LEGAL momentum
Advancing Women's Rights

395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Legal Resource Kit

Sex Discrimination and Sexual Harassment in Employment

LEGAL momentum
Advancing Women's Rights

395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Please Note

The materials contained in this Legal Resource Kit provide general information. This Kit should not be used as a substitute for an attorney's services. The publications in this Kit are for informational purposes only. They do not constitute legal services or representation and are not to be used in place of a consultation with an attorney. The Legal Department at Legal Momentum updates the Legal Resource Kits as often as possible. However, it is best for you to contact an attorney in your state or city for the most current laws regarding your case.

LEGAL momentum
Advancing Women's Rights

395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Contents

LEGAL momentum
Advancing Women's Rights

395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Overview of Federal Law on Sex Discrimination and Sexual Harassment in the Workplace

I. INTRODUCTION

If you believe you are being sexually harassed or discriminated against at work, you should know the federal, state and local laws that protect you. This kit focuses on the federal laws that enable you to sue your employer for sex discrimination or sexual harassment in employment. In addition to federal law, most states and many cities and towns have their own equal employment laws that in some cases give you more rights and remedies, and more favorable procedures. Check with your state and local departments of employment/human rights/human relations for information on the laws in your area.

The "Resource List" at the end of this kit includes a number to locate the Equal Employment Opportunity Commission ("EEOC") Office nearest to you as well as a list of each state's equal employment agencies where sex discrimination and sexual harassment claims are filed. Additional state and city numbers are in your telephone directory.

If the discrimination or harassment causes you either emotional or physical injury, additional claims under your state personal injury laws may be available.

If the harassment involved physical touching, coerced physical confinement or coerced sex acts, it may constitute a crime and you may want to contact your local law enforcement agencies.

If you think you and other people of your age, race, color, religion or national origin are being treated badly, you may have discrimination claims on those grounds as well.

This kit is not a substitute for a lawyer's advice but does provide useful information to help you stand up for your federally protected rights.

II. RELEVANT FEDERAL LAW

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act (commonly referred to

as "Title VII"), 42 U.S.C. §§ 2000e *et seq.* (1994), protects you against many forms of discrimination based on sex. It covers decisions about hiring, firing, work assignments and conditions, promotions, benefits, training, retirement policy and wages. Title VII applies to employers with fifteen or more employees. The law also prohibits these forms of discrimination by labor unions, employment agencies, and joint labor-management committees.

Title VII prohibits two types of discrimination:

Intentional discrimination: this occurs when your employer treats you less favorably than it would a man in the same situation because of your sex. Your employer may not defend itself by arguing that your male co-workers prefer to work with other men or that your male supervisors or co-workers believe "women don't belong."

Disparate impact: a policy that looks neutral but in fact negatively affects far more women than men has a "disparate impact" and is illegal if the employer cannot show that the policy is related to the duties of the position and that the policy is necessary for the business. An example of a policy with a disparate impact is one only allowing people over 5'6" to have a particular job (which would exclude far more women than men) when such a height has no relevance to the job duties. To win a disparate impact claim, you must be able to point to the particular policy or group of policies that keep women out, or otherwise negatively affect women, in greater numbers than men.

Sex discrimination under Title VII includes sexual harassment. Thus, Title VII also prohibits sexual harassment in the workplace. The "Spotlight on Sexual Harassment" section below explains the legal standards for sexual harassment.

Title VII also prohibits employers from treating women differently from other temporarily sick, injured or disabled employees because of the woman's pregnancy, childbirth or related medical conditions. This means that any benefits, leave or reinstatement rights other workers get from your employer when they cannot work for health reasons should be available to pregnant women and new mothers who are temporarily physically disabled. Unfortunately, if the other temporarily disabled workers are not entitled to benefits, Title VII does not mandate them for pregnant women or temporarily physically disabled new mothers, although disability insurance may be available under state law.

However, the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601-2654, does give parents who work for employers with fifty or more employees the right to an unpaid leave of up to twelve weeks. The law prohibits employers from refusing to hire someone due to pregnancy or from firing someone due to pregnancy. The law also prohibits employers from forcing an employee to go on maternity leave when she can work and from denying a woman who has been out on approved maternity leave her previous retirement, seniority or employment level when she returns. For more information on this subject, download or request a copy of Legal Momentum's legal resource kit on pregnancy and parental leave at www.legalmomentum.org.

An employer also can be held liable for retaliating against an employee who complains about sex discrimination or sexual harassment. The EEOC has published guidelines explaining its interpretation of retaliation.[1] Retaliation occurs when an employer takes an "adverse action" against an employee, such as firing the employee or giving her a bad job reference, because the employee engaged in a "protected activity," such as complaining about sexual harassment in the workplace.[2] If your employer retaliates against you because you exercised a legal right guaranteed by any of the federal employment discrimination statues, such as Title VII, then you may be able to sue your employer for retaliation. You must show that you had a "reasonable and good faith belief" that a civil rights violation took place and that your employer took adverse action against you as a result. To be liable, the employer's adverse action can range from a threat or reprimand to a

demotion or discharge. Additionally, your employer has violated the law if he or she retaliates against you for refusing to obey an order that would have you violate Title VII or another employment discrimination law (*e.g.*, if your employer commands you not to hire a job candidate because of her race).

Other Federal Laws Prohibiting Sex Discrimination

If you are employed by the local, state or federal government, you may also have special rights not to be discriminated against under **42 U.S.C. § 1983 ("Section 1983")** and the **U.S. Constitution**. If your employer has contracts with the Federal Government, **Executive Order 11246** requires that the employer agree not to discriminate on the basis of race or sex, and to take affirmative action to hire and promote women and racial minorities.

The **Equal Pay Act of 1963**, 29 U.S.C. § 206(d), prohibits employers from paying men and women unequal wages for "substantially equal" work. What constitutes equal work is determined by the skills, abilities and efforts required for the job, not by the job titles or descriptions provided by employers.

Notes on the Equal Pay Act

Although the Equal Pay Act has been in effect for over thirty years, the disparity between men's and women's wages remains significant. This disparity in wages occurs in all occupations, regardless of the skill or education required of the employees. Women are underrepresented in fields dominated by men such as construction and the skilled trades, effectively creating a "pink collar ghetto" of lower paying female jobs. Moreover, women do not receive equal pay for equal work. While a woman's job may require similar skills and experience as a man's job, women often are paid significantly less.

Overall, women employees are paid on average 75.5 cents for every dollar men are paid.[3] When looked at over a 15-year time period, "the average prime age working woman earned only $273,592 while the average prime age working man earned $722,693 (in 1999 dollars)."[4] Estimates indicate that over the course of a lifetime, a woman who works full time will earn $523,000 less than a male doing the same work.[5] The statistics are startling given that the wage gap began to close significantly during the 1980's and some of the best wage earning years for women occurred during the 1990's.[6] However, recent reports show that the wage gap is widening again.[7] While it is unclear why this is so, there are indications that the promising strides that women made during the 1980's and 1990's were ultimately more the result of stagnating men's wages and inflation rather than any real progress for women.[8]

To begin to address this type of wage discrimination in your own workplace, learn to recognize the various ways that discrimination often takes place. Be aware of the salaries of men who do the same job as you. If you feel you have been a victim of wage discrimination, it is important to keep a record of pay stubs indicating wage increases or a lack thereof. Keep note of any promotions you may or may not have received and also notice if and when others in a similar job position as you are receiving those promotions. An employer may defend pay disparity between men and women only by showing that there was a seniority or merit system in place, or a system which measures earnings by quantity or quality of production, or some "factor other than sex" which determined wage differential. So, it is especially important to keep a diary of any conversations you may have with supervisors or other employees regarding why you and/or other women in your office are paid less, receive fewer promotions, or are "steered" into jobs traditionally held by women. Finally, keep a record of any correspondence you and your employer may have regarding these types of issues.

Given the expense and complexity of litigation, you may want to first address any concerns you have regarding wage discrimination with your employer and/or human resources personnel at your workplace. If that does not provide any relief, you may file a complaint with the

EEOC. The EEOC may decide to sue on your behalf because of an employer's violation of the Equal Pay Act. You may also sue by going to a private attorney. Bear in mind that pay discrimination cases are often difficult cases to prove. Before filing a complaint or a lawsuit, you may wish to consult with an attorney who can discuss the available options with you, and provide relevant information for filing a complaint or lawsuit. If you prevail, whether by filing a private lawsuit or an EEOC charge, you may be able to recover wages that you lost as a result of the violation, you may be able to stop your employer from continued violations, and you also may be granted attorneys' fees and cost.

Federal Laws Prohibiting Other Forms of Discrimination

Besides Title VII (which prohibits discrimination on the basis of race, color, sex, national origin, or religion), other federal laws may protect you from discrimination and harassment based on grounds other than sex. For example, **42 U.S.C. § 1981 ("Section 1981")** is a federal statute that prohibits discrimination in hiring and the terms of employment because of your race, color or national origin. This applies to private employers as well as local, state and federal employers. Section 1981 is more limited in terms of who is covered than Title VII; people who are discriminated against on the basis of sex or religion are not protected by this statute. A successful suit under Section 1981 can lead to compensation for pain and suffering and fines against the employer. Unlike Title VII (discussed further in this section), there are no limits on these awards.

The **Age Discrimination in Employment Act of 1967**, 29 U.S.C. §§ 621-634, prohibits an employer of 20 or more employees from discriminating against employees between the ages of 40 and 70 on the basis of **age** in hiring and firing practices.

The **Rehabilitation Act of 1973**, 29 U.S.C. §§ 701-796 (1985), provides protection against employment discrimination for **people with disabilities**. Employers who have federal contracts of more than $2,500 may not discriminate against people with actual or perceived physical or mental handicaps anywhere in the company. These employers must make reasonable accommodations to hire disabled workers, which means that they must, where possible, provide ramps and other modifications that disabled workers require. The **Americans with Disabilities Act of 1990** ("ADA"), 42 U.S.C. §§ 12101-12213, which went into effect in 1992, prohibits all employers of 15 or more employees from discriminating against a "qualified individual with a disability" with regard to any aspect of employment. The ADA requires employers to make reasonable accommodations for the individual, within the company's budget. The disabled individual must be "qualified," that is, able to do the job with reasonable accommodations made. Both the Rehabilitation Act and the ADA protect employees who have Human Immunodeficiency Virus ("HIV") or AIDS. If you win an ADA or Rehabilitation Act case, you may be awarded compensatory and/or punitive damages. The amount of money you can receive in damages is based on the number of employees in the company. The limits are the same as those that apply in Title VII cases. (*See* discussion in the "What You Can Win in a Successful Title VII Suit" section of this kit). Damages are not available if the disability discrimination happens because of a neutral policy that is not obviously intended to keep out people with disabilities. Damages are also not available if the employer finds a position for you that is as good as the one for which you were turned down. (This is also subject to the company's budget).

While there is no federal law prohibiting employment discrimination on the basis of **sexual orientation**, there are some city and state laws that serve this purpose. You should also be aware that behavior that you feel discriminates against you on the basis of sexual orientation may be illegal if it also reflects discrimination on the basis of sex. For example, if someone you work for persistently refers to the women who work for the company as lesbians, he may be doing this for the purpose of harassment, hoping that this behavior will force all women, whatever their sexual orientation, to

leave the job. In such a situation, even if the city or state in which you work does not have a law which expressly prohibits discrimination on the basis of sexual orientation, the behavior of your employer may be considered discrimination on the basis of sex, which is prohibited by Title VII.

State and Local Laws

State and local employment, human rights and public accommodations laws also prohibit sex discrimination and may provide fruitful avenues of relief. In the employment area, these laws may reach smaller employers and may also afford greater compensatory and punitive damages than are available under Title VII.

Finally, in sexual harassment cases, plaintiffs have sustained claims for damages upon common law tort claims, such as assault, battery, and intentional infliction of emotional distress, and interference with contract.

III. SPOTLIGHT ON SEXUAL HARASSMENT

Increased awareness of sexual harassment has led more women than ever to report incidents of workplace harassment. Women should not be forced to leave hard-won jobs in order to avoid sexual harassment. This section is intended to give an overview of federal sexual harassment law in employment, and provide some ideas about how to challenge harassment without jeopardizing your job.

