegations and claimed they were fabricated in response to a work dispute.

2) Lower Courts' Decisions - After trial, the district court found the plaintiff was not the victim of sexual harassment and was not required to grant sexual favors as a condition of employment or promotion. Vinson v. Taylor, 22 EPD ¶ 30,708 (D.D.C. 1980). Without resolving the conflicting testimony, the district court found that if a sexual relationship had existed between plaintiff and her supervisor, it was "a voluntary one...having nothing to do with her continued employment." The district court nonetheless went on to hold that the employer was not liable for its supervisor's actions because it had no notice of the alleged sexual harassment; although the employer had a policy against discrimination and an internal grievance procedure, the plaintiff had never lodged a complaint.

The court of appeals reversed and remanded, holding the lower court should have considered whether the evidence established a violation under the "hostile environment" theory. Vinson v. Taylor, 753 F.2d 141, 36 EPD ¶ 34,949, denial of rehearing en banc, 760 F.2d 1330, 37 EPD ¶ 35,232 (D.C. Cir. 1985). The court ruled that a victim's "voluntary" submission to sexual advances has "no materiality whatsoever" to the proper inquiry: whether "toleration of sexual harassment [was] a condition of her employment." The court further held that an employer is absolutely liable for sexual harassment committed by a supervisory employee, regardless of whether the employer actually knew or reasonably could have known of the misconduct, or would have disapproved of and stopped the misconduct if aware of it.

3) Supreme Court's Opinion - The Supreme Court agreed that the case should be remanded for consideration under the "hostile environment" theory and held that the proper inquiry focuses on the "unwelcomeness" of the conduct rather than the "voluntariness" of the victim's participation. But the Court held that the court of appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisory employees.

a) "Hostile Environment" Violates Title VII - The Court rejected the employer's contention that Title VII prohibits only discrimination that causes "economic" or "tangible" injury: "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult whether based on sex, race, religion, or national origin. 106 S. Ct. at 2405. Relying on the EEOC's Guidelines definition of harassment,⁶ the court held that a plaintiff may establish a violation of Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* The Court quoted the Eleventh Circuit's decision in Henson v. City of Dundee, 682 F.2d 897, 902, 29 EPD ¶ 32,993 (11th Cir. 1982):

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. 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 made a living can be as demeaning and disconcerting as the harshest of racial epithets.

106 S. Ct. at 2406. The Court further held that for harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* (quoting Henson, 682 F.2d at 904).

b) Conduct Must Be "Unwelcome" - Citing the EEOC's Guidelines, the Court said the gravamen of a sexual harassment claim is that the alleged sexual advances were "unwelcome." 106 S. Ct. at 2406. Therefore, "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." *Id.* Evidence of a complainant's sexually provocative speech or dress may be relevant in determining whether she found particular advances unwelcome, but should be admitted with caution in light of the potential for unfair prejudice, the Court held.

c) Employer Liability Established Under Agency Principles - On the questions of employer liability in "hostile environment" cases, the Court agreed with EEOC's position that agency principles should be used for guidance. While declining to issue a "definitive rule on employer liability," the Court did reject both the court of appeals' rule of automatic liability for the actions of supervisors and the employer's position that notice is always required. 106 S. Ct. at 2408- 09.

The following sections of this document provide guidance on the issues addressed in Vinson and subsequent cases.

GUIDANCE

A. Determining Whether Sexual Conduct Is Unwelcome

Sexual harassment is "unwelcome . . . verbal or physical conduct of a sexual nature . . ." 29 C.F.R. § 1604.11(a). Because sexual attraction may often play a role in the day-to-day social exchange between employees, "the distinction between invited, uninvited-but-welcome, offensive- but-tolerated, and flatly rejected" sexual advances may well be difficult to discern. Barnes v. Costle, 561 F.2d 983, 999, 14 EPD ¶ 7755 (D.C. Cir. 1977) (MacKinnon J., concurring). But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. The Eleventh Circuit provided a general

definition of "unwelcome conduct" in Henson v. City of Dundee, 682 F.2d at 903: the challenged conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."

