SEXUAL HARASSMENT IN THE WORKPLACE: A PRIMER [1]

by

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Despite widespread publicity about the perils of sexual harassment,[4] surveys demonstrate that many businesses operating in the United States have yet to address the problem.[5] Moreover, recent news reports indicate that sexual harassment has reached the highest levels of management.[6] Although businesses know it exists, they appear unsure of what to do about it. As a result, the specter of employer liability for sexual harassment continues to loom over the workplace.[7]

Failure to adopt a pro-active and aggressive stance on this issue, how ever, can result not only in costly lawsuits, but also in a loss of employee morale, decline in productivity, and an erosion of a company's public image.[8] That businesses are still taking chances may reflect a failure to adequately consider the risks.

This may prove costly because these risks have substantially increased in recent years. In 1991, Congress amended Title VII to permit victims of sexual harassment to recover damages (including punitive damages) under federal law.[9] Moreover, in 1993 the U.S. Supreme Court broadened the reach of this law by making it easier to prove injury.[10] As a result, sexual harassment in the workplace presents a clear and present danger to businesses. They must now act or face increasing risk of liability.

To act wisely, companies need to understand the whole issue of sexual harassment. They need to consider the disturbing statistics behind an often hidden problem, the legal grounds available to victims, the current trends in the law, and the ways that companies can protect themselves.

This Article is a primer for attorneys to use when advising their clients on how to address sexual harassment in the workplace. We will begin by describing the scope and severity of the sexual harassment problem. Then we will examine the recently strengthened federal law governing sexual harass ment in the workplace. Finally, we will suggest policies and procedures for establishing and implementing a sexual harassment policy.

DISTURBING STATISTICS

On-the-job sexual harassment is not a recent problem, although legal liability for it is.[11] The American court system did not decide the first sexual harassment case under Title VII until 1976.[12] Moreover, the wider public appears not to have fully appreciated the problem's scope until 1991, when the Senate Judiciary Committee held hearings on Anita Hill's charges against Supreme Court nominee Clarence Thomas.

In 1976, the same year that the District Court of the District of Columbia resolved the first Title VII sexual harassment case, a *Redbook* magazine poll found that nine out of ten women said they had been subjected to unwanted sexual advances at work.13 In 1980, the federal government surveyed its own employees and found that forty-two percent of women stated they had experienced some form of work-related sexual harassment.[14] (In addition, fifteen percent of men reported such harassment.)[15] When the federal government looked at the same issue seven years later, the numbers had not changed.[16] Surveys done in the private sector revealed similar results.[17] These statistics notwithstanding, most cases of sexual harassment still go unreported: as many as ninety-five percent of all such incidents may not be brought to light.[18]

While the cost to victims is high, the cost to American business cannot be over-estimated. In the federal government's first sexual harassment survey, it discovered that the government itself had lost $189 million between 1978 and 1980 from the effects of sexual harassment.[19] In its next survey, the federal government saw its losses jump to $267 million for the years 1985 to 1987, even though the rate of sexual harassment had not changed.[20]

According to *Working Woman Magazine*, a typical Fortune 500 corporation can expect to lose $6.7 million, in 1988 dollars, annually.[21] Losses can result from absenteeism, lower productivity, increased health-care costs, poor morale, and employee turnover.[22] These losses do not include litigation costs or court-awarded damages.[23] Also not included is damage to a company's image. Bad press, which often accompanies such cases, can cost a business not only its reputation but also its customers and revenues.

In recent years, the number of sexual harassment cases filed with the Equal Employment Opportunity Commission (EEOC), as well as in federal and state courts, has climbed dramatically.[24] In 1992, for example, a year after the Anita Hill-Clarence Thomas hearings on Capitol Hill, the number of sexual harassment cases filed with EEOC offices across the country jumped fifty percent over the previous year.[25] Complaints about sexual harassment have ranged from fostering of a hostile work environment to demands for prostitution.

Although men face harassment, women are the most likely victims. Harm caused by sexual harassment is often extreme, including humiliation, loss of dignity, psychological (and sometimes physical) injury, and damage to professional reputation and career.[26] Inevitably, the victims face a choice between their work and their self-esteem. Sometimes, they face a choice between their jobs and their own safety.

STRONGER FEDERAL LAW

For years, sexual harassment victims who sought relief found them selves in a legal quandary. Federal legislation was on the books to protect employees from on-the-job discrimination, including sexual harassment, but the benefits of pursuing such a case were few.[27] Often, victims who spoke out jeopardized their jobs, their careers, and their reputation, with little reward.

Until 1991, Title VII entitled sexual harassment victims to collect only back pay, lost wages and, if they had been forced to leave, to be reinstated in their jobs.[28] Nothing was provided for pain and suffering. Often, women who did file EEOC complaints continued to be harassed at work, or felt compelled to quit. If they won, all they got were a few dollars and an intolerable job back.[29] However, these cases were very difficult to win.[30] Alternatively, the victims would file tort actions for assault, battery, false imprisonment, and /or intentional infliction of mental distress in state court.[31] As a result, sexual harassment victims found little recourse in the legal system for their harms.

Recognizing the need to strengthen the remedies for sexual harassment under Title VII, Congress amended the Civil Rights Act in 1991.[32] Now, sexual harassment victims can recover compensatory damages beyond back pay,[33] and may do so in a jury trial.[34] Moreover, these damages can encompass "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[35] Plaintiffs can also collect punitive damages, if they can demonstrate that an employer acted with malice or with reckless or callous indifference.[36]

The legislation, however, limits the sum of compensatory and punitive damages according to the number of employees.[37] (See Table I.) Nevertheless, sexual harassment victims can bring a claim under federal law and collect substantial amounts for harm done. Thus, for companies operating in the United States, the stakes have increased dramatically.