Defining Sexual Harassment

Sexual harassment in employment is a type of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII applies to all employers of 15 or more employees.[9]

The federal Equal Employment Opportunity Commission ("EEOC") defines sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" when any one of three criteria is met:

1. Submission to such conduct is either explicitly or implicitly made a term or condition of the individual's employment; or

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the 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 work environment.[10]

The threshold requirement of the EEOC definition is that the alleged sexual remarks, advances, or other behavior is "unwelcome."[11] In order to establish "unwelcomeness," you must clearly demonstrate that you neither enjoy nor encourage your harasser's behavior. Be aware that courts may examine the way you respond to the people who are harassing you. For example, if you are provoked to use profanity, a court may look at this critically. Nevertheless, some courts have found that such a response is not an indication that a victim of harassment welcomed offensive language or behavior aimed at her.[12] Courts also have found that a woman's life outside the workplace, including her posing nude for a magazine, is irrelevant to whether she would find an employer's sexual comments or advances welcome.[13]

But some courts have found that plaintiffs who were receptive to, or engaged in, sexually suggestive behavior, did not find it "unwelcome." For example, courts may interpret not wearing a bra, engaging in sexually suggestive gift-giving, exhibiting surgical scars, telling "dirty" jokes, or making sexually explicit suggestions as indications that alleged harassing behavior was welcome.[14] This may happen even if you explain to the court that you felt pressured to engage in sexual behavior in order to keep your job. It also is important that you complain of the harassment to a supervisor. Some courts interpret

not complaining as an indication that you welcomed the harassment.[15]

In applying the EEOC definition, courts have recognized two forms of sexual harassment claims: the "quid pro quo" claim, and the "hostile environment" claim. A "quid pro quo" claim (literally "this for that") involves harassment in which a supervisor demands sexual favors in exchange for job benefits over which that supervisor has some control or influence. By conditioning some aspect of employment on submission to sexual demands, the supervisor imposes a burden on the harassed employee that other employees do not suffer.

A "hostile work environment" claim involves unwelcome behavior of a sexual nature that creates an intimidating, hostile, or abusive work environment or has the effect of unreasonably interfering with an individual's work performance. You can only make a "quid pro quo" claim if the harasser has authority over you, meaning he has the power to hire, fire, promote you, etc. However, a hostile environment claim may involve unwelcome behavior of a sexual nature by anyone in the workplace, if the employer knew or reasonably should have known about the harassment. Such unwelcome behavior could include discriminatory intimidation, ridicule or insult. "Merely offensive" conduct would not be enough to establish discrimination.[16]

Elements of a Title VII Sexual Harassment Claim

1. "Quid pro quo" Harassment

To establish a quid pro quo sexual harassment claim, you must prove that:

> you are a member of a protected class (*i.e.*, you are a woman); and
>
> you were subjected to unwelcome conduct; and
>
> the harassment was based on sex (*i.e.*, sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature, or the harassment was non-sexual but only one sex was targeted for abuse); and
>
> your submission to the unwelcome conduct was an express or implied condition for receiving job benefits, or your refusal to submit to the harassing demands resulted in a tangible job detriment; and
>
> the harassment was carried out by an employer or agent of that employer.[17]

2. Hostile Work Environment

In 1993, the U.S. Supreme Court, in a case called *Harris v. Forklift Systems, Inc.*, clarified the requirements for establishing a hostile work environment, holding that you must prove that:

> you are a member of a protected class (*i.e.*, you are a woman); and
>
> you were subjected to unwelcome conduct; and
>
> the harassment was based on sex; and
>
> the harassment explicitly altered the terms or conditions of employment based on sex by creating an intimidating, hostile or abusive work environment.[18]

The Supreme Court also stated in *Harris* that courts should consider all of the circumstances to evaluate a "hostile work environment." Such factors may include:

> the frequency of the discriminatory conduct;
>
> its severity;
>
> whether it is physically threatening or humiliating, as opposed to a mere offensive utterance;
>
> whether it unreasonably interferes with an employee's

> work performance, discourages the employee from remaining on the job or keeps her from advancing in her career; and
>
> that psychological harm is only one factor the court can consider. Absence of psychological harm to the employee is not dispositive.[19]

In order to win a hostile work environment claim, you must satisfy both an objective and subjective standard.[20] First, to satisfy the objective test, the harassment must result in a "work environment that a *reasonable person* would find hostile or abusive." Second, to satisfy the subjective test, you must "subjectively perceive the environment to be abusive." Only then does the abusive conduct actually "alter the conditions of [the victim's] employment" and subject the employer to liability under Title VII.[21] However, this does not mean you have to suffer a nervous breakdown in order to prove sexual harassment.[22] You do not have to prove discrimination "so severe to seriously affect [your] psychological well-being" to establish a "hostile work environment" claim.[23] Nevertheless, there is a minimum threshold and one or two sexist comments will probably not be enough to support a hostile environment claim.[24] In addition, if your employer acted quickly and effectively to stop the harassing conduct, you may not be able to establish liability on the part of your employer. Generally, courts set high standards for an employer's "prompt and effective remedial action."[25]

3. Same-Sex Sexual Harassment

In *Oncale v. Sundowner Offshore Services*,[26] the Supreme Court unanimously held that same-sex sexual harassment is actionable under Title VII. In other words, men can sexually harass men, and women can sexually harass women. As in all sexual harassment cases, you must show that the harassment was "based on sex," and that it affected the "terms, conditions and privileges" of employment. According to the Court, same-sex harassment is actionable regardless of whether the harasser is motivated by homosexual intentions.

4. Establishing Employer Liability

The standard for holding employers responsible or liable for sexual harassment differs depending on whether the person who harassed you was a co-worker or a supervisor. In all cases, whether your harasser was a co-worker or supervisor, the employer will be responsible if it knew or should have known about the harassment and failed to remedy the situation. If, however, you have been harassed by a supervisor or an individual who has control over your employment situation, a different standard also applies. In two sexual harassment cases, *Burlington Indus. v. Ellerth*[27] and *Faragher v. City of Boca Raton*,[28] the Supreme Court specified that employers are liable, regardless of whether they knew about specific incidents, for sexual harassment by a supervisor with immediate (or successively higher) authority over the plaintiff that results in a tangible employment action. In other words, an employer is clearly liable for a supervisor's harassment if the plaintiff suffered a detrimental job impact such as being fired, demoted, involuntarily transferred, or denied a raise or promotion as a result of the harassing conduct.

In *Ellerth*, however, no tangible employment action was taken against the plaintiff. In fact, Kimberly Ellerth was promoted by the harasser. When no tangible employment action is taken, such as in Ms. Ellerth's case, the employer is entitled to an affirmative defense to liability. To qualify for the affirmative defense, the employer must show:

> that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
>
> that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[29]

Whether an employer exercised reasonable care under the first part of the defense depends on whether it had a well-distributed, comprehensive anti-harassment policy and zero tolerance for sexual harassment. The *Ellerth* and *Faragher* decisions thus create a strong incentive for employers to institute anti-harassment policies. In *Faragher*, the Supreme Court ruled that the employer did not have an affirmative defense because of its failure to distribute its sexual harassment policy.

Whether the employer can meet the second part of the defense depends, in large part, on whether the plaintiff employee complained about the harassment. Although it is not required in every case, if you are being harassed by a supervisor or by a co-worker, you should complain as soon as possible to a superior about the harassment. Once you have lodged a formal complaint with a person who has the authority to correct the situation, your employer will be liable for the conduct and has the responsibility to see that it is discontinued. Importantly, you are not *required* to use your employer's complaint procedure. However, if you do not complain, it will be difficult to win your case unless you provide a reasonable explanation for not complaining. For example, you might know, based on your employer's response to past complaints, that complaining would be useless. In addition, if you fear retaliation (*i.e.*, being fired or demoted) for reporting the sexual harassment, and therefore you do not complain to a higher authority, you should still have a Title VII claim providing that your fear of retaliation is reasonable and legitimate.

IV. BRINGING A LEGAL ACTION UNDER TITLE VII AGAINST SEX DISCRIMINATION OR SEXUAL HARASSMENT

Who May Be a Plaintiff Under Title VII?

A Title VII plaintiff may be any employee of an employer having 15 or more employees, or an employee of a city, state or federal government employer (not including the non-civilian sector of the military) who is a victim of sexual harassment.[30]

In general, independent contractors and partners are not employees, and thus may not sue under Title VII. Courts apply a range of factors to determine whether someone is an independent contractor or an employee. Generally, the more control an employer exerts, the more likely the hired party is an employee, and not an independent contractor.[31] Some courts permit a partner in a firm to sue under Title VII if the totality of the circumstances indicates that the person so lacks the traditional elements of partnership status that she or he is best described as an employee.[32]

Who May Be a Defendant Under Title VII?

A Title VII defendant may be a government employer[33] (not including military) or an employer having 15 or more employees, and/or "any agent" of such an employer. Unions and job referral agencies are also covered under Title VII.[34]

A co-worker cannot be named as a Title VII defendant. Courts, however, have held that certain supervisory employees can be "agents" of the employer, and thus may be named as individual defendants in a suit.[35] Some argue that individual supervisors are liable only if that supervisor has harassed an employee. Others argue that a supervisor's knowledge of harassment by other employees, and failure to take steps to prevent it ("ratification and condonation") where a supervisor had the power to do so, is sufficient basis for the supervisor's individual liability.

Can Gender Discrimination and Racial Discrimination Claims Be Combined and Pursued Under Title VII?

Title VII also protects against racial discrimination in the workplace. Plaintiffs can pursue separate race and sex claims under Title VII. It is less clear, however, whether plaintiffs can combine gender *and* racially motivated discrimination claims. A combined or "compounded"

discrimination claim is evident in a situation where, for example, black women are consistently passed over for better-paying positions while white women and black men advance.[36]

Increasingly, courts are recognizing compound discrimination claims under Title VII. The first case to do so was *Jefferies v. Harris County Community Action Ass'n*,[37] in which the Fifth Circuit Court of Appeals held that black women as a class are protected under Title VII. Although drawing upon the "sex-plus" theory as a foundation,[38] the court noted that depriving black women of a remedy under Title VII would be particularly unjust, since each characteristic alone, race or sex, was protected under Title VII.[39]

Since *Jefferies*, most courts that have addressed whether gender and race discrimination claims can be compounded have allowed such claims to go forward under Title VII.[40] The biggest hurdle for compound discrimination is establishing the prima facie case -- *i.e.*, supplying enough proof on its face that, for example, black women as a class experience discrete differences from white women or black men. Courts have noted the difficulty in supplying evidence of discriminatory conduct for compound discrimination.[41] Consequently, courts also have allowed proof of sexual harassment and of racial discrimination to be aggregated to support claims of compound discrimination.[42]

Courts may be reluctant to allow compound discrimination claims because they do not want to create a multitude of discrete classes where it would be nearly impossible to demonstrate that an employer has *not* discriminated on the basis of some characteristic (*e.g.,* non-white Chinese-born women over 50).[43] However, since *Jefferies,* only one court has explicitly rejected the compounding of racial and gender discrimination claims.[44] If a prima facie case of racial and gender discrimination can be made, in which statistics support a bias towards a certain class of employees, courts seem to be willing to allow these claims of compound discrimination to progress.[45]

EEOC Complaint Process

Federal, state, and local agencies provide an alternative forum, outside the court system, to bring your sex discrimination or sexual harassment complaint. In fact, you cannot bring a claim in federal court under Title VII without first pursuing administrative remedies through the EEOC. Additionally, many state and local laws have the same requirement.

The "Resource List" section of this kit contains a number to locate the EEOC Office nearest to you as well as a list of each state's equal employment agencies where sex discrimination and sexual harassment claims are filed. Additional state and city numbers are in your telephone directory.

The agency process is designed for use without lawyers and without spending large amounts of time and money. There is no filing fee and the agency does not charge for either investigating or attempting to resolve your complaint. Be very careful, however, to note the time limits required by these agencies. You must file an administrative complaint within the specified time period following the last discriminatory act. If you do not comply with these limits your complaint may be dismissed.