When confronted with conflicting evidence as to welcomeness, the Commission looks "at the record as a whole and at the totality of circumstances . . ." 29 C.F.R. § 1604.11(b), evaluating each situation on a case-by-case basis. When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party's claim will be considerably strengthened if she made a contemporaneous complaint or protest.⁷ Particularly when the alleged harasser may have some reason (e.g., prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome. Generally, victims are well-advised to assert their right to a workplace free from sexual harassment. This may stop the harassment before it becomes more serious. A contemporaneous complaint or protest may also provide persuasive evidence that the sexual harassment in fact occurred as alleged (see infra Section B). Thus, in investigating sexual harassment charges, it is important to develop detailed evidence of the circumstances and nature of any such complaints or protests, whether to the alleged harasser, higher management, co-workers or others.⁸

While a complaint or protest is helpful to charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. If the victim failed to complain or delayed in complaining, the investigation must ascertain why. The relevance of whether the victim has complained varies depending upon "the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b).⁹

Example - Charging Party (CP) alleges that her supervisor subjected her to unwelcome sexual advances that created a hostile work environment. The investigation into her charge discloses that her supervisor began making intermittent sexual advances to her in June, 1987, but she did not complain to management about the harassment. After the harassment continued and worsened, she filed a charge with EEOC in June, 1988. There is no evidence CP welcomed the advances. CP states that she feared that complaining about the harassment would cause her to lose her job. She also states that she initially believed she could resolve the situation herself, but as the harassment became more frequent and severe, she said she realized that intervention by EEOC was necessary. The investigator determines CP is credible and concludes that the delay in complaining does not undercut CP's claim.

When welcomeness is at issue, the investigation should determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome.¹⁰

In Vinson, the Supreme Court made clear that voluntary submission to sexual conduct will not necessarily defeat a claim of sexual harassment. The correct inquiry "is whether [the employee] 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 (emphasis added). See also Commission Decision No. 84-1 ("acquiescence in sexual conduct at the workplace may not mean that the conduct is welcome to the individual").

In some cases the courts and the Commission have considered whether the complainant welcomed the sexual conduct by acting in a sexually aggressive manner, using sexually-oriented language, or soliciting the sexual conduct. Thus, in Gan v. Kepro Circuit Systems, 27 EPD ¶ 32,379 (E.D. Mo. 1982), the plaintiff regularly used vulgar language, initiated sexually-oriented conversations with her co-workers, asked male employees about their marital sex lives and whether they engaged in extramarital affairs, and discussed her own sexual encounters. In rejecting the plaintiff's claim of "hostile environment" harassment, the court found that any propositions or sexual remarks by co-workers were "prompted by her own sexual aggressiveness and her own sexually-explicit conversations" *Id.* At 23,648.¹¹ And in Vinson, the Supreme Court held that testimony about the plaintiff's provocative dress and publicly expressed sexual fantasies is not *per se* inadmissible but the trial court should carefully weigh its relevance against the potential for unfair prejudice. 106 S. Ct. at 2407.

Conversely, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Although a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused, nor would "quid pro quo" harassment be allowed.

Any past conduct of the charging party that is offered to show "welcomeness" must relate to the alleged harasser. In Swentek v. US AIR, Inc., 830 F.2d 552, 557, 44 EPD ¶ 37,457 (4th Cir. 1987), the Fourth Circuit held the district court wrongly concluded that the plaintiff's own past conduct and use of foul language showed that "she was the kind of person who could not be offended by such comments and therefore welcomed them generally," even though she had told the harasser to leave her alone. Emphasizing that the proper inquiry is "whether plaintiff welcomed the particular conduct in question from the alleged harasser," the court of appeals held that "Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive 'her legal protections against unwelcome harassment.'" 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3, 32 EPD ¶ 33,639 (4th Cir. 1983)). Thus, evidence concerning a charging party's general character and past behavior toward others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward the alleged harasser.

A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome.¹² If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work.¹³ In any case, however, her refusal to submit to the sexual conduct cannot be the basis for denying her an employment benefit or opportunity; that would constitute a "quid pro quo" violation.

B. Evaluating Evidence of Harassment

The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus the resolution of a sexual harassment claim often depends on the credibility of the parties. The investigator should question the charging party and the alleged harasser in detail. The Commission's investigation also should search thoroughly for corroborative evidence of any nature.¹⁴ Supervisory and managerial

employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.