TABLE 1: LIMITS ON DAMAGES

Number of Employees in Company	Maximum Sum of Compensatory and Punitive Damages
15-100	$ 50,000
101-200	$ 100,000
201-500	$ 200,000
501 or more	$ 300,000

Quid Pro Quo

Federal law recognizes two different sets of legal grounds for claiming sexual harassment under Title VII.[38] The first is *quid pro quo*.[39] Under the *quid pro quo* form of harassment, a person in authority, usually a supervisor, demands sexual favors of a subordinate as a condition of getting or keeping a job benefit.[40] The second, which we will discuss below, is a hostile work environment harassment.

EEOC guidelines define sexual harassment generally as *unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.[41] In *quid pro quo* cases, the offense is directly linked to an individual's terms of employment or forms the basis for employment decisions affecting the individual. Usually, such cases are easy to recognize the first sexual harassment lawsuit under Title VII was decided on *quid pro quo* grounds.[42]

When such harassment occurs, the subordinate has the legal right to take the employer to court.[43] Because courts follow the doctrine of *respondeat superior,* the company is held strictly liable even if it had no knowledge of the conduct.[44] In 1982, the U.S. Court of Appeals for the Eleventh Circuit set forth the rationale for a company's strict liability in *Henson v. City of Dundee.*[45] The court reasoned:

> In that case, the supervisor uses the means furnished to him by the employer to accomplish the prohibited purpose. He acts within the scope of his actual or apparent authority to "hire, fire, discipline or promote." . . . Because the supervisor is acting within at least the apparent scope of his authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority.[46]

This makes a company responsible for a supervisory employee's action if that employee wields authority delegated by the corporation.[47] Moreover, the perpetrator does not even have to be an employee, but only an agent for the company.[48]

Hostile Work Environment

Frequently, a *quid pro quo* situation does not exist. Many sexual harassment victims are never threatened with termination or lack of advancement. Rather, they suffer repeated abuse by a hostile work environment, which is an alternative ground for bringing a Title VII sexual harassment action.[49] A hostile work environment arises when a co-worker or supervisor, engaging in unwelcome [50] and inappropriate sexually based behavior, renders the workplace atmosphere intimidating, hostile, or offensive.[51]

In one early case, *Bundy v. Jackson*,[52] the District of Columbia Circuit Court of Appeals characterized hostile environment cases as presenting a "cruel trilemma."[53] In *Bundy* the victim had three options: (1) to endure the harassment, (2) to attempt to oppose it and likely make the situation worse, or (3) to leave the place of employment.[54] A hostile work environment, the court held, represented discrimination under Title VII and constituted grounds for legal action.[55] Over the next few years other courts followed this holding.[56]

In 1986, the U.S. Supreme Court, in *Meritor Savings Bank v. Vinson*,[57] endorsed the notion of a hostile work environment.[58] Placing strong emphasis on EEOC guidelines, the Court held such sexual misconduct constitutes prohibited sexual harassment, even if it is not linked directly to the grant or denial of an economic *quid pro quo*, where "such

conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[59]

This decision set the stage for a broader definition of sexual harassment. It also gave rise to a debate over two related issues: What degree of abuse is needed to constitute hostility that interferes unreasonably with a victim's work performance, and what is the nature and extent of an employer's liability for a hostile work environment.

What Is a Hostile Work Environment?

As part of its decision in *Meritor,* the Supreme Court stated that a hostile work environment constitutes grounds for an action only when the conduct is unwelcome, based on sex, and severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment."[60] This standard raises numerous questions. What is unwelcome? When is conduct based on sex? Are employees allowed to flirt on the job anymore? Can they tell off-color jokes? What happens when someone gets offended? Who decides what is appropriate, and what is not? Should employees be required to tolerate some minimal level of offensive sexual behavior within the workplace?

The EEOC itself has stated, "Title VII does not proscribe all conduct of a sexual nature in the workplace."[61] The line is drawn between acceptable sexual conduct and sexual harassment where the conduct becomes unwelcome.[62] However, as the courts continue to grapple with the definition of unwelcome sexual conduct, their decisions have not followed a predictable pattern.[63]

Nonetheless, the courts now grant relief for sexual harassment far more often than they did initially. Today, courts will more likely find an illegal hostile environment present when the workplace includes sexual propositions, pornography, extremely vulgar language, sexual touching, degrading comments, or embarrassing questions or jokes.[64] The following cases illustrate conduct that creates a hostile work environment.

(1) In *Hall v. Gus Construction Co.,* a construction company hired three women to work as "flag persons" or traffic controllers at road construction sites.[65] Male co-workers immediately and continually subjected the women to outrageous verbal sexual abuse. One of the three women developed a skin reaction to the sun and the men nicknamed her "Herpes."[66] When the women returned to their car after work one day, they found obscenities written in the dust on their car.[67] Male co-workers continuously asked the woman if they wanted to engage in sexual intercourse or oral sex.[68] In addition to the verbal abuse, the women were constantly subjected to offensive and unwelcome physical contact. On one occasion, the men held up one of the female employees so that the driver of a truck could touch her.[69] The men subjected all three woman to other types of abuse, including "mooning" them, showing them pornographic pictures, and urinating in their water bottles and automobile gas tanks.[70] The company's supervisor was well aware of all of these activities.[71] The court found this conduct violated Title VII because it was

unwelcome conduct of a sexual nature, even though it did not contain "explicit sexual overtones."[72]

