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## The Use of the Racketeer Influenced & Corrupt Organizations Act in Claims of Quid Pro Quo Sexual Harassment

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**THE USE OF THE RACKETEER INFLUENCED & CORRUPT ORGANIZATIONS ACT  
IN CLAIMS OF QUID PRO QUO SEXUAL HARASSMENT**

by

**Margaret O'Brien**

**A Thesis Submitted to the Faculty of the Graduate School  
of Loyola University of Chicago in Partial Fulfillment  
of the Requirements for the Degree of  
Master of Science**

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**1990**

## VITA

The author, Margaret O'Brien, is the daughter of Arthur Robert O'Brien and Barbara (Bowers) O'Brien. She was born September 29, 1956, in Evanston, Illinois.

Her elementary education was obtained in the private school system in Deerfield, Illinois. Her secondary education was completed in 1974 at Regina Dominican High School in Wilmette, Illinois.

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## CHAPTER I

### INTRODUCTION

#### PURPOSE OF THE RESEARCH PROJECT

The basic purpose of employment law is "an attempt to protect workers and job applicants against the risks and irresponsibilities of unchecked employer power . . ." <sup>1</sup> For both employer and employee, Title VII of the Civil Rights Act of 1964, as amended, <sup>2</sup> is often considered the most significant of these laws. Under this statute, it is illegal for an employer to discriminate against any person on the basis of color, race, national origin, religion or sex in the terms and conditions of employment. <sup>3</sup>

Although not expressly stated in the Act, sexual harassment <sup>4</sup> has become a

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<sup>1</sup>Rothstein, Knapp and Liebman, *Cases and Materials on Employment Law* (1987), xix.

<sup>2</sup>42 U.S.C. § 2000(e), et. seq.; (hereinafter "Title VII" or "the Act").

<sup>3</sup>29 U.S.C. §§ 621-634, The Age Discrimination in Employment Act of 1967, prohibits discrimination in employment of persons over the age of 40; In 1978, Congress passed The Pregnancy Discrimination Act, 42 U.S.C § 2000e(k) which stipulates that sex discrimination includes discrimination based on pregnancy.

<sup>4</sup>Sexual harassment in the workplace generally refers to unwanted sexual advances or requests for sexual favors. *See infra*, notes 28 - 40 and accompanying text.

recognized form of discrimination under Title VII. Early case history, as revealed in *Barnes v Train*,<sup>5</sup> and *Corne v Bausch and Lomb*,<sup>6</sup> demonstrates the initial reluctance of the federal judiciary to consider sexual harassment an unlawful employment practice. Here, the courts viewed sexual harassment not as discrimination, but rather as sexual misconduct or impropriety.<sup>7</sup> The question of sexual harassment as a violation of Title VII did not reach the Supreme Court until twenty-four years after the enactment of the Civil Rights Act of 1964.<sup>8</sup> In *Meritor Savings Bank, FSB v Vinson*,<sup>9</sup> the Court declared that a charge of sexual harassment was a legitimate and actionable claim of sex discrimination under Title VII. The Court further upheld the idea that sexual harassment could take one or both of the following forms: economic quid pro quo and/or hostile work environment.<sup>10</sup>

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<sup>5</sup>13 Fair Empl. Prac. Cases (BNA) 123 (D.D.C. 1974).

<sup>6</sup>390 F.Supp. 161 (D. Ariz. 1975).

<sup>7</sup>See *Barnes*, 13 Fair Empl. Prac. Cases at 124 ("regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment . . ."); *Corne*, 390 F.Supp. at 163 (" . . . conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism.").

<sup>8</sup>See, e.g., *Horn v. Duke Homes*, 755 F.2d 599 (1985); *Huebschen v Dept. of Health*, 716 F.2d 1167 (1983); *Bohen v City of East Chicago* 622 F. Supp 1234 (N.D. Ind. 1985); *Scott v Sears, Roebuck & Co.*, 605 F. Supp.(N.D. Ill. 1985); *Zabkowicz v West Bend*, 589 F. Supp. 780 (E.D. Wis. 1984).

<sup>9</sup>106 S.Ct. 2399 (1986).

<sup>10</sup>The Court upheld the definitions rendered by the Equal Employment Opportunity Commission (hereinafter "EEOC" or "the Commission") (codified at 29 C.F.R. § 1604.11), which held that "quid pro quo" harassment occurs when sexual advances or requests for sexual favors result in tangible job benefits or the denial thereof; hostile work environment sexual harassment occurs when this conduct has the effect of unreasonably interfering with job performance. See, generally, note 40 and accompanying text.

It has been argued, however, that sexual harassment is often more than discrimination<sup>11</sup>. In recent years, redress for charges of sexual harassment has been sought under the tort claims of intentional infliction of emotional distress,<sup>12</sup> assault and/or battery<sup>13</sup> and invasion of privacy.<sup>14</sup> This thesis will examine the applicability of the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>15</sup> to claims of sexual harassment.

This thesis will examine the legislative and judicial histories of the Civil Rights Act and RICO.<sup>16</sup> In so doing, the types of actionable sexual harassment claims under Title VII will be identified and, where appropriate, extended to establish liability under RICO.<sup>17</sup>

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<sup>11</sup>See, e.g., Vhay, *The Harms of Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. Chi. L. Rev. 328, 329 (1988) ("the same difficulties that hindered the early courts in recognizing sexual harassment as sex discrimination prevent the modern-day courts from recognizing harassment as more than sex discrimination.").

<sup>12</sup>See, e.g., *Shaffer v National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983); *Rice v United Ins. Co. of America*, 465 So. 2d 1100 (Ala. 1984).

<sup>13</sup>See, e.g., *Rogers v Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981); *Skousen v Nidy*, 90 Ariz 215 (1966).

<sup>14</sup>See, e.g., *Phillips v Smalley Maintenance Services, Inc.*, 425 So.2d 705 (Ala. 1983); *Rogers v Loews L'Enfant Plaza Hotel*, 526 F. Supp. 523 (D.D.C. 1981).

<sup>15</sup>18 U.S.C. §§ 1961 - 1968.

<sup>16</sup>See, generally, note 78 and accompanying text.

<sup>17</sup>See, *Hunt v Weatherbee*, 626 F. Supp. 1097 (D. Mass. 1986), *infra* at note 349. (alleged sexual harassment argued under the RICO law survives a motion to dismiss).



## SCOPE OF ANALYSIS

It is without question that our society has experienced marked changes in the past thirty years.<sup>18</sup> Given this significant transformation, the composition of the workforce has changed dramatically.<sup>19</sup> The large influx of women into the business community has created new challenges and raised many questions.<sup>20</sup> To comprehend sexual harassment in both its legal and social context requires an examination of its definition and its pervasiveness. While many attempts to clarify these aspects of sexual harassment have been made, the most significant of these endeavors, beginning with a 1975 survey conducted through Cornell University,<sup>21</sup> will be presented in Chapter 2.

Any attempt to understand the judicial treatment given to sexual harassment claims necessitates a thorough investigation of the legislative history of the Civil Rights Act of

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<sup>18</sup>*See, generally*, Johnston and Packer, *Workforce 2000: Work and Workers for the Twenty-first Century*, at 105 (1987) ("Most of the laws and policies that affect American jobs and workers were developed several decades ago . . . when economic conditions were different, world trade was less important, manufacturing was more dominant, and women and minorities were a smaller share of the workforce.").

<sup>19</sup>*Id.* citing Bureau of Labor Statistics, the Hudson Institute reports that in 1960 only 11% of women with children under the age of six worked while presently this number has increased to 52%.

<sup>20</sup>*Id.* The Institute has identified "six challenges" including the reconciliation of the conflicting needs of women, work, and the family. Specifically, the necessity of providing more time off for parents, high quality day care and welfare reforms.

<sup>21</sup>*Reported in* Farley, *Sexual Shakedown*, (1978) at 20.

1964 and the amendments adopted in 1972.<sup>22</sup> This will be presented in detail in Chapter 3. In examining statutory case law history, Chapter 4 will identify the two forms of sexual harassment to which employees have been subjected, and court disposition of these claims. The judicial analysis of sexual harassment presented herein will reveal the evolution of sexual harassment law under Title VII as well as the administrative interpretation of Title VII's prohibition on sex discrimination as applied to cases of sexual harassment.

Having identified sexual harassment as a form of unlawful sex discrimination, Chapter 5 will detail the remedies available to the successful litigant. The adequacy of these remedies will be assessed in order to determine the need for an alternate form of redress.

In order to offer the RICO law as a credible alternative remedy for claims of sexual harassment, it is essential to grasp the original intent of the law as passed in 1970 and its subsequent judicial application. Chapter 6 will detail the legislative history of RICO as well as the elements necessary to establish a claim under the law.

Chapter 7 will discuss the various uses of civil RICO provisions in the employment setting. In addition, the various judicial interpretations of the elements necessary for the application of the racketeering law will be illustrated. The application of these elements to claims of sexual harassment will be discussed.

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<sup>22</sup>Pub. L. No. 92-261, The Equal Employment Opportunity Act, primarily granted enforcement powers to the EEOC and made various changes in coverage of the law. *See, generally*, Bureau of National Affairs, *The Equal Employment Opportunity Act of 1972 (1973)*.

Finally, chapter 8 will examine the relationship between "quid pro quo" cases of sexual harassment litigated under Title VII to the RICO law. This will be done in order to demonstrate the possible use of the RICO law as an additional remedial tool for the victim of sexual harassment.

### **ASSUMPTIONS OF STUDY**

Two basic assumptions underlie this research and form the basis of analysis contained herein. First, though sexual harassment can occur in many environments, this study will focus solely on the workplace. Second, while sexual harassment is typically a situation which involves a male harasser and a female victim, it is recognized that sexual harassment can and does involve a female harasser and a male victim,<sup>23</sup> or homosexual relationships.<sup>24</sup> The bulk of the literature and case law in this area, however, is concerned primarily with sexual harassment where the female is the alleged victim and a male is the alleged perpetrator, and will be the essence of this investigation.

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<sup>23</sup>*See, e.g.,* Heubschen v Dept. of Health, 716 F.2d 1167 (7th Cir. 1983); Formica v Galastino, No. 89-935 (E.D. Penn. 1989).

<sup>24</sup>*See, e.g.,* Joyner v AAA Cooper Transportation 597 F. Supp. 537 (D. Ala. 1983); Wright v Methodist Youth Services 511 F. Supp. 307 (N.D. Ill. 1981).

## CHAPTER II

### AN OVERVIEW OF SEXUAL HARASSMENT

#### HISTORICAL PERSPECTIVE

Though much has been written about the sexual harassment of working women in the past fifteen years, it is important to note that the occurrence of this behavior has existed for many years.<sup>25</sup>

Reports of sexual harassment, though then not defined as such, date back to late in the 19th Century.<sup>26</sup> Other later instances of sexual harassment have involved well-known women such as Emma Goldman, who shared their experience with this issue as early as 1917. In "The Traffic in Women," Goldman wrote:

Nowhere is woman treated according to the merit of her work, but rather as a sex. It is therefore almost inevitable that she should pay for her

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<sup>25</sup>See, generally, Goodman, *Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go*, 10 Cap. U. L. Rev. 445 (1981) and Bulzarik, *Sexual Harassment at the Workplace: Historical Notes*, 12 Radical America 25 (July, 1978).

<sup>26</sup>Goodman, *Sexual Harassment*, *supra* note 1, at 448 (citing a report by Louisa May Alcott in *How I went out to Service*, N.Y. Independent, June 4, 1874, at 1, col. 1).

right to exist, to keep a position in whatever line, with sex favors.<sup>27</sup>

With the advent of the women's movement in the early 1960's and its attendant increase in the number of women entering the paid labor force, it would be reasonable to expect the reports of sexual harassment to also increase. It was not until the late 1970's, however, that any extensive treatment of this issue was rendered. As will be demonstrated, the central focus of the research has been in attempting to define what behavior constitutes sexual harassment and a determination of its pervasiveness.

### **SEXUAL HARASSMENT DEFINED**

Lin Farley's 1978 work, *Sexual Shakedown*, describes sexual harassment as "unsolicited nonreciprocal male behavior that asserts a woman's sex role over her function as a worker."<sup>28</sup> Relying on the experiences shared with her by "working women across the nation,"<sup>29</sup> Farley characterized the purpose of sexual harassment in traditional jobs (positions typically dominated by females) against nontraditional jobs (male dominated occupations). In her view, "the function of sexual harassment in nontraditional jobs is to keep women out; its function in the traditional female sector is to keep women down."<sup>30</sup>

The roots of sexual harassment, according to Farley, are found in the rise of

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<sup>27</sup>Goldman, *The Traffic in Women*, in Red Emma Speaks: An Emma Goldman Reader (A. Shulman, ed. 1982).

<sup>28</sup>Farley, *Sexual Shakedown*, at 14 (1978).

<sup>29</sup>*Id.* at xii.

<sup>30</sup>*Id.* at 90.

American capitalism and the patriarchal society.<sup>31</sup> For decades women represented the undereducated, unskilled labor force necessary to insure profits in a free market economy controlled by the male population. These ideas of control have been perpetuated through "hiring policies that screen applicants first for sex appeal, regardless of skills and qualifications."<sup>32</sup>

Farley concludes that though legal remedies do exist, particularly Title VII, they are time consuming and do not work well. In her view, collective action by women and publication in the media are the best alternatives available to combat the problem.

The major impetus for a finding of sexual harassment as sex discrimination came with the 1979 publication of Catherine MacKinnon's *Sexual Harassment of Working Women*.<sup>33</sup> For MacKinnon, "sexual harassment, most broadly defined, refers to the unwanted imposition of sexual requirements in the context of a relationship of unequal power."<sup>34</sup> Using the then existing case law, as well as extensive interviews with victims of sexual harassment, MacKinnon asserts that:

[I]n many instances, sexual requirements are used to deny women access to 'privileges' of employment. In situations in which sexual threats and coercion shape a woman's job definition and working environment, or cases in which job-related pressures are used to coerce sexual acquiescence

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<sup>31</sup>*Id.* at 208 ("The sexual harassment of women at work arose out of men's need to maintain his control of female labor . . . the abuse maintains the age-old requirement of the Patriarchy: that women shall serve man with her labor and pay for the right to do so with her body.").

<sup>32</sup>*Id.*, at 92.

<sup>33</sup>MacKinnon, *Sexual Harassment of Working Women* (1979).

<sup>34</sup>*Id.* at 1.

or involvement, sexual harassment is a 'term' and 'condition' of work.<sup>35</sup>

For MacKinnon, this is clearly a violation of Title VII and the argument that sexual harassment is an individual expression of urges founded on the idea of biological reality is sharply criticized. Women should not be expected to face the situations presented through sexual harassment. Title VII does represent a proper means to redress the grievance and MacKinnon advocates its use.<sup>36</sup>

A third definition of sexual harassment was offered prior to the publication of the Equal Employment Opportunity Commission's 1980 Guidelines on Discrimination Because of Sex ("Guidelines").<sup>37</sup> Answering the invitation for public comment on the proposed amendment, Joan Vermuelen, as Director of the Working Women's Institute, defined sexual harassment as "any attention of a sexual nature in the context of a work situation which has the effect of making a woman uncomfortable on the job, impeding her ability to do her work, or interfering with her employment opportunities."<sup>38</sup> Lending solid support to the EEOC's effort to address the problem, Vermuelen argues that sexual harassment is more than an individual, personal problem. Rather, sexual harassment often results in psychological or physical dysfunction, striking at the core of a woman's

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<sup>35</sup>*Id.* at 208.

<sup>36</sup>*See., e.g.,* Hoyman & Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 Notre Dame L. Rev. 61 (1986); Hoyman & Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. Ill. L. Rev. 115.

<sup>37</sup>29 C.F.R. § 1604.11 (1980).

<sup>38</sup>Vermuelen, *Comments on the Equal Employment Opportunity Commission's Proposed Amendment Adding Section 1604.11, Sexual Harassment, to Its Guidelines on Sexual Discrimination*, 6 Women's Rights L. Rep. 285, 286 (1980).

productivity.<sup>39</sup> In general, sexual harassment contributes to female unemployment; specifically, economic hardship through loss of a job or denial of a promotion.

In November, 1980, the EEOC issued its Final Guidelines on sexual harassment.

In them the Commission stated that, Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.<sup>40</sup>

It has been this operative definition under which the scores of sexual harassment claims have been filed with the EEOC and to which the Supreme Court, in the *Meritor* decision, accorded deference.

## PERVASIVENESS

The efforts to establish sexual harassment as an issue relied heavily on the results of opinion surveys conducted in the late 1970's and early 1980's. One of the initial attempts to gather data took place in 1975, under the auspices of the Women's Section of Human Affairs Program at Cornell University.<sup>41</sup> Of the 155 responses to the questionnaire, 70% of the women reported personally experiencing some form of

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<sup>39</sup>*Id.* at 288 (citing Crull, *The Impact of Sexual Harassment on the Job: A Profile of the Experiences of 92 Women, Working Women's Institute Research Series, Report No. 3* (1979), a study which revealed psychological symptoms of fear, anger, decreased ambition and diminished job satisfaction; physical symptoms of nausea, headaches and weight change.).

<sup>40</sup>29 C.F.R. § 1604.11(a) (1980).

<sup>41</sup>Farley, *supra*, at note 4, 20.



harassment. While admittedly too small a group on which to base generalizations, this was the first time that the term sexual harassment was used to describe the unwanted behavior between the sexes or genders at work.