In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation.¹⁵ By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.¹⁶

Of course, the Commission recognizes that a charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged incident of harassment. Persons with whom she discussed the incident - - such as co-workers, a doctor or a counselor - - should be interviewed. Other employees should be asked if they noticed changes in charging party's behavior at work or in the alleged harasser's treatment of charging party. As stated earlier, a contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome (see supra Section A). So too is evidence that other employees were sexually harassed by the same person.

The investigator should determine whether the employer was aware of any other instances of harassment and if so what was the response. Where appropriate the Commission will expand the case to include class claims.¹⁷

Example - Charging Party (CP) alleges that her supervisor made unwelcome sexual advances toward her on frequent occasions while they were alone in his office. The supervisor denies this allegation. No one witnessed the alleged advances. CP's inability to produce eyewitnesses to the harassment does not defeat her claim. The resolution will depend on the credibility of her allegations versus that of her supervisor's. Corroborating, credible evidence will establish her claim. For example, three co-workers state that CP looked distraught on several occasions after leaving the supervisor's office, and that she informed them on those occasions that he had sexually propositioned and touched her. In addition, the evidence shows that CP had complained to the general manager of the office about the incidents soon after they occurred. The corroborating witness testimony and her complaint to higher management would be sufficient to establish her claim. Her allegations would be further buttressed if other employees testified that the supervisor propositioned them as well.

If the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may make a cause finding based solely on a reasoned decision to credit the charging party's testimony.¹⁸

In a "quid pro quo" case, a finding that the employer's asserted reasons for its adverse action against the charging party are pretextual will usually establish a violation.¹⁹ The investigation should determine the validity of the employer's reasons for the charging party's termination. If they are pretextual and if the sexual harassment occurred, then it should be inferred that the charging party was terminated for rejecting the employer's sexual advances, as she claims. Moreover, if the termination occurred because the victim complained, it would be appropriate to find, in addition, a violation of section 704(a).

C. Determining Whether a Work Environment Is "Hostile"

The Supreme Court said in Vinson that for sexual harassment to violate Title VII, it must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" 106 S. Ct. at 2406 (quoting Henson v. City of Dundee, 682 F.2d at 904. Since "hostile environment" harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether the others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct "unreasonably interfer[es] with an individual's work performance" or creates "an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1) Standard for Evaluating Harassment - In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Title VII does not serve "as a vehicle for vindicating the petty slights suffered by the hypersensitive." Zabkowitz v. West Bend Co., 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984). See also Ross v. Comsat, 34 FEP cases 260, 265 (D. Md. 1984), rev'd on other grounds, 759 F.2d 355 (4th Cir. 1985). Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Example - Charging Party alleges that her coworker made repeated unwelcome sexual advances toward her. An investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

A "reasonable person" standard also should be applied to be more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must "adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances." Highlander v. K.F.C. National Management Co., 805 F.2d 644, 650, 41 EPD ¶ 36,675 (6th Cir. 1986).²⁰

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. Cf. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626, 41 EPD ¶ 36,643 (6th Cir. 1986) (Keith, C.J., dissenting), cert. denied, 107 S. Ct. 1983, 42 EPD 36,984 (1987). Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 48 EPD ¶ 38,393 (1st Cir. 1988).

2) Isolated Instances of Harassment - Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. As the Court noted in Vinson, "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII." 106 S.Ct. at 2406 (quoting Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶ 7597 (5th Cir. 1971), cert. denied, 406 U.S. 957, 4 EPD ¶ 7838 (1972)). A "hostile environment" claim generally requires a showing of a pattern of offensive conduct.²¹ In contrast, in "quid pro quo" cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.²²

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severed the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.²³ Thus, in Barrett v. Omaha National Bank, 584 F. Supp, 22, 35 FEP Cases 585 (D. Neb. 1983), aff'd, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), one incident constituted actionable sexual harassment. The harasser talked to the plaintiff about sexual activities and touched her in an offensive manner while they were inside a vehicle from which she could not escape.²⁴

The Commission will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment. If an employee's supervisor sexually touches that employee, the Commission normally would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. Hall v. Gus Construction Co., 842 F.2d 1010, 46 EPD ¶ 37,905 (8th Cir. 1988); Hicks v. Gates Rubber Co., 833 F.2d 1406, 44 EPD ¶ 37,542 (10th Cir. 1987); Jones v. Flagship International, 793 F.2d 714, 721 n.7, 40 EPD ¶ 36,392 (5th Cir. 1986), cert. denied, 107 S. Ct. 952, 41 EPD ¶ 36,708 (1987).