(2) In *Robinson v. Jacksonville Shipyards, Inc.,* a shipyard company employed a female welder who was continually subjected to nude and partially nude pictures posted by her male co-workers.[73] The men posted these pictures not only in common areas, but also in places where the victim would have to encounter them, including her tool box.[74] The men referred to the victim as "baby," "sugar," "momma," and "dear."[75] In addition, the men wrote obscene graffiti directed at the victim all over the plant.[76] The men also made numerous suggestive and offensive remarks to the victim concerning her body and the pictures posted on the walls.[77] The victim complained about this atmosphere of harassment on a number of occasions, but the company's supervisory personnel provided little or no assistance.[78] The court found this conduct violated Title VII because the plaintiff belonged to a protected category, was subject to unwelcome sexual harassment, the harassment was based on sex, it affected a term or condition of her employment, and the employer knew or should have known about the harassment and failed to take remedial action.[79]

(3) In *Waltman v. International Paper Co.,* the harassment began when a co-worker broadcast over the company's public address system obscenities about the female victim, who then received over thirty pornographic notes in her locker.[80] The men covered the walls of the facility and the elevator with pornographic pictures and crude remarks concerning the victim.[81] In addition, one of the victim's supervisors told her that she should have sex with a certain co-worker; he also physically accosted her.[82] Another employee told the victim that "he would cut off her left breast and shove it down her throat."[83] On another occasion, this same employee held the victim "over a stairwell, more than thirty feet from the floor."[84] Other male employees also physically grabbed and pinched the victim. The court found this conduct stated a claim of hostile environment discrimination under Title VII, because employees touched her in a sexual manner, directed sexual comments toward her, and continued to write sexual graffiti hroughout the workplace.[85]

Even though these examples involved blue collar workers, the problem of sexual harassment permeates all businesses and reaches upper management.[86] No company or supervisor can prudently ignore the problem.

Another issue concerning hostile environment cases is whether a victim may only recover for sexual harassment aimed at the victim, or whether she may cite examples of sex-based conduct directed at other employees to establish her prima facie case. A number of courts have held that incidents involving employees other than the victim are relevant in establishing a generally hostile work environment.[87]

In the last few years, new rulings have introduced another element into the fray. In 1991, the U.S. Court of Appeals for the Ninth Circuit stated that sexual harassment should be examined from the perspective of what a "reasonable woman," not a "reasonable person," would find offensive.[88] This holding has raised additional questions: Whose perspective

should prevail? What is meant by a "reasonable woman?" By a "reasonable man?" By a "reasonable person?" If a reasonable woman standard is utilized can a male ever be confident of his conduct?

Although the courts are toiling over the details of hostile environment cases, the Supreme Court remains steadfast in its view that federal law prohibits that type of sexual discrimination. In the 1993 case of *Harris v. Forklift Systems, Inc.*,[89] the Supreme Court extended its ruling in *Meritor* to include conduct that does not actually cause psychological injury.[90] In this case, the Court reaffirmed its holding that Title VII is violated when a workplace is permeated with unwelcome discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[91] The Court added that "Title VII comes into play before the harassing conduct leads to a nervous breakdown. . . . Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it to be psychologically injurious."[92] Thus, the Court apparently employed a *reasonable person* standard.[93] Acknowledging that this test is not and cannot be mathematically precise, the Court emphasized that whether a work environment is hostile or abusive can be determined only by looking at all the circumstances.[94] The Court provided some guidance by noting some factors that could be part of the "circumstances" of the case:

· frequency of the discriminatory conduct;

· severity of that conduct;

· whether it is physically threatening or humiliating or a mere offensive utterance;

· whether it unreasonably interferes with an employee's work performance.[95]

The Court additionally stated that although psychological harm is relevant to determining whether a victim found the work environment abusive, it -- like any other relevant factor -- is not required.[96]

This decision makes it easier for sexual harassment victims to win law suits using a hostile work environment as grounds for the action.[97] Consequently, attorneys should advise their clients to take stringent steps to limit their legal liability. Above all, they should explain that companies should make certain their employees understand that all sexual matters belong outside the workplace.

When Is the Employer Liable?

In *Meritor* the Supreme Court sidestepped the issue of employer liability for a hostile work environment. It deferred instead to Congress, which it said wanted the courts to look to common-law principles of agency law for guidance in this area.[98] The Court,

however, announced some general parameters. In sexual harassment cases based on a hostile work environment, employers are not always automatically liable for their supervisors' conduct.[99] On the other hand, absence of notice regarding the supervisors' conduct does not necessarily insulate employers from liability.[100]

Since *Meritor,* the lower courts have not reached entirely uniform results in applying agency law principles to hostile environment cases.[101] Employers, therefore, are well advised to observe the EEOC's guidelines on this issue.[102] Under these guidelines, employers are liable when either their supervisors or agents create a hostile environment, or if the employer knew or should have known of the sexual harassment and failed to take immediate and appropriate corrective action.[103] According to the EEOC, employers are usually deemed to know of sexual harassment if it is: (1) openly practiced in the workplace; (2) well-known among employees; or (3) brought to the employer's notice by a victim's filing a charge.[104]

Employers may protect themselves from liability by taking immediate and appropriate corrective action. To do so, companies need to institute comprehensive, detailed, and responsible sexual harassment policies. Moreover, the courts have advised employers to look carefully at their current grievance procedures. In *Meritor,* the Supreme Court cautioned:

> [Employer's] general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. Moreover, the [employer's] grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that the [employee] failed to invoke the procedure and report her grievance to him.[105]

The EEOC has concisely explained the principle when it stated that it will generally find an employer liable for hostile environment sexual harassment by a supervisor when the employer failed to establish an explicit policy against sexual harassment, and did not have a reasonably available avenue by which victims of sexual harassment could complain to someone with authority to investigate and remedy the problem.[106]