In January of 1976, *Redbook* attempted to provide the first comprehensive statistics on the issue of sexual harassment. By its own admission, *Redbook* does note that the 9,000 women who responded to the survey are a "self selected group -- meaning that women who felt strongly about this problem, probably because they had experienced it, were likelier to fill out our questionnaire than women who had escaped it."<sup>42</sup> Nonetheless, the results of the survey indicated that 9 out of 10 women had to deal with unwanted sexual overtures, leading to the conclusion that "the problem is not epidemic; it is pandemic -- an everyday, everywhere occurrence."<sup>43</sup>

In a report entitled *Sexual Harassment in the Federal Workplace: Is it a Problem?*<sup>44</sup> the U.S. Merit Systems Protection Board determined that sexual harassment affected one out of every four federal workers. Conducted over a two year period, the survey was sent to over 23,000 federal workers and generated an 85% response rate. While not condoning the situation, the Board did stress that in spite of the high affirmation of sexual harassment, many respondents who had worked elsewhere prior to joining the government did not feel the problem existed to any greater degree than in the private sector. The

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<sup>42</sup>Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, 148 *Redbook* 149, 219. (Nov. 1976).

<sup>43</sup>*Id.* at 217.

<sup>44</sup>U.S. Merit Sys. Protection Bd. Office of Merit Review and Studies, *Sexual Harassment in the Federal Workplace: Is It a Problem* (1981). (hereinafter Merit Report).

Board further estimated that the cost of sexual harassment, in terms of lost productivity and absenteeism, was approximately \$189 million.

A follow-up survey, conducted in 1987, has been reported in *U.S. News and World Report*. The incidence of sexual harassment is estimated to be approximately 42%, and "the percentages were virtually identical to those reported seven years ago. . . ." <sup>45</sup>

The most current survey to date regarding the presence of sexual harassment was undertaken in 1988 by *Working Woman*.<sup>46</sup> Questionnaires were sent to the Fortune 500 industrial and service companies, resulting in a 16% response rate. It was found that 25% of the companies received 6 or more complaints of sexual harassment each year. The companies surveyed reported that 64% of the complaints received are valid, and one-third of the companies have been subjected to a lawsuit based on alleged sexual harassment. Costs of sexual harassment are estimated to be approximately \$6.7 million per year for each company.

## CONFLICTING VIEWS

In order to successfully deal with a problem, it is imperative to achieve consensus on its definition. As previously demonstrated, sexual harassment has been defined in many ways: behaviorally, sociologically and gender-specific. Throughout all the preceding definitions, the concept of "unwanted" is clear. The difficulty remains,

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<sup>45</sup>*Hands Off at the Office*, U.S. News and World Rep., Aug. 1, 1988, at 56.

<sup>46</sup>Sandroff, *Sexual Harassment in the Fortune 500*, Working Women, December 1988, at 69.

however, in precisely distinguishing what behavior constitutes sexual harassment.<sup>47</sup>

In 1980, data from a telephone survey of approximately 1200 working men and women in Los Angeles County was analyzed to determine perception about sexual harassment. The results of the survey indicated that "women are significantly more likely than men to label sexual behaviors at work as sexual harassment."<sup>48</sup>

In 1981, a joint survey by *Harvard Business Review* and *Redbook* attempted to "measure opinions and awareness of the issues of sexual harassment in the workplace."<sup>49</sup> While the results indicate that most see sexual harassment in the context of unequal power, "the striking finding on the question of how much abuse actually takes place is the difference in perception."<sup>50</sup> Asked about the recently issued EEOC Guidelines, 51% of the male respondents found them reasonable and necessary as compared to 64% of the female respondents; 11% of the male respondents found the Guidelines to be unreasonable and very unnecessary, while only 2% of the females had the same opinion.

This idea of differing perceptions was reiterated by the Merit Systems Protection

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<sup>47</sup>See, e.g., Brewer, *Further Beyond Nine to Five: An Integration and Future Directions*, 38 J. Soc. Issues 149 (1982) (arguing that behavior construed as sexual harassment falls into one of three categories: coercive/physically intrusive, offensive verbalization, or flirtation); Pryor, *The Lay Person's Understanding of Sexual Harassment*, 13 Sex Roles 273 (1985) (arguing that sexual harassment is defined based on the social role of the alleged perpetrator, any past history of the alleged behavior and individual interpretation).

<sup>48</sup>Konrad & Gutek, *Impact of Work Experiences on Attitudes toward Sexual Harassment*, 31 Ad. Sci. Q. 422, 437 (1986).

<sup>49</sup>Collins & Blodgett, *Sexual Harassment...Some See It ...Some Won't*, 59 Harv. Bus. Rev. 76, 78. (1981).

<sup>50</sup>*Id.* at 81.

Board in reporting its findings. In its survey of the available literature through 1981, the Board found that there was no common element in the behavior construed as sexual harassment. The Board suggests that, "there have been disagreements about what constitutes sexual harassment, how widespread it is and its consequence for employees..."<sup>51</sup>

In 1987, the Graduate School of Business at Indiana State University conducted a survey of human resource practitioners at companies across the country.<sup>52</sup> Of the 1100 representatives included, 247 responded to the questionnaire. Using actual statements for cases reported or litigated, the respondents were asked to determine if the behavior listed would be considered sexual harassment. It was found that the agreement rate was the highest in those instances that a tangible benefit was included as a factor in the statement.

Obviously concerned with the increasing confusion about what action constitutes sexual harassment, the EEOC issued a 30 page notice<sup>53</sup> in November, 1988. In it, the Commission restates the findings of the courts both before and after the 1986 *Meritor* decision. The Notice is an attempt to assist in the determination of unwelcome conduct, evaluating claims of harassment and establishing employer liability.<sup>54</sup>

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<sup>51</sup>Merit Report, *supra* note 20, at 19.

<sup>52</sup>Ford & McLaughlin, *Sexual Harassment at Work*, 31 Bus. Horizons 14 (Nov. 1988).

<sup>53</sup>Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, N-915.035 (Nov. 1988).

<sup>54</sup>*Id.* at 19 (referring to the Supreme Court's *Meritor* decision which held that courts are to look to agency principles in determining employer liability, making it clear that employers do not assume automatic liability for the acts of supervisors).

Recent reports on and discussion of the occurrence of sexual harassment has focused on the idea that sexual harassment is more than just an employment problem: For many in the field of labor law, human resources and sociology, the issue of sexual harassment is inherently a social matter. Judith Vladek, a New York labor lawyer, argues that "the problem goes beyond specific incidents. . . it goes to the whole issue of women's place in society."<sup>55</sup> Invited to speak on the issue of sexual harassment in a recent discussion sponsored by *Business and Society Review*, a Vice President of Corporate Communications, having dealt extensively with the issue of sexual harassment stated that, "sexual harassment is only the visible symptom of some deeper problem in our society..."<sup>56</sup>

Perhaps the most stinging assault on the current status of sexual harassment comes from the arena of sociology. Researchers, having studied the data gathered to date, have declared the statistics unreliable at best, having been collected through "surveys of convenience."<sup>57</sup> Because the questions asked in the survey are always different, the problem is continually defined differently. They contend that, "as long as claims-makers lack empirical documentation to support their new definition of a condition as a social problem, the status quo definition will continue to dominate."<sup>58</sup> In their view, sexual

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<sup>55</sup>Fritz, *Sexual Harassment and the Working Women*, 66 *Personnel* 4 (Feb. 1989).

<sup>56</sup>Hillman, Inuzka, Ott, Manley & Bryant, *Is Sexual Harassment Still on the Job?*, 67 *Bus. & Soc. Rev.* 5 (Fall, 1988).

<sup>57</sup>Gillespie & Leffler, *The Politics of Research and Methodology in Claims-Making Activities: Social Science and Sexual Harassment*, 34 *Soc. Probs.* 490, 493 (1987).

<sup>58</sup>*Id.* at 495.

**harassment is not taken as seriously as it should be.**

## CHAPTER III

### LEGISLATIVE HISTORY OF TITLE VII AND SEX DISCRIMINATION

During the first six months of 1963, President Kennedy issued two messages to Congress calling for the enactment of federal civil rights legislation.<sup>59</sup> The first of these directives, issued February 28, 1963, provided the fundamental rationale for ending racial discrimination. "The basic reason," Kennedy wrote, "is because it is right."<sup>60</sup> While the events of the early 1960's are a matter of record, by mid-June 1963 the United States was in the throes of a "national domestic crisis,"<sup>61</sup> which made ". . . enactment of the Civil Rights Act of 1963 . . . imperative."<sup>62</sup> In his second message to Congress dated June 19, 1963, Kennedy outlined the various provisions of the proposed legislation, with particular emphasis given to fair employment regulation. It was only through an increase in jobs, education and training along with the elimination of racial discrimination that

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<sup>59</sup>1963 U.S. Code Cong. & Ad. News 1507, 1526.

<sup>60</sup>*Id.* at 1507.

<sup>61</sup>*Id.* at 1535.

<sup>62</sup>*Id.* at 1536.

other rights afforded by the law would have meaning.<sup>63</sup>

Immediately following Kennedy's message, on June 20, 1963, Rep. Emanuel Celler (D. N.Y.), Chairman of the House Judiciary Committee, introduced H.R. 7152, a comprehensive civil rights bill. So began one of the toughest legislative issues to face a modern Congress.<sup>64</sup>

From the outset, proponents of this civil rights legislation faced stiff opposition, most notably in the person of Howard W. Smith (D. Va.), Chairman of the House Rules Committee.<sup>65</sup> It is in the Rules Committee that pending bills reached the floor or became roadblocked, depending on their administrative support or lack thereof. While Smith was a Democrat, the Kennedy administration did not receive his support for the legislation being contemplated. First and foremost a state's rights politician, Smith opposed this civil rights measure as yet another attempt by the federal government to erode state regulatory power. According to Smith, it was "time, not law,"<sup>66</sup> which would end the existing practices of discrimination. It was for this reason that Smith would make every effort to obstruct passage of this legislation, as he had done in 1957 and again in 1960.<sup>67</sup>

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<sup>63</sup>*Id.* at 1531.

<sup>64</sup>*See, generally*, C. & B. Whalen, *The Longest Debate* (1985).

<sup>65</sup>*See, generally*, Dierenfield, *Keeper of the Rules* (1987).

<sup>66</sup>*Id.* at 193.

<sup>67</sup>In 1957, Smith took an unexpected vacation upon receipt from the Senate of the civil rights bill, thus delaying any further discussion on the measure. In 1960, Smith aligned fellow Democrats to vote for a liberal amendment to one section of the pending legislation, then backed Republicans to defeat the section when a full vote was taken. *See, generally*, Dierenfield, *supra* at 7, 150-153 and 169-171.



No less important was Smith's anti-labor position. Throughout his career on Capitol Hill, Smith vigorously challenged legislation favorable to labor, including such New Deal programs as the National Industrial Recovery Administration,<sup>68</sup> the National Labor Relations Act<sup>69</sup> and the Fair Labor Standards Act.<sup>70</sup> During the 1940's, Smith was one of the principle authors of the War Labor Disputes Bill (the Smith-Connolly Act)<sup>71</sup>, intended to limit the right of organized labor to strike. In the late 1950's, in light of the recent findings of the McClellan Committee concerning union corruption, Smith spearheaded a coalition favoring passage of the Landrum-Griffin Act<sup>72</sup>, aimed at controlling internal union affairs.

A second major obstacle encountered by supporters of the civil rights bill, particularly in relation to employment, is found in the checkered history of fair employment practice ("FEP") legislation<sup>73</sup>. The first inroad regarding FEP laws came in 1941 with Executive Order 8802, issued by President Franklin Roosevelt. Limited to federally sponsored programs, the Order called for "participation in the national defense

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<sup>68</sup>National Industrial Recovery Act of 1933, Pub. L. No. 67, 48 Stat. 195 (1933).

<sup>69</sup>49 Stat. 449 (1935), as amended; 29 U.S.C. §§ 151-69 (1982).

<sup>70</sup>29 U.S.C. § 201 et seq. (1982).

<sup>71</sup>Pub. L. No. 89; 57 Stat. 163 (1943).

<sup>72</sup>Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959, as amended; 29 U.S.C. §§ 401-531 (1982).

<sup>73</sup>*See, generally, Hill, The Fair Employment Practices Committee 1941-1946, in Black Labor and the American Legal System (1977).*

program . . . regardless of race, creed, color, or national origin . . ."<sup>74</sup> But the Commission established under E.O. 8802 had no enforcement power and "so it concentrated on drafting policies and conducting public hearings."<sup>75</sup> A second FEP committee was instituted by Roosevelt in 1943, bolstered by greater jurisdiction and staff members. However, its enforcement powers were still sorely lacking and its authority expired at the end of June, 1946. From 1943 until passage of the Civil Rights Act of 1964, "literally hundreds of bills were filed seeking FEP legislation at the federal level; all died, usually in the House or Senate Committee to which the bill was referred, and at times, if a bill was reported and reached the Senate floor, it died as the result of a Senate filibuster."<sup>76</sup> The need for federal FEP law was recognized, though not by everyone. Therefore, it was not until 1964 that enactment of this legislation would occur.

Finally, in considering the proposed civil rights bill, Congress would be forced to reconcile two, often conflicting, obligations: the moral and the civic. When President Kennedy sent his message to Congress in June, 1963, he asked, "every Member of Congress to set aside sectional and political ties, and to look at this issue from the viewpoint of the Nation. I ask you to look into your hearts . . . for the one plain, proud, and priceless quality that unites us all as Americans; a sense of justice."<sup>77</sup> For many Congressmen, however, justice had to be tempered with constitutionality, procedure and

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<sup>74</sup>Exec. Order No. 8802, 6 F.R. 3109 (1941).

<sup>75</sup>*Background of the FEP Law*, in *The Civil Rights Act of 1964* (1964) at 10.

<sup>76</sup>Vaas, *Title VII: Legislative History*, 7 B.C. Indus. & Com. L. Rev. 431 (1966).

<sup>77</sup>1963 U.S. Code Cong. & Ad. News 1536.

balance of power.<sup>78</sup>

It was on these grounds, therefore, that H.R. 7152 was most adamantly debated; and of the ten titles contained in the bill, none received as much attention as Title VII. While Congress was willing to accept the challenge offered by President Kennedy, the unprecedented movement into the arena of private employment made that invitation even more difficult.

Title VII of H.R. 7152 called for equal employment opportunity and outlined the unlawful employment practices based on "race, color, religion, or national origin."<sup>79</sup> In addition, Title VII called for the establishment of an Equal Employment Opportunity Commission which "must confine its activities to correcting abuse, not promoting equality with mathematical certainty."<sup>80</sup> Title VII also required settlement of claims through trials *de novo*, leaving the proposed Commission with little enforcement powers.

It was not until January, 1964, that the House Rules Committee began public

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<sup>78</sup>Additional Views of Hon. George Meader. ("Congress has an obligation to carry out national policy with respect to civil rights . . . But the Congress should not attempt to violate other constitutional provisions . . . it should not seek to destroy protections of citizens guaranteed by the Bill of Rights."); Additional Views of Hon. Arch A. Moore, Jr. ("civil rights is the foremost issue of our times. But, to attempt to enact legislation in the heavyhanded and politically motivated manner that is presently being attempted is a disservice to the democratic process . . ."); Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152. ("The reported bill is not a 'moderate' bill and it has not been 'watered down.' It constitutes the greatest grasp for executive power conceived in the 20th century.") House Judiciary Committee Report No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* U.S. Equal Employment Opportunity Commission, 1 Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 2043, 2062, 2064 (undated) [hereinafter referred to as "Leg. Hist."]

<sup>79</sup>Leg. Hist., at 2010.

<sup>80</sup>*Id.* at 2150.

debate on the proposed legislation. Under the deft leadership of Rep. Smith, H.R. 7152 was ignored for the last six weeks of 1963, until Congressional pressure was such that Smith was forced to consider "this nefarious bill."<sup>81</sup> During the period from January 31, 1964 to February 10, 1964, no less than 47 amendments to Title VII were suggested, of which 18 were accepted.<sup>82</sup> As originally submitted, the House Judiciary Committee report to accompany H.R. 7152 stated "the purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."<sup>83</sup>

The question of sex discrimination did not reach the House floor until February 8, 1964, and was introduced by Rep. Smith as an attempt to defeat the bill. According to fellow Rules Committee member, Carl Elliott (D. Ala.), "Smith didn't give a damn about women's rights, black rights, equality. He was trying to knock off votes either then or down the line because there was always a hard core of men who didn't favor women's rights."<sup>84</sup> Motive nonetheless, the amendment stirred debate for two days, and led to "women's afternoon"<sup>85</sup> in the House chambers. The basic disagreement centered

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<sup>81</sup>Dierenfield, Keeper of the Rules at 192.

<sup>82</sup>Leg. Hist., apps. 1 - 3.

<sup>83</sup>*Id.* at 2026.

<sup>84</sup>Oberdorfer, *'Judge' Smith Moves with Deliberate Drag*, New York Times Magazine, Jan. 12, 1964 at 85.