3) Non-physical Harassment - When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

Did the alleged harasser single out the charging party?

Did the charging party participate?

What was the relationship between the charging party and the alleged harasser(s)?

Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. As the Guidelines emphasize, the Commission will evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female

language. However, in Rabidue v. Osceola Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit rejected the plaintiff's claim of harassment in such a situation.²⁵

One of the factors the court found relevant was "the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectations of the plaintiff upon voluntarily entering that environment." 805 F.2d at 620. Quoting the district court, the majority noted that in some work environments, "humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations, and girlie magazines may abound. Title VII was not meant to - - or can - - change this." Id. At 620-21. The court also considered the sexual remarks and poster at issue to have a "de minimus effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places." Id. at 622.

The Commission believes these factors rarely will be relevant and agrees with the dissent in Rabidue that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. "Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act." 805 F.2d at 626 (Keith, J., dissenting in part and concurring in part). Thus, in a decision disagreeing with Rabidue, a district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company-sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. Barbetta v. Chemlawn Services Corp., 669 F. Supp. 569, 45 EPD ¶ 37,568 (W.D.N.Y. 1987). The court held that the proliferation of pornography and demeaning comments, if sufficiently continuous and pervasive "may be found to create an atmosphere in which women are viewed as men's sexual playthings rather than as their equal coworkers." Barbetta, 669 F. Supp. At 573. The Commission agrees that, depending on the totality of circumstances, such an atmosphere may violate Title VII. See also Waltman v. International Paper Co., 875 F.2d 468, 50 EPD ¶ 39,106 (5th Cir. 1989), in which the 5th Circuit endorsed the Commission's position in its amicus brief that evidence of ongoing sexual graffiti in the workplace, not all of which was directed at the plaintiff, was relevant to her claim of harassment. Bennett v. Coroon & Black Corp., 845 F.2d 104, 46 EPD ¶ 37,955 (5th Cir. 1988) (the posting of obscene cartoons in an office men's room bearing the plaintiff's name and depicting her engaged in crude and deviant sexual activities could create a hostile work environment).

4) Sex-based Harassment - Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment - - that is, harassment not involving sexual activity or language - - may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or pervasive" and directed at employees because of their sex. Hicks v. Gates Rubber Co., 833 F.2d at 1416; McKinney v. Dole, 765 F.2d 1129, 1138, 37 EPD ¶ 35,339 (D.C. Cir. 1985).

Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment. Hall v. Gus Construction Co., 842 F.2d 1014; Hicks v. Gates Rubber Co., 833 F. 2d at 1416.

5) Constructive Discharge - Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of "quid pro quo" harassment.²⁶ It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation. See Derr v. Gulf Oil Corp., 796 F.2d 340, 343-44, 41 EPD ¶ 36,468 (10th Cir. 1986); Goss v. Exxon Office Systems Co., 747 F.2d 885, 888, 35 EPD ¶ 34, 768 (3d Cir. 1984); Nolan v. Cleland, 686 F.2d 806, 812-15, 30 EPD ¶ 33,029 (9th Cir. 1982); Held v. Gulf Oil Co., 684 F.2d 427, 432, 29 EPD ¶ 32,968 (6th Cir. 1982); Clark v. Marsh, 655 F.2d 1168, 1175 n.8, 26 EPD ¶ 32,082 (D.C. Cir. 1981); Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 61, 65, 23 EPD ¶ 30,891 (5th cir. 1980); Commission Decision 84-1, CCH EEOC Decision ¶ 6839. However, the Fourth Circuit requires proof that the employer imposed the intolerable conditions with the intent of forcing the victim to leave. See EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633, 672, 30 EPD ¶ 33,269 (4th Cir. 1983). But this case is not a sexual harassment case and the Commission believes it is distinguishable because specific intent is not likely to be present in "hostile environment" cases.

An important factor to consider is whether the employer had an effective internal grievance procedure. (See Section E, Preventive and Remedial Action). The Commission argued in its Vinson brief that if an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment. As Justice Marshall noted in his opinion in Vinson, "Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination" 106 S.Ct. at 2411 (Marshall, J., concurring in part and dissenting in part). Similarly, the court of appeals in Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 44 EPD ¶ 37,557 (5th Cir. 1987), held the plaintiff was not constructively discharged after an incident of harassment by a co-worker because she quit immediately, even though the employer told her she would not have to work with him again, and she did not give the employer a fair opportunity to demonstrate it could curb the harasser's conduct.