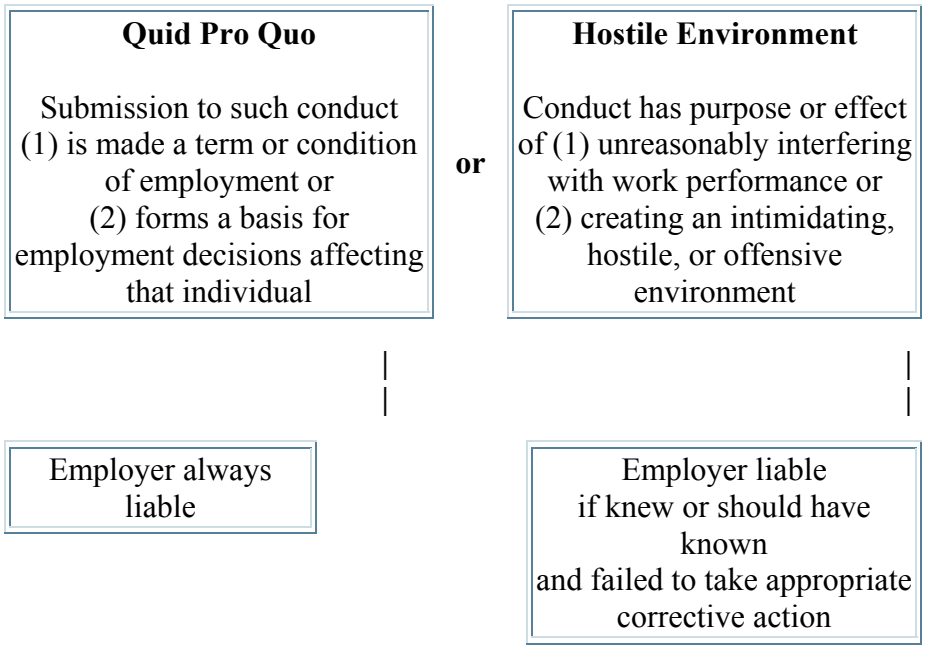
Figure I summarizes the elements of sexual harassment under Title VII.

FIGURE 1: SEXUAL HARASSMENT

Sexual Misconduct

Unwelcone sexual advances, requests for sexual favors,
and other verbal or physical conduct of a sexual nature

plus



ADDRESSING SEXUAL HARASSMENT

Given the high stakes involved in sexual harassment, many employers are woefully unprepared to protect their own interests, and those of their employees. Despite widespread recognition of sexual harassment, businesses are still exhibiting a surprisingly cavalier attitude about the problem. When *Inc*. magazine surveyed business managers in 1992, for example, it found that thirty-four percent of companies said they had not even thought about formulating a written sexual harassment policy.[107] Moreover, fewer than a quarter said they would promptly investigate a complaint.[108]

In stark contrast, the courts and the EEOC have repeatedly indicated that companies must take affirmative and effective steps both to prevent sexual harassment and, when it occurs, to intervene quickly.[109] At the same time, employers should ensure that male supervisors do not overreact by avoiding all unnecessary contact with females to minimize the risk of engaging in sexual harassment. Such an approach discriminates unfairly against female employees, and disregards the Supreme Court rulings in *Meritor* and *Harris*: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive environment an environment that a reasonable person would find hostile or abusive is beyond Title VII's purview."[110]

Company Policy

Companies that want to manage their risk prudently must act *before* a problem occurs. The EEOC encourages 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."[111]

First, companies need a comprehensive, detailed written policy on sexual harassment. The CEO should issue the policy and make it a high priority of the company. Second, they need to distribute this policy to all workers, supervisors, and even some non-employees. A basic policy should set forth the following:

· an express commitment to eradicate and prevent sexual harassment;

· a definition of sexual harassment including both *quid pro quo* and hostile work environment;

· an explanation of penalties (including termination) the employer will impose for substantiated sexual harassment conduct;

· a detailed outline of the grievance procedure employees should use;

· additional resource or contact persons available for consultation;

· an express commitment to keep all sexual harassment complaints and personnel actions confidential.[112]

To help employees grasp the nature of sexual harassment, companies may want to provide their workers with examples of behavior that they consider inappropriate. Professor Catherine MacKinnon advises companies to warn employees against posting suggestive photographs, telling sexual jokes or making innuendoes, or romancing subordinates.[113] She also suggests that workers be advised against referring to female employees as "girls," assigning work according to an individual's gender, or promoting employees based on gender.[114] In addition, Professor MacKinnon says workers should be told to refrain from requesting sexual favors, from touching or flirting with unwilling or even willing subordinates, and from making similar unwelcome sexual advances to co-workers.[115] Finally, she says that the company should prohibit everyone in the company from retaliating against a worker who files a sexual harassment complaint.[116]

Once a company develops a sexual harassment policy, it should circulate it widely. Companies should provide copies not only to newly hired employees, but also to current ones. In addition, companies should post copies throughout office and break areas, issue periodic memos about the policy, and hold informal and formal departmental meetings to discuss the topic. In particular, companies need to train their supervisors to deal with sexual harassment. Even small businesses will find it useful to educate their workers through videos and seminars. Companies may also wish to seek help from an outside consultant.

Procedure

Despite prudent measures, companies will always face the possibility, if not the probability, that sexual harassment will occur. However, as the Supreme Court indicated in *Meritor*, an employer greatly improves its position by having grievance procedures that encourage employees to come forward with sexual harassment complaints.[117] Lower courts have supported this view even more strongly.[118] With any grievance procedure, one element is paramount: A sexual harassment victim must not be required to address complaints to a supervisor who is involved in, condones, or ignores the harassment.[119]

Consequently, an effective grievance procedure should provide the complainant with alternative routes for reporting harassment. In setting up grievance procedures, a company may want to consider that women lodge the vast majority of sexual harassment complaints, and that the courts have found differences of perception to exist between men and women. As a result, an employer is better protected if a female employee is involved in assessing sexual harassment complaints. That way, female victims may be more willing to come forward, thus enhancing an employer's ability to take prompt and effective remedial action. As with any grievance procedure, of course, a company must maintain confidentiality, both for the sake of the victim and the accused.