<sup>85</sup>Leg. Hist. at 3221 (Statement of Rep. E. Green).

on the belief that by including sex as a prohibited category of discrimination, the legislation aimed at protecting the rights of the black population would have less meaning. Though the problems facing women in the workplace were a matter of concern at the time,<sup>86</sup> uppermost in the minds of the House members was "our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country."<sup>87</sup> Perhaps the strongest argument against adding sex to the legislation came from a report issued by the President's Commission on the Status of Women. Referred to in a letter from the Department of Labor, it was determined that "discrimination based on sex . . . involves problems sufficiently different from discrimination based on other factors listed to make separate treatment preferable."<sup>88</sup>

A third argument against adding sex to list of proscribed categories was grounded on the idea that adequate support for the amendment had not been demonstrated. According to Rep. Edith Green (D., OR):

May I say, Mr. Chairman, to the best of my knowledge, there was not one word of testimony in regard to this amendment given before the Committee on the Judiciary of the House or before the Committee on Education and Labor of the House, where this bill was considered. I repeat -- there was not one single bit of testimony given in regard to this amendment. There was not one single organization in the entire United States that petitioned

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<sup>86</sup>In 1961, President Kennedy established the President's Commission on the Status of Women, charged with the responsibility of reviewing the "differences in the legal treatment of men and women in regard to political and civil rights," as well as providing recommendations for "additional affirmative steps which should be taken through legislation, executive or administrative action to assure nondiscrimination on the basis of sex and to enhance constructive employment opportunities for women." Exec. Order No. 10980, 26 F.R.12059, *reprinted in* 1961 U.S. Code Cong. & Ad. News, 4252.

<sup>87</sup>Leg. Hist. at 3222 (Statement of Rep. E. Green).

<sup>88</sup>*Id.* at 3214. (Statement of Rep. E. Celler).

either one of these committees to add this amendment to the bill. There was not one single Member of the House who came to the Committee on Education and Labor or who came to the Committee on the Judiciary and offered such an amendment.<sup>89</sup>

Notwithstanding the debate, the sex discrimination amendment passed the House by a vote of 168 to 133.<sup>90</sup> Regardless of the "considerable confusion"<sup>91</sup> of that day, the majority of the House that voted on the issue appeared to agree that "the addition of that little, terrifying word 's-e-x' will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive. It will make it logical. It will make it right."<sup>92</sup> Following the adoption of the sex discrimination revision, the House voted to allow sex discrimination in those instances where sex is a *bona fide* occupational qualification "reasonably necessary to the normal operation of that particular business or enterprise."<sup>93</sup>

H.R. 7152 was sent to the Senate on February 17, 1964 where the questions of procedure were hotly contested.<sup>94</sup> The bill did not reach the Senate floor for consideration until March 30, 1964 which began a filibuster lasting until cloture was voted on June 10,

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<sup>89</sup>*Id.* at 3223. (Statement of Rep. E. Green).

<sup>90</sup>*Id.* at 3228.

<sup>91</sup>*Id.* at 3229.

<sup>92</sup>*Id.* at 3221. (Statement of Rep. St. George).

<sup>93</sup>§ 703(e), 42 U.S.C. § 2000e-2(e).

<sup>94</sup>Vaas, *Title VII*, at 444 argues, "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history,' or with greater care in the making thereof, to guide the courts in interpreting and applying the law."

1964. Throughout this period, bipartisan support for the bill was generated through the able direction of Senators Humphrey, (D. Minn.) Dirksen (R. Ill.) and Kuchel (R. Cal.). Working with House leaders and the Justice Department, the Senators attempted to insure that amendments accepted in the Senate would survive any additional changes in the House. In the debate that ensued, the Senate considered 24 amendments to Title VII, of which five were adopted.<sup>95</sup>

The discussion concerning sex discrimination was virtually non-existent in the Senate, save for some remarks made by Sen. Dirksen in a memorandum to the floor managers of the bill.<sup>96</sup> What little dialogue there was regarding this part of the legislation finally enacted was intended purely as a matter of clarification. Offered by Senator Bennett (R. Utah), an amendment was submitted because "I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act."<sup>97</sup> The Bennett amendment<sup>98</sup> was agreed to and consequently allowed for wage differentials based on sex where such disparity in

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<sup>95</sup>Leg. Hist., apps. 7 & 8.

<sup>96</sup>In addition to numerous questions regarding recordkeeping requirements, state laws and seniority, Dirksen expressed his concerns on sex discrimination. He maintained that, "frankly, I always like to discriminate in favor of the fairer sex. I hope that the might of the Federal Government will not enjoin me from such discrimination." Senator Clark, (D., Pa.) assured Dirksen that the BFOQ provision would continue to allow protective discrimination for women. Leg. Hist. at 3013.

<sup>97</sup>Leg. Hist. at 3233; The Equal Pay Act, 29 U.S.C. § 206(d), was passed in 1963 as an amendment to the Fair Labor Standards Act. Under this law, pay differentials for substantially similar work were prohibited absent certain conditions authorizing any disparity.

<sup>98</sup>The Bennett Amendment became § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

wages is authorized by the Fair Labor Standards Act.

In attempting to delineate the role of the Equal Employment Opportunity Commission, which would be set up to enforce the Act,<sup>99</sup> the Senate had the goal of "allaying the fear that the EEOC would develop into another expensive octopus like the NLRB . . ."<sup>100</sup> To that end, Sections 705 and 706 expressly stated the jurisdiction and enforcement powers of the Commission.<sup>101</sup> Under the Senate version of H.R. 7152, the EEOC could establish state and regional offices "as it deems necessary to accomplish the purposes of this title."<sup>102</sup> The EEOC was not, however, granted any further enforcement powers. The role of the Commission was "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."<sup>103</sup>

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<sup>99</sup>At the time the Act was being debated, 25 states and Puerto Rico had mandatory FEP laws. The first of these laws were passed in New York as early as 1945. *See, generally*, Bureau of National Affairs, *State Fair Employment Laws and Their Administration* (1964). Recognizing the importance of these laws, § 706(c)(d) and (e) required exhaustion of state remedies prior to proceeding with a charge through the EEOC. For a detailed judicial discussion concerning the interplay of state and federal discrimination laws, *see*, *Mohasco v Silver*, 447 U.S. 807 (1980) and *Kremer v Chemical Constructors*, 456 U.S. 461(1981). *See, also*, Garbutt, *Rights, Remedies and Procedures Under Illinois Law*, (1984).

<sup>100</sup>Vaas, "Title VII," 450.

<sup>101</sup>The EEOC was granted power to investigate, determine reasonable cause and where reasonable cause was found, to attempt settlement. (This lack of enforcement power created a 'toothless tiger.' *See*, Hunter & Branch, *Equal Employment Opportunity's: Administrative Procedures and Judicial Developments Under Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972*, 18 *How. L. J.* 543, 543 (1975).

<sup>102</sup>§ 705, 42 U.S.C. § 2000(e)-4(f).

<sup>103</sup>§ 706, 42 U.S.C. § 2000-e 5(b).



Failing this, the Commission would notify the complainant that it found reasonable cause for a violation and that the aggrieved party could sue the charged party in federal court. The Senate further modified H.R. 7152 by granting the Commission the authority to "refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party . . ." <sup>104</sup> and to provide counsel and assistance when necessary.

Having completed its examination of and amendments to the House version of the civil rights bill, the Senate referred the bill back to the House on June 30, 1964. Passed by a final vote of 289 - 126, <sup>105</sup> the Civil Rights Act of 1964 was signed by President Johnson on July 2, 1964. After months of struggle, Congress had accomplished the virtually impossible task of uniting the myriad political, social and moral contingencies into an omnibus piece of legislation. To be sure, legislation of this nature and magnitude was not without its critics. However, "while not the final answer - that lies in men's hearts - Title VII nevertheless makes an honest attempt to strike at the vicious circle of poverty and ignorance, which is the crux of discrimination." <sup>106</sup>

In 1972, Congress amended the Civil Rights Act because "the persistence of discrimination, and its detrimental effects require a reaffirmation of our national policy of

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<sup>104</sup>§ 705, 42 U.S.C. § 2000e-4(g)(6).

<sup>105</sup>Leg. Hist. at 11.

<sup>106</sup>Blakey, *Discrimination, Unions, and Title VII*, America 111, 212 (1964).

equal opportunity in employment."<sup>107</sup> Citing the "heroic effort"<sup>108</sup> of the EEOC, Congress recognized the need to substantially increase the enforcement powers of the Commission in order to deal with charges of discrimination.<sup>109</sup> Toward that end, the House Committee on Education and Labor introduced H.R. 1746 on June 2, 1971 with recommendations that the bill be passed.

Originally, the reported measure granted the EEOC the power to issue cease and desist orders. In addition, the functions of the Office of Federal Contract Compliance Programs (OFCCP) and the authority of the Attorney General in practice or pattern suits would be transferred to the Commission. This proposal, however, met with some disapproval. Chief among the critiques was that an extension of EEOC jurisdiction, in the form of consolidation with the OFCCP and the Attorney General's office, would hinder its enforcement capabilities, regardless of the cease and desist authority that was suggested. Based on Rep. Erlenborn's (R., IL) substitute amendment, the House voted not to grant cease and desist power, but rather to allow the EEOC to bring civil suits in federal court when conciliation efforts failed. In addition, though the functions of the Attorney General's office in practice or pattern cases was transferred to the Commission, the OFCCP remained a separate entity. The bill was passed in the House on September

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<sup>107</sup>Report to Accompany H.R. 1746, June 2, 1971 reprinted in *The Equal Employment Opportunity Act of 1972* (1973): 157.

<sup>108</sup>*Id.* at 157.

<sup>109</sup>*See, generally, Levin & Montcalmo, The Equal Employment Opportunity Commission: Progress, Problems, Prospects*, 22 *Lab. L.J.* 771 (1971) and *Controversy over the Enforcement Role of the U.S. Equal Employment Opportunity Commission*, 50 *Cong. Dig.* 257 (1971).

16, 1971.

In the Senate, the debate on Title VII was also centered on the enforcement powers of the EEOC. The Senate Labor Committee Report stated that "despite the national commitment of Congress to the goal of assuring equal employment opportunity for all our citizens, the machinery created by the Civil Rights Act of 1964 is not in all respects equal to that commitment."<sup>110</sup>

The Senate viewed Title VII as a failure<sup>111</sup> not because its objectives were unsound, but rather because there was no method under which those objectives could be achieved more fully. To combat this problem, the Senate, like the House, voted to authorize the EEOC to bring civil suit against a charged party under the terms of the various provisions of the Act.

Unlike the Congress in 1964, there was no substantial debate concerning the matter of sex discrimination. Both Houses, in 1972, acknowledged that women faced many problems in the workplace. According to the House Labor Committee, "women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."<sup>112</sup> The problems

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<sup>110</sup>*Id.* at 228.

<sup>111</sup>In discussing a need for the amendments, the Senate Labor Committee Report argued that "the resulting impasse between the EEOC and the employer has played a large part in the present failure of Title VII." *Id.* at 229.

<sup>112</sup>*Id.* at 159. The Senate issued an almost verbatim opinion regarding the issue of women's rights, referring to the belief that these matters are often viewed as "frivolous divertissements." at 229.

noted, however, usually dealt solely with matters of compensation and position differentials.

As approved on March 24, 1972, the Equal Employment Opportunity Act,<sup>113</sup> amending Title VII of the Civil Rights Act of 1964 contained several other changes, most notably in coverage, exemptions and federal employment. What the revised statute did not do, however, was to definitively clarify the meaning of the term 'discrimination.' Though the objective of both the 1964 Act and its 1972 amendments was to end discrimination in employment, no definition of the nomenclature was included in either piece of legislation. In 1964, an interpretive memorandum on Title VII was issued by Senators Clark (D., PA) and Case (R., NJ) in which they stated:

It has been suggested that the concept of discrimination is vague. In fact, it is clear and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.<sup>114</sup>

Based on the history of Title VII, particularly during the 88th Congress, there was neither a Senate Committee Report nor a joint Senate-House Conference Report issued. Therefore, "with these usual guides to legislative intent missing,"<sup>115</sup> it would become the

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<sup>113</sup>P.L. 92-261, Committee Print.

<sup>114</sup>Leg. Hist., at 3042.

<sup>115</sup>*Id.* at 3001. The lack of legislative history on the inclusion of 'sex' as a prohibited form of discrimination has been noted by the courts on numerous occasions. *See, e.g.,* Gilbert v U.S., 429 U.S. 125, 143 (1976) ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity."); Meritor Savings Bank, FSB v Vinson, 106 S.Ct. 2399, 2404 (1986) ("we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex'"); Commentators have argued that "[t]he sex amendment can best be described as

responsibility of the court system to determine exactly what action constituted a violation in the "compensation, terms, conditions, or privileges of employment."<sup>116</sup>

In 1971, Judge Goldberg of the 5th Circuit stated:

Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstructive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events . . . [b]ut today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.<sup>117</sup>

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an orphan, since neither the proponents nor the opponents of Title VII seem to have felt any responsibility for its presence in the bill. It is somewhat misleading, therefore, to speak of an "intent of Congress" with respect to its application, and the Commission and the courts will have to wrestle with the problems as best they can." Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 62 (1964).

<sup>116</sup>§ 703(a), 42 U.S.C. § 2000(e), et. seq.

<sup>117</sup>Rogers v EEOC, 454 F.2d 234, 238 (1971).

## CHAPTER IV

### JUDICIAL & ADMINISTRATIVE INTERPRETATION OF SEXUAL HARASSMENT CLAIMS UNDER TITLE VII

A review of early lower court cases of sexual harassment argued under Title VII reveal several judicial interpretations of the sex discrimination prohibition of the Act. District courts basically attempted to address whether sexual harassment constituted a violation of the law,<sup>118</sup> and if so, would the employer be liable for this violation.<sup>119</sup> In wrestling with the issues presented in a sexual harassment claim, the plaintiff had to prove that these incidents were violations of the law and not fundamentally personal matters between employees.<sup>120</sup>

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<sup>118</sup>See *infra* notes 121-125 and accompany text.

<sup>119</sup>See *infra* notes 126-129 and accompanying text.

<sup>120</sup>See, e.g., *Barnes v Train*, 13 Fair Empl. Prac. Cases (BNA) 123, 124 (D.D.C. 1974) ("This is a controversy underpinned by the subtleties of an inharmonious personal relationship."); *Heelan v John's-Manville*, 451 F. Supp. 1382, 1388 (D. Colo. 1978) (Recovery necessitates proof that actions were not an isolated attempt to establish a personal relationship).

In one of the first reported cases, *Barnes v Train*,<sup>121</sup> Plaintiff Paulette Barnes alleged that she was dismissed from her position with the Environmental Protection Agency for rebuffing her superior's sexual advances. The District Court for the District of Columbia stated that "conduct of the supervisor, regardless of how inexcusable it might have been, does not evidence arbitrary barriers to continued employment."<sup>122</sup>

In a second case, *Corne v Bausch & Lomb*,<sup>123</sup> plaintiffs argued that repeated verbal and physical abuse forced them to leave their positions with the employer. The District Court dismissed the complaint stating that the alleged behavior served no purpose for the employer and was not part of company policy. Rather, the court said that this "conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism . . . satisfying a personal urge."<sup>124</sup> The judge further expressed his concern for granting relief on the basis that "holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employer made amorous or sexually oriented advance toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual."<sup>125</sup>

The notion of employer policy and individual behavior was reiterated in *Miller v*

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<sup>121</sup>13 Fair Empl. Prac. Cases (BNA) 123 (D.D.C. 1974).

<sup>122</sup>*Id.* at 124.

<sup>123</sup>390 F. Supp. 161 (D. Ariz. 1975).

<sup>124</sup>*Id.* at 163.

<sup>125</sup>*Id.*

*Bank of America*,<sup>126</sup> in which plaintiff Margaret Miller claimed that her male supervisor "promised her a better job if she would be sexually 'cooperative' and caused her dismissal when she refused."<sup>127</sup> Here, Judge Williams questioned "whether Title VII was intended to hold an employer liable for what is essentially the isolated and unauthorized sex misconduct of employee to another."<sup>128</sup> The judge further reasoned that the employer would not be liable for the supposed actions as there was no company policy which "imposes or permits a consistent, as distinguished from isolated, sex-based discrimination on a definable employee group."<sup>129</sup>

## RECOGNITION OF A VIOLATION

The first case to establish sexual harassment as sex discrimination is found in *Williams v Saxbe*.<sup>130</sup> Initially, the circumstances surrounding the plaintiff's charges were handled through an internal hearing. When brought to court, two issues arose for decision. The court attempted to resolve (1) whether retaliatory action<sup>131</sup> by the plaintiff's

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<sup>126</sup>418 F. Supp. 233 (N.D. Cal. 1976).

<sup>127</sup>*Id.* at 234.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.* at 236.

<sup>130</sup>413 F. Supp. 654 (D.D.C. 1976).

<sup>131</sup>*Id.* at 655-656. (Plaintiff contended that following her refusal of her supervisor's sexual advances, he "engaged in a continuing pattern and practice of harassment and humiliation of her, including but not limited to, unwarranted reprimands, refusal to inform her of matters for the performance of her responsibilities, refusal to consider her proposals and recommendations, and refusal to recognize her as a competent professional in her field.").



supervisor, based on the plaintiff's rejection of the supervisor's sexual advances, constituted a violation of Title VII and (2) the manner in which the court should review the findings in the administrative record. The court squarely rejected the defendant's claim that there was no cause of action because the alleged behavior was not a company policy. While noting that a factual determination regarding company policy as opposed to individual action was necessary, the court did state that "if this was a policy or practice of plaintiff's supervisor, then it was the agency's policy or practice, which is prohibited by Title VII."<sup>132</sup> The court rendered judgement for the plaintiff, although on appeal the case was remanded for trial *de novo*, consistent with the provisions of Title VII.

