2019

A Mediator's Ethical Responsibility in Cases Involving Sexual Harassment

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AGENDA

A Mediator's Ethical Responsibility in Cases Involving Sexual Harassment

FRIDAY, MARCH 29, 2019

12:00PM – 12:10PM	WELCOME AND OPENING REMARKS
12:10PM – 12:25PM	ETHICAL GUIDELINES FOR MEDIATORS
12:25PM – 12:40PM	SEXUAL HARASSMENT OVERVIEW
12:40PM – 1:55PM	MEDIATING SEXUAL HARASSMENT: DECISION POINTS FOR MEDIATORS
1:55PM – 2:00PM	Q&A AND CLOSING REMARKS

TRAINER BIOGRAPHIES

PROFESSOR ALEXANDRA CARTER

Alexandra Carter is a Clinical Professor of Law and the Director of the Mediation Clinic at Columbia Law School. From 2012-2016, she also served as the Law School's Director of Clinical Programs, providing leadership in the area of experiential teaching and learning.

Professor Carter's teaching, research and publications lie in the field of alternative dispute resolution, primarily in mediation and negotiation. She has been sought as a trainer on mediation, civil procedure, negotiation and dispute systems design for many different groups from private and public sectors, including the United Nations, U.S. courts and federal agencies, private corporations and law firms. She has addressed the Chinese Academy of Social Sciences Rule of Law Conference, the 5th World Peace Conference in Jakarta, the ICU-CLS Peace Summit in Tokyo, and the Ceará Supreme Court Conference on Mediation; and has contributed as a faculty speaker at universities in South America, Asia and Europe. She has served on the Alternative Dispute Resolution Committee for the New York City Bar Association, as well as the Mediator Ethics Advisory Committee for the New York State Unified Court System.

Prior to joining the Columbia faculty, Professor Carter was associated with Cravath, Swaine & Moore LLP, where she worked as part of a team defending against a multibillion dollar securities class action lawsuit related to the Enron collapse, served as the senior antitrust associate on several multibillion dollar mergers, and handled cases involving copyright law.

Professor Carter received her Juris Doctor degree in 2003 from Columbia Law School, where she earned James Kent and Harlan Fiske Stone academic honors. She also won the Jane Marks Murphy Prize for clinical advocacy and the Lawrence S. Greenbaum Prize for the best oral argument in the 2002 Harlan Fiske Stone Moot Court Competition. After earning her degree, Professor Carter clerked for the Hon. Mark L. Wolf, U.S. District Court for the District of Massachusetts in Boston.

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ADDITIONAL READINGS

I. MEDIATION OF SEXUAL-HARASSMENT CASES

1. Jan Frankel Schau, *Where Confidentiality and Transparency Collide: In Sexual Harassment Cases, Mediators Face a Modern-Day Dilemma*, 25 DISPUTE RESOL. MAG., Winter 2019, at 6.

2. Susan K. Hippensteele, *Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution*, 15 J. GENDER SOC. POL'Y & L. 43 (2006).

3. Robert Lewis, *Mediation of a Sexual Harassment Claim*, 24 HOFSTRA LAB. & EMP. L.J. 87 (2006).

4. Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOT. J. 139 (1991).

5. Barbara J. Gazeley, *Venus, Mars, and the Law: On Mediation of Sexual Harassment Cases*, 33 WILLAMETTE L. REV. 605 (1997).

6. Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment*, 5 PSYCHOL. PUB. POL'Y & L. 693 (1999).

7. Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?*, 10 MEDIATION Q. 167 (1992).

8. Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISPUTE RESOL. 27 (1993).

9. Carrie A. Bond, Note, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 FORDHAM L. REV. 2489 (1997).

II. SEXUAL HARASSMENT, TRAUMA, AND PSYCHOLOGY

1. Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69 (2002).

2. David Isaacs, Editorial, *Sexual Harassment*, 54 J. PAEDIATRICS & CHILD HEALTH 341 (2018).

3. Thomas A. Kernodle, *Workplace Sexual Harassment*, *in* 4 SAGE ENCYCLOPEDIA OF PSYCHOLOGY AND GENDER 1852 (Kevin L. Nadal ed. 2017).

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Keeping things confidential in sexual harassment cases

Non-disclosure agreements: What do we do now?

Realizing restoration for victims and offenders

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Features

Articles

Where Confidentiality and Transparency Collide

In sexual harassment cases, mediators face a modern-day dilemma

By Jan Frankel Schau

We have now gone far beyond the "he said, she said" controversy in sexual harassment cases. Reports of complaints about Hollywood producer Harvey Weinstein first appeared in the *New York Times* in early October 2017, prompting hundreds of women to come forward with other accounts of unlawful and unwanted sexual misconduct by bosses and coworkers and teachers and coaches in the entertainment industry, workplaces, schools, government offices, and many other venues. Both those who were harmed and the public have demanded full investigations and complete accountability, even when the alleged misconduct took place decades ago. In this #MeToo era, a simple denial of misconduct or a claim that the behavior was consensual is no longer enough to make allegations go away.

Today victims of sexual harassment and misconduct are filing lawsuits, demanding compensation, and publicly sharing details of the abuses. These actions often provide comfort for others who have experienced similar treatment and help create safer workplaces. As the number of allegations swells, mediators are increasingly being called upon to help parties settle these disputes before lawsuits go to trial. This may be encouraging for mediators and for the field, but it raises new practice questions and causes tension for mediators who must grapple with employers' (and often their employees') desire to settle these claims confidentially and the public's demand for transparency and accountability.

Some of the new key questions

One of the basic principles of mediation is that the participants should feel free to communicate intimate, personal, and yet-unproven details that underlie their claims. Under many state statutes and court rules, anything said or any admission made for the purpose of, in the course of, or pursuant to a mediation is protected from discovery and admissibility as evidence. For example, the California Evidence Code prohibits the mediator from testifying in any subsequent civil proceeding.[1] (For a discussion about a revision of California's confidentiality rule, see "On Professional Practice" on page 30 in this issue.)

As mediators, knowing that we will never be called upon to take sides in a dispute that came before us or accurately recall all that was said during a mediation (much of which is not memorialized in writing) gives us considerable comfort.

But what happens to that comfort if we are called upon to mediate a series of disputes against the same employer, prompted by multiple claimants who allege that the company's powerful leaders have repeatedly taken sexual advantage of the young women who work for them? When many allegations are repeated against the same bosses, is the duty of confidentiality stronger than an individual's personal sense of moral duty to disclose ongoing harm? It is noteworthy that, as a general principle in cases involving allegations about workplace misconduct, the individual alleged perpetrator is seldom present at the mediation, but

the company and its lawyers (and often times insurance carriers) are there to do "damage control" and settle these matters before they become public.

If the parties expressly agree that their settlement is not confidential, does the mediator then have the responsibility — or even the legal competence — to testify about the negotiations leading up to the settlement or the ultimate settlement terms? Are the statutes that so carefully protect the confidentiality of the mediation process now overridden by the interests of the public or other potential victims?

The purpose of offering confidentiality is to provide a safe place in which disputants may air their grievances and resolve their differences without a judge, a jury, or the public listening in. Is this fair, just, and right in the context of sexual harassment cases? Are mediators playing a role in obfuscating the public's "right to know" about a history of sexual assault or mistreatment? Are we making a politically-based judgment that acts of sexual harassment must be disclosed, whereas discrimination based on race or disability, for example, is entitled to the full protections of confidentiality? It is an ethical conundrum — but one that has solutions for the creative mediator.

Confidentiality: one of mediation's basic principles

In employment disputes, both sides typically agree — or at least accede to the employer's demand — to include a confidentiality clause in the settlement agreement. (This is in addition to the mediator's customary Agreement to Participate, which usually includes language explaining that the process is confidential.) The confidentiality clause in the settlement agreement will usually identify a few necessary exclusions under the law (such as enforcement of the agreement, information to attorneys and accountants, or disclosure where required by other lawful process). Occasionally, the parties may negotiate a specific statement to be used in the event that either party is asked to comment on the settlement publicly. (For a more extended discussion of non-disclosure agreements, see the article by Elizabeth Tippett on page 12.)

While those who favor prohibiting non-disclosure clauses in sexual harassment settlements see a strong value in exposing abusers so that other potential victims (as well as those who have been wronged by the same "bad actor") will be aware of the claims, from both the victim and perpetrator's point of view there is a competing value in keeping the claims private. Many parties and their lawyers choose mediation as a means of resolving their disputes expressly because they want to avoid the publicity, anxiety, risk, and expense of discussing the disputes in open court. By their nature, these types of cases are deeply personal. They may include the most intimate of details and may expose those involved to personal and professional backlash that may extend far beyond the payment of damages.

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As we know from news reports, these kinds of claims can be deeply embarrassing, bringing shame and hurting the wrongdoer's reputation as well as damaging marriages and other relationships. They can result in loss of employment and, in the case of Harvey Weinstein, may even result in criminal charges.

There is good reason to keep the salacious details involved in many sexual harassment cases out of the public eye. Yet by doing so, the process of mediation can become a legal way to "hush" the victims, to keep them from disclosing the facts or outcome to potential claimants, other victims, or even just citizens who may be interested in knowing about this conduct by, for example, their elected officials, clergy, or other public figures.

Employers and employees have effectively used confidentiality clauses as part of the settlement of employment-related disputes arising out of allegations of sexual harassment. Yet the combination of a new tax law and the societal pressure to expose the misconduct may confound and obfuscate that process.

A new consideration: 'the Harvey Weinstein tax'

Until the end of 2017, federal tax law allowed businesses and employees to claim a business expense deduction for litigation arising out of claims of sexual harassment if the settlement of those claims was kept confidential. But federal tax legislation filed in 2017, known as "the Harvey Weinstein tax" and prompted by the political movement toward disclosure and the wish to provide information for future claimants, disallowed this deduction. Any payment on account of alleged sexual harassment or abuse may not be deducted as a business expense if it is subject to a confidentiality provision. If the parties expressly hold that their agreement is confidential, the employer cannot deduct the payment as an ordinary business expense and the claimant may not deduct her attorney's fees as an expense.

In practical terms, confidentiality is often a huge incentive, providing leverage for the plaintiff and her lawyer in early settlement negotiations. Typically, these negotiations take place at a time when many facts are still in dispute and liability has not been admitted or clearly established. Also, the employer or its insurance carrier typically is paying for the misconduct alleged to have been committed by an individual, and the "punishment" is inflicted upon the payor, not the harasser himself. Accordingly, the employer may be trying to avoid the negative publicity and damage to its reputation that may come from the lawsuit or claim, even though the wrongdoer may already have been disciplined or fired. Subjecting the employer to public disclosure of the claim or the settlement may serve as a disincentive for the employer to settle the lawsuit for what the plaintiff would consider to be a reasonable amount, in part for fear of setting a "floor" for future claims.

In many instances, an employee (or former employee) has a desire to keep her claims confidential for fear of reprisal or recrimination in future personal or business relationships. For some private individuals (as opposed to celebrities or other public figures), making their claims known to the perpetrator and his or her employer is enough to satisfy the individuals, and they have no need to publicly shame the wrongdoer or the company or publicize their claims.

For most employees, payment of damages, an apology or explanation, and a commitment by the employer to make changes to ensure that the misconduct will not be repeated are sufficient compensation, and they have no need to publicize their settlement — especially if this means they will get higher damages in exchange for keeping the settlement confidential.

But the #MeToo movement has brought about a big change in how companies — and individuals — respond to allegations of sexual misconduct, and today most people (except perhaps public figures and their employers) agree that public figures, especially officials, should not be able to buy their way out of sexual harassment and assault charges through non-disclosure agreements. Yet in the context of civil litigation, there is equal justification for applying the principles of confidentiality that adhere to every other type of case that is resolved through mediation.

It is often the case that neither the employer nor the employee wants the publicity and potential embarrassment that comes from a public airing of this type of very personal experience. In addition, the employer may actually be trying to make things right by paying serious settlement money to the plaintiff

"… the #MeToo movement has brought about a big change in how companies — and individuals — respond to allegations of sexual misconduct, and today most people (except perhaps public figures and their employers) agree that public figures, especially officials, should not be able to buy their way out of sexual harassment and assault charges through non-disclosure agreements."

but will not do so willingly if the employer also must suffer the negative publicity from a public disclosure that its employee, especially someone in a leadership role, failed to abide by the employer's own policies. Also, these settlements can readily reach well into six figures, and the business deduction usually realized under corporate tax codes makes that expense much more palatable to a business. Under the Weinstein tax, if the terms of the agreement are kept confidential, there is no deduction available to either side, even for legal fees and costs of litigation.

These types of cases can be expensive, stressful, contentious, and embarrassing to both employer and employee, and the prospect of an early settlement is attractive to both sides as a way to avoid all that. Once the accuser "goes public," however, the employer has less incentive to pay substantial damages because the employer may then want to defend its reputation and protect its "goodwill" in the public eye, which may require harsh litigation and media attention.

Voluntariness, informed decision-making, and self-determination

Mediation is, at its core, a voluntary process. Where there is a willing buyer and a willing seller, mediators usually do not interfere with the bargain the parties strike, even when we believe it may not be in one side's best interest. Other maxims of mediation are that it is designed to give parties the right to make their own decisions and get all the information they need to make well-informed choices. As long as mediators believe that one party has not been coerced or overpowered, once again we usually do not interfere with the parties' decision.

But informed decision-making has limits: When a mediator uses private caucuses, this essentially guarantees an imperfect or incomplete exchange of information, as the mediator will not reveal all of what either side says or believes to the other. Consequently, there are limitations on the "informed" aspect of informed decision-making when parties divulge their confidential interests or rationale for settlement to the mediator in private caucus.

If sexual harassment or abuse cases are uniquely carved out as an exception to the general confidentiality protections afforded in mediation, the parties may be less willing to disclose the underlying interests or motivations toward settlement. In other words, they may not be making a decision out of their own free will, but rather the optics of how the settlement will appear in the public eye.

"If sexual harassment or abuse cases are uniquely carved out as an exception to the general confidentiality protections afforded in mediation, the parties may be less willing to disclose the underlying interests or motivations toward settlement."

Some options to consider

When working on sexual harassment cases, plenty of creative options may serve to maximize recovery, minimize tax consequences, and preserve the integrity of the confidential mediation process. Where both sides are prepared to carefully consider the consequences of a confidentiality agreement or an express disclaimer of confidentiality, settlements may be more achievable and enforceable than they would be if people simply gave in to the new wave of transparency without thinking about everyone's best interests.

In cases where both sides want the settlement to be confidential, mediators and parties still have several good options to consider in the course of the negotiations. The parties can explicitly allocate a reasonable amount of the damages to claims arising out of sexual harassment, leaving the balance of the payment of damages for other, non-sexual harassment-related claims, such as wage and hour violations, retaliation for whistleblowing, disability discrimination, or whatever else has been raised in the pleadings or other demand letters. Those damages will be non-confidential and therefore can still be deducted for tax purposes. The amount must be fair and reasonable, to avoid running afoul of the new tax law, but the other contentions or allegations don't need to be the predominant cause where the claims

> … only after the parties carefully analyze the costs and benefits of confidentiality and the public's right to know can they determine whether they want to keep the terms of the agreement confidential.

are broader than a single cause of action of sexual harassment or abuse.

Or the parties can negotiate the terms of the confidentiality and reflect that in their agreement so that it does not rise to the level of a "non-disclosure agreement." For example, the claims and terms of agreement may be disclosed "upon request" by subpoena or in the course of other legal processes but may not be subject to general disclosure via media or other private communication except to a spouse, attorney, or accountant.

As a third option, the parties can cooperate in drafting an approved statement that will constitute the public disclosure if either party is asked. For example, specific language could state "The parties to this lawsuit have decided it is in both side's best interests to resolve the pending dispute in order to focus upon business and personal matters. Accordingly, effective immediately, employee has dismissed her claims against the employer and any further inquiries should be directed to the human resources director."

Finally, the parties can expressly expunge all preliminary non-disclosure agreements but maintain that the terms of the settlement will not be publicized without notice to the company in advance — and if the terms are made public, provide for an opportunity to craft an acceptable statement to release to current employees and to the public.

Conclusion

There are no easy answers to questions such as whether it's justifiable to allow people in cases of race discrimination — but not those involved in sexual harassment and misconduct cases, for example — to keep details of their claims confidential. However, there are practical ways to address the parties' desire to maintain confidentiality while still taking advantage of the tax benefits that are afforded to all other employment-related cases, by allocating only a part of the settlement to the sexual harassment-based claims. As with all matters in mediation, the agreement to disclose or keep information confidential is a voluntary matter that is subject to negotiation between the parties, helping them arrive at the best possible solution. Because mediation is meant to be self-determinative, the skillful mediator will know to raise the issue but not provide the solution.

In the end, only after the parties carefully analyze the costs and benefits of confidentiality and the public's right to know can they determine whether they want to keep the terms of the agreement confidential. New tax laws make confidentiality less financially appealing, but there are still plenty of justifications to keep mediated agreements in such cases confidential, just as there are in other cases.

And what about a mediator's moral duty to protect future victims and not contribute to "hushing" up a culture of harassment? The reality is that in today's world, allegations against public figures, celebrities, and high-profile individuals are often likely to come to light, helping inform the public, comfort other victims, and ensure that sexual misconduct is well understood and never tolerated. Mediators can sleep soundly knowing that parties who choose mediation, rather than trying their case in the courtroom or the public forum, typically do so with good reason. And with understanding of various confidentiality options, mediators can protect and safeguard the dispute's details as well as its eventual resolution. ■

Endnotes

1 Cal. Evid. Code Section 1119.

Jan Frankel Schau *is a neutral with ADR Services in Southern California and an adjunct faculty member at the Straus Institute of Dispute Resolution. She focuses on mediating cases arising out of employment, business, real estate, and tort disputes. A Distinguished Fellow of the International Academy of Mediators and former President of the Southern California Mediation Association, she practiced as an employment litigator for more than 20 years. She can be reached at JFSchau@adrservices.com.*

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Mediation Ideology: Navigating Space From Myth to Reality in Sexual Harassment Dispute Resolution

Susan K. Hippensteele

MEDIATION IDEOLOGY: NAVIGATING SPACE FROM MYTH TO REALITY IN SEXUAL HARASSMENT DISPUTE RESOLUTION

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INTRODUCTION

"*The victim who is able to articulate the situation of the victim has ceased to be a victim; he, or she, has become a threat.*"
—James Baldwin[1]

"*A struggle for rights can be both a vehicle for politics and an affirmation of who we are and what we seek.*"
— Elizabeth M. Schneider[2]

The increase in public attention toward sexual harassment in the wake of the 1991 U.S. Senate hearings that resulted in the appointment of Clarence Thomas to the U.S. Supreme Court produced dramatic shifts in public attitudes toward victims, perpetrators, and the larger phenomenon of sexual harassment itself.[3] The idea that sexual harassment is injurious to women rather than a normal or inevitable part of working life had been clearly articulated and refined by feminist theorists and activists,[4] but while the term sexual harassment had been coined nearly two decades earlier and the problem had been studied extensively by social scientists since the early 1980s,[5] the general public had remained skeptical that the problem of sexual harassment was a serious one.

For the most part, prior to the Thomas hearings, the legal

1. James Baldwin, *The Devil Finds Work*, *in* COLLECTED ESSAYS 652 (1998).

2. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement,* 61 N.Y.U. L. REV. 589, 652 (1986).

3. *See* Judith K. Bowker, *Believability: Narratives and Relational Messages in the Strategies of Anita Hill and Clarence Thomas, in* THE LYNCHING OF LANGUAGE: GENDER, POLITICS AND POWER IN THE HILL-THOMAS HEARINGS 149, 162-64 (Sandra L. Ragan et al. eds., 1996) (detailing a survey conducted five months after the hearings that showed less than one-fourth (twenty-two percent) of survey participants were inclined to believe that Clarence Thomas sexually harassed Anita Hill while he was her supervisor at the EEOC. This figure suggests a dramatic reversal from the sixty-plus percent figures reported during and immediately following the hearings); *see also* Nina Totenberg, *Preface* to THE COMPLETE TRANSCRIPTS OF THE CLARENCE THOMAS-ANITA HILL HEARINGS: OCTOBER 11, 12, 13, 1991, 7 (Anita Miller, ed., Academy Chi. Pub.) (1994) (describing the heated conversations, book deals, and political campaigns that the hearings launched).

4. *See, e.g.*, Schneider, *supra* note 2, at 643 (citing the role played by educational and training programs, such as the Working Women's Institute, and the important work of feminist litigators and activists).

5. *See* Anita F. Hill, *Thomas v. Clinton, in* DEBATING SEXUAL CORRECTNESS: PORNOGRAPHY, SEXUAL HARASSMENT, DATE RAPE, AND THE POLITICS OF SEXUAL EQUALITY 122, 123-24 (Adele M. Stan ed., 1995) (comparing her own experience in the Thomas confirmation hearings with the experience of Paula Jones confronting President Clinton); *see also,* Margaret S. Stockdale, *What We Know and Need to Learn, in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 3, 7 (Margaret Stockdale, ed., 1996) (providing a succinct overview of research on sexual harassment experiences and outcomes from the 1980s to mid 1990s).

community had treated sexual harassment as an anomaly affecting working women in the U.S. that provided opportunities for occasionally lucrative litigation. Post-Thomas hearings, attitudes within the legal community toward sexual harassment changed.

Alternative dispute resolution (ADR) of employment discrimination claims had begun to emerge as a field of legal practice and scholarship in the early 1980s.[6] Following success in applying ADR to collective bargaining and organized labor disputes,[7] ADR advocates promoted mediation and arbitration as alternatives to litigation for employers seeking less costly methods for resolving the growing number of employee claims of workplace discrimination and sexual harassment.[8] Proponents suggest that the phenomenal growth of ADR into a full-fledged industry has been linked to widespread consumer satisfaction,[9] citing lower cost, speed, and efficiency, and flexibility of solutions,[10] as well as disputants expanded sense of control over the ADR process and outcome.[11] Opponents suggest that employers rely on these fast, inexpensive strategies because ADR

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6. *See* Carrie Menkel-Meadow, *From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context,* 54 J. LEGAL EDUC. 7, 7 (2004) (highlighting the progression of ADR from merely a method to resolve legal disputes to a broader field based on the study of human conflict).

7. *See* Michael J. Yelnosky, *Title VII, Mediation, and Collective Action,* 1999 U. ILL. L. REV. 583, 585 (1999) (analyzing the evolution and application of mediation in Title VII cases as linked to employee dissatisfaction with the limited options for systemic change available through traditional a litigation framework); *see also* Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?,* 9 OHIO ST. J. ON DISP. RESOL. 27, 32-36 (1993) (examining the process of grievance mediation and noting that problems may arise when there is a marked imbalance of power between the parties).

8. Michael Z. Green, *Addressing Race Discrimination Under Title VII After Forty Years: The Promise of ADR as Interest-Convergence,* 48 HOW. L.J 937, 964-68 (2005) (cautioning that ADR should only be used in situations where both employer and employee have the possibility to benefit from arbitration); Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes,* 34 WAKE FOREST L. REV. 135, 156 (1999); Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum,* 10 MEDIATION Q. 167, 168 (1992).

9. *See JOHN* M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE AND POWER 39 (1998) (explaining that disputants view mediation positively because they feel that they have more control over that process than over litigation).

10. *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women,* 100 YALE L.J. 1545, 1548 (1991) (explaining that emotions and relationships are worked into mediation, allowing parties to come to a solution that is workable for their particular interests).

11. *See* Susan A. FitzGibbon, *Arbitration, Mediation, and Sexual Harassment,* 5 PSYCHOL. PUB. POL'Y & L. 693, 718 (1999) (noting that mediation is a particularly attractive alternative for sexual harassment claims because it allows the parties to privately solve a sensitive, private, and possibly embarrassing conflict); Angela Garcia, *The Problematics of Representation in Community Mediation Hearings: Implications for Mediation Practice*, 22 J. OF SOC. & SOCIAL WELFARE 23, 40 (1995).

processes are "coercive mechanism[s] of pacification."[12] They work because the law provides no meaningful incentives for more than a showing of "good faith" that the employer make some effort to prevent or remedy illegal conduct, even if the effort is totally ineffective.[13]

In this paper, I suggest a different sociopolitical reason for the dramatic rise in popularity of ADR generally, and mediation specifically, for sexual harassment complaints. I suggest that the sudden and dramatic shift in public awareness and attitudes toward sexual harassment and the sharp increase in sexual harassment complaint reporting following the Thomas hearings created a unique climate of anxiety among employers and the legal community. In response to this anxiety, re-privatizing sexual harassment became a key goal not only for employers, but for many civil rights advocates as well. More specifically, the legal profession's failure to understand the psychology of sexual harassment combined with renewed political backlash against sexual harassment victims provided the ADR industry a unique opportunity to move into the sexual harassment arena. This opportunity arose despite ample evidence that ADR generally, and mediation specifically, do not meet the remedy and resolution needs of victims and may undermine important advances made by those seeking to curtail sexual harassment on the job.

Part II of this article briefly frames the historical backdrop through which discussing sexual harassment became part of mainstream U.S. culture. In this section, I discuss the rights dilemma faced by feminists and other legal advocates seeking to represent sexual harassment claimants within institutions (legal and otherwise) that frequently fail to provide the structural framework necessary for meaningful resolution and corrective action of sexual harassment claims to take place. I further outline and briefly explore the tensions between the need for individual resolutions and a political framework that effectively incorporates the personal and collective harm that results from sexual harassment in the workplace. This section ends with questions regarding the interpretive frameworks attorneys and others working in and around law rely upon when working with

12. *See* Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology,* 9 OHIO ST. J. ON DISP. RESOL 1, 1 (1993) (theorizing that the often unequal footing between legal professionals and the average citizen can result in a control relationship over the less powerful party).

13. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law,* 26 HARV. WOMEN'S L.J. 3, 12 (2003) (explaining that the availability of affirmative defenses creates an incentive for employers to develop a formal policy, offer anti-harassment training, or take some other preventative measure to avoid sexual harassment liability).

sexual harassment claimants.

Part III explores five resolution themes that emerged as scholars and others responded to the sharp rise in sexual harassment complaint reporting during the early 1990s. I examine the influence of these five themes on the shift from a rights-based approach to resolving workplace discrimination that preceded the shift in sexual harassment complaint reporting[14] and the relational approach to sexual harassment complaint resolution that followed. I examine the degree to which these resolution themes actually serve claimants' interests and question whether they are, instead, serving to re-privatize sexual harassment. I also suggest that these resolution themes, as promoted by mediation proponents, are unsupported by empirical or other data and are little more than myths. As such, they serve to promote the polite fiction that sexual harassment is a personal, private insult to working women rather than as a form of invidious discrimination.

Part IV goes back to the question of why sexual harassment seems to have created such a high level of anxiety among those from across the political spectrum. This seems to suggest that neither the civil rights community or existing frameworks for understanding and resolving discrimination complaints were equipped to understand or address the sexual harassment complaints brought forth in the months immediately following the Thomas confirmation hearings and that mediation emerged as a preferred approach to addressing sexual harassment as a result.

Part V concludes with a call for more and better research exploring the legal profession's understanding of sexual harassment and reliance on mediation as a mechanism for resolving sexual harassment complaints.

I. THE "POLITICAL" IS PERSONAL...AGAIN

"*The process by which a society resolves conflict is closely related to its social structure. Implicit in this choice is a message about what is respectable to do or want or say....In the adversary system, it is acceptable to want to win.*" — Trina Grillo[15]

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14. *Id.* at 6-7 (citing EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES AND EEOC AND FEPAS COMBINED: FY 1992-2001, *at* http://www.eeoc.gov/stats/harass.html (last modified Feb 6, 2003) (noting that while levels of sexual harassment in the workplace appear to be consistent with those reported two decades ago, both administrative charges and numbers of lawsuits filed have continued to rise both in absolute numbers and in terms of the percentage of total complaints processed by the EEOC).

15. Grillo, *supra* note 10, at 1607.

A. Articulating the Claim of Sexual Harassment

At the time of the Thomas hearings, many working women who had entered the workforce in the 1950s and 1960s viewed sexual harassment as simply part of life that must be tolerated. Some believed heightened attention given to the issue as a result of the Thomas hearings would harm rather than help women seeking entry into an arena still largely controlled by men.[16] However, some felt the coming together of black and white women on the issue of sexual harassment was a hopeful sign that the women's movement could serve as a catalyst for change.[17]

Legal theorist Kimberle Crenshaw noted the unique opportunity for expanded understandings of gender/race intersections and the complex ways power relationships, both public and private, were being publicly recast as a result of the hearings.[18] Marked changes in attitudes towards a woman's right to work in an environment free from sexual harassment contributed to the heated public debates that followed the subpoenaed testimony of Anita Hill.[19] In the months following those historic hearings, the effect of the debates on public consciousness regarding sexual harassment became increasingly apparent.[20] And it is noteworthy that sexual harassment became part of public consciousness not through the force of a social movement aimed at increasing public awareness and sensitivity, but rather through a sensationalized, racially charged, and highly contested account of one woman's experience.[21]

The civil rights movement of the mid-twentieth century brought

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16. *See* JOAN KENNEDY TAYLOR, WHAT TO DO WHEN YOU DON'T WANT TO CALL THE COPS 7 (1999) (arguing that expanded sexual harassment laws and aggressive policing are actually harmful to the interests of women in the workplace).

17. *See* Christine Stansell, *White Feminists and Black Realities: The Politics of Authenticity, in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 265 (Toni Morrison ed., 1992).

18. Kimberle Crenshaw, *Whose Story Is it, Anyway? Feminist and Antiracists Appropriations of Anita Hill, in* RACE-ING JUSTICE, EN-GENDER-ING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 435-36 (Toni Morrison ed., 1992).

19. Sandra L. Ragan et al., *Introduction to a Communication Event: The Hill-Thomas Hearings, in* THE LYNCHING OF LANGUAGE: GENDER, POLITICS, AND POWER IN THE HILL-THOMAS HEARINGS xviii (Sandra L. Ragan et al. eds., 1996).

20. Bowker, *supra* note 3.

21. *See* Darrin Hicks & Phillip J. Glenn, *The Pragmatics of Sexual Harassment: Two Devices for Creating a "Hostile Environment, in* THE LYNCHING OF LANGUAGE: GENDER, POLITICS, AND POWER IN THE HILL-THOMAS HEARINGS 215 (Sandra L. Ragan et al. eds., 1996) (citing the Thomas hearings as a "lightening rod" for the first nationwide discussions of sexual harassment and for introducing sexual harassment into the public consciousness as a "problem," while also showing that sexual harassment is almost by definition an isolating experience for many victims).

with it a call for change accompanied by countless examples of the effects of racism on equal opportunities for African-Americans.[22] These examples validated in the minds of many the goals and objectives of the movement.[23] The call for change in social mores that followed the Thomas hearings, on the other hand, had no analogous escort. Academics scrambled to generate distilled summaries of complex social scientific studies of sexual harassment for public consumption,[24] but these lacked the emotional features of individual stories and accounts that had made the issue of racial discrimination accessible to the (predominantly white) voting public. Unlike victims of other forms of protected class discrimination, victims of sexual harassment were generally reticent to discuss their experiences publicly—in fact many refused to speak with anyone, even close friends and intimates, about their experiences.[25] Concerned that their claims would be minimized, they would be blamed, and their perpetrators would be defended in the court of public opinion, many victims of sexual harassment, like victims of sexual assault and domestic violence, suffered in silence.[26]

Initial public sentiment regarding Anita Hill's testimony about Clarence Thomas's alleged misconduct while he was her supervisor at the Equal Employment Opportunity Commission (EEOC) confirmed the worst fears of many sexual harassment victims.[27] Most women who experience sexual harassment at work tend not to talk about it. Like Hill, most sexual harassment victims are afraid of adverse career consequences, concerned that they will be subject to allegations of impure motives, or worried that the truthfulness of their allegations will be challenged.[28] The adversarial nature of the hearings, opportunistic accusations leveled at Hill by the Judiciary Committee members questioning her, and harsh reconstruction of Hill's identity and motives by the media fueled the initial negative public sentiment regarding Hill in particular, and sexual harassment victims in general. Yet within a scant six months public attitudes had changed

22. *See* STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 311 (1995) (arguing that vigorous enforcement of the civil rights court victories caused courts and litigators to lose sight of the benefits that were originally sought).

23. *See id.* at 312-13 (emphasizing the civil rights movement's objective was not to merely eliminate segregation, but also to eliminate the injury that segregation ultimately caused).

24. *See* Hicks & Glenn, *supra* note 21, at 216-17 (discussing and critiquing several such publications that emerged in the wake of the hearings).

25. Ragan et al., *supra* note 19, at xvi.

26. *Id.*

27. *Id.*

28. *Id.*

dramatically. The most dramatic shifts in attitude came from women, who overwhelmingly reported *believing* that Hill told the truth and was terribly mistreated by the all-white, male Senate Judiciary Committee.[29] During these same six months, a record number of women came forward to file sexual harassment claims with the EEOC.[30]

B. Sexual Harassment as an Emerging Justice/Rights Dilemma

The shift in public attitudes and increased willingness of working women to formally report allegations of sexual harassment on the job came at an important time in the evolution of equal employment opportunity rights in the U.S. Premised on the underlying assumption that private lawsuits would be the primary mechanism through which employees would seek relief, the 1972 amendments to Title VII expanded the EEOC's jurisdiction and gave it the power to enforce its own findings by filing lawsuits.[31] Since the 1970s, the rise in litigation of employment discrimination cases had been producing a corollary effect of increasing employee access to internal grievance mechanisms.[32] Faced with an increasingly sophisticated and empowered workforce, employers began looking for ways to avoid the expense and organizational impact of litigation by expanding human resource and personnel offices so as to resolve employee concerns "in house."[33]

The public spectacle of the Thomas hearings also inspired President George H.W. Bush to sign the Civil Rights Act of 1991 (1991

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29. *See id.*; *see also* Dianne G. Bystrom, *Beyond the Hearings: The Continuing Effects of Hill v. Thomas on Women and Men, the Workplace, and Politics, in* THE LYNCHING OF LANGUAGE: GENDER, POLITICS AND POWER IN THE HILL-THOMAS HEARINGS 260, 261-262 (Sandra L. Ragan et al. eds., 1996) (citing eleven national public opinion polls conducted between October 8 and October 15, 1991 which showed that forty-six to sixty percent of those surveyed believed Thomas and twenty to thirty-seven percent believed Hill, compared with national public opinion polls conducted by the *Wall Street Journal* and NBC News in September 1992 showing opposite results).

30. *See* Bystrom, *supra* note 29, at 268 (citing a 150% increase in inquiries to the EEOC in the nine months following the Hill-Thomas hearings and a fifty percent increase in charges filed). It is important to note that the rise in number of inquiries and complaints persisted after 1992; the numbers of complaints filed has remained steady since that time. *Id.*

31. *See* Green, *supra* note 8, at 947 (explaining that the expanded powers of the EEOC did not help to resolve a greater number of disputes but only created a backlog of complaints that forced the EEOC to settle many claims).

32. *See* Margaret L. Shaw, *Designing and Implementing In-House Dispute Resolution Programs,* SD70 A.L.I.-A.B.A. 447, 449 (1999) (remarking that employers often created an ADR program to resolve disputes between employees).

33. *See id.* at 451 (cautioning that some critics of in-house ADR find the procedure inherently unfair because employees are required to agree to mediation instead of pursuing their claim in court).

CRA) on November 7, 1991 after much delay.[34] The 1991 CRA, which granted plaintiffs the right to jury trials in cases where intentional discrimination is alleged and a claim for punitive damages where intentional discrimination is proved,[35] provided employers a powerful new incentive to develop and enforce strong non-discrimination policies and offer employees meaningful access to internal grievance resolution options.[36] That same year, the EEOC began a mediation pilot program in four field offices to address the backlog of existing cases it had been unable to close.[37]

The flood of inquiries and charges brought to the EEOC in the months following the Thomas confirmation hearings sent shockwaves through the civil rights enforcement community. A less ambivalent and increasingly well-informed public brought individual and organized efforts demanding accountability on behalf of the fifty to eighty-five percent of American women who experience some form of sexual harassment during their working lives.[38] Employers quickly launched sexual harassment education and prevention programs, while labor unions, academic institutions, and agencies emphasized rights-based analyses and services.[39] Existing avenues and traditional mechanisms for redress were reevaluated and new options explored.[40]

While scholars quickly weighed in with a wide range of opinions as to the relative merits of various approaches to resolving sexual harassment disputes, several underlying themes quickly became apparent. Among them: (1) sexual harassment is a uniquely "sensitive" problem and resolving claims requires attention to the emotional aspects of the situation;[41] (2) victims of sexual harassment

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34. Green, *supra* note 8, at 948-49.

35. Civil Rights Act of 1991, 42 U.S.C. § 1981 (2006); *see also* Susan Schenkel-Savitt & Brian S. Rauch, *Title VII, ADEA, Civil Rights Act of 1991 and Selected Local FEP Statutes*, 621 PRACTICING L.I. LIT 65, 70 (1999) (explaining that punitive damages may be awarded where discriminatory acts were perpetrated with "malice" and "reckless indifference," and pointing out that, although these terms focus on the actor's state of mind, the employer's conduct need not be independently egregious or outrageous for punitive damages to flow).

36. *See* Beverly Bryan Swallows, *Reducing Legal Risk and Avoiding Employment Discrimination Claims,* 19 FRANCHISE L.J. 9, 16 (1999) (stating that maintaining a fair and accurate performance evaluation systems is one way employers can avoid discrimination claims).

37. Green, *supra* note 8, at 950.

38. Stamato, *supra* note 8, at 167.

39. *Id.* at 168.

40. *Id.*

41. *See* Rebecca A. Thacker, Mark Stein & Samual J. Bresler, *Mediation Keeps Complaints Out of Court,* HR MAGAZINE, May 1994, at 72 (suggesting that in order to respond effectively to sexual harassment, its unique features must be acknowledged and addressed); *see also* James K. Hoenig, *Mediation in Sexual Harassment: Balancing the Sensitivities,* 48 DISP. RESOL. J. 51, 53 (Dec. 1993) (offering a mediator's

want/need to preserve their privacy and avoid the stress of formal, adversarial proceedings;[42] (3) sexual harassment victims want/need to personally confront the harasser;[43] (4) sexual harassment is an inherently subjective and ambiguous phenomenon;[44] and (5) formal complaint adjudication disadvantages victims of sexual harassment.[45]

These five themes have been touted as justifying mediation as the preferred resolution option for sexual harassment from the victim's perspective. The argument goes something like this: "Interest-based" options that provide for quick, informal responses to sexual harassment (e.g., job reassignment or change in work hours for the victim, opportunity to discuss how the harassment made the victim feel, and so on) are what victims need to move beyond the experience and get on with their lives.[46] And while sexual harassment victims frequently choose not to file complaints,[47] often accept blame for their situation,[48] and frequently fear retaliation,[49] these factors provide evidence in support of a dispute resolution system that will ensure that effective measures are taken to end harassment and prevent retaliation, as opposed to supporting interest-based options as preferred alternative dispute resolution mechanisms for victims.

It is important to note that these five themes emerged to justify

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first-hand account of the need to constantly gauge the emotions of parties in a sexual harassment mediation).

42. *See* Hoenig, *supra* note 41, at 52 (relaying how one plaintiff in a sexual harassment case became much more amenable to a reasonable settlement after a mock cross-examination during mediation).

43. *Id.*

44. *See* Stamato, *supra* note 8, at 169.

45. *Id.*

46. *See* Mary P. Rowe, *Dealing with Sexual Harassment: A Systems Approach, in* SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 241, 250 (Margaret Stockdale ed., 1996) (defining interest-based options, but cautioning that these alone do not provide an adequate solution to harassment claims).

47. *See* Anna Marie Marshall, *Idle Rights: Employee Rights Consciousness and the Construction of Sexual Harassment Policies,* 39 LAW & SOC'Y REV. 83, 111 (2005) (describing women as their own "gatekeepers" who do not file sexual harassment claims partially out of fear of their supervisor's reaction); *see also* Louise F. Fitzgerald, et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace,* 32 J. VOCATIONAL BEHAV. 152, 162 (1988).

48. *See, e.g.*, Nina Burleigh & Stephanie Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms,* A.B.A. J., Aug. 1989, at 46, 48 (discussing the reluctance of female attorneys to report sexual harassment for fear of being perceived as weak or unable to handle the problem themselves).

49. *See* MARTIN ESKENAZI & DAVID GALLEN, SEXUAL HARASSMENT: KNOW YOUR RIGHTS! 166 (Carroll & Graf Publishers, Inc 1992) (citing EEOC guidelines relating to evaluating welcomeness, which state, in pertinent part, "[w]hile a complaint or protest is helpful to a charging party's case, it is not a necessary element of the claim). Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. *Id.*

mediation only for victims of sexual harassment; they have not served as rationale for mediating other forms of workplace discrimination. In certain respects, sets of practices that discriminate against particular groups of people are unique from one another. Few would argue that discrimination based on race will "look" like discrimination based on religion, although there may certainly be some overlap. But with the exception of sexual harassment claims, all forms of workplace discrimination have been, in effect, treated equally. In other words, claims of discrimination have been subjected to fact-finding and decision-making that recognized the "need to draw bright lines delineating acceptable behavior in the workplace."[50] And while the EEOC's mediation program expanded into a nationwide system that has helped to reduce the backlog of charges in all categories,[51] the application of ADR and mediation principles to sexual harassment within the legal academic community and among practitioners has not been without controversy. The sudden recognition and acceptance of sexual harassment as a serious social problem sparked immediate calls for a wholly different approach to addressing this particular form of employment discrimination.[52] Why? And perhaps more importantly, how did these calls for applying modified discrimination resolution mechanisms to sexual harassment cases come to be met and satisfied almost exclusively by ADR proponents, many of whom come from a solidly liberal, pro civil rights, and/or labor oriented backgrounds?[53]

II. REFRAMING SEXUAL HARASSMENT RESOLUTION IDEOLOGY

"The glories of cooperation...are easily exaggerated."
— Trina Grillo[54]

A. Blurring Boundaries

It is easy to point to management consultants and employer defense firms as the main proponents of mediation for resolving sexual harassment complaints. There is ample literature to suggest that these entities, along with some scholars and others generally hostile to

50. Irvine, *supra* note 7, at 28.

51. Green, *supra* note 8, at 950.

52. Stamato, *supra* note 8, at 169.

53. This question implicates complex issues of ADR history, strategy, process, goals, and objectives. Exploration of these issues is beyond the scope of this paper, which attempts to assess a single aspect of the larger ADR/mediation phenomenon—its application to sexual harassment and other individual claims of workplace discrimination.

54. Grillo, *supra* note 10, at 1608.

gains made by civil rights advocates of the 1950s-1980s, banked heavily on the social anxiety that the rise in sexual harassment lawsuits produced to generate support for their own efforts to promote its use.[55] Legal scholars and attorneys, who had accepted without question warnings from the elite within the legal community that "adversarial modes of conflict resolution were tearing the country apart," further fueled this anxiety.[56]

Yet some of the most influential proponents of mediation to resolve sexual harassment disputes have been women and employee rights advocates who argue that mediation, among all the possible resolution options, best meets the needs and serves the interests of sexual harassment victims.[57] Creators designed mediation, which is promoted as a "win-win" approach to employment discrimination through which both parties can come to understand the other's perspective and become educated in the process, to diffuse acrimony between parties.[58] Susan Sturm argued that in order to continue advancing in the workplace, women need to gain the capacity to develop social capital by nurturing and strengthening informal relationship networks with men in the workplace who make promotion and hiring decisions.[59] Through unwritten norms of

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55. *See, e.g.*, Carrie Bond, *Resolving Sexual Harassment Disputes in the Workplace: The Central Role of Mediation in an Employment Contract,* 52 DISP. RES. J. 15 (Spring 1997); Elizabeth R. Koller Whittenbury, *Sexual Harassment Claims: When Can Mediation Work?,* 1997 BUS. & ECON. REV., July-Sept. 1997, at 12; Thacker, et al., *supra* note 41.

56. Nader, *supra* note 12, at 5-6 (discussing the 1976 Roscoe Pound Conference at which Chief Justice Warren Burger, leaders of the American Bar Association and members of the American judiciary concurred that American lawyers are too adversarial and that the American people too litigious). Nader suggests that those in attendance promoted alternative dispute mechanisms so lawyers could heal a system that was infected by many ills and in dire need of treatment. *Id.* Nader argues that Chief Justice Burger and his supporters presented their own values as facts and that few within the legal profession questioned the factual basis for the statements promoting ADR as a means of reforming the legal system. *Id.*

57. *See, e.g.*, Rowe, *supra* note 46, at 250 (suggesting that mediation may allow employee needs to be more easily met and contrasts "interest-based" informal procedures with "rights-based" formal adjudicative procedures). The typical rationales for using "interest-based" procedures are (1) that the harassment or discrimination may have been the result of a "misunderstanding" or "ignorance" by the perpetrator(s), and/or (2) that it may be difficult or even impossible for a decision-maker to determine who is telling the truth. *Id.*

58. *See* Jay Folberg & Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation, reprinted in* STEPHEN B. GOLDBERG, ERIC D. GREEN, & FRANK E. A. SANDER, DISPUTE RESOLUTION 97 (1985) (stating that mediation helps each party to understand the other's position).

59. Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 640 (1998) (arguing that dynamics and patterns of racial and sex bias are more subtle and interactive than in the past and that "individualistic, fault-driven categories embodied in current legal structures" conflict with female employees' need to engage in informal relationship building).

cooperation, shared values, and goals, mediation purports to provide women, the most frequent victims of sexual harassment, an opportunity to engage in a nurturing, educationally-oriented resolution process more appropriate to their natural, "relational" selves.[60] As an added bonus, mediation also fits comfortably within most organizations' preferred non-adversarial approach to resolving conflict.[61] But as Professor Mori Irvine points out, those who argue that education, rather than discipline, is the appropriate response to sexual harassment minimize the harm that sexual harassment produces for victims and the larger workforce by subordinating public acknowledgement of the injury and its impact in the "guise of . . . reconciliation."[62]

Menken-Meadow points out that mediation is often justified on the basis of the perceived "consent" of the parties even while acknowledging the contested nature of "consent" in the context of race, class, sex, gender, and other power inequalities—institutional and otherwise.[63] Yet Menken-Meadow also argues that when mediation and other ADR alternatives are compared to litigation, we must be clear about "what is being measured against what."[64] In other words, equal access to legal resources, money, and the multitude of other factors that affect the outcome of a jury case must be taken into account.[65]

Anthropologist Laura Nader has examined harmony ideology at work on unsuspecting citizens in different contexts.[66] She has found that social influence and cultural power mechanisms amount to covert control and suggests that while both attorneys and clients are likely to be sensitive to overt acts of dominance and control to which they are subject or witness, attorneys in particular may not be alert to or able to protect their clients from overt mechanisms of control and domination within law or legal processes.[67] Nader goes on to suggest

60. Grillo, *supra* note 10, at 1550-56.

61. *See* Sturm, *supra* note 59, at 640 (noting that most organizations prefer a system that grants workers more ability to participate in decision-making).

62. Irvine, *supra* note 7, at 50-51.

63. *See* Menkel-Meadow, *supra* note 6, at 22-23 (emphasizing the disputed nature of consent and the idea that economic and social power has a significant impact on altering the equality of bargaining positions in mediation).

64. *See id.* at 22.

65. *See id.* (stating that the factors limiting fairness in mediation are equally present in trial situations).

66. *See* Nader, *supra* note 12, at 1-2 (suggesting that "harmony ideology" is a rhetorical strategy for achieving "peace through consensus" and that within the legal profession harmony ideology became rooted in the culture through controlling processes, i.e., the intense influence of socially and/or institutionally powerful advocates and the related agendas they promoted).