[D. Deleted 6/1999]

E. Preventive and Remedial Action

1) Preventive Action - The EEOC'S Guidelines encourage employers to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f). An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. See Vinson, 106 S. Ct. at 2408. It should ensure confidentiality as

much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

2) Remedial Action - Since Title VII

"affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" (Vinson), 106 S. Ct. at 2405), an employer is liable for failing to remedy known hostile or offensive work environments. See, e.g., Garziano v. E.I. Dupont de Nemours & Co., 818 F.2d 380, 388, 43 EPD ¶ 37,171 (5th Cir. 1987) (Vinson holds employers have an "affirmative duty to eradicate 'hostile or offensive' work environments"); Bundy v. Jackson, 641 F.2d 934, 947, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (employer violated Title VII by failing to investigate and correct sexual harassment despite notice); Tompkins v. Public Service Electric & Gas Co., 568 F.2d 1044, 1049, 15 EPD 7954 (3d Cir. 1977) (same); Henson v. City of Dundee, 682 F.2d 897, 905, 15 EPD ¶ 32,993 (11th Cir. 1982) (same); Munford v. James T. Barnes & Co., 441 F. Supp. 459, 466 16 EPD ¶ 8233 (E.D. Mich. 1977) (employer has an affirmative duty to investigate complaints of sexual harassment and to deal appropriately with the offending personnel; "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior")²⁷

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. See Waltman v. International Paper Co., 875 F.2d at 479 (appropriateness of remedial action will depend on the severity and persistence of the harassment and the effectiveness of any initial remedial steps). Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309-10, 44 EPD ¶ 37,557 (5th Cir. 1987) (the employer's remedy may be "assessed proportionately to the seriousness of the offense"). The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

Recent Court decisions illustrate appropriate and inappropriate responses by employers. In Barrett v. Omaha National Bank, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984), the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim's behalf or reporting the conduct. The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.

In contrast, in Yates v. Avco Corp., 819 F.2d 630, 43 EPD ¶ 37,086 (6th Cir. 1987), the court found the employer's policy against sexual harassment failed to function effectively. The victim's first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment. Similarly, in Zabkowicz v. West Bend Co., 589 F. Supp. 780, 35 EPD ¶ 34,766 (E.D. Wis. 1984), co-workers

harassed the plaintiff over a period of nearly four years in a manner the court described as "malevolent" and "outrageous." Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The court held the employer liable because it failed to take immediate and appropriate corrective action.²⁸

When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. The EEOC investigator should, of course, conduct an independent investigation of the harassment claim, and the Commission will reach its own conclusion as to whether the law has been violated. If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.²⁹

_____ Approved:

_____ Date

R. Gault Silberman
Vice Chairman

¹ See, e.g., Miller v. Bank of America, 600 F.2d 211, 20 EPD ¶ 30,086 (9th Cir. 1979) (plaintiff discharged when she refused to cooperate with her supervisor's sexual advances); Barnes v. Costle, 561 F.2d 983, 14 EPD ¶ 7755 (D.C. Cir. 1977) (plaintiff's job abolished after she refused to submit to her supervisor's sexual advances); Williams v. Saxbe, 413 F. Supp. 665, 11EPD 10,840 (D.D.C. 1976), rev'd and remanded on other grounds sub nom. Williams v. Bell, 587 F.2d 1240, 17 EPD ¶ 8605 (D.C. Cir. 1978), on remand sub nom. Williams v. Civiletti, 487 F. Supp. 1387, 23 EPD ¶ 30,916 (D.D.C. 1980) (plaintiff reprimanded and eventually terminated for refusing to submit to her supervisor's sexual demands).

² See, e.g., Katz v. Dole, 709 F.2d 251, 32 EPD ¶ 33,639 (4th Cir. 1983) (plaintiff's workplace pervaded with sexual slur, insult, and innuendo and plaintiff subjected to verbal sexual harassment consisting of extremely vulgar and offensive sexually related epithets); Henson v. City of Dundee, 682 F.2d 897, 29 EPD ¶ 32,993 (11th Cir. 1982) (plaintiff's supervisor subjected her to numerous harangues of demeaning sexual inquiries and vulgarities and repeated requests that she have sexual relations with him); Bundy v. Jackson, 641 F.2d 934, 24 EPD ¶ 31,439 (D.C. Cir. 1981) (plaintiff subjected to sexual propositions by supervisors, and sexual intimidation was "standard operating procedure" in workplace).