Enforcement

Even the most comprehensive sexual harassment policies and procedures are bound to fail if a company does not enforce them quickly, consistently, and aggressively.[120] To be effective, companies must take sexual harassment seriously. They need to make certain that personnel responsible for enforcement conduct prompt, thorough, and documented investigations of all complaints, even those that appear trivial.[121]

Employers should also keep tabs on their supervisors. This can be accomplished by means of monthly meetings with higher management, unscheduled spot checks, or periodic sexual harassment training sessions. Depending on management style, some businesses may find it useful to survey subordinates about sexual harassment issues, as a way to gauge supervisors attitudes about the problem.[122] Finally, companies may want to screen annual data on hiring, firing, promotions, and compensation packages for any pattern of overt gender discrimination that may also be occurring.

Once a company has received notice of sexual harassment, its liability may be reduced or eliminated depending on how promptly and effectively it responds. Prompt means precisely that: under no circumstance should a company delay an investigation of sexual harassment more than a few days. Notably egregious sexual misconduct should be handled immediately. Whatever the situation, a company should take action that is reasonably calculated to end the harassment.[123] Such action must be directed toward the harasser, and may include verbal warnings, written warnings, job transfers, suspension of employment, and, if necessary, termination.[124]

In dealing with problems, companies must avoid any measures that penalize the individual who has lodged a sexual harassment complaint. This can occur, for example, when a company transfers the complainant to a less desirable position as a way to avoid

interaction between the victim and the accused. As the Seventh Circuit Court of Appeals has warned, "A remedial measure that makes the victim of sexual harassment worse off is ineffective per se."[125]

A company should also be careful not to allow too much time to elapse before achieving a satisfactory resolution of the harassment. Once matters have been brought under control, a company should continue to monitor the situation to ensure compliance. Toward this end, follow-up interviews with all parties and witnesses are highly recommended. When claims of sexual harassment cannot be substantiated, an employer should still take the opportunity to reemphasize to employees that sexual harassment will not be tolerated.

Exhibit 1 summarizes our suggestions for addressing sexual harassment and provides guidelines that all companies should consider in establishing and implementing their sexual harassment policy.

CONCLUSION

Sexual harassment in the workplace presents an ongoing and growing risk to businesses operating in the United States. Today, the time is right for businesses to begin to manage their risk in this area more wisely. Preventing sexual harassment in the workplace requires a considerable investment of time and personnel. In the end, however, these costs will be offset by significant savings in legal fees and health-care costs. Companies will also benefit from increased worker productivity. From a purely business perspective, a company only stands to gain if it takes a no-nonsense, hard-line position on sexual harassment. Not only is it the right thing to do, it is the smart thing to do.

EXHIBIT 1
GUIDELINES FOR A SEXUAL HARASSMENT POLICY

UNDERSTAND SEXUAL HARASSMENT

- Appreciate that you and your company can be held liable if your employees engage in sexual harassment
- Know that any unwelcome sexual activity tied to employment decisions or benefits is sexual harassment
- Recognize that sexual harassment may include jokes, vulgar language, sexual innuendoes, pornographic pictures, sexual gestures, physical grabbing or pinching, and other unwelcome or offensive physical touching or contact
- Remember that every sexual harassment charge is extremely serious
- Comprehend that employees who comply with unwelcome sexual advances can still be victims of sexual harassment
- Realize that men as well as woman may be sexually harassed
- Understand that employees may wait a while before lodging sexual harassment charges

COMMUNICATE POLICY

- Issue a strong policy from the CEO against sexual harassment
- Provide a clear definition of sexual harassment using examples of inappropriate behavior
- Review the policy with your employees on a regular basis
- Discuss the policy with all new employees
- Ensure that third-party suppliers and customers are aware of your sexual harassment policy

ESTABLISH PROCEDURES

- Appoint a senior corporate official to oversee the implementation of the policy
- Train your supervisors and managers to recognize and prevent sexual harassment

- Outline procedures to use in reporting sexual harassment
- Designate a personnel officer or other appropriate manager, rather than a direct supervisor, to receive sexual harassment complaints
- Provide alternative routes for filing complaints
- Keep all sexual harassment charges confidential

ENFORCE POLICY

- Make sure employees who bring charges do not face retaliation
- Safeguard the rights of the accused
- Investigate all sexual harassment charges quickly and thoroughly
- Maintain accurate records of the investigation and the findings
- Take immediate action when sexual harassment is discovered or suspected
- Discipline appropriately any employee found to have engaged in sexual harassment
- Safeguard your employees from third-party work-related sexual harassment

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4. A search in the University of North Carolina Microfilm, Inc. database under "sexual harassment" yielded more than 6500 records. This database indexes articles since 1989 from thirty leading newspapers.

5. Pamela Kruger, *See No Evil,* WORKING WOMAN, June 1995, at 32-33 [hereinafter *See No Evil*]; Ellyn E. Spranguns, *The Cost of Sexual Harassment*, 14 INC. 145 (1992).

6. It was widely reported that W.R. Grace & Co. had ousted its president and CEO, J.P. Bolduc, based on five female employees' allegations of sexual harassment. Judith H. Dobrzynski & Diana B. Henrigues, *Grace Thrown Into Turmoil Over Sexual Harassment Allegations,* N.Y. TIMES, Mar. 31, 1995, at D1; Richard Gibson & Thomas Borton, *W.R. Grace Says Bolduc Resigned Because of Sex-harassment Claim,* WALL ST. J., Mar. 31, 1995, at B4; John Greenwald, *Sex, Lies, & W.R. Grace,* TIME, Apr. 10, 1995, at 58.