67. *See id.* (demonstrating that while the United States has constitutional

that attorneys should educate themselves to learn to recognize controlling processes in law in order to better critique and engage with their profession in an proactive way.[68] Because sexual harassment claims do not rest on the treatment of individual women, even when these claims are brought forward by individuals, they have implications for the entire workplace. As such, these claims, and the individuals who bring them forward, are uniquely vulnerable to the controlling mechanisms Nader and others have identified.

B. The Sexual Harassment Resolution Themes

1. Sexual harassment is a uniquely "sensitive" problem and resolving claims requires attention to the emotional aspects of the situation.

There is little doubt that sexual harassment causes victims stress, emotional anguish, and other personal and professional disturbance. What is less clear is whether victims of sexual harassment suffer a different, more sensitive type of injury than victims of other forms of workplace discrimination. If they do, the relational discourse that blankets discussion of sexual harassment grievance resolution might be justified. If they do not, then this discourse may be little more than a facile excuse for disparate treatment of sexual harassment cases by employers and by employee rights advocates.[69]

It is well documented that people who experience sexual harassment at work generally want (1) the offensive conduct to stop; (2) assurances that the conduct will not reoccur and that others will not be treated similarly; (3) protection from retaliation; and (4) to regain the type of work environment they had prior to experiencing the offensive conduct.[70] However, these goals fall neatly within the

protections against overt acts of domination, indirect acts receive less security).

68. *Id.* at 4.

69. Among the group of "employee rights advocates," I include labor organizations and employee unions, labor and employment attorneys, and some women's rights groups such as 9–5 and the Working Women's Institute. Perhaps the most controversial claim I make in this paper is that many liberal supporters of traditional affirmative action and equal opportunity programs have found common ground with political conservatives, supporting sexual harassment grievance response mechanisms that re-privatize sexual harassment, thus rendering the discourse less threatening to conservative goals and agenda. Alternative dispute resolution generally, and mediation specifically, fit neatly within the liberal scheme for achieving a gender-blind workplace; personal empowerment rhetoric conforms both to the overarching goals of ADR and the procedural and substantive objectives of mediation.

70. *See* Howard Gadlin, *Mediating Sexual Harassment, in* SEXUAL HARASSMENT ON CAMPUS 186, 189 (Bernice R. Sandler & Robert J. Shoop eds., 1997) (suggesting that most victims of sexual harassment want their story to be believed and to protect their privacy and reputation); *see also* Ford Motor Co. v. Equal Emp. Opportunity Comm'n, 458 U.S. 219, 230 (1982) (finding that securing and maintaining employment are the primary motives of employees when filing employment discrimination complaints); Harkavy, *supra* note 8, at 156-57 (arguing that mediation

rubric of rights-based resolution objectives and reflect the practical concerns that compel those who experience many, or even most, forms of discrimination at work to file complaints.[71] Empirical studies that have examined the question refute the notion that sexual harassment victims have different goals and objectives from victims of other forms of workplace discrimination. In fact, the sharp increase in EEOC complaints filed after the Thomas hearings suggests that sexual harassment victims are more than willing to file complaints when they perceive the public as accepting the legitimacy of sexual harassment and concomitantly believe that their complaint will be taken seriously.[72]

Mediation literature continues to stress the importance of sexual harassment victims identifying their feelings, venting anger and other emotions, and figuring out what they "really want" out of a resolution.[73] In this regard, mediation theory and mediation practice appear to conflict. Where emotional issues are brought forth in mediation practice, the emphasis is generally on "redirect[ing the emotions] in a productive manner."[74] As Grillo pointed out in her comprehensive and influential work on mediating divorce, "negative" emotions such as expressions of anger, in particular, are frequently discouraged during mediation, especially when expressed by women.[75] Other studies have similarly shown that, because

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allows a complaining employee to confront her harasser without fear of retribution and to put the incident behind her).

71. *See* Jeanette N. Cleveland & Kathleen McNamara, *Understanding Sexual Harassment: Contributions from Research on Domestic Violence and Organizational Change*, *in* SEXUAL HARASSMENT IN THE WORKPLACE; PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES 217, 235-36 (Margaret S. Stockdale ed., 1996) (examining the problem of blaming the victim, which often results in the victim losing her job as an obstacle to reporting sexual harassment).

72. *See* Grossman, *supra* note 13 (detailing the increase in the receipt of sexual harassment charges filed under Title VII and the percentage increase in charges filed by males).

73. *See* Carol A. Wittenberg et al., *Why Employment Disputes Mediation is on the Rise*, 770 PLI/LIT. 747, 749-50 (1998).

74. *See* Harkavy, *supra* note 8, at 158; *see also* CONLEY & O'BARR, *supra* note 9, at 50 (demonstrating a situation in which a mediator helps the parties to move past emotions and arrive at a compromise); Christina Lepera & Jeannie Costello, *New Areas in ADR*, 605 PLI/LIT. 593, 608 (1999) (describing how mediators help the parties see beyond their emotions to their actual bargaining positions).

75. *See* Grillo, *supra* note 10, at 1572-73 (making a strong case that among women, the sanctions imposed for expressions of anger correlate with race and ethnicity, with black women experiencing the most dramatic pressure to modulate or suppress their anger, and making equally clear that the expressions of anger legitimized through the adversary system are not wholly without problems because they are often expressed not by the parties but by their representatives and it is often not the "actual anger that is being expressed but rather the anger the party is expected to have").

"cooperation is the highest normative value" in mediation,[76] mediators often denigrate expressions of anger or frustration that arise during mediation and/or label the outbursts as "counterproductive" to the goals of compromise and, ultimately, consensus.[77]

2. Victims of sexual harassment want/need to preserve their privacy and avoid the stress of formal, adversarial proceedings.

The persistent emphasis on mediation as a means for resolving sexual harassment without "revealing publicly the intimate and embarrassing details of conduct . . . and degradations"[78] so as to protect the victim belies the truth and substance of the claim itself. If sexual harassment is accepted as a form of sex discrimination, being sexually harassed neither reflects poorly on the victim nor constitutes conduct she or he should be embarrassed about. In many respects, the filing of a sexual harassment complaint signals the victim's acknowledgment that she or he is not at fault—a recognition that the conduct complained of "is not purely personal behavior, nor simply natural attraction gone awry."[79] However, for sexual harassment to remain intimate or the stuff of personal embarrassment,[80] it must continue to be treated as a private shame. Mediation's emphasis on confidentiality as a means of protecting victims affirms, but also relies on, its continuing status as a deeply personal and necessarily private injury. Creating a non-judgmental atmosphere and "win-win" outcomes[81] further disempower an already subordinated person.[82] Significantly, a documented disadvantage of mediation for sexual

76. CONLEY & O'BARR, *supra* note 9, at 58.

77. *Id.* at 50 (drawing disturbing conclusions from their review of the microdiscourse of mediation literature, pointing out that while mediation is designed to equalize power between parties to a dispute, the more competitive party will be most advantaged by the process because of the emphasis on cooperation and relational goals). The party whose personal style or position makes them more facilitative will be more likely to compromise and may concede important points in the interest of cooperation rather than fairness. *Id.* The claimant is more likely to be the less competitive party in employment discrimination cases). *Id.*

78. Harkavy, *supra* note 8, at 157.

79. Hill, *supra* note 5, at 125.

80. *See id.* (arguing that emphasizing the embarrassment of sexual harassment will promote its continuation).

81. *See* Wittenberg et al., *supra* note 73, at 750 (describing the benefits to both parties during sexual harassment mediation).

82. Grillo, *supra* note 10, at 1610 (grappling with the manner in which mediation, which purports to help the subordinated victim avoid the adversary system, also harms the victim's cause by forcing her to compromise).

harassment victims is the "absence of public vindication."[83] Because, in a mediation context, the identity of the person telling the truth is largely irrelevant to the outcome of the mediation, the victim has no chance of personal or professional exoneration through the process. In most situations, other employees have either direct or indirect knowledge of the victim's allegations. Public vindication by a neutral third party (judge, jury, arbitrator, or other decision-maker) is a key element of a satisfying resolution in sexual harassment cases because it helps reestablish the victim's credibility among her or his peers and supervisors.[84] This outcome is almost never available to the sexual harassment victim who enters into mediation.

3. Sexual harassment victims want/need to personally confront the harasser.

A key selling point of mediation is that it provides a victim of sexual harassment the opportunity to "tell him to his face"[85] and regain self-esteem and a "sense of competence"[86] in a manner unavailable through formal adjudication processes. However, as Howard Gadlin and others have noted, despite the claim for confrontation as an advantage of mediation, many sexual harassment victims are reluctant to meet with, let alone confront, their harasser.[87]

Coworkers and supervisors often minimize and downplay sexually harassing behavior.[88] Where a coworker or supervisor's sexually harassing conduct manipulates or coerces an individual, the notion that a mediation can propel the victim onto equal footing with the harasser is "magical thinking" at its best. Advocates of formal adjudication argue that the abuse of power that produces sexual harassment makes a "fair and equitable resolution through mediation impossible because the [victim] is not in an equal bargaining position with her [or his] harasser, and they are bargaining over matters that

83. Harkavy, *supra* note 8, at 161; *see* Jean R. Sternlight, *ADR is Here: Some Preliminary Reflections on Where It Fits in a System of Justice,* 3 NEV. L.J. 289, 299-300 (2003) (acknowledging the significance of a party's emotional needs within the justice system).

84. Harkavy, *supra* note 8, at 161-62 (discussing the value of public vindication to both sides of a mediation).

85. *See* Gadlin, *supra* note 70, at 194 (stating that when a trusted person supports the victim by accompanying them to the mediation, victims more often desire to meet the harasser in person).

86. Deborah Gartzke Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1203 (1990).

87. Gadlin, *supra* note 70, at 194; *see also* Marshall, *supra* note 47, at 106-109 (implying that harassed employees often avoid confronting their harasser because of the negative impact the action will have on their work situation).

88. *See* Irvine, *supra* note 7, at 38 (stating that male coworkers use peer pressure to entice harassed employees to join the group as a means of ending the harassment).

are not negotiable."[89] In such a context, face-to-face confrontation can only increase the vulnerability of the victim by opening her or him to further manipulation or additional abuse.[90]

4. Sexual harassment is an inherently subjective and ambiguous phenomenon.

In stark testimony to nine years work as a district attorney in New York City's Special Victim's Unit, Alice Vachss wrote that society has "allowed sex crimes to be the one area of criminality where we judge the offense not by the perpetrator but by the victim."[91] In the sexual harassment arena, courts have consistently upheld the notion that "power in a hierarchical work force can be sexualized."[92] When federal courts began evaluating sexual harassment claims through the lens of a reasonable person in the same circumstances as the victim, they sent an implicit message that prevailing stereotypes and behavior that have long reinforced discriminatory practices against women workers would no longer be tolerated.[93] In other words, the courts affirmed challenges to discriminatory practices that women, but not necessarily men, find objectionable.[94] In a society that largely views interactions between women and men as inherently sexual,[95] the import of this arguably radical legal development is profound. At the

89. *Id.* at 39

90. *See* Gadlin, *supra* note 70, at 194 (advocating "shuttle-mediation," a process in which the mediator meets with the parties individually and helps develop a settlement agreement between them, where it is otherwise impossible to avoid "abusive negotiation" between the parties).

91. ALICE VACHSS, SEX CRIMES 279 (1993).

92. Harkavy, *supra* note 8, at 148.

93. *See* Irvine, *supra* note 7, at 42-43; *see also* Ellison v. Brady, 924 F.2d 872, 878, 880-81 (9th Cir. 1991) (adopting the "reasonable victim's perspective" standard in order to move away from older ideas of what constitutes non-harassing behavior); *see also* Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524-25 (M.D. Fla. 1991) (adopting the victim's perspective test to determine the nature of the objectionable behavior and noting that the fact that other employees did not complain did not alter the objective basis for the finding).

94. *See Ellison*, 924 F.2d at 879 (asserting that because women are more often victims of rape they are more concerned with milder forms of harassment, fearing that the behavior may be the beginnings of a larger problem).

95. *See* William Broyles, Jr., *Public Policy, Private Ritual,* N.Y. TIMES, October 16, 1991, *reprinted in* DEBATING SEXUAL CORRECTNESS: PORNOGRAPHY, SEXUAL HARASSMENT, DATE RAPE, AND THE POLITICS OF SEXUAL EQUALITY 144, 144-46 (Adele M. Stan ed. 1995) (arguing that the Thomas hearings "put on public display the private rituals by which men and women come together," and suggesting that because men are generally the initiators of romantic relationships with women, they are responsible (post-hearings) for "consequences ranging from sexual harassment to beginning a lifetime relationship"). Broyles also bemoans the fact that the "rules of sexual harassment are not objective but [are] determined by the reactions of the woman involved" and suggests that this is the real reason that men "don't get it" and never will. *Id.*

same time, the courts' emphasis on the "reasonableness" part of the standard left the power of the victim to define her or his injury open to question, scrutiny, and dismissal. It has long been presumed that being emotional and being rational are mutually exclusive states of mind[96] and that emotional individuals are susceptible to exaggeration, misperception, and overreaction while rational individuals are more reliable, competent, and objective.[97] That women are "emotional" and men are "rational" is the prevailing stereotype throughout much of Western culture. That a (usually female) victim of sexual harassment would be emotional about her experience confirms not only the stereotype about women generally but more importantly contrasts her perceptions against those of her more rational and objective, albeit harassing, counterpart. Thus, the crucial role subjectivity plays in determining what constitutes sexual harassment becomes an unyielding weapon in the hands of one ill equipped to evaluate its use.[98]

5. Formal complaint adjudication disadvantages victims of sexual harassment.

Richard Delgado argues that formal (courtroom) rules of procedure and evidence create normative expectations that result in behavior reflecting "higher" public values of "fairness, equality, and respect for personhood."[99] Clear legal principles may also help the victim of sexual harassment define her injury in a context where the assertion of legal rights is legitimate and, optimally, transformative.[100] Vachss argues convincingly that political "aid and comfort" discourse is often used to promote social and/or legal "reform" by social liberals invested in maintaining their own status but unwilling to say so openly.[101] That this myth would remain within the consciousness of

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96. GEORGE E. MARCUS ET AL., WITH MALICE TOWARD SOME: HOW PEOPLE MAKE CIVIL LIBERTIES JUDGMENTS 10-11 (1995).

97. *See* Florence L. Geis, *Self-Fulfilling Prophecies: A Social Psychological View of Gender, in* THE PSYCHOLOGY OF GENDER 9, 31, 32 (Anne E. Beall & Robert J. Sternberg eds., 1993) (discussing the difficult situation confronting women when coworkers expect them to exhibit traditionally masculine traits, such as objectivity and leadership, while simultaneously maintaining their sexuality and femininity).

98. *See* Broyles, *supra* note 95 (suggesting that "highly professional, otherwise capable women imagine relationships that did not exists . . . and contrive harassment charges to revenge other slights or to advance themselves").

99. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1388.

100. *See* Grillo, *supra* note 10, at 1558 (comparing formal adjudication with mediation of divorce cases, specifically identifying the traditional adversarial litigation process as the more potentially effective means for addressing fault and redressing past injury).

101. *See* VACHSS, *supra* note 91, at 279.

the legal community practiced in the art of formal complaint adjudication is a conundrum that will be addressed further below.

C. The Privatization of Workplace "Justice"

Scholars and practitioners have raised objections to mediation for women, people of color, and others disenfranchised within institutions because of concerns that mediation is risky since mediators themselves may be biased and will exert a great deal of power in the process,[102] mediation perpetuates power imbalances,[103] mediation does not involve fact-finding,[104] and perhaps most importantly, mediation does not involve an assertion of "rights."[105] Further, research comparing mediated and litigated outcomes has raised significant questions about the substantive justice that women and people of color obtain through mediation.[106]

Procedures emphasizing relational, as opposed to rights-based outcomes, tend to decrease the likelihood of a victim of sexual harassment achieving what the law entitles her.[107] Mediator and practitioner Jonathan Harkavy suggests that as the courts increasingly emphasize employer self-enforcement in sexual harassment cases, workplace justice will likely be "privatized to a considerable extent with the aid of mediators."[108] Internal sexual harassment complaint procedures have been described as creating a "double consciousness" about the law of sexual harassment for victims who have increased knowledge about their rights under existing statutes and employer policies but who experience significant barriers to rights enforcement, both procedural and in terms of the social pressure from supervisors and others not to adjudicate their complaints

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102. *See* Grossman, *supra* note 13, at 66.

103. *See id.*

104. *See id.* (citing Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27, 37 (1993)).

105. *See* Schneider, *supra* note 2, at 627-33 (discussing the significance and benefits of women asserting their rights under the law).

106. *See* Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases,* 30 LAW & SOC'Y REV. 767, 789 (1996).

107. *See generally* Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 526 (1987) (suggesting that methods which increase the likelihood of a victim actually receiving nominally available statutory rights are needed).

108. *See* Harkavy, *supra* note 8, at 148 (discussing how the Supreme Court's most recent Title VII sexual harassment decisions, rather than elucidating a definitive test for hostile environment sexual harassment, have instead created an incentive-based approach aimed at preventing this form of discrimination, and noting that while creating a purportedly uniform and predictable standard of employer liability, the Court left open most of the questions regarding the scope of actionable conduct or the contours of disparate conditions of employment in the sexual harassment arena).

formally.[109]

Both the process and outcome goals of mediation in the employment context prioritize creative over substantive resolutions and mitigating rather than correcting the injury that is the substance of the victim's claim. In their sociolinguistic analysis of legal discourse within the practice of mediation, Conley and O'Barr point out that "it should come as no surprise that women should at once like mediation and fare badly in it."[110] The authors suggest that women are socialized to seek non-confrontational, relational strategies for resolving disputes rather than strategies that emphasize rights-based outcomes. Women who engage in informal dispute resolution with men tend to be disadvantaged because men are socialized to pursue self-interest and a favorable outcome when involved in disputes.[111] Nancy Welch has recently suggested that it is time for legal scholars, and I would argue attorneys as well, to make a commitment to extending the goals of mediation beyond simple resolution of disputes to include substantive justice goals.[112]

III. PRIVATE SHAME AND PUBLIC CHOICES

A. The Promise and the Myth of Mediation

Subordinated groups have long used their collective power to inspire and demand social change. Public outcry over "private" injuries of sex abuse, domestic violence, and workplace discrimination have repeatedly sparked an increase in the recognition of the prevalence and validation of the impact of these social ills.[113] Both the promise and the myth of mediation is that it provides the opportunity for all parties to a dispute to "win." Where a dispute stems from poor communication and does not implicate subordination of important rights, social justice, or legal principles, a process designed to facilitate compromise and win-win outcomes can be of significant value, particularly in the business world, where conflicts may stem from poorly planned commercial transactions and the inability to find a compromise solution could result in greater financial harm to both parties. But disputes involving allegations of

109. *See* Marshall, *supra* note 47, at 106.

110. *See* CONLEY & O'BARR, *supra* note 9, at 132.

111. *Id.* at 132-33.

112. *See* Nancy A. Welch, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 51 (2004).

113. *See, e.g.*, Wendy Kaminer, *The Privacy Problem*, *in* DEBATING SEXUAL CORRECTNESS: PORNOGRAPHY, SEXUAL HARASSMENT, DATE RAPE, AND THE POLITICS OF SEXUAL EQUALITY 138, 139-40 (Adele M. Stan ed., 1995).

sexual harassment *do* implicate these things. So, what does the promise of mediation mean in the context of sexual harassment complaint response?

There appears to be little room for discussion of sexual harassment as a form of invidious sex discrimination in contemporary treatment of the problem when mediation is in the mix. The fact that sexual harassment is a symptom of biased attitudes toward women poses a threat to workplace norms and culture in a manner not implicated by the glass ceiling, wage differentials, and other forms of sex discrimination women in the U.S. experience on the job. Even Justice Scalia's admonishment that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination"[114] has done little to undermine the argument that "sex arrived at work when women did" and that sexual harassment laws have taken aim at the occasional "dirty joke or clumsy flirtation."[115] And while some argue that employers are increasingly motivated by recognition of the need for a diverse workforce to accommodate a range of employee needs and rights,[116] others suggest that rules of liability, at least with respect to sexual harassment, have created an environment in which employers have very few incentives to provide more than the minimum process required by law.[117] Privatizing the problem of sexual harassment with responses that shield perpetrators and reinforce stereotypes that sexual harassment is shameful for the victim allows for social dynamics that foster unchecked sexual harassment in the workplace.

B. No Longer a "Dirty Secret"[118]

The relative ease with which the backlash against sexual harassment and its victims has made its mark was, perhaps, predictable. Unlike forms of discrimination in which the perpetrator subjects a victim to biased or hostile treatment easily identified as group or identity based, perpetrators of sexual harassment usually target a single victim for

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114. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (finding that Title VII is not a "civility code" and harassment that is sexual in nature does not automatically equate to discrimination).

115. *See* Broyles, *supra* note 95, at 145-46.

116. *See* Green, *supra* note 8, at 970 (stating that "major U.S. employers have adopted a diversity rationale as a measure of good business").

117. *See* Grossman, *supra* note 13, at 70 (noting that employers have, in fact, been reinforced for "gam[ing] the system" and aiming at precise rule compliance, i.e., providing options for complaint resolution but not encouragement or assistance in reporting sexually harassing conduct and that these employers fare best in litigation).

118. *See* Anita Hill, *The Nature of the Beast,* in SEXUAL HARASSMENT: YOU'RE YOUR RIGHTS (Martin Eskenazi & David Gallen eds., 1992) (discussing ten lessons Ms. Hill learned from her experience testifying before the Senate Judiciary Committee).

individualized discriminatory treatment.[119] It is here that one significant difference between sexual harassment and other forms of discrimination rests and perhaps where the source of much social anxiety around sexual harassment for civil rights advocates and others lies.

Sexual harassment, although group based, is a uniquely isolating experience for victims. Unlike race discrimination, in which the target of the biased treatment can readily tap into shared experience of other workers or even family members of the same racial background who may have had similar experiences,[120] victims of sexual harassment have no analogous shared history with other victims. Sexual harassment is a newly acknowledged form of sex discrimination. Until Anita Hill's taped testimony was broadcast on national and international network television, sexual harassment was a private shame with its public consequences largely ignored. There have been other sexual harassment cases since the Thomas hearings, but none with the impact of Professor Hill's story, which galvanized the nation on this issue.

Significantly, while Anita Hill was initially vilified and publicly excoriated by the press, politicians, and the public, she exemplified none of the negative stereotypes commonly attributed to women victims of sexual harassment. Hill was "careful and deliberate," in control, and even-handed throughout her testimony to the Committee.[121] And as the heat of the moment dissipated, her credibility became increasingly apparent to members of the press and the public. The long-term impact of Hill's testimony on workplace norms and values threatened traditional power dynamics and hierarchies in ways that continue to resonate today. Within a year, public opinion had shifted dramatically in Hill's favor and women workers around the country rallied in support of their own rights to a workplace free from sexual harassment.[122] Their efforts to employ public dialogue and communitarian strategies to keep sexual

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119. *See* John Pryor, *Sexual Harassment Proclivities in Men,* 17 SEX ROLES 269, 290 (1987).

120. *Cf.* Daniel R. Ortiz, *Self-Defeating Identities*, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 371, 374 (Robert Post & Michael Rogin eds.,1998) (discussing minority groups' abilities to unify and effect social change).

121. *See* Erica Verrilo, *Who Is Anita Hill? A Discourse Centered Inquiry into the Concept of Self in American Folk Psychology*, *in* THE LYNCHING OF LANGUAGE: GENDER, POLITICS AND POWER IN THE HILL-THOMAS HEARINGS 61, 74 (Sandra L. Ragan et al. eds., 1996).

122. *See* Bystrom, *supra* note 29, at 262, 270-75 (suggesting that anger at the Senate Judiciary Committee's treatment of Anita Hill at the Thomas hearings contributed to the elections of Carol Mosley-Braun, Pattie Murray, Diane Feinstein, and Barbara Boxer to the U.S. Senate in 1992).

harassment evolving within public consciousness[123] quickly met the resistance of employers and others determined to quash the momentum generated by the Senate Judiciary Committee hearings—hearings that had resulted in the confirmation of Clarence Thomas to the U.S. Supreme Court. And so we return to the question: Why were calls for applying modified discrimination resolution mechanisms to sexual harassment cases successful?

C. Does the Legal Community Understand Sexual Harassment?

Researchers have developed several models to help explain sexual harassment. One model, the "natural/biological model," may provide an insight into the tremendous reach mediation has had in the sexual harassment dispute resolution arena. The natural/biological model is premised on the assumption that the human sex drive is stronger in men than in women,[124] presumes heterosexual normativity, that both sexes will participate in sexualized behavior in the workplace, that they like it this way, and that "harassing" conduct is idiosyncratic.[125] This theory has been widely dismissed by sexual harassment researchers in favor of socio-cultural and organizational explanatory models. However, the courts have drawn on aspects of the natural/biological model in analyzing cases of heterosexual sexual harassment cases, suggesting that the theory continues to carry some currency within the legal profession.[126]

Where the natural/biological model is applied, a perpetrator of sexual harassment is presumed to be acting on sexual desire that may or may not have been encouraged or discouraged by his (typically female) object of desire.[127] Either way, the issue of discrimination is not part of the analysis and there are analogous presumptions that the target of attention should be flattered by the behavior, or at least not offended by it, and that she will suffer no negative consequences since the behavior was not motivated by discriminatory animus.[128]

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123. *See* Michael Feher, *Empowerment Hazards: Affirmative Action, Recovery Psychology, and Identity Politics, in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 175, 183 (1998).

124. *See* Sandra S. Tangri, Martha R. Burt & Leonor B. Johnson, *Sexual Harassment at Work: Three Explanatory Models*, J. OF SOC. ISSUES 38 (4), 33, 35-37 (1982).

125. *Id.*

126. *See* Grossman, *supra* note 13, at 28-29.

127. *Id.*

128. *See* Tangri et al., *supra* note 124, at 37.

CONCLUSION

"*The lesson that stays with me is that it takes both legal action and direct political agitation to sustain even limited victories in this highly contested area of...rights to dignity and economic parity.*"
— Martha Chamallas[129]

Michael Green has argued that employees vulnerable to discrimination in the workplace must have "flexibility in their employment discrimination dispute resolution systems."[130] Most legal scholars and attorneys would likely agree that it is important for disputants to feel that they were treated fairly and that they obtained a just outcome through whatever dispute resolution mechanism they have employed.[131] But because mediation is almost always conducted privately and mediated cases and their outcomes generally result in little or no public debate or discussion,[132] claimants generally have no basis upon which to evaluate their result from a substantive justice perspective. They must rely on their attorneys to inform them of the relative "fairness" of their result.

The confidential and undocumented nature of most mediation has made empirical data tracking applied to mediation difficult to obtain.[133] Calls have begun to emerge for more and better research that could help explain why mediation has proven so attractive to legal scholars and practitioners despite significant evidence that it has failed to live up to its promise.[134] Mediation practitioners' highly credible accounts offer insight into the dynamics employees who

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129. *See* Martha Chamallas, *Anatomy of a Lawsuit, in* SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS 248, 259 (Bernice R. Sandler & Robert J. Shoop eds., 1997) (analyzing the case of Professor Jean Jew who successfully sued the University of Iowa for race and sex discrimination. Jew, a first generation Chinese-American, received her M.D. at the age of twenty-four and joined the University in 1973 as the only woman faculty member in the College of Medicine. In the course of winning her lawsuit, Jew became one of the few faculty members to successfully argue that her academic department constituted a hostile work environment); *see also* Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990).

130. *See* Green, *supra* note 8, at 958.

131. *See* Sternlight, *supra* note 83, at 296-97.

132. *See* Grossman, *supra* note 13, at 65.

133. *See id.* (discussing the difficulty of evaluating mediation for distributive justice because decisions are not published); CONLEY & O'BARR, *supra* note 9, at 157 (explaining that a benefit of mediation is the confidential nature of the proceedings).

134. *See* Katherine R. Kruse, *Learning from Practice: What ADR Needs From A Theory of Justice*, 5 NEV. L. J. 389, 397 (2004-05) (arguing convincingly that only through testing mediation methods (i.e., legal processes) will we know whether our underlying theories and the methods we chose to implement them are effective); Sternlight, *supra* note 83, at 297 (calling for additional research exploring the reasons that different potential litigants prefer mediation).

mediate claims of sexual harassment continue to face.[135] Alternative dispute resolution (ADR) mechanisms such as mediation frequently fail to provide victims of sexual harassment meaningful resolution to their injuries. Yet mediation continues to be promoted by legal scholars and practitioners as a desirable and effective alternative to litigation in sexual harassment cases, particularly from the victim's point of view.

As women increasingly come to challenge institutions that perpetuate their subordination, the tendency has been "to blame and/or restrict women while excusing men's behavior."[136] This practice has often extended to so-called solutions to social problems that fail to challenge the underlying assumptions regarding the rights of women, especially when doing so involves questioning the concomitant responsibilities of men or their surrogates.[137] With mediation, women have come to depend upon a system and processes that enable sexual harassment against them to go unpunished—a system that regulates sexual harassment rather than correcting it in the "guise of protecting women"[138] —a system that effectively trades justice for harmony.[139] The time has come to put the mediation of sexual harassment to the test. As legal scholars and practitioners assess the level of understanding of sexual harassment within the legal community and researchers address empirical gaps that have emerged in the field, the distance between mediation ideology and its application to sexual harassment dispute resolution—in some respects space between myth and reality—may begin to prove easier to navigate.

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135. *See* Grillo, *supra* note 10; Silver, *supra* note 107; *see also* CONLEY & O'BARR, *supra* note 9 (relying on case studies and/or sociolinguistic analytical methods, but also grounding their contextual critique of mediation in their own experiences as professional mediators).

136. *See* Patricia D. Rozee, *Women's Fear of Rape: Cause, Consequences, and Coping, in* LECTURES ON THE PSYCHOLOGY OF WOMEN 276, 286 (Joan C. Chrisler, Carla Golden & Patricia D. Rozee eds., 1996) (discussing society's inclination to blame the victims of rape for their experiences).

137. *See id.* (illustrating an example of society imposing restrictions on women's activities in an attempt to reduce rape).

138. *See id.* (arguing that the criminal justice system, which is male dominated, regulates violence against women in "the guise of" protecting women).

139. *See* Nader, *supra* note 12, at 1.

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Mediation of a Sexual Harassment Claim

Robert Lewis

PRACTITIONERS' NOTES

MEDIATION OF A SEXUAL HARASSMENT CLAIM

Robert Lewis[*]

I. SEXUAL HARASSMENT

The best definition of sexual harassment is that it is unwelcome sexual attention that causes the recipient distress and results in an inability to function effectively on the job.

II. SEVERE OR PERVASIVE?

Where the harasser is a co-worker of the harassed employee, the Supreme Court has held that employers are liable if: (1) the harassment was severe or pervasive, (2) the employer knew or should have known of the harassment, and (3) the employer failed to take prompt remedial action.[1]

The article in the December 31, 2005 *New York Times* sports section headlined "U.S. Women Accuse a Coach of Harassment," recounts the story of an Olympic bobsled candidate who alleged that at the start line of a race, her coach commented on how good she looked in

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1. Faragher v. City of Boca Raton, 524 U.S. 775, 786, 788-89 (1998); Burlington Indus. Inc. v. Ellerth, 524 U.S. 742, 752, 765 (1998); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 70-71 (1986).

her speed suit, patted her on the buttocks, and tried to kiss her on the lips.[2] Subsequently, an arbitrator ruled that the coach's actions did not violate the United States Bobsled and Skeleton Federation's sexual harassment policy.[3] Did the coach's actions constitute severe harassment under the law?

Not all workplace conduct with sexual undertones is severe enough to be actionable. A number of courts have held that conduct similar to that of the U.S. women's bobsled coach is all too commonplace in today's America to be classified as discriminatory.[4]

In a suit against Madison Square Garden, a former figure skater cheerleader for the New York Rangers hockey team alleged that after a game, her supervisor solicited her for sex at a bar and put his tongue down her throat.[5] In dismissing her complaint, the court held that while in some instances a single act can create a hostile work environment, such single acts must be "extraordinarily severe" to be found actionable.[6]

In another case, the complainant stated that her supervisor told her, "[y]ou are looking very beautiful."[7] While acknowledging that such words may show a flirtatious purpose, the court found that the supervisor's flirtation did not rise to the level of sexual harassment.[8]

Of course, every case has to be analyzed based on its unique facts. It is clear that employers need not apply Victorian standards of etiquette in considering whether the conduct is severe. Rather, as one court put it, sexual harassment must be analyzed against the background of "contemporary American popular culture in all its sex-saturated vulgarity."[9]

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2. Wina Sturgeon & Lynn Zinser, *U.S. Women Accuse a Coach of Harassment*, N.Y. TIMES, Dec. 31, 2005, at D1.

3. Juliet Macur, *For U.S. Skeleton Team, Racing Will be the Easy Part*, N.Y. TIMES, Feb. 13, 2006, at D1.

4. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) ("A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks . . . ."); Jennings v. Univ. of N.C., at Chapel Hill, 444 F.3d 255, 272 (4th Cir. 2006) (rejecting Plaintiff's argument that the "sexual banter" she heard during practice for two years amounted to sexual harassment).

5. Prince v. Cablevision Sys. Corp., 95 Fair Empl. Prac. Cas. (BNA) 1305, 1311 (S.D.N.Y. May 6, 2005).

6. *Id.* at 1312 (quoting Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2000)). Subsequently, the plaintiff amended her complaint to include additional allegations of sexual misconduct. This time, the court denied the defendants' motion to dismiss because the additional allegations buttressed the original complaint. Prince v. Madison Square Garden, 427 F. Supp. 2d 372, 376-77 (S.D.N.Y. 2006).

7. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 584 (11th Cir. 2000).

8. *Id.*

9. Bakersville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995).

III. PRACTICE AS DEFENSE COUNSEL

During my years of practice, I advised many employers on sexual harassment matters. In one of the cases I litigated, I was representing a large supermarket chain. The female plaintiff was working part-time in the produce department and was harassed by a male co-worker.

The plaintiff filed suit against the company in federal district court for subjecting her to a sexually hostile work environment.[10] At trial, she testified that her co-worker had stood behind her and placed his hands at her sides and made back and forth sexual motions behind her while he pinned her against the table.

The main issue in the case was whether the supermarket had knowledge of the incident.[11] The plaintiff's attorney argued that the store manager had constructive knowledge because the harassment was so severe that the manager should have known of it. I argued that the company did not have knowledge because the produce department, where the plaintiff worked, was in the back of the store, a long way from the store manager's office. Although the jury awarded her $139,000, my subsequent argument to the court prevailed, reducing the award to $10,000.[12] The Third Circuit Court of Appeals affirmed.[13]

IV. MEDIATING SUPERVISORY HARASSMENT

In June 2000, I retired from Jackson Lewis. After training in mediation techniques, I applied for placement on the rosters of state and federal courts, and advertised my availability in bar association journals. Soon after, the cases started to come in.

One case involved a class action by the EEOC against the partners of a law firm. This was the first time the EEOC had sued a New York City law firm. A female attorney and clerical workers complained that they were repeatedly subjected to sexually explicit comments by some of the firm's partners, two of whom had pornography on their computer screens. By the end of the day, the parties had agreed on a settlement, which included compensation for lost wages to the attorney complainant who had allegedly been forced to resign, and sensitivity training for the firm's partners, staff, and associates.

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10. Stewart v. Weis Mkts., Inc., 890 F. Supp. 382, 386 (M.D.Pa. 1995).
11. *Id.* at 390-91.
12. *Id.* at 400.
13. Stewart v. Botsford, No. 95-7415, 1996 U.S. App. LEXIS 14998, at *1 (3d Cir. May 7, 1996).

The law involving supervisory harassment states that employers are strictly liable for a supervisor's conduct, provided it is severe or pervasive, and culminates in a tangible employment action such as demotion or discharge. However, an employer can avoid liability by proving both elements of an affirmative defense:

> (1) *that it exercised reasonable care to prevent and promptly correct the harassment; and*
>
> (2) *that the plaintiff employee unreasonably failed to take advantage of preventive opportunities provided by the employer.*

This is termed the *Faragher/Ellerth* affirmative defense, from the names of the two cases in which the Supreme Court articulated it.[14] Simply stated, the first prong concerns the behavior of the defendant employer: whether it had an effective policy and procedure for preventing harassment and handling complaints. The second prong concerns the behavior of the complainant: whether he or she unreasonably failed to take advantage of the employer's policy and procedure. The defendant employer bears the burden of proof on both elements of the defense.

I recently mediated another Eastern District sexual harassment case involving a company on Long Island, New York. Two former female employees had filed charges with the EEOC, claiming that the company's president repeatedly used graphic and offensive language in the workplace. One of the employees charged that the president had stated he would like to have sex with her, commented about her sexual relations with her husband, and joked about the fact that she probably does not perform enough oral sex on him.

The EEOC uses media strategy as part of its litigation game plan. It may place an article in the local press, and it may arrange for a report of the case to be aired on national television news broadcasts, where the complainant is interviewed.

At the opening of the mediation, I was taken aback upon learning that on the day before the mediation, the company president had filed two state court suits for defamation against the two complainants in the EEOC case. The suits were based on a television news broadcast arranged by the EEOC publicizing the complainant's lawsuit. The

14. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).

president complained that his reputation had been damaged when his family and friends viewed the broadcast. He sought $15 million in compensatory and punitive damages. Given this background, and the extreme hostility between the parties, I was unable to settle the case.

There is, however, another chapter to the story. When the EEOC learned of the defamation law suits, it informed the magistrate judge and moved to amend its complaint to add a retaliation claim, which was granted. The case is pending in federal court.

V. MEDIATION IN PRACTICE

Should you engage in mediation? Some defense attorneys have expressed reluctance to mediate in EEOC cases, where mediation is voluntary. I believe these attorneys do their clients a serious disservice by litigating without first trying mediation.

Assume you and your adversary have been having discussions regarding settlement of a matter, but so far have been unsuccessful. One of you may suggest mediation and propose names of possible mediators. If both sides agree on a person, the proposed mediator will be called concerning his or her availability and, if it is a private mediation, fees.

When I am asked whether my prior management background has handicapped my selection as a mediator, I answer that, to the contrary, it has enhanced it. Plaintiffs' attorneys will sometimes select me because they believe that I have high credibility with the employer and its counsel, due to my prior experience.

When I am chosen to mediate, I communicate with both sides by phone or letter, explaining the need to submit a pre-mediation statement summarizing the background and the status of the dispute. The statements are confidential, and for my eyes only. After I read the statements, I generally research the legal issues. Under certain circumstances, I may meet separately with counsel before the mediation, or I will make pre-mediation phone calls to counsel and inquire as to the position and responsibility of the management representative who will accompany him or her to the mediation.

VI. PRACTICAL CONSIDERATIONS

What happens if the management representative is not present at the mediation or does not have full authority to settle? In one reported case, the court ordered mediation when a female employee filed a sexual

harassment complaint against a food chain in the Eastern District of Missouri.[15]

At the mediation session, company counsel was accompanied by the local regional manager, whose settlement authority was limited to $500.[16] Any settlement amount above $500 had to be authorized by the company's general counsel, who was not present at the mediation.[17]

When the mediation did not result in a settlement, plaintiff's counsel filed a motion for sanctions for failure to mediate in good faith.[18] The court awarded sanctions of $1300 against the company and a similar amount against local counsel.[19] The court explained that a decision-maker must be personally present because, without his presence, he learns only what local counsel chooses to relate.[20] Because the general counsel was not present at the mediation, sanctions were warranted.[21]

If I learn from my pre-mediation phone calls to company counsel that the management representative planning to attend does not have full authority to settle, I will not mediate. Similarly, if I learn that the company has employment liability insurance and that the insurance adjuster will not be attending the mediation, I will adjourn, pending the adjuster's attendance.

VII. ROLE OF MEDIATOR

A typical mediation opens with a joint session. Counsel and their clients will be introduced if they haven't previously met during discovery. I will make opening remarks describing the process. I state that after the joint meeting I will be meeting separately with each side, noting that all information disclosed to me during these private caucuses will be held confidential. Confidentiality fosters an atmosphere of trust, which is essential to mediation. Mediation would not be nearly as effective if the parties were not assured that their discussions with the mediator would remain private.

Following my opening remarks, the parties are given an opportunity to make opening statements. Usually that is done by the attorneys. The remarks should be addressed to the opposing side rather than the

15. Nick v. Morgan's Foods, 99 F. Supp. 2d 1056 (E.D. Mo. 2000), *aff'd*, 270 F.3d 590 (E.D. Mo. 2001).
16. *Id.* at 1058.
17. *Id.*
18. *Id.* at 1059.
19. *Id.* at 1064.
20. *Id.* at 1062.
21. *Id.* at 1063.

mediator.

VIII. MISTAKES IN MEDIATION

I was recently asked to do a training session for EEOC trial attorneys on mistakes by plaintiffs' counsel in employment law mediation. Among the matters I discussed was the failure to have the complainant describe the incidents alleged in the complaint. Often, the attorney describes the incidents and the complainant remains mute or just nods her head. In my opinion, this is a mistake. Rather, I ask the complainant to tell her story first, and then have the attorney briefly outline the issues or summarize her statement. By having the complainant take the lead and describe the incidents, the company's representative and insurance adjuster can visualize what impact the claimant's testimony would have on a jury if the case does not settle.

After the opening statements, I will meet privately with each side, usually starting with the plaintiff. The private caucus permits counsel to argue his or her position outside the presence of his adversary. During the first caucus, I seek to clarify the points made during the parties' opening statements. In subsequent caucuses, I seek to nail down plaintiff's demand in monetary and other terms, and then ascertain defendant's offer, which more often than not is on the low side. I then engage privately in "shuttle diplomacy," seeking to bridge the gap between the parties.

IX. ADVANTAGES OF SETTLEMENT

During the caucuses, I will point out to the employer the indirect costs of litigation, such as time, stress, distraction from business productivity, and the possibility of unfavorable publicity. I remind the employee and counsel that settlement avoids the expense and risks involved in a lengthy litigation, and allows the employee to move on with his or her life, both mentally and emotionally.

A word of advice: In caucus, although you will want to convince the mediator of the strength of your side to enable him or her to persuade the other side to settle, do not lose credibility with the mediator by overstating your chances of prevailing in litigation. A good approach is to state that you believe you would prevail, while indicating that you are interested in a reasonable settlement.

During the caucuses, I am often asked to convey a candid, neutral assessment of the dispute—an evaluation of the likely outcome or value of a legal claim or defense if it were adjudicated. I do not hesitate to do

so when asked. At some point, to achieve settlement, I may have to tell plaintiff's counsel that I believe his or her case is weak, or suggest to defense counsel that it is unlikely that his or her contemplated motion for summary judgment would be granted. I do this by explaining my opinion and the caselaw that supports it.

Most mediations settle in a day or less. If not, I may continue to mediate by phone (I once settled a case after 30 days of daily phone calls). I persevere, persist, and do not give up until I am convinced it is hopeless. Even if the mediation fails, it is often useful in narrowing the issues. Indeed, in these failed mediations, I am sometimes told a year later that the case settled.

X. PREVALENCE OF SEXUAL HARASSMENT

Sexual harassment is still prevalent in today's society. You read about it in the daily press, and a week does not go by without a new case being reported. The Olympic story is one example.[22] On the whole, sexual harassment is rising.[23] Indeed, last year the EEOC received nearly 13,000 sexual harassment complaints, and surveys show no decrease in the prevalence of unwanted sexual attention despite over twenty years of litigation.[24]

XI. CONCLUSION

I have often been asked how I like my second career as a mediator. My response has always been positive. Every mediation is different, and it is challenging to devise creative solutions for the different scenarios. The most gratifying part is the opportunity to help people come from conflict to resolution.

22. *See supra* text accompanying notes 2-4.

23. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEXUAL HARASSMENT CHARGES, http://www.eeoc.gov/stats/harass.html (last visited Oct. 24, 2006) (showing an increase in sexual harassment complaints).

24. *Id.*

Careful Maneuvers: Mediating Sexual Harassment

Howard Gadlin

The rapid growth of mediation as a form of dispute resolution over the past decade is in large part the result of extending the techniques of mediation into new areas. As we know, mediation, which originated as a tool in the resolution of labor disputes, later emerged as an alternative or an adjunct to traditional means of handling neighborhood and community conflicts, environmental issues, and divorce and family disputes. As a result, the techniques of mediation have been elaborated, expanded, and transformed. Similarly, expanding the range of mediation has enhanced our understanding of the dynamics of conflict. At the same time, extending mediation to new areas has raised ethical and political questions about the impact of mediation within institutions, as well as about the conceptions of justice and fairness that inform decisions to employ mediation as a form of conflict resolution. One area in which deployment of mediation has been relatively limited to date is sexual harassment.

In recent years, sexual harassment has received considerable attention, both on campuses and in the workplace. Over the past eight years, I have incorporated mediation into the handling of grievances at the University of Massachusetts, Amherst, where I am the ombudsperson. Among my responsibilities has been working with sexual harassment grievances, especially those where the grievant prefers to work out a resolution to her complaint (95 percent of grievants have been women) without filing a formal charge. The procedure at the university allows for a complaint to be handled through either "formal" or "informal" channels. Filing a formal charge requires participating in a hearing, and most people who feel they have been sexually harassed prefer, for a variety of reasons, to avoid formal hearings. When a complaint is handled informally, the sexual harassment procedure at UMass relies heavily on mediation, usually conducted by the Ombuds Office. Because of the preference for informal resolutions, I have worked with roughly 85 percent of the 130 sexual

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harassment cases that have been pursued through the university's procedure since 1982. Of those 110 cases, I have used full mediation sessions in approximately one third, and mediation-like shuttle intervention in many of the remainder.

While I am convinced that mediation is enormously useful in reaching both effective and just resolutions to harassment grievances in many circumstances, certain problematic areas still remain that must be addressed. In turn, I have realized that mediating these cases has taught me a lot about the dynamics of sexual harassment. In thinking about what I have learned, it occurs to me that as practicing mediators we have not taken full advantage of the ways in which mediating a conflict can also be a form of inquiry. When we generalize from our mediation work, we tend to generalize about the processes of conflict intervention rather than about the conflict area in which we are intervening. It is almost as if we think that increasing the effectiveness of our techniques is, by itself, added justification for the application of those techniques to a particular realm of conflict. But, to the extent that we learn more about a conflict area through mediation, we ought also to think further about the nature of the conflict area and the appropriateness of using mediation.

Although I did not originally think of mediating sexual harassment cases as a means of researching the phenomenon of sexual harassment, I soon became aware that I was, as a mediator, in a rather privileged position with respect to the thinking, feelings, and interactions of the disputants in these cases. Consequently, I began to look more systematically at the cases with which I worked and to reflect in new ways about the dynamics of sexual harassment and the effects of disparities in power on the dynamics of conflict and conflict resolution. I also developed some ideas about the ways in which I believe the techniques of mediation should be adapted to handle the particular qualities of sexual harassment cases.

The Nature of Sexual Harassment

Sexual harassment is unwanted attention of a sexual nature, often with an underlying element of threat or coercion. Following federal law in this area, sexual harassment can be identified along three major dimensions: (1) when acceptance or rejection of sexual advances is a condition of education or employment; (2) when acceptance or rejection of sexual advances affects grades, performance evaluations, or any academic or personnel decisions that concern the student or employee; and/or (3) when unwelcome sexual actions interfere with work or create an intimidating, hostile, offensive, or humiliating environment. While it is less dramatic than the first two, the third category—often referred to as "the hostile environment"—is the most typical form of sexual harassment. It includes actions such as displaying pinups, making inappropriate suggestive or sexual jokes or comments, making unwanted physical contact, and offering compromising invitations or advances.

Most sexual harassment policies began to appear on American campuses and in corporations after 1980, when the Equal Employment Opportunity Commission issued guidelines that defined sexual harassment as a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The guidelines applied to all companies that employed 15 or more persons. In 1982, the Department of Education issued its own guidelines as an interpretation of Title IX of the

1972 Educational Amendment to the Civil Rights Act. Prior to that time, sexual harassment was hardly recognized as a problem, and in many educational and employment settings the use of positions of power for purposes of sexual maneuvering was, for men, a tacitly accepted part of the culture. However, with the heightened sensitivity that accompanied the growth of the feminist movement and the increases in women's participation in the workplace, practices once taken for granted came under critical scrutiny and were challenged.