Unless you are employed by the federal government, you must file a complaint with the EEOC within 180 days; if there is a state deferral agency with which a charge is filed as well, the period is extended to 300 days (240 days in some states). Federal employees must initiate contact with an agency EEO counselor within 45 days. In most states filing a complaint with the state or local agency will result in an automatic filing with the federal EEOC.

Your complaint should describe in detail the types of discrimination and/or harassment you have suffered and include the names of all the supervisors who took part in or failed to stop any co-worker harassment. To ensure

that you preserve your right to sue individual supervisors as well as your employer in court, you should name them in the administrative complaint. An EEOC complaint should also broadly characterize the discrimination to avoid any later claim that you "did not complain about *that* to the EEOC."

Although this kit describes the basic requirements of the administrative complaint procedures, it is still a good idea to request a description of the process in writing from the federal or state agency. The following is a suggestion of the questions you should consider asking:

> Where and with whom do I file?
>
> What is the time limit within which I must file?
>
> What is the process once I have filed?

You should also ask the EEOC some additional questions:

> If I file with you, do you investigate my claim or do you send it over to the state agency to investigate?
>
> If you send it to the state, does that have any effect on the rights I may have under state law?

Ask state and city agencies:

> If I file with you do I lose my right to bring my case in state court?

After receiving your complaint, also known as a charge, the agency will notify your employer of your complaint, investigate it and attempt to resolve the problem. If the claim cannot be resolved at the end of the investigation, the EEOC sends you either a "right to sue" letter or notification that they intend to bring the case on your behalf by initiating a suit in federal court. Though the EEOC rarely initiates lawsuits, if it does choose to litigate the case on your behalf, you do not pay them for their efforts. You may receive monetary damages, such as back pay and reinstatement.

In 2003, the EEOC resolved 27,146 claims of sex discrimination administratively and only brought 393 sex discrimination suits.[46] Importantly, the EEOC currently has a backlog of approximately 40,000 charges.[47] Of those discrimination charges, 30.6% were gender-related.[48] As a result of the EEOC's backlog, it takes the agency an average of one year to complete the investigation process for a complaint. This processing time may be longer or shorter depending on the merits of your claim (*i.e.,* if the agency finds that discrimination is likely to have occurred in your case, it will take longer to research it).

If you know that you would like to file a lawsuit, you may decide to ask for your right to sue letter before the EEOC contacts you regarding the resolution of your claim. You may request a right to sue letter once 180 days have passed since you filed your complaint with the EEOC. A "right to sue" letter means that the EEOC will not bring the case. The letter will indicate whether or not the EEOC believes that discrimination took place. Even if the EEOC finds that there was no sex discrimination or sexual harassment, you may still go to court and try to prove your claim there. Regardless of the EEOC's conclusions, you can initiate a lawsuit in court. If you decide to pursue a legal claim, both you and your employer are entitled to a copy of the EEOC's investigative findings on your complaint. You should ask the EEOC representative handling your claim how to go about obtaining a copy of your EEOC file.

In an effort to streamline its review process, the EEOC instituted the "priority charge handling" program in 1995. Under the priority charge handling system, the EEOC assigns each claim to one of three categories, known as Categories A, B, and C. Category A charges are those complaints that the agency views as being most likely to have involved discrimination and will receive the most attention from the agency. Charges can be bumped up from Category B or C to Category A level depending on what the EEOC uncovers in the investigation process.

However, just because your claim is identified as a Category A, or high priority, claim, this does not necessarily mean that the EEOC will pursue the case in court on your behalf. Due to the EEOC's scarce resources, the agency may issue you a right to sue letter indicating that it found cause that discrimination did occur. If this is the case, then you will need to find a private attorney to handle your legal claim.

Filing in Federal Court

After going through the administrative agency procedure, you may wish to initiate a sex discrimination or sexual harassment lawsuit on your own. Court procedures and deadlines are stricter and more complex. Upon *receipt* of the right to sue letter from the EEOC, you have ninety (90) days within which to file a complaint in federal court. As noted above, if you wish to go to court quickly, you may request a right to sue letter after 180 days from when you filed your EEOC complaint, without waiting for an administrative determination. However, you cannot file in court without first pursuing your administrative remedies.

It is best to be represented by an attorney familiar with sex discrimination or sexual harassment law. One problem with bringing your own case is that lawyers are expensive. Very little free legal representation exists for people with sex discrimination or sexual harassment cases. However, if your income is less than 125% of the federal poverty level, you may be able to get free legal services from the Legal Aid Society or a Legal Services Corporation in your area, although most offices do not do employment cases.

Additionally, you may be able to retain an attorney for either no fee or a small payment to cover costs. You and your attorney can agree that if you win your case, she will seek an award of reasonable fees from your employer as provided in the applicable laws and/or receive a pre-determined percentage of any money you win. See the "Resource List" section of this kit for resources that can help you find an attorney.

Mediation at the EEOC

Within the past few years, the EEOC has adopted voluntary mediation as an alternative form of dispute resolution for some employment discrimination complaints. In the 1998 fiscal year, the EEOC attempted to resolve over 2,000 employment discrimination cases through voluntary mediation, the vast majority of which were settled in that forum. The mediation process is entirely separate from the traditional investigation procedure. This separate track allows parties to be completely open during the mediation process without fearing that their statements may disadvantage them if the claim is litigated at a later point.

The EEOC has at least one trained mediator at each of its 23 district offices. Your local EEOC office also may have a mediator on staff, depending on its particular resources. Typically, parties whom the agency considers most likely to resolve their differences through mediation are approached to participate in the program. For instance, parties who plan to continue to work together may wish to conciliate outside of court. Participation in the EEOC's dispute resolution program is completely voluntary; once one party has decided it would like to undergo mediation, the EEOC will invite the other party to participate in reconciliation efforts. If both parties agree to mediation, the EEOC will assign a mediator to hear the dispute. The mediator is a neutral party who usually is an EEOC administrator, an administrative law judge, or an attorney who has volunteered to mediate for the agency. He or she will work with both parties impartially to try to find a solution that is acceptable to each side. If the mediation fails to satisfy either party, the claim will be returned to the investigative track, and the agency will resume its inquiry as to whether there is cause to pursue the matter in court. However, the information that surfaces as a result of mediation (*e.g.*, if your employer admits guilt during the negotiation) will be not noted in the EEOC file on your charge, and it will not be admissible in a court of law.

If you would like to attempt to resolve your claim through mediation, you should request that the EEOC use this approach. Monetary damages are occasionally awarded in this forum, depending on the nature of the dispute and what is reasonable to both parties.

Note on Arbitration

In contrast to voluntary mediation, employers increasingly are adding clauses to employment contracts that require employees to submit any claims of job discrimination to an arbitration panel rather than to a court or an administrative agency such as the EEOC. You should be especially aware of this possibility if you work in the securities exchange, construction, insurance, banking, information technology industries, or if you are a member of a union. Supporters of arbitration view it as a fast, efficient alternative to federal court for resolving employment disputes. However, an arbitration panel might not afford you the fairness, neutrality, and procedural protections Title VII was meant to provide.[49] An agreement to arbitrate may be contained in your employment application, employment contract, in your application for registration in the securities industry, in your law or consulting firm's partnership agreement, or in your union's collective bargaining contract.

If you have signed an agreement to arbitrate, you probably cannot bring your claim in court unless you can demonstrate that you did not knowingly or voluntarily waive your right to a jury trial. In *Gilmer v. Interstate/Johnson Lane Corp.*,[50] the Supreme Court upheld mandatory arbitration clauses contained in the application for registration in the securities exchange industry. The Court held that under the Federal Arbitration Act ("FAA"),[51] an employee must submit an age discrimination claim to mandatory arbitration if he or she signed the standard application for securities industry registration ("U-4 form"), which provides for mandatory arbitration of "any controversy . . . arising out of the employment or termination of employment" between the employee and the corporate employer.[52] As of January 1, 1999, however, U-4 forms no longer contained binding arbitration clauses. Due to an amendment to the National Association of Securities Dealers ("NASD") rules requiring NASD members to submit any employment disputes to binding arbitration approved by the Securities and Exchange Commission, the decision to compel employees to agree to predispute arbitration is now left to individual securities organizations. In *Circuit City Stores, Inc. v. Saint Clair Adams*, the U.S. Supreme Court determined that transportation workers are the only employees *exempt* from the FAA's requirement that courts enforce arbitration agreements in employment contracts.[53]

In *Wright v. Universal Maritime Serv. Corp.*,[54] the Court allowed the plaintiff to bring his disability claim in court, even though his collective bargaining agreement contained a general arbitration clause. The Court based its ruling, however, on the fact that the actual language at issue did not clearly waive the plaintiff's right to sue in court. In so ruling, the Court sidestepped the larger question of whether a more carefully worded waiver would be enforceable. This will undoubtedly be re-examined in future cases.

Several Courts of Appeals, following *Gilmer*, have held that under the FAA, Title VII claims for sexual harassment and gender discrimination also may be subject to compulsory arbitration.[55] Federal courts also have extended this holding to cover arbitration clauses contained in employment contracts and partnership agreements.[56] Some of these agreements have been upheld even when the employees were told that they would not be hired or would lose their jobs if they did not sign them.[57]

Importantly, you may still be able to bring your claim in court if you did not knowingly waive your right to sue: for example, if you were not shown a copy of the arbitration agreement, or if the arbitration clause was written in an employee handbook rather than in a document you signed.[58] In addition, you still may be able to bring your claim in court if the arbitration clause is contained in your union's collective bargaining contract,

and you never signed an individual agreement to arbitrate. The Supreme Court in *Gilmer* expressly stated that its holding applied only to individuals who had signed an individual agreement, and several Courts of Appeals have ruled that collective bargaining contracts cannot be used to force an individual worker to arbitrate civil rights claims, such as a sexual harassment or race discrimination claim.[59]

Recent judicial decisions suggest that there may be hope for employees who file Title VII claims in spite of a past agreement to arbitrate. One court has stated clearly that arbitration is not a substitute for the protection that courts give to individual civil rights.[60] Accordingly, the court ruled that binding arbitration clauses that prevent employees from litigating civil rights claims are unenforceable under the language of the Civil Rights Act of 1991. Another court agreed with this conclusion, stressing that the structure of arbitration unfairly favors employers.[61] Based on this finding, the court held that arbitration is an inadequate forum for deciding civil rights claims.

What You Can Win In a Successful Title VII Suit

Title VII remedies for sex discrimination or sexual harassment include declaratory and injunctive relief, back pay, front pay under certain conditions,[62] attorney's fees and costs and, under the Civil Rights Act of 1991, compensatory damages (such as pain and suffering) and punitive damages for intentional discrimination. Unfortunately, there is a limit on the amount of compensatory and punitive damages that you can win in even the worst cases. The limit depends on how many employees the employer has, as follows:

Total Employees	Total Damages
100 or less	$50,000
101 to 200	$100,000
201 to 500	$200,000
501 or more	$300,000

Either a judge, or a jury if you or the employer asks for one, decides on the amount of damages within these limits if you win. This money is not payable in "disparate impact" Title VII cases, where the discrimination takes the form of a neutral policy and the employer did not intentionally discriminate. Your state laws on equal employment opportunity, contracts or torts, under which you may have additional rights, may also give you damages.

Finally, it bears keeping in mind that a court or administrative proceeding may not be the most effective or fastest way to resolve a sex discrimination or sexual harassment situation. The unfortunate reality is that you must carefully consider whether you are willing to jeopardize your job and reputation by making your treatment a public issue. In addition, some discrimination or harassment may not rise to the level necessary to succeed in federal court, despite its serious impact on you. You should seriously consider taking the strategic informal actions discussed above before bringing formal action before a court or an agency. Not only can these strategic actions empower you, but they will place you in a better position if you ultimately decide to file an administrative or court complaint.