Following the district court's ruling in the *Williams* case, the appellate court began to rule more favorably for victims of sexual harassment. In its *per curiam* decision in *Garber v Saxon Business Products*,<sup>133</sup> the court reversed the district judge's order for dismissal based on lack of cause. Stating that "the complaint and its exhibits, liberally construed, allege an employer policy or acquiescence in a practice of compelling female employees to submit to the sexual advances of their male supervisors in violation of Title VII."<sup>134</sup> The case, therefore, was remanded for further proceedings.

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<sup>132</sup>*Id.* at 660.

<sup>133</sup>552 F.2d. 1032 (4th Cir. 1977).

<sup>134</sup>*Id.*

The District of Columbia Circuit, in *Barnes v Costle*,<sup>135</sup> overturned the district court's dismissal of *Barnes v Train*.<sup>136</sup> Circuit Judge Robinson contended that, ". . . she became the target of her supervisor's sexual desires because she was a woman, and was asked to bow to his demands as a price for holding her job."<sup>137</sup> Following a review of the legislative histories of the Civil Rights Act of 1964 and its 1972 amendments concerning sex discrimination, the court concluded that "it is much too late in the day to contend that Title VII does not outlaw terms of employment for women which differ appreciably from those set for men, and which are not genuinely and reasonably related to performance on the job."<sup>138</sup>

The Third Circuit, in *Tomkins v Public Service Electric & Gas Co.*<sup>139</sup> outlined the two elements necessary to state a cause of action for sexual harassment under Title VII. Accepting the facts established as true, the court found that Appellant Tomkins was forced to acquiesce to the sexual demands of her superior as a condition of employment. Secondly, this condition of employment was based on sex. Holding this as a violation of Title VII, the court found for the appellant and remanded the case for additional proceedings.

The Ninth Circuit addressed the issue of sexual harassment in the appeal of *Miller*

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<sup>135</sup>561 F.2d. 983 (D.C. Cir. 1977).

<sup>136</sup>*Supra* at note 121.

<sup>137</sup>561 F.2d at 990.

<sup>138</sup>*Id.* at 989-990.

<sup>139</sup>568 F.2d. 1044 (3rd Cir. 1977).

*v Bank of America*.<sup>140</sup> Rejecting the lower court's opinion that the Defendant-Appellee Bank of America should not be held liable for the sexual harassment by one of its supervisors because of the plaintiff-appellant's failure to use the company grievance procedure, the court ruled that, " while Congress has established certain preconditions to suit, it has not established use of the employers personnel procedures as such a precondition. "<sup>141</sup>

### EEOC GUIDELINES

In April, 1980, the EEOC announced that it would amend its Guidelines on sex discrimination in order to "re-affirm that sexual harassment is an unlawful employment practice."<sup>142</sup> Of the numerous letters received during the public comment period, the majority of remarks concerned § 1604.11 (c) which established employer liability for sexual harassment.<sup>143</sup>

Disagreeing with the contention that "liability under this section is too broad and

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<sup>140</sup>600 F.2d. 211 (9th Cir. 1979).

<sup>141</sup>*Id.* at 214.

<sup>142</sup>45 Fed. Reg. 25,024 (1980).

<sup>143</sup>Under § 1604.11(c) "an employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."

unsupported by case law,"<sup>144</sup> the EEOC stated that:

[T]he strict liability imposed in § 1604.11(c) is in keeping with the general standard . . . the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates Title VII, regardless of knowledge or any other mitigating factor.<sup>145</sup>

For some, the Guidelines represented a concerted effort to eliminate sexual harassment from the workplace.<sup>146</sup> Others, however, disagreed.<sup>147</sup> In response to the controversy, then Vice-Chairman of the EEOC, Daniel Leach, stated:

Sexual harassment was an issue in the workplace long before the Commission issued its voluntary guidelines . . . the EEOC was late in getting into the fray . . . [E]mployers don't like knowing that they are liable for these kind of things and they point the finger at the EEOC, but

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<sup>144</sup>45 Fed. Reg. 74,676 (1980).

<sup>145</sup>*Id.*

<sup>146</sup>*See, e.g.,* Ledgerwood & Johnson-Dietz, *The EEOC's Bold Foray into Sexual Harassment on the Job: New Implications for Employer Liability*, 33 Ind. Rel. Research A. 55, 61 (1980) ("Sexual harassment undermines the integrity of the workplace. The courts as well as the EEOC recognize this as a reality and appear determined to extirpate sexual harassment from the American workplace."); Martin, *EEOC's New Sexual Harassment Guidelines: Civility in the Workplace*, 5 Nova L.J. 405, 418 (1981) ("With its guidelines on sexual harassment, EEOC takes a large step toward making us aware that sexual harassment is a persistent problem.").

<sup>147</sup>William Knapp, labor law attorney for the U.S. Chamber of Commerce, argued that the Guidelines go "beyond the reach of the law to cover interpersonal relationships," and serve only to confuse the issue of liability. 120 Empl. Prac. Rep. (CCH) (October 10, 1980).; *See, also,* Karnes, *Sexual Harassment: New Guidelines, New Cases, New Problems*, 7 EEO Today 159, 160 (1980) ("[I]t is not very comforting that guidelines would confer absolute liability on the employer for discriminatory acts of supervisors regardless of whether the employer knew of the supervisor's acts.").

I suggest that they are wrong. It is the courts who have made this judgment.<sup>148</sup>

## JUDICIAL RESPONSE

The idea of hostile work environment sexual harassment as a violation of Title VII reached the D.C. Circuit in *Bundy v Jackson*.<sup>149</sup> Here, the court held that the violation of the sex discrimination prohibition includes a hostile work environment based on sexual harassment which "follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible benefits."<sup>150</sup> In remanding the case to the lower court, Judge Wright suggested that the Guidelines be used as a reference in determining relief to the plaintiff. Noting that the "goal of the Guidelines is *preventive*,"<sup>151</sup> the court should help "ensure that such corrective action never becomes necessary."<sup>152</sup>

The Eleventh Circuit fully elaborated on the distinction between a hostile environment claim of sexual harassment and those claims considered "quid pro quo" harassment. In *Henson v City of Dundee*<sup>153</sup> the plaintiff charged that she was the victim

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<sup>148</sup>Bureau of National Affairs, *Sexual Harassment and Labor Relations* (1981) at 6.

<sup>149</sup>24 Fair Empl. Prac. Cases (BNA) 1155 (D.C. Cir. 1981).

<sup>150</sup>*Id.* at 1160 (citing *Rogers v EEOC*, 454 F.2d at 238).

<sup>151</sup>*Id.* at 1161.

<sup>152</sup>*Id.*

<sup>153</sup>682 F.2d. 897 (11th Cir. 1982).

of both hostile environment<sup>154</sup> and quid pro quo harassment.<sup>155</sup> In its ruling on the hostile environment claim, the court found that ". . . a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."<sup>156</sup>

When addressing the issue of "quid pro quo" harassment, the court defined it as a situation in which "the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee."<sup>157</sup> Testimony and evidence presented at the district level caused the Circuit Court to rule that Plaintiff Henson did in fact suffer the loss of a tangible job benefit (attendance at the police academy) for her refusal of a sexual relationship with her supervisor.

The *Henson* decision is also important in that it delineated those circumstances under which an employer is held liable for the sexual harassment of its supervisor. In the charge of hostile environment harassment, the court found that the employer should not be liable because "the capacity of any person to create a hostile or offensive environment is not necessarily enhanced or diminished by any degree of authority which

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<sup>154</sup>*Id.* at 899. Plaintiff contends that she and a coworker were "subjected [them] to numerous harangues of demeaning sexual inquiries and vulgarities throughout the course of the two years "and that her supervisor "repeatedly requested that she have sexual relations with him."

<sup>155</sup>Plaintiff alleged that she, unlike male coworkers, was denied the benefit of attending the police academy solely because she refused a sexual relationship with her supervisor.

<sup>156</sup>*Id.* at 902.

<sup>157</sup>*Id.* at 910.

the employer confers upon that individual."<sup>158</sup> In determining employer liability for the "quid pro quo" harassment the court upheld the *respondeat superior*<sup>159</sup> theory of liability. Here, the court held that in denying Henson the benefit of attending the police academy, her supervisor "act[ed] within at least the apparent scope of the authority entrusted to him by the employer [and] his conduct can fairly be imputed to the source of his authority."<sup>160</sup>

## THE SUPREME COURT DECISION

It was in the October, 1985 term that the Supreme Court agreed to hear the matter of sexual harassment. The decision reached by the Court in *Meritor Savings Bank, FSB v Vinson*<sup>161</sup> is at once both gratifying and "as troubling as sexual harassment itself."<sup>162</sup> While the Court firmly established both quid pro quo and hostile work environment sexual harassment violations of Title VII, its reasoning in the case raised as many questions as it attempted to answer.<sup>163</sup>

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<sup>158</sup>*Id.*

<sup>159</sup>*Id.*, at 909. The court stated that "in a typical Title VII case, an employer is held liable for the discriminatory acts of its supervisors which affect the tangible benefits of an employee. *See, also*, Sparks v Pilot Freight Carriers, 830 F.2d. 1554 (11th. Cir. 1987); Schroeder v Schock, 42 Fair Empl. Prac. Cases (BNA) 1112 (D. Kans. 1986).

<sup>160</sup>*Id.* at 910.

<sup>161</sup>106 S.Ct. 2399 (1986).

<sup>162</sup>Dodier, *Meritor Savings Bank v Vinson: Sexual Harassment at Work*, 10 Harv. Women's L.J. 203, 205 (1987).

<sup>163</sup>The Court definitively answered four questions: (1) hostile work environment sexual harassment is as much a violation of Title VII as "quid pro quo" harassment; (2) the standard under which a hostile environment claim is actionable depends upon the severity and pervasiveness of the sexual harassment; (3) evidence of a plaintiff's speech or dress is not inadmissible; (4) policies against and grievance procedures for sexual harassment do not shield the employer from liability. Left unanswered were the following: (1) how

When this case was first presented in district court,<sup>164</sup> the following facts were established and credited: Plaintiff, Mechelle Vinson, was hired by Defendant, Sidney Taylor, in early September, 1974. Thereafter, and through September, 1978, Vinson received three promotions "based solely on her merit as an employee."<sup>165</sup> Vinson took an extended leave of absence beginning in September 1978 and was dismissed on November 1, 1978 for excessive use of sick time. This action was brought by Vinson against Taylor and the employer for violations of Title VII. Unresolved at trial were Vinson's allegations that Taylor began making sexual advances towards her starting in May, 1975 and continuing through September, 1977.<sup>166</sup> Taylor denied all allegations against him, claiming they were made in response to a separate, unrelated business dispute. The bank disclaimed any liability, arguing that even if the sexual advances were made, the bank neither approved nor knew of such activities.

The district court concluded that Vinson was not the victim of either sexual harassment or sex discrimination. That Vinson suffered no loss of economic benefit negated her claim under Title VII. In addition, the court reasoned that "if the plaintiff and Taylor did engage in a sexual relationship during the time of plaintiff's employment

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does a plaintiff prove the conduct was unwelcome?; (2) what evidence of plaintiff's speech or dress is relevant to the question of unwelcomeness?; (3) what is the rule on employer liability?

<sup>164</sup>23 Fair Empl. Prac. Cases (BNA) 37 (D.C. 1980).

<sup>165</sup>*Id.* at 38.

<sup>166</sup>Vinson contends that during this period, Taylor fondled her in front of co-workers, had intercourse with her between 40 and 50 times and forcibly raped her on more than one occasion.



with Capital, that relationship was a voluntary one."<sup>167</sup>

On appeal,<sup>168</sup> the District of Columbia Circuit reversed the lower court decision for its failure to address the issue of hostile work environment sexual harassment. Citing its earlier ruling in *Bundy*, the Court of Appeals found that Vinson was indeed the victim of sex discrimination under Title VII. The court further held that the district judge erred in allowing testimony regarding Vinson's sexual fantasies and dress, matters which "had no place in this litigation."<sup>169</sup> The appellate decision also looked to the Guidelines issued by the EEOC and found the bank, as the employer, liable for the violations committed by Taylor. In accord with its decision, the case was remanded for further proceedings.

The Supreme Court granted certiorari in 1985, after a rehearing en banc<sup>170</sup> was denied. Relying on prior decisions regarding hostile environment based on race,<sup>171</sup> religion,<sup>172</sup> and national origin<sup>173</sup> the Court stated that "nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise

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<sup>167</sup>*Id.* at 42. The court's conclusion that the relationship was a voluntary one was based on the fact that participation had nothing to do with Vinson's continued employment or promotions at the bank.

<sup>168</sup>753 F.2d. 141 (D.C. Cir. 1985).

<sup>169</sup>*Id.* at 146.

<sup>170</sup>760 F.2d 1330 (1985).

<sup>171</sup>Firefighters Institute for Racial Equality v St. Louis, 549 F.2d. 506 (8th Cir.).

<sup>172</sup>Compston v Borden, Inc., 424 F.Supp. 157 (S.D. Ohio 1976).

<sup>173</sup>Cariddi v Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977).

prohibited."<sup>174</sup> The Court also deferred to the EEOC Guidelines which held both quid pro quo and hostile environment sexual harassment as violations of Title VII.

Cautioning that not all behavior described as harassment gives rise to a Title VII claim, the Court rejected the district court's view of voluntariness and referred to the Guidelines' requirement of 'unwelcomeness.' To determine whether alleged behavior is welcome or not, the Guidelines call for an investigation of "the context in which the alleged incidents occurred."<sup>175</sup> Based on this criteria, the Supreme Court disagreed with the circuit court and held that testimony regarding the "complainants sexually provocative speech or dress . . . is obviously relevant."<sup>176</sup>

On the question of employer liability, the Court said that it would "decline the parties' invitation to issue a definitive rule."<sup>177</sup> In making this decision, the Court turned away from the EEOC Guidelines and looked instead to the amicus brief filed by the Commission. Here, the Solicitor General argued that the employer should be held responsible for the sexual harassment by its supervisor's when that supervisor is acting

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<sup>174</sup>106 S.Ct. at 2405.

<sup>175</sup>29 C.F.R. 1604.11(b).

<sup>176</sup>106 S.Ct. at 2406.

<sup>177</sup>*Id.* at 2408.

within the scope of his authority.<sup>178</sup> The Guidelines, however, do not place this limitation on liability. Rather, the Guidelines hold that "an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence."<sup>179</sup>

Although he concurred with the majority opinion in the *Meritor* case, Justice Marshall stated that "the Solicitor General's position is untenable."<sup>180</sup> In Marshall's view, this case should utilize "the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave 'notice' of the offense."<sup>181</sup>

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<sup>178</sup>Supervisors not acting within the scope of their authority may be held personally liable for discriminatory actions. *See, e.g., Kyriazi v Western Electric Co.*, 476 F. Supp. 35 (D. N.J. 1979); For related articles on this subject, *see, generally, Munchus, Personal Legal Liability of Managers Under Employment Discrimination Law: Some Historical Case Observations*, 3 Acad. Mgmt Exec. 246 (1989); Axford, *Personal Liability of Personnel Managers*, 11 Empl. Rel. Today 86 (1984).

<sup>179</sup>29 C.F.R. 1604.11(c).

<sup>180</sup>106 S.Ct. at 2410.

<sup>181</sup>*Id.* at 2411. Justice Marshall's opinion was similar to that invoked by Members of Congress in its amicus brief. Here, the Committee on Education and Labor suggested that the employer be held liable for sexual harassment under the same legal standards as racial, ethnic or religious harassment. *See, generally, Brief of Amici Curaie Members of Congress in Support of Respondent, Meritor Savings Bank, FSB v Vinson*, 106 S.Ct. 2399 (1986) (No. 84-1979).

Both the Supreme Court's reasoning and the EEOC's position in the *Meritor* case presented many questions. First, the EEOC, concerned with the notion that "sexual attraction is a fact of life, and it may often play a role in the day-to-day social exchange between employees in the workplace,"<sup>182</sup> has erroneously likened 'attraction' to 'harassment'. This is the same argument used by the district court in *Miller v Bank of America*, where it dismissed the Plaintiff's Title VII claim on the theory that "the attraction of males to females . . . is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions."<sup>183</sup>

Second, the EEOC created new standards for employer liability "in some tension"<sup>184</sup> with its Guidelines. This poses yet another issue for the court system to address in sexual harassment cases. While no unequivocal endorsement of the EEOC's position was rendered, the Supreme Court suggested that courts look to agency principles<sup>185</sup> in determining whether a supervisor acted within or outside the scope of his employment. Thus, an employer may be relieved of liability for sexual harassment even though a cause of action has been recognized. By providing an avenue for exceptions to

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<sup>182</sup>Brief for the United States and the Equal Employment Opportunity Commission as Amici Curaie, *Meritor Savings Bank FSB v Vinson*, 106 S.Ct. 2399 (1986), (No. 84-1979) at 13.

<sup>183</sup>418 F.Supp at 236, *rev'd* 600 F.2d 211 (9th Cir. 1979). See, Anderson, *Employer Liability under Title VII for Sexual Harassment after Meritor Savings Bank v Vinson*, 87 Colum. L. Rev. 1266-68 (1987).