7. According to one study, over one third of Fortune 500 companies have faced sexual harassment suits in recent years. *See No Evil, supra* note 5, at 33.

8. Ronni Sandoff, *Sexual Harassment in the Fortune 500*, WORKING WOMAN, Dec. 1988, at 68-73.

9. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (Supp. IV 1992)). This law modified Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§2000e 2000e-17 (1988 & Supp. II 1990)) [hereinafter Title VII]. Title VII by its terms applies only to employers. 42 U.S.C. § 2000e-2 (1994). Employer is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person. . . ." 42 U.S.C § 2000e-(b) (1994). The terms defining employer are further defined in § 701. 42 U.S.C. § 2000e-(f)-(h) (1994).

10. Harris v. Forklift Sys., 114 S. Ct. 367 (1993).

11. *See generally* B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1 (1993); Barbara Gutek, *Understanding Sexual Harassment at*

Work, 6 NOTRE DAME J.L. ETHICS & PUB. POL. 335 (1992); Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law: A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854 (1993) [hereinafter *Is There a Place*].

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

13. Claire Safran, *What Men Do To Women on the Job: A Shocking Look at Sexual Harassment,* REDBOOK, Nov. 1976, at 149. *See also Sexual Harassment,* GLAMOUR, Jan. 1981, at 31, (stating 85% of women responding indicated that they had suffered some form of sexual harassment at work).

14. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, OFFICE OF MERIT REVIEW AND STUDIES, *Sexual Harassment in the Federal Workplace: Is it a Problem?,* at *36* (1981) [hereinafter the 1981 MERIT SYSTEM REPORT].

15. *Id.*

16. UNITED STATES MERIT SYSTEMS PROTECTION BOARD, OFFICE OF MERIT REVIEW AND STUDIES, *Sexual Harassment in the Federal Government: An Update,* at 11 (1988) [hereinafter MERIT SYSTEM UPDATE].

17. *See* Robert W. Schupp et al., *Sexual Harassment Under Title VII: The Legal Status,* 32 LAB. L.J. 238 (1981) (discussing a 1975 United Nations survey conducted by the Ad Hoc Group on Equal Rights for Women revealing that 50% of female respondents, as well as 31% of male respondents, had been exposed to sexual harassment perpetrated by someone in a position of authority). S*ee also* D. Maypole, *Sexual Harassment at Work: A Review of Research and Theory,* 2 AFFILIA 24 (1987) (indicating that 36% of female respondents have been subject to sexual harassment). *Cf.* CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 26 (1979) (reporting that 90% of the 9000 women surveyed were victims of sexual harassment). *See generally* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

18. Mike Truppa, *Sexual Harassment Awareness Up, But Employers Slow to React,* CHI DAILY L. BULL, Oct. 2, 1992, at 2 [hereinafter *Awareness Up*]; Ronni Sandroff, *Sexual Harassment: The Inside Story* , WORKING WOMEN, June 1992, at 47 (reporting sexual harassment survey results).

19. MERIT SYSTEM REPORT, *supra* note 14, at 76.

20. MERIT SYSTEM UPDATE, *supra* note 16, at 40.

21. Sandoff, *supra* note 8, at 71.

22. *Id.*

23. *Id. See also* Eliot Brenner, *U.S. Finds Sexual Harassment Costly,* L.A. DAILY J., Apr. 29, 1981, at 7; Walter Kiechel III, *The High Cost of Sexual Harassment,* Fortune, Sept. 14, 1987, at 147 (outlining the social and corporate costs of sexual harassment). For a more in-depth analysis of the overall cost of sexual harassment in both social and economic terms see BARBARA GUTEK, SEX AND THE WORKPLACE (1985); Peggy Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 WOMEN*, WORKING'S INSTITUTE RESEARCH SERIES REPORT No. 3 (1978); Fran Sepler, *Sexual Harassment From Protective Response to Proactive Prevention,* 11 HAMLINE J. PUB. L. & POL. 61, 66-68 (1990) [hereinafter *Proactive Prevention*].

24. Nancy Montwieler, *Commissioner-Led Task Forces Will Probe EEOC's Major Concerns*, DAILY LAB. REP., Dec. 2, 1994, at D3 (reporting that a total of 8,200 cases of sexual harassment were filed with the EEOC during fiscal year 1994, up 13% from the previous year); *More Disability Charges Have Been Filed Than EEOC Estimated, the General Counsel Says*, DAILY LAB. REP., Jan. 26, 1993, at A4 (indicating sexual harassment claims increased 69% from 3,329 in 1991, to 5,629 in 1992).

25. *See, e.g.,* Montwieler, *supra* note 24, at D3; Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 303 n.102 (1993); Barry Willoughby, *Discrimination Law: Sexual Harassment After the Thomas Hearings,* 10 DEL. LAW. 18 (1992); Claudia MacLachlon, *Harassment Charges Up One Fear After Hill,* NAT' L L.J., Oct. 26, 1992 at 7 [hereinafter *Harassment Charges Up*].

26. *See, e.g.,* Beasley v. Spiegel, Inc., No. 92C4008, 1993 U.S. Dist. LEXIS 17934, at *2 (N.D. Ill. Jan. 12, 1994); Ward v. Cheltenham Township, 1991 U.S. Dist. LEXIS 5982, at *2 (E.D. Pa. May 3, 1991).