If after pursuing informal and administrative remedies you decide to go to court, be prepared for a long, drawn-out litigation, with the possibility of intensive and intrusive factfinding. Events of recent years have done much to educate the public, including judges and employers, about sexual harassment. We can hope that, in the future, charges of sex discrimination or sexual harassment will be evaluated fairly based on the facts and circumstances of each case, without stereotypical assumptions about what women should be willing to accept as the price of a job.

LEGAL momentum
Advancing Women's Rights

395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Effective Complaint and Investigation Procedures For Workplace Sexual Harassment

I. WHAT IS SEXUAL HARASSMENT?

This section discusses what constitutes sexual harassment under the law, what an employee who feels she is being sexually harassed should do, and suggestions for employers concerned about sex discrimination and sexual harassment.

There are both male and female harassers and victims, and sex discrimination and sexual harassment can occur between a male and a female or members of the same sex. This kit refers to harassers as males and harassed individuals as females to reflect the fact that in most sex discrimination and sexual harassment cases, a male harasses a female.

Sexual harassment is experienced by millions of women in this country. While some forms of it are not prohibited by law -- cat calls and obscene leers on the street for example -- sexual harassment is prohibited as a form of sex discrimination in the workplace by federal law (if your employer has more than 15 employees or is a government employer) and by the laws of many states, counties and municipalities. In addition, many state and local laws prohibit sex discrimination, including sexual harassment, in public accommodations (places where goods, services, or facilities are extended, offered, or sold).

As noted in the previous section of this kit, courts have recognized two forms of sexual harassment claims: the "quid pro quo" claim, and the "hostile environment" claim. A "quid pro quo" claim (literally "this for that") involves harassment in which a supervisor demands sexual favors in exchange for job benefits over which that supervisor has some control or influence. This conditioning of some aspect of employment on submission to sexual demands, the supervisor imposes a burden on the harassed employee that other employees do not have to endure. A "hostile work environment" claim involves unwelcome behavior of a sexual nature that creates an intimidating, hostile or abusive work environment or has the effect of unreasonably interfering with an individual's work performance. In the case *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the United States Supreme Court declared that employees have the right to "work in an environment free from discriminatory conduct, insult and ridicule" even if tangible employment benefits like pay and promotion are not affected by the harassment. Not only is it important for the well-being of employee and employer alike to have clear and effective sexual harassment policies and procedures, but it is a fundamental step an employer must take to insure against being held legally responsible

should an employee be sexually harassed.

The United States Supreme Court in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), clarified when an employer will be liable for the actions of a supervisor who is found to have sexually harassed an employee. The Supreme Court specified that employers are liable, regardless of whether they knew about specific incidents, for sexual harassment by a supervisor with immediate (or successively higher) authority over the victim that results in tangible employment action. However, when a tangible employment action does not occur, an employer may be entitled to an affirmative defense if the employer can show: (a) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. The standard of liability imposed by the Court creates an incentive for employers to enact comprehensive sexual harassment policies. The Court held that while a sexual harassment policy or company grievance procedure would not make an employer immune from liability, it might be relevant in determining whether an employer had adopted a reasonable means of addressing sexual harassment. However, an effective policy or grievance procedure must be more than a mere paper policy. It must present an effective means of addressing harassment that is widely known and understood by all employees.

The United States Supreme Court has addressed the legal issues raised when a victim is not fired, but is constructively discharged, or in essence, left with no option but to leave her job because of sex discrimination or sexual harassment. In *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004), the Supreme Court noted that constructive discharge caused by a hostile work environment can count as a "tangible employment action," and that an employer can raise an affirmative defense against such a claim. The Court explained that a hostile-environment constructive discharge claim requires that the plaintiff "show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."[63] An employer can defend against a hostile work environment/constructive discharge claim by showing that "it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and . . . that the plaintiff unreasonably failed to avail herself of that employer provided preventive or remedial apparatus."[64] This defense is unavailable "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation."[65]

II. *GUIDANCE FOR EMPLOYEES:* WHAT TO DO IF YOU FEEL YOU ARE BEING HARASSED OR DISCRIMINATED AGAINST

You do not have to tolerate sexual harassment from your boss or co-workers. If the harassment is so severe that it interferes with your job performance, or makes you feel intimidated, scared or stressed, it may constitute a violation of your equal employment rights under Title VII. An isolated incident of sexual harassment by co-workers and/or supervisors does not usually constitute a violation of Title VII (unless the incident is extreme, like assault or rape). Winning a sexual harassment lawsuit depends on whether the incidents complained of are severe or numerous enough to bother a reasonable woman. For example, something as severe as just one request for sex tied to your job by your boss may be enough to prove a Title VII violation.

Under Title VII you cannot sue your co-workers for sexual harassment. However, you can sue your employer/ company and high-level supervisors for the harassing and discriminatory actions of your immediate supervisors, or for knowingly allowing your co-workers to continually harass you and make the workplace a hostile environment. The preceding section of this kit, "Spotlight on Sexual Harassment" discusses in more detail the law of Title VII.

Regardless of whether or not you could win a federal

lawsuit based on your situation, know that EVERY EMPLOYER HAS A DUTY TO TAKE FIRM ACTION AGAINST SEXUAL HARASSMENT and you have every right to expect your employer to fulfill that duty.

What You Should Do

You are not required to ignore individual incidents until they build up to be so intolerable that you must leave your job or suffer severe mental anguish. If an incident of sexual harassment occurs, make it immediately clear to the harasser that you do not welcome his behavior and want it to stop. A sample "letter to a harasser" is included in this kit. If you do not feel comfortable confronting the harasser, consider speaking with his or your supervisor. Your legal claims can be hurt if you keep silent. If you do not come forward and complain, but later wish to do so, you may have to provide a compelling reason for why you did not complain in the first place. A failure to complain may result in your employer having a defense against your complaint, and then your employer will not be held responsible for the sexual harassment you experienced. To help avoid this, inform the harasser and/or your employer or supervisor that you do not welcome such behavior. Keep records of all conversations about the harassment since your employer may later deny that you notified them. Informing your supervisor or employer of the harassment places your employer on notice so that if you bring a claim later you can show that your employer knew about the harassment.

Keeping Records

You should take notes about all incidents of harassment or other discrimination. Write down the date, time, name of the harasser, what happened, what was said, and the names of any witnesses to the incidents. Be sure to write down when, where, and how superiors may have become aware of the harassment. Note if you lost any money as a result of the harassment, for example, by having to take a day off. Do not record anything in these notes unless it is directly relevant to the harassment. Keep your notes in a safe place at home separated from personal diaries and records. Keep in mind that these notes may be discoverable (*i.e.*, required to be turned over to the other side) if the case goes to court.

If your employer keeps written records about your job performance and you have a good employment record, immediately mail a sealed copy of your employment records to yourself and do not open the postmarked envelope. It may be useful evidence regarding the state of your job performance before you complained of harassment and it will be safe from loss or tampering. You should also save any emails, notes, cards or presents that your harasser gives you.

Internal Grievance Procedures

Your employer may have an equal employment opportunity or sexual harassment policy and/or a confidential procedure for investigating and resolving sexual harassment and discrimination claims. While you may feel the in-house grievance procedure will only expose you to greater harm, because it may require you to complain to your harasser or his friends, you may not have a claim unless you have attempted to use your employer's grievance procedure. Supreme Court decisions require that an employee address any complaint through an in-house grievance procedure deemed to be reasonable.

Using an in-house grievance procedure does not mean that you have lost your right to file a complaint later with a city, state or federal agency if your employer fails to resolve your internal complaint satisfactorily. If you are a union or guild member, you may consider contacting your local representative or shop steward and following the grievance procedures outlined in the contract.

Of course sorting out any problem without the bother of formal action is preferable. Talk to people at your workplace and try to solve the problem. Sometimes, informal actions by co-workers may be sufficient to stem

sexual harassment. For example, co-workers may support you by organizing a series of lunchtime meetings to discuss sexual harassment, or by gathering with notebooks around your desk poised to take down the harasser's words each time he approaches.

Remember that you may not have a legal claim or you may have a claim but decide not to pursue it for a variety of reasons. For example, filing a lawsuit or EEOC complaint may be too costly, too risky, too damaging to your personal life, or may not offer the outcome you desire. In the course of asking for the help you need, it is probably smart not to punctuate your requests with "or I'll sue you!" Keep in mind that as you attempt to solve the problem you may discover that others have also suffered harassment. These people could share expenses of a lawsuit and be added to the claim either by name, or anonymously as members of a group of people who have been similarly treated.

You do not have to wait for the internal procedure to run its course before filing a complaint with the local, state, or federal equal employment enforcement agencies. In fact, if you wait too long you may lose your right to file at all. Strict deadlines for filing discrimination complaints apply under federal, state and local laws. Although pursuing an internal complaint grievance procedure arguably could stretch the time frames for filing by "tolling" the deadlines, you should not rely on this possibility. If you wish eventually to pursue legal remedies, or even think that you might, do not delay in filing complaints with the appropriate federal, state or local agency.

A sample "letter to a harasser" is included in this kit. In addition, the "Overview of Federal Law on Sex Discrimination and Sexual Harassment in the Workplace" section explains the administrative complaint procedure that you can follow if you decide to go beyond your employer and complain to the EEOC. The "Sex Discrimination and Sexual Harassment Resource List" at the end of this kit contains information on how to contact the nearest EEOC office.

III. *GUIDANCE FOR EMPLOYERS:* WHY HAVE SEXUAL HARASSMENT POLICIES?

1. Having a good sexual harassment policy can help an employer defend against liability. As discussed earlier, and as explained in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1989), and *Pa. State Police v. Suders*, 124 S. Ct. 2342 (2004), an employer may use the existence of a sexual harassment policy, along with a plaintiff's failure to utilize that policy, as an affirmative defense to employer liability for sexual harassment that does not result in a tangible adverse employment action.

2. Reducing harassment increases productivity since one common result of harassment is absenteeism and diminished productivity. Forty-six percent of women who reported experiencing harassment said they tried to ignore the problem. Of these women, about 25% were fired or forced to quit their jobs, 25% felt that the harassment had seriously undermined their self-confidence, 27% of women felt their health was impaired due to the harassment, and 13% felt they experienced long-term career damage.[66]

Furthermore, a reduction in sexual harassment reduces an employer's costs and can reduce an employer's risk of expensive litigation. The bottom line is that the estimated annual cost of sexual harassment is $6.7 million for each Fortune 500 company.[67] Between 1992 and 1994, the federal government spent $327 million to address and litigate employees' sexual harassment claims.[68]

3. Good policies encourage the harassed party to come forward and take action against the alleged harasser. This will, in turn, give management an opportunity to act quickly and effectively to stop harassing behavior.

4. Good policies reduce the need for "self-help" measures. If no official action is taken to stop the harassment, the harassed person may try a third-party

self-help scheme such as asking co-workers to organize a meeting to discuss sexual harassment or help her document the harassing incidents. This can pose risks to everyone, including physical violence as has happened in some cases. It can seriously complicate resolution of the problem. It can also exacerbate emotional discomfort. Effective, readily usable procedures and prompt action to stop harassment are the best means to avoid these problems.

5. Sexual harassment policies are preventive measures. The chances of harassment occurring are reduced when everyone is made aware of the rules, through well-written and well-publicized policies. Furthermore, an effective sexual harassment policy may be evidence that an employer has provided a reasonable procedure to prevent and correct sexual harassment. This may provide the employer with an affirmative defense against lawsuits, especially when an employee fails to take an advantage of such a policy.

IV. ALL SEXUAL HARASSMENT POLICIES AND PROCEDURES SHOULD INCLUDE:

1. Clear definitions: A concise written statement that provides clear definitions, covering both subtle and blatant behavior, of what exactly is prohibited sexual harassment. The more clearly the policy illustrates the problem, the less trouble you will have with any possible misunderstandings of the rules. The policy should also detail the consequences of engaging in prohibited activity. Enforcement is an important element of a sexual harassment policy. A policy should **state what types of disciplinary actions will be taken** and possible penalties should include termination.

2. A choice of either formal or informal complaint procedures: Many women who might hesitate in making a formal claim feel more comfortable in going through an informal complaint process. The complaint procedures should detail how to file both formal and informal complaints, and contain clearly defined timetables for each step of the procedure and methods of investigation. The policy should also contain a list of people trained to handle sexual harassment complaints and it should include their names, phone numbers and their responsibilities.