<sup>184</sup>106 S.Ct. at 2408.

<sup>185</sup>*Id.*; For a detailed discussion of the application of agency principles, see R. Baxter, *Sexual Harassment in the Workplace: A Guide to the Law*, 49-57. (1989).

employer liability for sexual harassment under Title VII, the Court and the EEOC run the "risk [of] frustrating its purpose."<sup>186</sup>

Finally, throughout the history of Title VII litigation, courts have continually likened sex discrimination cases to race discrimination cases.<sup>187</sup> While acknowledging that sexual harassment is a violation of Title VII, the Supreme Court held that "the gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'."<sup>188</sup> This additional burden of proof placed on the plaintiff is inconsistent with racial harassment cases in that courts have held that racial harassment is presumptively offensive. While both race and sex are established as prohibited categories of discrimination, "as a whole, courts have applied higher, more exacting standards when analyzing sexual harassment claims."<sup>189</sup>

While the concerns expressed regarding the *Meritor* decision warrant consideration, it is equally important to note that the Guidelines issued by the EEOC do

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<sup>186</sup>Vhay, *The Harms in Asking: Towards a Comprehensive Treatment of Sexual Harassment*, 55 U. Chi. L. Rev. 345 (1988).

<sup>187</sup>The analogy between race and sex discrimination is seen in Supreme Court decisions in *Dothard v Rawlinson*, 433 U.S. 32 (1977) *citing* *Griggs v Duke Power*, 401 U.S. 424 (1971) and *Meritor Savings Bank, FSB v Vinson*, 106 S.Ct. 2399 (1986) *citing* *Rogers v EEOC*, 454 F.2d 234, *cert. denied* 406 U.S. 957 (1972).

<sup>188</sup>106 S.Ct. at 2406.

<sup>189</sup>*See*, Stanley-Elliott, *Sexual Harassment in the Workplace: Title VII's Imperfect Relief*, 6 J. Corp. L. 655 (1981).

not have the force of law. While the Supreme Court will give "great deference"<sup>190</sup> to EEOC Guidelines, "deference must have its limits where . . . application of the guidelines would be inconsistent with an obvious congressional intent . . . [c]ourts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.'"<sup>191</sup> As noted in *Meritor*, the lack of a solid legislative history regarding sex discrimination<sup>192</sup> makes a determination of congressional intent virtually impossible. In addition, the Guidelines on sex discrimination, which attribute strict liability to the employer, are inconsistent with "[congressional] intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."<sup>193</sup>

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<sup>190</sup>The first opinion specifically endorsing 'great deference' was the concurring opinion in *Phillips v Martin Marietta*, 400 U.S. 542, 545 (1971). This was followed by in *Griggs v Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

<sup>191</sup>*Espinoza v Farah Mfg. Co.*, 414 U.S. 86, 94 (1973); *See, also*, *General Electric Co. v Gilbert*, 429 U.S. 125, 141 (1976) (Justice Rehnquist noting that Guidelines are "not controlling upon the courts . . .").

<sup>192</sup>106 S.Ct. at 2404.

<sup>193</sup>*Id.* at 2408.

## CHAPTER V

### JUDICIAL RELIEF FOR CLAIMS OF SEXUAL HARASSMENT

#### Title VII

Having judicially and administratively established sexual harassment as a violation of Title VII, attention must now focus on the relief available to the successful litigant.

Section 706(g) of Title VII states that if discrimination has been found:

[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.<sup>194</sup>

The remedial purpose of Title VII was addressed by the Supreme Court in *Albamarle Paper Co. v Moody*.<sup>195</sup> Here the Court held:

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<sup>194</sup>42 U.S.C. § 2000(e)-5(g); It is important to note that Title VII relief is barred for those victims of discrimination who are employed by an employer with less than 15 employees as defined in § 701(g); In addition, under the standards evoked in *Meritor*, relief is only available where the employer is found liable for sexual harassment.

<sup>195</sup>422 U.S. 405 (1975)

[T]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.<sup>196</sup>

It is within this framework that the greatest criticism<sup>197</sup> of Title VII remedies for claims of sexual harassment have been leveled. These criticisms focus not only on the remedies expressed in Title VII, but also on the remedies excluded from those available.<sup>198</sup>

Fundamentally, granting an injunction forbidding the continuation of an unlawful employment practice is not without merit. But, in terms of sexual harassment:

the effectiveness [of an injunction] . . . is questionable. It is suggested that plaintiffs and defendants are usually not the "best of friends" after a lawsuit. But rather, after the termination of a lawsuit, plaintiffs and defendants express hostility towards one another. This type of employment atmosphere would seem to facilitate verbal abuse or possibly some other retaliatory action. . . .<sup>199</sup>

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<sup>196</sup>*Id.* at 418.; *See, also*, Senate Conference Report on H.R. 1746, 118 Cong. Rec. 7158 (1972) (concerning S 706(g): The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.).

<sup>197</sup>*See infra* notes 199-202 and accompanying text.

<sup>198</sup>Compensatory and punitive damages are unavailable in Title VII actions. *See infra* notes 203-204 and accompanying text.

<sup>199</sup>Andrews, *The Legal and Economic Implications of Sexual Harassment*, 14 N.C. Cent. L.J. 113, 142-143 (1983).



In addition, the granting of back pay would theoretically benefit only those victims of "quid pro quo" harassment who suffered some sort of economic loss as a result of the illegal activity. The EEOC defines back pay as, ". . . the difference between what [the employee] actually earned and what [the employee] would have earned had [the employee] been promoted, had [the employee] received the job for which [the employee] applied, or had [the employee] not been fired."<sup>200</sup> An employee aggrieved through hostile environment sexual harassment would necessarily have to plead a "quid pro quo" element to the harassment in the form of tangible economic injury.

Finally, the practicality of reinstatement in cases of sexual harassment is open to debate. Similar to the argument against injunctive relief, commentators have noted that, ". . . the advantages of returning to the prior harassing worksite are questionable."<sup>201</sup> The dubious nature of reinstatement to a hostile environment have also been explored in the Fair Employment Practices Manual,<sup>202</sup> although no specific reference to sexual harassment is made.

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<sup>200</sup>Bureau of National Affairs, Fair Employment Practices Compliance Manual, 431:315 at 91 (1989).

<sup>201</sup>Dworkin, Ginger & Mallor, *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 San Diego L. Rev. 125,131 (1988); See, also, *Mays v Wiilamson*, 591 F. Supp. 1518 (E.D. Ark. 1984) (the court doubting reinstatement was a proper remedy due to hostility in the workplace). *But, see*, *EEOC v Domino's Pizza, Inc.*, 34 Fair Empl. Prac. Cases (BNA) 1075 (E.D. Mich. 1983) (court ordered reinstatement where offending supervisor was no longer with the company).

<sup>202</sup>Bureau of National Affairs, Fair Employment Practices Manual,431:355-357 at 114 ("Excessive friction or antagonism between the complainant and company supervisors, officials, or fellow employees may be an exceptional circumstance precluding reinstatement.").

## COMPENSATORY AND PUNITIVE DAMAGES

The second objection to relief under Title VII stems from the fact that compensatory and punitive damages are unavailable to the prevailing party. This compensatory insufficiency is particularly noteworthy in cases of sexual harassment. The absence of compensatory damages, aimed at providing retribution for pain and suffering, emotional distress and the like, has lead one court to conclude that " [r]einstatement, back pay and injunctions vindicate the rights of the victimized group without compensating the plaintiff for such personal injuries as anguish, physical symptoms of stress, a sense of degradation, and the cost of psychiatric care."<sup>203</sup>

Punitive damages, intended to punish the wrongdoer, are also unavailable in Title VII litigation. Regardless of whether or not an employer is found liable for sexual harassment, "the absence of any potential monetary recovery discourages harassment victims from bringing Title VII actions . . . for no tangible reward other than a judicial 'slap on the hand'."<sup>204</sup>

## TORT REMEDIES

Statutory authority for a state cause of action is granted in Section 708 of Title VII. Here, Congress unequivocally declared that:

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<sup>203</sup>Holien v Sears, Roebuck & Co., 36 Fair Empl. Prac. Cases (BNA) 137 (Or. 1984); *See, also*, Stewart v Thomas, 538 F.Supp. 891, 897 (D.D.C. 1982) ("to the extent that Title VII fails to capture the personal nature of the injury done to the plaintiff as an individual, the remedies provided by the statute fail appreciate the relevant dimensions of the problem in this case.").

<sup>204</sup>Wymer, *Compensatory and Punitive Damages for Sexual Harassment*, 183 Personnel Journal 181, 181 (1983).

Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.<sup>205</sup>

According to one commentator, "[t]ort law is particularly suited for sexual harassment cases, as it is a flexible and evolving doctrine: a court may allow a tort action even if the particular cause of action has not been recognized before."<sup>206</sup> To that end, complaints have been filed under a variety of theories such as assault and battery,<sup>207</sup> intentional infliction of emotional distress,<sup>208</sup> intrusion<sup>209</sup> and interference with contract.<sup>210</sup>

The difficulty in applying a tort claim, however, is threefold. First, though by

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<sup>205</sup>42 U.S.C. § 2000(e)-7; It is long settled that Title VII does not prevent a claimant from seeking relief under other federal laws. *See, e.g.*, *Johnson v Railway Express Agency, Inc.* 421 U.S. 454 (1975) (holding that Title VII and earlier civil rights laws are totally distinct causes of action which can be pursued separately); *See also*, *Alexander v Gardner-Denver Co.* 415 U.S. 36 (1974).

<sup>206</sup>Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 Golden Gate U. L. Rev. 879, 885 (1980).

<sup>207</sup>*See, e.g.*, *Rogers v Loews L'Enfant Plaza Hotel* 526 F.Supp. 523 (D.D.C. 1981); *Skousen v Nidy*, 90 Ariz 215(1961).

<sup>208</sup>*See, e.g.*, *Shaffer v National Can Corp.* 565 F.Supp. 909 (E.D. Pa. 1983); *Rice v United Ins. Co. of America* 465 So.2d 1100 (Ala. 1984); *Rogers v Loews L'Enfant Plaza Hotel* 526 F.Supp. 523 (D.D.C. 1981)

<sup>209</sup>*See, e.g.*, *Phillips v Smalley Maintenance Services, Inc.* 425 So.2d 705 (Ala. 1983) *answering certified questions at* 711 F.2d 1524 (11th Cir. 1983); *Rogers v Loews L'Enfant Plaza Hotel*, 526 F.Supp. 523 (D.D.C. 1981).

<sup>210</sup>*See, e.g.*, *Guyette v Stauffer Chemical Co.*, 518 F.Supp. 521 (D.N.J. 1981); *Kyriazi v Western Electric Co.*, 461 F.Supp. 894 (D.N.J. 1978).

definition<sup>211</sup> a tort may have occurred, not all states recognize a cause of action.<sup>212</sup> Secondly, the question of diversity jurisdiction<sup>213</sup> must be resolved. Finally, if a tort claim is attached to a claim under Title VII, pendent jurisdiction<sup>214</sup> must be settled.

Like Title VII, tort remedies for claims of sexual harassment are not above reproach. A very basic argument is that plaintiffs should not have to rely on state remedy

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<sup>211</sup>*See, generally*, Restatement (Second) of Torts (1965). The definition of assault is provided in S 21 (actor intended to cause harmful or offensive physical contact and victim was apprehensive of the same); S 31 defines battery as a harmful or offensive contact offensively caused; S 46(1) declares that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." (The standard of judgment for emotional distress is provided in comment d which states that, "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'); S 766 indicates the liability for interference with contract as "One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by . . . causing the third person not to perform the contract, is subject to liability to the other for pecuniary loss resulting . . ."

<sup>212</sup>*See, e.g.*, *Spencer v General Electric Co.*, 1989 U.S. App. Lexis 561 (4th Circuit dismissed claim of invasion of privacy and negligent supervision as these tort claims were not viable under Virginia law); *Cummings v Walsh Construction Co.*, 561 F.Supp 872 (S.D. Ga. 1983) (claim of intrusion dismissed for lack of proof that conduct was not wanted, invited, or warranted as required by state law ).

<sup>213</sup>In *Rogers, supra at note 207*, the court upheld a cause of action for a claim of \$500,000 in the belief that even though the monetary damages sought may not have been awarded, there was a degree of 'judicial certainty' that the actual award would meet the statutory minimum of \$10,000. 526 F. Supp. at 532.

<sup>214</sup>In combining a federal Title VII claim with a state tort claim, the federal district court must determine if the claim is derived from a common set of facts, if the federal claim has sufficient substance and if the combined claims constitute a single cause of action. *See, generally*, *Schlei and Grossman, Employment Discrimination Law* (2d ed., 1983 and 1989 Five-Year Cumulative Supplement) for a listing of those federal courts which have/have not allowed pendent claims.

when a federal statute exists.<sup>215</sup> Second, within the tort remedies used, various limitations preclude true effectiveness. For example, battery claims exist when the offensive contact is a single event, and sexual harassment is often a recurring activity.<sup>216</sup> Claims for assault "provides a specific remedy only for those damages that result directly from a specific instance of assault."<sup>217</sup> In charges argued under intentional infliction of emotional distress the conduct must be extreme and outrageous, neither of which are clearly defined. In addition, the court needs to believe that the harasser intended to harm the victim.<sup>218</sup> When arguing interference with contract, wrongful discharge may not apply to employees at will.<sup>219</sup>

## SUGGESTED ALTERNATIVES

It has been argued that "Title VII and tort law together fail to meet the human

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<sup>215</sup>Bratton, *The Eye of the Beholder: An Interdisciplinary Examination of Law and Social Research on Sexual Harassment*, 17 N.M.L. Rev. 91, 106 (1987): "First, plaintiffs should not have to depend on the availability of favorable state law to recover punitive or other compensatory damages for violations of a right created by federal statute. Second, tort law allows recovery only from the primary tortfeasor. This limitation runs counter to the language of Title VII which places responsibility of the employer for the maintenance of a nondiscriminatory work environment."

<sup>216</sup>Note, *Legal Remedies for Claims of Employment-Related Sexual Harassment*, 64 Minn. L. Rev. 151, 168 n.14 (1979).

<sup>217</sup>*Id.* emphasis added.

<sup>218</sup>*Id.*

<sup>219</sup>*See, generally*, W. Holloway and M. Leech, *Employment Termination: Rights and Remedies* (1985), at 195.

need for certainty in the law."<sup>220</sup> Given these apparent drawbacks, several commentators have suggested alternatives to correct these weaknesses in the law. Most emphasis has been given to separating sexual harassment from the general Title VII prohibition against sex discrimination, and enacting federal legislation strictly dealing with this issue.<sup>221</sup>

Others have recommended that "Congress should amend title [sic] VII to allow for comprehensive remedies tailored to the injuries suffered by victims -- remedies including compensatory damages -- if sexual harassment in the workplace is to be remedied and deterred."<sup>222</sup> Short of this, it is suggested that in claims argued under Title VII, courts should adopt a 'reasonable victim' viewpoint when they try to determine a standard of credibility.<sup>223</sup> Finally, acknowledging the restrictions in tort law, it has been suggested that a separate tort of sexual harassment become recognized.<sup>224</sup>

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<sup>220</sup>Comment, 10 *Cap. U. L. Rev.* 611 (1981).

<sup>221</sup>*See, e.g.*, Comment, 10 *Capital University Law Review* (Spring, 1981): ("A more direct and effective approach would separate sexual harassment from the more general category of sex discrimination and attempt to pass federal laws solely against sexual harassment."); 48 *Ohio State Law Journal* 1151, 1164 (1987): ("A federal statute would assure uniformity ... would affect every employer in the country ... would leave no questions in the minds of employers as to the seriousness of the problem and commitment of lawmakers to crafting a solution."). *But see*, 64 *Minnesota Law Review* 151, 180 (November, 1979): (arguing against a federal statute because sexual harassment does not "... engender a high level of opprobrium from all strata of society.").

<sup>222</sup>Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 *Harv. L. Rev.* 1449, 1467 (1984).

<sup>223</sup>Attanasio, *Equal Justice Under Chaos: The Developing Law of Sexual Harassment*, 51 *U. Cin. L. Rev.* 1, 22 n. 145 (1982).

<sup>224</sup>Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 *U. Pa. L. Rev.* 1461, 1485-1495 (1988).

To date, none of these suggested alternatives have been realized. If the arguments that Title VII and tort law are insufficient remedies for claims of sexual harassment<sup>225</sup> are accepted, relief should be sought under other available statutes. The remainder of this thesis will examine the federal RICO law as a possible alternative.

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<sup>225</sup>*See infra* notes 199-220 and accompanying text.

## Chapter VI

### RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS<sup>225</sup>

#### BACKGROUND

Government concern with organized crime is a matter of public record. In 1951, Estes Kefauver (D. TN) headed the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.<sup>226</sup> In 1958, John McClellan (D. Ark) led the Senate Select Committee on Improper Activities in the Labor or Management Field.<sup>227</sup> Again, in 1965, McClellan directed the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, Organized Crime and Illicit Traffic in Narcotics.<sup>228</sup> In 1967, the Task Force on Organized Crime, part of the President's Commission on Law Enforcement and Administration of Justice, issued a report analyzing the nature and scope

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<sup>225</sup> 18 U.S.C. § 1961-1968 (1982).

<sup>226</sup>See S. Rep. 307, 82nd Cong., 1st Sess (1951).