³ To avoid cumbersome use of both masculine and feminine pronouns, this document will refer to harassers as males and victims as females. The Commission recognizes, however, that men may also be victims and women may also be harassers.

⁴ For a description of the respective roles of the Commission and other federal agencies in investigating complaints of discrimination in the federal sector, see 29 C.F.R. § 1613.216.

⁵ In a subsection entitled "Other related practices," the Guidelines also provide that where an employment opportunity or benefit is granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be liable for unlawful sex discrimination against others who were qualified for but were denied the opportunity or benefit. 29 C.F.R. § 1604.11 (g). The law is

unsettled as to when a Title VII violation can be established in these circumstances. See DeCintio v. Westchester County Medical Center, 807 F.2d 304, 42 EPD ¶ 36,785 (2d Cir. 1986), cert. Denied, 108 S. Ct. 89, 44 EPD ¶ 37,425 (1987); King v. Palmer, 778 F.2d 878, 39 EPD ¶ 35,808 (D.C. Cir. 1985), decision on remand, 641 F. Supp. 186, 40 EPD ¶ 36,245 (D.D.C. 1986); Broderick v. Ruder, 46 EPD ¶ 37,963 (D.D.C. 1988); Miller v. Aluminum Co. of America, 679 F. Supp. 495, 500-01 (W.D. Pa.), aff'd mem., No. 88-3099 (3d Cir. 1988). However, the Commission recently analyzed the issues in its "Policy Guidance on Employer Liability Under Title VII for Sexual Favoritism" dated January 1990.

⁶ The Court stated that the Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Vinson, 106 S. Ct. at 2405 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42, 12 EPD ¶ 11,240 (1976), quoting in turn Skidmore v. Swift & Co., 323 U.S. 134 (1944)).

⁷ For a complaint to be "contemporaneous," it should be made while the harassment is ongoing or shortly after it has ceased. For example, a victim of "hostile environment" harassment who resigns her job because working conditions have become intolerable would be considered to have made a contemporaneous complaint if she notified the employer of the harassment at the time of her departure or shortly thereafter. The employer has a duty to investigate and, if it finds the allegations true, to take remedial action including offering reinstatement (see infra Section E).

⁸ Even when unwelcomeness is not at issue, the investigation should develop this evidence in order to aid in making credibility determinations (see infra p. 12).

⁹ A victim of harassment need not always confront her harasser directly so long as her conduct demonstrates the harasser's behavior is unwelcome. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898, 48 EPD ¶ 38,393 (1st Cir. 1988) ("In some instances a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman's consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man's conduct is unwelcome"); Commission Decision No. 84-1, CCH EEOC Decisions ¶ 6839 (although charging parties did not confront their supervisor directly about his sexual remarks and gestures for fear of losing their jobs, evidence showing that they demonstrated through comments and actions that his conduct was unwelcome was sufficient to support a finding of harassment).

¹⁰ Investigators and triers of fact rely on objective evidence, rather than subjective, uncommunicated feelings. For example, in Ukarish v. Magnesium Electron, 33 EPD ¶ 34,087 (D.N.J. 1983), the court rejected the plaintiff's claim that she was sexually harassed by her co-worker's language and gestures; although she indicated in her personal diary that she did not welcome the banter, she made no objection and indeed appeared to join in "as one of the boys." Id. At 32,118. In Sardigal v. St. Louis National Stockyards Co., 41 EPD ¶ 36,613 (S.D. Ill. 1986), the plaintiff's allegation was found not credible because she visited her alleged harasser at the hospital and at his brother's home, and allowed him to come into her home alone at night after the alleged harassment occurred. Similarly, in the Vinson case, the district court noted the plaintiff had twice refused transfers to other offices located away from the alleged harasser. (In a particular charge, the significance of a charging party's refusing an offer to transfer will depend upon her reasons for doing so.)