An optimal sexual harassment policy should also give complainants an option to approach a woman manager or investigator, since women who have been harassed may feel uncomfortable discussing the harassment with men.

3. An explanation of the effects of harassment on the target of the harassment and on the company: As noted above, sexual harassment can have a major impact on workers and productivity. Managers, supervisors and employees will all take the policy more seriously if they know that harassment affects the bottom line and is not just a matter of morality or policing of social relationships.

4. A multiple entry reporting system: Such a system allows a victim of sexual harassment to report the problem to a manager or a responsible person outside her work unit if she so chooses. This is essential for the harassed woman whose supervisor is the harasser or who fears retaliation within her work unit as a result of reporting.

Individuals with different life experiences or culturally different views may opt for different modes of complaint. For example, one woman may feel comfortable complaining to a manager while another employee would prefer to file a complaint with an EEO coordinator or the head of a women's committee at work.

5. Confidentiality requirements: It is crucial that sexual harassment policies guarantee confidentiality to the extent possible. Without confidentiality, a harassed woman may be labeled a "troublemaker," thus unfairly damaging her reputation and career. Confidentiality also protects the complainant against retaliation. In addition, lack of confidentiality may injure an accused harasser's reputation, as well as undermine overall confidence and

trust in the employer. A good sexual harassment policy should carefully balance the need for thorough investigations with the need to ensure confidentiality.

All communications about a complaint, written and oral, should be kept confidential. Each step of an investigation should be documented in a confidential file. Information should be disclosed only on a need-to-know basis and with the understanding that the recipient has a duty to preserve confidentiality.

6. A provision for a neutral and well-trained investigator to follow-up on complaints: The neutrality of the complaint recipient and investigator is extremely important, and encourages victims of harassment to come forward.

Investigators should be trained to handle complaints according to professional investigatory techniques. Without proper training, an investigator may unfairly judge victims of harassment. For example, some women who have been sexually harassed control their distress very well and give no outward appearance of harm. The naive investigator might wrongly conclude that the harassment was "not all that bad." In contrast, other women's job performances suffer greatly as a result of sexual harassment. The untrained investigator may conclude that such women are incompetent rather than victimized by sexual harassment.

7. Education and training at all levels of the workforce: Training and education should be available to all managers and workers. In acquainting everyone with sexual harassment policies and procedures and how they apply to real-life situations, trainings play an important preventive role.

A good training program should be tailored to a specific workplace's norms and be sensitive to issues that arise in that particular workplace. Training sessions should go beyond legal definitions and should include discussions and interactive exercises in addition to informative presentations. It may even be useful to hold separate training sessions for male and female employees to discuss in detail the specific issues that affect them and promote a more honest, open dialogue. If possible, the training should include annual sessions enabling employees to discuss how the policy is working, clarify misunderstandings and make the policy clearer for new employees. Managers, other designated complaint receivers and investigators should receive special training in receiving and handling complaints.

8. Protection against retaliation: Victims of sexual harassment will not be comfortable coming forward unless they are confident that it will not harm them. The policy must stress that complainants will not face repercussions and that anyone who takes any action in retaliation for the filing of a formal or informal complaint will face the same range of sanctions as the original harasser.

9. Review mechanisms: These should be in place to "check" the workplace atmosphere and can be done through task forces or periodic surveys. In addition, sexual harassment policies should provide for reviews of the persons receiving and investigating the complaints.

10. Broad distribution of the policy: The policy must reach every employee, not just the managers and supervisors. Your company should distribute the policy using whatever methods it normally uses to spread important information, such as email, bulletin boards, company newsletters, personnel manuals, and inclusion with employees' paychecks.

Ultimately, it is important than an employer not merely post or distribute a sexual harassment policy. An employer should take the time to go over the sexual policy with the employees and explain what sexual harassment is, how it affects employees and the workplace, and that sexual harassment will not be tolerated. A concerted, proactive program to educate employees about sexual harassment and the employer's own policies and procedures will minimize the number of individual employees who do not know the policy and

may protect an employer from liability should an incidence of sexual harassment occur.

V. INVESTIGATING COMPLAINTS OF SEXUAL HARASSMENT

The investigation of sexual harassment complaints is the most complex area in a sexual harassment policy. All complaints should be thoroughly and promptly investigated. Investigators should interview the complainant, accused harasser, and any witnesses.

Good investigation techniques, including effective unbiased interviewing, are essential because complaints often boil down to the word of the victim against the word of the alleged harasser. As discussed above, all investigators should be fully trained to deal with sexual harassment complaints, and all investigators should ensure confidentiality for both harassed victims and accused harassers.

At the beginning of each interview, whether of a complainant, alleged harasser, or witness, the investigator should explain how the employer's investigatory procedure works. The investigator should explain that he or she will conduct a thorough and impartial investigation of the sexual harassment complaint. Further, the investigator should clarify that confidentiality will be guaranteed to the extent possible, and that every person involved in the harassment will be promptly notified of the results of the investigation in a confidential memorandum.

Interviewing the Complainant

The investigator should obtain information directly from the complainant, with the aim to obtain a detailed account of the specific verbal statements and physical conduct alleged. The investigator should ask the complainant to retell her story as she remembers it.

In documenting the complaint, the investigator should ask the complainant to describe the harassment in as much detail as possible, including dates, names of harassers and any witnesses, the type of behavior (innuendos, physical assault, etc.), and frequency. In cases of multiple incidents by the same harasser, the investigator should document each incident, but should also focus on the most significant and blatant incidents. Careful documentation of fewer incidents is better than incomplete documentation of many incidents.

It is highly likely, however, that a sexual harassment complainant will not initially recall all incidents. Rather, she may focus on the most recent or upsetting event. The investigator should encourage the complainant to supply more information at a later date if she recalls further instances or perceives a larger pattern of harassment.

The investigator must not ask accusatory questions that blame the victim. For example, an investigator should not ask questions like "What were you wearing on X date?" Also, the investigator should refrain from asking the complainant to speculate on why the alleged harasser engaged in the behavior, as well as avoid focusing on the psychological harm caused by the harassment.

Interviewing the Alleged Harasser

The interview should begin in a non-threatening manner, and should first cover neutral information such as the accused harasser's employment history, present duties, and names of superiors and subordinates. In addition to setting the tone, this approach permits the interviewer to observe the accused harasser's normal demeanor; any later deviation in terms of eye contact or directness of response could indicate deception or withholding of information.

The investigator should inform the alleged harasser that a sexual harassment allegation has been filed against him. An investigator should avoid starting an interview with the key elements of the harassment. Instead, the investigator's initial goal is to place the accused harasser in geographical and temporal proximity to the alleged

harassment. For example, asking "Did you put your hand on X's breast last Monday in the cafeteria?" may put the accused harasser on the defensive and lead to a flat denial. Moreover, once someone denies something, it is difficult to retract even a false denial.
A better approach would be gradually to establish the alleged harasser's opportunity to harass the complainant by asking whether the alleged harasser was in the cafeteria at a certain time, whether he talked to X, etc. Once the accused harasser acknowledges the surrounding circumstances of an incident, it becomes much harder to lie about or deny perpetrating the actual harassment.

After establishing the alleged harasser's opportunity to perpetrate the harassment, the investigator can focus on the actual harassment. The investigator should still ask non-threatening questions such as: "During your conversation, did you have any physical contact?" or "How close were you standing?" The investigator might also find it useful to ask the accused harasser to describe the complainant's mood both at the beginning and end of the encounter.

During the course of the interview, the investigator should go through each specific element of the complaint. If the accused harasser denies engaging in sexually harassing behavior, the investigator may use behavior-provoking questions to evaluate truthfulness. For example, the investigator could ask: "When X says that you put your hand on her breast, is she lying?" A truthful employee would not hesitate to accuse X of lying, but because of the psychological difficulty of accusing someone else of lying when one knows that is not the case, a deceptive employee might answer hesitantly or evasively. Another way to evaluate truthfulness is to ask the accused harasser what he thinks should happen to a supervisor who harasses an employee. An employee who has engaged in sexually harassing behavior is more likely to express the view that harassers be treated leniently.

Gathering Evidence

The investigator must gather and preserve evidence without introducing biases into the information-gathering process. Corroborative evidence is desirable but it is not always necessary or possible since harassers often carefully time their harassment to avoid detection (or embarrassment).

The employer should keep all records of the investigation and resolution of sexual harassment complaints. It is not uncommon for harassers to target multiple victims. In the event that further complaints are brought against an employee, the employer can rely on records of past harassment to determine sanctions for the multiple offender.

VI. HOW DO YOU KNOW IF YOUR SEXUAL HARASSMENT POLICY IS EFFECTIVE?

Employees and employers should not assume that a lack of complaints, either before or after the implementation of a sexual harassment policy, indicates that there is no sexual harassment in your workplace, or that you are alone if you have been harassed. One study shows that 94% of women who experience harassment do not take any formal action.[69] In fact, an effective training program may lead to an increase in complaints at your workplace because employees will know that the company thinks that sexual harassment is inappropriate and will take action.

A strong commitment by your workplace's top management should directly affect the climate throughout the organization. The true barometer of the success of the program at your workplace is how you and other employees, especially women employees, feel about the work environment.

LEGAL momentum
Advancing Women's Rights
395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Sample Letter to a Harasser

Date

Dear (Harasser's name):

I am writing this letter to inform you that I do not welcome and have been made to feel (uncomfortable) (intimidated) (threatened) (angered) by your action(s). This (these) action(s) I am referring to is (include):

[Provide examples]
At the office's 2004 Christmas party, telling me that I could go far in the company if I was a "good sport" and a "team player" -- and saying that I could prove this by sleeping with you.

On or around July 24, 2005, leaving a magazine on my desk that I consider obscene, opened to the centerfold. When I asked if it were yours, you claimed that you thought that I would be interested in the subject.

On three separate occasions, starting on the second day of my employment, following me into the supply closet to hug me and fondle my breasts.

On numerous occasions, standing around my desk to speculate with other employees about my possible sexual practices.

Booking only one hotel room for the two of us at the engineering association conference in Phoenix and changing the reservation only after I insisted in front of the clerk. At the banquet that evening you told me that I was "jeopardizing our working relationship and my position" with my "unfriendliness."

This behavior is offensive to me and constitutes sexual harassment. This (these) incident(s) has (have) created a (an) (unprofessional) (tense) (stressful) (detrimental) (harmful) working environment that interferes with my job performance, particularly in any matters that require contact with you. Therefore, I am asking you to stop this illegal harassment now.

[Optional Paragraph]
If you continue with this behavior, or harass me further as a result of this letter, I will deliver a copy of this letter to (your supervisor, _____) (the Personnel Department) (my union representative) (the president of the company, _____). **[NOTE: This contact is dependent on the employer's grievance procedure, if any exists.]** If necessary, I will file a formal complaint with the (Equal Employment Opportunity Commission) (state or local Fair Employment Practices agency), which investigates charges of employment discrimination.