<sup>227</sup>See S. Rep. 1417, 85th Cong., 2nd Sess. (1958); S. Rep. 621, 86th Cong., 1st Sess. (1959); S. Rep. 1139, 86th Cong., 2nd Sess. (1960).

<sup>228</sup>See S. Rep. 72, 89th Cong., 1st Sess. (1965).



of organized crime.<sup>229</sup>

Consistent with his opposition to organized crime, McClellan introduced Senate Bill 30, (S. 30) The Organized Crime Control Act, (OCCA) to the 91st Congress on January 15, 1969.<sup>230</sup> Hearings were held on March 18, 19, 25, 26, and again on June 3 and 4, 1969,<sup>231</sup> on organized crime and other anti-crime proposals<sup>232</sup> pending in the Senate. In his opening remarks, McClellan explained, "[T]he [crime] situation is so critical in my judgment that today it is incumbent upon the Congress of the United States to provide every legal tool within the framework of the Constitution that can be made available to our law enforcement officials to combat organized crime."<sup>233</sup>

To spur action on S. 30, President Nixon sent a message to Congress outlining the necessity of combatting organized crime and its infiltration into legitimate business. Referring to the OCCA, Nixon stated that, "it is designed to improve the investigation and prosecution of organized crime cases, and to provide appropriate sentencing for

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<sup>229</sup>President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, (1967).

<sup>230</sup>116 Cong. Rec. 769 (1969).

<sup>231</sup>*See, generally, Measures Relating to Organized Crime: Hearings before the Subcommittee on Criminal Laws and Procedure, Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., 1969.*

<sup>232</sup>In addition to McClellan's bill, eight additional bills were proposed during the Senate hearings: S. 974, S. 975, S. 976 were introduced by Joseph Tydings (D. MD); S. 1623, S.1624 and S. 2022 were introduced by Roman Hruska (R. Neb); S.1861 and S 2122 were introduced by McClellan. *See, generally, 1969 Congressional Quarterly Almanac at 699.*

<sup>233</sup>*Hearings, supra* at note 221, 86.

convicted offenders. I feel confident that it will be a useful new tool."<sup>234</sup>

It was not until mid-December, 1969, however, that the OCCA was reported with amendments.<sup>235</sup> As reported, the bill contained ten titles, with provisions ranging from grand jury powers to witness protection programs. With a final vote of 73-1 the Senate gave overwhelming approval to S. 30.<sup>236</sup>

On January 26, 1970, the OCCA was referred to the House Committee on the Judiciary. Support for the legislation was not as great as in the Senate.<sup>237</sup> Accordingly, hearings on the measure were delayed until the end of May, 1970, and continued sporadically through the end of July, 1970. Finally, on September 30, the Judiciary Committee favorably reported S. 30 with amendments, "but the bill was reported only after the Committee had been warned that if [it] were not reported, it would be forced out by a discharge petition."<sup>238</sup>

In their dissent, Representatives Conyers (D. Mich), Mikva (D. IL) and Ryan (D. NY) claimed that this legislation was trying to seek easy answers to difficult questions. "Never," they stated, "has a bill masqueraded under false pretenses more than the

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<sup>234</sup>Pub. Papers, Richard Nixon, April 23, 1969, 320-321.

<sup>235</sup>S. Rep. 617.

<sup>236</sup>116 Cong. Rec. 972 (1970).

<sup>237</sup>Emanuel Celler (D. NY.) referred to a report from the ABA labelling the bill 'repressive' and questioned the Constitutionality of the bill. *See, generally*, 1970 Congressional Quarterly Almanac, 545.

<sup>238</sup>*Id.* at 552.

Organized Crime Control Act."<sup>239</sup> In spite of these objections, the House passed S 30 by a vote of 341 - 26.<sup>240</sup>

When finally enacted, the OCCA had as its stated purpose, "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>241</sup>

### Elements of a RICO Offense<sup>242</sup>

Title IX of the OCCA, Racketeer Influenced and Corrupt Organizations,<sup>243</sup> created a new chapter in the United States criminal code.<sup>244</sup> Under the law, it would be illegal for a person to use the proceeds from a pattern of racketeering activity to invest in,<sup>245</sup>

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<sup>239</sup>2 Cong. and Admin. News (1970), 4091; In addition, they argued that although the bill purports to deter organized crime, no definition of organized crime was included in the legislation. Saying that the bill was "pregnant with the potential for abuse . . . it is more likely to catch poachers and prostitutes than pushers and pimps."

<sup>240</sup>1970 Congressional Quarterly Almanac, Vote, 68-H.

<sup>241</sup>84 Stat 923 (1970).

<sup>242</sup>See, generally, G. Robert Blakey and Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies* 53 Temp. L.Q. 1007 (1980) and Jeff Atkinson, *Racketeer Influenced and Corrupt Organizations: Broadest of the Federal Criminal Statutes*, 69 J. Crim. L. & Criminology 1 (1978).

<sup>243</sup> 18 U.S.C. § 1961-1968 (1982).

<sup>244</sup>84 Stat 923 (1970) adds Chapter 96 to 18 U.S.C.

<sup>245</sup> 18 U.S.C. § 1962 (a) (1982) provides:

It shall be unlawful for any person who has received any income derived,

control<sup>246</sup> or conduct the business of<sup>247</sup> an enterprise. Conspiring to commit any of these offenses is also illegal.<sup>248</sup>

The broad reach of RICO is seen in the definitions incorporated within the statute.

Under Section 1961(3), the term person "includes any individual or entity capable of

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directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one more directors of the issuer.

<sup>246</sup>18 U.S.C. § 1962(b) (1982) provides:

It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

<sup>247</sup>18 U.S.C. § 1962(c) (1982) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

<sup>248</sup>18 U.S.C. § 1962 (d) (1982) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

holding a legal or beneficial interest in property."<sup>249</sup> The definition of enterprise is equally sweeping as it "includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact though not a legal entity."<sup>250</sup> Both by design and directive, Congress intended RICO to be "liberally construed to effectuate its remedial purposes."<sup>251</sup>

What needed to be remedied is the "highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy, . . . the money and power [from which] are increasingly used to infiltrate and corrupt legitimate business. . . ."<sup>252</sup> This so-called racketeering activity, defined in Section 1961(1), includes eight state offenses and over 30 federal offenses.<sup>253</sup> What is essential

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<sup>249</sup> 18 U.S.C. § 1961(3) (1982).

<sup>250</sup> 18 U.S.C. 1961(4) (1980).

<sup>251</sup> § 904(a), Title IX, Pub. L. No. 452.

<sup>252</sup> 84 Stat 923, Congressional Statement of Findings and Purpose (1970).

<sup>253</sup> 18 U.S.C. § 1961(1) (1989 Supp.) defines "racketeering activity" as:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 ... section 224 ... sections 471, 472, and 473 ... section 659... if the act indictable under section 659 is felonious ... section 664 ... sections 891-894 ... section 1029 ... section 1084 ... section 1341 ... section 1343 ... sections 1461-1465 ... section 1503 ... section 1510 ... section 1511 ... section 1512 ... section 1513 ... section 1951 ... section 1952 ... section 1953 ... section 1954 ... section 1955 ... section 1956 ... section 1957 ... section 1958 ... sections 2251-2252 ... sections 2312 and 2313 ... sections 2314 and 2315 ... section 2321 ... sections 2341-2346 ... sections 2421-24; (C) any act which is indictable under title 29, United States Code, section 186

to establish a violation of the RICO law is that the racketeering activity is conducted in a pattern. Statutory definition states that a pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."<sup>254</sup>

## CIVIL PROVISIONS

Under Section 1964(c),

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."<sup>255</sup>

The Supreme Court's ruling in *Sedima, S.P.R.L. v Imrex Co., Inc.*<sup>256</sup> is important for a number of reasons. Here, the Court addressed the issues of standing to sue under Section 1964(c), and the requirement of a prior criminal conviction. Though not presented to the Court, the issue of 'pattern of racketeering' was addressed.

In 1979, a Belgian corporation, Sedima, entered into a joint venture agreement with respondent, Imrex, to obtain electronic components for a second Belgian firm.

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... or section 501(c); (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transaction Reporting Act;

<sup>254</sup> 18 U.S.C. § 1961(5) (1982).

<sup>255</sup> 18 U.S.C. 1964(c) (1982).

<sup>256</sup>105 S.Ct. 3275 (1985).

Convinced that Imrex had overstated its bills, thus cheating Sedima out of its share of profits, Sedima filed suit in the Federal District Court for the Eastern District of New York. In addition to various common-law claims, Sedima asserted RICO claims against Imrex and two of its officers, alleging violations of Section 1962(c), based on the racketeering acts of mail and wire fraud. The District Court<sup>257</sup> dismissed the claim for failure to state a racketeering injury. On appeal, the Second Circuit,<sup>258</sup> affirmed the lower court decision. In addition to finding that Sedima had not alleged a racketeering injury, the Court of Appeals also found that because the defendants had no prior criminal conviction, the RICO claims were invalid.

The Supreme Court reversed, referring to the language of the RICO statute. According to the Court, "[T]he word 'conviction' does not appear in any relevant portion of the statute."<sup>259</sup> The Court also rejected the notion of 'racketeering injury' offered by the Second Circuit. Rather, the Court held that "the plaintiff has standing if, and can recover only to the extent that, he has been injured in his business or property by the conduct constituting the violation."<sup>260</sup>

Concerning the idea of 'pattern of racketeering,' Justice White noted "the failure

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<sup>257</sup>574 F. Supp. 963 (E.D.N.Y. 1983).

<sup>258</sup>741 F.2d. 482 (1984).

<sup>259</sup>105 S.Ct at 3280. Additionally, the Court held that although § 1964(c) uses the term 'violation' this does not imply conviction.

<sup>260</sup>*Id.* at 3285.

of Congress and the courts to develop a meaningful concept of pattern."<sup>261</sup> While the Court did not further clarify the issue, it did look to the statutory definition<sup>262</sup> and noted that "in common parlance two of anything do not form a 'pattern.'"<sup>263</sup> Therefore, based on the legislative history of the RICO law, courts would be well advised to look for some sort of persistence and connection in the racketeering activity.<sup>264</sup>

The injury to business or property and pattern of racketeering activity requirements established by the Supreme Court are particularly important in cases of sexual harassment. By its definition<sup>265</sup> "quid pro quo" sexual harassment results in a tangible job detriment. Courts have been much more likely to rule favorably for plaintiffs who are able to demonstrate an injury in the form of lost income.<sup>266</sup> The 'continuity plus relationship' requirement necessary to form a pattern is clearly evident in cases of sexual

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<sup>261</sup>*Id.* at 3287.

<sup>262</sup>18 U.S.C. § 1961(5), *supra* at note 254, a pattern "requires at least two acts . . ."

<sup>263</sup>105 S.Ct. at 3285, n. 14.

<sup>264</sup>*Id.* citing S Rep 91-617, "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern." In addition, the Court referred to 18 U.S.C. 3575(e) and quoted: "[C]riminal activity forms a pattern if it embraces the criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

<sup>265</sup>*Supra* at note 40.

<sup>266</sup>*See infra* notes 297-302 and accompanying text.



harassment. The Merit Board survey<sup>267</sup> found that most cases of sexual harassment are "not just passing events - most lasted more than a week and many lasted longer than six months."<sup>268</sup>

As in claims of employment discrimination under Title VII, courts continually look to prior decisions in order to determine the disposition of the litigation at hand. The use of RICO in the employment setting deserves attention in order to demonstrate the various applications of the law.

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<sup>267</sup>*Supra* at note

<sup>268</sup>Merit Report, *supra* at note 44, at 5.

## CHAPTER VII

### RICO IN EMPLOYMENT

#### RATIONALE FOR USE

Being labelled a 'racketeer,' as most of us understand the term is something many employers have probably never considered. In recent years, however, the federal racketeering law is being used with more frequency as employees add RICO to the list of possible remedies for employment disputes.<sup>269</sup> The rationale for doing so is easy to ascertain: RICO allows a federal forum, treble damages and attorney's fees to the successful litigant.<sup>270</sup>

In light of the 1985 *Sedima* decision, many employees are suing their employers in yet another example of the liberal construction clause<sup>271</sup> of RICO. As will be demonstrated, however, not all courts are willing to uphold a claim and employees are

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<sup>269</sup>See *infra* notes 278-296 and accompanying text. RICO has been used successfully in claims for retaliatory discharge, employer fraud and employee benefits.

<sup>270</sup>18 U.S.C. § 1964(c) (1982).

<sup>271</sup>§ 904(a), Pub. L. No. 452.

finding out with equal frequency that "[t]he RICO Treasure Hunt"<sup>272</sup> is often not rewarding.

### Person/Enterprise Dichotomy

When a claim under RICO is brought in the employment context it is typically argued under Section 1962(c), which makes it "unlawful for any person employed by or associated with an enterprise"<sup>273</sup> from conducting the affairs of the enterprise through a pattern of racketeering activity. Most courts have construed this to mean that the person must be distinct from the enterprise.<sup>274</sup> In *Roeder v Alpha Industries, Inc.*,<sup>275</sup> for example, the plaintiff alleged that due to non-disclosure of a bribe by company officials to an outside subcontractor, which led to a decline in stock prices, the plaintiff was defrauded. Filing a RICO claim under section 1962(c), Roeder named the president, vice president and Alpha as the 'person' and these same three plus the outside subcontractor, the outside subcontractor's private company and the outside subcontractors employer as the enterprise. Because Alpha was named as both the person and the enterprise the court dismissed the claim. As the Fourth Circuit Court of Appeals noted, " we would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a

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<sup>272</sup>Leech, *RICO and the Fired Employee: What's New* (1989 by Michael J. Leech).

<sup>273</sup> 18 U.S.C. § 1962(c) (1982).

<sup>274</sup>*See, e.g.*, *Haroco, Inc. v American National Bank and Trust Company of Chicago* 747 F.2d 384 (7th Cir. 1987); *Bishop v Corbitt Marine Ways, Inc.* 802 F.2d 122 (5th Cir. 1986); *Bennett v United States Trust Co.* 770 F.2d. 308 (2nd Cir. 1985); *Rae v Union Bank* 725 F.2d 478 (9th Cir. 1984); *Bennett v Berg* 685 F.2d 1053 (8th Cir. 1982); *But see*, *United States v Hartley* 678 F.2d 961 (11th Cir. 1982).

<sup>275</sup>814 F.2d. 22 (1st. Cir. 1987).

defendant could conspire with his right arm, which held, aimed and fired the fatal weapon.<sup>276</sup>

## STANDING TO SUE

A second condition fundamental to an employment related claim expressed by the courts is a standing to sue. Under Section 1964(c), civil remedies are available when a "person [is] injured in his business or property by reason of a violation of section 1962 . . ."<sup>277</sup> The strong emphasis given to this requirement is especially noteworthy in claims for retaliatory discharge.

In *Pujol v Shearson/American Express, Inc.*,<sup>278</sup> the plaintiff alleged that his refusal to sign an internal compliance statement indicating he knew of no irregularities in the defendant's reporting of securities values was his reason for dismissal. The court held that although the defendant's alleged misrepresentations could be considered racketeering activity, Pujol was "not a defrauded client or investor and was not the target of any of the acts pleaded as 'predicate acts.'"<sup>279</sup> Citing the Supreme Court rule on standing,<sup>280</sup> the court dismissed the plaintiff's claim.

The 11th Circuit used the same standing requirement expressed in *Pujol*, when it

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<sup>276</sup>United States v Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982).

<sup>277</sup> 18 U.S.C. § 1964(c) (1982).

<sup>278</sup>829 F.2d. 1201 (1st Cir. 1987).

<sup>279</sup>*Id.* at 1205. "Predicate acts" are generally understood to be the racketeering violations listed in § 1961(1).

<sup>280</sup>105 S.Ct. at 3285. (A person has standing to sue if they are injured in their business or property as a result of the pattern of racketeering activity).

ruled in *Morast v Lance*.<sup>281</sup> Here, plaintiff reported an irregular bank transaction to the Comptroller of the Currency, as required by banking laws. Subsequently, the plaintiff was fired. The claim stated that Morast was fired because he reported the incident, and assisted in the investigation of the conspiracy at the bank. The court, however, dismissed the plaintiffs claim, reasoning that "Morast was not fired because he refused to participate in the bank's illegal scheme; therefore, Morast's injury, his discharge, did not flow directly from the predicate acts, the defendant's banking violations."<sup>282</sup> Other courts have adopted the same rationale expressed in *Sedima* and these two cases,<sup>283</sup> revealing the strict adherence to the 'proximate cause' standard.

Retaliatory discharge as a violation of RICO was argued successfully in *Williams v Hall*.<sup>284</sup> Here, plaintiffs, Harry Williams and Bill McKay, alleged a conspiracy by the defendants to commit RICO offenses. Refusing to participate in the scheme to bribe foreign officials and cover up the illegalities was recognized as a RICO violation. The court explained its reasoning this way:

Suppose several racketeers were to decide to take over a construction company. Suppose they said, "Let's agree to operate this company in

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<sup>281</sup>807 F.2d. 926 (1987).

<sup>282</sup>*Id.* at 933.

<sup>283</sup>See, e.g., *Cullom v Hibernia National Bank*, 666 F.Supp 88 (E.D.La. 1987) (plaintiff's dismissal for refusal to participate in an inflated loan participation scheme was not a RICO violation); *Nodine v Textron*, 819 F.2d 347 (1st Cir. 1987) (firing an employee for reporting customs violations not actionable under RICO); *Burdick v American Express Co.*, 677 F.Supp. 228 (S.D.N.Y. 1988) (retaliatory discharge for complaints regarding failure to properly credit interest and churning transactions is not a RICO violation).