Because of often great disparities in age as well as in power, faculty harassment of students was especially alarming to some. At the same time, since the predominant cultural pattern is for older, more powerful men to be involved with younger, less powerful women, sexual harassment of women students by male faculty was often seen as a sort of logical extension of this "normal" pattern. While some teachers on campuses frowned on colleagues who exploited both their status and the relative naivete of their students, others considered sexual liaisons with young women among the perquisites of working in the academic world.

With the issuance of the guidelines derived from the Civil Rights Act, schools and businesses that had averted their institutional eyes were forced to take notice and to implement policies that allowed those who were being harassed some means of self-protection. While many of the more blatant instances of sexual harassment—for example, an explicit threat of loss of job or lower grade if the woman refused a sexual liaison with the teacher/employer/supervisor—were well-suited to formal hearings and rules of evidence within which it could easily be decided whether harassment had in fact taken place, many other examples of sexual harassment charges that were less easily dealt with abounded.

While all too many instances of faculty or employers who promise a trade of grades, promotion, or other advantage for sex occur, much sexual harassment is subtler than that. Furthermore, responses to what might be interpreted as offensive sexual actions are so widely divergent that people are often confused about what is appropriate and what is inappropriate. Sometimes harassment is defined more by a difference in how particular actions are understood than by the actions themselves. For example, a form of teasing acceptable between friends might feel cruel and invasive when initiated by someone who has not been given the tacit acceptance and cooperation of the person targeted.

Harassment is simply not defined by objective criteria. The key term in the definition is "unwelcome." It is when a person makes clear that the sexual advances or remarks are unwelcome that harassment can begin. At the workplace or on campus people are often exploring the boundaries of relationships; asking for dates for coffee, lunch, or dinner can be a way of extending a friendship or expanding a collegial relationship. In these kinds of informal negotiations of relationships, there is plenty of potential for misunderstanding and miscommunication.

One of the most common types of sexual harassment originates in what I have called the "infatuated professor syndrome." In the academic context, it is often the faculty member's misinterpretation of a student's interest and enthusiasm that initiates a chain of misunderstandings that culminate in sexual harassment. Quite frequently a professor, especially a male professor, interprets a woman student's responsiveness to his interests as a sexual and emotional

interest in him. Fueled by the professor's (not fully conscious) fantasies of a growing passion, the student-teacher relationship is broadened: they meet for coffee or lunch or drinks to discuss readings or joint projects, they set up an independent study course, the student becomes his research assistant. Along with developing a work relationship, the faculty member might pursue a more personal friendship: asking about her personal life, talking about his relationship(s), etc.

Frequently, circumstances occur where this scenario develops into sexual harassment. I am putting aside those situations where the faculty member's sexual/emotional response to the developing relationship is reciprocated and an affair develops. Student-faculty affairs may be objectionable but they are not sexual harassment. Sexual harassment is unwanted sexual attention. But it is around the definition of "unwanted" that the discrepancies in power between student and teacher become relevant, because it may not be academically wise (and it certainly will not be easy) for a student to tell a professor that his sexual attention is unwanted.

The signs of his interest are typically subtle and ambiguous; the student may be misinterpreting. A rebuff to a professor whom she respects, given differences in power between them, makes it unlikely that the student would feel that she could safely limit their relationship. With graduate students, a mentor is often the most important path to professional opportunity. If the student feels she must comply with the professor's personalization of the relationship, eventually the faculty member's sexual interest in the student will become explicit—he will attempt to kiss or fondle her, or he will proposition her, or ask her to attend a meeting with him and propose that they share a room. The student may feel trapped and get involved because no other alternative seems available or the student will say no and the professor will react angrily to being rebuffed. He may lose interest in her work, withdraw funding, or evaluate her as someone who has failed to live up to earlier expectations.

Typically, in those situations that become sexual harassment cases, a student reaches a point where she can no longer manage the relationship with the faculty member and she seeks assistance. Sometimes this occurs before the professor's sexual interest has been made unambiguously explicit, sometimes not until afterward. Often, she will talk with other students or a trusted faculty member or the ombudsman or the affirmative action officer, and only for the first time will the situation come to be understood as sexual harassment.

Of central importance for our consideration here is the discrepancy in the experience of the two parties and the degree of ambiguity in the situation. It is this ambiguity that calls for modes of intervention that can be sensitive to the perspective and concerns of both parties while also responding to the institution's needs for ways of controlling and eliminating sexual harassment.

The Applicability of Mediation to Sexual Harassment

It is this large area of ambiguity that led me to believe that mediation might be unusually useful in handling sexual harassment cases where a formal hearing might be a very unsatisfactory forum for resolving the issue. Lacking firm evidence, those on the hearing panel are limited to inferring about the character or integrity of the parties or surmising about their motives and intentions. In such circumstances, most hearing panels are most unlikely to conclude that

the sexual harassment policy has been violated. The hearing panel's reluctance to act might leave unattended a situation that cries out for thoughtful intervention.

These observations suggest three major reasons mediation can be usefully incorporated into procedures for dealing with sexual harassment grievances. First, mediation might be an ideal tool for handling the harassment grievance in a way that is consonant with the grievant's needs and preferences. Second, mediation might be better suited than a formal hearing procedure to achieving a successful resolution of an ambiguous situation. Finally, mediation might be a means of educating the alleged harasser, while still honoring his rights and interests.

A person who has been harassed might prefer to handle a charge of sexual harassment through mediation for many reasons. In a very large number of harassment situations the person harassed prefers not to bring charges through a procedure that requires a formal hearing. Most of the people who approach me with a complaint of sexual harassment make clear early on that they do not want to bring formal charges. Frequently, they also make clear that if their only option is a formal hearing, they will not proceed with the complaint. While in some instances this reluctance to proceed is the result of fear of retaliation, more often than not such reluctance is separate from any such fear. Nor, in my experience, is hesitation about following a formal complaint route related to the ambiguity of the situation giving rise to the charge of harassment. Often those who have been blatantly harassed are as wary of bringing a formal charge as those who are not even sure themselves that what they are experiencing is harassment. I am thoroughly convinced that a sexual harassment procedure that allows only for formal hearings of harassment charges would result in a situation where a great majority of potential harassment grievances would not be pursued.

In a recent article, Mary Rowe of MIT identified some of the concerns that appear frequently among people who believe they have been harassed (Rowe, 1990). Her observations overlap considerably with mine and help us to understand why many of these people are reluctant to bring formal charges.

The following concerns are the primary factors to keep in mind when thinking of the tactics needed to mediate sexual harassment cases successfully:

1. *The grievants want the harassment to stop.* Often this is most important among the desires of those who feel harassed.

2. *They want things to go back to normal.* While this is usually not a realistic aspiration, the experience of being harassed is typically as disruptive as other experiences of trauma and victimization. Those affected cannot help but indulge in some magical thinking—"If only everything was like it was before my mother's death, or the fire, or the accident . . ."

3. *Fear of retaliation.* Since harassment often occurs between people with discrepant power, the victim usually has genuine concerns about retaliation. Even if her harasser were to conduct himself in a perfectly proper manner with respect to written documents and formal actions, the threat of whispered conversations and well-placed phone calls always exists. In the professional and academic worlds all sorts of blacklisting is possible, without anything overtly improper ever being done.

4. *They do not want to get a reputation as a troublemaker.* This concern goes well beyond a fear of retaliation. Organizations do not always take well to people who lodge complaints, especially against respected people in positions of power. Even if the person bringing the charge is completely in the right and the situation is totally unambiguous, there is a risk that one's reputation will be poisoned simply for having lodged a complaint and for getting someone in trouble.

5. *They do not want to get the person who harassed them in trouble.* At first glance this seems contradictory, but I have come across this attitude often enough to consider it typical rather than aberrant. Since harassment often emerges in situations previously defined by a relation of trust and mutual support, this response seems less puzzling. Especially in circumstances where the more powerful harasser has been the teacher, boss, or mentor of the less powerful person, harassment sometimes develops as a result of the more powerful person misinterpreting a history of closeness and liking as sexual. Frequently, such relations carry strong residues of loyalty and the emergence of harassment is as much an occasion for sadness as anger. In addition, in many harassment situations, the experience of harassment leads the harassed person to a profound personal uncertainty. Often, the reluctance to get someone in trouble blends with concerns about retaliation thus creating a massive inhibition against acting on a complaint.

6. *They blame themselves.* In almost every case of sexual harassment I have handled, the person harassed has blamed herself for the harassment to some degree. Not totally, and not without recognition of the inaccuracy of self-blame, but in some way or another self-blame is present—if only in the form of wondering, "If I had done such and such or if only I hadn't . . ." This holds even in situations where the furthest stretch of the imagination would not allow an independent observer to blame the victim. Advocates for harassment victims are often dismayed to hear such talk, especially in circumstances where the advocates would like to hear expressions of outrage and anger, but self-blame is an important clue to the responses evoked when harassment occurs. In addition, a considerable body of social psychological research about victims of crimes and accidents demonstrates that experiencing self-blame is often an important component in helping people who have been victimized regain some sense of self-esteem and control over their own future. It is almost as if by blaming oneself, one is saying this did not have to happen, and if it did not have to happen, then it does not have to happen again in the future. Working with women who have been harassed, one has both to introduce an element of reality into their account and to hear the self-blame as an indicator of the needs that must be met in a process of intervention.

7. *They are concerned about the loss of privacy if they pursue their complaint.* Even when a woman has been treated outrageously and is clearly not responsible for what has happened to her, it is embarrassing to have been harassed. Often, if pursuing the matter means more people knowing about what happened, a woman will decide against further action. This concern with privacy is related as well to the following issue.

8. *They do not want to lose control of the complaint.* In many procedures for handling sexual harassment, once the person who feels harassed brings

a complaint, she loses control of it. There can be a fear that interests other than her own are foremost on the handling of the situation. This fear is not entirely unfounded, since considerations of institutional liability might require forms of intervention that conflict with the desires and concerns of the grievant.

9. *They feel they have no conclusive proof and that they have limited skills in establishing the truth.* Much harassment occurs out of the view of others. In many situations, we have only one person's word against another's. In an institution where the accused inherently has much more power than the accuser, it is reasonable for the person bringing the complaint to be concerned that she might not be believed, especially if the person whom she alleges harassed her is more facile verbally than she.

10. *They are often interested in an outcome that will prevent the same thing from happening to others.* In my experience, this concern more than any other leads people to overcome reluctance and pursue charges of harassment. It is also a central component of most of the mediated agreements in sexual harassment cases, as indicated by clauses that include promises not to repeat the offensive actions, clauses that include reference to educational workshops on sexual harassment, and clauses that create contingencies in the event another charge of sexual harassment should be brought against the same person. For the mediator, the concern to prevent a recurrence of harassment is a clear example of an interest for which there might be many possible satisfactory bargaining positions.

Given all of these concerns, it is easy to understand why mediation might be preferred by people who feel harassed and why it might be considered institutionally appropriate as one of the modes of responding to a charge of sexual harassment. From conversations with grievants and experience with both mediated and adjudicated cases of harassment, I can identify the following reasons a grievant might prefer mediation:

1. *To reach faster resolution.* Investigations and hearings take a long time. Most grievants want the matter to be over with as quickly as possible. Mediation can commence soon after the grievant indicates she wants to mediate, and the process need not go on for a long time.

2. *To preserve confidentiality.* Being harassed is often humiliating. Mediation promises a level of confidentiality that often cannot be matched in a hearing or during an investigation.

3. *To avoid the stress of a hearing.* By definition, hearings are formal and adversarial. Each party is impelled to present the other in the worst possible light and to attempt to prove the other wrong. The aim is to win, not to come to an understanding. Often the experience of the hearing is almost as disturbing as the harassment itself. While harassment mediation is not easy to endure, it is not typically as stressful as a hearing because it is not a totally adversarial situation.

4. *To focus on education rather than punishment.* As mentioned earlier, for a variety of reasons many victims of harassment do not want to get the person who harassed them in trouble. At the same time, they want the harasser to know what the impact of the harassment has been, and they want to keep it from happening again. Often, they will pursue a complaint only if they are

assured that the complaint will not lead directly to punishment. Mediation itself can be a means of educating the harasser, because it provides a setting in which relatively nondefensive communication can occur. To the extent that the mediator is successful in helping to create a setting in which each party can hear the other's perspective, mediation can help the person harassed accomplish one of her goals.

5. *To restore relations.* In some circumstances, the person harassed wishes to establish an understanding that will allow her to resume safely the working relationship with the harasser. Pursuing a formal charge through a hearing would make that unlikely. Mediation can provide a groundwork for rebuilding a working relationship as well as a resource for resolving further difficulties should they arise.

6. *To address ambiguity of evidence.* In many instances of allegations of harassment, the interactions and circumstances described are quite ambiguous. Even in some quid pro quo situations, a skilled harasser might be able to mask his intentions and claim miscommunication. Recall that harassment is not defined objectively in terms of the actions of the harasser but rather subjectively in terms of the reactions of the person who feels harassed. In terms of office banter and conversation, what one woman finds offensive and disruptive another might find acceptable or even enjoyable. In many of the hostile environment situations sufficient ambiguity surrounds the circumstances so that a hearing panel or investigator would be unlikely to conclude that the person charged had in fact violated the sexual harassment policy. Pursuing a formal charge of harassment in these cases can be a futile endeavor, only adding to the pain of the person who feels she has in fact been harassed. Mediation can be successful even when no clear cut evidence of harassment exists, because mediation is not directed toward ascertaining objective truths about past events.

While the discussion thus far has emphasized the ways in which mediation can be suited to the needs of those who feel harassed, it is noteworthy that mediation can also meet the concerns of those who have been accused of harassment. Indeed, many of the underlying interests of those accused of harassment are compatible with the interests of those who feel harassed; it is this overlap of interests that helps mediation succeed. On the basis of my experiences with sexual harassment cases, I can identify the following characteristics to usually be found in those accused of harassment:

1. *They want things to go back to normal.* Once a charge has been brought, even informally, the workplace becomes a source of constant tension. Considerable amounts of time are spent responding to the charge or preparing to respond, and it is difficult to concentrate on work. In addition the specter of possible punishment looms overhead. Most people who have been accused of harassment want to bring the matter to a close a quickly as possible.

2. *They are afraid of punishment.* Given that most harassment policies have provisions for punishment for those found in violation, this is a realistic concern for those accused. On the other hand, strict punishment for people in upper echelon positions is still quite rare. Nonetheless, a concern about sanctions is present in conversations with most people accused of harassment. Mediation puts them in a position of having some role in designing and approving of the sanctions for their situation. Many critics of mediation are concerned

that allowing harassers to mediate charges is simply a way of avoiding sanctions. However, nothing keeps sanctions from being included within a negotiated agreement. For example, in adjudicated cases, one of the most common sanctions for milder, first offense harassment is a letter in the personnel file of the harasser. But a letter in the personnel file can be and often is a common feature of mediated settlements in harassment cases as well. Very often, the sanctions in a mediated settlement appear fair to both parties—an outcome that is hard to achieve after a formal hearing.

3. *They are concerned about their reputation.* Perhaps even more than worrying about punishment, people accused of harassment fear that they will get a bad reputation and that their career will thereby be adversely affected. The climate on campuses has changed sufficiently in the past decade so that people accused of harassment cannot be cavalier about the effects of such accusations.

4. *They are concerned about confidentiality.* The interest in preserving one's reputation makes those accused especially concerned about confidentiality in the procedures by which the charge is handled. Many are suspicious of formal procedures because they do not trust in their confidentiality. In addition, many fear that even were they to be cleared of charges of wrongdoing, their reputation would, nevertheless, be affected. Many have expressed the concern that a charge of harassment tends to be believed no matter what the outcome of the procedures for dealing with it.

5. *They do not want to lose control of the complaint.* Here, even mediation is seen as a threat, because the conflict is no longer a matter between the person who feels harassed and the person accused of harassment. Especially in situations where the alleged harasser is the more powerful one keeping the matter private promises to keep the alleged harasser in control. The presence of a mediator threatens the imbalance of power, because the mediator is not likely to tolerate the intimidations and coercions by which domination is maintained. However, mediation still affords more control for the disputants than formal investigations or hearings because each person speaks for herself or himself, and because the outcomes are composed by the disputants rather than being imposed from without.

6. *They blame the accuser, not themselves.* Here is the one great divergence in the characteristics of the disputants in harassment cases. Whereas those who feel harassed are usually self-blaming and often concerned for the welfare of those they are accusing, those accused of harassment are neither so generous nor so self-critical. From the outset, they usually respond as if they are building a case, even in circumstances where no realistic threat of a possible hearing exists and where the aims of mediation have been clearly explained and understood. It is rare for a person accused of harassment to express concern that his actions may have caused pain and difficulty for the person accusing him. And it is equally uncommon for the alleged harasser to turn a critical eye on his own actions and to say "I can see why she might have interpreted my behavior as harassment," or, "If only I hadn't done such and such then she might have felt differently." In addition, it is fairly common for the alleged harasser to explain the complaint against him in terms of some qualities of the grievant—the lack of a sense of humor, hypersensitivity, vindictiveness for other

actions, being flirtatious or in some way asking for it, or just being different than other women. While it is easy to interpret such reactions cynically, the mere fact of being accused, even or especially if the accusation is accurate, seems to induce defensiveness. I am also convinced that, most typically, those accused of harassment really do believe their own accounts and explanations of how they come to be facing charges. However skeptical we may feel personally, it is necessary to conduct the mediation process with the same balance in crediting differing stories that we do with any other conflict that might come to mediation.

These characteristics of those accused of harassment are important to keep in mind when assessing the appropriateness of mediation for sexual harassment for two reasons. First, modes of intervention in harassment situations have to be fair to both parties, as well as being responsive to institutional needs in situations where legally specified liabilities are dictated. Second, the reputation of mediation is at stake. If mediation comes to be seen as a form of punishment, favoring the needs of those accusing over those accused, it will damage the effectiveness of mediation as a means of dispute resolution. In terms of procedures, it is essential that mediation be only one of the available means of resolving harassment charges, that there be no compulsion toward choosing mediation over other means of redressing a harassment grievance, and that formal mechanisms such as investigations and hearings be effectively administered and seriously considered.

Mediating Harassment—Modifications and Challenges

Assuming a general policy and procedure that meet the criteria just outlined, the challenges for mediators of sexual harassment disputes are formidable. Mediating such a case means dealing with a conflict that arises because the trust essential to a working relationship is felt to have been violated and the power involved in the working relationship has been exploited. Since one begins with a total failure of trust between the parties, it is absolutely essential to establish and build trust in the mediation process as well as in the mediator. More than with other kinds of disputes, it is my impression that trust, even faith in the mediator, is necessary if the process is to have a chance of success. It may or may not be possible to reestablish trust between the parties.

But more important than restoring that trust is knowing when it is inappropriate to even attempt to reestablish it. From the disputants' points of view, a mediator who moves prematurely to rebuild shattered trust in a harassment case is one who has not believed or understood the story of the dispute. To the degree that trust between the parties can be reestablished, it is usually a consequence of mediation rather than a prelude to it. Reestablishing trust depends mostly on how the mediator is able to handle the discrepancies in power between disputants (when they exist), the volatility of emotions that goes along with issues of sexuality and power, and the divergent orientations toward blame and responsibility that characterize one of the main differences between the accuser and the accused.

I have found two major modifications to traditional community and family mediation practices to be of enormous help. First, I hold individual sessions—often several individual sessions—before joint sessions. Typically, mediators do not meet separately with the disputants prior to the first mediation session.

Usually, both parties are present and each tells his or her story to the mediator in the presence of the other party. In sexual harassment mediations, I find it useful to meet first with each party separately, often over several separate sessions, before bringing the parties together. I developed this approach because of a concern that the mediation not become an extension of the harassment: individual sessions allow for the venting of the powerful emotions associated with harassment and for some assessment of the probability of reaching an agreement satisfactory to both parties.

By beginning with a sort of shuttle diplomacy, there is generally considerable movement away from positional posturing over the course of the individual sessions. Central to these sessions is helping the parties identify the underlying interests they hope to satisfy through mediation. Often, during these individual sessions I also work with each party in developing alternative ways of expressing their feelings about the dispute. When it seems that we have reached the point where joint sessions will be neither abusively volatile nor excessively hostile, and where there is some basis for beginning negotiations, I bring the parties together.

At that point, even though I have already heard the story from each disputant, I conduct the session as I would any other first session, beginning with each party telling his or her story in the presence of the other. (It is always interesting to note how different the stories are when told in the presence of the other disputant as compared to those told in the individual sessions with the mediator.) From there, I proceed to intersperse individual sessions with joint sessions as they may be required to further the negotiations.

Second, I encourage disputants to work with an adviser/support person throughout the mediation. For the most part, mediators prefer to exclude all but the disputants from the mediation. My preference for including advisers began because many of the people pursuing sexual harassment grievances had already formed strong working alliance with a counselor and were hesitant about proceeding without that person's presence and support. In many instances, the first time a person who felt harassed came to see me she was accompanied by her counselor. At the same time, most of the employees at the University of Massachusetts are unionized and many of them have preferred to be accompanied by their union grievance officer when dealing with an issue for which the potential for disciplinary sanctions existed.

Although reluctant at first to proceed with advisers present, I quickly found that advisers, in addition to providing support through a stressful procedure, could help the disputants to assess realistically the settlement options developed in the course of mediation. And, since many of the advisers are sensitive to the issue of sexual harassment, advisers have also been important in helping the person accused of sexual harassment understand the situation from the point of view of the person harassed. It is also my sense that the presence of advisers tends to balance out real and perceived disparities in power between the disputants. This affects both disputants positively.

For the person bringing the harassment charge, the presence of an adviser who has heard her story and has the responsibility to act as an advocate is often crucial in providing a sense of security that cannot be achieved merely by the presence of the mediator. In addition, if the adviser is someone with professional or academic standing in the institution, the impact of differences instatus

between the disputants seems to be diminished. From the perspective of the alleged harasser, no matter how much the mediator proclaims his or her neutrality, there is always an underlying suspicion that the mediator is in some way on the side of the person bringing the charge. After all, it is typically the person bringing the charge who has chosen mediation as the way to pursue it and the policies and procedures stipulate mediation as one means of achieving satisfaction when one feels harassed. The presence of an adviser/advocate for the alleged harasser eliminates the sense of standing alone against the institution. (I should note, ironically, that at least in my experience, a much greater proportion of those charged than those bringing charges prefer to go through the process without an adviser present.) Nonetheless, in the majority of cases I have mediated, both parties have been accompanied by advisers at almost every step of the process, and in balance, I have always found it beneficial to the process as well as to the parties.

One other benefit of the presence of advisers is in helping the mediator to deal with the problem of power imbalances. Perhaps more than with any other type of mediation I have conducted, imbalance of power is a crucial problem in sexual harassment. In many instances, it is an imbalance of power that helps define the situation as sexual harassment. In addition, the same disparities of status and power that contribute to the harassment situation would be present in a one-to-one negotiation session. (It is noteworthy how many people accused of harassment actually propose settling the issue by meeting alone with the person bringing the charge in order to work it out together.) Typically, significant disparities exist between the parties in their skills, experience, and intellectual or emotional abilities to negotiate. Very often, gender-based differences in orientation to conflict that incline women to settle for less than they would like and make men inclined to demand more than they are entitled to are also at work. Equally common is an uneven familiarity with or access to relevant information, rules, regulations, and procedures that pertain to the workings of the institution. Finally, there is also the presence or sense of mental or even physical intimidation (I always ensure that a table or some such physical barrier stands between the parties when conducting sexual harassment mediations).

It is not possible for a mediator to respond to or correct these imbalances without violating neutrality. However, by urging each of the parties to seek the help of an adviser, and by working in a system where the advisers are knowledgeable about sexual harassment and somewhat skilled in negotiation, it is possible for a mediator to ameliorate much of the power imbalance. Advisers can provide appropriate educational material, guidance about the negotiation process, and counsel about personal style and conduct throughout the mediation. Of course, the responsibility for handling power imbalance still rests with the mediator: techniques such as setting ground rules and governing the actual mediation process are absolutely essential to the creation of a process that is fair and nondestructive. The mediator must maintain a balance in the discourse that takes place between the two parties and ensure that the more articulate person does not take control of the process. The use of private sessions and frequent and active reframing so that major points raised are restated in the common voice of the mediator are crucial to maintaining a balance of power in the mediation.

Nonetheless, some people argue that the presence of a power imbalance between disputants automatically disqualifies mediation as a satisfactory means of resolution. These objections were discussed a few years ago by my colleague at UMass, Janet Rifkin:

> Although critics of mediation charge that it may keep the less powerful party from achieving equality and equal bargaining power, it is not so clear . . . how this operates in practice. These objections . . . are inextricably tied to the view that the formal legal system offers both a better alternative and a greater possibility of achieving a fair and just resolution to the conflict. The general assumption that the lawyer can "help" the client more meaningfully than a mediator is part of the problem . . . In many instances . . . patterns of domination are reinforced by the lawyer-client relationship, in which the client is a passive recipient of the lawyer's expertise. This is particularly true for women . . . for whom patterns of domination are at the heart of the problem . . . In these [mediation] situations, the women felt that the relationship of dominance had been altered and the hierarchy in the relationship had to some extent been altered. A transformation of the pattern of dominance will affect the power relationship as well. (Rifkin, 1984: 30-31)

My own experience mediating sexual harassment cases confirms Rifkin's analysis, and my observation of sexual harassment hearings gives me little reason to believe that formal hearing proceedings are more balanced than mediations.

Policy and Neutrality

While mediation has much to offer as one of the ways of handling sexual harassment grievances, cautionary notes are still necessary. To begin with, any mode of response to harassment has to be evaluated within the context of the overall policy and procedures for sexual harassment. On my campus, the effectiveness of mediation derives in part from it being one of the alternative paths for pursuing sexual harassment grievances. In the UMass policy, complaints can be "formal" or "informal." Formal grievances lead to hearings conducted by a three person board drawn from a panel of 25 trained members of the campus community. They are indeed formal affairs, modeled after trials and complete with cross examination, witnesses, and so on. Informal grievances may be pursued through mediation or even less structured negotiations.

While it is easy to extol the virtues of mediation by contrast with the stresses of formal hearings, both seem essential to an effective sexual harassment policy. It may well be that it is the existence of formal hearings that makes mediation an attractive alternative. In many of my cases, grievants would not have gone forward if a formal hearing was the only route open to them. Similarly, although not necessarily for the same reason, many respondents' preferences for mediation were grounded in their hesitance over the prospects of a formal hearing.

If we are honest, mediators must acknowledge that the desire to avoid formal proceedings provides much of the motivation that renders mediation effective. While some might argue that mediation is simply allowing harassers and their institutions to cover up the extent of the problem, it seems clear that if no informal channels for the pursuit of grievances existed, the great majority of sexual harassment situations would remain the private burden of those who

are victimized. But aside from its institutional justification, mediating sexual harassment cases raises several questions about mediation.

First there is the question of what it means to include mediation among the options available for the pursuit of a grievance that can lead to sanctions. Clearly, within the structure of a sexual harassment policy, mediation is a part of the administrative apparatus of an institution. While mediation is thus an alternative to institutionally administered formal hearings, it is not alternative dispute resolution in the sense of ADR as a movement counterpoised to the courts and other formal adversarial processes. Of course, this is not a problem unique to the incorporation of mediation into sexual harassment policies. All mediation programs affiliated with courts and other institutions have to face up to this dilemma. In most sexual harassment cases, we are a far cry from the situation of two mutually aggrieved parties seeking a beneficent alternative to proceedings they perceive as incompatible with or hostile to their underlying intentions.

This is not an argument against using mediation in sexual harassment cases. On balance, I am very much an advocate for this. But I do believe we need to rethink our understanding of what mediation is when it is conducted within the framework of disciplinary policies. One thing it is not is neutral, at least not in the ways in which mediation is typically promoted as being neutral with respect to outcomes as well as in its stance toward disputants.

Mediation is incorporated into some policies because it is believed to be an effective means of stopping sexual harassment as well as resolving particular charges. Again, this is not an argument against mediation, but it is a challenge to the way we think of ourselves as neutrals. No matter how effective an individual mediator may be in maintaining her or his neutrality in any particular dispute, in the context of a sexual harassment policy, mediation per se is not neutral. In addition, although I fully appreciate what it means to attempt to function as a neutral in dealing with a sexual harassment dispute, a retrospective analysis of the cases I have mediated reveals numerous deviations from textbook definitions of neutrality. Mind you, I am not talking about becoming a partisan for one or the other of the disputants, although at times it took every effort I could marshal to override my personal feelings, suspicions, and preferences and function in a balanced way vis-a-vis both parties. And I have no doubt that an independent observer would have noticed many ways in which my partiality seeped through the seams of professionalism, if not in terms of my blatantly taking one person's side, at least in terms of an imbalance of energy and effort devoted to clarifying, communicating, and persuading on behalf of one of the parties.

However, even in cases in which maintaining a balance was not at all problematic, I think mediator neutrality is not what we would like to think it is. Recent research by my colleagues Janet Rifkin and Sara Cobb highlights the fact that when thinking about their neutrality, mediators tend to underestimate their own role in what they term the disputant's story-telling processes (see Cobb and Rifkin, forthcoming). They point to the ways in which the mediator's questions and reframings structure the emergent understanding of the conflict and, hence, the possible resolutions to that conflict. Also underlined is the significance of the sequencing of story-telling in mediation and the overarching influence of the initial story.

In sexual harassment cases, the first story told is always a complaint against the second party, and the second story is always told in response to parameters defined in the first story. The first party is making a case, the second party is presenting a defense; and no matter how much we, the mediators, explain how mediation is different than adjudication, the theme of accusation and defense persists throughout the process. To accept the definition of the conflict as the disputants present it is itself a violation of one notion of neutrality because the mediator is going along with the disputants' understanding of the conflict, which is itself part of the conflict. Reframing the statements of the parties so that the accusation-defense form is eliminated is hardly a neutral act, nor is it always appropriate.

Again, the point here is not to argue against the use of mediation, but rather to highlight the ways in which extending mediation into new domains forces us to reconsider some of our most cherished notions about the process. The history of other disciplines is replete with stories of growth that emerged after a field extended itself into areas in which it did not "belong." In every instance progress followed when endeavors in the new domain were accompanied by a critical self-reflection that forced a reevaluation of basic concepts and techniques. Without that, there is only proselytizing. It is not yet clear what will happen with mediation and alternative dispute resolution, but the opportunity exists to reshape our thinking in positive ways that do not undermine the integrity of mediation itself.

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VENUS, MARS, AND THE LAW: ON MEDIATION OF SEXUAL HARASSMENT CASES*

BARBARA J. GAZELEY**

I. INTRODUCTION

Over thirty years ago, Congress enacted the Civil Rights Act of 1964, with its inclusion of "sex" as a prohibited basis of discrimination. Since that time, social mores and legal standards of acceptable workplace behavior have changed dramatically. Yet, sexual harassment in the workplace remains a serious problem. In the words of one lawyer: "I have been handling sexual harassment cases for more than a decade. Just when I think I can no longer be shocked, I am shocked. . . . Just when I think things are better, I find irrefutable evidence that they are not."[1] Statistics on the prevalence of sexual harassment vary, but the most reliable studies indicate continuing harassment of large numbers of women. The most often-cited data come from a well-designed, random survey of 24,000 United States government employees, which was conducted by the Merit Systems Protection Board in 1981 and updated in 1988 and 1995.[2] In both 1981 and 1988, responses indicated that 42% of the women and 15% of the men surveyed had experienced sexual harassment in the preceding two years.[3] Although some women

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* With apologies to John Gray, Ph.D., author of MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992).

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1. Roxanne Barton Conlin, *Opening Our Eyes to Sexual Harassment*, 29 TRIAL, May 1993, at 7, 7.

2. U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981) [hereinafter 1981]; U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE (1988) [hereinafter 1988]; U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES (1995) [hereinafter 1995].

3. *See supra* note 2. *See also* Ellison v. Brady, 924 F.2d 872, 880 n.15 (9th Cir.

harass, it has been estimated that 90-95% of harassers are male.[4] The 1995 report of the Merit Systems Protection Board reveals that many people still do not recognize some types of illegal behavior as sexual harassment.[5] The same report indicates that many people believe that a harasser's intent determines whether the conduct is unlawful sexual harassment.[6]

Although 95% of sexual harassment cases settle before trial,[7] a significant percentage of cases that go to trial result in a plaintiff's verdict.[8] Damages can be substantial: Some verdicts have exceeded the million-dollar mark,[9] and the average jury verdict from 1988 through 1992 was reported at $181,847.[10] The

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1991). Other surveys indicate that 50-90% of American women are likely to be victims of sexual harassment at some time during their work lives, and that in 55% of cases where the harassee is male, the harasser also is male. *See, e.g.*, Dara A. Charney et al., *An Overview of Sexual Harassment*, 151 AM. J. PSYCHIATRY 10 (1994); Linda Stamato, *Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?*, 10 MEDIATION Q. 167 (1992) [hereinafter Stamato, *Sexual Harassment*]; Linda Stamato, *The Case for Mediating Sexual Harassment*, SUPP. N.J. L.J., Aug. 15, 1994, at 16, 16 [hereinafter Stamato, *The Case for Mediating*].

4. Andrea Williams, *Model Procedures for Sexual Harassment Claims*, ARB. J., Sept. 1993, at 66, 74 n.7 (citing Louise Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOC. BEHAV. 152, 152-72 (1988)). *See also* M. Komaromy et al., *Sexual Harassment in Medical Training*, 328 NEW ENG. J. MED. 322, 326 (cited in Charney et al., *supra* note 3, at 17 n.30).

5. *See* 1995, *supra* note 2, at 6.

6. *Id.* One commentator has noted that these results "support the notion that people disciplined for harassment may tend to feel wronged and may want to be vindicated." Alba Conte, *When the Tables Are Turned*, 32 TRIAL, March 1996, at 30, 31. Another writer has commented that "unlike Justice Potter Stewart's view of pornography, sexual harassment is not immediately recognized by those who see it, or even by those who experience it." Williams, *supra* note 4, at 66.

7. Robert J. Aalberts & Lorne Seidman, *Seeking a "Safe Harbor": The Viability of Summary Judgment in Post-Harris Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 223, 240 (1996) (citing JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 36 (1992)).

8. Statistics cited for plaintiff verdicts range from 33-64%. *See* 1981, *supra* note 2, at 81 (50%); Stamato, *Sexual Harassment, supra* note 3, at 167 (64%); D.E. Terpstra & D.D. Baker, *Outcomes of Sexual Harassment Charges*, 31 ACAD. MGMT. J. 185, 191 (1988) (one-third).

9. *See* Mary Maloney Roberts, *Costly Lessons: What Have Firms Learned from the* "Baker" *Verdict?*, L.A. DAILY J., Feb. 9, 1995, at 6 (taking note of the $7.1 million jury verdict in *Rena Weeks v. Baker & McKenzie and Martin Greenstein*). The award included $6.9 in punitive damages, later reduced by the court to $3.5 million, which was what the plaintiff had sought. *Id.*

10. Christine Woolsey, *Employers Review Harassment Policies*, BUS. INS., Nov. 15, 1993, at 1, 1 (cited in Aalberts & Seidman, *supra* note 7, at 224). Another article reported the average jury verdict at $460,000, without citing any supporting studies. Stamato, *The Case for Mediating*, *supra* note 3, at 16. Conversely, another article has

average defense costs were reported at $80,000.[11] However, the complete cost of litigation in sexual harassment cases can be as high as $200,000, depending on the case's length and complexity.[12] The risks posed by sexual harassment cases are greater now than ever before[13] because of changes in social and legal standards, as well as the unpredictability of jury behavior in cases where credibility decisions control the case's outcome. Due to the risks, cost, emotional trauma, and time consumed by litigation, lawyers and parties increasingly are choosing to attempt to resolve these disputes in mediation.[14]

There is a minority view that mediation is never appropriate in a sexual harassment case because of the power imbalance between the "victim" and "perpetrator." Mori Irvine, in *Mediation: Is It appropriate for Sexual Harassment Grievances?*, articulates this argument well.[15] It should be noted that this view is driven by a perception that sexual harassment cases are strongly analogous to cases involving criminal assault, rape, or domestic violence because they uniformly involve a severe imbalance of power, rendering the woman[16] incapable of participating effectively in mediation.[17] In the Irvine article, there is an emphasis on "punishment," rather than on resolving the dispute in a positive way.[18] Irvine feels that punishment is necessary in order to "send the message" to other potential harassers that so-

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reported that "when plaintiffs do prevail, settlements have typically been quite small." Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 123 (1995) (citing Terpstra & Baker, *supra* note 8).

11. *See* Stamato, *Sexual Harassment, supra* note 3, at 167.

12. Aalberts & Seidman, *supra* note 7, at 229.

13. Roberts, *supra* note 9, at 6.

14. Some commentators have suggested that lawyers "do their clients a serious disservice" and perhaps "should be liable for malpractice" if they counsel their clients to litigate without first trying mediation. Edward J. Costello, Jr., *The Mediation Alternative in Sexual Harassment Cases*, ARB. J., March 1992, at 16, 20 n.12 (quoting Professor Robert F. Cochran, Jr.); Sara Adler, *Sexual Harassment Claims Lend Themselves to Mediation*, L.A. DAILY J., Feb. 18, 1994, at 7.

15. Mori Irvine, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 OHIO ST. J. ON DISP. RESOL. 27 (1993).

16. As previously mentioned, men may be the victims of sexual harassment. However, because most victims are women, and for purposes of readability, this Article uses the term "woman" in place of "victim." *See supra* note 3 and accompanying text.

17. Irvine, *supra* note 15, at 28.

18. *Id.* at 50.

ciety will not tolerate such behavior.[19] While that may be true in some cases, it also is true that in many cases an educative approach, which restores both parties' dignity, can be much more satisfying to all concerned.

Mediation has been demonstrated to be an effective way of resolving many sexual harassment cases,[20] and studies show that most women are more concerned with making the problematic conduct stop and getting on with their jobs and careers than they are with blaming and punishing the harasser.[21] Therefore, it appears that while mediators and attorneys should be alert for power balance issues, and should either take action to address problematic power imbalances or refuse to mediate in such cases, many, and perhaps most, women are sufficiently "empowered" to profit from mediation. Indeed, mediation has been shown to be an empowering process because it provides an opportunity for the woman who complains of harassment to "tell her story" in a tolerant and respectful environment. Experience has shown that mediation of sexual harassment cases often produces greater satisfaction for all parties than do other more adversarial approaches.[22]

In order to provide context, the next Part of this Article reviews the history of changes in the law and social standards related to sexual harassment. The third Part discusses general differences in perception between men and women regarding sexual harassment behaviors. These differences tend to help create disparity in how men and women recall specific events, and affect their interpretations of behavior. The fourth Part describes mediation and addresses the advantages of resolving many sexual harassment disputes through mediation rather than arbitration or litigation. The last Part discusses factors and strat-

19. *Id.*

20. *See, e.g.*, Costello, *supra* note 14; Stamato, *The Case for Mediating, supra* note 3; Williams, *supra* note 4; Anthony Aarons, *Mediation Good Forum for "Delicate" Topics*, L.A. DAILY J., May 17, 1993, at S33; Adler, *supra* note 14; Norman Brand, *Resolving Sexual Harassment Complaints in the Workplace*, L.A. DAILY J., June 4, 1993, at 7.

21. Charney et al., *supra* note 3, at 13. *See also* Williams, *supra* note 4, at 68.

22. The "experience" referred to is that of this author, of other mediators, of those persons listed in the acknowledgment at the beginning of this Article (note **) and of the authors of articles and texts cited herein. *See also, e.g.*, Amy Saltzman, *Life After the Lawsuit*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 57 (relating the difficulties involved in sexual harassment litigation and ongoing struggles in the lives of four women who sued their employers and won); Andrea Bernstein, *Sex Harassment Suits: The Fight for Damages Gets Uglier*, Ms., July-Aug. 1996, at 18.

egies that may affect the success of a sexual harassment mediation.

II. A Socio-Legal History of Sexual Harassment

In little more than thirty years, our society has seen a complete upheaval in social customs and legal standards regarding both the employment of women and the social and sexual behavior of men and women. In the 1950s and 1960s, relatively few women worked in male-dominated professions and trades. For the most part, jobs for women were limited to a few acceptable types of employment, such as secretarial work, waitressing, teaching, and nursing. In the early 1970s, women moved into professions and trades in increasingly larger numbers. This caused great change in male and female gender identity, standards of acceptable behavior, and legal consequences attached to behavior. The social and legal history that follows demonstrates how greatly times have changed. Retaining an awareness of this legal history may facilitate the development of empathy for the real people involved in sexual harassment cases.

To some extent, a clash of cultures continues to exist in the workplace: Older versus newer mores and legal requirements, male versus female perspectives. For example, an older man may be "clueless" about how his behavior affects the women around him, while a younger woman may not be aware that her openness about sex and her casual dress may be misinterpreted by men raised in earlier times. Similarly, an older woman may be more sensitive to sexual innuendo and jokes than a younger woman might be, and men may not understand that a woman who enjoys sexual humor might not enjoy sex jokes that demean women, and conversely, that women who object to demeaning humor are not necessarily oversensitive "prudes." Further, men may respond inappropriately to the insecurity they may feel as a result of the influx of women into formerly male-dominated areas.

Occasionally, claimants and defendants lie about what actually happened in the workplace, and sometimes harassment is intentional or malicious. Much more frequently, the "truth" is less clear. Research shows that men and women have different perceptions of what type of behavior constitutes sexual harassment, and different interpretations of men's motivations for

problematic behavior.[23] A man accused of harassment may feel genuinely affronted because he intended no harm. Further, he may deny the charge of "harassment" because he didn't intend to harass; research shows that many people still believe that harassment requires bad intent.[24] In the same situation, the woman may be justifiably aggrieved by the man's inappropriate conduct, regardless of his motivation; she may see an abuse of power of which the man is unaware. Conceding the view that harassing behavior never has been appropriate, it is nonetheless true that cultural standards have changed over the past thirty years, and that these changes have contributed to confusion in both men and women about how they should interact in the workplace. Maintaining a sense of how dramatically customs and legal standards have changed, and still are changing, is useful to those who attempt to resolve sexual harassment disputes in a less traumatic way.

A. Title VII and Early Cases: The "Denial" Phase

Under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[25] The term "sex" was added at the last minute on the floor of the House of Representatives, and there is little legislative history to provide evidence of congressional intent.[26] There has been some speculation that those attempting to defeat Title VII proposed the amendment, on the theory that the prohibition of employment discrimination against women was so laughable that it would torpedo the entire effort.[27]

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23. *See infra* Part III. *See also* Carol A. Ford & Francisco J. Donis, *The Relationship Between Age and Gender in Workers' Attitudes Toward Sexual Harassment*, 130 J. PSYCHOL. 627 (1996).

24. *See* 1995, *supra* note 2, at 6.

25. 42 U.S.C. § 2000e-2 (1994).

26. 110 CONG. REC. 2577-84 (1964).

27. Jo Annette Jacobs, *No More Nervous Breakdowns: Sexual Harassment and the Hostile Work Environment*, 62 U. MO. KAN. CITY L. REV. 521, 528 n.57 (1994) ("The amendment was introduced by Representative Smith of Virginia and most of the declarations in support of [the amendment] were either offered by female representatives or men who represented southern states. . . . Indeed, as was aptly pointed out by the Oregon representative Mrs. Green, many who voiced support for the addition of 'sex' had

In the mid-1970s, sexual harassment cases began to percolate through the courts. Some early cases reflected the social mores of the time, as well as the predisposition of some older, conservative male judges, who viewed "sexual harassment" as merely a fact of life that women must accept if they wished to remain in their chosen occupation. For example, in *Corne v. Bausch & Lomb*, two women claimed that they had been repeatedly subjected to their supervisor's verbal and physical sexual advances.[28] The case was dismissed for failure to state a claim under Title VII.[29] The court found that the supervisor's alleged behavior was merely a "personal proclivity, peculiarity, or mannerism" and that he had been "satisfying a personal urge."[30] The conduct was not a company policy, and the company did not benefit from the conduct; therefore, it could not be considered a "company directed policy which deprived women of employment opportunities."[31] The court also expressed concern that "an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual."[32]

B. *The Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Sex*

In 1980, the EEOC issued its Guidelines on Discrimination Because of Sex, which state:

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opposed the passage of the Equal Pay Act of 1963, just a year earlier."). *See also* Deanna Weisse Turner, Note, *Civil Rights—Employer's [sic] Beware: The Supreme Court's Rejection of the Psychological Injury Requirement in* Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993), *Makes It Easier for Employees to Establish a Claim for Sexual Harassment Based on a Hostile Working Environment*, 17 U. ARK. LITTLE ROCK L.J. 839, 843-44, n.47 (1995) (noting that southern men were concerned about the possibility of "colored" or "Negro" women getting better treatment than "white Christian" women).

28. 390 F. Supp. 161 (D. Ariz. 1975), *vacated by* Corne v. Bausch & Lomb, Inc., 562 F.2d 55 (9th Cir. 1977).

29. *Id.* at 162.

30. *Id.* at 163.

31. *Id.*

32. *Id.* at 163-64. *See also* Barnes v. Train, 13 FAIR EMPL. PRAC. CAS. (BNA) 123, 124 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977) (at the administrative level, discrimination was found to be based not on the plaintiff's sex, but on her refusal to have sex with her supervisor, which resulted in an "inharmonious personal relationship.").

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[33]

The first two subsections above set out what has become the test for "quid pro quo" sexual harassment. The third subsection describes "hostile environment" harassment. The Guidelines further provide that a determination of sexual harassment will be made by looking at "the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which [they] occurred."[34] An employer is to be responsible for its acts

> and those of its agents and supervisory employees . . . regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence . . . . With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.[35]

The Guidelines also state that the employer can be held responsible for the acts of nonemployees (such as clients or customers) under the same "knew or should have known" standard.[36]

C. "Quid Pro Quo" and the "Hostile Environment"

The first cases in which the courts granted relief, in the late 1970s and early 1980s, distinguished between mere "individual" or "personal" sexual advances (which the courts were reluctant to find illegal) and those in which the granting of sexual favors

33. 29 C.F.R. § 1604.11(a) (1980).
34. *Id.* § 1604.11(b).
35. *Id.* § 1604.11(c), (d).
36. *Id.* § 1604.11(e).

was made a condition of continued employment, promotion, or other job benefits. In *Henson v. City of Dundee*,[37] the court stated: "An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits."[38] The employer is strictly liable for quid pro quo sexual harassment.[39]

"Hostile environment" claims were sustained first in *Rogers v. EEOC*,[40] a 1971 case of discrimination based on national origin. The court held that "the phrase 'terms, conditions and privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[41] A few years later, feminist legal scholar Catherine MacKinnon authored a text asserting that sexual harassment also creates a hostile or abusive work environment and impermissibly alters the conditions of women's employment, thereby violating Title VII.[42] However, it was not until 1986 that the United States Supreme Court addressed this issue and concluded that "hostile environment" sexual harassment provides a basis for relief under Title VII.[43] In *Meritor*, the Court held that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[44]

In *Meritor*, plaintiff Vinson claimed that her supervisor, Taylor, made demands for sex, which she initially refused but eventually accepted because she was afraid of losing her job.[45] Vinson claimed that Taylor's actions spanned three years, and included forty to fifty acts of forced sexual intercourse, fondling her in front of other employees, exposing himself, following her

37. 682 F.2d 897, 908 (11th Cir. 1982), *superceded by statute*, WASH. REV. CODE ANN. § 49.60.180 (West 1990 & Supp. 1993).