Sincerely,

(Your Name)

(cc:_____)
(encl, e.g. *copies* of notes)
[BE SURE TO MAKE COPIES OF

YOUR LETTER]

LEGAL momentum
Advancing Women's Rights
395 HUDSON STREET, NEW YORK, NY 10014-3684 (212) 925-6635 FAX: (212) 226-1066

Sex Discrimination and Sexual Harassment Resource List

LOCAL RESOURCES

Alabama
Equal Employment Opportunity Commission
1130 22nd Street South, Suite 2000
Birmingham, AL 35205-2397
(205) 731-0082
www.eeoc.gov

Alaska
Alaska Women's Resource Center
610 C Street Suite 2A
Anchorage, AK 99501
(907) 276-0528
awrc@awrconline.org
www.awrconline.org

Alaska State Commission for Human Rights
800 "A" Street, Suite 204
Anchorage, AK 99501-3669
(907) 276-4692
TTY: (907) 274-4692
http://gov.state.ak.us/aschr/aschr/htm

Arizona
Center for Prevention of Abuse and Violence (CASA)
77 E. Thomas Road, Suite 100
Phoenix, AZ 85012
hotline: (602) 254-9000
www.casacares.org

Attorney General's Office
Civil Rights Division
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-5025
www.ag.state.az.us/civil_rights/

Arkansas
Equal Employment Opportunity Commission
820 Louisiana Street, Suite 200
Little Rock, AR 72201
(479) 324-5060
TTY: (479) 324-5481
www.eeoc.gov

California
University of California at San Francisco
Center for Gender Equity
100 Medical Center Way, Box 0909
San Francisco, CA 94143-0909
(415) 476-5837
www.ucsf.edu/cge/

Equal Rights Advocates
1663 Mission Street, Suite 250
San Francisco, CA 94103
(800) 839-4ERA
www.equalrights.org
info@equalrights.org

California Department of Fair Employment and Housing
Sacramento District Office
2000 O Street, Suite 120
Sacramento, CA 95814-5212
(916) 445-5523
Toll-free: (800) 884-1684
FAX: (916) 323-6092
www.dfeh.ca.gov

Workers' Rights Clinic Employment Law Center
600 Harrison Street, Suite 120
San Francisco, CA 94107
(415) 864-8208
TTY: (415) 593-0091
www.employmentlawcenter.org

Colorado
Colorado Civil Rights Division
1560 Broadway, Suite 1050
Denver, CO 80202
(303) 894-2997
www.dora.state.co.us/civil-rights/

Connecticut
Connecticut Women's Education and Legal Fund
135 Broad Street
Hartford, CT 06105-3701
(806) 247-6090
www.cwealf.com

Connecticut Commission on Human Rights & Opportunities
21 Grand Street
Hartford, CT 06106
(860) 541-3400
TDD (860) 541-3459

Delaware
CONTACT Delaware
P.O. Box 9525
Wilmington, DE 19809
New Castle County Crisis Line: (302) 761-9100
Kent/Sussex Counties: (800) 262-9800 (in-state only)
www.contactdeleware.org

Delaware Department of Labor
Anti-discrimination Section
4425 N. Market Street
Wilmington, DE 19809
(302) 761-8200

District of Columbia
DC Office of Human Rights
441 4th Street, NW
Suite 570 North
Washington, DC 20001
(202) 727-4559
ohr@dc.gov
www.ohr.dc.gov/ohr/site/default.asp

DC Employment Justice Center
1350 Connecticut Ave, NW Suite 600
Washington, DC 20036-1712
(202) 828-WORK
www.dcejc.org

Florida
The Commission on Human Relations
2009 Apalachee Pkwy, Suite 100
Tallahassee, FL 32301
(800) 342-8170
(850) 488-7082
http://fchr.state.fl.us

Florida National Employment Lawyers Association
www.floridanela.org

Georgia
Georgia Commission on Equal Opportunity
Atlanta Office
229 Peachtree Street, Suite 710 International Tower
Atlanta, GA 30303-1605
(404) 656-1736
(800) 493-OPEN

Georgia Commission on Equal Opportunity
Savannah Office
7 E. Congress Street, Suite 402-Century South
Bank Building
Savannah, GA 31401-3351
(912) 651-3130
www.gceo.state.ga.us

9 to 5 National Association of Working Women
Atlanta Chapter
1430 W. Peachtreet Street, Suite 610
Atlanta, GA 30309
(800) 522-0925
hotline9to5@igc.org
www.9to5.org

Hawaii
Sexual Abuse Treatment Center
55 Merchant Street, 22nd Fl.
Honolulu, HI 96813
business line: (808) 535-7600
Crisis: (808) 524-RAPE (7273)

Hawaii Civil Rights Commission
830 Punchbowl Street, Room 411
Honolulu, HI 96813
(808) 586-8636
http://hawaii.gov/labor/hcrc/.

Idaho
Idaho Women's Network
P.O. Box 1385
Boise, ID 83701
(208) 344-7509
iwn@rmci.net
www.idahowomensnetwork.org

Idaho Commission on Human Rights
1109 Main Street, Suite 400
P.O. Box 83720
Boise, ID 83720-0040
(208) 334-2873
(888) 249-7025
TTY: (208) 334-4751
www2.state.id.us/ihrc/ihrchome.htm

Illinois
Illinois Department of Human Rights
James R. Thompson Center
100 West Randolph Street, te. 10-100
Chicago, IL 60601
(312) 814-6200
www.state.il.us/dhr/

National Employment Lawyers Association/Illinois
c/o David L. Lee
53 W. Jackson Blvd., Suite 660
Chicago, IL 60604-3607
www.nela-illinois.org

Indiana
Information and Referral Network
PO Box 30530
Indianapolis, IN 46230
(317) 926-4357 or 2-1-1
www.irni.org

Indiana Civil Rights Commission
100 North Senate Ave.
Indiana Government Center N103
Indianapolis, IN 46204
(317) 232-2600
(800) 628-2909
Hearing Impaired: (800) 743-3333
www.state.in.us/icrc/

Iowa
Women's Resource and Action Center
University of Iowa
130 N. Madison Street
Iowa City, IA 52242
(319) 335-1486
wrac@uiwoa.edu
www.Uiowa.edu/~wrac

Iowa Civil Rights Commission
Grimes State Office Building
400 E. 14th Street
Des Moines, IA 50319-1004
(515) 281-4121
(800) 457-4416
www.state.ia.us/government/crc

Kansas
Kansas Human Rights Commission
900 SW Jackson, Suite 568-S
Topeka, KS 66612
(785) 296-3206
TTY: (785) 296-0245

Kentucky
Kentucky Commission on Human Rights
332 W. Broadway, Suite 700
Louisville, KY 40202
(502) 595-4024
TDD: (502) 595-4084
(800) 292-5566
kchr@cris.com
www.state.ky.us/agencies2/kchr/

Legal Aid of the Bluegrass
489 Georgetown Street
P.O. Box 12947
Lexington, KY 40583-2947
(859) 233-4556
(800) 928-4556
www.accesstojustice.org/CKLS.html

Appalachian Research and Defense Fund of Kentucky
120 North Front Ave.
Prestonsburg, KY 41653
(606) 886-3876
www.accesstojustice.org/ARDF.html

Louisiana
Equal Employment Opportunity Commission
701 Loyola Ave., Suite 600
New Orleans, LA 70113-9936
(504) 589-2329

New Orleans Legal Assistance Group
1010 Common, Suite 1400A
New Orleans, LA 70112
(504) 529-1000
www.nolac.org

Louisiana Pro Bono Project
(504) 581-4043
www.gnacn.org/~probono/

Arcadian Legal Services
1020 Surrey Street
Lafayette, LA 70501
(337) 237-4320

Maine
Maine Women's Lobby/Maine Women's Policy Center
P.O. Box 15
Hallowell, ME 04347
(207) 622-0851
www.mainewomen.org
womenspolicycent@aol.com

Maine Human Rights Commission
51 State House Station
Augusta, ME 04333
(207) 624-6050
TTY: (207) 624-6064
www.state.me.us/mhrc/

Maryland
Maryland Commission on Human Relations
6 St. Paul Street, Suite 900
Baltimore, MD 21202
(410) 767-8600
(800) 637-6247
TTY: (410) 333-1737
www.mchr.state.md.us

Equal Employment Opportunity Commission (EEOC)
Baltimore District Office
10 S. Howard Street, City Crescent Building, 3d Fl.
Baltimore, MD 21201
(410) 962-3932
(800) 669-4000
www.eeoc.gov

Massachusetts
Cambridge Women's Center
46 Pleasant Street
Cambridge, MA 02139
(617) 354-8807
www.cambridgewomenscenter.org

Massachusetts Commission Against Discrimination
McCormack State Office Building
1 Ashburton Place, Room 601
Boston, MA 02108
(617) 994-6000
www.state.ma.us/mcad/

Women in Development of Greater Boston
(617) 489-6777
93 Concord Ave, Suite 8
Belmont, MA 02478
www.widgb.org

Michigan
Michigan Department of Civil Rights
Capitol Tower Building, Suite 800
Lansing, MI 48933
(517) 335-3165
TTY: (517) 241-1965
www.michigan.gov/mdcr

Minnesota
Minnesota Women's Consortium
555 Rice Street
St. Paul, MN 55103
(651) 228-0338
www.mnwomen.org

Minnesota Department of Human Rights
190 E. 5th Street, Suite 700
St. Paul, MN 55101
(651) 296-5663
(800) 657-3704
TTY: (651) 296-1283
www.humanrights.state.mn.us/

Mississippi
Jackson Area Office Equal Employment
Opportunity Commission (EEOC)
207 W. Capitol Street, Suite 207
Jackson, MS 39269
(601) 965-4537

Missouri
Missouri Commission on Human Rights
3315 W. Truman Boulevard
P.O. Box 1129
Jefferson City, MO 65102
(573) 751-4091
Email: MCHR@dolir.state.mo.us
www.dolir.mo.gov/hr/index.htm

Montana
Montana Human Rights Bureau
1625 11th Ave.
P.O. Box 1728
Helena, MT 59620
(406) 444-2884
(800) 542-0807
http://erd/dli/mt/gov/humanright/hrhome.asp

Nebraska
Nebraska Equal Opportunity Commission
State Office Building, 5th Floor
301 Centennial Mall South
P.O. Box 94934
Lincoln, NE 68509-4934
(402) 471-2024
(800) 642-6112
www.nol.org/home/neoc

University of Nebraska Women's Center
340 Nebraska Union
University of Nebraska
Lincoln, NE 68588-0446
(402) 472-2597
womenscenter@unl.edu
www.unl.edu/involved/womens_center/

Nevada
Nevada Equal Rights Commission
1515 East Tropicana, Suite 590
Las Vegas, NV 89119
(702) 486-7161
TDD: (702) 486-7164
http://detr.state.nv.us/nerc/NERC_index.htm

New Hampshire
Womankind Counseling Center
21 Green Street
Concord, NH 03301
(603) 225-2985

New Hampshire Commission for Human Rights
2 Chenell Drive
Concord, NH 03301
(603) 271-2767
humanrights@nhsa.state.nh.us
www.state.nh.us\hrc\index.html

New Jersey
Women's Referral Central
(800) 322-8092 (in-state only)

New Jersey Division on Civil Rights
140 E. Front Street, 6 Floor
P.O. Box 090
Trenton, NJ 08625-0090
(609) 292-4605
TTY: (609) 292-1785
www.njcivilrights.com

New Mexico
New Mexico Human Rights Commission
1596 Pacheco Street
Santa Fe, NM 87505
(800) 566-9471
www.dol.state.nm.us/dol_qhrd.html

New York
NOW NYC
150 W.28th Street, Suite 304
New York, NY 10001
(212) 627-9895

New York City Citizen Action
Women's Rights at Work Project
Sexual Harassment Hotline: (888) 979-7765 ext. 42
www.citizenactionny.org/wrw/wrw_index.html

New York State Division of Human Rights
One Fordham Plaza
Bronx, NY 10458
(718) 741-8400
www.dhr.state.ny.us

North Carolina
North Carolina Human Relations Commission
217 West Jones Street, 4th Floor
Raleigh, NC 27603 (919) 733-7996
(866) 324-7474
www.doa.state.nc.us/hrc.welcome.htm

North Dakota
University of North Dakota Women's Center
305 Hamlin Street
Grand Forks, ND 58203
(701) 777-4300
undwomenscenter@und.nodak.edu
www.und.edu/dept/womenctr/

North Dakota Department of Labor
600 E. Boulevard Ave., Dept. 406
Bismarck, ND 58505-0340
(701) 328-2660

(800) 528-8032
TTY: (800) 366-6888/9
labor@state.nd.us or humanrights@state.nd.us
www.state.nd.us/labor/contact.html

Ohio
Committee against Sexual Harassment (CASH)
YWCA
65 South 4th Street
Columbus, OH 43215
(614) 224-9121

Ohio Civil Rights Commission
Southeast Regional Office
1111 East Broad Street, Suite 301
Columbus, OH 43205
(614) 466-6715
http://crc.ohio.gov