27. *See, e.g.,* Hope A. Comisky, *"Prompt and Effective Remedial Action?" What Must an Employer Do to Avoid Liability for "Hostile Work Environment" Sexual Harassment?,* 8 LAB LAW. 182 (1992); Phillip M. Perry, *Avoid Costly Lawsuits for Sexual Harassment,* L. PRAC. MGMT., Apr. 1992, at 18 [hereinafter *Avoid Costly Lawsuits*].

28. 42 U.S.C. § 2000e-5(g). *See also* authorities cited *supra* note 22.

29. MACKINNON, *supra* note 14, at 49-52; Estrich, *supra* note 14, at 853-58.

30. *See, e.g.*, Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976) (holding sexual harassment does not state a claim under Title VII), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); Miller v. Bank of America, 418 F. Supp. 233 (N.D. Col. 1976) ("It is conceivable under plaintiff's theory, that flirtations of the smallest order would give rise to liability."), *rev'd*, 600 F.2d 211 (9th Cir. 1979). *See also* Terry M. Dworkin et al.,

Theories of Recovery for Sexual Harassment: Going Beyond Title VII, 25 SAN DIEGO L. REV. 125, 131 (1988); Estrich, *supra* note 14, at 818-19; Sepler, *supra* note 20, at 66-68.

31. *E.g.,* Byrd v. Richardson-Greenshields Sec., 552 So.2d 1099, 1104 (Fla. 1989) (employee's claims for assault and battery, intentional infliction of emotional distress, and negligent hiring and retention of employees arising from instances of sexual harassment are not barred by the exclusivity remedy of state worker's compensation statute); Holen v. Sears Roebuck & Co., 689 P.2d 1292, 1303 (Or. 1984) (discharge for resistance to employer's sexual demands is actionable common law tort); West Bend Mut. Ins. Co. v. Berger, 531 N.W.2d 636, 640-41 (Wis. App. 1995) (employee may have a private cause of action for assault arising out of sexual harassment); O'Connell v. Chasdi, 511 N.E.2d 349, 351-52 (Mass. 1987) (employee's claims for assault and battery, and intentional infliction of emotional distress against co-employee for alleged sexual harassment are not barred by the exclusivity remedy of state worker's compensation statute).

32. Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981 (Supp. IV 1992)). Section 2 states in part: "The Congress finds that (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . ."

33. *Id.* at § 102(a)(1) (providing for compensatory and punitive damages).

34. *Id.* at § 102(c).

35. *Id.* at § 102(b)(3).

36. *Id.* at § 102(b)(1). *See also* Splunge v. Shoney's Inc., 874 F. Supp. 1258, 1275 (M.D. Ala. 1994); West v. Boeing Co. 851 F. Supp. 395, 399 (D. Kan. 1994) (compensatory and punitive damages are available for intentional discrimination under Title VII).

37. Civil Rights Act of 1991 § 102(b)(3).

38. Equal Employment Opportunity Commission, *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11 (1980) [hereinafter EEOC Discrimination Guidelines]. *See* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Miller v Bank of America, 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom*. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1977). *See also* David J. Burge, Note, *Employment Discrimination Defining an Employer's Liability Under Title VII for On-The-Job Sexual Harassment: Adoption of a Bifurcated Standard,* 62 N.C. L. REV. 795 (1984).

39. *See* MACKINNON, *supra* note 17 (stating that *quid pro quo* sexual harassment occurs where "the woman must comply sexually or forfeit an employment benefit.").

40. *See, e.g.,* Gary v. Long, 59 F.3d 1391, 1395 (D.C. Cir. 1995); Ellert v. University of Texas, at Dallas, 52 F.3d 543, 545 (5th Cir. 1995); Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989).

41. *Gary*, 59 F.3d at 1395; *Ellert*, 52 F.3d at 545; *Carrero*, 890 F.2d at 579.

42. *Williams*, 413 F. Supp. at 654.

43. *E.g., Gary,* 59 F.3d at 1395. The victim may also be able to sue the harassing supervisor or co-worker as well. The Second Circuit Court of Appeals recently held that supervisors and agents are not personally liable for employment discrimination under Title VII. *See* Tomka v. Seiler Corp., No. 94-7975, 1995 WL 572112 (2d Cir. Sept. 27, 1995). However, supervisors and co-workers may be personally liable under a state anti-discrimination statute or for common law battery. *Id.*

44. *Gary*, 59 F.3d at 1395 (holding *respondeat superior* is a necessary part of the plaintiff's proof).

45. 682 F.2d 897 (11th Cir. 1982).

46. *Id.* at 910 (citations omitted).

47. *Id*.

48. EEOC Discrimination Guidelines, *supra* note 38.

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

50. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (holding "the gravaman of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (stating unwelcome sexual advances are those "the employer did not solicit or incite.").

51. *Meritor*, 477 U.S. at 68; *Robinson*, 760 F. Supp. at 1522.

52. 641 F.2d 934 (D.C. Cir. 1981).

53. *Id.* at 946.

54. *Id.*

55. *Id.*

56. *E.g.,* Katz v. Dole*,* 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

57. 477 U.S. 57 (1986).

58. *Id.* at 73.

59. *Id.* at 65.

60. *Id.* at 67.

61. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, EEOC Notice No. N-915.050 (Mar. 19, 1990), *reprinted in* 3 EEOC COMP. MAN. No. 4031 (BNA) [hereinafter EEOC HARASSMENT GUIDANCE].

62. *See supra* note 50.

63. *See Is There a Place*, *supra* note 11.

64. *See Is There a Place, supra* note 11, at 878; George, *supra* note 11, at 10.

65. Hall v. Gus Const. Co., 842 F.2d 1010 (8th Cir. 1988).

66. *Id.* at 1012.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 1014.

73. Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1493-99 (M.D. Fla. 1991).