38. *Id. See also* Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Serv. Elec. & Gas Co., 568 F.2d 1044 (3d Cir. 1977) (finding a strong congressional mandate for providing relief, and dismissing concerns based on judicial economy); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

39. *See, e.g.*, Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994).

40. 454 F.2d 234 (5th Cir. 1971).

41. *Id.* at 238.

42. CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

43. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

44. *Id.* at 66.

45. *Id.* at 60.

into the rest room, and forcible rape.[46] These activities ceased only after the plaintiff started going with a steady boyfriend.[47] Vinson testified that because she was afraid of Taylor, she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.[48] Taylor denied Vinson's allegations, saying that she made them up in response to a business dispute.[49] The district court denied relief, but did not resolve the conflicting testimony.[50] Instead, it found that Vinson's participation was "voluntary" and "had nothing to do with her continued employment . . . or her advancement or promotions at [the bank]."[51] The court found that Vinson had not been sexually harassed and further found that, because of Vinson's failure to lodge a complaint, the bank was without notice and could not be held liable for Taylor's actions.[52] The circuit court reversed, in reliance on the EEOC guidelines, and found that Vinson's harassment was of the "hostile environment" variety.[53] The circuit court found that Vinson's "voluntariness" was immaterial if toleration of sexual harassment was a condition of her employment, and held that an employer is absolutely liable for harassment practiced by supervisory personnel, regardless of whether the employer knew or should have known of the misconduct.[54]

The Supreme Court granted certiorari, ultimately affirming in part on other grounds.[55] The employer argued that Title VII's protection was limited to tangible or economic loss and did not apply to "purely psychological aspects of the workplace environment."[56] The Supreme Court rejected that defense, relying on the EEOC's Guidelines Regarding Sexual Harassment, which permit sexual harassment claims based on an "intimidating, hostile or offensive working environment."[57] Where the trial court

46. *Id.*
47. *Id.*
48. *Id.* at 61.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 62-63.
55. *Id.* at 63.
56. *Id.* at 64.
57. *Id.* at 65.

had focused on Vinson's "voluntary" participation and found that the relationship had not affected her employment, the Supreme Court emphasized the "unwelcome" nature of Taylor's conduct.[58] The Court held that a plaintiff may recover for "hostile environment" sexual harassment by demonstrating that unwelcome sexual conduct was severe or pervasive enough to alter the conditions of employment and create an abusive work environment.[59] The Court refused to apply strict liability in hostile environment cases, but held that employers could be liable for supervisors' acts under agency principles, which it declined to clarify.[60] The Court also found that the mere existence of a sexual harassment policy could not insulate the employer from liability, and refused to require proof of "tangible" or "economic" injury in hostile environment cases.[61]

After *Meritor*, a split in the circuits developed over the degree of harm required to prove a hostile environment sexual harassment case. In *Meritor*, the Court referred to an "abusive" environment and to the victim's "emotional and psychological stability," which led some courts to impose a requirement of psychological harm.[62]

In *Rabidue v. Osceola Refining Co.*,[63] the plaintiff alleged that she and other female employees were subjected to obscene comments by a supervisor, that male employees displayed pictures of naked women, and that she was undermined in a number of other ways. In that case, the court held plaintiff had to prove that the hostile environment seriously affected her psy-

58. *Id.* at 68.

59. *Id.* at 67.

60. *Id.* at 72. The Court stated:

> We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability.

Id. (citations omitted).

61. *Id.* at 64.

62. *Id.* at 60.

63. 805 F.2d 611 (6th Cir. 1986).

chological well-being.[64] The court found that the obscene remarks and pictures, while annoying, did not cause psychological harm, and declined to impose liability.[65]

Similarly, in *Sparks v. Pilot Freight Carriers, Inc.*,[66] *Downes v. FAA*,[67] and *Paroline v. Unisys Corp.*,[68] the courts found that in order for the harassment to be sufficiently severe to support liability, it must affect the plaintiff's psychological well-being seriously. Conversely, in *Ellison v. Brady*,[69] a case in which the harasser exhibited obsessive, stalking-type behavior toward a coworker whom he barely knew, the court specifically disagreed with the "psychological harm" requirement of *Rabidue* and declined to impose it. The Ninth Circuit found that *Meritor* did not dictate such a standard and stated that "it is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment. Surely, employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."[70] The Ninth Circuit in *Ellison* adopted a "reasonable

64. *Id.*

65. The court also quoted with approval the language of the district court opinion, which stated:

> Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this .... Title VII [was not] designed to bring about a magical transformation in the social mores of American workers.

Id. at 620-21. A strong dissenting opinion noted that "the majority suggests ... that a woman assumes the risk of working in an abusive, anti-female environment ... [and] contends that such work environments somehow have an innate right to perpetuation ...." *Id.* at 626 (Keith, J., concurring in part, dissenting in part). Judge Keith described many more egregious details of the harassing conduct, including the fact that the plaintiff's supervisor referred to women as "whores," "cunt," "pussy," and "tits"; that a poster on the wall in the workplace "showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore'"; that the supervisor prevented plaintiff from visiting or taking customers to lunch as all previous male credit managers had done; that the plaintiff was denied the "perks" that were accorded to male management employees; and that the supervisor in other ways undermined plaintiff and made it difficult for her to do her job. He found that the supervisor's conduct evinced a clear "anti-female animus," which should be imputed to the employer under agency principles, per *Meritor*. *Id.* at 624-25.

66. 830 F.2d 1554 (11th Cir. 1987).

67. 775 F.2d 288 (Fed. Cir. 1985).

68. 879 F.2d 100 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990).

69. 924 F.2d 872 (9th Cir. 1991).

70. *Id.* at 878.

woman" standard,[71] which the court said would classify conduct as unlawful sexual harassment "even when harassers do not realize that their conduct creates a hostile working environment."[72] The court also held that the employer, which had initially transferred the harasser to a different office but returned him when he filed a grievance action, did not take strong enough remedial action.[73]

D. Our Awakening: Anita Hill and Clarence Thomas

In October 1991, men and women watched the Anita Hill/Clarence Thomas drama unfold on national television. During the Senate hearings regarding Thomas' nomination to the Supreme Court, Hill accused Thomas of sexually harassing her ten years earlier when he was her boss at the EEOC. Thomas vehemently denied her claims, and stated that the alleged harassment incidents (comments about pubic hairs on Coke cans, sexual innuendo, lewd comments, and unwanted advances and requests for dates) simply did not happen. Both spoke with great conviction. Much was made of the fact that Hill did not complain of the incidents at the time they happened; little thought was given to the possibility that workplace standards had changed in the preceding ten years, and that Thomas' behav-

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71. *Id.* at 878-79. The court stated that:

> Conduct that many men consider unobjectionable may offend many women. . . . *See also* Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law* . . . (men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object") . . . [W]e hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment . . . [W]e believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.

Id. (citations omitted).

72. *Id.* at 880.

73. *Id.* at 882.

> The record on appeal suggests that Ellison's employer did not express strong disapproval of Gray's conduct, did not reprimand Gray, did not put him on probation, and did not inform him that repeated harassment would result in suspension or termination. Apparently, Gray's employer only told him to stop harassing Ellison. Title VII requires more than a mere request to refrain from discriminatory conduct. Employers send the wrong message to potential harassers when they do not discipline employees for sexual harassment.

Id. (citations omitted).

ior in the early 1980s was being judged by early 1990s standards.[74]

The debate during the hearings, and in the weeks and months that followed, centered on a search for the objective truth, much like a civil trial. The central question was: Who lied? Was Thomas denying the truth, or was Hill fabricating stories to get back at a boss she disliked?[75] Few seemed to consider the possibility that both were telling the truth, from their differing perspectives: that incidents so agonizingly embarrassing and painful to Hill that they created permanent memories were so trivial and inconsequential to Thomas that he had forgotten them completely.[76]

Polls taken at the close of the hearings showed that a majority of both men and women believed Thomas, although more women than men accepted Hill's version of the events.[77] However, follow-up polls conducted a year after the hearings produced the opposite result: A majority of both men and women now believed Hill, although more women than men did so.[78] Commentators theorized that in the intervening year, men and women talked to each other and discussed women's harassment experiences, in many cases for the first time.[79] One study

74. This is not meant as a comment on the "fairness" to Thomas of being judged by different standards than those existing at the time of the alleged harassment; nor is it meant to defend inappropriate behavior. It is merely intended to note the possibility that standards, in fact, had changed and that Thomas may have been caught in the fallout from this cultural evolution.

75. "You clearly have to say one of them is lying," said Democratic Sen. Herb Kohl of Wisconsin. *See* Rhodes Cook, *Hill vs. Thomas*, CONG. Q., Dec. 9, 1995, at 3717, 3719.

76. As a litigator, this author realizes that no two witnesses to an event ever seem to remember the same set of facts. In many cases, from the accounts of eyewitnesses, one might suspect that completely different events were witnessed. At the time of the hearings, the author expressed to friends the possibility that both Hill and Thomas were telling the truth, each from his or her own perspective. Few seemed to find that plausible, however; people's predispositions and the need to find out "the truth" completely overwhelmed the possibility that two legitimately different interpretations might exist. *Cf.* Louise H. Kidder et al., *Recalling Harassment, Reconstructing Experience*, 51 J. SOC. ISSUES 53, 63 (1995) ("Might the same words be forgotten throw-away lines for him and leave indelible marks on her?"). It also is possible that, over the years, the details became magnified in Hill's mind. Memory is not videotape, after all.

77. See Cook, *supra* note 75, at 3719.

78. Suzanne Garment, *Confirming Anita Hill?*, 4 AM. ENTERPRISE 18 (1993); Dianne Rucinski, *The Polls—A Review: Rush to Judgment? Fast Reaction Polls in the Anita Hill-Clarence Thomas Controversy*, 57 PUB. OPINION Q. 575 (1993).

79. As Roxanne Barton Conlin relates:

showed that women were significantly more likely than men (women 64-71%, men 27-33%) to report "vivid image" or "flashbulb" memories of sexual harassment as a result of watching the hearings.[80] This may parallel Hill's and Thomas's perceptual differences. In the year following the Hill/Thomas hearings, there was a reported 50-70% increase in the filing of sexual harassment complaints.[81] Thus, the 1991 Hill/Thomas hearings catalyzed a marked shift in men's and women's consciousness of sexual harassment.

E. Putting Some Teeth in Title VII

Coincidentally, in 1991, the same year that the Hill/Thomas hearings took place, Congress amended Title VII, in the Civil Rights Act of 1991.[82] Prior to that time, a plaintiff who won a hostile environment action under Title VII was limited to recovering economic losses, which might include injunctive relief in the form of reinstatement, back pay, lost benefits, attorney's fees, court costs, and interest.[83] Since the 1991 amendment, plaintiffs have had the right to recover additional damages, including: compensatory damages (including those for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life) and punitive damages (where plaintiff must prove malicious intent or reckless indifference to her civil rights).[84]

> One evening, I was discussing the hearings with a group of friends, including a couple who had been married nearly 40 years. The husband asked, "Why didn't she complain? Why didn't she just leave?" His wife turned to him and said, "I didn't when it happened to me." The husband was shocked speechless. To that day, he was unaware that the woman he loved had been sexually harassed in the early years of their marriage. I know that this scenario was repeated again and again all over the country.

Conlin, *supra* note 1, at 7.

80. Claire K. Morse et al., *Gender Differences in Flashbulb Memories Elicited by the Clarence Thomas Hearings*, 133 J. SOC. PSYCHOL. 453 (1993). "Flashbulb" memories are described as vivid, detailed memories of personal experiences of sexual harassment, which many women (and few men) reported having at the time they viewed the Hill/Thomas hearings.

81. Mollie L. Jaschik-Herman et al., *Women's Perceptions and Labeling of Sexual Harassment in Academia Before and After the Hill-Thomas Hearings*, 33 SEX ROLES 439, 440 (1995) (50% increase); *cf.* Charney et al., *supra* note 3, at 13 n.42 (70% increase).

82. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2 (1994)).

83. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1988) (as amended by Act of Nov. 21, 1991).

84. 42 U.S.C. § 2000e-2 (1994).

Such damages are subject to statutory caps, ranging from $50,000 to $300,000, depending on the size of the company, measured by the number of employees.[85] Plaintiffs suing for compensatory or punitive damages may demand a jury trial and may be awarded expert witness fees, in addition to attorney fees.[86]

F. Clarification: Nervous Breakdowns Not Required

In 1993, the United States Supreme Court in *Harris v. Forklift Systems, Inc.*[87] finally resolved the conflict in the circuits over whether a "hostile environment" case required psychological harm. In that case, the president of Forklift Systems allegedly had made demeaning comments to the plaintiff such as: "You're a woman, what do you know?"; "We need a man as the rental manager"; "Dumb ass woman."[88] He also allegedly threw objects onto the ground and asked her to pick them up, requested that she get change out of his front pocket, and suggested that they discuss her raise at a motel.[89] Further, the plaintiff alleged that he made sexual comments about Harris' and other women's clothing, and implied that Harris succeeded in making a deal with a customer by "promising him some [sex] on Saturday night."[90] The trial court found his conduct offensive but held for the defendant on the basis that the conduct did not affect plaintiff's psychological well-being,[91] and the Sixth Circuit affirmed.[92] The Supreme Court reversed in a unanimous decision written by Justice O'Connor, which was released less than one month after oral argument. The Court found that Title VII "comes into play before the harassing conduct leads to a nervous breakdown" and stated that because "Title VII bars conduct that would seriously affect a reasonable person's psychological well-being . . . there is no need for it also to be psychologically injurious."[93] Reaffirming *Meritor*, Justice O'Connor set out the following "objective-

85. *Id.*

86. *Id. See also* Francis Achampong, *Potential Ramifications of the Elimination of the Psychological Harm Requirement in Hostile Environment Sexual Harassment Cases*, 38 How. L.J. 163, 175-76 (1994).

87. 510 U.S. 17 (1993).

88. *Id.* at 19.

89. *Id.*

90. *Id.*

91. *Id.* at 20.

92. *Id.*

93. *Id.* at 22.

subjective" standard: To violate Title VII, the conduct complained of must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive"; in addition, the plaintiff must "subjectively perceive the environment to be abusive."[94]

G. Unresolved Questions

Sexual harassment law remains a work in process. The current standard has been criticized as vague. However, as Justice O'Connor noted: "This is not, and by its nature cannot be, a mathematically precise test."[95] One commentator has observed that courts have been reluctant to grant summary judgment based on the *Harris* standard, except where they have found that the employer took immediate remedial action to deal with the harassment.[96] Conversely, other exasperated (and notably female) scholars say that it's simple: "If you can't do it or say it in front of your spouse or children, don't do it at the office."[97] The Supreme Court has yet to determine whether the applicable standard should be the "reasonable woman" or the "reasonable person under the same or similar circumstances." Those who have been hotly debating this issue may find relief in a recent study demonstrating that the choice of standard (reasonable per-

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94. *Id.* at 21-22.

95. *Id.* at 22. See also Justice Scalia's concurring remarks: "I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts. For this reason, I join the opinion of the Court." *Id.* at 25 (Scalia, J., concurring in part). Commentators similarly have discussed the difficulty of determining what behavior constitutes harassment. *See* Eugene Volokh, *Let's Clarify What We Mean by "Sexual Harassment,"* L.A. DAILY J., Jan. 20, 1995, at 6; *see also* Kerry A. Colson, Comment, Harris v. Forklift Systems, Inc.: *The Supreme Court Moves One Step Closer to Establishing a Workable Definition for Hostile Work Environment Sexual Harassment Claims*, 30 NEW ENG. L. REV. 441 (1996).

96. Aalberts & Seidman, *supra* note 7, at 244.

97. Paula Poda, *One Day "No" Might Be Enough: What to Do When Sexual Harassers Just Don't Get It,* BARRISTER, Spring 1993, at 27, 27; *see also* Conlin, *supra* note 1, at 7.

> Those who are confused over the meaning of the law need to remember only a few simple rules. If it is something you would not say or do in front of your mother or sister or daughter, it is wrong to say or do it to a co-worker. If you wouldn't say it to a person of the same sex, why would you need to say it to a person of the opposite sex? If you wouldn't want to see it on the front page of the newspaper, you shouldn't do it. If in doubt, don't.

Id.

son versus reasonable woman or victim) had no effect on the jury verdict.[98] In addition, scholars currently are debating over whether sexual harassment law infringes on First Amendment rights.[99] Newer varieties of claims being asserted include suits by alleged harassers,[100] as well as complaints of third-party harassment by nonemployees, such as clients, customers, and consultants.[101] In addition to the federal claims, sexual harassment cases may be based on analogous state statutes,[102] or common-

98. Richard L. Wiener et al., *Social Analytic Investigation of Hostile Work Environments: A Test of the Reasonable Woman Standard*, 19 LAW & HUM. BEHAV. 263, 276 (1995). *See also* Barbara A. Gutek & Maureen O'Connor, *The Empirical Basis for the Reasonable Woman Standard*, J. SOC. ISSUES, Spring 1995, at 151, 162. It is sometimes comforting to know that lawyerly arguments over how many angels can dance on the head of a pin may have no real effect on the jury's determination, which may be a terrific argument for retaining the jury system. For more on the continuing debate, see, for example, Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, 42 DISSENT 48 (1995); Gillian K. Hadfield, *Rational Women: A Test for Sex-Based Harassment*, 83 CAL. L. REV. 1151 (1995).

Recently, courts and scholars have begun to debate whether the law provides relief for same-gender harassment, which may put a new spin on the "reasonable woman vs. reasonable victim" debate. *See, e.g.*, Renee Levay, *Employment Law: Does/Should Title VII Apply to Same-Gender Sexual Harassment?*, 26 U. MEM. L. REV. 1601 (1996); Julianna Ryan & John M. Butler, *Without Supreme Court Precedent, Federal Courts Struggle with the Issue of Whether Title VII Lawsuits May Be Brought for Same-Sex Sexual Harassment*, NAT'L L. J., Dec. 23, 1996, at B8; Charles Howard Wilson, *Goosing, Bagging and Dry-Humping: Foreplay or Horseplay? Same-Sex Sexual Harassment Claims Under Title VII:* McWilliams v. Fairfax County Board of Supervisors, 21 T. MARSHALL L. REV. 211 (1996); Lisa Fair McEvers, Comment, *Civil Rights—Work Environment: Sexual Harassment: "Sexual Harassment by a Supervisor of the Same Sex, Is It Actionable?"*, 72 N.D. L. REV. 397 (1996); Susan Perissinotto Woodhouse, Comment, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?*, 36 SANTA CLARA L. REV. 1147 (1996).

99. *See* Wayne Lindsey Robbins, Jr., *When Two Liberal Values Collide in an Era of "Political Correctness": First Amendment Protection as a Check on Speech-Based Title VII Hostile Environment Claims*, 47 BAYLOR L. REV. 789 (1995); *cf.* Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399 (1996); Jacobs, *supra* note 27, at 542; George Rutherglen, *Sexual Harassment: Ideology or Law?*, 18 HARV. J.L. & PUB. POL'Y 487 (1995); Eugene Volokh, *Thinking Ahead About Freedom of Speech and Hostile Work Environment Harassment*, 17 BERKELEY J. EMP. & LAB. L. 304 (1996);

100. Conte, *supra* note 6, at 30.

101. Achampong, *supra* note 86, at 179; *New Legal Worry: Third-Party Sexual Harassment*, HR FOCUS, July 1996, at 1; Lynn Hecht Schafran, *Sexual Harassment: An Ounce of Prevention*, 30 TRIAL 14, 20 (1994); Patricia Konopka, Comment, *Combatting Sexual Harassment in the Workplace Without Risking a Wrongful Discharge Lawsuit: An Employer's Dilemma*, 42 KAN. L. REV. 437 (1994).

102. *See, e.g.*, OR. REV. STAT. § 659.030 (1995). Claims under both the federal and state statutes first must be presented to the appropriate government agency

law theories such as breach of contract, tortious interference with contract, negligence, intentional or negligent infliction of emotional distress, fraud, assault, battery, and invasion of privacy.[103]

Arguably, the standards the Supreme Court set forth in *Meritor* and *Harris* are vague enough that the jury is given only fairly general directions to guide its determination of what constitutes "harassment." Moreover, in many sexual harassment cases, the facts are very much in dispute; the outcome often depends on the jury's credibility determination. Because our legal system is set up as a search for "the truth," the jury must decide which party owns the truth and which party is lying. In many cases, the reality is not that simple. Even in cases in which the facts are undisputed or one side appears to be much more credible than the other, a jury still may be unable to address the parties' "real" interests. Mediation offers the opportunity for creative solutions, as well as greater satisfaction with both the process and the result.

III. How and Why Men "Just Don't Get It": Women and Men Perceive Social and Sexual Behavior Very Differently

Over the past twenty years, we slowly have become more aware that men and women simply don't see sexual harassment from the same perspective. This difference in perspective creates the context in which harassment occurs, and tends to cause each side of a sexual harassment dispute to suspect the other side of evil intent. Recent research provides information that can help each side understand the legitimacy of the other's perspective, even where conduct is clearly unacceptable. This understanding may increase the likelihood of apology, forgiveness, and at least the beginnings of healing for both parties. Unlike the adversarial process, mediation offers the chance to educate the participants about their differing perspectives; mediation permits this healing, which cannot be accomplished through monetary awards or defense verdicts. The following is a summary of recent research in this area.

(EEOC/BOLI) for the purpose of obtaining a "right to sue" letter before they may be filed in court.

103. Williams, *supra* note 4, at 68.

A. *Male and Female Differences in Perception of Harassment*

Researchers have theorized that "sexual harassment results from the complex interplay of ambivalent motives and gender stereotyping of women and jobs . . . . Traditionally, men's motivational orientation toward women has been deeply ambivalent, reflecting male desires for both dominance and intimacy."[104] As a result, men may perceive their motivations as positive, even when these motivations encourage conduct that is problematic for women. Thus, discrimination and harassment may be either "benevolent" or "hostile";[105] however, both types are illegal. Men who do not intend to hurt women may be embarrassed and offended when accused of sexual harassment. In addition, a continuum of behavior exists, and both men and women have difficulty applying legal definitions to daily conduct.[106]

Men and women do not agree about what constitutes sexual harassment. Women use broader definitions of sexual harassment, and therefore are more likely to define specific behaviors as harassment.[107] Women also find sexual harassment to be more serious than do men.[108] Men are significantly less likely to perceive behavior as harassing, and are likely to perceive a woman's friendly behavior as a sign of sexual interest and availability.[109] Even though men see male-female exchange as more "sexual" than do women, they also believe that such behaviors are more normative and acceptable than do women.[110] As discussed by the *Ellison* court, this difference may be due to the fact that women have much greater reason to feel threatened by men's sexual behavior because of women's particular vulnerability to rape and violent sexual assault.[111] In addition, women may

104. Susan T. Fisk & Peter Glick, *Ambivalence and Stereotypes Cause Sexual Harassment: A Theory with Implications for Organizational Change*, J. Soc. Issues, Spring 1995, at 97, 97-98.

105. *Id.* at 98-99.

106. Williams, *supra* note 4, at 67.

107. Wiener et al., *supra* note 98, at 264.

108. Aron Saperstein et al., *Ideology or Experience: A Study of Sexual Harassment*, 32 Sex Roles 835, 839 (1995).

109. Rick Garlick, *Male and Female Responses to Ambiguous Instructor Behaviors*, 30 Sex Roles 135, 139 (1994).

110. *Id.*

111. Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991). The court stated:

> For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may

perceive, with some basis, that some men view them "less as colleagues and more as objects of sexual challenge."[112]

In a recent study, both sexes tended to agree that the presence of the following factors indicated that sexual harassment had taken place: Quid pro quo harassment, unwanted physical contact, and superior/subordinate relationships.[113] Despite this common viewpoint, men and women disagreed on what constitutes harassment in the case of less severe conduct and in situations involving "peer" harassment.[114] In addition, many people do not consider some social and sexual behaviors harassment, depending on the context in which they occur.[115] These "ambiguous" behaviors include hugs, an arm around someone's shoulder, compliments, joking requests for dates, and sexual jokes and comments.[116] Men rate more ambiguous behaviors to be appro-

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understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Id.

112. Richard L. Wiener, *Social Analytic Jurisprudence in Sexual Harassment Litigation: The Role of Social Framework and Social Fact*, J. SOC. ISSUES, Spring 1995, at 167, 174. Women are more likely than men to attribute the cause of sexual harassment to characteristics of the harasser, and less to the character of the harassee. *See* Wiener et al., *supra* note 98, at 264.

113. Charney et al., *supra* note 3, at 11-12. This differential could be explained by men's blindness to and women's perception of the inherent power differential between men and women, even in "peer" situations, due to men's superior physical strength and the history of oppression of women. Older statistics (reported prior to 1982) showed that 80% of harassers were supervisors and only 20% were co-workers. Williams, *supra* note 4, at 74 n.8. More recent statistics show that only 40% of harassers are supervisors, and 60% are peers. Charney et al., *supra* note 3, at 12 nn.22-23 (citing the statistics in the 1981 and 1988 studies of the Merit Systems Protection Board). *See also Sexual Harassment Claims Filed*, J. ACCT., Jan. 1997, at 15 (reporting on a study done on 456 companies by the American Management Association which indicated that 49.7% of harassment is done by peers or co-workers, 26.4% by direct supervisors, 17.1% by other supervisors, and 6.8% by customers or vendors). Another recent study found that harassment by supervisors and superiors produced more serious emotional and psychological consequences than did peer harassment. *See* Rebecca A. Thacker & Stephan F. Gohmann, *Emotional and Psychological Consequences of Sexual Harassment: A Descriptive Study*, 130 J. PSYCHOL. 429 (1996); *see also* Roger C. Katz et al., *Effects of Gender and Situation on the Perception of Sexual Harassment*, 34 SEX ROLES 35 (1996).

114. Charney et al., *supra* note 3.

115. Wiener, *supra* note 112, at 175.

116. *Id.* This article notes specific factors that influence perceptions of socio-sexual behavior, including the relationship between the parties, the "observer's global evaluation of the incident," the appropriateness of the behavior, the probability that the behavior will be reciprocated, the likelihood of the incident to recur, characteristics of

priate and feel greater comfort with them than do women.[117] Immediacy behaviors—those that function to reduce physical and psychological distance between people—are similar to harassing behaviors in their ambiguity.[118] Immediacy behaviors may create a hostile environment, but they also have been shown to improve the environment; for example, in an academic setting, instructors' immediacy behaviors have been shown to be "positively correlated with students learning."[119] However, researchers have observed that "to the extent that certain harassers may well exploit ambiguity and innuendo to avoid confrontation and rejection, . . . [the] employer's pressures toward clarity of agenda rather than rewards for avoiding it will diminish the difficulties that women face."[120]

Men and women also differ in their interpretations of women's failure to report incidents of sexual harassment. Courts and juries often misinterpret coping behavior as consent.[121] Women indicate that they do not report harassment because they are afraid of hurting their careers, being humiliated, or losing their jobs; they also often believe that nothing can be done to stop the harassment. Unfortunately, "such beliefs are often well founded."[122] Conversely, men are more likely to say that women should handle sexual harassment on their own and not turn to an

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the observer, and work environment context. *Id.* In addition, there are "significant and widespread" differences in the way in which men and women evaluate socio-sexual behavior, which are influenced by factors such as feeling responsibility for social-sexual conduct at work, outcomes of past interactions, frequency of prior harassment experiences, sex role attitudes, religiosity, internal locus of control, rape myth acceptance, extent to which heterosexual relationships are perceived as adversarial, experience as a victimizer, age, erotophobia versus erotophilia, repression versus sensitization, and social desirability sensitivity. *Id.* at 174-75.

117. Garlick, *supra* note 109, at 152-56.

118. *Id.* at 137 ("Examples of immediacy behaviors in an instructor-student context include maintaining close but appropriate physical distance, touching in an appropriate manner, remaining relaxed, gesturing, spending time with interactants and being vocally expressive.").

119. *Id.*

120. Sarah E. Burns, *Issues in Workplace Sexual Harassment Law and Related Social Science Research*, J. SOC. ISSUES, Spring 1995, at 193, 197.

121. "[J]uries and appellate courts have consistently construed women's behavior to mean that the harassment was welcome, did not occur, or could not have been that bad—interpretations referred to, respectively as the Slut, Nut, (or So What?) defenses." Fitzgerald et al., *supra* note 4, at 129 (citing Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991)).

122. Fitzgerald et al., *supra* note 4, at 122. *See also* Charney et al., *supra* note 3, at 13.

agent of the employer, and to say that women exaggerate the amount of reported sexual harassment.[123]

B. *The Role of Power*

Although men and women generally agree that a relationship between a superior and a subordinate tends to increase the likelihood that behavior constitutes harassment, individual supervisors accused of harassment usually deny any intent to harm.[124] Recent research on the effects of power on men may explain the mechanism that produces this "cluelessness," and provide hope that education may help reduce the incidence of sexual harassment.[125]

Persons in positions of power may experience their alleged harassment behavior differently from the way in which their subordinates experience it. A boss who says to his secretary "I find you attractive" might think he is treating her as an equal. The benign interpretation of such behavior is that the boss is blind to his power because he is unaware of his privilege. The critical interpretation is that persons of power who engage in such behavior are abusing their power.[126] The conflicting memories and attributions of intent of the harasser and harassee are "predictable within this framework. They have different memories because they occupy different positions."[127]

In addition, recent research has shown that for some men, power automatically triggers thoughts about sex.[128] Experimental studies have shown that for men likely to sexually harass, the

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123. Wiener et al., *supra* note 98, at 264.

124. John A. Bargh & Paula Raymond, *The Naive Misuse of Power: Nonconscious Sources of Sexual Harassment*, J. Soc. Issues, Spring 1995, at 87.

125. Conversely, for men who are most likely to harass, sexual desire also may be linked to hostility and/or a desire to dominate women. *See* Fisk & Glick, *supra* note 104, at 99.

126. Kidder et al., *supra* note 76, at 63.

> Just as many Americans and Europeans in the white majority frequently fail to see how they live by "white skin privilege," some professors, physicians, and other institutional actors are blind to their positional privilege. If persons in power fail to see the layers of institutional privilege they embody even as they shift agendas from the professional to the sexual and try to shed their clothing, they fail to understand the threat they represent. They have not shed the power that blinds them.

Id.

127. *Id.* at 63-64.

128. Bargh & Raymond, *supra* note 124, at 85.

idea of power has become habitually associated with the idea of sex.[129] Further, such men rated women who participated in the experiment as more attractive when the concept of power was surreptitiously introduced to these men, by the inclusion of "power" words in the experimental questions they were asked to answer.[130]

The researchers conclude that because the man is unconscious of the link between power and sex, his only explanation for his attraction to the female subordinate is based on factors of which he is aware, such as her physical features and behavior (friendliness, deference, intelligence) or both.[131] On the other hand, the subordinate is aware of the power aspects of the situation, which she sees as an important motivation for her friendly, deferential behavior.[132] Both the man and the woman

> attribute the man's behavior to the features of the situation that are "salient" to them, but these are different. To the man, the salient features . . . are the woman's physical appearance and friendly behavior, but the woman sees instead a man who has power over her [job and future career]. Consequently, she may perceive his sexual advances as an abuse of power, . . . while he perceives his behavior as motivated by personal attraction on his part that seems to be reciprocated [by] her.[133]

The above research may explain why harassers often acknowledge their behavior but do not attach the same meaning or importance to it as the victim does. Reportedly, 75% of harassers "simply don't understand that they are harassers."[134] They do not perceive that they intended to cause distress to the victim; rather, they attribute their actions to another more acceptable motive—e.g., "paying a compliment."[135] Researchers argue that men's lack of awareness

> of the role that their power over a woman plays in their interpretation of her behavior and their own behavior toward her is an important obstacle in changing such behavior. These men will resist the idea that their behavior is an abuse of

129. *Id.* at 87.
130. *Id.* at 89.
131. *Id.* at 90.
132. *Id.*
133. *Id.*
134. *Id.* at 87.
135. *Id.*

> power because they do not consciously experience any influence of that power.[136]

This is similar to the "automatic and nonconscious effects of gender and racial stereotypes on judgments and decisions, which have been documented; here, too, the person often does not intend or consciously experience the operation of the stereotype, and thus will deny any bias."[137] The researchers hope that, in the same way that white people have become more aware of the likelihood that they may have "hidden biases against minority groups," men can be made aware that

> their feelings of attraction toward their female subordinates—and their perceptions of the subordinates' attraction for them—[may] be subconsciously enhanced by the power they hold over those women. Without awareness of this possibility, all the good intentions in the world will not help [because] . . . the majority of sexual harassers already believe that their behavior was motivated by good intentions.[138]

C. The Effects of Stereotyping and "Sex Role Spillover"

Studies of persons in power show that they do not perceive their subordinates accurately; rather, they rely on stereotypes.[139] Gender stereotyping is more likely to occur: (a) when there are few women in a male-dominated environment; (b) when women move into jobs or professions that were formerly exclusively male domains; (c) when the workplace is a "sexualized environment"—i.e., graffiti, pornographic posters and sexual remarks are tolerated; and (d) when "individuating information" (i.e., information that helps describe women as unique individuals) about particular women, as well as evaluative criteria, are ambiguous.[140] It takes a great deal of individuating information to dissolve stereotypical thinking. This is especially true in the case of women in occupations that were traditionally dominated by men.[141]

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136. *Id.* at 93.

137. *Id.*

138. *Id.* at 93-94.

139. Their subordinates, by contrast, develop "detailed and potentially accurate impressions of the 'higher-ups' on whom they depend." Kidder et al., *supra* note 76, at 63. *See also* Fisk & Glick, *supra* note 104, at 109.

140. Eugene Borgida et al., *On the Courtroom Use and Misuse of Gender Stereotyping Research*, J. SOC. ISSUES, Spring 1995, at 181, 182.

141. *Id.* at 185, 187-88.

In addition, stereotypes may be used as a method of simplifying complex judgment tasks, regardless of the presence of individuating information. Stereotypes cause or enable people to extrapolate beyond the given data because they assume that all members of the stereotyped group have certain characteristics.[142] For example, women may be stereotyped as dependent or sexual, whereas men may be stereotyped as autonomous and competitive. Thus, the stereotypes influence social judgments because the personal data available will be interpreted differently, depending on the stereotype evoked. Clearly unambiguous information about a woman who rose meteorically to a prestigious management position nonetheless may be construed differently because she is a woman (e.g., "She must have slept her way to the top.") than if the same information were applied to a man (e.g., "He must be highly qualified and ambitious.").[143]

Stereotyping also may occur as a consequence of "sex role spillover," which refers to the tendency for men and women to bring to the workplace the gender roles that guide their interaction elsewhere. According to researchers, because of sex role spillover, "women workers are viewed as sexual with the capacity to elicit sexual conduct from men, and male workers are viewed as 'organizational beings—active, work oriented.'"[144] Stereotypical thinking and sex role spillover tend to cause some men to view women as sex objects rather than as colleagues.[145]

Socio-psychological research can enlighten men and women involved in sexual harassment cases about the genesis, mechanics, and consequences of the harassing behavior. In appropriate cases, women who have been harassed may be able to see their harassers as genuinely lacking in malicious intent; men may be able to understand the effects of their behavior on women, permitting them to apologize without having to see themselves as evil.[146]

While this does not obviate the need for disciplinary action or monetary compensation, it does permit the parties to move toward conciliation and compromise through mutual under-

142. *Id.* at 185.

143. *Id.*

144. Wiener, *supra* note 112, at 173.

145. *Id.* at 174.

146. Conversely, in cases involving genuinely hostile men, it may help to remember that fear and insecurity often underlie abusive behavior.

standing. Mediation is the best forum for encouraging the parties to tell their stories, educate themselves and each other about what happened, and reach a solution that will be more satisfying for all concerned.[147]

IV. THE ADVANTAGES OF MEDIATION

Mediation is a voluntary, nonbinding process in which disputing parties try to reach an agreement with the active assistance of a neutral third party—the mediator. Like other species of alternate dispute resolution, mediation allows the parties to tailor a process that will maximize their chances of reaching a satisfactory settlement.[148] Mediation offers the opportunity for each side to see the other's perspective without having to agree with it, and to reach agreement without having to share the same point of view.[149]

In a variety of cases, mediation can be a better means of dispute resolution than traditional litigation, or even arbitration. In sexual harassment cases, the advantages of mediation are even more compelling. Parties in these cases tend to be very emotional, and can cope more easily with mediation than with depositions and trial, which generally are very stressful. Litigators accustomed to operating in the adversarial system may not realize how threatening and unpleasant this environment is for most clients. Sexual harassment cases can be especially difficult because of the need to testify about intimate behavior. In addition, the parties' stories often conflict, and both sides risk adverse credibility judgments, which can be damaging. The plaintiff may be better able to tell her story in the presence of a person who is in a neutral, nonjudgmental role. In sexual harassment cases, the facts often are hotly contested; mediation allows the parties to end the dispute without the need for a credibility determination, which may be destructive to one or both parties.[150]

147. For those who desire a more comprehensive understanding of the psychology and dynamics of sexual harassment, as well as additional information on how to prevent it, an excellent source is PETER RUTTER, UNDERSTANDING AND PREVENTING SEXUAL HARASSMENT (Bantam paperback ed. 1997) (originally published in hardcover as SEX, POWER AND BOUNDARIES (1996)).

148. Costello, *supra* note 14, at 20.

149. Stamato, *Sexual Harassment*, *supra* note 3, at 169.

150. *See* Adler, *supra* note 14.

While mediation can occur at any stage, early mediation is especially desirable in many cases because it allows for a speedier resolution. The necessity of obtaining a "right to sue" letter before proceeding with civil litigation under Title VII or similar state statutes adds additional delay to the usually glacial pace of litigation.[151] All parties stand to save a great deal of stress, time, and expense by settling in mediation.[152] How much they save depends on how early the case is mediated. Mediation better serves the mutual needs of the plaintiff, alleged harasser, and employer for confidentiality and privacy; it allows for creative solutions that are more satisfactory to all the parties.[153] In addition, the parties may choose their mediator based on relevant considerations such as gender, style, age, and knowledge of the substantive law.[154]

Research shows that men and women have different styles of resolving disputes, and that the formality and judgmental aspects of the litigation process better fit a male orientation.[155] Usually female victims simply want the behavior to stop, with no negative consequences to their careers.[156] Women generally are more comfortable with informal processes targeted at ending the problem, rather than finding fault and administering punishment.[157] However, if women suffer secondary injury due to the adversarial nature of litigation, they may respond vindictively; and if the only way of being made whole is through monetary compensation, the price may be quite high.[158] Because it creates a safe environment for telling the story, mediation better meets the needs of women who have been harassed. It allows for catharsis and creative solutions that may be more meaningful for

151. *See supra* note 102.

152. Costello, *supra* note 14, at 19-20.

153. *See* Stamato, *Sexual Harassment*, *supra* note 3, at 169.

154. Adler, *supra* note 14.

155. Charney et al., *supra* note 3, at 13 (citing Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures,* 46 AM. PSYCHOL. 497, 501 (1991); CAROL GILLIGAN, IN A DIFFERENT VOICE (1982)). For more general discussion of differences in the way men and women communicate, see, for example, DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION (1990).

156. Charney et al, *supra* note 3, at 13. *See also* Williams, *supra* note 4, at 68.

157. Charney et al., *supra* note 3, at 13 (citing Riger, *supra* note 155; and GILLIGAN, *supra* note 155). *See also* Adler, *supra* note 14.

158. Elizabeth Jubin Fujiwara, *Proving Damages in a Sexual Harassment Case*, 30 TRIAL, April 1994, at 34, 38; Schafran, *supra* note 101, at 14, 22-23.

the plaintiff and at least somewhat less costly for the employer and the harasser.

In addition, mediation can empower the woman who has been harassed, giving her the opportunity to be heard, understood, and treated respectfully. In harassment cases, the plaintiff often has been in a relatively powerless position, and mediation can provide a strong antidote to her powerlessness by allowing her an opportunity to speak. Conversely, in litigation, her feelings of powerlessness often are exacerbated because she must try to be "heard" through her responses to her attorney's questions, which may not be well-designed to let her express herself. She then is subjected to hostile cross-examination. Further, she has no control over the outcome of the case, and is not given an opportunity to seek more meaningful relief, such as an apology from the harasser and the employer or both.[159] Mediation also allows the alleged harasser to explain his perspective and seek forgiveness for unconsciously hurtful acts. Even a defense verdict often does not provide as much satisfaction as does the opportunity to apologize.

In mediation, creative solutions can enhance the likelihood of settlement and can provide greater satisfaction to plaintiffs, often at lower overall cost to defendants. These solutions may include: A written, confidential apology from the harasser and the employer or both, with or without a direct verbal apology during the mediation; the employer's promise to institute sexual harassment training, implement a new policy, or improve or better enforce an existing policy; an offer of transfer or promotion in lieu of job loss; job modification; letters of reference and recommendation; payments in the nature of severance pay; educational funding to provide an opportunity for career change or advancement; acknowledgement of wrongdoing by senior management; employee discipline that "sends a message"; and payment of attorney fees and mediation fees, often in addition to money damages.[160] Moreover, parties sometimes can use media-

159. Shereen G. Bingham & Lisa L. Scherer, *Factors Associated with Responses to Sexual Harassment and Satisfaction with Outcome*, 29 SEX ROLES 239 (1993). These researchers found that "although making a formal or informal complaint was not associated with greater satisfaction, talking to the harasser without using aggressive communication strategies increased the likelihood of a satisfactory outcome for the employee." *Id.*

160. This list of creative solutions available in mediation came from the experi-

tion to heal relationships and set the stage for continuing to work together in a positive, supportive manner.

Attorneys sometimes are reluctant to mediate due to fear of revealing "smoking gun" evidence. The experience of many mediators indicates that attorneys often overestimate the value of evidence sought to be concealed; and such evidence can be kept confidential in the mediation if the attorney insists. In many cases, however, such information can be used in mediation to help persuade a party to settle.

There are situations in which mediation cannot work—for example, where the plaintiff seeks only a windfall jury verdict award, where a CEO is willing to spend "millions for defense and not a dime for settlement," or where the mediator or counsel believe that an extreme power imbalance exists that cannot be addressed adequately in mediation.[161] Except in these relatively infrequent situations, however, mediation usually is useful and often successful in resolving the case. Even in cases that do not settle in mediation, the information exchanged and catharsis achieved increase the likelihood of a later settlement prior to trial.[162] In most cases, mediation is by far the best method of resolving a sexual harassment case.[163]

V. STRATEGIC CONSIDERATIONS IN MEDIATION

Mediations can be useful and successful in many different circumstances. Effective mediators have a variety of personality styles, educational and experiential backgrounds, and approaches. There is no single best approach for any particular case. However, attorneys and mediators should consider factors that may influence the course of the mediation, and attempt to tailor the mediation to help the parties and attorneys feel safe, develop trust, and make a whole-hearted effort to resolve their

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ence of this author and the mediators and attorneys listed in the acknowledgment at the beginning of the Article (note **).

161. These examples are drawn from the experiences of many mediators and attorneys, as related in interviews with those listed in the acknowledgment at the beginning of this Article, and others who are not named (note **). To preserve confidentiality, the examples, factual scenarios, and tactical suggestions provided in this Article are not credited specifically to particular individuals.

162. *Id.*

163. *See, e.g., supra* note 14.

case. The following are some strategic considerations to assist practitioners.

A. *Preliminary Considerations*

Before mediation begins, attorneys and parties may make choices that can affect the course and outcome of the mediation. The following are some factors to consider prior to the commencement of mediation:

1. *Conflicts of Interest*

It is important for attorneys to avoid conflicts of interest. In some cases, mediations have failed because of avoidable conflicts that became painfully apparent during the course of the mediation.[164] To avoid this problem, attorneys considering representing multiple clients need to be aware of potential conflicts. An attorney representing several plaintiffs who were harmed in the same workplace should remember that one client's case may be affected adversely by being "bundled" with the others. For example, where the plaintiff's lawyer represents three sexual harassment clients, one claimant may have a weak case on the facts, another may have great facts but be subject to a unique defense, and the third may have a strong case with egregious facts and no apparent problems. Grouping these cases may be a disservice to the plaintiff with the best case because her case may be diminished by the other less favorable claims. In addition, the plaintiffs may not agree on how to "split the pot," or an initial agreement on a pro-rata split may appear unfair in hindsight.

Similarly, a defense attorney representing both the employer and the alleged harasser may have difficulty doing justice to both clients. For example, in some cases, the harasser maintains innocence and initially has the employer's support; later in the mediation, damning evidence may come to light indicating that the offensive conduct, in fact, did occur. At that point, the employer may want to change its strategy and "throw the harasser to the wolves," creating a painful dilemma for an attorney representing both employer and alleged harasser. Even when the employer and the alleged harasser remain aligned, there can be an issue as to the percentage of the monetary com-

164. This is not meant to be an exhaustive discussion of conflicts of interest. Practitioners should consult additional materials for more complete information.

pensation each should pay. In some instances, alleged harassers have sued employers after the resolution of the principal case, claiming unfair treatment in the process.[165] This may be particularly true where the alleged harasser is kept isolated and is not informed of the case's progress, nor allowed to participate in decisions.[166]

These concerns do not mean that attorneys never should represent multiple parties. However, the examples above indicate that attorneys should give some initial thought to potential problems, and make their decisions about whom to represent accordingly.

2. When to Mediate

Often, the best time to mediate is early in the case, perhaps even before litigation is filed. At this point, the parties have not been further polarized, angered, and hurt by the adversarial process; they may have an easier time apologizing, forgiving, agreeing on a settlement, and getting on with their lives. In addition, early mediation saves time and money. Sexual harassment cases can be quite expensive, particularly given the potential for recovery of attorney fees. When cases are resolved without huge litigation costs, defense attorneys have happier clients who may be sources of repeat business. Conversely, plaintiffs' attorneys may realize a higher return on the time they spend on a case when it settles early. Moreover, plaintiffs who settle in mediation are more likely to be satisfied with the overall result, and thus are more likely to recommend their lawyers to others who need representation in similar cases. In addition, both sides benefit from early mediation because it decreases their exposure to publicity and embarrassment.

In some cases, parties or their attorneys may not be ready or able to mediate at an early stage of the case. Sometimes the parties need time to grieve or allow anger and hurt to diminish before resolving the dispute, releasing their anger, and getting on with their lives. In addition, factual discrepancies often require at least some discovery prior to mediation.[167] However,

165. Conte, *supra* note 6, at 31.

166. *Id.* at 33.

167. Of course, attorneys need not disclose in mediation any information they desire to keep secret; however, complete development of the facts tends to increase the likelihood that the parties will reach an agreement.

attorneys should be aware that mediation often provides an excellent opportunity for informal discovery, and allows each side time to evaluate the credibility of the opposing party and important witnesses. This informal approach can be far less costly than formal discovery if the case settles in mediation. Formal discovery is often overrated and may not be worth the delay it creates. If the case does not settle in mediation, normally depositions and other discovery still can be accomplished prior to trial.

Even at later stages of the case, mediation can provide a better result for both sides than will a trial and potential appeal. Each side will save time and money, reduce stress, eliminate further uncertainty, and have the opportunity to achieve a more meaningful and satisfying result regardless of when the mediation takes place. If attorneys approach each case with the benefits of mediation in mind, it is more likely that mediation may occur at the earliest and most advantageous time.

3. *Choosing the Mediator*

One of the obvious advantages of mediation is that the parties may choose the mediator. A party should consider many factors in selecting a mediator, including gender, age, style, experience, and training. Attorneys should weigh all these and other relevant factors, and choose a mediator who inspires their mutual confidence and appears capable of building an environment of trust.

Some believe that female mediators are preferable in sexual harassment cases.[168] However, experience demonstrates that male mediators can be equally effective. The mediator's gender may be more significant in some cases than in others. When a female plaintiff has been frightened or seriously aggrieved, and in cases involving real or perceived power imbalances, a female mediator may be a better choice; the plaintiff may more easily feel understood by and have confidence in a woman. Conversely, if the female plaintiff feels the need for the appearance of greater physical security in the mediation itself, a male mediator may appear better able to control the process and enforce civility. In cases where the plaintiff is a fairly strong woman and

168. Barry Winograd, *Men as Mediators in Cases of Sexual Harassment*, 50 DISP. RESOL. J., June 1995, at 40.

the alleged harasser is nervous and defensive, a male mediator may be more effective.