<sup>284</sup>683 F. Supp. 639 (E.D.Ky. 1988).

violation of the law. Let's rig bids, bribe officials, intimidate and threaten competitors not to bid on jobs and let's travel in interstate commerce to accomplish all of this. And, oh yes, let's fire all of the honest employees in the company, so we won't have any opposition in accomplishing our scheme."<sup>285</sup>

The court acknowledged the debate over standing in retaliatory discharge cases, yet the claims of plaintiffs survived to state a RICO cause of action. The plaintiffs were reportedly awarded \$43 million and \$23 million in damages from the wrongful termination.<sup>286</sup>

### **Employer Fraud**

Employees have brought suit against their employers under various theories of fraud, some successful and others not. In *Waldo v North American Van Lines*,<sup>287</sup> the plaintiff, an owner/operator truck driver filed suit against North American claiming to have been falsely induced to accept employment. Alleging that the trucking firm over recruited and under utilized its workforce, the complaint cited various examples of misrepresentation. First, having read an advertisement in the newspaper, the plaintiff called the company, requesting and receiving a recruitment brochure. Second, a later telephone conversation with the company's agent discussed employee benefits, working conditions and the like. Accepting a position, the plaintiff claims that not only was he misled in both written and verbal communications regarding the earnings potential, the

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<sup>285</sup>*Id.* at 644.

<sup>286</sup>Naeve, *Racketeering Penalties Apply to Employment Litigation*, Personnel J. 113 (Sept. 1989).

<sup>287</sup>669 F. Supp. 722 (W.D.Pa. 1987).

company failed to disclose the high turnover rate. The court recognized a pattern of fraud.

A second case allowing a RICO claim is found in *Smith v MCI Communications Corp.*<sup>288</sup> Plaintiff was an account representative for defendant. On numerous occasions the defendant did not calculate commissions properly. In addition, credit for new accounts was not given to the plaintiff. MCI claimed that the plaintiff failed to allege a pattern of racketeering activity. The court, however, did not agree, stating that, "Although MCI's acts relate only to a single scheme to deprive Smith of her commissions, the acts were themselves separate occurrences, and the scheme, which would continue as long as Smith was employed, was open-ended."<sup>289</sup>

A RICO cause of action for fraud was not recognized in *Jones v Baskin, Flaherty, Elliot and Mannino, P.C.*,<sup>290</sup> where plaintiff attached a 1962(c) RICO violation to his age discrimination claim. Fired by his employer law firm, Jones alleged that the defendant engaged in several incidents of fraud. As a result of concealing various fee payments put in escrow, the plaintiff suffered lower partner profits; non-reporting of certain payouts led to reduced capital payouts to the plaintiff as a shareholder; finally, the complaint alleges that due to fraudulent K-1 forms from the law firm, the plaintiff faced a future tax liability. The court dismissed the RICO counts for a lack of standing, contending that although the plaintiff suffered economic losses, they were due to bookkeeping

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<sup>288</sup>678 F. Supp. 823 (D.Kan. 1987).

<sup>289</sup>*Id.* at 827.

<sup>290</sup>670 F. Supp. 597 (W.D.Pa. 1987).

improprieties which paralleled the alleged tax fraud activity of the law firm.<sup>291</sup>

### **Employee Benefits**

Promises of benefits later denied has presented interesting interpretations RICO violations from the courts. In *McLendon v Continental Group, Inc.*,<sup>292</sup> the employer had a 'magic number' benefit plan for employees who lost their jobs. Under the program, employees facing layoffs could still receive benefits if, at the time of layoff, their combined ages and years of service was one of two numbers. This plan was negotiated with, and part of, their union collective bargaining agreement. By carefully selecting employees for layoff, the company was able to deny payments to them. Plaintiffs alleged that this scheme both violated ERISA law and constituted RICO infractions. The court agreed, holding that:

Just as fraud exists where an official breaches his or her duty for honest, faithful and disinterested services to the public ... so it may exist where an industrial organization breaches its statutory duty not to deprive private employees of their pension benefits based upon such employees' status with respect to those benefits.<sup>293</sup>

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<sup>291</sup>See also, *Penry v Hartford Fire Ins. Co.*, 662 F.Supp. 792 (E.D.Tex. 1987) (plaintiffs contention that his discharge was a scheme to defraud is dismissed. Fired on August 6, 1986, the company telephoned and sent a letter to plaintiff confirming the discharge. These communications were received on August 14, 1986, which court contends would in no way facilitate a scheme in retaliation for filing of OSHA complaint and Workers' Compensation claim.); *Flowers v Continental Grain Co.*, 775 F.2d 1051 (8th Cir. 1985) (claim for fraud due to failure to receive a promised bonus, based on alleged manipulation of prices, was not properly pleaded); *McBee v IHSS, Inc.*, 655 F.Supp. 448 (D.Colo. 1987) (employee-purchaser of company not a victim of pattern of RICO violations because misrepresentations of business conditions related to single scheme.).

<sup>292</sup>602 F. Supp. 1492 (D.N.J. 1988).

<sup>293</sup>*Id.* at 1508.



The court further reasoned that if the plaintiff's were able to prove that the company never intended to pay them, this too would constitute a violation of RICO.

Threats made to thirty-two plaintiffs in *Saporito v Combustion Engineering, Inc.*<sup>294</sup> established a pattern of racketeering activity adequate to uphold a RICO claim. Here, plaintiffs were told that if they refused to accept a voluntary early separation plan they would be laid off. These threats were made in spite of the fact that other employees were told that a better plan would be forthcoming. This, according the court, was mail fraud, a violation of RICO.

The district court in *Cefali v Buffalo Brass Co.*<sup>295</sup> did not find a pattern of racketeering sufficient to uphold a RICO cause of action. In this case, the parent company, Atlantic Richfield, sold its metal division to American Brass Company. The plaintiffs were given two choices of either quitting and receiving Atlantic Richfield severance benefits or staying and collecting benefits from American Brass. The benefits of American Brass, according to Atlantic Richfield, were as good if not better than those already possessed. In addition, the plaintiffs were told that twenty days notice would be given prior to the sale of the division. Instead, the division was sold in six days and American Brass fired the plaintiffs. Alleging that the benefits offered by American Brass were in fact inferior to those at Atlantic Richfield, the plaintiffs refused to sign a waiver releasing American from any further obligation or liability upon termination.

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<sup>294</sup>843 F.2d 666 (3rd. Cir. 1988).

<sup>295</sup>653 F. Supp. 123 (W.D.Mo. 1986).

Consequently, no benefits were given to the fired employees. The court ruled that no pattern of fraud was found, as the activity that transpired related to a single event - - the sale of the division.<sup>296</sup>

### **Injury to Business or Property**

An employee claiming violations of the RICO statute necessarily must show a damage to his business or property.<sup>297</sup> This has proved difficult on more than one occasion, but as the following discussion reveals, courts are more likely to rule favorably in circumstances where the alleged loss is in the form of lost income.

In *Acampora v Boise Cascade Corp.*,<sup>298</sup> plaintiff discovered defendant Tisony's theft from the company. As a result of this discovery, plaintiff was repeatedly subjected to harassment and eventually lost her job. While the plaintiff did not contend that she was directly injured by the stealing, her injury stemmed from an overall scheme of the predicate offenses and attempts to cover them up. It was these activities which caused the plaintiff to lose her job. Citing the earlier decision in *Callan v State Chemical Manufacturing*<sup>299</sup> the court was "persuaded that plaintiff's alleged injury is sufficiently

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<sup>296</sup>See also, *Bigger v American Commercial Air Lines, Inc.*, 652 F.Supp. 123 (W.D.Mo. 1986) (company's failure to transfer excess assets from existing plan to a newly created plan in alleged breach of fiduciary duties did not form a pattern.).

<sup>297</sup> 18 U.S.C. § 1964(c) (1982).

<sup>298</sup>635 F. Supp. 66 (D.N.J. 1986).

<sup>299</sup>584 F.Supp. 619 (E.D.Pa 1984) (holding that although plaintiff was not injured by the predicate offenses of commercial bribery, refusal to participate in bribery and subsequent dismissal was compensable under RICO.).

related to defendant's alleged illegal conduct to enable her to maintain this action."<sup>300</sup>

The District Court for the Northern District of Indiana ruled differently on the same issue presented in *Acampora* in *Kouvakas v Inland Steel Co.*<sup>301</sup> The defendant was alleged to have sent false invoices to customers over a two year period. The plaintiff, aware of the fraudulent practices, refused to participate. This refusal led to severe abuse and harassment by the defendants, which resulted in physical and mental symptoms of distress to the plaintiff. As a result of the disabilities, the plaintiff alleged inability to hold gainful employment and loss of consortium. The court dismissed the plaintiff's RICO claim, holding that the injuries suffered by the plaintiff were personal and a result of the harassment, not the alleged racketeering activities.<sup>302</sup>

### **Respondeat Superior**

By its construction, RICO is intended to recognize the enterprise as a victim of racketeering, seldom as the perpetrator. One of the questions with which courts have had to deal is the liability of the employer (enterprise) for acts of its employees. In *Saporito*,<sup>303</sup> the court decided that vicarious liability was possible in Section 1962(a) cases,

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<sup>300</sup>635 F.Supp. at 69; *See, also*, *Komm v McFlicker*, 662 F.Supp. 924 (W.D.Mo. 1987) (action allowed as endorsed by 8th Cir.); *But, see*, *Nodine v Textron, Inc.*, 819 F.2d 347 (1st Cir. 1987) (although plaintiff discharge is an injury to business or property it is not by reason of a RICO violation).

<sup>301</sup>646 F. Supp. 474 (1986).

<sup>302</sup>*See, also*, *Callen v State Chemical Manufacturing Co.*, 584 F.Supp. 619 (E.D.Pa. 1984) (holding that while loss of income as a result of racketeering activities is compensable, recovery for mental anguish and damage to reputation is denied.).

<sup>303</sup>*See infra* note 294 and accompanying text.

but not in 1962(c) cases.<sup>304</sup> The Seventh Circuit has reached decisions in two recent cases, and based on the circumstances, ruled differently in each.

In *Liquid Air Corp. v Rogers*,<sup>305</sup> the plaintiff leased air compressors to the defendant's company, D & R Welding. Under the leasing agreement, D & R would pay for the compressors until they were returned to plaintiff. In an elaborate scheme involving an employee of Liquid Air, the records of return were falsified, thereby allowing D & R to retain the air compressors and not pay for them. In addition, defendant Rogers and other D & R officials helped the Liquid Air employee establish a private welding business in an area in which they were unable to operate due to a non-competition agreement. They provided the new business with many of the air compressors owned by Liquid Air. The court upheld the action against Rogers on the grounds that D & R did in fact benefit from the racketeering activities and would be held liable.

A second case, with somewhat similar circumstances, was presented to the Seventh Circuit in *D & S Auto Parts, Inc. v Schwartz*.<sup>306</sup> Here, an employee of the A.P. Walter Company was selling auto parts to one company and sending fraudulent invoices for the products to the plaintiff. After paying in excess of \$150,000 the scam was discovered by the plaintiff who in turn informed Schwartz, president of Walter. Defendant immediately fired the employee and reported the incident to the State's

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<sup>304</sup>Unlike § 1962(c), the court held that the language of § 1962(a) requires that no distinction be made between the person and the enterprise.

<sup>305</sup>834 F.2d. 1297 (7th Cir. 1987).

<sup>306</sup>838 F.2d. 964 (7th Cir. 1988).

Attorney. The court dismissed the claim against Schwartz, stating that "vicarious liability is inconsistent with this court's approach to direct RICO liability."<sup>307</sup> The court found that the company, and Schwartz, as president, were unwitting victims of the employee's scheme, not the perpetrators.

It appears from these cases that when the employer has received a benefit from the racketeering activity and could be viewed as committing the RICO offense, liability will incur. This same idea was previously expressed in the First Circuit<sup>308</sup> and the Eighth Circuit.<sup>309</sup>

### Employer uses of RICO

"RICO is not a single-edged sword in employee relations,"<sup>310</sup> and as such requires a look at those situations in which employers have brought cases against employees. The uses of RICO by employers are as numerous as those used by employees: embezzlement,<sup>311</sup> violation of non-competition agreements,<sup>312</sup> theft of trade secrets,<sup>313</sup> destruction of property,<sup>314</sup> and conspiracy to steal customers<sup>315</sup> are just a few of the ways

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<sup>307</sup>*Id.* at 966.

<sup>308</sup>*Schofield v First Commodity Corp. of Boston*, 793 F.2d. 28 (1st Cir. 1986).

<sup>309</sup>*Luthi v Tonka Corp.*, 815 F.2d. 1229 (8th Cir. 1987).

<sup>310</sup>*Shepard, Horn and Dunston, RICO and Employment Law*, 3 Lab. Law. 267, 282 (1987).

<sup>311</sup>*See, e.g., United Fish Co. v Barnes*, 627 F.Supp. 732 (D.Me. 1986).

<sup>312</sup>*See, e.g., Van Dorn Co. v Howington*, 623 F.Supp. 1548 (N.D.Ohio 1985).

<sup>313</sup>*See, e.g., Formax v Hostert*, 841 F.2d 388 (D.C. Cir. 1988).

<sup>314</sup>*See, e.g., Woodward v DiPalermo*, 1 RICO Lit. Rep. (D.D.C. 1984).

RICO claims have been brought by employers to redress injuries arising out of alleged racketeering activities.

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<sup>315</sup>*See, e.g.,* Systems Research, Inc. v Random Inc., 614 F.Supp. 494 (N.D.Ill. 1985).

## CHAPTER VIII

### RICO AND QUID PRO QUO SEXUAL HARASSMENT

#### THE FUNDAMENTALS OF EXTORTION

Under Section 1961 of RICO, racketeering activity includes any act which is indictable under various provisions of the United States Criminal Code.<sup>316</sup> Among the multitude of violations listed, Section 1951, relating to interference with commerce by threats or violence<sup>317</sup> defines extortion as:

the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.<sup>318</sup>

For purposes of this section, 'property' has been understood to mean many different things: freedom to make business decisions without outside interference,<sup>319</sup> the right to

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<sup>316</sup> 18 U.S.C. § 1961(1)(b) (1982).

<sup>317</sup> 18 U.S.C. § 1951 (1982).

<sup>318</sup> 18 U.S.C. § 1951(b)(2) (1982).

<sup>319</sup> See, e.g., U.S. v Santoni, 585 F.2d 667 (4th Cir. 1978), cert. denied 99 S.Ct. 1221.

solicit business without fear of physical destruction and personal harm,<sup>320</sup> and unrealized business profits.<sup>321</sup> Most recently, the Third Circuit Court in New Jersey declared that the intangible rights afforded union members through the labor laws was within the realm of 'property' protected by Section 1951.<sup>322</sup> In this case, the government filed a civil complaint against several members of "The Provenzano Group" alleging that for the period beginning in 1961 through 1981, "[the defendants] extorted the membership's rights to vote, speak, and assemble freely by systematic acts of intimidation . . ." <sup>323</sup> The court affirmed, holding that the various acts of murder and union office appointments conducted in the twenty year period violated the provisions of the Labor-Management Reporting and Disclosure Act.<sup>324</sup>

In addition to a uniformly broad interpretation of the term 'property', the courts have also unanimously agreed that the obtaining of property does not imply that the one who is guilty of extortion necessarily must benefit from the extortionate act.<sup>325</sup> This idea

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<sup>320</sup>See, e.g., U.S. v Zemek, 634 F.2d 1159 (9th Cir. 1980), *cert. denied* 101 S.Ct. 1359.

<sup>321</sup>See, e.g., U.S. v Nadaline, 471 F.2d 340 (5th Cir. 1973), *cert. denied* 93 S.Ct. 1924.

<sup>322</sup>See, U.S. v Local 560 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 780 F.2d 267 (3rd Cir. 1985), *cert. denied* 106 S.Ct. 2247; See also, Rodonich v House Wreckers Union, Local 95 of Laborers' International Union of North America, 627 F.Supp. 176 (S.D.N.Y. 1985).

<sup>323</sup>780 F.2d. 267, 271.

<sup>324</sup>29 U.S.C. § 401 et seq.

<sup>325</sup>See, e.g., U.S. v Clemente, 640 F.2d 1069 (2nd Cir. 1981), *cert. denied* 102 S.Ct. 102; U.S. v Cerilli, 603 F.2d 415 (3rd Cir. 1979), *cert. denied* 100 S.Ct. 728; U.S. v Santoni, 585 F.2d 667 (4th Cir. 1978), *cert. denied* 99 S.Ct. 1221; U.S. v Jacobs, 451



was first stated in *U.S. v Green*<sup>326</sup> where the Supreme Court held that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property."<sup>327</sup> The crux of the violation, therefore, is not so much a gain to the extortioner, but rather a loss to the victim.

While the concepts of force and violence (actual or threatened) are generally understood, the meaning of the term 'fear' has received more attention from the courts. Similar to the general agreement concerning 'property,' the courts have been consistent in their reading of what constitutes fear, specifically the idea of economic harm.<sup>328</sup> It has become generally accepted that the offense of extortion not only includes a threat of physical force or violence, but a fear of economic loss as well.