Oklahoma
Resonance Listening and Growth Center for Women
1608 South Elwood Avenue
Tulsa, OK 74119
(918) 587-3888
www.resonancetulsa.org

Oklahoma Human Rights Commission
Jim Thorpe Building
2101 North Lincoln Boulevard, Room 480
Oklahoma City, OK 73105-4904
(405) 521-2360
www.youroklahoma.com/ohrc

Oregon
Sexual Assault Support Services (SASS) of Lane County
591 W. 19th Avenue
Eugene, Oregon 97401
(541) 343-SASS (7277)
www.sasswilliamette.netwww.sass-lane.org

Oregon Bureau of Labor and Industries
Civil Rights Division
800 N.E. Oregon, Suite 1045
Portland, OR 97232
(503) 731-4200
www.oregon.gov/BOLI/CRD/index.shtml

Pennsylvania
Pennsylvania Human Relations Commission
1400 Spring Garden Street
711 State Office Bldg
Philadelphia, PA 19130
(215) 560-2496
TTY: (215-560-3599
www.phrc.state.pa.us

Rhode Island
Rhode Island Commission for Human Rights
180 Westminster Street, 3Floor
Providence, RI 02903
(401) 222-2661
TTY: (401) 222-2664
www.richr.state.ri.us/frames.html

South Carolina
Center for Women
531 Savannah Highway
Charleston, SC 29407
(843) 763-7333
www.c4women.org
c4women@bellsouth.net

South Carolina Human Affairs Commission
P.O. Box 4490
2611 Forest Drive, Suite 200
Columbia, SC 29204
(803) 737-7800
www.state.sc.us/schac

South Dakota
South Dakota Division on Human Rights
700 Governors Drive
Pierre, SD 57501
(605) 773-4493
www.state.sd.us/dol/boards/hr/

HELP!Line Center
1000 West Avenue North, Suite 310
Sioux Falls, SD 57104-1314
www.helplinecenter.org

Tennessee
Rape and Sexual Abuse Center
Nashville Center
25 Lindsley Ave.
Nashville, TN 37210
24 hour crisis lines (615) 256-8526
(800) 879-1999
www.rasac.org

Rape and Sexual Abuse Center
Clarksville Center
331-A6 Madison Business Circle, Union St
Clarksville, TN 37040
(931) 647-3632
www.rasac.org

Tennessee Human Rights Commission
530 Church Street, Suite 400
Cornerstone Square Building
Nashville, TN 37243
(615) 741-5825
www.state.tn.us/humanrights

Texas
Women's Advocacy Project
P.O. Box 833
Austin, TX 78767-0833
(512) 476-5377
(800) 777-3247 (FAIR) (family law hotline)
(800) 374-4673 (HOPE) (family violence)
www.women-law.org

Texas Worforce Commission- Civil Rights Division
mailing: P.O. Box 13006 Austin, TX 78711
location: 1117 Trinity Street, Rm. 144T
Austin, TX 78778
(512) 437-3450
Toll-free in TX: (888) 451-4778
TTY: (512) 371-7473
tchr.state.tx.us

Utah
Labor Commission of Utah
160 East 300 South
P.O. Box 146650
Salt Lake City, UT 84111
(801) 530-6901

Vermont
Vermont Human Rights Commission
135 State Street, Drawer 33
Montpelier, VT 05633-6301
V/TTY: (802) 828-2480
V/TTY: (800) 416-2010
www.hrc.state.vt.us

Virginia
Alexandria Human Rights Commission
421 King Street, Suite 400
Alexandria, VA 22314
V/TTY: (703) 838-6390
http://alexandria.gov/human/alexhumrghtshome.html

Fairfax Human Rights Commission
12000 Government Center Parkway, Suite 318
Fairfax, VA 22035
(703) 324-2953
www.co.fairfax.va.us/hrc/

Washington
Northwest Women's Law Center
3161 Elliott Ave., Suite 101
Seattle, WA 98121
(206) 621-7691 TTY: (206) 521-4317
www.nwwlc.org

Washington State Human Rights Commission
711 S. Capital Way, Suite 402
P.O. Box 42490
Olympia, WA 98504-2490
(360) 753-6770

(800) 233-3247
TTY: (800) 300-7525
www.hum.wa.gov

West Virginia
Center for Economic Options, Inc.
214 Capitol Street, Suite 200
Charleston, WV 25301
(304) 345-1298
www.centerforeconomicoptions.org
info@economicoptions.org

West Virginia Human Rights Commission
1321 Plaza East, Room 108A
Charleston, WV 25301-1400
(304) 558-2616
www.wvf.state.wv.us

Wisconsin
9 to 5, National Association of Working Women
152 W. Wisconsin Ave., Suite 408
Milwaukee, WI 53203
(414) 274-0925
www.9to5.org

Wisconsin Department of Workforce Development, Equal Rights Division
201 East Washington Avenue, Room A300
P.O. Box 8928
Madison, WI 53708
(608) 266-6860
http://www.dwd.state.wi.us/er/

Wyoming
Advocacy & Resource Center
P.O. Box 581
Sheridan, WY 82801
(307) 672-7471
Hotline (307) 672-3222
http://www.city-sheridan-wy.com/arcenter/organ

The Wyoming Department of Employment, Labor Standards Office
1510 E. Pershing Blvd. West wing
Cheyenne, WY 82002
(307) 777-7261
http://wydoe

NATIONAL RESOURCES

BNA, Inc.
1231 25th Street, N.W.
Washington, DC 20037
(800) 372-1033
www.bna.com

Equal Employment Opportunity Commission (EEOC)
1801 L Street, N.W.
Washington, D.C. 20507
(800) 669-4000
TTY: (800) 669-682
(202) 663-4900
TTY: (202) 663-4494
info@ask.eeoc.gov

Equal Rights Advocates
1663 Mission Street, Suite 250
San Francisco, CA 94103
Advice and Counseling hotline:
(800) 839-4ERA
Other: (415) 621-0672
www.equalrights.org
info@equalrights.org

Federally Employed Women
1666 K Street, NW, Suite 440
Washington, DC 20006
(202) 898-0994
www.few.org

Fund for the Feminist Majority
1600 Wilson Boulevard, Suite 801
Arlington, VA 22209
(703) 522-2219
www.feminist.org

Legal Momentum
395 Hudson Street, 5th Floor
New York, NY 10014
(212) 925-6635
www.legalmomentum.org
peo@legalmomentum.org

National Employment Lawyers Association (NELA)
44 Montgomery Street, Suite 2080
San Francisco, California 94104
(415) 296-7629

National Partnership for Women and Families
1875 Connecticut Ave., NW, Suite 650
Washington, DC 20009
(202) 986-2600
www.nationalpartnership.org

National Women's Law Center
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
(202) 588-5180
www.nwlc.org

9 to 5, National Association of Working Women
152 W. Wisconsin Ave.
Milwaukee, WI 53203-2308
414-274-0925
Job Problem Hotline: (800) 522-0925
www.9to5.org

Women Employed
111 North Wabash Avenue, Suite 1300
Chicago, IL 60602
(312) 782-3902
www.womenemployed.org

OTHER WOMEN'S GROUPS

Speaking to other women who have experienced sexual harassment can help you find support and useful information. Local NOW Chapters and other non-legal women's groups in your community may run support groups addressing sexual harassment.

Notes

[1] *See* EEOC Enforcement Guidance 915.003 (Enforcement Guidance on Retaliation), EEOC Comp. Man. (CCH) § 614 (May 20, 1998). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (holding that Title VII's prohibition of retaliation against "employees" includes former employees).

[2] EEOC Comp. Man. (CCH) § 614.

[3] Institute For Women's Policy Research, Fact Sheet, The Gender Wage Ratio: Women's and Men's Earnings 1 (2004), *available at* http://www.iwpr.org/pdf/C350updated.pdf (last visited July 11, 2005).

[4] Institute for Women's Policy Research, Report, Still A Man's Labor Market: The Long-Term Earnings Gap iii (2004), *available at* http://www.iwpr.org/pdf/C355.pdf (last visited July 11, 2005).

[5] Institute for Women's Policy Research, Briefing Paper, The Male-Female Wage Gap: Lifetime Earning Losses 1 (1998); Institute for Women's Policy Research Calculations Based on the March Current Population Survey, U.S. Bureau of the Census, 1975-1997.

[6] Institute For Women's Policy Research, *supra* note 1, at 1.

[7] *Id.*

[8] Tamar Lewin, *Women Losing Ground to Men in Widening Income Difference*, N.Y. TIMES, Sept. 15, 1997, at A1.

[9] 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-2.

[10] 29 C.F.R. § 1604.11(a).

[11] The fact that the alleged harasser and victim had a consensual relationship does not automatically bar a claim. Even if the complaining party is found to have "voluntarily" entered into a relationship, a case of sexual harassment may still be made with respect to any unwelcome acts. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

[12] *See Carr v. Allison Gas Turbine*, 32 F.3d 1007 (7th Cir. 1994) (victim did not welcome sexual pranks and insults, despite her use of offensive language, when she repeatedly complained of the harassment to her supervisor); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994) (victim who spoke like "drunken sailor" could not for that reason be said to have welcomed supervisor's sexually explicit comments), *cert. denied*, 513 U.S. 1082 (1995); *Swentek v. USAIR, Inc.*, 830 F.2d 552 (4th Cir. 1987) (plaintiff's use of foul language or sexual innuendo in a consensual setting does not deprive her of protection against unwelcome harassment).

[13] *Burns v. McGregor Electronic Indus., Inc.*, 989 F.2d 959 (8th Cir. 1993) (sexual harassment victim's posing for nude magazine outside work hours was immaterial to the welcomeness of employer's sexual comments). *See also Kimzey v. Wal-Mart Stores*, 907 F. Supp. 1309 (W.D. Mo. 1995) ("The [*Harris*] Court does not rigidly require that a plaintiff form a well-defined subjective belief of hostility at the exact moment an incident occurs."), *aff'd in part and rev'd in part*, 103 F.3d 568 (8th Cir. 1997).

[14] *See Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991) (victim of gender-based insults and physical attacks who used offensive language and engaged in sexually suggestive behavior was found to have welcomed the harassment); *Highlander v. K.F.C. National Mgm't Co.*, 805 F.2d 644 (6th Cir. 1986) (plaintiff who suggested having a "business drink if you want to call it that" to supervisor in the context of discussing a promotion had no claim for *quid pro quo* sexual harassment when supervisor later said "there is a motel across the street").

[15] *See Highlander*, 805 F.2d at 650 (plaintiff had no claim for hostile work environment sexual harassment when she had indicated that co-worker touching her legs, buttocks and breasts was "not that big of a deal," and she had waited three months to report *quid pro quo* harassment by her supervisor).

[16] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). In *Harris*, the Supreme Court affirmed and clarified the *Meritor* standard for "hostile work environment" claims.

[17] *See Sparks v. Pilot Freight Carriers*, 830 F.2d 1554, 1557-60 (11th Cir. 1987); *see also Meritor*, 477 U.S. at 72-73; *Huddleston v. Roger Dean Chevrolet*, 845 F.2d 900, 904 (11th Cir. 1988). In a *quid pro quo* claim, an employer is strictly liable for the acts of a supervisor because the supervisor relied upon his authority to coerce the victim. *See, e.g., Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316-17 (11th Cir. 1989); Restatement (Second) of Agency 219(2)(d) (1958) (agent's actions are within the scope of his employment when he acts with the apparent authority of the employer).

[18] *See Harris*, 510 U.S. at 21; *Meritor*, 477 U.S. at 63-69.

[19] *Harris*, 510 U.S. at 21.

[20] *Id.* at 21; *see also Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994).

[21] *Harris*, 510 U.S. at 21.

[22] *Id.*

[23] *Id.* at 21-22. The Court's references in *Meritor* to workplaces with such severe discrimination "merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable." *Id.* at 22 (citing *Meritor*, 477 U.S. at 66).

[24] *See Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924-25 (5th Cir. 1982) (complainant who joined in making comments does not have racial discrimination claim); *Cariddi v. Kansas Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (a few sporadic comments do not make a racial discrimination case).