The degree of severity of the harassment, and the relationship between harasser and harassee, also may affect mediator gender preference. Studies have shown that women are more likely to complain about sexual harassment, feel more confident, and are less prone to unwarranted self-blame in situations where the conduct was more egregious and when the harasser is her boss.[169] Moreover, in such cases, the harasser may be more defensive. In addition, if we assume that the ultimate root of abusive behavior is fear and insecurity, we might conclude that the most outrageous harassers are also the most fearful and insecure. In such cases, perhaps involving quid pro quo harassment and extreme behavior or both, a male mediator may be more able to help support the harasser and allow him to admit his behavior and apologize. Conversely, in cases of more ambiguous behavior, and in hostile environment situations, women may be more likely to blame themselves. In these cases, female mediators may be more sensitive to the plaintiff's perspective, and better able to validate her sense of violation. Cases in which a male is harassed are fairly rare,[170] so sufficient research and experiential basis does not exist to permit informed assumptions about how mediator gender might affect the mediation; however, some of the same considerations described above might apply by analogy in such cases.

The mediator's style also is an important consideration. In some cases, it might be more important to choose a mediator who is more gentle, or relationship-oriented, or whose style is more facilitative or interest-based. In other cases, a directive style or evaluative "settlement conference" approach may be more useful.[171] In reality, many cases can be resolved satisfacto-

169. Sarah Barton Samoluk & Grace M.H. Pretty, *The Impact of Sexual Harassment Simulations on Women's Thoughts and Feelings*, 30 SEX ROLES 679, 694 (1994).

170. *See supra* note 4 and accompanying text.

171. Mediators with a "facilitative" style focus on helping the parties communicate more effectively and enhancing their ability to resolve the dispute, without giving opinions about the merits or value of either side's case. They may, however, draw out evaluative information by questioning the attorneys (usually in separate caucus) about their view of the likelihood of certain outcomes. "Evaluative" mediators, conversely, offer their legal opinions and analysis. "Interest-based" mediation refers to the efforts made to identify all the interests and needs of the parties, including those normally not addressed in litigation—such as emotional concerns, values, intangible goals, etc.

rily with mediators who have a range of styles; many mediators have flexible styles and can adapt their approaches to suit the needs of a particular case.

Depending on the ages of the parties and their attorneys, the age of the mediator also may be relevant. When a young woman claims she was harassed by an older male, she may have difficulty trusting an older male mediator. Conversely, an older female plaintiff may not believe that a younger mediator of either sex can understand her experience. In cases where the alleged harasser is very nervous and defensive, it may be more important to choose a mediator in his age group.

A mediator's experience, training, and knowledge of sexual harassment law also may be important. While in many cases the mediator's competence in managing the process is more relevant than his or her knowledge of substantive sexual harassment law, sometimes the parties or attorneys may have greater confidence in a substantively knowledgeable mediator. Attorneys should discuss their needs in these matters with proposed mediators.

Finally, attorneys should remember to consider the big picture, rather than focusing solely on their client's separate interest. The success of the mediation depends not only on one side's comfort zone, but on whether the overall needs and interests of both sides are met. In many cases, an attorney may best serve his or her client's interests by choosing a mediator who can inspire the opposing party's trust, particularly when the other party apparently has a narrower range of comfort. Attorneys can enhance the possibility of settlement by sharing information about their respective clients' needs and attempting to accommodate both parties.

4. Who Should Attend the Mediation?

It can be crucial to the success of the mediation to ensure

Many, if not most, mediators use an "interest-based" style, but some still may come from a "position-based" style that focuses exclusively, or nearly so, on the legal issues in the case and the parties' positions on those issues. For more in-depth information on mediation theory, see, for example, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION (1994); ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981); JAY FOLBERG & ANN TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICTS (1986).

that all important "players" attend and participate. These important participants may include some or all of the following: claimant, alleged harasser, supervisor, management representative, insurance claims representative, and significant witnesses; support people such as spouses, significant others, friends, family members, and therapists. Sometimes the absence of an important person makes resolution more difficult. For example, in one case, the plaintiff would not accept a monetary settlement until she received an apology from a management representative and the assurance that the president of the company knew of her claim and had authorized the settlement offer personally.[172] It is critically important that the plaintiff feel heard, understood, and respected. In cases where it is possible for the parties to talk directly with one another, the victim's awareness that the alleged harasser and the employer's representative have heard her may facilitate settlement. It may be equally important for the man accused of harassment to communicate his perspective directly to his co-worker or subordinate, including subjectively benign intentions, and to offer his apology. Even in the "he said, she said" cases in which the facts remain in dispute, mediation can result in a settlement when each side has the opportunity to tell its story even without the parties having to agree on the facts. Having all important players at the mediation greatly facilitates this process.

When spouses and significant others attend the mediation, the attorneys and mediator may need to make tactical decisions about whether, how, and when to include them. In some cases, acknowledgement of improper conduct and complicity may be important to resolution; but the presence of a spouse or significant other who has a personal stake in his or her partner's "innocence" may interfere with or prevent this. In such cases, it may be helpful to arrange for the harasser and harassee to talk alone with the mediator, or to excuse all support people from a separate caucus or joint session, in order to fully develop the facts and permit the parties to make necessary acknowledgements and apologies. In one case, after the initial storytelling, the mediator suspected that at one time there had been a consensual, voluntary relationship between the parties that had soured, creating bad feelings on both sides and resulting in an accusation of har-

172. *See supra* note 161.

assment.[173] In that situation, the mediator arranged for the parties to talk alone in the presence of the mediator, where they were able to acknowledge their mutual involvement and apologize for the difficulties they had caused each other.[174] After that meeting, the mediator sent each party off to talk with his or her attorney; eventually, after additional negotiation, the parties reached a settlement.[175] The case probably would not have settled at the mediation without the mutual understanding and exchange of apologies. The mediator took a risk in bringing the parties together; but the catharsis, closure, and resulting willingness to consider a reasonable settlement probably would not have happened without doing so.

5. *Preparing for the Mediation*

Prior to the mediation, attorneys can increase the likelihood of a satisfactory resolution by preparing themselves and their clients. Attorneys need to "shift gears" from an adversarial mode to a collaborative one, particularly in cases fraught with acrimony between counsel as well as between the parties. The legal system is set up as a search for the objective "truth." Therefore, lawyers must adopt a mindset in which reasonable people legitimately may have different perspectives. This orientation may permit the opportunity for a resolution by allowing a face-saving view of the dispute as the product of differences in perspective. The attorneys should embody and model civility, objectivity, a conciliatory attitude, and a willingness to listen to the other side with a relatively open mind. This will be easier if the attorneys take the time to understand the potential bases for a legitimate difference in perspective between the parties[176] and, in appropriate cases, educate their clients about this information. Defense attorneys often need to remember to be gentle in mediation to avoid retraumatizing the plaintiff. This may require a conscious mental shift for lawyers who have an aggressive, adversarial approach to litigation.[177] Even when the defense attorney has a

173. *See supra* note 161.

174. *See supra* note 161.

175. *See supra* note 161.

176. *See supra* Part III.

177. For more discussion on how lawyers can best serve their clients by "turning down the heat," see Charles Guittard, *Detoxifying Sensitive Cases*, LEGAL TIMES, July 15, 1996, at 13.

fairly jaded view of the plaintiff, courtesy, kindness, and gentleness can facilitate settlement.

Attorneys can prepare their clients to generate creative solutions in mediation by asking questions that will help them identify their needs and what they might offer to the other side, such as: "What do you need to have happen in order to feel better?" "What works?" "What would it take for you to be able to resolve this and get on with your life?" "What would be fair?" "What is necessary to correct the imbalance of power?" "Would an apology help?" "Is it important to heal this relationship?" "Even if you cannot agree with the other side's version of the facts, is there something you can ask or offer that might help both sides to resolve this dispute?" These and similar questions can be invaluable in preparing the parties for mediation; they help the parties explore possible creative solutions and identify intangible needs that must be satisfied before the case can be resolved. The attorneys also can help prepare the mediator by conveying this information to her or him. Focusing on pragmatic solutions, emotional needs, and intangible interests is more likely to produce a satisfactory outcome than honing the client's version of the facts and reinforcing the client's position.

B. The Mediation Process

The format and process of mediation varies, depending on the mediator's style and the parties' needs. Many factors influence the flow of the mediation. Some involve strategic choices, and some are essential elements in any mediation.

1. Joint Session versus Shuttle Diplomacy

Mediators have different views of how a sexual harassment mediation should be structured. Should it begin with a joint session, in which the mediator introduces and explains the process and then encourages each side to tell its story in the presence of the other? Or are sexual harassment cases so fraught with emotional tension and difficulty that shuttle diplomacy is the only way to proceed?

Despite the risk, many mediators feel that starting with a joint session is extremely important to the outcome of the mediation. They view the joint session as an invaluable way to set the tone for mutual respect and understanding. Providing a safe place for the parties to share their stories with one another can

be crucial to each side's ability to see the other party's legitimately different perspective. These mediators feel that, even in cases where the facts will remain in dispute, the likelihood of reaching a resolution is much greater when each side is heard, understood, and respected by the other.

To help the participants see each other as individuals rather than combatants, the mediator may start the mediation with fairly extensive introductions of both the parties and their attorneys. This does not take long, but puts a human face on the process. At the beginning of the joint session, the mediator explains the process and answers any questions. By establishing the ground rules—such as requiring that only one person speak at a time and that everyone listen with respect even when they disagree—the mediator creates a safe environment for all participants. Starting with a joint session allows everyone to begin "on the same page," enhancing trust. The mediator's calm, matter-of-fact way of dealing with potentially explosive subject matter sets an example that encourages the parties to relate their stories with feeling but without histrionics. The assumption that all participants are capable of civil discourse tends to be a self-fulfilling concept, in the same way that other human behavior—whether of children or adults—tends to rise or sink to expectations. The joint session also creates an opportunity to provide educational information to all parties—such as the fact that research has demonstrated that men and women simply have different perspectives and may disagree about what constitutes sexual harassment. This allows the parties to step back from their own dispute, and realize that this dilemma is not unique to them and is a cultural problem, rather than strictly the product of the other side's malice or hypersensitivity.

When mediators start with a joint session, they usually try to create a collaborative, educational environment rather than continue the adversarial interactions that have preceded the mediation.[178] For example, rather than having the attorneys start with opening statements, the mediator may ask the plaintiff to tell her story first, and then have her attorney briefly outline the issues objectively. Then the alleged harasser and his attorney follow the same procedure. The focus is not on persuading, but rather on ensuring that everyone understand's each side's story. Expe-

178. *See supra* note 161.

rience indicates that even parties who are nervous can speak with conviction, and can be articulate, if not eloquent. Just being able to tell one's story is empowering and helps correct any actual or apparent power imbalance. Also, having parties talk about their suffering allows for the development of empathy. Attorneys who are skeptical of the benefit of having the parties speak for themselves may appreciate the opportunity to learn how the client and the opposing party present themselves under pressure. There is no need in mediation to reach an agreement on "the true facts," nor is it necessary to decide which party is more credible. Sometimes the parties can agree on what happened, and sometimes they cannot; the important point is that each side is heard, understood, and respected. Experience indicates that when the parties participate actively, the mediation tends go more quickly and smoothly.[179]

Some mediators use a "shuttle diplomacy" model in all sexual harassment cases because they view these cases as too volatile to risk a joint session.[180] These mediators feel that, in a joint session, the plaintiff may be retraumatized or that one or both parties will be unable to listen without becoming explosively angry, which might doom the mediation.[181] In shuttle diplomacy cases where the mediator prefers to prevent direct contact betweeen the parties, the mediator may have to take extreme steps to ensure separation, such as using conference rooms on two different floors of a building and having the parties arrive and leave at different times in order to avoid meeting in the elevator.

However, even mediators who prefer this approach sometimes get the parties together. This may be done to allow a direct apology in the hope of breaking an impasse, or to clarify complex facts. In some cases, the plaintiff may resist meeting with the alleged harasser but is willing to speak directly with a management representative or insurance claims person. This approach offers her the opportunity to experience the catharsis and closure that telling her story and feeling heard and respected affords, without feeling threatened or frightened. In this scenario,

179. *See supra* note 161.

180. *See supra* note 161.

181. *See supra* note 161.

the mediation process offers some benefits of a joint session, at a reduced risk.

2. Use of Separate Caucus

Most frequently, even in mediations that begin with a joint session, the mediator subsequently will separate the parties and utilize separate caucuses. In this nonthreatening and confidential environment, the mediator can encourage complete development of the facts, permit emotional venting and catharsis, provide reality-testing, and allow discussion of what each side could offer the other.[182]

Although the parties may develop the facts fairly completely during the joint session, additional details, and often crucial nuances, usually come to light only when the mediator spends time alone with each side. The mediator may help the parties understand why sharing this information with the other side is useful or why keeping it confidential is preferable. At a minimum, it usually is important for the mediator to have as complete an understanding of all the facts and concerns of each side as possible. Separate caucuses provide an opportunity for the mediator to draw out sensitive information not revealed in the joint session.[183]

To ensure a safe environment in the joint session, the mediator must require that the parties remain civil and discuss their emotions in a nonabusive manner. It may be important to provide an opportunity for each side to express strong emotions in the safety of the separate caucus. Each side needs to feel heard and understood and have their genuine emotions validated, regardless of how they have treated each other prior to the mediation. This cathartic experience often must occur before the parties can go of the dispute and work on a pragmatic resolution.

At some point in the separate caucuses, mediators become the "agent of reality." The mediator may ask questions such as: "How do you think a jury might view that?" "Do you think the judge is going to allow that evidence to come in?" "Do you think there is a possibility that jurors who are forced to choose whose story is true might favor the other side?" The focus is not on finding out who is lying, but, rather, on examining what an

182. *See supra* note 161.
183. *See supra* note 161.

objective fact-finder might do with the stories presented. Often, parties have legitimate strong feelings but nonetheless can concede weaknesses in their case. This can begin to help them move into an objective mode and consider reasons to be pragmatic because they realize that there is a chance that they could lose the case at trial. In addition, in separate caucus, the mediator can discuss with the attorneys in the presence of their clients the risks, costs, and stress involved in continuing litigation.

After the mediator and participants in separate caucus have fully developed the facts, provided an opportunity for and experienced emotional catharsis, and engaged in reality-testing, the parties will begin the task of generating possible elements of a resolution. At this point, the mediator will ask the attorneys and parties to discuss creative solutions, and the mediator can make suggestions if they have difficulty with this task.

Throughout the separate caucus stage of the mediation, the mediator moves between the parties, conveying information, facilitating expression of emotion, keeping the parties working toward the goal of settlement, presenting tentative offers, and performing any other useful functions. At some point during the caucus stage, or after an agreement has been reached, the mediator may reunite the parties to convey an apology and expression of forgiveness, exchange additional information, clarify complex facts, or confirm verbally the terms of their agreement.

3. Additional Considerations

Other details are important in the mediation. Even minor power imbalances need to be addressed and dealt with in order for the mediation to succeed. Where an ongoing relationship is involved, additional mediation sessions may be necessary to keep things on track. Due to their complexity and emotional volatility, sexual harassment mediations can be more time-consuming than other kinds of mediations; parties and attorneys need to be prepared to commit the time necessary to optimize the likelihood of a successful outcome. Often parties who are nervous do not eat before the mediation; keeping everyone adequately fueled can be a real concern.

Finally, the parties and attorneys need to remain flexible throughout the mediation—and release an attachment to a particular outcome—in order to evaluate each proposal from a fresh perspective and maintain the ability to generate new ideas.

This may sound a bit Zen-like, but actually it is quite pragmatic. It has been said that the person with the most flexibility has the most power in mediation.[184] This is because people who become rigid and fixated on particular points have fewer options for a successful resolution than do those who remain open-minded and capable of considering all offers and generating creative ideas.

VI. CONCLUSION

Although we have made significant progress as a society, sexual harassment is a problem that probably will persist for some time. The change required in order to eliminate it is fundamental; resistance to such change is strong, even in those who have received education and want to change. Mediators and attorneys can help resolve individual cases, as well as expedite fundamental social change, by educating parties about the perceptual differences between men and women that this Article describes.[185] Experience and research demonstrate that mediation is a much better process for resolving sexual harassment claims than litigation or arbitration; mediation works best when attorneys and participants are well-prepared and committed to the effort required for successful resolution of their disputes.

184. The author first heard this expressed by James Melamed and Robert Benjamin during a mediation course they presented in Portland, Oregon in May-June 1993.

185. Preventive training is beyond the scope of this Article, but a number of other articles and books address this topic. *See, e.g.*, RUTTER, *supra* note 147; Joe Schumacher & Judy Fester, *Practical Ways to Address Workplace SXH Problems*, PUB. MGMT., July 1996, at 19; Dorraine A. Larison & Mary E. Olk, *Sexual Harassment Awareness Training: It's Not the Boogie Monster*, 72 N.D. L. REV. 387 (1996).

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ARBITRATION, MEDIATION, AND SEXUAL HARASSMENT

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The 1998 Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* recognized an affirmative defense to hostile environment sexual harassment claims based in part on the existence of an effective policy prohibitiong sexual harassment in the workplace. The promulgation or refinement of policies prohibiting sexual harassment will likely lead to an increase in complaints of sexual harassment. This article concludes that mediation and arbitration procedures which follow recognized standards of due process are appropriate means to resolve these claims and may substantially contribute to the Title VII goal of eradicating discrimination from the workplace.

I. Introduction

Congress passed Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination on the basis of race, color, national origin, religion, or sex.[1] The primary goal of the legislation clearly was elimination of racial discrimination. Discrimination on the basis of sex was a last-minute addition, and the future effects of this provision were probably not imagined by many in 1964.[2]

In 1964 the position of women in the American family and society had not changed much from the 1950s or, really, from the 1930s. The key contribution of American women to the war effort and economy was conveniently forgotten.[3] The societal ideal of the happy, nuclear, middle-class family cast women in the role of dutiful wives. Strict divorce laws made it extremely difficult to escape an unhappy marriage and, to a certain extent, Victorian morals still held sway.

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[1] 42 U.S.C. § 2000e-2(a)(1) (1964). This article was submitted on July 23, 1998, before the U.S. Supreme Court decision in Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998) (no requirement to exhaust the arbitration procedure under a general arbitration clause of a collective bargaining agreement prior to filing claim of discrimination under the Americans with Disabilities Act because the collective bargaining agreement lacked a clear and unmistakable waiver of individual employees' rights to bring a federal employment discrimination claim to a judicial forum, although the Court did not decide the enforceability of such a waiver) or the Ninth Circuit decision in Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir. 1998) (holding that the Federal Arbitration Act does not apply to labor or employment contracts).

[2] M. Player, *Employment Discrimination Law* 201 (1988) (citing Vaas, *Title VII: Legislative History*, 7 Boston C. Ind. & Comm. L. Rev. 431, 441 (1966)).

[3]*See, e.g.*, Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 262–265 (1988).

The second half of the 1960s brought a sort of revolution in American society. Prompted by opposition to the Vietnam war, it was a revolt against authority, hierarchical structures, social norms, middle-class morality, and even dress codes. It was a bid for greater freedom on various fronts and, for women, this included independence and equal rights with men.

Additional developments at this time contributed to greater freedom for women. Time-saving household appliances such as washers, dryers, dishwashers, and even second cars became widely available at least for members of the middle class. In *Griswold v. Connecticut,* the U.S. Supreme Court struck down prohibitions on use of contraceptives in 1965.[4] In 1969 California enacted the first no-fault divorce law,[5] and since the late 1960s courts have dealt with issues of workplace discrimination on the basis of sex.

Workplace discrimination issues may be roughly divided into two categories. The first category involves discrimination in hiring, promotion, compensation, or discharge decisions on the basis of gender.[6]

The second category is sexual harassment, which was recognized in the mid-1970s[7] and which may involve objectionable sexual attraction, attention, and interaction. Sexual harassment encompasses *quid pro quo* harassment, in which an employment decision is based on acceptance or rejection of sexual advances, and hostile environment harassment, which involves unwelcome conduct of such a severe and pervasive nature as to change the conditions of the victim's employment.[8] The judicial legal regulation of sexual harassment claims is described in the next section. Although the legal prohibition of sexual harassment protects men and women from heterosexual harassment (and, now, from same-sex harassment[9]), the law developed primarily from situations of men harassing women, and most disputes present this situation.

In this decade sexual harassment has become a matter of constant national attention. While in broad policy terms, the legal regulation of sexual harassment is designed to eradicate existing discrimination and to overcome the effects of past discrimination, it also is intended (Justice Scalia's protests notwithstanding[10]) to impose a certain civility in the workplace and thereby to regulate workplace social interactions.[11]

In our current society, American workers put in long hours in a workplace

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[4]381 U.S. 479 (1965). Obviously there have been other women's issues including the legalization of abortion. Roe v. Wade, 410 U.S. 113 (1973).

[5]California Family Law Act of 1969, ch. 1608, §§ 1–32, 1969 Cal. Stat. 3312 (1969). This statute served as the model for the nationwide change from fault to no-fault divorce. *See, e.g.,* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath,* 56 U. CIN. L. REV. 1 (1987).

[6]Including pregnancy; *see* The Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 1978 U.S.C.C.A.N. (92 Stat.) 2076, 2076 (codified as amended at 42 U.S.C. § 2000e-(k)).

[7]Barnes v. Train, 13 F.E.P. cases 123 (D.D.C. 1974), *aff'd sub nom,* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[8]Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

[9]Oncale v. Sundowner Offshores Servs. Inc., 118 S. Ct. 998 (1998).

[10]*Id.*

[11]For example, Justice Rehnquist noted that Title VII protects employees from discriminatory insults. *Meritor,* 477 U.S. at 65.

populated by men and women, and the workplace is a meeting place.[12] Given human nature, an "off-duty" romantic relationship between two people employed in the same workplace is likely to manifest itself at work.[13] Consequently, the workplace regulation of interaction between people has by necessity become regulation of their off-duty behavior.

The annual meeting of the National Academy of Arbitrators in June 1998 presented a panel discussion entitled Romance in the Workplace: Nepotism, Fraternization, Off-duty Conduct and Sexual Harassment.[14] This title of a presentation to a group whose members are constantly called on to resolve workplace problems demonstrates the breadth of possible (and existing) regulation of conduct. One panelist presented a hypothetical example to dramatize the situation: A business owner learns that two employees had a consensual sexual encounter at work and other employees became aware of it. The business owner calls her attorney for advice because she is concerned, not for the couple not working, but for the business owner's potential liability in the event of complaints from other employees. Another panelist described a real antifraternization policy of a law firm, which obligated all firm members to report any fraternization to the managing partner. One wonders whether going to the movies counts as fraternization. The panelist acknowledged that this policy was ignored, but an ordinary employee in an ordinary business would risk adverse employment consequences to ignore such a workplace policy.

The foregoing has particular significance in light of the June 26, 1998 decisions in *Faragher v. City of Boca Raton*[15] and *Burlington Industries, Inc. v. Ellerth,*[16] in which the U.S. Supreme Court advised employers that adoption of and compliance with sexual harassment policies may represent a defense against certain claims. According to some media commentators who represent employer interests, the general reaction of employers to these decisions was relief that the Court did not adopt a strict liability standard for these cases and a willingness to follow the U.S. Supreme Court's advice[17] to establish policies to avoid and correct sexual harassment.

Experience suggests that employers are not adverse to regulating their employees, especially where such regulation may limit liability. Additional regulation, particularly of off-duty conduct, increases the employer's power over employees. Among other things, the Paula Jones lawsuit, the Monica Lewinsky situation, and the necessity of a legal defense fund for the President to defend

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[12] *See, e.g.,* Susan Diesenhouse, *Workers in Love, With the Boss's Blessing,* N.Y. TIMES, April 24, 1996 at C1.

[13] *See, e.g.,* Philip Weiss, *Don't Even Think About It (The Cupid Cops Are Watching),* N.Y. TIMES MAGAZINE, May 3, 1998, at 42.

[14] This panel discussion was presented on June 5, 1998, by Donald L. Sapir, Esq. of Sapir & Frumkin, Sharon P. Stiller of Underberg & Kessler, and Richard K. Zuckerman of Rains & Pogrebin. *See* National Academy of Arbitrators, Program Materials, 51st Annual Meeting, San Diego, California, June 4–6, 1998 (on file with author).

[15] 118 S. Ct. 2275 (1998).

[16] 118 S. Ct. 2257 (1998).

[17]*Also see Effective Policies and Procedures More Crucial After Supreme Rulings*, 67 U.S.L.W. 2019 (July 14, 1998) (noting that these rulings are viewed as a victory for employers).

against a sexual harassment suit have prompted some members of the public to question the limits of regulation of sexual conduct.

With respect to ordinary employment relationships two questions arise. First, how far should an employer be allowed to go in regulating the natural friendly and romantic affiliations of its workers?

Second, are certain sexual harassment problems in employment simply employment problems that can be quickly solved by corrective actions in the workplace through mediation and/or arbitration with a dose of common sense and without going to court? This article is concerned with this second question.

Even the Equal Employment Opportunity Commission (EEOC) has concluded that "there may be a sizeable number of disputes . . . which may not involve discrimination issues at all. They reflect rather basic communication problems in the workplace."[18]

Particularly in view of the events of 1998, it seems that the freedom that was the hallmark of the 1960s should not be completely supplanted by regulation in this area. The key issue is to strike a proper balance between the freedom of individuals in the workplace and the regulatory scope demanded by the public policy against discrimination on the basis of sex. It is important to recognize that protective laws inevitably also regulate the protected group as demonstrated, for example, by various laws earlier in this century passed to protect women in the workplace, which ultimately resulted in limiting women's work opportunities.[19]

Alternative dispute resolution (ADR) refers to methods for resolving disputes outside of courts or nonjudicial dispute resolution. A wide variety of alternative dispute resolution methods exists including arbitration, mediation, negotiation, peer review, minitrial, summary jury trial, and early neutral evaluation. Some ADR processes are now suggested, offered, or mandated by courts. ADR processes that are not court-connected (and even some that are) are generally private proceedings in which the parties have more control over the process, the standard of the decision, and the remedies. ADR methods are generally viewed as providing the opportunity for a faster and less expensive dispute resolution process, and many commentators believe that the parties may obtain better quality solutions and a better process in ADR methods than they would obtain in the courts.[20]

As noted, this article will consider whether the ADR processes of arbitration and mediation may play a valuable role in the resolution of workplace sexual harassment problems. Arbitration and mediation warrant this focus because they

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[18]The EEOC ADR study is cited in UNITED STATES GEN'L ACC'TING OFFICE, GENERAL GOVERNMENT DIVISION, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS EXPERIENCES WITH ADR IN THE WORKPLACE 14–15 (August 1997) (1997 WL 709361 F.D.C.H.). (hereinafter GAO/GGD).

[19]For example, in Muller v. Oregon, 208 U.S. 412 (1908), the U.S. Supreme Court allowed a law limiting women's hours of work to stand, but in Lochner v. New York, 198 U.S. 45 (1905), it struck down similar legislation for men. In a 1944 labor arbitration case, Arbitrator Shulman awarded women pay equal to men for their work in a certain job classification despite a state law ban on women performing the heavy lifting occasionally required by the job. Ford Motor Co., 6 LAB. ARB. (BNA) 952 (1944) (Shulman, Arb.).

[20]*See generally,* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF

LAWYERS 45–48 (2d ed. 1996). For a more complete description and analysis of the brief overview of ADR in this and the following two paragraphs *see generally Id.*

Sexual Harassment in the Workplace: Is Mediation an Appropriate Forum?

Linda Stamato

Factors prevalent in sexual harassment cases include desire for confidentiality and flexibility; the need for a variety of remedies that often reach beyond the individual parties; and frequently the interest of all parties in avoiding the cost, delay, and exposure associated with litigation or formal hearings. Accordingly, mediation, given the flexibility it accords parties to control the process and reach agreement on remedies voluntarily, may be a desirable forum. The limited experience with mediation suggests, moreover, that it may prove to be an avenue that encourages sexual harassment cases to surface—they are grossly underreported at present—and therefore contribute to reducing sexual harassment in the workplace.

Sexual harassment, an ancient shame, has become a modern embarrassment (Stimpson, 1991). In the last year it has become far less a private matter too, not only as a result of the Clarence Thomas confirmation hearings and the allegations of sexual harassment made against him by Professor Anita Hill, but also because of the press coverage, seminars, conferences, speeches, and individual and organized expressions of outrage that took place in their wake.

The public is less likely to be ambivalent, for it is increasingly informed.[1] Sexual harassment is widespread: 50–85 percent of American women will experience some form of sexual harassment during their working lives. It is costly: sexual harassment costs a typical Fortune 500 company $6.7 million per year, a cost of $282 per employee. Considerable legal costs accrue in dealing with sexual harassment as well: 64 percent of cases that led to a jury verdict, as of 1991, were decided in favor of the complainant; judgments can reach $300,000, and the cost to defend is reported to be $80,000 on the average. It is grossly underreported: 90 percent of sexual harassment victims are unwilling to come forward for a

variety of reasons, with the fear of retaliation and loss of privacy among them.[2] And sexual harassment is not a victimless crime but, in fact, an invidious form of sex discrimination (Siegel, 1991).

Being roused from complacency or ignorance, however, is not the same thing as arriving at a commitment to do something about sexual harassment. Accordingly, education and training programs have been launched to curb its occurrence. Pressing on legal fronts (by providing information on legal rights, for example, and free legal services) are labor unions, corporations, institutions, and agencies. Moreover, existing mechanisms for redress are being evaluated and additional options explored. Avenues for addressing sexual harassment range from formal handling, such as legal and administrative hearings, to fact-finding with recommendations, a recent offering by the American Arbitration Association (Coulson, 1991–1992). Several experienced ombudspeople argue persuasively for the ombuds model as particularly suitable (see Waxman, 1987–1988; Rowe, 1990; Gadlin, 1991). Sexual harassment is finally commanding the attention it deserves.[3]

No one process is likely to be appropriate for handling all or even most cases; choice depends upon such factors as the degree of abuse, its persistence, and the pattern of behavior; upon the victim's power and capacity to negotiate; and upon the needs and interests of the specific parties involved and those of the organization however they may be articulated. That said, among various choices mediation has much to commend it given the elements that are prevalent in sexual harassment cases: the desire for confidentiality and flexibility; the need for a variety of remedies that often reach beyond the individual parties (to other people, for example, and to institutional integrity), and, more often than not, the interest of both or all parties in avoiding the cost, delay, and exposure associated with litigation. Accordingly, the purpose of this article is to advance its consideration.

Paradoxically, the attractiveness of alternatives to formal litigation gain in proportion to the seriousness accorded an offense by law. Court proceedings and administrative hearings (and the potential sanctions for conviction) provide incentives to parties, and particularly to the "offending" party, to make alternative processes work. This shadow-of-the-court phenomenon has greater potential with respect to sexual harassment now that Congress has given victims a right to sue for monetary damages under the Civil Rights Act of 1991.[4]

Consider too the process qualities and the remedies or outcomes likely to be sought. Why might a woman (or, far less frequently, a man) who alleges harassment, choose mediation? She may want to:

Avoid a protracted investigatory process and obtain immediate relief from continued harassment

Preserve her privacy and avoid the stress of formal, adversarial proceedings (harassment is humiliating enough without publicly exposing it)[5]

Confront the harasser in a way that provides both an opportunity to relate directly what she feels and to explain why he is responsible, so as to educate rather than to punish, and to preserve their future working relationship should that continue.[6]

Given that subjectivity and ambiguity may enter the picture, raising doubt about what took place, she may wish to avoid being twice victimized, both by the harasser and by the process, and choose the informality and confidentiality mediation affords; for, where harassment charges involve two people, without witnesses, and no corroborating evidence, fact-finding and formal hearings are less suitable processes. Moreover, blame and punishment are seldom high on the list of outcomes sought by the harassed person. Why then use a system, litigation or variations on the fact-finding or arbitration themes, that seek to find fault and levy costs or impose sanctions?

Sexual harassment is often clouded by different perceptions of what took place and of what was intended. Ordinarily, one would expect that parties holding different, even clashing, perceptions of an occurrence, a problem, a conflict, or a complaint, would draw different conclusions as to how to deal with it; voluntary agreement would seem unlikely (Ertel, 1991). Sexual harassment situations often fall into this category. Different perceptions may be genuine; in those situations mediation affords an opportunity for the harasser to put his intentions aside and see that what the victim experienced was harassment. Often, however, the question is not a difference in perception, but denial or intentional misrepresentation of what occurred. In either case mediation affords each party an opportunity to see the other's perspective without having to agree with it, and presumably to reach an agreement that satisfies future needs and interests, again without having to share the same view of what took place.

Sexual harassment is often about power.[7] Thus a process that allows a woman to enter as an equal, that encourages dealing directly with disrespect and violations of trust, is essential. Mediation allows for respectful communication, and, because solutions and remedies are voluntarily and mutually arrived at, compliance rests on, and makes responsible and accountable, both parties. Thus mediation can be empowering. Unlike formal systems too, in mediation the way the problem is defined, interpreted, or "framed" if you will, rests with the parties; so does control over the process and crafting remedies or solutions.

The design of mediation programs for sexual harassment cases requires very careful attention, however. As others (Gadlin, 1991) have suggested, certain features may be desirable, such as allowing individual sessions before any joint meetings and permitting parties to have others

accompany them to sessions. And, as is the case in some victim-offender mediation and restitution programs, victims of sexual harassment may wish to remain unidentified, avoid face-to-face encounters, and mediate indirectly. Monitoring and evaluation are as important here as they are in other informal dispute resolution programs; certainly, advanced, sophisticated training for mediators involved in this kind of mediation is essential.

The appropriateness of mediation depends upon a number of factors, but unquestionably an effective process design ranks high among them. Commitment by the employer to a harassment-free workplace is critical too, of course, requiring both policies and practices that sensitize employees to what may constitute harassment; that provide for services for employees (counseling, education, and training); that encourage employees to surface unwanted advances and other harassing actions; and that include appropriate sanctions. Mediation can only be effective in a workplace in which freedom from harassment is a serious, valued objective.

In the final analysis, one point is as obvious as it is necessary: if mediation is to be a viable option, it must be voluntary. Employees should not only retain the right to use other legal, administrative, or institutional avenues to seek redress, they must feel encouraged to do so.

Sexual harassment is serious; it is pervasive; it is invidious; and it is underreported. To the extent that victims of sexual harassment are refusing to press charges to avoid formal investigation and hearing, the availability of mediation may provide an important, even vital, avenue. As a society, we need to attack sexual harassment at its roots with education, training, and prevention strategies, but we also need to confront it when it occurs in ways that move us in that direction as well.

Notes

1. The following sampler of books, all published in 1992, represents the first wave of sexual harassment books to appear since the Hill-Thomas confrontation in Washington: Ellen J. Wagner's *Sexual Harassment in the Workplace—How to Prevent, Investigate and Resolve Problems in Your Organization* (Amacom); Susan Webb's *Step Forward: Sexual Harassment in the Workplace* (Mastermedia); Ellen Cassedy's *The 9 to 5 Guide to Combating Sexual Harassment* (Wiley); Martin Esikenazi's and David Gallen's *Sexual Harassment: Know Your Rights!* (Carroll & Graf); and William Petrocelli's and Barbara Kate Repa's *Sexual Harassment on the Job* (Nolo Press).

2. A new "boldness" may be on the rise, however, if recent statistics from the Equal Employment Opportunity Commission (EEOC) are any measure. The EEOC reported in July (Gross, 1992b) that sexual harassment charges filed in the first half of the year increased by more than 50 percent, to 4,754 complaints, from 3,135 in the same reporting period the previous year.

3. The phenomenon is not limited to the United States by any means. In July 1991 the newly forming European Economic Community adopted a code of conduct protecting the dignity of women and men at work in order to increase awareness of the problem of harassment. Following the Hill-Thomas hearings, however, and results from national opinion polls assaying the attitudes of French citizens concerning the incidence of sexual harassment, the

French government, with parliamentary support, undertook to make sexual harassment in the workplace a crime punishable by up to twelve months imprisonment and fines ranging from $360 to $3,600 (Riding, 1992). And in Japan, the first successful legal action against sexual harassment was handed down by a district court in Kukuoka in April of this year; the victory is considered particularly significant because the harassment was verbal: crude remarks from a supervisory employee had driven the female plaintiff to quit her job. The harassment had involved no direct physical harm or threat. Sexual approaches by men have been considered the "norm" in Japanese workplaces; lawsuits alleging harassment are rare; of the few that have been brought and in which the plaintiff prevailed, judges have issued ambiguous verdicts, ruling that "an assault had occurred" or "a threat had been made," rather than finding that sexual harassment had occurred. This case, then, has aroused considerable discussion across the country. To illustrate how extensive a problem remains, however, the *New York Times* (Weisman, 1992, p. A7) reported that Japanese male newspaper columnists were ridiculing the concept of sexual harassment "as a passing fad from the United States," and indicating that lawsuits, such as this one, "would spoil the harmony and sense of fun at the workplace."

4. This avenue was conspicuously unavailable to Professor Hill, given the absence of legal redress from a hostile work environment until 1986 (*Meritor Savings Bank FSB* v. *Vinson*, 477 U.S. 57). Developments in state courts, favorable to plaintiffs, may add to the sexual harassment case law in ways that further strengthen the appeal of informal avenues. For example, a state Appeals Court in New Jersey decided a case in April 1992 that may set a significant precedent for determining when a hostile work environment exists under state law. While acknowledging that the defendant may not have *intended* to harass the plaintiff, the court ruled that his conduct could still constitute sexual harassment or misconduct: "We [the court] have no doubt that many actions that a reasonable woman would find offensive are perceived by men to be harmless and innocent" (Hester, 1992, p. 10). Plaintiffs need not show that harassment was intentional, only that, in the perception of the plaintiff, it occurred—sufficient to constitute a sexually hostile work environment under the state's antidiscrimination law. Under a recent U.S. Supreme Court ruling (*Franklin* v. *Gwinett County Public Schools*, Feb. 26, 1992), students alleging sexual harassment may also sue for monetary damages, under Title IX of the Education Amendments of 1972, thus extending coverage beyond the workplace relationship into schools and colleges, public and private. In at least one state, Minnesota, schools are liable for damages in sexual harassment cases under state law; in a recent lawsuit the Duluth school system was required to pay damages to a female student who was sexually harassed by her male peers. While Minnesota leads the way, other states are moving in that direction, notably California and Pennsylvania (Gross, 1992a). And, since the U.S. Constitution provides a right to a jury trial in civil suits that involve damages, sexual harassment cases under Title IX will be tried before juries that are generally believed to be more sympathetic to plaintiffs in discrimination cases than judges are (Greenhouse, 1992).

5. At the University of Massachusetts at Amherst, only 12 of approximately 125 allegations of sexual harassment since 1982 have gone to a formal hearing (Gadlin, 1991b); of those who chose to pursue their concern through mediation, "many," according to Gadlin, indicated they would have dropped the charge if required to face a hearing. Reinforcing this experience in the academic workplace, Louise Fitzgerald, a psychologist at the University of Illinois who studied two thousand women working in large state universities, found that most had not reported sexual harassment because they thought they would not be believed, that they would suffer retaliation, would be labeled as troublemakers, or would lose their jobs (Fitzgerald and others, 1991).

6. As Gadlin (1991b, p. 58) sees it, "Many victims of harassment do not want to get the person who harassed them in trouble—often [victims] will pursue a complaint only if they are assured that their complaint will not directly lead to punishment." Fitzgerald and coauthors

(1991) confirm this point: she and her colleagues found that some women say they stay silent because they fear that reporting an incident may cost the harasser his job or his marriage.
7. As Daniel Goleman (1991, pp. C1, C12) summarizes this aspect of sexual harassment, it has less to do with sex than with power: "It is a way to keep women in their place . . . to devalue a woman's role in the workplace by calling attention to her sexuality." Fitzgerald (as cited in Siegel, 1991, p. 20) confirms: "Only about 25 percent of sexual harassment cases are botched seductions; less than 5% involve a bribe or threat for sex; the rest are assertions of power."

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Mediation: Is it Appropriate for Sexual Harassment Grievances?

MORI IRVINE*

I. INTRODUCTION

Arbitration is the current mainstay of labor dispute resolution.[1] Even so, more and more labor grievances are being resolved by mediation.[2] This re-emergence[3] of grievance mediation has been well received.[4] Through the use of mediation, the cost, formality, and delay of arbitration can be avoided.[5] As a result, it has been successful in providing a forum for cases that do not warrant the time and expense of an arbitration hearing.

While mediation does not guarantee a satisfactory solution to all cases, the likelihood of amicable resolution is one of its strengths.[6] But

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1. Labor arbitration developed in the United States during the last part of the nineteenth century. It made its most significant advances after World War II. FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS (4th ed. 1985). For the historical development of labor arbitration in the United States, see Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

2. Leonard Bierman & Stuart A. Youngblood, *Resolving Unjust Discharge Cases: A Mediatory Approach*, 40 ARB. J. 48 (1985); John M. Caraway, *Grievance Mediation: Is It Worth Using?*, 18 J.L. & EDUC. 495 (1989); Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 NEGOTIATION J. 9 (1989) [hereinafter Goldberg I]; Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982) [hereinafter Goldberg II]; Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 NEGOTIATION J. 249 (1990); Matthew T. Roberts et al., *Grievance Mediation: A Management Perspective*, 45 ARB. J. 15 (1990); Sylvia Skratek, *Grievance Mediation: Does it Really Work?*, 6 NEGOTIATION J. 269 (1990).

3. Nolan & Abrams, *supra* note 1, at 373; "Grievance mediation may not be a 'brand new' technique, but it has recently been receiving renewed attention by parties involved in the administration and enforcement of labor agreements." Caraway, *supra* note 2, at 502; Peter Feuille, *Why Does Grievance Mediation Resolve Grievances?*, 8 NEGOTIATION J. 131 (1992).

4. *See* Goldberg & Brett, *supra* note 2, at 252; Roberts et al., *supra* note 2, at 16.

5. Goldberg II, *supra* note 2, at 281; Goldberg & Brett, *supra* note 2, at 252; Roberts et al., *supra* note 2, at 15.

6. Goldberg II, *supra* note 2, at 284.

mediation is not appropriate for all types of cases. Some are better suited for a mechanism that involves fact-finding and decision making. This is particularly true where, ultimately, we need to draw bright lines delineating acceptable behavior in the workplace. Sexual harassment is one such case type.

Sexual harassment cases are similar in power structure to domestic violence or criminal assault matters. In those cases there is more than a simple dispute over money or property. Instead, there is a dynamic present that involves power, fear, and coercion. These elements underlie the "dispute" being mediated, which may be a "simple" divorce or the resolution of a criminal charge such as "simple" assault. But like an iceberg, only the tip is visible, and the most dangerous part remains unseen. In those situations, there is an imbalance of power between the batterer and the victim that cannot be reconciled in mediation. Many legal commentators have concluded that mediation is inappropriate in these cases unless special circumstances are present.[7] Because the same dynamic exists between harasser and victim, mediation is also inappropriate in sexual harassment grievance cases.

Sexual harassment grievances involve more than whether the discipline or discharge of the harasser is appropriate. Instead, how these matters are treated, and how harassers are disciplined is a reflection of how women in the workplace are faring. Grievance mediation of these cases, no matter how well intended, risks trivializing the seriousness of sexual harassment and maintaining an inhospitable environment for the female workforce. This article will examine the appropriateness of mediating union sexual harassment grievance cases.[8]

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7. Andree G. Gagnon, Recent Development, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 30 (1982); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated*, 34 EMORY L.J. 855, 862 (1985); Joseph B. Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359 (1975).

8. I will limit my analysis to grievance mediation in unionized settings; however, this form of dispute resolution has been used in the nonunion workplace as well. *See* Bierman & Youngblood, *supra* note 2. A mediation model for nonunion companies has been proposed as the solution to its employer-employee disputes. Adam J. Conti, *Mediation of Work-Place Disputes: A Prescription for Organizational Health*, 11 EMPLOYEE REL. L.J. 291 (1985).

II. GRIEVANCE ARBITRATION

The foundation stone of labor grievance resolution is arbitration.[9] Arbitration is a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."[10] While the initial rise of labor arbitration was meant to prevent strikes and was used as "the substitute for industrial strife"[11] in the collective bargaining arena, it soon grew to be the primary method of resolving disciplinary grievances as well. The vast majority of union disciplinary grievances go through the arbitration process for resolution.[12] Its main advantages include "the expertise of a specialized tribunal and the saving of time, expense, and trouble."[13]

Grievance arbitration is bargained for by the parties and is part of the collective bargaining agreement reached by the union and the employer.[14] As such, "its rules, limits and regulations" are created by

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9. Supreme Court Justice Arthur J. Goldberg wrote:

> In the United States Arbitration Act, the Labor-Management Relations Act and in numerous state statutes, our legislative bodies have voiced their conviction that voluntary arbitration of disputes is favored and has an important role in society which seeks the peaceful, prompt and just disposition of controversies involving our citizens.

Arthur J. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. 13, 13 (1965); *see also* 29 U.S.C. § 171(b) (1988); John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

10. Matthew N. Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, 6-7 (1944).

11. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

12. Discharge and discipline provisions are found in more than 95% of all collective bargaining agreements. Goldberg I, *supra* note 2, at 9. "[A]rbitration provisions can today be found in an estimated 96% of all agreements." ARCHIBALD COX ET AL., LABOR LAW 705 (10th ed. 1986). Final and binding grievance arbitration is provided for in 98% of labor agreements. BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS IN UNION CONTRACTS 5 (Washington, DC: Bureau of National Affairs Inc., 1989).

13. ELKOURI & ELKOURI, *supra* note 1, at 7.

14. Goldberg I, *supra* note 2, at 9; COX ET AL. *supra* note 12; BUREAU OF NATIONAL AFFAIRS, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS IN UNION CONTRACTS (Washington, DC: Bureau of National Affairs Inc., 1989).

the union and the employer, and may be changed by them.[15] Having chosen arbitration as the best way to resolve their disputes, the parties usually honor their agreement and proceed through the grievance process to final, binding arbitration.[16] While each contract is different, the arbitration process usually includes three progressive stages of notification and negotiation to resolve the grievance. The final step, if no agreement is reached, is binding arbitration.[17]

Grievance arbitration arises from challenges to the employer's imposition of discipline or discharge of an employee for some act or omission. It is understood that workers are expected to meet certain standards of conduct on the job, and if they fail to adhere to these standards, the employer will impose some discipline for that failure.[18] Each work environment is different, and each work place has its own "culture" with acceptable parameters of behavior; however, conduct by the work force that constitutes sexual harassment cannot be tolerated[19] and will result in discipline or discharge.[20]

III. MEDIATION

A. The Mediation Model

In its simplest form "[m]ediation is a process through which two or more disputing parties negotiate a voluntary settlement of their difference with the help of a 'third party' (the mediator) who typically has no stake in the outcome."[21] However, as mediation continues to grow, expand, and develop it is increasingly difficult to provide a single, universal definition of this process.[22] Nonetheless, this is considered to

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15. Thomas J. McDermott, *Arbitrability: The Courts Versus the Arbitrator*, 23 ARB. J. 18, 19 (1968).

16. ELKOURI & ELKOURI, *supra* note 1, at 23.

17. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, HOW ARBITRATION WORKS 52-64 (4th ed. Supp. 1985-89).

18. ARNOLD M. ZACK, GRIEVANCE ARBITRATION: ISSUES ON THE MERITS IN DISCIPLINE, DISCHARGE, AND CONTRACT INTERPRETATION 57 (1989).

19. This is usually in the form of an antidiscrimination clause in the collective bargaining agreement. Also, employers, well aware of their potential liability under federal law, implement antiharassment policies and work rules.