74. *Id.*

75. *Id.* at 1498.

76 . *Id.* at 1499.

77. *Id.* at 1498-99.

78. *Id.* at 1501-02.

79. *Id.* at 1522-32.

80. Waltman v. International Paper Co., 875 F.2d 468, 470 (5th Cir. 1989).

81. *Id.* at 471.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 477-78.

86. *See* sources cited *supra* note 5.

87. Heckert v. Firestone Tire & Rubber Co., 968 F.2d 20 (10th Cir. 1992); Hall v. Gus Constr. Co., 842 F.2d 1010, 1015 (8th Cir. 1988); Hicks v. Gales Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987); Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985).

88. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). *See also* Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773 (1993) (examining the development and implications of the "reasonable woman standard").

89. 114 S. Ct. 367 (1993).

90. *Id.* at 371.

91. *Id.* at 371-72.

92. *Id.* at 371.

93. *See* Leah R. McCaslin, Note, Harris v. Forklift Systems, Inc.: *Defining the Plaintiff's Burden In Hostile Environment Sexual Harassment Claims,* 29 TULSA L. J. 761 (1994).

94. *Id.* at 770.

95. *Id.* at 770-71.

96. *Id.* at 778.

97. Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After* Harris v. Forklift Systems, Inc.?, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 398 (1995).

98. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

99. *Id.*

100. *Id.*

101. *See, e.g.,* EEOC v. Hacienda Hotel , 881 F.2d 1504 (9th Cir. 1989) (involving "hostile environment" sexual harassment by a co-worker, in which the Ninth Circuit Court of Appeals acknowledged that courts have had "a difficult time developing a standard to govern the liability of an employer for sexual harassment perpetrated by supervisory personnel). The *Hacienda* court determined that the prevailing trend of the "hostile environment" case law was that of actual or constructive knowledge for the imposition of employer liability). *See generally* Katherine S. Anderson, *Employer Liability Under Title VII for Sexual Harassment After* Meritor Savings Bank v. Vinson, 87 COLUM. L. REV. 1258 (1987); Gayle Ecabert, Comment, *An Employer's Guide to Understanding Liability for Sexual Harassment Under Title VII:* Meritor Savings Bank v. Vinson, 55 U. CIN. L. REV. 1181 (1987); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at* Meritor Savings Bank, FSB v. Vinson, 44 VAND L. REV. 1229 (1991).

102. EEOC HARASSMENT GUIDANCE, *supra* note 61. While the EEOC has the authority to issue procedural regulations, it does not have the authority to make rules having the force and effect of law. *See* 42 U.S.C. § 2000e-12; Dobbins v. Local 212, 292 F. Supp. 413, 444 (D.C. Ohio 1968). Although the EEOC's interpretation of Title VII is entitled to "great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433 (1971), its interpretation is not binding on the court. General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976). An employer who in good faith relies on EEOC guidance may claim immunity for any alleged discrimination, even if the court chooses to disregard EEOC guidance. 42 U.S.C. § 2000e-12(b).

103. EEOC HARASSMENT GUIDANCE, *supra* note 61, at 110.

104. EEOC HARASSMENT GUIDANCE, *supra* note 61, at 112.

105. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72-73 (1986).

106. EEOC HARASSMENT GUIDANCE, *supra* note 61, at 110.

107. Spranguns, *supra* note 5, at 146.

108. *Id*.

109. EEOC HARASSMENT GUIDANCE, *supra* note 61, at 111-12.

110. Harris v. Forklift Sys., 114 S. Ct. 367, 370 (1993).

111. EEOC Discrimination Guidlines, *supra* note 38.

112. *See* William L. Kandell, *Sexual Harassment: Persistent, Prevalent, But Preventable,* 14 EMPLOYEE REL. L.J. 439 (1988) (advocating that it is in the employer's best business interest to have a sexual harassment policy far tougher than the minimum outlined in the EEOC Guidelines). *See also* Charles S. Mishkind, *Sexual Harassment Hostile Environment Class Actions: Is There Cause for Concern*, 18 EMPLOYEE REL. L.J. 141, 146-67 (1992) (advocating a strict sexual harassment policy and setting forth specific guidelines for such a policy).

113. *Avoid Costly Lawsuits*, *supra* note 27, at 20.

114. *Id.*

115. *Id.*

116. *Id.*

117. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986). *See also* Kandell, *supra* note 112, at 445.

118. *See* Comisky, *supra* note 27; Phillips, *supra* note 101.

119. *See, e.g.,* Katz v. Dole, 709 F.2d 251 (4th Cir. 1983*)*.

120. For an analysis of employers' responses to sexual harassment complaints, see generally Comisky, *supra* note 27.

121. *See* Cheryl Blackwell Bryson, *The Internal Sexual Harassment Investigation: Self-Evaluation Without Self-Incrimination*, 15 EMPLOYEE REL. L.J. 551 (1990); Michael E. Connell, *Defusing a Liability Timebomb: Investigating the Sexual Harassment Complaint* , MGMT REV., Apr. 1988, at 45.

122. *See* Sepler, *supra* note 23, at 75-78 (offering alternative suggestions for eradicating sexual harassment in the workplace).

123. *See, e.g.,* Guess v. Bethlehem Steel, 913 F.2d 463, 464 (7th Cir. 1990); *Katz,* 709 F.2d at 256.

124. While employers certainly want to be emphatic when denouncing documented instances of sexual harassment, they should not be so aggressive that they disregard male employee's rights and interests in the process. *See generally* Hannah Katherine Vorwerk, *The Forgotten Interest Group: Reforming Title VII to Address the Concerns of Workers While Eliminating Sexual Harassment*, 48 VAND L. REV. 1019 (1995).

125. *Guess*, 913 F.2d at 465.