¹¹ See also Ferguson v. E.I. DuPont deNemours and Co., 560 F. Supp. 1172, 33 EPD ¶ 34,131 (D. Del. 1983) ("sexually aggressive conduct and explicit conversation on the part of the plaintiff may bar a cause of action for [hostile environment] sexual harassment"); Reichman v. Bureau of Affirmative Action, 536 F. Supp. 1149, 1172, 30 FEP Cases 1644 (M.D. Pa. 1982) (where plaintiff behaved "in a very flirtatious and provocative manner" around the alleged harasser, asked him to have dinner at her house on several occasions despite his repeated refusals, and continued to conduct herself in a similar manner after the alleged harassment, she could not claim the alleged harassment was unwelcome).

¹² In Commission Decision No. 84-1, CCH Employment Practices Guide ¶ 6839, the Commission found that active participation in sexual conduct at the workplace, e.g., by "using dirty remarks and telling dirty jokes," may indicate that the sexual advances complained of were not unwelcome. Thus, the Commission found that no harassment occurred with respect to an employee who had joined in the telling of bawdy jokes and the use of vulgar language during her first two months on the job, and failed to provide subsequent notice that the conduct was no longer welcome. By actively participating in the conduct, the charging party had created the impression among her co-workers that she welcomed the sort of sexually oriented banter that she later asserted was objectionable. Simply ceasing to participate was insufficient to show the continuing activity was no longer welcome to her. See also Loftin Boggs v. City of Meridian, 633 F. Supp. 1323, 41 FEP Cases 532 (S.D. Miss. 1986) (plaintiff initially participated in and initiated some of the crude language that was prevalent on the job; if she later found such conduct offensive, she should have conveyed this by her own conduct and her reaction to her co-workers' conduct).

¹³ However, if the harassing supervisor engages in conduct that is sufficiently pervasive and work-related, it may place the employer on notice that the conduct constitutes harassment.

¹⁴ As the court said in Henson v. City of Dundee, 682 F.2d at 912 n.25, "In a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial."

¹⁵ In Sardigal v. St. Louis National Stockyards Co., 41 EPD ¶ 36,613 at 44,694 (S.D. Ill. 1986), the plaintiff, a waitress, alleged she was harassed over a period of nine months in a restaurant at noontime, when there was a "constant flow of waitresses or customers" around the area where the offenses allegedly took place. Her allegations were not credited by the district court because no individuals came forward with testimony to support her.

¹⁶ See Commission Decision No. 81-17, CCH EEOC Decisions (1983) ¶ 6757 (violation of Title VII found where charging party alleged that her supervisor made repeated sexual advances toward her; although the supervisor denied the allegations, statements of other employees supported them).

¹⁷ Class complaints in the federal sector are governed by the requirements of 29 C.F.R. § 1613 Subpart F.

¹⁸ In Commission Decision No. 82-13, CCH EEOC Decisions (1983) ¶ 6832, the Commission stated that a "bare assertion" of sexual harassment "cannot stand without some factual support." To the extent this decision suggests a charging party can never prevail based solely on the credibility of her own testimony, that decision is overruled.

¹⁹ See, e.g., Bundy v. Jackson, 641 F.2d 934, 953, 24, EPD ¶ 31,439 (D.C. Cir. 1981).

²⁰ In Highlander and also in Rabidue v. Osceola Refining Co., 805 F.2d 611, 41 EPD ¶ 36,643 (6th Cir. 1986), cert. denied, 107 S. Ct. 1983, 42 EPD ¶ 36,984 (1987), the Sixth Circuit required an additional showing that the plaintiff suffered some degree of psychological injury. Highlander, 805 F.2d at 650; Rabidue, 805 F.2d at 620. However, it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person.