20. *See supra* note 19 and accompanying text.

21. NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 1 (1987).

22. *Id.*

be the "classic" mediation model.

Practitioners tend to agree that while there is no "best way" to mediate, certain basic techniques promote successful mediation.[23] Experienced mediators are adept at investigation, empathy, persuasion, invention, and distraction.[24] Using these skills, the mediator will: "encourage exchanges of information, . . . help the parties to understand each other's views, . . . promote a productive level of emotional expression, . . . help the parties realistically assess alternatives to settlement, . . . encourage flexibility, . . . stimulate the parties to suggest creative settlements, . . . and invent solutions that meet the fundamental interests of all the parties."[25]

In practice, mediation usually involves several overlapping stages: "introduction of the process by the mediator;" "presentation of viewpoints by each of the parties;" emotional expressions by the parties; "caucusing [the mediator meeting privately with a party] to discuss confidential information;" "exploration of alternative solutions" and forging an agreement that the parties find acceptable.[26]

In the early stages, mediators work "to establish their integrity, competence and concern for the parties" and their positions.[27] Later, through the use of "active" listening and open-ended questions, mediators are able to gather the information necessary to serve as a foundation for the ensuing discussions. As the session continues, it is common for mediators to meet with each side separately in a "caucus" to discover additional information that the party did not want to share in the joint session with the other disputant present. During this private meeting, the mediator may challenge the party's position and attempt to persuade him or her to hear and understand the other side's viewpoint.[28] In later caucuses, the mediator may suggest alternative settlement terms or test the parties' positions on proposals already discussed. "Mediators expect the

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23. *Id.* at 8; *see, e.g.*, Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91-106 (1981). Many of those principles have their foundation in labor (collective bargaining) mediation. WALTER A. MAGGIOLO, TECHNIQUES OF MEDIATION 91-104 (2d ed. 1985); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING (2d ed. 1986).

24. Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149, 152-154 (1988).

25. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 103 (2d ed. 1992).

26. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE 8 (1989).

27. *Id.* at 9.

28. *Id.*

parties to speak frankly in caucuses and may do so themselves in ways that would create hostility if done in a joint session."[29] Through a series of these joint and separate sessions, the mediator structures the parties' negotiations, encourages cooperative bargaining, and helps them reach a resolution that is satisfactory for all concerned.[30]

For mediation to be accepted as an alternative to an adjudicatory process, such as grievance arbitration, the mediator must be fair, impartial, and nonjudgmental; the process must be voluntary and free of bias; and the parties must be equals in the dispute. As mediation is adopted as the means to resolve more and more types of disputes, adherence to this criteria is crucial for the process to be considered appropriate and legitimate.

B. The Rise of Grievance Mediation

Grievance mediation[31] has rejoined arbitration on the labor dispute resolution landscape and is being promoted as a preferred alternative to grievance arbitration.[32] In contrast to grievance arbitration "[t]he essence of mediation . . . is compromise. . . . [The mediator's] aim is to persuade negotiators, by proposals or arguments, to come to voluntary agreement."[33] As such, each side is expected to compromise in order to develop a solution.[34] In its most common form, mediation is

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29. *Id.*

30. This is only a cursory overview of mediation. For a detailed description of the mediation process and mediator techniques see CHRISTOPHER W. MOORE, THE MEDIATION PROCESS (1986); PAUL M. LISNEK, A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION (1992).

31. Grievance mediation has a long history. The New York State Mediation Board offered grievance mediation in 1886, and mediation was used to resolve grievances in the anthracite coal industry in 1903. Caraway, *supra* note 2, at 495.

32. *See* Goldberg I, *supra* note 2; Goldberg II, *supra* note 2; *see also* Bierman & Youngblood, *supra* note 2; Caraway, *supra* note 2; Roberts et al., *supra* note 2; Skratek, *supra* note 2. Not only unions have followed this trend. In South Carolina, the State Commissioner of Labor is granted broad powers to deal with industrial disputes that arise between "employer and employees or capital and labor." S.C. CODE ANN. § 41-17-10 (Law. Co-op. 1976). The Commissioner has used these powers to establish the Labor Management Services (LMS) Division of the South Carolina Department of Labor. This agency implemented a grievance mediation program to handle discharge cases in the nonunion setting. However, it does not handle grievances involving allegations of race, age, sex, religious or national origin employment discrimination. Bierman & Youngblood, *supra* note 2, at 55.

33. ELKOURI & ELKOURI, *supra* note 1, at 4.

34. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING, *supra* note 17, at 56.

added as an additional step to the union grievance process.[35] Mediation is usually conducted after all the typical grievance steps have been completed except for arbitration, which is the final stage of the grievance process. The most widely known example of a union grievance mediation system was designed by Professor Goldberg for the United Mine Workers of America (UMWA) in the bituminous coal industry.[36] The UMWA model provided for mediation after all the steps of the grievance procedure, except arbitration, had been completed.[37] While discipline cases were subject to mediation, the UMWA plan did not provide for mediation in discharge cases.[38]

In the UMWA mediation scheme, the mediator facilitated the discussion of the parties. If they were unable to resolve the dispute, the mediator provided them with a nonbinding advisory opinion of the probable outcome if the matter were referred to arbitration.[39] In the event the parties went to arbitration, the individual who served as the mediator could not serve as the arbitrator in the matter.[40] Further, nothing said or done in the mediation by either party or by the mediator could be used in the arbitration hearing.[41] Using this procedure, eighty-nine percent of the grievances were successfully resolved through mediation; additionally, seventy-seven percent of the grievants whose disputes were mediated were satisfied with the process.[42] This model, with some variations, has been adopted in other settings.

The Washington Education Association (WEA), in cooperation with the Washington State School Directors' Association (WSSDA), also experimented with grievance mediation.[43] The matters sent to mediation included discipline, discharge, and discrimination cases.[44] While

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35. *See* Goldberg I, *supra* note 2; Goldberg II, *supra* note 2.

36. Goldberg & Brett, *supra* note 2, at 249; Goldberg I, *supra* note 2, at 11.

37. *See* Goldberg I, *supra* note 2.

38. Goldberg & Brett, *supra* note 2, at 249-50.

39. Goldberg I, *supra* note 2 at 11; Goldberg & Brett, *supra* note 2, at 250; *see also,* A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, *supra* note 17, at 56. This mediation model bears a striking resemblance to Early Neutral Evaluation. Early Neutral Evaluation is also known as E.N.E., Early Neutral Case Evaluation or Case Evaluation. For a more detailed description of this process, see Wayne D. Brazil et al., *Early Neutral Evaluation: an Experimental Effort to Expedite Dispute Resolution,* 69 JUDICATURE 279 (1986).

40. Goldberg I, *supra* note 2, at 11.

41. *Id.*

42. Goldberg & Brett, *supra* note 2, at 250-51.

43. Skratek, *supra* note 2, at 270.

44. *Id.* at 273.

employers were initially reluctant to engage in mediation in discipline and dismissal cases, they were made part of the grievance mediation study.[45]

The model employed by the WEA closely followed the UMWA model, with mediation being provided as a last step in the grievance process just prior to arbitration.[46] Like the UMWA program, if the parties were unable to settle the matter, the mediator provided them with a nonbinding, advisory opinion regarding the probable outcome of the case.[47] Similarly, if the matter continued on to arbitration, the mediator would not serve as the arbitrator and no information revealed in the mediation could be used at the hearing.[48]

Statistics for the WEA pilot project were similar to the UMWA. Thirty of the thirty-two grievances referred to mediation during the 1988 study were resolved as a result of the mediation conference.[49] The grievants' satisfaction rate with the process was eighty-eight percent, while the grievees' satisfaction rate was ninety percent. All of the union advocates were satisfied, and eighty-two percent of the management advocates were satisfied with the process.[50]

Grievance mediation programs have also been established in other areas. Southwestern Bell Telephone Company (SWBT) and District 6 of the Communications Workers of America (CWA) implemented a one year dispute resolution pilot project[51] that added mediation as a step to the parties' contractual grievance procedures.[52] "Designed to meet the need for an expeditious and inexpensive procedure for settling a heavy volume of local grievances, the program [sought] to creatively expand on a heavily taxed dispute resolution system."[53] The parties agreed to limit mediation to two specific issues: employee disciplinary suspension for just cause and employee dismissal for just cause.[54]

As in the other grievance mediation programs described, the mediator would challenge each side, plant some doubts, and encourage the

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45. *Id.*

46. *Id.*

47. *Id.* at 273.

48. Skratek, *supra* note 2, at 279.

49. *Id.* at 274.

50. *Id.* at 278.

51. Alan D. Silberman, *Breaking the Mold of Grievance Resolution: A Pilot Program in Mediation*, 44 ARB. J. 40 (1989). The project began on September 1, 1987. An earlier project was conducted three years before in a similar experiment with Southern Bell Telephone Company. *Id.* at 41.

52. *Id.*

53. *Id.*

54. *Id.*

parties to modify "their positions to be more acceptable to their opponent."[55] The emphasis was in preparing both sides to "compromise" to reach a settlement.[56] If the parties were unable to resolve the matter, the mediator provided them with "an immediate oral advisory opinion" to provide the parties with the benefit of the mediator's judgment regarding the outcome of the case. This opinion would serve as a foundation for further negotiation.[57]

Finally, grievance mediation has also been used to resolve disputes between the California public school systems and their unions.[58] The mediation has been conducted by the California State Mediation and Conciliation Service, a state agency primarily responsible for mediating impasses in union contract negotiations.[59]

As is the case in most, if not all, union grievance programs, the mediation is governed by the terms of the collective bargaining agreement. Akin to the other programs discussed, the California mediation program is conducted as a step towards arbitration. In case of impasse, the mediator gives the parties an evaluation of the case and its potential outcome.[60] In some instances, the mediator will render a written opinion as to the appropriate resolution of the grievance or will preside over a grievance adjustment board hearing. The board is composed of an equal number of union and management designees who take limited evidence[61] and issue a final, binding written decision based on a majority vote.[62] If there is no majority, there is no decision, and the matter continues to "formal" arbitration where staff mediators are not permitted to act as arbitrators.[63]

Ninety-two percent of all available grievances are processed

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55. Silberman, *supra* note 51, at 42.

56. *Id.* at 43.

57. *Id.* at 44.

58. This discussion of grievance mediation programs is by no means comprehensive. Instead, it is intended to be illustrative of the extent to which union grievance mediation has been used and to highlight the terms and conditions of the mediation model employed. There are other programs most of which share some if not all the terms already described. *See, e.g.*, Mollie H. Bowers et al., *Grievance Mediation: A Route to Resolution For the Cost-Conscious 1980s*, 33 LAB. L.J. 459 (1982); Thomas J. Quinn et al., *Grievance Mediation and Grievance Negotiation Skills: Building Collaborative Relationships*, 41 LAB. L.J. 762 (1990).

59. Caraway, *supra* note 2, at 496.

60. *Id.*

61. The hearing is mostly narrative evidence with no cross-examination of witnesses and little of the formality associated with arbitration hearings. *Id.*

62. *Id.*

63. *Id.* at 496-97.

through this mediation program.[64] It is deemed worthwhile because it saves time, money, and provides the participants flexibility in fashioning a remedy. Based at least in part on the "success" of these pilot projects, commentators have been quick to tout the informality, efficiency, speed and inexpensiveness of grievance mediation,[65] each adding a personal twist to the process and its use.[66] It is this process that is now being proposed as the preferred alternative for resolving sexual harassment grievances.[67] It is this "solution" of which we need to be wary.

IV. GENDER AND MEDIATION

A. Imbalance of Power

Imbalance of power between the disputants is a problem that mediators must often face. A great imbalance makes it impossible to resolve the dispute fairly because the weaker party cannot negotiate on an equal basis. There are different views on how to deal with a power imbalance. Some mediators advocate "rebalancing" the power during the session[68] while others recommend terminating the meeting. The pivotal criterion is whether there is "a substantial power disparity" between the disputants. If this exists, mediation is "inappropriate because it threatens

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64. Caraway, *supra* note 2, at 498-502.

65. "[T]he introduction of grievance mediation as a step prior to arbitration will yield faster, less expensive, and less time-consuming resolutions to all grievance disputes. . . ." Sylvia Skratek, *Grievance Mediation — Does It Really Work?*, MONT. ARB. ASS'N Q. IX, Winter 1989, at 1, *quoted in* Silberman, *supra* note 51, at 45. Interestingly enough, these are the same reasons that arbitration was preferred and championed over litigation for the resolution of labor disputes.

66. Quinn et al., *supra* note 58, at 762; Bowers et al., *supra* note 58, at 459; John C. Sigler, *Mediation of Grievances: An Alternative to Arbitration?*, 13 EMPLOYEE RELATIONS L.J. 266 (1987). *See generally supra* note 2.

67. Edward J. Costello, *The Mediation Alternative in Sex Harassment Cases*, 47 ARB. J. 16 (1992); Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOTIATION J. 139 (1991); Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161 (1990).

68. Of course, the risk in "balancing" the power is that the mediator then ceases being neutral and impartial, and instead takes on the role of advocate for the weaker party. At best, the mediator can act to help weaker parties effectively utilize whatever power they do possess. CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 282 (1986); LISNEK, *supra* note 30, at 10-12.

to exploit the apparent powerlessness of one disputant."[69] Because dealing with a power imbalance can be difficult and risky, it is imperative that the mediator be sensitive to its presence. If the mediator perceives the power imbalance to be so serious and unchangeable that an agreement would be unfair, then the mediator should terminate the process.[70]

Power can be based on a variety of factors including personality, strategic positions, tactical positions, or gender.[71] Power based on gender is not merely a difference in physical strength. It can be grounded in the emotional, psychological, or financial hold one person has over another.

Of course not every man-woman relationship has a gender-based power imbalance, nor are all imbalances destructive. However, a power imbalance is probably most starkly present in the realm of domestic mediation and abusive relationships. Much has been written about domestic relations mediation.[72] A prevailing sentiment among many mediators is that mediation is inappropriate when there has been conjugal violence.[73] One of the primary reasons mediation is avoided is because of the imbalance of power between the batterer and the victim.[74] This

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69. Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 17 (1985); *see also* MATTHEW LEVINE, POWER IMBALANCES IN VERMONT LAW SCHOOL DISPUTE RESOLUTION PROJECT, A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION 137 (1984).

70. LISNEK, *supra* note 30, at 10-13. For a discussion on defining a quality mediation, particularly with respect to this issue see Robert A Baruch, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989).

71. LISNEK, *supra* note 30, at 10-12.

72. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research in Mediation Research in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION (Kenneth Kressel & Dean C. Pruitt, eds., 1989); ROBERT DINGWALL & JOHN EEKELAAR, DIVORCE MEDIATION AND THE LEGAL PROCESS (1988); DIVORCE MEDIATION: THEORY AND PRACTICE (Jay Folberg & Ann Milne, eds., 1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, MEDIATION Q., Fall 1990, at 39.

73. Gagnon, *supra* note 7, at 15; Bethel & Singer, *supra* note 7, at 15; Rowe, *supra* note 7, at 855. It is not only the commentators that have addressed the issue of mediating domestic violence cases. In certain circumstances the law prohibits the use of mediation. ME. REV. STAT. ANN. tit. 19, § 768 (West Supp. 1992) (prohibiting mandated mediation in domestic violence cases); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993) (prohibiting mandated participation in domestic violence cases).

74. Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, MEDIATION Q., Summer 1990, at 317, 318; David B. Chandler, *Violence, Fear and Communication: The Variable Impact of Domestic Violence on Mediation*, MEDIATION Q., Summer 1990, at 331, 333; Kathleen O. Corcoran & James C.

imbalance makes it impossible for the weaker party[75] to enter into an agreement freely, knowingly, and without fear or coercion. Mediation under those conditions risks reaching an unfair agreement tainted by intimidation.

When a power relationship exists and is partially based on gender, it may have its roots in the basic societal differences between men and women. It has been theorized that men and women cannot share equivalent power in a patriarchy because "[a] society characterized by gender inequality, one that is differentiated and stratified by gender, and that has an institutionalized ideology justifying male domination in all socially significant contexts . . . is a society that routinely provides [men] with greater resources than [women]."[76]

An imbalance of power does not always exist between the sexes. However, there is usually some destructive gender power imbalance present in sexual harassment cases. In the workplace, particularly where women occupy sex-atypical jobs, gender-based power and its potential for being destructive becomes more acute. The power exercised by a harasser can manifest itself with many of the same characteristics as coercion and intimidation from which abused wives suffer. Like spousal abuse, the harassment can include: relentless criticism, isolation from the group, "intimidation, name-calling, mind games, shouting," threats, and unwanted touching.[77] In this charged, sometimes overwhelming atmosphere, a woman will sometimes "go along"[78] with male co-workers in a mistaken belief that by doing so she will show she can "get along" with the group and the harassment will cease. This is eerily similar to the battered spouse who believes if she just "tries harder" her partner will not hit her again.[79]

A United States Civil Rights Commission report articulated some serious problems with mediation in domestic violence cases:

Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation,* MEDIATION Q., Summer 1990, at 303, 311-12.

75. The weaker party is usually the woman. "Only five percent of all reported spouse abuse victims are men (*National Crime Statistics Report,* 1986)." Corcoran & Melamed, *supra* note 74, at 303.

76. Desmond Ellis, *Marital Conflict Mediation and Postseparation Wife Abuse,* 8 LAW & INEQ. J. 317, 330 (1990).

77. Corcoran & Melamed, *supra* note 74, at 305.

78. Victims commonly cope with harassment by participating in the offensive joking or behavior in an attempt to defuse the situation. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1519 (M.D. Fla. 1991).

79. "Chronically abused women repeatedly forgive their partners, accept the blame, and believe, *if they just try harder,* their relationship will work out." Corcoran & Melamed, *supra* note 74, at 305 (emphasis added).

> Mediation . . . place[s] the parties on equal footing and ask[s] them to negotiate an agreement for future behavior. · Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants' promises not to commit further crimes.[80]

With the parallels in power and behavior, the same could be said for sexual harassment grievance cases. The woman who is a victim of sexual harassment is often unaware of the power imbalance. The power exerted in this model makes a fair and equitable resolution through mediation impossible because the woman is not in an equal bargaining position with her harasser, and they are bargaining over matters that are not negotiable. As a result, mediation should be avoided as the means to resolve a grievance arising from this subjugative conduct.

V. SEXUAL HARASSMENT LAW

Pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor. Sexual harassment is often personified by "horseplay" and innuendo, and the law regulating such behavior is still developing. Bright lines need to be drawn to delineate acceptable conduct. The law is slowly evolving to provide the arbitrator with the objective standards needed to resolve the factual quagmires often present in these cases. This evolution places, in the hands of the arbitrator, tools to excise sexual harassment from the workplace. With these guidelines, the employer and the arbitrator can send a strong signal to workers that unacceptable behavior will be punished accordingly. This same message cannot be delivered by a mediator. It is better to have a fact-finder, the arbitrator, who will assess the actions in light of all the circumstances rather than a mediator who attempts to reconcile the parties, often by undermining the victim's position.

A. Forms of Sexual Harassment

Sexual harassment in employment is a type of sex discrimination

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80. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984) (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982)).

that is prohibited under Title VII of the Civil Rights Act of 1964.[81] For Title VII purposes, sexual harassment is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[82] This conduct constitutes harassment when one of three other criteria is met: (1) submission to such conduct is made, either explicitly or implicitly a term or condition of the worker's employment, (2) submission to or rejection of such conduct by a worker is used as a basis for employment decisions affecting the worker, or (3) such conduct has the purpose or effect of unreasonably interfering with a worker's job performance or creating an intimidating, hostile, or offensive work environment.[83]

There are two forms of sexual harassment: the tangible job benefit ("quid pro quo") harassment and the hostile work environment.[84] The quid pro quo harassment occurs when a supervisor conditions some aspect of employment over which he[85] has control on the worker's submission to sexual demands.[86] This is the clearest form of harassment. This "tangible job benefit" sexual harassment is between a superior and a subordinate. It less commonly results in a labor grievance action.[87]

The less clear form of harassment, and more common grievance action,[88] occurs when offensive conduct, usually by co-workers, creates a

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81. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 (1988). Title VII applies to all employers of 15 or more employees. *See also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile work environment" sexual harassment is a form of sex discrimination that is actionable under Title VII).

82. Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, C.F.R. § 1604.11(a) (1991). The threshold requirement is that the conduct is "unwelcome."

83. *Id.*

84. Martha F. Davis & Alison Wetherfield, *A Primer on Sexual Harassment Law*, 26 CLEARINGHOUSE REV. 306, 307 (1992); *see also* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

85. The law is gender neutral. Certainly a woman could sexually harass a male employee; however, in the vast majority of sexual harassment cases the victim is a woman. "Dr. Freada Klein, who is probably the best-known surveyor of this topic in the United States, agrees with me in estimating that 5% of men and 15% of women in the workplace feel seriously harassed each year on the basis of sexual harassment alone." Rowe, *supra* note 67, at 162; Gadlin, *supra* note 67, at 139 (noting that 95% of the complainants in sexual harassment cases are women).

86. Davis & Wetherfield, *supra* note 84, at 307.

87. Only 18.6% of the sexual harassment arbitration cases involved harassment by a supervisor. The vast majority (66.3%) were cases where the victim was harassed by a co-worker. Helen LaVan, *Decisional Model for Predicting Outcomes of Arbitrated Sexual Harassment Disputes*, 44 LAB. L.J. 230, 236 (1993).

88. *Id.*

hostile work environment that changes the victim's terms and conditions of employment.[89] In assessing "environmental" harassment, the offending conduct is viewed in its totality to determine whether the conduct "creates an intimidating, hostile, or offensive work environment."[90] The more outrageous the behavior, the less pervasive it needs to be. Likewise, the more pervasive the harassment, the less severe the individual acts need to be to support a claim of harassment. As a result, numerous "minor" incidents viewed together may constitute harassment.[91] Harmful intent is not required. Well-intentioned remarks may support a harassment claim if sufficiently severe or pervasive.[92] The worker who engages in this offensive conduct is subject to discipline. The critical issue is then: From whose perspective is the conduct judged for offensiveness?

B. The Reasonable Woman Standard

The evidence of a hostile work environment is evaluated under an objective standard. In ratifying the theory of the hostile work environment, the United States Supreme Court in *Meritor Savings Bank v. Vinson*[93] defined harassment from the perspective of the objective, gender-neutral, reasonable person.[94] That standard has slowly evolved. Instead of examining the behavior from a gender-neutral perspective, the offending conduct is now assessed from the view of a "reasonable person in the same circumstances."[95]

Two recent federal court decisions, *Ellison v. Brady*[96] and *Robinson v. Jacksonville Shipyards, Inc.*,[97] reflect a growing trend among the courts to define environmental harassment using the reasonable woman standard.[98] Each held that it is the victim's perspective that must be used

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89. Steven H. Winterbauer, *Sexual Harassment—The Reasonable Woman Standard*, 7 LAB. LAW. 811, 811 (1991).

90. George M. Sullivan & William A. Nowlin, *Critical New Aspects of Sex Harassment Law*, 37 LAB. L.J. 617, 617 (1986).

91. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

92. Winterbauer, *supra* note 89, at 812.

93. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

94. *Id.* at 69.

95. Davis & Wetherfield, *supra* note 84, at 307.

96. 924 F.2d 872 (9th Cir. 1991).

97. 760 F. Supp. 1486 (M.D. Fla. 1991).

98. Winterbauer, *supra* note 89, at 811.

to decide what conduct creates a hostile work environment.[99] This means that when the victim of the harassment is female, the perspective used is that of the reasonable woman.

In rejecting the "reasonable person" standard in favor of the victim's perspective, the court in *Ellison* accepted the assumption that men and women have different views of what constitutes harassment. This difference is based at least in part on a woman's greater susceptibility to sexual assault than a man. As a result, the court reasoned that even faced with "mild" harassment, a woman "may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault."[100]

In adopting the reasonable woman standard, the court attempted to eliminate the perpetuation of existing discriminatory practices that men, but not women, find acceptable.[101] The court went on to state that the "pervasive and severe" requirement refers to the conduct of the harasser. The victim need not show that conduct had a "severe" effect on her psychological well-being.[102]

Workplace culture is not a defense to environmental harassment. In *Robinson*, a female welder was subjected to a constant barrage of verbal and visual harassment from her male co-workers. When she was unsuccessful in getting her supervisors to remedy the problem she filed suit. The employer argued that the shipyard was a male-dominated, roughhewn, and vulgar workplace and that by choosing to work there, Robinson had knowingly subjected herself to such behavior. The court rejected the employer's argument, holding that Title VII was not intended as a shield to protect preexisting abusive work environments but rather was intended as a sword to battle such conditions.[103] The court upheld the trend that expects behavioral changes in the workplace. The workplace culture must change to accommodate the sensibilities of women as they enter sex-atypical and traditionally male-dominated fields.

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99. *Ellison*, 924 F.2d at 878; *Robinson*, 760 F. Supp. at 1522. These are not the first federal courts to adopt the reasonable woman standard. The standard was adopted in 1987 by the Sixth Circuit in Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987), and in 1989 by the Third Circuit in Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1989).

100. *Ellison*, 924 F.2d at 879.

101. *Id.*

102. *Id.* at 878.

103. *Robinson*, 760 F. Supp. at 1526.

> The entire thrust of the reasonable woman standard is to alter, not reinforce, prevailing stereotypes and generally tolerated, if not accepted, discriminatory practices. If the conduct is sufficiently severe or pervasive in the eyes of the reasonable woman, it is sexual harassment, irrespective of how commonplace the practice may be in society at large.[104]

The message to employers is clear: They must respond to harassment with strong disapproval and with discipline or discharge of the offending worker.

C. The Use of External Law in Grievance Arbitration

Much has been written on the subject of whether an arbitrator may apply external law in a grievance arbitration.[105] One view is that the arbitrator is confined to the interpretation and application of the contract language and is forbidden to add to or modify the terms of the agreement. In other words, the arbitrator is bound by the "internal law" of the collective bargaining agreement and must apply it exclusively.[106] The contrary view is that it is sometimes necessary and appropriate for the arbitrator to consider principles of "external law" when interpreting and enforcing a contract's provisions.[107] As a result of this debate, some arbitrators take the position that every contract embodies the law and as such, the arbitrator must interpret and apply all the law when interpreting the collective bargaining agreement.[108] The other side argues that the arbitrator's power derives solely from the contract, and if the contract and the law are in conflict, then the arbitrator is bound to follow the terms of the agreement.[109] This is the majority view. While an arbitrator may look to many sources for guidance, the arbitrator may not base his or her award solely upon the arbitrator's view of the requirements of the

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104. Winterbauer, *supra* note 89, at 818.

105. Jay E. Grenig, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. & EDUC. 515 (1989); George R. Fleischli, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. & EDUC. 505 (1989); Theodore St. Antoine, *Deferral to Arbitration and Use of External Law in Arbitration*, 10 INDUS. REL. J. 19 (1988). This is just a sample. The National Academy of Arbitrators' Annual Meeting often results in spirited debate and papers that address this issue.

106. Grenig, *supra* note 105, at 515.

107. Fleischli, *supra* note 105, at 505.

108. Grenig, *supra* note 105, at 517.

109. *Id.* at 520.

law.[110] An award will not be enforced if it exceeds the scope of the submission or if it is based on the arbitrator's "view of the requirements of enacted legislation."[111] That is not to say that external law is not used by arbitrators in reaching their decisions.

Some collective bargaining agreements incorporate external law into the contract. As such, when the parties expressly incorporate language into their contract that is identical to a statute or regulation, the arbitrator must interpret that statute or regulation in reaching his or her decision.[112] Consequently, when a contract provides its employees with protection from sexual harassment using language similar to existing external law, the arbitrator is permitted or even required to rely, at least in part, on decisional law in interpreting the offending worker's conduct.

More problematic is the use of external law where the contract contains only a vague "antidiscrimination" clause. Arbitrators' decisions must draw their essence from the contract; however, the contract cannot be read in a legal vacuum. The arbitrator may consider external law in interpreting ambiguous or vague contract language.[113]

Arbitrators are selected for their judgment and for their ability to interpret collective bargaining agreements to reflect the intent of the parties. In judging the conduct of a worker, the arbitrator must be keenly aware of the parties' intent to eradicate sexual harassment as evidenced by their inclusion of an "antidiscrimination" clause into the contract.[114] Arbitrators should exercise their judgment in applying the current standards. "[A]rbitrators today 'are not afraid to look to applicable statutory and decisional law [and] will apply it if it is relevant.' In short, modern arbitrators seem prepared to take on this added responsibility."[115]

Clearly under the *Steelworkers*[116] trilogy, the arbitrator is

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110. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

111. Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974) (quoting *United Steelworkers*, 363 U.S. at 597).

112. Grenig, *supra* note 105, at 518-19.

113. *Id.* at 526.

114. "Collective bargaining agreements increasingly contain antidiscrimination [sic] clauses that include Title VII prohibitions (Hauck and Pearch, 1992)." LaVan, *supra* note 87, at 231.

115. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, *supra* note 17, at 88 (quoting Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared,* PROCEEDINGS OF 39TH ANNUAL MEETING OF NAA, at 108).

116. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

required to follow the terms of the contract and not the civil rights law. "If there is a conflict between the contract and Title VII, the arbitrator . . . must follow the agreement;" however, "where the contract is silent or the contract has antidiscrimination language requiring the law to be followed, the arbitrator can, and perhaps must, turn to Title VII."[117] In interpreting general antidiscrimination clauses, arbitrators have the use of *Ellison, Robinson,* and *Vinson* in their arsenal.

In applying these standards, the arbitrator is in a better position to enforce the parties' intent to eliminate sexual harassment in the workplace by sending a strong signal that such conduct will not be tolerated and will be punished appropriately. This cannot be done if the case is subjected to grievance mediation in which the goal is "compromise."

VI. SEXUAL HARASSMENT GRIEVANCES

A. Sexual Harassment Grievances

Collective bargaining contracts protect workers from sexual harassment through antidiscrimination clauses.[118] In compliance with these clauses, employers implement policies and work rules prohibiting sexual harassment. Enforcement of these rules and policies lead to grievances.

In the union context, most sexual harassment grievances arise as the result of the discipline or discharge of the harasser, rather than as a grievance filed by the victim of the harassment.[119] Generally, the collective bargaining agreement provides that no employee shall be disciplined or discharged without a showing of "just cause."[120] The just

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117. Thomas G. Hauck & Vern E. Pearch, *Sexual Harassment and Arbitration,* 43 LAB. L.J. 31, 34 (1992).

118. "Collective bargaining agreements increasingly contain antidiscrimination [sic] clauses that include Title VII prohibitions (Hauck and Pearch, 1992)." LaVan, *supra* note 87, at 231; Pearce & Flasch, *Sexual Harassment Polices in the Organization,* PROCEEDINGS OF THE SOUTHWEST DIVISION REGIONAL MEETING OF THE ACADEMY OF MANAGEMENT 193-97 (March 12, 1987).

119. Hauck & Pearch, *supra* note 117, at 31; Arjun P. Aggarwal, *Arbitral Review of Sexual Harassment in the Canadian Workplace,* 46 ARB. J. 4 (1991); LaVan, *supra* note 87, at 230; Jonathan S. Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases,* 37 LAB. L.J. 713 (1986).

120. To establish whether the employer has "just cause" to discipline the grievant the following criteria must be met: 1) the alleged misconduct must be proven to the satisfaction of the arbitrator, 2) the misconduct must warrant disciplinary action, 3) there must be no extenuating circumstances that might mitigate the guilt of the grievant, 4) there must be no

cause rule leads to a final binding grievance arbitration award if the worker disagrees with the discipline imposed for his actions.

An analysis of these awards reveals the nature of union workplace sexual harassment grievances. The harasser is usually a co-worker of the victim.[121] The conduct most often disciplined involves sexual comments, innuendo, or jokes.[122] Staring, looks, and suggestive leers have the next highest incident rates.[123] Unwanted sexual touching and sexual propositions are the least reported forms of harassment.[124] In the majority of the cases the discipline imposed is suspension or discharge of the harasser.[125] It is into this environment that proponents want to inject grievance mediation.

B. Gender and Sexual Harassment Grievances

A significant problem confronting eradication of sexual harassment from the workplace is feminine guilt. Many female victims of harassment wonder whether "they might be at fault in part themselves."[126] As a result, they feel compelled to monitor their own

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proof that the employer had discriminatory reasons for administering the discipline, 5) the misconduct affected the employer-employee relationship and 6) the discipline was appropriate for the offense. Jean T. McKelvey, *Discipline and Discharge, in* ARBITRATION IN PRACTICE 91 (Arnold M. Zack ed., 1984); MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, REMEDIES IN ARBITRATION 552 (2d ed. 1991); *Enterprise Wire Co.*, 46 LAB. ARB. (BNA) 359 (1966) (Daugherty, Arb.). Discharge, as the ultimate discipline, is considered "industrial capital punishment." As such some arbitrators use "beyond a reasonable doubt" as the proof necessary to uphold the termination. This burden has been challenged by other arbitrators as unreasonable. *See* ELKOURI & ELKOURI, *supra* note 1, at 661-63 and the cases cited therein. *But see* McKelvey, *supra* at 99.

121. In a study of one hundred published labor arbitration awards "[s]eventy-two percent of the awards concerned sexual harassment by co-workers, five percent concerned supervisors, and four percent concerned non-employees." Hauck & Pearch, *supra* note 117, at 38. Only 18.6% of the sexual harassment arbitration cases involved harassment by a supervisor. The vast majority (66.3%) were cases where the victim was harassed by a co-worker. LaVan, *supra* note 87, at 236.

122. LaVan, *supra* note 87, at 230; Hauck & Pearch, *supra* note 117, at 31 (stating that the most common conduct complained of involved lewd language or gestures).

123. The incident rate for such acts was at least 27% in this study. LaVan, *supra* note 87, at 230.

124. Unwanted touching rates were 24%, and propositions were reported at a rate of over 20%. *Id.*

125. Monat & Gomez, *supra* note 119, at 715; Hauck & Pearch, *supra* note 117, at 31.

126. Patricia A. Gwartney-Gibbs & Denise H. Lach, *Workplace Dispute Resolution and Gender Inequality*, 7 NEGOTIATION J. 187, 191 (1991); Winterbauer, *supra* note 89, at 817.

behavior rather than seek to have the harasser change his behavior.[127] This dynamic mirrors the sense of responsibility that a victim in an abusive domestic relationship feels.[128]

Part of this problem stems from a societal prohibition against anger in women. "Despite changes brought about by the recent feminist movement, expressions of anger and aggression are still considered 'masculine' in men, and 'unfeminine' in women."[129] As such, these societal prohibitions make it difficult, if not impossible for many women to be "directly, clearly, self-assertively angry"[130] because "[i]t is considered unfeminine to be angry, even angry with good reason."[131] Confronted with the inability to express anger, some women are vulnerable to victimization. This interferes with their ability to be self-assertive and competitive.[132] Instead of fighting back, these women stay silent and cultivate an unconscious rage, which they may experience through depression, hurt, or guilt.[133] These feelings of guilt and responsibility for the offending conduct explain, in part, why victims file so few sexual harassment grievances. It also is a warning that women who are victims of sexual harassment should not be subjected to the subtle and not-so-subtle pressures of grievance mediation.

Mediation involves more than resolving differences. Mediators and uninformed parties would be naive not to appreciate the interpersonal power dynamics at work in the session. "Men may not comprehend their role in this system of sexual domination [domestic violence] any more than women may be able to articulate the source of their feeling of disempowerment. Yet both of these dynamics are at work in the mediation setting."[134] Arbitration, with its bright lines, can cut through this disempowerment by recognizing the misconduct for what it is. Only in fact-finding are the parties equal.

Arbitration is not a panacea in all cases. Unfortunately, a victim's self-castigation is reinforced by some commentators and sadly, even by some labor arbitrators. It is unacceptable when employers are admonished to "not overreact when there is no evidence of intent to

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127. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505 (M.D. Fla. 1991).

128. Corcoran & Melamed, *supra* note 74, at 305.

129. Grillo, *supra* note 72, at 1576 (quoting Harriet Lerner, *Internal Prohibitions Against Female Anger*, 40 AM. J. PSYCHOANALYSIS, 137, 138 (1980)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1576.

134. Grillo, *supra* note 72, at 1605.

intimidate and harass"[135] or when the victim is made to appear at fault for the harassment because she "overreact[ed] to simple horseplay, [or] when touching is a normal office practice."[136] This problem is exacerbated when the victim is scrutinized for her behavior, speech or dress to see if "she asked for it."[137] This harkens back to the earlier days of rape prosecution when the victim was accused of inviting her attack.

When a commentator or arbitrator talks about "excessive" harassment,[138] it implies that "some" harassment is acceptable if the harasser does not have an otherwise tarnished work record.[139] This is particularly troubling when the analysis is couched in terms such as "a poor work record may be used to substantiate a claim that sexual harassment is unacceptable."[140] This is a clear signal to workers that so long as they are valuable producers they will be given the benefit of the doubt when their conduct towards their female co-workers is scrutinized.

Fortunately, not all arbitrators condone such conduct, and their awards reflect their intolerance of sexual harassment. An individual arbitration award is not binding precedent from one arbitration to another.[141] However, the decisions of arbitrators confronted with similar problems can be illustrative in showing how some arbitrators are dealing with sexual harassment. Decisions also show that some behavior is so egregious that once proven, reasonable minds cannot differ on the penalty.

Arbitrators are known and evaluated by the quality of their awards. Those arbitrators who reflect a tolerance for sexual harassment, unless it is "excessive" or coupled with other work deficiencies, will soon find themselves without work, as employers and unions, eager to rid the workplace of sexual harassment, no longer select them. This same marketplace pressure cannot be exerted against a mediator whose work is

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135. Monat & Gomez, *supra* note 119, at 715.

136. Hauck & Pearch, *supra* note 117, at 35 (citing King Soopers, Inc. 86 Lab. Arb. (BNA) 254 (1985), DOD Scott AFB, IL, LAIRS 15931 (1984) and Zia Company, 84 FLRR 2-2205 (1984)).

137. Hauck & Pearch, *supra* note 117, at 38.

138. *Id.* at 35 (citing Chicago Social Security Administration, 84 FLRR 2-2078 (1983)).

139. *Id.* (citing DOD Robins AFB, GA, LAIRS 17589 (1986)).

140. *Id.*

141. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, ARBITRATION IN PRACTICE, app. at 225 (Arnold M. Zack ed. 1984). The Code provides "an arbitrator must assume full personal responsibility for the decision in each case decided" and "the extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing." Code at G(1) and G(1)(a).

cloaked in confidentiality, persuasion, and subtle pressure.

Sexual harassment and the punishment for such conduct should not be subject to compromise or reconciliation. "The glories of cooperation . . . are easily exaggerated. If one party appreciates cooperation more than the other, the parties might compromise unequally. Moreover, the self-disclosure that cooperation requires, when imposed and not sought by the parties, may feel and be invasive."[142] This is very true in sexual harassment cases.

Men and woman simply do not perceive the same event in the same way. Research has shown that women find sexual conduct in the workplace more disturbing than men do. "When a survey asked people how they would respond to being sexually approached in the workplace, approximately two-thirds of the men said they would be flattered, whereas two-thirds of the women said they would be insulted."[143] This difference in perception is perhaps the origin of sexual harassment behavior. Education can help cure this misperception of the welcomeness of an unsolicited proposition. Nonetheless, unwanted and unwelcome sexual conduct must be eliminated for the health of the workplace. If an employer values its female workers, gender insults and sexual harassment must be stopped.[144] Grievance mediation will not accomplish that goal.

C. Conflict of Interest and Sexual Harassment Grievances

While not the focus of this article, there is another consideration in deciding if mediation is appropriate: the union's duty of fair representation. The union's duty of fair representation of its members is a serious one, and the consequences are grave if the union fails in its responsibility.[145] The duty is complicated by the dual representative capacity the union serves in the case of a grievance based on sexual harassment. The union can find itself caught in the middle of the dispute.[146] Not only does the union represent the harasser in his grievance of the discipline or discharge he received because of his actions, but more often then not the victim of his actions is also a union member.

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142. Grillo, *supra* note 72, at 1608.

143. Winterbauer, *supra* note 89, at 817 (citing Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1505 (M.D. Fla. 1991)).

144. Aggarwal, *supra* note 119, at 60.

145. Failure by the union to take the employee's grievance to arbitration could result in the union being subject to a federal court action for breach of the duty of fair representation. Bowen v. U.S. Postal Serv., 459 U.S. 212 (1983); Robert J. Rabin, *The Impact of the Duty of Fair Representation Upon Labor Arbitration*, 29 SYRACUSE L. REV. 851 (1978).

146. LaVan, *supra* note 87, at 231.

As a result, a conflict of interest arises as the union attempts to serve two members, each with a decidedly different interest in the grievance and its outcome. This places undue pressure on the harassment victim, usually a woman, to minimize her abuse.

The victim is the loser in this conflict. A better procedure may be to have the victim aligned with management in the arbitration as the victim-witness of the harassment whose perpetrator has been disciplined. This eliminates the union's conflict because her abuse will be presented fully and completely by the employer to substantiate its disciplinary actions.

VII. CONCLUSION

Arbitration is not perfect. There will always be arbitrators who find odious conduct to be nothing more than "boys will be boys." However, grievance mediation is not the solution. Mediation poses a greater process danger to the victims of sexual harassment than arbitration. That process danger is partially due to the fact that most victims are women.[147] Much of it is due to the nature of grievance mediation as it is practiced, and the dynamics of the mediation process itself. "[F]orcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them . . . or good for the system."[148] Some will argue that education, not discipline, is the way to eliminate sexual harassment. There is an enormous need to teach the work force what is acceptable conduct even at the roughest work sites. The preferred place for this education is outside the disciplinary setting. Nonetheless, discipline and discharge must remain the "iron fist" of punishment in the "velvet glove" of education. A strong, clear message must be sent to transgressors. That message must not be diluted by the vagaries that result from the "compromise" of mediation. Too much is at stake.

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147. "[M]ediation as a process is not necessarily good or bad for women's interests; it depends on who the mediator is and what model of mediation is being used." Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 53 n.78 (1985). However, "critics claim that mediation is detrimental to the interests of women, who, being less empowered, need both the formal legal system and aggressive legal representation to protect existing rights and pursue new legal safeguards." Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 22 (footnote omitted) (1984).

148. Grillo, *supra* note 72, at 1607.

Victims of sexual harassment must know that their harassers will be punished and that they will not be prodded to minimize their abuse in the guise of mediation and reconciliation. The victim is not the only benefactor from the public discipline of the harasser. How the employer, and ultimately the arbitrator, treat harassers has a profound impact on female workers. Victims of harassment, as well their female co-workers, are liable to view reinstatement or reduction in discipline "of the harasser as a slap in their face as well as a slap on the wrist of the offender."[149]

Reinstatement or reduction of penalty could and probably would be a common result of grievance mediation. It may create fear and resentment among the female work force, and it sends "the wrong signal to other employees, particularly bullying male workers."[150] The psychological cost of this informal dispute resolution mechanism to the female work force would be high indeed.

Arbitration does not benefit the female workers alone. Male employees have the right to know what conduct and behavior is appropriate and acceptable. Mediation would leave doubts in the work force as to what conduct is permitted. However, vigorous enforcement through arbitration of the antiharassment work rules and the antidiscrimination clause in the contract sends the correct message that sexual harassment will not be tolerated.

Some will argue that mediation as a step toward grievance arbitration cannot do any harm. That is not the case. With settlement rates well in excess of the eighty percent range, grievance mediation would have a significant impact on how these cases would be resolved.

In grievance mediation, the victim is unrepresented and may not even be at the table when union and employer negotiate a resolution. In a situation where the victim is made part of the mediation and the disciplined worker is grieving to avoid discharge or suspension, the pressure on her would be enormous to capitulate and go along with a compromise. As a result, "[f]orcing mediation can produce a situation in which the [person] with the fewest scruples wins."[151]

In the case of grievance mediation, it is the harasser who is confronted with discharge or discipline. He has the most to lose in the arbitration and the most to gain in manipulating the mediation. It would be the victim of the harassment that would be the object of that manipulation, and the one who would suffer the most from it.

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149. Aggarwal, *supra* note 119, at 15.

150. *Id.*

151. Grillo, *supra* note 72, at 1584.

It is this manipulative potential of mediation[152] that is one of its greatest weaknesses. It should not be used in a setting fraught with so many dangers for the female victim. Just because it has been reported that many find mediation helpful does not mean everyone would profit from the experience, or that it is appropriate in every case.[153]

Because of its flexible, informal nature mediation has been challenged as never appropriate[154] or as inappropriate under certain circumstances.[155] However, mediation is generally recognized as a useful means of resolving some disputes in a variety of fora.[156] Nonetheless, Professor Fuller, while a supporter of mediation, recognizes its limitation. He wrote:

> A pervasive use of mediation could . . . obliterate the essential guideposts and boundary markers men need in orienting their actions toward one another and could end by producing a situation in which no one could know precisely where he stood or how he might get where he wanted to be. As between black and white, gray may sometimes seem an acceptable compromise, but there are circumstances in which it is essential to work hard toward keeping things black and white.[157]

Professor Rosenberg put it another way: "[l]et the [f]orum [f]it the [f]uss."[158]

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152. Rifkin, *supra* note 147, at 21.

153. Grillo, *supra* note 72, at 1606.

154. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

155. Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 OHIO ST. J. ON DISP. RESOL. 129 (1989); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328 (1971); *see also* Gagnon, *supra* note 7, at 272; Grillo, *supra* note 72, at 1547; Rifkin, *supra* note 147; Rowe, *supra* note 7, at 855.

156. JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); JAMES E. CROWFOOT & JULIA M. WONDOLLECK, ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION (1991); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE 429, 440 (Jay Folberg & Ann Milne eds., 1988); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981).

157. Fuller, *supra* note 155, at 328.

158. Introductory Remarks of Maurice Rosenberg as Moderator, Panel II: Let the Tribunal Fit the Case — Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms, *Current Developments in Judicial Administration: Papers Presented at the Plenary Session of the American Association of Law Schools*, 80 F.R.D. 147, 166 (1977).

In the headlong rush to add mediation to the labor grievance dispute resolution arsenal,[159] we should not lose sight of the fact that not every forum is appropriate for every fuss. We should be wary of situations where "mediation becomes a wolf in sheep's clothing."[160] The sexual harassment grievance is just such a situation.

159. Not all voices are praising grievance mediation. "But, before the praise gets any greater and the use more widespread, the grievance mediation process deserves much more careful scrutiny than it has received." Feuille, *supra* note 3, at 142.

160. Grillo, *supra* note 72, at 1610.

NOTES

SHATTERING THE MYTH: MEDIATING SEXUAL HARASSMENT DISPUTES IN THE WORKPLACE

*Carrie A. Bond**

"The great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive and realistic. Too often we hold fast to the clichés of our forebears."[1]

INTRODUCTION

Sexual harassment has infected the American workplace. Studies put the incidence of sexual harassment at fifty percent to eighty percent of all working women,[2] with five percent of men and fifteen percent of women suffering sexual harassment each year.[3] The Equal Employment Opportunity Commission ("EEOC"), the government agency responsible for ensuring equal employment in the workplace,[4]

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* I would like to thank my husband for his continued love and support in every way, and my parents for their encouragement and the example they have set as parents, people, and workplace managers. I would also like to thank Professors George Friedman and Nolan-Haley for their guidance with this Note.

1. John F. Kennedy, Commencement Speech at Yale, *in* The Great Thoughts 226, 226 (George Seldes ed., 1985) (1962).

2. Susan R. Meredith, *Using Fact Finders to Probe Workplace Claims of Sexual Harassment*, 47 Arb. J. 61, 61 (1992). These are the more conservative figures; one of the earliest mainstream sexual harassment surveys, a *Redbook* poll cited by Meredith, shows that 90% of 9,000 women surveyed in 1976 reported being harassed at work. Claire Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, Redbook, Nov. 1976, at 149, 217.

3. Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 Negotiation J. 161, 162 (1990). Because in the majority of cases the victim of sexual harassment is female, this Note will refer to the victim as "she." This is not to discount the significant number of male victims of harassment who seek legal relief. *See, e.g.*, Yeary v. Goodwill Indus.-Knoxville, Inc., No. 96-5145, 1997 WL 73312, at *7 (6th Cir. Feb. 24, 1997) (upholding male complainant's same-sex sexual harassment claim); Schrader v. E.G. & G., Inc., No. CIV.A.95-B-870, 1997 WL 61018, at *9 (D. Colo. Feb. 7, 1997) (dismissing male plaintiff's claim for sexual harassment by female supervisor). This Note also uses the terms "victim" and "complainant" interchangeably although a legal complaint has not necessarily been filed.

4. Reorganization Plan 1 of 1978, 5 U.S.C. app. § 3 (1994) (transferring authority for agency determinations of sexual harassment from the Civil Service Commission to the Equal Employment Opportunity Commission). The EEOC ("EEOC") instructs potential victims that "[c]harges of sexual harassment may be filed at any field office of the U.S. Equal Employment Opportunity Commission." *Facts About Sexual Harassment, in* The United States Equal Employment Opportunity Commission Technical Assistance Program, Sex Discrimination B-4, B-4 (1995) [hereinafter Sex Discrimination]. The job of the EEOC is to receive complaints, investigate them, attempt conciliation, and litigate claims on the behalf of the victims. Edward J. Costello, Jr., *The Mediation Alternative in Sex Harassment Cases*, 47 Arb. J. 16, 18 (1992). In practice, the EEOC meets few of these goals, and "[t]he only thing all parties can be relatively

has a backlog of over 80,000 sexual harassment cases.[5] This is especially remarkable given that the percentage of sexual harassment claims actually reported is traditionally very low.[6]

Sexual harassment in the workplace has also been a frequent topic in the news over the last few years, as evidenced by the extensive national coverage of both the Anita Hill and Clarence Thomas hearings[7] and the sexual harassment allegations against Baker & McKenzie, one of the country's largest law firms.[8] Too often, employers consider their dispute resolution policies, or lack thereof, *after* an incident of sexual harassment, rather than designing policies as a preventative measure. Neither arbitration nor civil litigation, both costly in time and money, provide any solution to such a socially detrimental and pervasive problem. Disputants should not resort to litigation and arbitration simply because those are the methods that they have always employed.

This Note provides a contractual provision that proposes mediation as a method for resolving sexual harassment disputes. Mediation offers a potential plaintiff all of the remedies available in litigation, including cash settlements, in addition to other remedies that can be specifically tailored to the individual plaintiff's situation. Part I discusses the serious problem of sexual harassment in the workplace. Part II sets forth the two most common dispute resolution methods for sexual harassment claims, litigation and arbitration, and explains why both are ultimately ill-suited for resolving sexual harassment dis-

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sure of at the EEOC level is that the complainant will have to wait six months before doing anything else about the complaint." *Id.* The EEOC does pass guidelines, however, on how the federal regulations defining sexual harassment should be interpreted. *See infra* note 46 and accompanying text. These guidelines are frequently relied on by the courts in their determinations of unlawful and harassing conduct. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

5. Nadya Aswad, *ADR: Many Attorneys Welcome EEOC Decision to Refer Charges to Federal Mediators*, 200 Daily Lab. Rep. (BNA) A-8 (Oct. 16, 1996). In fact, as a result of the backlog, the EEOC has agreed, in conjunction with the Federal Mediation and Conciliation Service, to offer mediation for discrimination claims. *Id.*

6. Stephanie Riger, *Gender Dilemmas in Sexual Harassment Policies and Procedures, in* Sexual Harassment 197, 198 (Edmund Wall ed., 1992); *Hearings on H.R. 1, The Civil Rights Act of 1991: Hearings Before the House Comm. on Education and Labor*, 102d Congress, 1st Sess. 168, 172 (1991) [hereinafter The Civil Rights Act of 1991: Hearings] (statement of Dr. Freada Klein) (indicating that more than 90% of sexual harassment victims are unwilling to report the incidents).

7. *See, e.g.*, Jill Abramson & David Shribman, *High Court Drama: Sex Harassment Furor Jeopardizes Thomas, Embarrasses Politicians*, Wall St. J., Oct. 9, 1991, at A1 (discussing how Anita Hill's allegations of sexual harassment impacted Justice Thomas' Supreme Court nomination); *see also* Anna D. Smith, *The Most Riveting Television: The Hill-Thomas Hearings and Popular Culture, in* Race, Gender, and Power in America 248, 248 (Anita F. Hill & Emma C. Jordan eds., 1995) ("The Hill-Thomas hearings were one of the most watched public events in the history of television.").

8. *See, e.g.*, *Sex-Harassment Award Reduced*, N.Y. Times, Nov. 29, 1994, at A22 (discussing a California state judge's reduction of compensatory and punitive damages awarded to plaintiff Rena Weeks).

putes. Part III provides an introduction to mediation and explains why mediation is the preferable forum for resolving most sexual harassment disputes. Part IV offers a sample mediation provision appropriate for integration into an employment contract or handbook. Finally, part V carefully parses the contractual agreement proposed in part IV, offering justifications for each clause of the provision. This Note stresses the central role that mediation should play in an employer's sexual harassment policy to minimize the effects of illegal conduct on workers and the workplace.

I. THE REALITY OF SEXUAL HARASSMENT

Any policy aimed at eradicating workplace sexual harassment must first face the "formidable task" of defining sexual harassment.[9] Because the harassment occurs in the workplace, a highly social environment, a delineation must be made between illegal conduct and ordinary social interaction.[10] Once harassment is identified, Title VII, the federal anti-discrimination statute,[11] is the primary legal vehicle through which an employee can seek relief.[12] Yet sexual harassment has only existed as a cause of action under Title VII for twenty years.[13] Nevertheless, these twenty years have produced a wealth of

9. Cynthia F. Cohen, *Legal Dilemmas in Sexual Harassment Cases*, 38 Lab. L.J. 681, 681 (1987). Sexual harassment is itself "a term of art—a statutory concept that derives from an interpretation of Title VII's prohibition against sex discrimination." Tim Bornstein, *Arbitration of Sexual Harassment*, *in* Arbitrating Sexual Harassment Cases 1-31, 1-32 (Vern E. Hauck ed., 1995). Sexual harassment is difficult to define because it encompasses such a diverse range of behavior, from off-color jokes to workplace rape. The Civil Rights Act of 1991: Hearings, *supra* note 6, at 185 (statement of Dr. Freada Klein). Further, sexual harassment is both "subjective" and "context-dependent." *Id.*

10. Cohen, *supra* note 9, at 681.

11. 42 U.S.C. § 2000e-2(a) (1994) provides in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id.

12. Title VII, however, is not the only course of action for an injured sexual harassment plaintiff. *See infra* note 118 and accompanying text.

13. Sexual harassment was first held to be actionable under Title VII in Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), *rev'd*, 587 F.2d 1240 (D.C. Cir. 1978) (reversing summary judgment for the employee for a trial de novo). The Supreme Court subsequently agreed with the *Williams* court, finding a cause of action for sexual harassment under Title VII in Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Catherine MacKinnon, well known for her book entitled Sexual Harassment of Working Women: A Case of Sex Discrimination (1979), was instrumental in Congress's recognition of sexual harassment as a Title VII claim. *See* Deborah N. McFarland, Note, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 Fordham L. Rev. 493, 510 (1996) (discussing MacKinnon's role in shaping sexual harassment law).

conflicting case law as courts struggle with the vexing task of identifying and remedying sexual harassment.

A distillation of the case law is necessary so that both employers and employees will be able to discern what conduct is illegal under Title VII. After an alleged act of harassment, an understanding of sexual harassment law is imperative for the parties involved in a sexual harassment dispute so that they can evaluate the viability of their Title VII claim. This will both inform the parties and aid them in deciding whether they are interested in litigating the case in court. This part offers a general discussion of what constitutes Title VII sexual harassment, identifies the costs of harassment to society, and introduces the main actors in any sexual harassment dispute.

A. *Sexual Harassment: What Is It?*

Title VII sexual harassment is commonly defined as "unwelcome" conduct or requests of a sexual nature.[14] There are two strands of sexual harassment actionable under Title VII: quid pro quo[15] and hostile environment.[16]

Quid pro quo harassment occurs when a harasser makes employment or employment benefits contingent upon submission to sexual requests.[17] This type of harassment is both more established and more clearly defined than the hostile environment strand.[18] To prove quid pro quo sexual harassment at trial, a plaintiff must establish:

> 1) that the employee was a member of a protected class; 2) that the employee was subjected to unwelcomed sexual harassment in the

14. 29 C.F.R. § 1604.11(a) (1995).

> Harassment on the basis of sex is a violation of Section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id. (footnote omitted).

15. *See, e.g*, *Meritor*, 477 U.S. at 62 (stating that a quid pro quo claim exists where the harassment "involves the conditioning of concrete employment benefits on sexual favors"); *see also* Karibian v. Columbia Univ., 14 F.3d 773, 776 (2d Cir.) (recognizing a claim for quid pro quo sexual harassment where the plaintiff claimed that her supervisor "coerced her into a violent sexual relationship by telling her that she 'owed him' for all he was doing for her" and that "the conditions of her employment—including her raises, hours, autonomy and flexibility—varied from time to time, depending on her responsiveness to [her supervisor]"), *cert. denied*, 512 U.S. 1213 (1994).

16. The first federal court to uphold a hostile environment sexual harassment claim was the Court of Appeals for the D.C. Circuit in 1981. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). The Supreme Court later recognized this claim as actionable under Title VII in *Meritor*, 477 U.S. at 57.

17. *Meritor*, 477 U.S. at 62; *Karibian*, 14 F.3d at 778.

18. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 452 (N.J. 1993).

> form of sexual advances or requests for sexual favors; 3) that the harassment complained of was based on sex; 4) that the employee's submission to the unwelcomed advances was an express or implied condition for receiving job benefits or that the employee's refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment; and 5) the existence of respondeat superior liability.[19]

The hostile environment strand shares many common burdens of proof with the quid pro quo strand.[20] A hostile work environment constitutes sexual harassment when the complainant shows that:

> 1) she belongs to a protected group; 2) she was subject to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition, or privilege of employment; and 5) [the employer] knew or should have known of the harassment and failed to take proper remedial action.[21]

The line dividing quid pro quo harassment from hostile environment harassment is difficult to discern, as the two strands often occur together.[22] Complaints under the hostile environment strand, however, are more common.[23]

B. *Shared Elements of Quid Pro Quo and Hostile Environment Sexual Harassment Claims*

Establishing sexual harassment under either the quid pro quo or hostile environment strand places many of the same burdens of proof on the plaintiff. This section discusses those common elements, including the requirements of proving the plaintiff's membership in a protected class, the unwelcomeness of the activity, that the discrimination was based on sex, and employer liability.

1. Protected Class

Both quid pro quo and hostile environment sexual harassment claimants may be required to establish that they belong to a protected

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19. Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 186 (6th Cir. 1992), *cert. denied*, 506 U.S. 1041 (1992); *see also* 1 Alba Conte, Sexual Harassment in the Workplace: Law and Practice § 6.43, at 279-84 (2d ed. 1994).

20. *Compare supra* text accompanying note 19 (listing proof burdens on the quid pro quo plaintiff) *with infra* text accompanying note 21 (listing proof burdens on the hostile environment plaintiff).

21. Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 964 (8th Cir. 1993); *see also Meritor*, 477 U.S. at 57 (finding claim for hostile environment sexual harassment); Conte, *supra* note 19, § 6.44, at 284-304.

22. *EEOC Notice, March 3, 1990 Policy Guidance on Current Issues of Sexual Harassment, in* Sex Discrimination, *supra* note 4, at D-1, D-3; *see, e.g.*, Carrero v. New York City Hous. Auth., 890 F.2d 569 (2d Cir. 1989) (holding that the plaintiff had established both quid pro quo and hostile environment sexual harassment).

23. Mori Irvine, Note, *Mediation: Is It Appropriate for Sexual Harassment Grievances?*, 9 Ohio St. J. on Disp. Resol. 27, 40 (1993).

group.[24] Not all courts, however, include this prong in their formulations of the legal standard.[25] Even in jurisdictions that require proof of this element, the burden is essentially nonexistent. Because an employer could discriminate against any given employee, every employee is a member of the protected class, broadly defined as "workers."[26]

2. Unwelcomeness of the Alleged Harasser's Conduct

Both strands of sexual harassment also require proof that the sexual harassment was, as a legal matter, unwelcome.[27] Courts agree that the behavior must be objectively, and therefore reasonably, unwelcome.[28] Requiring a reasonableness threshold releases employers from liability for claims where a plaintiff is "hypersensitive."[29] At this juncture, however, courts split between requiring that a plaintiff establish that the conduct would offend a "reasonable person,"[30] and requiring proof that a "reasonable woman" would be offended.[31]

Defenders of the reasonable woman standard argue that, in the context of sexual harassment, the reasonable person standard ignores the very real differences between what men and women find offensive in the workplace.[32] Because men have historically been over-repre-

24. *Compare supra* text accompanying note 19 (requiring proof that quid pro quo plaintiff was in a "protected class") *with supra* text accompanying note 21 (requiring proof that hostile environment plaintiff was in a "protected group").

25. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 875-76 (9th Cir. 1991) (explicating a three-prong hostile environment sexual harassment claim and not requiring proof that the victim was a member of a protected class); Andrews v. Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (providing the elements of a hostile environment claim, and not requiring proof that victim was a member of a protected class).

26. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982) (requiring "a simple stipulation that the employee is a man or woman"); Radtke v. Everett, 501 N.W.2d 155, 162 (Mich. 1993) (stating that the plaintiff must establish that she "belonged to a protected group").

27. *Compare supra* note 19 (requiring "unwelcome sexual harassment") *with supra* note 21 (same).

28. *See, e.g.*, *Radtke*, 501 N.W.2d at 164 (applying a "reasonable person" standard); *Ellison*, 924 F.2d at 879 (applying a "reasonable woman" standard).

29. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 458 (N.J. 1993). While these courts used an objective standard to determine whether the conduct was unwelcome, they did not ignore the victims' subjective experiences. Courts utilize this information in evaluating the damages in the harassment claim. "[T]he subjective reaction of the plaintiff and her individual injuries [is] relevant to compensatory damages." *Id.*

30. *See, e.g.*, *Radtke*, 501 N.W.2d at 167 (applying a "reasonable person" standard).

31. *See, e.g.*, *Ellison*, 924 F.2d at 879 ("[W]e believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."). Of course, if the plaintiff were male, the standard would be that of a reasonable man; the vantage point is that of "a reasonable victim of the same sex as the plaintiff." *Id.* at 880; *see also Lehmann*, 626 A.2d at 458 ("If the plaintiff is male, the perspective used shall be that of a reasonable man.").

32. *Lehmann*, 626 A.2d at 459; *see also* Rosemarie Skaine, Power and Gender: Issues in Sexual Dominance and Harassment 178 (1996) (citing numerous studies finding a difference between how men and women perceive sexual harassment). "The variable that most consistently predicts variation in people's definition of sexual har-

sented in positions of power in the workplace, their views are often considered normative.[33] Therefore, use of the reasonable person standard runs the risk of validating the majority male perspective of acceptable on-the-job behavior.[34]

Notably, courts opposing the reasonable woman standard also express concern about entrenching unfavorable gender stereotypes. These courts are reluctant to endorse a gender-specific standard because it reflects a view that women are weak and need the protection of a separate standard.[35] Some scholars also take offense at the "essentialist" nature of the reasonable woman standard because it treats all women as if their response to sexual behavior is uniform and naturally predetermined.[36]

Sexual harassment, therefore, is not defined by completely objective criteria; the key term is "unwelcome." To prove that conduct was unwelcome, the victim must demonstrate that she did not solicit or

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assment is the sex of the rater [evaluating the behavior]. Men label fewer behaviors at work as sexual harassment." *Id.* While men and women can agree that certain egregious conduct should be considered harassment, men view more subtle sexual behavior directed toward them as flattering, while women view these same acts as insulting. *Id.*

33. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1189 (1989) ("Men, who enjoy a hegemonic power over social meanings by virtue of their dominant status in society, label as 'different' all qualities, values, and practices characteristic of or associated with women.").

34. *Ellison*, 924 F.2d at 878; *Lehmann*, 626 A.2d at 459.

35. Radtke v. Everett, 501 N.W.2d 155, 167 (Mich. 1993).

> The belief that women are entitled to a separate legal standard merely reinforces, and perhaps originates from, the stereotypic notion that first justified subordinating women in the workplace. Courts utilizing the reasonable woman standard pour into the standard stereotypic assumptions of women which infer women are sensitive, fragile, and in need of a more protective standard. Such paternalism degrades women . . . .

Id.

36. Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA Women's L.J. 37, 50 (1993); *see also* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 Cornell L. Rev. 1398 (1992) (critiquing the reasonable woman standard). Any reasonableness standard is essentialist in the sense that the actions of a hypothetical person are dubbed normative in the eyes of the law. To the extent that a reasonableness standard insulates employers from oversensitive employees, it is desirable. *See supra* note 29 and accompanying text. Beyond this point, however, courts should refrain from further fracturing the standard. One scholar argues that a black woman, for example, may have a different view of harassment than a white woman as a result of her race. Abrams, *supra* note 33, at 1214. Socioeconomic position may also affect a woman's perception of sexual harassment. *Id.* Applying a reasonable woman standard is a difficult task because it is defined in relation to a reasonable man standard, which is itself amorphous. It is not desirable or efficient to implement standards that are more plaintiff-specific. Otherwise innocuous behavior, for example, might be harassment if targeted at a Native American woman of limited economic means, but not at a middle-class, white female employee. Assessing one's workplace conduct is challenging enough without muddying the waters by splintering the reasonable man or, if necessary, reasonable woman standard even further.

invite the behavior.[37] The Supreme Court has said that the unwelcomeness determination turns on credibility and is largely a question for the trier of fact.[38]

3. Discrimination Based on Gender

The plaintiff must establish that, but for her gender, she would not have been harassed.[39] When the conduct is "sexual or sexist in nature, the but-for element will automatically be satisfied."[40] An actionable claim, however, need not be clearly sexual.[41] If, for example, a harasser targeted only women and subjected them to a particular physical but not overtly sexual encounter, this would meet the but-for requirement.[42] Because in crafting Title VII Congress intended to protect against gender-specific discrimination, the plaintiff must establish that she suffered harassment because she was a woman.[43]

Consequently, this but-for requirement has led courts to conclude that a bisexual employee may harass others without fear of Title VII liability.[44] In this instance, a harasser would be according similar treatment to both men and women. As such, instances of harassment equally offensive to both genders do not support a sexual harassment claim.[45]

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37. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

38. *Id.* To refute a plaintiff's claim that the behavior was unwelcome, an employer might allege that the victim participated in the incident voluntarily. Because a plaintiff may consent out of fear, however, this argument cannot constitute a complete defense to allegations of sexual harassment. The focus is on whether the complainant indicated the conduct was unwelcome, not whether she participated in it. *Id.*

39. *Compare supra* text accompanying note 19 (requiring that quid pro quo sexual harassment be based on gender) *with supra* text accompanying note 21 (requiring that hostile environment sexual harassment be based on gender). Interestingly, the woman filing suit need not be the target of all, or even any, of the offensive conduct if it created a hostile working environment for her. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 457 (N.J. 1993).

40. *Id.* at 454.

41. *Id.*; Hall v. Gus Constr. Co., 842 F.2d 1010, 1014 (8th Cir. 1988) ("Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.").

42. *See Lehmann*, 501 N.W.2d at 454.

43. Likewise, a male victim of harassment must establish that he was harassed because he was a man.

44. *See, e.g.*, Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) ("[I]nstances of complained of conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge . . . ."), *cert. denied*, 481 U.S. 1041 (1987); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982); *see also* Anja A. Chan, Women and Sexual Harassment: A Practical Guide to the Legal Protections of Title VII and the Hostile Environment Claim 9-10 (1994); Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 Vt. L. Rev. 55, 79 (1995) ("[T]ruly bisexual harassment is not disparate treatment prohibited by Title VII."). The question of whether bisexual harassment *should* fall under Title VII is beyond the scope of this Note. For an argument suggesting that both bisexual and homosexual harassment should be actionable, see McFarland, *supra* note 13, at 541-42.

45. *Rabidue*, 805 F.2d at 620.

4. Employer Liability

The EEOC Guidelines on Discrimination Because of Sex[46] delineate the level of employer liability appropriate where the harasser is a supervisor, another employee, and even a non-employee outside party.[47] An employer is liable for harassment by an employee's supervisor or an agent of the employer regardless of whether the employer knew or should have known that the harassment was occurring.[48] Supervisors "trigger strict liability in the sense that they have been cloaked with the employer's authority and act as its alter ego."[49]

The same level of strict respondeat superior liability, however, does not extend to cases where another non-supervisory employee or a non-employee is the harasser. In those cases, an employer is liable for harassment by another employee or a non-employee only if it knew or should have known of the harassment.[50] Courts will review the level of control that the employer had over the behavior of any non-employee to determine whether liability should be imputed to the employer.[51] An employer can escape liability where either another non-supervisory employee or non-employee harasses an employee if the employer can show that it acted immediately to correct the situation.[52]

C. *Unique Elements of the Quid Pro Quo and Hostile Environment Claims*

As demonstrated above, a quid pro quo plaintiff and a hostile environment plaintiff share four burdens of proof, including establishing that they are a member of a protected class, that the offensive conduct was unwelcome, that they were targeted because of their gender, and that their employer is liable for the harassment.[53] At this point, however, the two strands diverge. Quid pro quo and hostile environment harassment differ in their formulations of what conduct constitutes harassment, and in what damages a plaintiff must prove to recover. This section examines the unique elements of both the quid pro quo and hostile environment sexual harassment strands.

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46. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)-(e) (1997) [hereinafter EEOC Guidelines]. For an explication of the role of the EEOC and its Guidelines in sexual harassment determinations, see *supra* note 4.

47. EEOC Guidelines, *supra* note 46, § 1604.11(a)-(e).

48. *Id.* § 1604.11(c).

49. Andrew J. Ruzicho & Louis A. Jacobs, Employment Practices Manual: A Guide to Minimizing Constitutional, Statutory and Common-Law Liability § 6:25 at 54 (1994).

50. EEOC Guidelines, *supra* note 46, § 1604.11(d)-(e).

51. *Id.* § 1604.11(e).

52. *Id.* § 1604.11(d)-(e).

53. *See supra* part I.B.

1. Quid Pro Quo Claims

The central issue commonly litigated in quid pro quo claims is whether the harasser used the complainant's conduct as a basis for determining any element of her employment.[54] It is sufficient for the plaintiff to show that the harasser made job benefits contingent on her acceptance or rejection of his advances.[55] Traditionally, the plaintiff must also establish economic loss as a result of the harassment.[56]

2. Hostile Environment Claims

To be actionable under the hostile environment strand, the harassment must affect a term or condition of employment, and not all harassment meets this requirement.[57] The Supreme Court has held that the harassment must be so severe that it alters the plaintiff's employment, creating an abusive working environment.[58] The damage caused to the plaintiff, however, need not be both economic and psychological for her to recover.[59] For example, if the harassment detracts from her job performance, or interferes with a promotion, it is not necessary that the harassment also affect the plaintiff's psychological well-being.[60]

The EEOC has advised courts to examine the "totality of the circumstances" when deciding whether an environment is legally hostile.[61] The Supreme Court has delineated several factors that courts should consider in evaluating harassment, including the frequency and severity of the harassment, whether the behavior is of a threatening or humiliating nature, and the extent to which the conduct interferes

54. *See, e.g.*, Karibian v. Columbia Univ., 14 F.3d 773, 777 (2d Cir. 1994) ("[T]o establish a prima facie case of quid pro quo harassment, a plaintiff must present evidence that she was subject to unwelcome sexual conduct, and that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment." (emphasis omitted)), *cert. denied*, 512 U.S. 1213 (1994).

55. *Id.* The plaintiff from whom the supervisor requests sexual favors, however, is not the only one who may sue. The EEOC Guidelines indicate that other employees who were qualified for, but denied, a benefit because it was conferred on another employee who was acquiescing to the harasser's requests may also sue the employer. EEOC Guidelines, *supra* note 46, § 1604.11(g); *see, e.g.*, King v. Palmer, 778 F.2d 878, 882 (D.C. Cir. 1985) (finding a basis for a discrimination claim where an employee was passed over for promotion because of her supervisor's relationship with a fellow employee). This employee has a cause of action under Title VII because the harassment directly affects the passed-over employee's employment as well.

56. *See* Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989).

57. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

58. *Id.*

59. *Id.* at 64 ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").

60. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

61. EEOC Guidelines, *supra* note 46, § 1604.11(b).

with the plaintiff's work performance.[62] In most cases, a finding of hostile environment is based upon "multiple and varied combinations and frequencies of offensive exposures."[63] If sufficiently severe, however, a single incident may create an abusive environment, especially where the workplace is small and close-knit.[64] In fact, one court found the basis for a hostile environment claim in two days of extreme harassment.[65] If sufficiently severe, even short-term harassment can detrimentally affect the workplace. The next section explicates how costly sexual harassment is to workers, employers, and society.

D. *Costs of Sexual Harassment*

Sexual harassment, whether it is quid pro quo or hostile environment, carries innumerable costs to victims, employers, and society. The law targets sexual harassment specifically because of the harm it causes to society.[66] Although the victims are hurt psychologically, physically, and financially, they are not the only casualties of sexual harassment.[67]

Employers also suffer from the adverse effects of sexual harassment. The employer sustains reduced efficiency and safety in the workplace.[68] Further, the employer is hurt when employees leave their jobs or incur medical and sick leave costs as a result of the unlawful harassment.[69] In a presentation to the House of Representa-

62. *Harris,* 510 U.S. at 23. In some jurisdictions, a woman may show that other women have been harassed to demonstrate the severity of her working conditions. *See, e.g.,* Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 457 (N.J. 1993). Courts allowing such evidence indicate that it is directly relevant in establishing both the nature of the workplace and its effects on a particular plaintiff. *Id.; see also* Vinson v. Taylor, 753 F.2d 141, 146. (D.C. Cir. 1985). This is especially true because a woman could sue even if she was not the direct target of the conduct. *See, e.g.,* EEOC Guidelines, *supra* note 46, § 1604.11(g) (indicating that when employment benefits are inappropriately granted to an employee because she accepted sexual favors, employees qualified for, but denied, those benefits also suffer sexual harassment); *see also supra* note 39 (indicating that a plaintiff may have a Title VII claim even if she is not the direct target of the harassment). Courts forbidding such testimony hold that, while it may be relevant in a class action, it is not revealing in an individual lawsuit on the question of how harassment has affected a particular plaintiff. Jones v. Flagship Int'l, 793 F.2d 714, 721 n.7 (5th Cir. 1986), *cert. denied,* 479 U.S. 1065 (1987).

63. Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986).

64. Radtke v. Everett, 501 N.W.2d 155, 158-59 (Mich. 1993) (finding a prima facie claim for sexual harassment based on a hostile environment where a doctor-supervisor harassed a veterinary technician during a weekend shift while working alone with her).

65. Ross v. Double Diamond, Inc., 672 F. Supp. 261, 264-65 (N.D. Tex. 1987) (detailing pattern of harassment, including that plaintiff's boss asked within her first hour on the job whether she "fooled around," called her extension asking her to pant heavily, and that salesmen in her office placed a camera under plaintiff Ross and took a photograph up her dress).

66. *Radtke,* 501 N.W.2d at 161.

67. *Id.* at 161 & n.15.

68. *Id.*

69. *Id.*

tives, one researcher estimated the cost of sexual harassment for a Fortune 500 company to be $6.7 million annually in the form of reduced productivity, absenteeism, employee turnover, and the use of internal complaint procedures.[70] Remarkably, this figure did not consider litigation costs, including attorneys' fees or damages paid by a company to any successful claimants.[71] These costly expenses of litigation would raise the estimate astronomically. This $6.7 million figure breaks down to a cost of $282.53 per employee per year for each Fortune 500 company.[72] Minimal preventative efforts, on the other hand, cost merely $8.41 per employee.[73]

Society also suffers as a consequence of sexual harassment; sexual harassment "results in the creation of a female job ghetto in which a large segment of the work force remains transient or abused in the job market."[74] Society, like an employer, is also hurt economically when business productivity is undermined. The costs of sexual harassment are overwhelming to all parties involved. The next section provides an introduction to those parties who bear the significant costs of the harassment.

E. *The Actors in a Sexual Harassment Incident and Their Interests in Resolving the Dispute*

Any alleged incident of sexual harassment revolves around three primary actors: the employee, the employer, and the accused harasser. The alleged victim, or complainant, is likely to be a woman with low income and little power.[75] Harassment disproportionately targets women working in predominantly male environments and women who have been employed for fifteen years or less.[76] While women of limited means and, by inference, limited education are more likely to be harassed, women with higher educational levels are more likely to report the harassment.[77]

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70. *The Civil Rights Act of 1991: Hearings*, *supra* note 6, at 207-14.

71. *See id.*

72. *Id.* at 214.

73. *Id.*

74. Radtke v. Everett, 501 N.W.2d 155, 161 & n.15 (Mich. 1993).

75. Riger, *supra* note 6, at 198. When the victim is a member of a racial minority, several courts allow "evidence of racial hostility [to] be aggregated with evidence of sexual hostility in determining the extent to which the environment is hostile to the plaintiff." Stingley v. Arizona, 796 F. Supp. 424, 428 (D. Ariz. 1992); *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (allowing racial and sexual harassment to be considered together when evaluating hostile environment). One scholar laments that there have been too few attempts to determine whether a woman's race or ethnicity makes her a more likely target of harassment. Skaine, *supra* note 32, at 182.

76. Bornstein, *supra* note 9, at 1-50.

77. Skaine, *supra* note 32, at 180 (indicating that women with college degrees were overrepresented in the reporting rate, even though most victims "are in the lower positions of occupational and educational structure").

In the experience of one ombudsman involved with over 6000 sexual harassment victims, over seventy-five percent of victims express serious concern about some form of retaliatory or adverse consequences flowing from their complaint.[78] They are often worried not only about disapproval from co-workers and supervisors, but also about the complaint straining their personal relationships at home.[79] Over fifty percent of victims appear very distressed, and they are concerned about appearing oversensitive or even childish.[80] Many victims even blame themselves for the harassment.[81]

Further, victims are not eager to take cases to court.[82] In fact, although uncomfortable about involving a third party, most victims feel that they are unable to rectify the situation on their own.[83] A majority of victims make clear that they do not want to lose control over their complaint. It is very important to the complainants to "have the chance to custom-design an approach to their concerns."[84]

Most victims are primarily interested in ending the harassment,[85] rather than punitive or disciplinary remedies. They want assurance that the conduct will not recur so they can quickly return to work.[86] Some victims are also interested in a resolution that helps ensure that someone else will not suffer harassment within their workplace.[87]

Employers' foremost aim, in contrast, is to maintain a productive and harmonious workforce.[88] Employers want to avoid negative publicity and desire a fast, inexpensive end to any complaint of sexual harassment.[89] They want to provide their employees with, and be perceived by their employees as providing, a "credible forum" for resolving workplace disputes.[90] Providing an appropriate dispute resolution process may also satisfy the employer's legal responsibility to effectively and promptly respond to a complaint.[91]

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78. Rowe, *supra* note 3, at 164.

79. *Id.*

80. *Id.* at 165-66.

81. Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 Negotiation J. 139, 144 (1991). In this sense, unfortunately, they are not alone in placing the blame with themselves, as "[s]ociety has blamed women for letting [the harassment] happen." Skaine, *supra* note 32, at 182.

82. *See* Rowe, *supra* note 3, at 165.

83. *Id.*

84. *Id.* at 162.

85. *Id.* at 165.

86. Gadlin, *supra* note 81, at 146.

87. *Id.* at 145.

88. Costello, *supra* note 4, at 16.

89. *Id.* at 16-17.

90. *Id.* at 17.

91. Andrea Williams, *AAA's Sexual Harassment Claims Resolution Process*, 20 Colo. Law. 1217, 1217 (1993); *see, e.g.*, Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 463 (N.J. 1993) ("[T]he existence of effective preventative mechanisms provides some evidence of due care on the part of the employer.").

The accused harasser/employee also has an interest in how the dispute will be resolved.[92] Because sexual harassment primarily stems from relative power imbalances within the workplace, the accused harasser is overwhelmingly likely to be male.[93] Specifically, men with low self-esteem and entrenched traditional values demonstrate a propensity to harass.[94] The harasser needs to know what specific behavior caused offense and will likely appreciate the chance to explain his behavior to the victim.[95] Because harassers may be unaware that their conduct was offensive, much less unlawful, some accused are interested in a forum where they can express remorse and will not be treated as stereotypical harassers.[96]

Like the victim, the accused harasser would like to return to work as quickly as possible, after a confidential resolution.[97] Confidentiality is important to the accused because he is concerned about his reputation and afraid of the possible repercussions on his relationships with others at work.[98] Unlike the victim, however, the accused is not prone to self-blame.[99] On the contrary, the accused is likely to blame the victim for his position in this dispute.[100] Overall, the accused would like a voice in the resolution process.[101]

A successful dispute resolution process, then, must reconcile the often conflicting interests of the complainant, the employer, and harasser. In addition, the fact-intensive nature of the typical sexual harassment complaint requires a flexible dispute resolution method capable of assessing the complexities of each unique case. The next part of this Note illustrates why litigation and arbitration do not meet the needs of the parties. Ultimately, mediation is offered as the solution that best reconciles the parties' concerns.

II. Litigation and Arbitration: Current Methods of Resolving Harassment Disputes

Litigation and arbitration are currently the most common fora for resolving harassment disputes. From 1986 through 1987, more than 10,000 employment discrimination cases were filed in federal and state

92. Costello, *supra* note 4, at 16.
93. Skaine, *supra* note 32, at 183.
94. *Id.* at 184.
95. *Id.*
96. Mark S. Umbreit, Mediating Interpersonal Conflicts: A Pathway to Peace 144-45 (1995) ("Through open discussion of feelings, victim and offender can deal with each other as people, oftentimes from the same neighborhood, rather than as stereotypes and objects.").
97. Costello, *supra* note 4, at 16.
98. Gadlin, *supra* note 81, at 147.
99. *Id.*
100. *Id.*
101. Williams, *supra* note 91, at 1217.

courts.[102] In fact, employee litigation had been characterized as "one of the 'growth industries' of the 1980s."[103] The following part assesses the shortcomings of both litigation and arbitration as dispute resolution mechanisms for sexual harassment disputes.

A. *Litigation*

The Supreme Court of New Jersey has noted that "courtrooms are not the best place to prevent or remedy a hostile work environment."[104] Even if the plaintiff is successful at trial, the damage caused to her relationships with her co-workers cannot be repaired.[105] Male workers may resent changes in behavior required in the workplace that are a result of a judicial order rather than being initiated by the employer.[106]

Furthermore, a court judgment lacks instructive value for employers, and ultimately only succeeds in labeling as sexual harassment the particular incident in question in the litigation.[107] Court opinions fail to direct employers to specific changes that they should make in the workplace;[108] the opinions neither guide employers toward legally sound determinations of acceptable conduct, nor do they instruct employers how to educate employees about corporate antidiscrimination policies. In addition, these court judgments do not involve the employer in effectuating change in the workplace.[109]

While courts may provide somewhat primitive justice, they are adjudicating claims increasingly more often.[110] Moreover, while the average nationwide award for sexual harassment is $38,500,[111] the amounts of the high-end awards are rising. In 1988, for example, the largest settlement in a corporate sexual harassment suit was $200,000.[112] By 1991, it was more than $500,000.[113] Furthermore, the

102. Alan F. Westin & Alfred G. Feliu, Resolving Employment Disputes Without Litigation 1 (1988).

103. *Id.*

104. Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 465 (N.J. 1993).

105. *Id.* (citing Abrams, *supra* note 33, at 1215).

106. *Id.* (citing Abrams, *supra* note 33, at 1216).

107. "Judgments—and even opinions—in sexual harassment cases give employers only an anecdotal notion of what behavior is unacceptable, and otherwise fail to direct employers toward more satisfactory behavior." Abrams, *supra* note 33, at 1216.

108. *Id.*

109. *Id.*

110. *See supra* note 103 and accompanying text.

111. Wayne N. Outten, *Evaluating Plaintiff's Case and Settlement Opportunities: Plaintiff's Perspective, in* Litigation and Administrative Practice Course Handbook Series 7, 21 (Practicing Law Institute 1996), *available in* WESTLAW, 12 LERCMS 33.

112. Carol Kleiman, *Dealing with Harassment: Firms Seek Advice to Head Off Incidents, Lawsuits*, Chi. Trib., Oct. 15, 1991, at B1.

113. *Id.*

Civil Rights Act of 1991 increased potential jury awards for both compensatory and punitive damages.[114]

What a judgment offers a harassment plaintiff is simple: money. Courts may award a successful plaintiff compensatory damages, punitive damages, and equitable relief in the form of reinstatement, back pay, or attorney fees.[115] Thus, litigation attempts to convert the feelings of complainants into dollars.[116] A judgment, however, is unlikely to compensate the plaintiff for the economic investment, psychological stress, and notoriety she incurs during the course of trial.[117]

Indeed, these awards may be adequate for some Title VII sexual harassment claims. A sexual harassment plaintiff, however, may have a significant number of other legal grounds on which to bring suit. A plaintiff may have grounds to bring claims for racial harassment, constructive discharge, retaliatory discharge, wrongful termination in violation of public policy, negligent supervision, breach of covenant of good faith and fair dealing, intentional or negligent infliction of emotional distress, defamation, assault, battery, or rape, among other bases.[118]

Once a plaintiff has chosen to file a Title VII suit, she will find that the trial process is very difficult for harassment victims. The employee is, in some sense, "on trial to determine if he or she 'deserved' to be harassed."[119] Being harassed is emotionally distressing, but replaying it in front of a judge or jury in public may be even more traumatizing.[120] Discovery often compels a victim to reveal "raw" emotional wounds that are "close to the surface."[121] Further, a victim may be forced to reveal private and personal information during the course of a litigation.[122] The Supreme Court held in *Meritor Savings Bank v. Vinson*[123] that courts may consider an alleged victim's past sexual behavior, including her dress and sexual fantasies, in making a determi-

114. 42 U.S.C. § 1981a(b)(1) (1994) (allowing for punitive damages for discrimination violations committed with "malice or with reckless indifference to the federally protected rights of an aggrieved individual"); *id.* § 1981(b)(2) (indicating ceiling sums for compensatory damages based on number of employees); Barry Winograd, *Men as Mediators in Cases of Sexual Harassment*, Disp. Resol. J., Apr. 1995, at 40, 43.

115. Chan, *supra* note 44, at 25-26.

116. Andrea Williams, *Model Procedures for Sexual Harassment Claims*, Arb. J., Sept. 1993, at 66, 68.

117. Riger, *supra* note 6, at 208.

118. Chan, *supra* note 44, at 30-31.

119. Cohen, *supra* note 9, at 687. While this may help the court draw the line between acceptable personal relationships and unlawful behavior, *see supra* text accompanying notes 9-10, it could be "an invitation to attempt to discredit genuine victims of sexual harassment." Cohen, *supra* note 9, at 687.

120. Margaret J. Grover, *Mediation of Sexual Harassment Claims, in* ABA Tort and Insurance Practice Section Practice Tips 55, 55 (1995), *available in* WESTLAW, 24-SPG Brief 55.

121. Winograd, *supra* note 114, at 41.

122. *See* Grover, *supra* note 120, at 55.

123. 477 U.S. 57 (1986).

nation of sexual harassment.[124] There is no rape shield law[125] that would prevent a lawyer from asking about these issues at trial. Defense lawyers have asked prior sexual harassment complainants about their past sexual experiences, incidences of childhood molestations, abortions, and venereal disease.[126] In one case, a reporter in New Mexico filed a sexual harassment complaint and, at trial, opposing counsel produced gynecological records from her university and evidence of discussions with her therapist. These discussions detailed many of her early sexual experiences, including the fact that she had been raped as a teenager.[127]

Even in cases where the litigation is confined to the incident of the alleged harassment itself, sexual harassment claims often come down to the word of the complainant against the word of the alleged harasser. In all likelihood, no witnesses were present during the alleged incident of harassment.[128] If both the complainant and the accused are equally credible, judges and arbitrators will find for the harasser.[129] Further, the trial process tends to lend more credibility to a more aggressive, articulate speaker; a male harasser is more likely than a female complainant to speak in this style.[130] While plaintiffs

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124. *Id.* at 69.

> In practice, both traditional and nontraditional women may find that their own actions are used against them in the unwelcomeness analysis. A woman who behaves in the most stereotypical ways—complimenting men, straightening their ties, "mov[ing] her body in a provocative manner," let alone eating dinner with the boss on a business trip, or remaining friendly even after rejecting his advances—may find that the sexual advances she rejects are, as a matter of law, not unwelcome. Similarly, women who act too much like men—who use "crude and vulgar language," or choose to eat with the men in the employee lunchroom—cannot be heard to complain of a worksite which is "permeated by an extensive amount of lewd and vulgar conversation and conduct."

Chamallas, *supra* note 36, at 45 (citation omitted).

125. *See, e.g.*, Fed. R. Evid. 412 (restricting admission of evidence of victim's sexual predisposition or other sexual behavior).

126. Ellen E. Schultz & Junda Woo, *The Bedroom Ploy: Plaintiffs' Sex Lives Are Being Laid Bare in Harassment Cases*, Wall St. J., Sept. 19, 1994, at A1.

127. *Id.* at A9. The only available opinion in this case is an affirmance on appeal of a grant of summary judgment to the employer. Stieber v. Journal Publishing Co., D.C. No. CIV-93-648-LH, 1996 WL 599795, at *1 (10th Cir. 1996). The opinion lacks a complete factual recitation. *Id.*

128. Susan D. Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. Cal. L. Rev. 1451, 1451 (1992).

129. Stephen M. Crow & Clifford M. Koen, *Sexual Harassment: New Challenge for Labor Arbitrators?*, Arb. J., June 1992, at 6, 8. Precisely because the unique situation of sexual harassment leaves a plaintiff without other extrinsic evidence of the events, she will often find it nearly impossible to prove that the harassment occurred. "[T]he difficulties associated with proving one's claim probably have a chilling effect on the willingness of a sexual harassment victim to file a grievance." *Id.*

130. Ross, *supra* note 128, at 1455.

> [M]any women have a "powerless" speaking style that makes them less credible as witnesses than those using a "powerful" style. Research shows that the "powerless" use "hedges" (like "I think"), "hesitation forms" (words like

traditionally have an advantage over an employer in a jury trial,[131] the litigation process is in some ways unfavorable toward a complainant.

The traditional plaintiff, the direct object of the harassment, is not necessarily the only employee with a cause of action for sexual harassment. Because employees other than those at whom the conduct is directed may sue,[132] a sufficiently offensive environment could invite suits from every woman in the workplace. In these cases, litigation may not be an attractive option to the employer because the chances for success are low. If an employer will almost certainly be held liable after trial, it is in the employer's best interest to settle early rather than investing in litigation.

Even when an employer chooses to litigate, he can never be sure that a sexual harassment claim has been completely resolved. Because the employees may be able to bring subsequent claims on various legal bases, some uncertainty surrounds the final resolution of any sexual harassment dispute.[133] After a plaintiff has unsuccessfully sued under Title VII, for instance, she may still bring a viable claim, if not barred by the statute of limitations, for battery or negligence.[134] If dismissed, the harasser might also have a cause of action challenging the dismissal. Federal employees, for example, may appeal adverse employment decisions, such as dismissals as a result of sexual harassment, to the Merit Systems Protection Board.[135] Ultimately, decisions of the Merit Systems Protection Board may also be appealed in fed-

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"um"), "polite forms" (such as "sir"), and "question intonation" (declaring something with "rising intonation so as to convey uncertainty.") The research study showed:

> [W]itnesses of low social status—the poor and uneducated—were most likely to use this style of testimony. Female witnesses used the style more frequently than men. . . . Those witnesses in the taped trials whose social status in court was higher—for example, well-educated, white collar men and expert witnesses of both sexes—tended to use a style that exhibited relatively few features of the powerless style.

Id. (quoting John M. Conley et al., *The Power of Language: Presentations Style in the Courtroom*, 1978 Duke L.J. 1375, 1380-81, 1386). *But see* Deborah Tannen, You Just Don't Understand: Women and Men in Conversation 225 (1990) ("If a linguistic strategy is used by a woman, it is seen as powerless; if it is done by a man, it is seen as powerful. Often, the labeling of 'women's language' as 'powerless language' reflects the view of women's behavior through the lens of men's.").

131. *See infra* note 187 and accompanying text.

132. For example, in a quid pro quo case, a qualified woman who was denied benefits because they were conferred on someone in a sexual relationship with the boss could sue. *See supra* note 55 and accompanying text. Similarly, in a hostile environment case, a plaintiff need not be the direct target of the illegal conduct to be afforded a legal remedy. *See supra* note 39.

133. Cohen, *supra* note 9, at 685.

134. *See supra* note 118 and accompanying text.

135. 5 U.S.C. § 7701(a) (1994) ("An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation.").

eral court.[136] Many collective bargaining agreements also grant similar challenge power to employees.[137] If an employer dismisses a harasser employee, that employee could challenge the termination. If the employer takes no action, the victim could sue under Title VII or file another related claim. Thus, an employer may be vulnerable to additional legal suits filed by either the victimized employee or the alleged harasser, even after the first litigation is completed.

In most cases, litigation is an unattractive choice for the victim, the harasser, and the employer. While the victim does have an advantage at trial, to capitalize on her advantage she must endure a psychologically grueling trial where her personal affairs will become a matter of public record. The harasser will suffer damage to relationships with his coworkers as a result of the public proceedings in which he was not necessarily permitted to participate. Whether the employer pays a handsome award or wins at trial, he can never be sure that he will not be summoned to appear in court again to defend a claim based on the very same incident. As a result, litigation is largely ineffective at resolving sexual harassment disputes.

B. *Arbitration*

Alternative Dispute Resolution, or "ADR," as it is commonly known, refers to alternatives to trial. Arbitration is one of the most common ADR methods. ADR has been endorsed by numerous legislative provisions, including the Civil Justice Reform Act of 1990[138] and the now-expired Administrative Dispute Resolution Act of 1990.[139] Indeed, the Federal Rules of Civil Procedure empower judges to promote alternatives to trial during pretrial conferences.[140]

ADR options within the workplace can be either "internal" or "external."[141] Common external procedures in the employment context include negotiation,[142] mediation,[143] arbitration,[144] and mini-trial.[145]

136. *Id.* § 7703(a)(1) ("Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.").

137. Cohen, *supra* note 9, at 686.

138. 28 U.S.C. § 473(a)(6) (1994).

139. 5 U.S.C. §§ 571-583 (1994).

140. Fed. R. Civ. P. 16(c)(9).

141. Charles P. O'Connor & Anita W. Coupe, *Employment ADR: There Is More Than Meets the Eye*, Metropolitan Corp. Couns., Aug. 1995, at 10. External procedures traditionally involve third parties, such as arbitrators or mediators, while internal procedures happen within the company without the assistance of a third party. *See id.*

142. Negotiation has been characterized as "the mainstay of dispute resolution." Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government 10 (Erika S. Fine ed., 1988) [hereinafter Containing Legal Costs].

143. *See infra* note 168 and accompanying text.

144. *See infra* note 147 and accompanying text.

145. The mini-trial is defined as an "abbreviated case presentation[ ] made by counsel to principals from each side and, if desired, a neutral advisor of the parties' choos-

The internal procedures available include fact finding,[146] negotiation, and peer review.