[25] *See Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); *Tunis v. CorningGlass Works*, 747 F. Supp. 951, 958-59 (S.D.N.Y. 1990); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369 (W.D.N.C. 1988).

[26] 523 U.S. 75 (1998).

[27] 524 U.S. 749 (1998).

[28] 524 U.S. 775 (1998).

[29] *See Ellerth* 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

[30] 42 U.S.C. § 2000e.

[31] A non-exhaustive list of factors considered by the courts includes: the hiring party's right to control the manner and means of production; the hiring party's right to assign additional projects; the duration of the hiring relationship; the skill required for the job; whether the work is part of the hired party's regular business; the hired party's discretion over when and how to work; the hired party's discretion in hiring and responsibility for paying assistants; the hired party's employee benefits; and the tax treatment of the hired party's compensation. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). No one factor is conclusive. *See id.* at 324. In many circuits the "economic realities" of the situation are also considered. *See, e.g., Lambertsen v. Dep't of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996); *Wilde v. Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994); *cf. Folkerson v. Circus Circus Enters., Inc.*, 68 F.3d 480 (9th Cir. 1995) (unpublished decision without precedential weight) (adopting common law approach but noting that "the hybrid and common law agency approaches are virtually the same"); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (professing obedience to the *Darden* common law test, but declaring that "there is little discernible difference between the hybrid test and the common law agency test"). *But see Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993) (strictly following *Darden's* common law test).

[32] A partner is more likely to be found an "employee" protected by Title VII if her or she lacks the following characteristics: participation in firm profits and losses; employment security; investment in and partial ownership of firm assets; a role in management, operation and control; voting rights; control over hiring and firing of personnel; the right and duty to act as an agent of other partners; and fringe benefits comparable to other partners. *See Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1997); *Serapion v. Martinez*, 119 F.3d 982 (1st Cir. 1997); *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859 (9th Cir. 1996); *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir.), *cert. denied*, 484 U.S. 986 (1987); *see also Fountain v. Metcalf, Zina & Co.*, 925 F.2d 1398 (11th Cir. 1991) (articulating test for analogous question of whether members of a professional corporation should be treated as partners or employees); *EEOC v. Dowd & Dowd*, 736 F.2d 1177 (7th Cir. 1984) (same).

[33] 42 U.S.C. § 2000e-16.

[34] 42 U.S.C. § 2000e.

[35] *See Paroline v. UNISYS Corp.*, 879 F.2d 100, 103 (4th Cir. 1989). *But see Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

[36] *See Jefferies v. Harris County Community Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

[37] *Id.*

[38] "Sex-plus" theories have been used in numerous instances where courts find that discrimination has occurred against a subclass of women or men on the basis of their sex *plus* another characteristic. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (sex-plus discrimination where employer refused to hire females with pre-school age children); *Jacobs v. Martin Sweets Co.*, 550 F.2d 364, 371 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977) (sex-plus discrimination where employer fired single women who became pregnant); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971) (sex-plus discrimination where employer prohibited females from marrying). Generally, the only area in which sex-plus discrimination has not been found to violate Title VII is for sex plus grooming/appearance claims. *See Barker v. Taft Broadcasting Co.*, 549 F.2d 400, 401 (6th Cir. 1977) (employer required males to have short hair); *Rauw v. Glickman*, No. CV-99-1482-ST, 2001 U.S. Dist. LEXIS 22739, at *26 (Aug. 6, 2001 D. Or.) (denying defendant's motion for partial summary judgment due to failure to state a claim and explaining that "[t]his court is unwilling to hold . . . that [the plaintiff] is precluded from bringing her sex plus marital status claim of discrimination."). *See also Jespersen v. Harrah's*, 392 F.3d 1076 (9th Cir. 2004) (affirming decision that policy requiring female employees to wear makeup and male employees to follow other appearance guidelines was not discriminatory because it placed equal burdens on men and women).

[39] "[W]e cannot condone a result which leaves black women without a viable Title VII remedy." *Jefferies*, 615 F.2d at 1032.

[40] *See Chambers v. Omaha Girls' Club*, 629 F. Supp. 925, 944 n.34 (D.Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987); *Prince v. I.N.S.*, 713 F. Supp. 984, 992 (E.D. Mich. 1989); *Judge v. Marsh*, 649 F. Supp. 770, 779-80 (D.D.C. 1986); *Graham v. Bendix*, 585 F. Supp. 1036, 1047 (D. Ind. 1984).

[41] "[A]n employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females...[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women." *Jefferies*, 615 F.2d at 1031-32.

[42] *See Hicks*, 833 F.2d at 1406; *see also Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) ("when a plaintiff is claiming race and sex bias, it is necessary to determine whether the employer discriminates on the basis of that combination of factors, not just whether it discriminates against people of the same race or of the same sex.").

[43] *Yu v. Northwest Pipeline Corp.*, 56 Fair Empl. Prac. Cas. (BNA) 313, 315 (D. Utah 1991) (plaintiff claimed discrimination based on sex, race, national origin and age). *See Judge*, 649 F. Supp. at 780 ("The difficulty with this [*Jefferies*] decision is that it turns employment discrimination into a many-headed Hydra, impossible to contain within Title VII's prohibition . . . [P]rotected subgroups would exist for every possible combination of race, color, sex, national origin and religion. It is questionable whether any employer could make an employment decision under such a regime without incurring a volley of discrimination charges.").

[44] *Floyd v. State of New Jersey*, 56 Fair Empl. Prac. Cas. (BNA) 1833, 1836 (D. N.J. 1991) (black male brought compound discrimination claim based on race and sex, and court held that "[t]here is no protection afforded combinations of classes under the statutes or in prior case law . . . . The statutes prevent discrimination based on race or sex, each of which must be analyzed separately." The statutes the court referred to were generally classified as "civil rights statutes.").

[45] For a good discussion of compound discrimination claims under Title VII, *see* Kathy Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 189 U. CHI. LEGAL F. 139 (1989); Elaine W. Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. REV. 793 (1980); Peggie R. Smith, *Separate Identities: Black Women, Work and Title VII*, 14 HARV. WOMEN'S L.J. 21 (1991); Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 (1991).

[46] Dan Ackman, *Walmart and Sex Discrimination by the Numbers*, FORBES, June 23, 2004, *available at* http://www.forbes.com/2004/06/23/cx_da-0623topnews.html (last visited July 11, 2005).

[47] *EEOC Backlog Down, Money Obtained Up*, Fair Employment Practices (Bureau of Nat'l Affairs, Inc., Washington, D.C.) Apr. 7, 1997; U.S. Equal Employment Opportunity Commission, Charge Statistics from the U.S. Equal Employment Opportunity Commission, FY 1991 Through FY 1997.

[48] U.S. Equal Employment Opportunity Commission, Charge Statistics from the U.S. Equal Employment Opportunity Commission, FY 1991 Through FY 1997.

[49] A 1994 study by the General Accounting Office estimated that of the 726 arbitrators used by the New York Stock Exchange and the National Association of Securities Dealers at the end of 1992, 89 percent were white men whose average age was 60, and who had little experience in labor law. In the labor arbitration arena, Marion Crane argues that unions do not always represent their female members' interests in arbitration of sexual harassment claims because of perceived conflicts between the class interests of the male union members and the gender interests of the female members. *See* Marion Crane, WOMEN, *Labor Unions, and Hostile Work Environments: the Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995).

[50] 500 U.S. 20 (1991).

[51] 9 U.S.C. § 1 *et seq*.

[52] Since *Gilmer*, federal courts have recognized a narrow exception for employees in the railroad or shipping industries or employees who actually transport goods in interstate commerce. *See Asplundh Tree Expert Co. v. Bates*, 71 F. 3d 592, 601 (6th Cir. 1995); *Rojas v. TK Communications, Inc.,* 87 F.3d 745 (5th Cir. 1996); *see* 9 U.S.C. § 1 ("nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

[53]532 U.S. 105 (2001).

[54] 525 U.S. 70 (1998). The Court noted that its ruling leaves unresolved the tension between *Gilmer*, which favors mandatory arbitration of employment discrimination claims, and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which favors the right to a judicial forum.

[55] *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 39 F.3d 1482 (10th Cir. 1994) (employee had signed U-4 form); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (same*); Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (same); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (same).

[56] *See Cole v. Burns Int'l Security Svcs.*, 105 F.3d 1465 (D.C. Cir. 1997) (employee who signed agreement to arbitrate all employment-related disputes, including discrimination claims, must arbitrate race discrimination claim); *Rojas v. TK Communications, Inc.*, No. 95-50882, 1996 WL 346611 (5th Cir. July 11, 1996) (radio disc jockey who signed employment contract containing an agreement to arbitrate all disputes must arbitrate sexual harassment claims); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (employee who had signed employment application containing agreement to arbitrate disputes concerning compensation, termination and employment must arbitrate sexual harassment claims); *Scott v. Family Farm Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993) (insurance sales agent who signed "agent agreement" containing an arbitration clause must arbitrate sex and pregnancy discrimination claims); *Dancu v. Coopers and Lybrand*, 778 F. Supp. 832 (E.D. Pa. 1991) (partner in consulting firm who signed a partnership agreement containing a mandatory arbitration clause must arbitrate his ADEA claims).

[57] *See, e.g., Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (employee's fear that she would not be hired or would lose her job if she did not sign arbitration agreement does not mean employee was coerced into signing agreement).

[58] *See Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) (victims of sexual harassment and discrimination did not have to submit claims to arbitration because they did not knowingly waive their rights to statutory remedies when they signed the U-4 form), *cert. denied*, 516 U.S. 812 (1995); *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104 (9th Cir. 1997) (same); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (1997) (arbitration provision in employee handbook, issued unilaterally by employer, cannot bind employee to arbitrate statutory claims), *cert. denied*, 118 S. Ct. 1511 (1998); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998) (plaintiff was not informed that she was agreeing to an arbitration contract when she signed U-4 form and many other documents required of new employees). *But see Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832 (8th Cir. 1997) (employee who signed separate arbitration agreement contained in back of employee handbook must arbitrate discrimination claims).

[59] *See Pryner v. Tractor Supply Co.,* 109 F.3d 354 (7th Cir.)(collective bargaining agreement cannot require individual employees to arbitrate federal civil rights claims), *cert. denied*, 118 S. Ct. 295 (1997); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 946 (1997); *Tang v. Rhode Island, Dept. Of Elderly Affairs*, 904 F. Supp. 69 (D. R.I. 1995) (reinstatement and back pay awarded through arbitration does not preclude

employee from bringing Title VII claim for injunctive relief, attorneys' fees and punitive damages). *But see Austin v. Owens-Brockway Glass Container, Inc.,* 78 F.3d 875 (4th Cir. 1995) (union employee must arbitrate her ADA claims under the mandatory arbitration clause in her collective bargaining agreement).

[60] *See Duffield v. Robertson Stephens & Co.*, 144 F. 3d 1182 (9th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3321 (1998). *But see Seus v. John Nuveen & Co., Inc.,* 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) (disagreeing with *Duffield* that the Civil Rights Act of 1991 effectively repealed the Federal Arbitration Act with respect to agreements to arbitrate Title VII claims).

[61] *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 995 F. Supp. 190 (D. Mass. 1998) (holding generally that compelled, predispute arbitration agreements are not enforceable in Title VII actions). *But see Desiderio v. Nat'l Ass'n of Securities Dealers, Inc.,* 2 F. Supp. 2d 516 (S.D.N.Y. 1998) (disagreeing with *Rosenberg* and stating that the compelled arbitration clause contained in U-4 forms does not violate one's civil rights).

[62] *See Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985).

[63] *Pa. State Polic v. Suders*, 124 S. Ct. 2342, 2347 (2004).

[64] *Id.*

[65] *Id.*

[66] Klein Assoc., Inc., 1992 Working Woman Sexual Harassment Survey (1992).

[67] Klein Assoc, Inc., 1988 Working Woman Sexual Harassment Survey (1988).

[68] U.S. Merits Systems Protection Board, Sexual Harassment in the Federal Workplace: Trend, Progress, Continuing Challenges, (1995), *available at* http://www.mspb.gov/studies /sexhar.pdf (last visited July 11, 2005).

[69] *Id.*