²¹ See, e.g., Scott v. Sears, Roebuck and Co., 798 F.2d 210, 214, 41 EPD ¶ 36,439 (7th Cir. 1986) (offensive comments and conduct of co-workers were "too isolated and lacking the repetitive and debilitation effect necessary to maintain a hostile environment claim"); Moylan v. Maries County, 792 F.2d 746, 749 40 EPD ¶ 36,228 (8th Cir. 1986) (single incident or isolated incidents of harassment will not be sufficient to establish a violation; the harassment must be sustained and nontrivial); Downes v. Federal Aviation Administration, 775 F.2d 288, 293, 38 EPD ¶ 35,590 (D.C. Cir. 1985 (Title VII does not create a claim of sexual harassment "for each and every crude joke or sexually explicit remark made on the job...[A] pattern of offensive conduct must be proved...")); Sapp v. City of Warner-Robins, 655 F.Supp. 1043, 43 FEP Cases 486 (M.D. Ga. 1987) (co-worker's single effort to get the plaintiff to go out with him or did not create an abusive working environment); Freedman v. American Standard, 41 FEP Cases 471 (D.N.J. 1986) (plaintiff did not suffer a hostile environment from the receipt of an obscene message from her co-workers and sexual solicitation from one co-worker); Hollis v. Fleetguard, Inc., 44 FEP Cases 1527 (M.D. Tenn. 1987) (plaintiff's co-worker's requests, on four occasions over a four-month period, that she have a sexual affair with him, followed by his coolness toward her and avoidance of her did not constitute a hostile environment; there was not evidence he coerced, pressured, or abused the plaintiff after she rejected his advances).

²² See Neville v. Taft Broadcasting Co., 42 FEP Cases 1314 (W.D.N.Y. 1987) (one sexual advance, rebuffed by plaintiff, may establish a prima facie case of "quid pro quo" harassment but is not severe enough to create a hostile environment).

²³ The principles for establishing employer liability, set forth in Section D below, are to be applied to cases involving physical contact in the same manner that they are applied in other cases.

²⁴ See also Gilardi v. Schroeder, 672 F. Supp. 1043, 45 FEP Cases 283 (N.D. Ill. 1986) (plaintiff who was drugged by employer's owner and raped while unconscious, and then was terminated at insistence of owner's wife, was awarded \$133,000 in damages for harassment and intentional infliction of emotional distress); Commission Decision No. 83-1, CCH EEOC Decisions (1983) ¶ 6834 (violation found where the harasser forcibly grabbed and kissed charging party while they were alone in a storeroom); Commission Decision No. 84-3, CCH Employment Practices Guide ¶ 6841 (violation found where the harasser slid his hand under the charging party's skirt and squeezed her buttocks).

²⁵ The alleged harasser, a supervisor of another department who did not supervise plaintiff but worked with her regularly, "was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff." 805 F.2d at 615. The plaintiff and other female employees were exposed daily to displays of nude or partially clad women in posters in male employees' offices. 805 F.2d at 623- 24 (Keith, J., dissenting in part and concurring

in part). Although the employees told management they were disturbed and offended, the employer did not reprimand the supervisor.

²⁶ However, while an employee's failure to utilize effective grievance procedures will not shield an employer from liability for "quid pro quo" harassment, such failure may defeat a claim of constructive discharge. See discussion of impact of grievance procedures later in this section, and section D(2)(c)(2), below.

²⁷ The employer's affirmative duty was first enunciated in cases of harassment based on race or national origin. See, e.g., United States v. City of Buffalo, 457 F. Supp. 612, 632-35, 18 EPD ¶ 8899 (W.D.N.Y. 1978), modified in part, 633 F.2d 643, 24 EPD ¶ 31,333 (2d Cir. 1980) (employer violated Title VII by failing to issue strong policy directive against racial slurs and harassment of black police officers, to conduct full investigations, and to take appropriate disciplinary action); EEOC v. Murphy Motor Freight Lines, Inc., 488 Supp. 381, 385-86, 22 EPD ¶ 30,888 (D. Minn. 1980) (defendant violated Title VII because supervisors knew or should have known of co-workers' harassment of black employees, but took inadequate steps to eliminate it).

²⁸ See also Delgado v. Lehman, 665 F.Supp. 460, 44 EPD ¶ 37,517 (E.D. Va. 1987) (employer failed to conduct follow-up inquiry to determine if hostile environment had dissipated); Salazar v. Church's Fried Chicken, Inc., 44 FEP Cases 472 (S.D. Tex. 1987) (employer's policy inadequate because plaintiff, as a part-time teenage employee, could have concluded a complaint would be futile because the alleged harasser was the roommate of her store manager); Brooms v. Regal Tube Co., 44 FEP Cases 1119 (N.D. Ill. 1987) (employer liable when a verbal reprimand proved ineffective and employer took no further action when informed of the harasser's persistence).

²⁹ For appropriate procedures, see §§ 4.4(e) and 15 of Volume I of the Compliance Manual.

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