Courts have also determined that the intended victim of the extortionate acts need not know with certainty whether or not the defendant has the ability to carry out the threats made.<sup>329</sup> What is needed in these cases is a reasonable belief on the part of the victim that the extortioner has the authority or power to support the threats.

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F.2d 530 (5th Cir. 1971), *cert. denied* 92 S.Ct. 1170; *U.S. v Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied* 92 S.Ct. 736.

<sup>326</sup>76 S.Ct. 522 (1956).

<sup>327</sup>*Id.* at 526.

<sup>328</sup>*See, e.g.*, *U.S. v Haimowitz*, 725 F.2d 1561 (5th Cir. 1984); *U.S. v Billups*, 692 F.2d 714 (4th Cir. 1982), *cert. denied* 104 S.Ct. 84; *U.S. v Cusmano*, 659 F.2d 714 (7th Cir. 1981).

<sup>329</sup>*See, e.g.*, *U.S. v Furey*, 491 F.Supp. 1048 (D.C.Pa. 1980) *aff'd* 636 F.2d 1211; *U.S. v Salvitti*, 464 F. Supp. 611 (D.C.Pa. 1979); *U.S. v Brown*, 540 F.2d 364 (8th Cir. 1976);

## QUID PRO QUO SEXUAL HARASSMENT AS EXTORTION

Under the EEOC Guidelines, "quid pro quo" sexual harassment occurs when "submission to or rejection of such [sexual harassment] conduct by an individual is used as the basis for employment decisions affecting such individual."<sup>330</sup> The idea that "quid pro quo" harassment may be subject to criminal law was first articulated by the District of Columbia Circuit Court in *Barnes v Costle*.<sup>331</sup> In his concurring opinion, Judge MacKinnon stated that "[w]here sexual favors are solicited in return for job benefits or under retaliatory threats . . . the gravity of the incident might also constitute a violation of the criminal laws."<sup>332</sup>

In a typical case of sexual harassment the principles of extortion are clearly evident. The loss of a job<sup>333</sup> or employment benefits<sup>334</sup> resulting from the alleged conduct have been established as violations of Title VII. These types of losses are also within the realm of 'property' injury which give standing to sue under RICO, based on prohibited extortion activities.<sup>335</sup>

The requirement of threats, violence and/or fear accompany "quid pro quo" sexual

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<sup>330</sup>29 C.F.R. § 1604.11(a)(1)(2).

<sup>331</sup>561 F.2d 983. *See supra* note 135 and accompanying text.

<sup>332</sup>*Id.* at 995.

<sup>333</sup>*See, e.g.*, *Miller v Bank of America*, 600 F.2d 211 (9th Cir. 1979); *Tompkins v Public Service Elec. & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977); *Barnes v Costle* 561 F.2d 983 (D.C. Cir. 1977).

<sup>334</sup>*See, e.g.*, *Henson v City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

<sup>335</sup>*See, e.g.*, notes 318 and accompanying text.

harassment claims as well.<sup>336</sup> The Eleventh Circuit, in *Sparks v Pilot Freight Carriers*,<sup>337</sup> upheld a claim in which the defendant made threatening remarks such as "your fate is in my hands,"<sup>338</sup> which "so frightened the plaintiff, she doubted her job security."<sup>339</sup>

In a recent case in the District Court,<sup>340</sup> the plaintiff was told that she had "'better do something nice' [or the defendant] would 'get mean.'"<sup>341</sup> Judge Boyle credited plaintiff's testimony that "she was so frightened by the implications of these remarks that she did not report for work . . ." <sup>n342</sup>

In yet another decision,<sup>343</sup> testimony provided at trial indicated that plaintiff had "extreme distress and concern about the supervisor's unwelcomed advances and the fear of losing her job . . ." <sup>n344</sup>

The basic idea of "quid pro quo" harassment as extortion has been reiterated by

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<sup>336</sup>In *Valerio v Dahlberg*, 716 F.Supp. 1031, 1039 (1988), the District Court for the Southern District of Ohio ruled that "sexual favors need not actually be exchanged to have quid pro quo harassment, they need only be proposed with a *threatened* or implied detriment . . ." [emphasis added].

<sup>337</sup>830 F.2d 1554 (11th Cir. 1987).

<sup>338</sup>*Id.* at 1556.

<sup>339</sup>*Id.*

<sup>340</sup>*Coley v Consolidated Rail Corp.*, 561 F.Supp. 645 (E.D.Mich. 1982).

<sup>341</sup>*Id.* at 647.

<sup>342</sup>*Id.*

<sup>343</sup>*Wilcox v Boeing Military Airplane Company & Hubert E. Richerson*, 1989 U.S. Dist. Lexis 11034.

<sup>344</sup>*Id.* at 9.

the courts on a number of occasions. In its seminal opinion in *Henson v City of Dundee*,<sup>345</sup> the Eleventh Circuit stated that a "quid pro quo" claim rests on the ability of the supervisor to use either actual or apparent authority to "extort sexual consideration from an employee."<sup>346</sup>

The idea of "quid pro quo" harassment as a tort claim for extortion has been attempted in two instances, yet these claims have been rejected. In *Bouchet v The National Urban League*,<sup>347</sup> the plaintiff, an attorney, lost her job through what she considered 'sexual extortion.' In the opinion rendered in the case, Judge Scalia wrote:

[W]ith regard to appellants self-styled 'sexual extortion' claim, [which] rests upon activities such as disrupting Bouchet's work and threatening her with the loss of her job unless she provided sexual favors, we have not found, and have not been cited by appellant, any precedent in D.C. cases rendering such activities actionable, or any indication that the D.C. courts are moving in that direction. We cannot create a new tort on behalf of the District . . .<sup>348</sup>

While the courts that have considered claims for extortion under tort theory have rejected the plaintiff's argument, the dismissal has rested not on the fact that extortion did not

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<sup>345</sup>682 F.2d 897 (11th Cir. 1982).

<sup>346</sup>*Id.* at 910; *See, also*, *Schroeder v Schock*, 42 Fair Empl. Prac. Cases (BNA) 1112, 1114 (D.Kan. 1986) ("In a *quid pro quo* sexual harassment case, the supervisor is relying on and 'using' his authority . . . to *extort* sexual consideration from an employee [emphasis added]); *Sowers v Kemira*, 701 F.Supp. 809, 827 (S.D. Ga. 1988) ("a supervisor in *quid pro quo* harassment is using his authority to *extort* sexual consideration from an employee." [emphasis added]).

<sup>347</sup>730 F.2d 799 (D.C. Cir. 1984); *see also*, *Helwig v Suburban Chevrolet, Inc.*, 33 Fair Empl. Prac. Cases (BNA) 1261 (D.Md. 1983).

<sup>348</sup>730 F.2d at 807.

occur, but rather on the fact that a tort theory for extortion does not exist.

### **SEXUAL HARASSMENT, EXTORTION, AND RICO**

To date, one case has been presented at the district level charging that sexual harassment has violated the RICO statute. In *Hunt v Weatherbee*,<sup>349</sup> the defendant's motion to dismiss was rejected by the court. Plaintiff, Rosa Hunt, alleged that she was subjected to a continuing pattern and practice of sex discrimination and sexual harassment as an apprentice in the United Brotherhood of Carpenters and Joiners of America, Local 40. In a 13 count complaint, Hunt brought charges under the federal statutes of RICO, the Civil Rights Act, Sections 1985(2),(3) and 1986, and the Landrum-Griffin Act. In addition, various state claims for violation of civil rights were attached to the complaint.

The RICO claims brought by the plaintiff stem first from an incident in 1981 at which time Hunt was assaulted by a fellow employee. When a criminal complaint was filed by Hunt against the co-worker, she was called to a meeting with union officials, including Weatherbee. At the meeting, she was coerced and intimidated into withdrawing the complaint through accusations that she was responsible for the assault and sundry forms of sexual animus. A second incident occurred in 1984, when Hunt was assigned, through Local 40, to a project under the direction of Turner Construction and its supervisor, Mark Dirksmeir. Shortly after starting the project, Hunt was approached by the shop steward, Joe Shaw, to purchase raffle tickets for the Local 40 Political Action Fund. Shaw allegedly made threats to physically harm Hunt if she did not buy the raffle

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<sup>349</sup>626 F. Supp. 1097 (D.Mass. 1986).

tickets. Weatherbee, upon learning of the confrontation from Hunt, refused to act. When these threats were repeated to Hunt, in the presence of Dirksmeir, he also declined to take any action. Fearing for her safety, Hunt left the worksite and never returned to work as a Local 40 worker. Six months after this incident, Hunt filed her action against the defendants.

The defendants moved to dismiss Hunt's RICO claim on three grounds.<sup>350</sup> First, they argued, loss of wages is not actionable under the statute. Second, the predicate acts of coercion to withdraw her criminal complaint and purchase raffle tickets do not meet the pattern of racketeering activity requirement of RICO. Finally, they contended that Hunt failed to allege a nexus between the defendants and organized crime. The court disagreed, and upheld Hunt's RICO complaint. The loss of wages, as an injury to business or property, is given credence by the Supreme Court's decision in *Sedima*. Here, the Court said that in determining a business injury, courts are advised to look to Section 4 of the Clayton Act, (15 U.S.C. § 15). Citing relevant cases, Judge Young held that in the antitrust context the loss of an opportunity to perform work is indeed an injury to business or property. In regard to the pattern requirement under RICO, the court held that the coercion to withdraw the criminal complaint and purchase raffle tickets are actionable as predicate acts of extortion under both federal and state codes. The pattern requirement is met by virtue of the fact that these two incidents are simply examples of a prolonged practice of sexual harassment and are sufficient to demonstrate a claim under

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<sup>350</sup>The defendants argued that Hunt's claim is really one for intentional infliction of emotional distress, and as such not actionable under RICO.

**RICO. The defendants motion to dismiss was denied.**

## CHAPTER IX

### CONCLUSION

The *Hunt* case presents an interesting departure from the usual "quid pro quo" theory of sexual harassment in that at no time were sexual favors allegedly required from the plaintiff. On its surface, this appears to be a hostile work environment claim of sexual harassment. The EEOC, however, has recently stated that "although 'quid pro quo' and 'environmental' harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together."<sup>351</sup> While Title VII action requires unwelcome sexual conduct as a prerequisite to claims of sexual harassment, the complaint in *Hunt* appears to introduce a new form of "quid pro quo harassment." In upholding the plaintiff's claim for RICO violations based on sexual harassment, it could be argued that a quid pro quo violation occurs when action is demanded by a claimant by virtue of her sex, regardless of whether the action demanded is for sexual favors. In the instant case, Hunt was forced, because of her sex, to accede

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<sup>351</sup>Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, N-915.035 (October 25, 1988), at 2.



to the demands of her superiors or suffer the consequences (i.e., physical harm and, ultimately, loss of her job).<sup>352</sup>

It is difficult to say with certainty whether other courts would recognize a cause of action under RICO for claims of "quid pro quo" harassment. The idea that this type of harassment is analogous to extortion, a RICO offense, has been demonstrated. The injury requirement in the form of lost income or benefits (which results from noncompliance with the demand for sexual favors), has also been upheld. Proving the pattern requirement can be established by a review of the incidents which led up to the injury sustained by the plaintiff.

The most difficult requirement to meet under a RICO case involving sexual harassment would be found in the liability of the employer for the actions of the employee. Under Section 1962(c)<sup>353</sup> it is unlawful for anyone employed by an enterprise to conduct the activities of the enterprise through a pattern of racketeering. In "quid pro quo" sexual harassment under Title VII, the courts and the EEOC have unquestionably held the employer liable for the acts of its supervisory employees. However, the *respondeat superior* theory of liability under RICO has not fared well in the courts, particularly where the employer receives no benefit from the illegal activity.<sup>354</sup>

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<sup>352</sup>In *Pease v Alford Photo Industries, Inc.*, 667 F.Supp. 1188 (W.D.Tenn. 1987) the court ruled that the plaintiff, subjected to a sexually hostile work environment was the victim of quid pro quo harassment when she refused, under orders of the employer's wife, to stop complaining to the plant manager about the sexual harassment. The plaintiff's unwillingness to drop the matter led to her dismissal from the company.

<sup>353</sup>18 U.S.C. § 1962(c).

<sup>354</sup>*See supra* notes 303-309 and accompanying text.

Arguably the greatest obstacle facing any potential RICO claimant is found in the current status of the law. The civil provisions of RICO went virtually unnoticed throughout the 1970's.<sup>355</sup> Following the Supreme Court's adherence<sup>356</sup> to the liberal construction clause of RICO, "within two years the number of RICO suits topped 1,000."<sup>357</sup> Given the broad interpretation of RICO endorsed by the Supreme Court, suits have been filed in such diverse situations as abortion protests,<sup>358</sup> public utilities,<sup>359</sup> livestock weighing,<sup>360</sup> and product liability.<sup>361</sup> Clearly, "[T]he statute doesn't apply to blue-collar people only, or no-collar people only, it applies to everybody."<sup>362</sup>

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<sup>355</sup>Jost, *Racketeering Law Comes Under Attack*, 1989 Editorial Research Reports 134, 136, citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law (1985). ("through 1980 . . . found only 14 written court decisions in civil RICO suits during the entire decade.").

<sup>356</sup>105 S.Ct. at 3286. ("The statute's 'remedial purposes' are nowhere more evident than in the provision for a private action for those injured by a racketeering injury.").

<sup>357</sup>*Id.* at 142.

<sup>358</sup>*See, e.g.*, *Northeast Women's Center v McMonagle*, 670 F.Supp. 1300 (E.D.Pa. 1987) (holding that an abortion clinic has standing to sue where protestors harass employees and clients and trespass on property).

<sup>359</sup>*See, e.g.*, *County of Suffolk v Long Island Lighting Company*, 685 F.Supp 38 (E.D.N.Y. 1988). (customers sue utility alleging construction of power plants was designed to increase rates).

<sup>360</sup>*See, e.g.*, *Gerace v Utica Veal Co., Inc.*, 580 F.Supp 1465 (N.D.N.Y. 1984) (infected cattle sent for slaughter were misweighed and misgraded resulting in lower payments to farmers).

<sup>361</sup>*See, e.g.*, *Campbell v A.H. Robins*, 615 F.Supp 496 (D.Wis. 1985) (Insurer sued for injury resulting from defective contraceptive device).

<sup>362</sup>ABC News, *Nightline*, April 12, 1989 (Show #2058). Statement of G. Robert Blakey, Prof. of Law, Notre Dame University. Mr. Blakey was one of the drafters of RICO in his position of Chief Counsel to the Senate Subcommittee on Criminal Laws and

But RICO is not without its critics. As one commentator noted, "by drafting [RICO] so broadly its caught up so many people that Congress never intended to catch up, people whose only contact with a racket is the occasional tennis game, clearly not what Congress intended to do.[sic] I think they have to go back to the drawing board."<sup>363</sup>

The judicial system has suggested that Congress amend the statute. In the opinion handed down in *Sedima*, Justice White noted that private actions are being brought against legitimate businesses rather than the typical 'mobster.' To remedy the situation, however, "this defect - if defect it is - is inherent in the statute as written, and its correction must lie with Congress."<sup>364</sup>

Chief Justice William Rehnquist has also been critical of the increase in civil RICO cases, commenting that the cases often have no link to organized crime and are crowding the federal courts.<sup>365</sup>

In the federal legislature, attempts have continually been made to reform the civil provisions of RICO.<sup>366</sup> The current Congress, believing that there has been "an explosion

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Procedure.

<sup>363</sup>*Id.* Statement of L. Gordon Crovitz, Assistant Editor of *The Wall Street Journal* Editorial Page.

<sup>364</sup>105 S.Ct. at 3287.

<sup>365</sup>Rehnquist, *Get RICO Out of My Court*, Wall St. J. May 19, 1989, at sec. A, p.14.

<sup>366</sup>*See, generally, Proposed RICO Reform Legislation: Hearings Before the Committee on the Judiciary*, (1985, 1987); *RICO Reform: Hearings Before the Subcommittee on Criminal Justice of the Committee on the Judiciary*, (1985-1986); *Oversight on Civil RICO Suits: Hearings Before the Committee on the Judiciary*, (1985).

of abusive and harassing lawsuits,<sup>367</sup> has introduced legislation which, while not removing the civil remedy of RICO will reduce the treble damages currently afforded in the statute as well as limit the situations under which a suit can be brought.

Specific attention to the *Hunt* case was paid in the most recent attempts by Congress to reform the RICO statute. When Senator Deconcini introduced legislation to reform the RICO law<sup>368</sup> he was joined by Senator Hatch, who remarked that:

[U]nder recent case law, civil RICO can be used in wrongful discharge cases, e.g., *Williams v Hall* (citations omitted) and sexual harassment cases, *Hunt v Weatherbee* (citations omitted). Now, obviously, persons may be entitled to relief in these and other circumstances of business wrongdoing, but trebling damages in such cases is not appropriate and may eventually work a revolution in our law.<sup>369</sup>

Until such time as the reform measures pass Congress, however, a cause of action for "quid pro quo" sexual harassment under RICO remains.

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<sup>367</sup>135 Cong. Rec. S1652 (remarks of Sen. Deconcini)

<sup>368</sup>135 Cong. Rec. S1652.

<sup>369</sup>*Id.* at S1656.

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The thesis is therefore accepted in partial fulfillment of the requirements for the degree of Master of Science, Industrial Relations.

April 29, 1996  
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