Arbitration is a dispute resolution method where "a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard."[147] Binding arbitration comprises a part of almost every collective bargaining agreement that unions negotiate,[148] and is instrumental in the resolution of many types of workplace disputes. The use of arbitration in the workplace is increasingly more popular because of its ability to "present viable solutions for dealing with problems which are peculiar to the workplace."[149] Arbitration is useful in cases where employment strife in the form of imminent labor strikes can be averted without lengthy litigation.

However, because all arbitration awards can be reviewed by courts, arbitration is not final or binding.[150] Historically, mandatory arbitration clauses in workplace manuals produced a wealth of litigation as to their enforceability.[151] The Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[152] however, upheld the enforceability of a mandatory arbitration clause, which foreclosed the plaintiff from filing an age discrimination suit.[153] Presumably, the same outcome would result in a Title VII sexual harassment case, so long as the plaintiff was not duped into signing the contract.[154] Interestingly, the EEOC cautions against mandatory arbitration clauses in Title VII cases, advising that arbitra-

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ing. . . . Afterwards, the [parties] meet on their own to negotiate settlement." Containing Legal Costs, *supra* note 142, at 8. The drawback to a mini-trial is that the role of the neutral advisor is to assess the viability of each side's position, but not necessarily to encourage or facilitate settlement. *See id.*

146. In fact-finding, a neutral third party with expertise in the substantive legal area (i.e., sexual harassment) reviews the case and evaluates dispute facts. *Id.* at 9-10.

147. Black's Law Dictionary 70 (abr. 6th ed. 1991). Arbitration is "the most rigid and often the least satisfactory method[ ] of conflict resolution for the participants." Jay Folberg & Alison Taylor, Mediation 26 (1984).

148. Peter M. Panken et al., *Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's*, 69, 73 (A.L.I./A.B.A. Dec. 5, 1996), *available in* WESTLAW, SB 31 ALI-ABA 69.

149. George H. Singer, *Employing Alternative Dispute Resolution: Working at Finding Better Ways to Resolve Employer-Employee Strife*, 72 N.D. L. Rev. 299, 301 (1996).

150. *See* Vern E. Hauck, *Introduction* to Arbitrating Sexual Harassment Cases 1-1, 1-3 (Vern E. Hauck ed., 1995).

151. Nancy Sedmak, *Arbitration of Discrimination Claims Should Not Be Mandatory, Panelists Say*, 153 Daily Lab. Rep. (BNA) C-3 (Aug. 9, 1995).

152. 500 U.S. 20 (1991).

153. *Id.* at 33.

154. The Ninth Circuit refused to compel arbitration in a sexual harassment case, however, where the plaintiff was not given enough information about the arbitration clause of the contract. Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995). "[A] Title VII plaintiff may only be forced to forego her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." *Id.*

tion should only be appropriate when the parties agreed to arbitrate *after* the claim arose.[155]

The process of arbitration weighs in favor of the employer.[156] First, claims against supervisors are unlikely to fall within a mandatory arbitration clause in the labor context because supervisors are not normally part of the bargaining unit.[157] Even if arbitration is offered under a given collective bargaining agreement, therefore, a plaintiff who is harassed by her supervisor will be unable to avail herself of the arbitration option. In addition, the arbitrator pool is largely lacking in any gender or racial diversity; the panel of arbitrators that is likely available for a sexual harassment claim is ninety-seven percent white, with eighty-nine percent of the panel comprised of highly educated males with an average age of over sixty years old.[158] Finally, because a minimal number of arbitration decisions are published,[159] it is difficult for employers with mandatory arbitration clauses to discern illegal conduct.[160]

The employer is often interested in retaining a working relationship with the accused harasser; if internal policy forces the employer to discharge an employee, and the discharge is later upheld in arbitration, the relationship between the harasser and the employer will be severed. Harassers, however, are not always discharged by arbitrators. In fact, arbitrators often prefer a corrective discipline, somewhere short of discharge,[161] in the hopes that the relationships between the parties could continue. "Unfortunately, corrective discipline is not always successful. Arbitral awards that are *unsuccessful* in rehabilitating sexual harassers thwart the public policy against sexual harassment by placing an employee in the workplace who will continue to sexually harass others."[162]

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155. Panken et al., *supra* note 148, at 80.

156. *See infra* note 187 and accompanying text.

157. Hauck, *supra* note 150, at 1-21.

158. William M. Howard, *Arbitrating Employment Discrimination Claims: Do You* Really *Have To? Do You* Really *Want To?*, 43 Drake L. Rev. 255, 287-88 (1994).

159. Hauck, *supra* note 150, at 1-21 ("Published labor arbitration awards represent a small portion of the total number of grievances dealing with sexual harassment arbitrated each year . . . .").

160. Some generalizations about sexual harassment in the arbitration context can be drawn, and this information is useful in helping parties to a harassment dispute evaluate the viability of the claim. For instance, arbitrators consistently uphold discharges of harassers where there has been physical touching of any kind, including a kiss on the cheek. William A. Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 Arb. J. 31, 38 (1988). In general, the harasser will be discharged by an arbitrator when the harassment was excessive, when it occurred without remorse, when it affected the working environment, or when it tarnished the company's public image. Hauck, *supra* note 150, at 1-22.

161. Chris Baker, Comment, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. Cin. L. Rev. 1361, 1381-82 (1993).

162. *Id.* at 1383.

Once an arbitrator has issued an award, parties may still end up in court. Courts can review arbitration awards,[163] and those who do must balance two competing policies: the public policy against sexual harassment, and the judicial policy favoring the finality of arbitration awards.[164] Any weighing of public policy invites challenges by parties unhappy with the arbitrator's decision.[165] As one commentator notes, "[t]he longer a labor relations dispute is allowed to go on, the greater the risk of hostility, mistrust, and disaffection."[166] Arbitration is ill-suited for sexual harassment disputes because it lacks both the flexibility of negotiation and the safeguards of litigation. The next part offers mediation as the most effective and efficient forum for resolving most sexual harassment disputes.

III. The Process of Mediation

Mediation may be the best choice for resolving most sexual harassment disputes. To be effective, a resolution system must ultimately meet the majority of the concerns of all parties. Mediation is able to reconcile the widely differing concerns of the actors in a case of sexual harassment.[167] The next section begins by introducing mediation, and then explains why it is uniquely suited for the sexual harassment arena.

A. *Definition of Mediation*

Mediation, defined as "the use of a third-party neutral to intervene between two parties who are in conflict,"[168] is a highly flexible dispute

163. Singer, *supra* note 149, at 321.

> [C]ourts generally limit their review to the consideration of whether the arbitrator performed the assigned role. The review of an arbitrator's adherence to performance standards does not, in theory, involve scrutiny of the award itself. The sufficiency of the evidence on which an arbitrator bases his or her decision is likewise not a matter for judicial review. In this regard, appeal rights do not generally parallel those commonly found in civil litigation; errors of fact *or* law by the arbitrator are usually not subject to review on appeal.

Id. (citations omitted).

164. Baker, *supra* note 161, at 1361.

165. Douglas E. Ray, *Sexual Harassment, Labor Arbitration and National Labor Policy*, 73 Neb. L. Rev. 812, 829-30 (1994).

166. *Id.* at 830.

167. *See supra* part I.E.

168. Adam J. Conti, *Mediation of Work-Place Disputes: A Prescription for Organizational Health*, 11 Employee Rel. L.J. 291, 291 (1985). Folberg and Taylor, professors at Lewis and Clark Law School, offer the following definition of mediation:

> Mediation is first and foremost a *process* that transcends the content of the conflict it is intended to resolve. . . . It can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. . . . The most useful way to look at mediation is to see it as a goal-directed, problem-solving intervention.

resolution method. Mediation seeks to reach an agreement about *future* conduct, not to place blame with one party or the other.[169] Mediation explores the legal and non-legal issues and, more importantly, the options for resolving them.[170] Although the process of mediation is flexible and can be modified at any time prior to, or even during, the mediation session, the following is a representative sampling of the various procedural aspects of the mediation session.

The mediator[171] traditionally begins with an initial joint session, where all parties are present, during which the mediator introduces both himself and the process.[172] The parties then give opening statements without interruption by the other parties to give the mediator an overview of the dispute.[173] The mediator proceeds to meet with each party separately. During these meetings or "caucuses," the mediator works with the parties to define the central issues through the use of open-ended questions.[174] The mediator focuses on developing the trust of the parties during these caucus sessions.[175] Once the issues are identified, the primary goal is to generate options for resolving the dispute.[176] These proposed resolutions become the focus of the mediation as the parties, through the mediator, evaluate those options and negotiate an acceptable solution.[177] Traditionally, the mediator or a party then drafts the solution into a written contract signed by both parties, which is the culmination of a successful mediation.[178]

B. *Mediation Is the Most Appropriate Method for Resolving Most Sexual Harassment Disputes*

The primary reason to choose mediation is because, put simply, it works. In general, mediation resolves the conflict in question an esti-

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Folberg & Taylor, *supra* note 147, at 7-8.

169. Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 Vt. L. Rev. 15, 17 (1982) (describing mediation as "prospectively rather than retrospectively oriented").

170. Conti, *supra* note 168, at 295.

> Through this process of exploration and understanding, resolution is approached by one of three ways—by each side making movement toward a common ground, by the realization of one or both parties that the actual problem was something other than initially perceived, or through the synergistic effect of the process itself, which is the most creative approach.

Id.

171. The mediator is the "[n]eutral third person who helps disputing parties to reach agreement through the mediation process." Black's Law Dictionary 678 (abr. 6th ed. 1991).

172. Folberg & Taylor, *supra* note 147, at 39-41.

173. *Id.* at 40-42.

174. *Id.* at 41-43.

175. *Id.* at 38-40.

176. *See id.* at 49-50.

177. *Id.* at 53-58.

178. *Id.* at 60-62.

mated eighty-five percent of the time.[179] Countless attorneys have endorsed mediation as particularly appropriate in sexual harassment cases.[180] The EEOC itself instituted a pilot ADR program in 1992 employing voluntary mediation as a means to resolve various discrimination disputes.[181] The program had an ultimate success rate of more than fifty percent, with ninety-two percent of the parties rating the mediation process as "very fair" or "fair."[182] The remedies varied from cash settlement and changes in employment status to apologies.[183]

Because of its flexibility, mediation works especially well when sensitivity to emotional issues is required, as in cases of sexual harassment.[184] Mediation, because it is ultimately guided by the concerns of the parties, is responsive to the factual pattern in any given case. As such, mediation is appropriate for resolving disputes involving either quid pro quo or hostile environment sexual harassment.[185]

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179. Cindy C. Ettingoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. Mem. L. Rev. 1131, 1135 (1996).

> Mediation has been used to resolve collective bargaining impasses between unions and management since at least as early as 1947. . . . Mediation has also been used recently to aid parties in reaching divorce settlements; as an alternative to small claims court; and . . . to resolve a broad variety of disputes ranging from minor criminal offenses to landlord-tenant disagreements.

Conti, *supra* note 168, at 292 (citations omitted).

180. *See, e.g.*, Aswad, *supra* note 5, at A-9 (quoting Berkley, California attorney Amy Oppenheimer in support of mediation because it "gives [parties] a chance to be heard"); *Mediation Can Work Well Adjudicating Sex Harassment Claims, ABA Panel Says*, 155 Daily Lab. Rep. (BNA) D-9 (Aug. 15, 1994), *available in* WESTLAW, 1994 DLR 155 D9 (stating that attorneys from San Francisco and Florida firms recommended mediation for sexual harassment claims at ABA annual meeting); Simon J. Nadel, *Sexual Harassment: Costly Workplace Incidents Persist; Innovative Approaches Recommended*, 88 Daily Lab. Rep. (BNA) CC-1, CC-2 (May 7, 1996) ("New York attorney Brody [senior counsel to the labor and employment group of Gibney, Anthony & Flaherty] proposes mediation as a solution to sexual harassment charges, noting that because sexual harassment is a 'profound interpersonal problem,' addressing it requires discussion and accommodation."); Sedmak, *supra* note 151, at C-3 (listing lawyers from New York and San Francisco extolling mediation for sexual harassment cases, partly because of its educative element); *Sexual Harassment Claims Prime Area for Mediation, Attorney Tells Seminar*, 133 Daily Lab. Rep. (BNA) A-4 (July 10, 1992), *available in* WESTLAW, 133 DLR A-4 (indicating that Washington, D.C. attorneys James Heller and Francine Weiss endorsed mediation for sexual harassment claims).

181. Ettingoff & Powell, *supra* note 179, at 1150.

182. *Id.* at 1151.

183. *Id.*

184. *See* James K. Hoenig, *Mediation in Sexual Harassment: Balancing the Sensitivities*, Disp. Resol. J., Dec. 1993, at 51, 53.

185. The adversarial approach of traditional litigation, on the other hand, is "uniquely unsuited to resolving these claims . . . [because it] has difficulty in appreciating the gradations along the sexual harassment continuum." Williams, *supra* note 116, at 68.

The choice of the forum for a sexual harassment case can be absolutely critical to its outcome.[186] While the employer typically has an edge over the victim in arbitration, the victim tends to be more successful in a trial where she can present her case to a jury.[187] Mediation, in contrast to either of these options, is a forum without a predisposition to either party. Ultimately, the use of mediation results in less resentment between the parties, as well as less emotional and financial involvement.[188]

The actual process of mediation also makes it a more desirable dispute resolver than arbitration for sexual harassment plaintiffs. In a recent study, 77% of the claimants who mediated their disputes were satisfied with the process, compared with only 45% of those whose disputes went to arbitration.[189] This greater satisfaction is not surprising in light of the amount of control that complainants are able to exercise over the mediation process[190] compared to the much lesser degree of control they have in an arbitration. For these reasons, complainants should be eager to exercise their right to mediation.

Allowing the mediator flexibility in guiding the process of the mediation session enables him to help the parties reach a resolution. The mediator may offer himself as a scapegoat during a joint session, for example, by suggesting a ridiculous resolution to the controversy.[191] In response, the parties can begin a fruitful pattern of agreement by uniting to reject the mediator's proposal. The mediator may also find it useful to give the parties control over certain elements of the mediation procedures, such as the timing, that are not crucial to the mediation but are points on which the parties can begin to agree. The timing of a mediation session, for example, is an unlikely source of conflict between the parties, because the entire mediation process is often completed in a day or less.[192] In fact, the rapid resolution of mediation makes it particularly appealing when compared to the often time-consuming choices of arbitration and litigation.[193]

In addition to the ability to control the mediation *process*, parties have a greater opportunity to exercise control over the *solution* to

186. Sedmak, *supra* note 151, at C-3.

187. *Id.*

188. Michael D. Young, *How to Use ADR to Your Advantage: Effective Participation in the Mediation Process*, *in* How to Use Alternative Dispute Resolution to Your Advantage 65, 79 (1995) (on file with the *Fordham Law Review*).

189. Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences Between Mediation and Arbitration*, 6 Negotiation J. 249, 250-51 (1990).

190. *See infra* part V.D. While the mediator has discretion in structuring a mediation, there is no preset course that the mediation must take. As such, parties are in the position to make procedural requests of the mediator.

191. Jack Etheridge, *Mending Fences: Mediation in the Community*, *in* Dispute Resolution Devices in a Democratic Society 73, 77 (The Roscoe Pound-American Trial Lawyers Foundation 1985).

192. Conti, *supra* note 168, at 302.

193. Grover, *supra* note 120, at 56.

their own dispute in mediation than in any other dispute resolution method.[194] In both arbitration and litigation, an arbitrator or judge has the final and only say over the resolution of the dispute.[195] Mediation is a distinctly different process of dispute resolution from litigation and arbitration; it is not a compressed, informal trial. The primary goal in mediation is to reach an agreement about the future conduct or relationships between the parties, not to assign blame for the alleged incident of harassment.[196]

This focus on the future cannot be overemphasized in cases of sexual harassment. Both the complainant and the alleged harasser may be interested in continuing their employment, and the employer is likely to be interested in a continuing relationship with one or both of the employees. In these circumstances, mediation is the best dispute resolution method because the financial costs are shared by the parties, giving them a greater personal stake in the process and its outcome.[197]

Further, mediation may preserve the quality of any continuing relationship because the parties are centrally involved in crafting the final agreement. Each party to a mediation, in contrast to parties of other dispute resolution methods, is more likely to perceive the ultimate outcome as "fair."[198] As a result, if and when the parties return to the workplace, the workplace relationships have suffered less damage than if a "winner" and a "loser" had been declared, as in an arbitration or at trial.

Within the workplace, employers have an interest in encouraging the reporting of incidents of sexual harassment, out of concern for both their employees and the productivity of the company, and because it is their legal obligation to maintain a workplace free from discrimination.[199] Internal grievance procedures, and particularly the mediation procedure detailed below,[200] can help shield employers from legal liability when an employee sues on a sexual harassment

194. *See* Michael W. Hawkins, *Alternative Dispute Resolution: An Alternative for Resolving Employment Litigation and Disputes*, 20 N. Ky. L. Rev. 493, 494-95 (1993).

195. Because both judges and arbitrators render decisions the parties are bound by law or contract to accept, the parties have no influence over the specific terms of the remedy granted.

196. Folberg & Taylor, *supra* note 147, at 8 ("Mediation is more concerned with how the parties will resolve the conflict and create a plan than with personal histories.").

197. Grover, *supra* note 120, at 55-56.

198. Conti, *supra* note 168, at 302. Additionally, mediation should be preferred because even if an employee would otherwise have wanted to remain in the workplace, the acrimonious nature of litigation and arbitration may sever the relationship between the parties, making continued employment impossible.

199. *See supra* note 91 and accompanying text.

200. *See infra* part IV.B.

claim.[201] This is especially true in cases where the employee chooses not to utilize the internal procedures that the employer offered.[202]

Of the available internal options, mediation is the better choice for a complainant, as it will provide a greater opportunity for her to be heard. Mediation is also highly flexible as to timing, scope, and format. The mediator should structure the mediation in such a way that the parties feel they have a chance to tell their side of the story.[203] This allows parties to "vent" about the emotional issues that are common in sexual harassment disputes[204] in a way that is not possible within the rigid confines of litigation. Because both parties are interested in telling their version of the events—regardless of whether their story is legally relevant—mediation is often very effective at defusing volatile situations.[205] In contrast, a trial rarely allows the parties an opportunity to be heard without being rushed by their counsel or opposing counsel.[206]

While one writer expressed hesitation in endorsing mediation in cases of sexual harassment, noting the potential discrepancies in power between the complainant employee and the employer,[207] at least one feminist legal scholar has indicated that there is no evidence that a litigator, in comparison to a mediator, can better help a woman overcome any power imbalance.[208] The mediator can structure the mediation to account for any power imbalances between the parties. This is, in fact, the mediator's job—to neutralize power imbalances.[209] The mediator may choose, for example, to suspend the initial joint meeting so that the parties are not forced to meet face-to-face at the outset of the mediation. In fact, the mediator may not require that the

201. Amy Holzman, Note, *Denial of Attorney's Fees for Claims of Sexual Harassment Resolved Through Informal Dispute Resolution: A Shield for Employers, A Sword Against Women*, 63 Fordham L. Rev. 245, 248-50 (1994). "[A] company can do much to . . . avoid liability for hostile environment sexual harassment if it can show that . . . it has promulgated a company policy against sexual harassment that encourages employees to notify the company of any such claim . . . ." John L. Valentino, *An Effective Employer Response to Complaints of Sexual Harassment*, N.Y. St. B.J., Mar.-Apr. 1996, at 36, 37-38. Having a dispute resolution process in place can also help an employer avoid suits by the accused "claiming damages arising from the charges made against [him]." Williams, *supra* note 26, at 1218; *see also* Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 463 (N.J. 1993) (holding that preventative measures can be evidence of "due care").

202. Holzman, *supra* note 201, at 250.

203. *See* Grover, *supra* note 120, at 56.

204. *See id.*; Hoenig, *supra* note 184, at 53.

205. *See* Ettingoff & Powell, *supra* note 179, at 1160.

206. Aswad, *supra* note 5, at A-9.

207. *See* Irvine, *supra* note 23, at 50.

208. Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 J.L. & Inequality 21, 30 (1984).

209. *Mediation Can Work Well Adjudicating Sex Harassment Claims, ABA Panel Says*, *supra* note 180, at D-9. ("Mediation seeks to neutralize the power that one party has over the other and to put both parties in a position to negotiate.").

parties ever negotiate face-to-face because of the sensitivity of issues in a sexual harassment dispute.[210]

The same critic of mediation has argued that victims should avoid mediation because it "risks trivializing the seriousness of sexual harassment."[211] Under this view, mediation does not do enough to set appropriate standards for workplace conduct because the level of public discipline that harassers receive is somehow a "reflection" of women's progress in the workplace.[212] Mediation, however, does no more damage than pre-trial settlements or arbitrations with unpublished decisions. In addition, the court opinions that result from litigation are similarly criticized because they often fail to set real standards for employers.[213] This argument also implies that an individual victim desiring a private resolution of her complaint should choose litigation to preserve the uniformity of sexual harassment law. No one would advocate litigation for a tort plaintiff who wanted to settle, however, and there is no compelling reason why a sexual harassment complainant should be treated any differently.[214]

Mediation expands the potential for alternative resolutions for complainants seeking relief that is not solely monetary.[215] The outcomes in mediation can range from an agreed-upon cash settlement amount to more individualized solutions. Indeed, "[i]n mediation, the remedies are limited only by the imagination and willingness of the parties, their counsel, and the mediator."[216] Arbitrators, like judges, are unlikely to offer such nontraditional remedies.[217] In mediating sexual harassment claims, the parties can explore solutions such as the fol-

210. *See* Gadlin, *supra* note 81, at 149; Grover, *supra* note 120, at 55; Thomas F. Levak, *Sexual Harassment in the Workplace: The Alternative Dispute Resolution (ADR) Option*, 12 LERC Monograph Ser. 33, 35 (1993), *available in* WESTLAW, 12 LERCMS 33.

211. Irvine, *supra* note 23, at 28.

212. *Id.*

213. *See supra* notes 107-09 and accompanying text.

214. While sexual harassment is indeed a different cause of action than a garden variety tort action, neither potential plaintiff should be forced to litigate. Sexual harassment plaintiffs have already been victimized because of their gender, and complainants should not be forced to subordinate their choice of an alternative dispute resolution method to contribute to a body of sexual harassment law. This is particularly so in light of court opinions' failure to educate the workplace and its inhabitants about what conduct is illegal. *See supra* notes 107-09 and accompanying text. Ironically, the author advancing the argument against mediation quotes the following in support of the proposition that women should litigate: "'[F]orcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them . . . or good for the system.'" Irvine, *supra* note 23, at 50 (quoting Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1607 (1991)). This is, however, precisely why women should not be forced to litigate their sexual harassment claims.

215. *See infra* part V.H.

216. Costello, *supra* note 4, at 21.

217. Levak, *supra* note 210, at 34.

lowing: education rather than punishment;[218] transfers, retraining, counseling, back pay;[219] disciplining of the offender, separation of offender and victim, office-wide training, updated complaint processes;[220] letters of reference, or job modifications.[221]

A personal apology can also function as a remedy in a sexual harassment case. An acknowledgment of the offensiveness of the harasser's conduct from the harasser himself[222] helps relieve the victim of her feelings of self-doubt.[223] The harasser also benefits from the opportunity mediation provides to truly understand the position of the person he has offended, and to offer a sincere apology.[224] Apologizing can often go a long way in defusing the difficult emotional issues in a sexual harassment case so that the parties can focus on the future relationships. Litigation and arbitration never offer this opportunity to the parties.

Unlike mediation, litigation focuses too much on what a claim is worth, reducing every claim to a dollar amount.[225] The solutions reached in mediation, in contrast to those imposed by judges in a litigation setting, are more likely to endure and be respected by the parties.[226] This is certainly a result of the input the parties had in shaping the resolution to best fit their needs. Consider, for example, an employer who agrees through mediation to pay a complainant employee $\$X$ in damages and to revise the complaint procedure in the workplace. The employer is unlikely to resent the terms of the agreement he helped design. The complainant employee is also more likely to view the employer as willing to remedy the situation, rather than simply accepting the determination forced upon him by the court.

The employer also benefits from mediation's remedy scheme, especially when the alternative is litigation. Litigation is often unsatisfactory to the employer because it is an "all or nothing" dispute resolution method.[227] Methods of alternative dispute resolution, such

218. Gadlin, *supra* note 81, at 145-46.

219. Levak, *supra* note 210, at 34-35.

220. Grover, *supra* note 120, at 57.

221. Williams, *supra* note 91, at 1219.

222. Winograd, *supra* note 114, at 41 ("For some victims, the need to hear an acknowledgment that conduct was offensive, coupled with an apology for the uninvited action, will be a necessary precondition for the negotiation and acceptance of more traditional forms of relief."); *see also* Williams, *supra* note 116, at 73 (suggesting "letters of apology" as a creative remedy in sexual harassment mediations).

223. Winograd, *supra* note 114, at 43.

224. *See* Hoenig, *supra* note 184, at 51.

225. Grover, *supra* note 120, at 57. This is not to imply that women should not be financially compensated for any injuries they suffer as a result of workplace sexual harassment, but merely that money may not be the only, or perhaps even the foremost, remedy in which employees are interested.

226. *Id.* at 56-57.

227. Levak, *supra* note 210, at 33.

as mediation, eliminate the possibility of a highly inflated jury verdict.[228]

Overall, mediation is an excellent dispute resolver for a company put off by the exorbitant legal costs of taking every incident of alleged sexual harassment to trial.[229] The number of employment claims is skyrocketing[230] and, along with it, the number of women in the workplace is rising as well. Women are projected to comprise nearly half the workforce by the year 2000.[231] Timely mediation can save over 80% of the court and counsel costs of litigation.[232] Mediation is the least expensive and the least disruptive dispute resolution method available.[233] The fast resolution improves employee relationships and guarantees fewer lost employee hours.[234] In addition, in house counsel, rather than outside counsel, can handle the employer's case, reducing expenses for attorney's fees.[235]

The complainant employee also saves money by choosing mediation. She will often get a settlement before she can accrue much in attorney's fees.[236] Further, she avoids the trouble of securing representation to litigate. For a blue-collar worker, a $2500 or $5000 retainer essentially constitutes a bar to any representation.[237] Many attorneys will not take a plaintiff's sexual harassment case in any event, and certainly not on a contingency basis.[238] Plaintiffs' attorneys know the case will require an inordinate time commitment to compete with what will likely be a higher-financed defense by the employer.[239]

Mediation is a cost-effective, time-efficient solution that allows all the parties to participate in the formulation of an acceptable result to the conflict. Unlike the options of arbitration and litigation, mediation allows the parties to exercise greater control over the remedy of the dispute. For these reasons, employers should integrate mediation into their dispute resolution policies and encourage employees to mediate any sexual harassment disputes that arise. The next part offers a

228. Cindy Fuzzi, Book Review, Disp. Resol. J., Jan. 1995, at 85 (reviewing Julie M. Tamminen's *Sexual Harassment in the Workplace: Managing Corporate Policy* (1994)).

229. *See* Meredith, *supra* note 2, at 62.

230. Ettingoff & Powell, *supra* note 179, at 1133 (citing Steven M. Kaufman & John A. Charin, *Directing the Flood: The Arbitration of Employment Claims*, 10 Lab. Law. 217 (1994)).

231. Lamont E. Stallworth & Martin H. Malin, *Workforce Diversity*, Disp. Resol. J., June 1994, at 28.

232. Judith Meyer, *Mediation Works... With the Least Damage Done to the Parties' Egos and Pocketbooks*, Disp. Resol. J., Apr.-June 1995, at 46.

233. Grover, *supra* note 120, at 55-56.

234. *Id.* at 56.

235. Jeanne C. Miller, *ADR in Employment Matters, in* How to Use Alternative Dispute Resolution to Your Advantage, *supra* note 188, at 163.

236. *Id.*

237. Howard, *supra* note 158, at 289.

238. Costello, *supra* note 4, at 19; Howard, *supra* note 158, at 288.

239. Costello, *supra* note 4, at 19.

sample mediation provision that should be part of an employer's dispute resolution policy.

IV. CONTRACTUAL MEDIATION FOR SEXUAL HARASSMENT CLAIMS

Evaluating dispute resolution procedures after a dispute has arisen is not effective for an employer. As the EEOC guides, "[p]revention is the best tool for the elimination of sexual harassment."[240] This part outlines a general sexual harassment policy and focuses on the role of mediation within that policy by offering a sample mediation clause for inclusion in an employment contract or employee handbook.

A. *Sexual Harassment Policy, Generally*

Every company's larger policy targeting sexual harassment should provide for mediation of any disputes that arise. To be successful, a corporation's policy should "increas[e] the reporting rate and decreas[e] the actual incidence [of sexual harassment]."[241] For the policy to be effective, it should: (a) be in writing; (b) be given to all employees; (c) make clear that sexual harassment of any kind will absolutely not be tolerated; (d) provide a clear definition of sexual harassment, complete with examples of behavior that would be unacceptable under the regulations; (e) provide for education and training programs; (f) indicate the appropriate procedure for filing a complaint; (g) indicate procedures for resolving the complaint, including any appeals procedures open to employees; (h) reassure that complainants will not be retaliated against for filing such a complaint; (i) indicate that all claims will be investigated; and (j) note that all meritorious claims will be appropriately remedied.[242] A mediation clause would comprise only a small part of a company's complete sexual harassment policy, falling here under part (g), the appropriate procedures for resolution of the complaint. While mediation would be but one element of such a policy, it is a crucial one. Once a dispute has arisen, in spite of the educative elements of the policy, the dispute resolution choice is of paramount importance.

The EEOC has indicated that an effective ADR program, such as a mediation clause, must focus on voluntariness, confidentiality, and neutrality.[243] What follows is a suggested sample mediation provi-

240. EEOC Guidelines, *supra* note 46, § 1604.11(f).

241. *The Civil Rights Act of 1991: Hearings, supra* note 6, at 198 (statement of Dr. Freada Klein).

242. *See* Valentino, *supra* note 201, at 38; Michael B. Reuben & Isaac M. Zucker, *Remedying Sexual Harassment: A Primer*, Litig., Winter 1995, at 44.

243. *EEOC Policy Statement on Alternative Dispute Resolution*, 137 Daily Lab. Rep. (BNA) A-1 (July 18, 1995).

sion, addressing these central considerations, as well as the mediation's structure, costs, and settlement options.[244]

B. *Proposed Contractual Provision for Mediation*

I. Proposal of Mediation

1. Any party to an alleged incident of sexual harassment may initiate mediation at such time the party becomes aware there is an alleged incident of sexual harassment. A party is defined for purposes of this provision as a complainant employee, an alleged harasser, or the employer. The party initiating the mediation must give written notice to all parties to the mediation, including the alleged victim, the alleged harasser, and the employer.
2. This notice must indicate that a response, either accepting or declining mediation, must be given within 14 days. Any party wishing not to mediate must waive, in writing, his or her right to mediation. Any party filing an EEOC complaint or Title VII suit will have, by filing, constructively waived their right to mediate.
3. Neither this document nor an agreement to mediate waives any substantive legal right or responsibility of any party. By choosing to mediate, no party is at any time waiving his or her right to file suit in court, go to arbitration, or file an EEOC complaint.

II. The Mediation Process

1. The mediation sessions will aim to reach an agreement about the future conduct and relationship of the parties. The mediator's role is to facilitate agreement; the mediator is not a judge or an arbitrator and does not "rule" on the merits of this case. The power to resolve the dispute resides solely with the parties, not the mediator. Before beginning the mediation session, all parties must read the description of the mediation process accompanying this policy,[245] and must acknowledge in writing that they have read the description.

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244. Several authorities were used as guidance in the drafting of this provision, including: Model Standards of Conduct for Mediators §§ 1, 2, 4, 5 (American Arbitration Association et al., 1994); Containing Legal Costs, *supra* note 142, at 51; A Drafter's Guide to Alternative Dispute Resolution 72-73 (Bruce E. Meyerson & Corinne Cooper, eds., 1991); *Resolving Employment Disputes: A Manual on Drafting Procedures*, 2, 10 (American Arbitration Association, 1993); Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, Disp. Resol. J., Jan.-Mar. 1996, at 17; Levak, *supra* note 210, at 34-35; Anthony J. Mercorella, *Alternative Dispute Resolution—Expediting Cost Efficient Resolution of Claims, in* How to Use Alternative Dispute Resolution to Your Advantage, *supra* note 188, at 17-19; David M. Shacter, *To Litigate or Not?—Time for A.D.R.*, 28 Beverly Hills B.J. 30, 33 (1994).

245. The description would define mediation, explain the logistics of the process, and would largely mirror the discussion in *supra* part III.A.

2. The mediator has complete control over the procedures used during the sessions, including, but not limited to, the frequency and duration of caucusing, the use of the initial joint session, and the scheduling of the sessions.
3. The choice to participate in mediation is voluntary. Any party may terminate the mediation at any time for any reason, by giving written notice of the termination to the mediator and to each of the other parties to the mediation. Filing an EEOC complaint or Title VII suit will be considered termination for purposes of this policy.
4. The mediation sessions are confidential. Neither the mediator nor any party to the mediation may disclose to anyone any information about or from the mediation process. Each party and the mediator shall sign a confidentiality agreement prior to the commencement of the first mediation session.
5. All parties shall attend the mediation sessions and make a good faith effort to mediate.
6. At least one of the individuals present on behalf of each party must have the authority to settle the dispute.
7. Each party to the mediation is both allowed and encouraged to bring counsel to the mediation sessions. Counsel shall function, however, as advisors rather than advocates.
8. The parties' remedies are not limited to cash settlements. The exploration of other potential remedies is strongly encouraged.

III. Selection of a Mediator

1. The mediator must be:
   (a) neutral and impartial;
   (b) knowledgeable in the area of sexual harassment; and
   (c) certified by an organization that requires:
      (i) supervised training in the mediation process; and
      (ii) adherence of the mediator to standards of conduct.[246]
2. The mediator shall immediately disclose any potential conflict of interest to all parties.
3. An organization qualified to certify mediators as per III.1(c) shall provide a list of three suggested mediators who meet the qualifications in Section III.1 above. If the parties agree on any of the suggested mediators, that person will be the mediator. Alternatively, any party to the mediation may suggest another

246. *See, e.g.*, Model Standards of Conduct for Mediators, *supra* note 244. These standards were drafted by representatives from the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution. *Id.* "The model standards of conduct for mediators are intended to perform three major functions: to serve as a guide for the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes." *Id.* at i.

mediator who meets the qualifications in Section III.1., but all the other parties must agree to that person being the mediator.

4. If the parties cannot agree on a mediator within 14 days after mediation has been initiated, the organization supplying the mediator will suggest one appropriate mediator. No party may then object to the suggested mediator unless the mediator has a conflict of interest.
5. The mediation shall commence within 21 days from the date on which the mediator was chosen.

IV. Costs

1. The cost of the mediator will be split as follows: The employer is responsible for 90% of the mediator's fees, and the complainant employee is responsible for 10%. Inability of the employee to pay the 10% will not, however, prevent a complainant employee from pursuing mediation. In such cases, the employer shall pay the full amount and make arrangements with the complainant employee for him or her to repay some amount, up to the 10%, on a reasonable repayment schedule. The amount to be paid and the repayment schedule shall be set by the Human Resources Personnel Office, or similar office of the employer.[247]
2. Further, the employer shall pay the cost of counsel for the complainant employee, up to and including the cost of 25 billable hours or $3000, whichever is less. The complainant employee shall choose his or her counsel. This counsel, if he or she is to be paid by the employer, must be present at the mediation.

V. Settlement

1. Any settlement reached by the parties must contain a liquidated damages clause, providing a set amount that shall be paid should a party breach the contractual agreement.
2. Once a settlement has been reached, the mediator or counsel for one of the parties shall draft a written settlement document incorporating the terms of the settlement.
3. If the mediator does not draft the settlement agreement, the mediator shall review the agreement before it is given to the parties for signature.
4. This draft shall be given to all parties, reviewed, changed if appropriate, and executed.

247. The amount and schedule of payments should: (a) be set on a sliding scale, where the amount and schedule of payments are based on the employee's income and (b) apply on a company-wide basis to all mediations. The scale should be determined in advance of any dispute.

V. COMMENTARY ON THE PROPOSED MEDIATION PROVISION

The following part discusses each section of the proposed mediation provision, offering explanation of how and why the sections are effective in mediating sexual harassment disputes. Understanding the provision is crucial so that employers can make any necessary modifications to respond to the unique contours of sexual harassment problems in their workplaces.

A. *Proposal of Mediation (Sections I.1, I.2, I.3)*

The first section of the contractual provision gives the right to mediation to the parties involved in a sexual harassment dispute. Policies that do not offer informal dispute resolution options like mediation will likely discourage complaints.[248] The control over the dispute that mediation offers encourages a high reporting rate for sexual harassment.[249]

Some employers, such as large law firms, have complained they fear that too many employees will lodge sexual harassment complaints if the process is user-friendly, and may be reluctant to adopt a provision such as the one suggested here.[250] Employers who have actually implemented such programs, however, have not experienced a flood of complaints.[251] In addition, a low reporting level caused by an inaccessible dispute resolution system simply belies the detrimental effects that sexual harassment has on an employer's business.

Any party wishing to mediate can initiate the process by notifying the parties in writing. The other parties have two weeks after receiving the notice within which to respond. The notice requirement ensures that no party can be forced to make an immediate decision about whether to mediate. It gives parties time to evaluate the legal and factual sufficiency of the allegations[252] and decide on a dispute resolution method.

Any party may waive its right to mediate if it does so in writing. Filing an EEOC complaint or Title VII lawsuit will also be considered a waiver of the party's mediation rights. The provision does not absolutely require the parties to mediate because voluntary participation is crucial to the mediation's success.[253] In addition, because the enforce-

248. *See* Rowe, *supra* note 3, at 171.

249. *Id.* at 170. "[A]n employer must choose between a very high degree of complainant choice, in dealing with concerns of harassment—and having a high reporting rate—or, on the other hand, insisting on mandatory reporting to an Equal Opportunity-type office and having a lower reporting rate." *Id.* at 171.

250. Richard B. Schmitt, *More Law Firms Seek Arbitration for Internal Disputes*, Wall St. J., Sept. 26, 1994, at B18.

251. *Resolving Employment Disputes: A Manual on Drafting Procedures, supra* note 244, at 3.

252. The explication of the legal framework for quid pro quo and hostile environment provided in parts I.A-C will aid in this determination.

253. *See infra* notes 263-64 and accompanying text.

ability of agreements in advance of arbitration has been the subject of considerable litigation,[254] a provision requiring mediation would be similarly problematic. The proposed provision offers a compromise. While not requiring mediation, it does require an affirmative act by the parties to waive their mediation option. This will encourage some reflection by the parties before relinquishing their mediation rights in writing.

The provision also indicates that, by pursuing mediation, the parties to the complaint of sexual harassment do not forfeit any other rights or responsibilities. A complainant, for example, does not waive her right to pursue a formal EEOC complaint by agreeing to attempt mediation under the company's internal policy. All parties must be aware that an agreement to mediate will not preempt them from exercising any of their remaining options for resolving the dispute, such as arbitration or the filing of a formal Title VII suit. Although the high success rate of mediation[255] makes it unlikely that the parties' conflict will ultimately require litigation or arbitration, this policy does not foreclose that option.

B. *Purpose of Mediation, Generally (Section II.1)*

It is imperative that the parties to a mediation understand both the ultimate goal of mediation and the role of the parties in achieving that goal. The contractual provision carefully differentiates between mediation and arbitration or litigation, which serves both to educate the parties and to focus the mediation session itself on the future rather than the past.[256] The policy allays the parties' fears about loss of control over the resolution of the dispute.[257] Parties ultimately retain control through the settlement they reach. The mediator has no authority to force a settlement on the parties.[258]

Because some or all of the parties might be fundamentally unfamiliar with mediation, the policy also requires all parties to read a description of the mediation process itself.[259] As mediation is quite

254. *See* Sedmak, *supra* note 151, at C-3.

255. *See supra* note 179 and accompanying text.

256. *See supra* note 169 and accompanying text. This is not to discount the role that discussion of past events will play in a mediation. The focus, however, should be on the resolution of those events.

257. *See supra* note 84 and accompanying text.

258. *See, e.g.*, American Arbitration Association, National Rules for Resolution of Employment Disputes: Arbitration and Mediation Rules Rule 10, at 36 (1996) (hereinafter National Rules) ("The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute.").

259. It is in the employer's best interest to provide the best possible information about the mediation process to potential aggrieved employees, as this will likely increase the number of employees willing to mediate their claims. The provision requires that the employer provide the employee with, at a minimum, a written description of mediation. This should not discourage employers from investing in

different from litigation and arbitration, the employer must have a statement prepared defining mediation to prepare parties for the process. While the mediator may depart from the generally accepted elements of the mediation,[260] parties should be conversant with the basic concepts.

C. *Process and Timing of Mediation (Section II.2)*

While the parties have absolute power over the final agreement arising out of the mediation, the mediator retains control over the process of mediation itself. The mediator cannot force a particular settlement on the parties,[261] but for the mediation to be successful the mediator must direct the procedural elements of the mediation as provided by the contractual provision. For example, under this policy, the mediator may terminate a mediation session if the parties are at an impasse.[262] The mediator, as a neutral party, is in the best position to determine which procedures are most appropriate, fair, and likely to result in an amicable resolution.

D. *Voluntariness and Control (Section II.3)*

The contract reminds the parties that mediation is voluntary, and provides for a method for withdrawing from the mediation. Compelling participation undermines the benefits of a party's participation in the mediation's outcome.[263] Maintaining this balance of voluntariness and control over the outcome is essential for the mediation process to be most successful.

It is important to note, however, that "voluntary," for purposes of the provision, does not mean strictly voluntary.

> To say that there may be strong pressures to cooperate is not to say that there is no voluntariness. We all make choices that are not autonomous but that we are free to reject. It is in this sense that mediation is voluntary; it relies both on coercive external pressures and on an individual's decision to participate.[264]

For the purposes of the contract, therefore, voluntary means "not mandatory." The provision also allows for a mechanism permitting parties to withdraw from the mediation. This gives meaning to the voluntariness language by allowing withdrawal provided it is commu-

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other educational media, including books or videos, that would provide employees with further information.

260. *See supra* note 210 and accompanying text.

261. *See supra* note 258 and accompanying text.

262. *See, e.g.*, National Rules, *supra* note 258, Rule 10, at 37. ("The mediator is authorized to end the mediation whenever, in the judgment of the mediator, further efforts at mediation would not contribute to a resolution of the dispute between the parties.").

263. *See* Conti, *supra* note 168, at 298 & n.19.

264. Bethel & Singer, *supra* note 169, at 19.

nicated to the other parties in writing. Filing an EEOC complaint or a Title VII lawsuit will also be considered a termination for purposes of the contract. Thus, the provision does not compel participation by an uninterested party.

One limited instance where one of the parties may want to refuse its right to mediate or withdraw from the mediation occurs when it becomes clear that the other side's case is completely without merit and a motion in court could dispose of the complaint.[265] This is one of the rare instances where litigation, because it would be so truncated, might be more economically efficient than mediation.[266] In these rare instances, the policy allows the parties to terminate the mediation.

E. *Confidentiality and Privacy (Section II.4)*

All parties to the mediation, including the mediator, are required to sign a confidentiality agreement stipulating that the mediation sessions are entirely confidential. The EEOC advises that any dispute resolution method chosen for sexual harassment cases should encourage confidentiality.[267] "There is general agreement that the success of mediation is dependent upon an expectation of privacy and confidentiality."[268] All parties to the mediation, including the employer, the complainant employee, and the alleged harasser, will have privacy concerns surrounding the mediation. The employer, for instance, will likely be worried about the negative publicity,[269] while the employees will be concerned about their reputations, both at the office and in the community at large.[270] For this reason, mediation is an especially appropriate forum when "there is some possibility that each party may have engaged in less then ideal behavior."[271]

This confidentiality requirement not only protects the public reputation of the parties, but also shields them from improper use of the mediation discussions in a future litigation, if the case were to go to trial.[272] Often, the parties discuss incriminating or sensitive informa-

265. Mercorella, *supra* note 244, at 18.

266. If the case were truly meritless, there would be no reason to negotiate because the party defending against a meritless position would, as expected, have no reason to bargain.

267. Sex Discrimination, *supra* note 4, at D-29.

268. Folberg & Taylor, *supra* note 147, at 264.

269. Grover, *supra* note 120, at 55; Ettingoff & Powell, *supra* note 179, at 1142-43 (discussing the negative publicity for Baker & McKenzie flowing from the firm's loss of a multi-million dollar sexual harassment case); *supra* note 89 and accompanying text.

270. *See supra* notes 79 & 98 and accompanying text.

271. Ettingoff & Powell, *supra* note 179, at 1160.

272. Folberg & Taylor, *supra* note 147, at 271 ("A court would not necessarily be bound to honor this private contract, though it may be persuaded by public policy considerations to do so."). One court has gone so far in support of confidentiality, however, as to imply an unwritten confidentiality provision into a mediation. *See* NLRB v. Macaluso, 104 L.R.R.M. (BNA) 2097, 2099-100 (9th Cir. 1980).

tion in the mediation sessions in the hopes of reaching a final agreement. Without a confidentiality clause, the parties would be less likely to offer potentially helpful information during the course of the mediation because the other party could use it against them in subsequent litigation or arbitration.[273]

F. *Good Faith Efforts to Negotiate (Sections II.5, II.6)*

Sections II.5, II.6, and II.7 reinforce the role of the parties in the mediation process. The dispute is unlikely to be resolved unless the parties make a commitment to mediate in good faith.[274] The presence of a representative capable of settling for each party at the mediation is also required to ensure that the parties do not negotiate in vain.[275] For the employee parties, including the alleged harasser and the victim of harassment, they will have the authority to settle these claims. Section II.6 ensures that the representative sent on behalf of the employer has the requisite authority to settle the claim when the parties arrive at a resolution. These stipulations help ensure that there are no barriers to the mediation, either psychological or logistical, that would frustrate its purpose.

G. *Function of Counsel (Section II.7)*

If the employee is represented by counsel, the power imbalances inherent in a conflict between an employer and employee, such as those present in a sexual harassment dispute, can begin to be redressed.[276] Further, employers will almost always have counsel present at the mediation,[277] and the presence of counsel for the employee helps to bolster the employee's bargaining power and begins to bring her into parity with the employer.[278] The contractual provision encourages all parties to bring representation to the mediation.

An imbalance of power can also exist between the complainant employee and the accused harasser. This disparity may be based on a combination of "personality, strategic position, tactical position, and gender."[279] The harasser is unlikely to be disadvantaged during the

273. Costello, *supra* note 4, at 20.

274. "It is . . . essential that all parties approach the mediation with open minds and good faith. To begin with, the employee should be sincere in asserting the grievance." Conti, *supra* note 168, at 297. This provision is also meant to protect against situations where one party is agreeing to mediate as a pretext for siphoning information from the other party that could influence litigation strategies. Conduct like this would violate the contract.

275. Shacter, *supra* note 244, at 33. "There is nothing more frustrating than spending several hours at the table helping the parties to embrace a more realistic view of their case that will allow them to settle, only to find that the person with authority either is not there or has to leave." *Id.*

276. Holzman, *supra* note 201, at 255.

277. *Id.*

278. *Id.*

279. Irvine, *supra* note 23, at 37.

mediation because the goal of both the harasser and the employer, who is represented by counsel, is largely the same: to avoid liability for the alleged harassment.[280] The power imbalances of the employer and harasser combine to create an especially disadvantageous situation for an unrepresented victim.

These potential disparities in power make counsel for the victim a practical necessity.[281] Victim's counsel can help the accused harasser understand the harassment situation from the victim's point of view.[282] Counsel for the victim, as well as for the employer, however, must act in an advisory, not adversarial capacity.[283] An adversarial approach to the mediation on behalf of counsel for one of the parties can destroy the spirit of compromise that characterizes a successful mediation. Attorneys should advise their client as to the viability of the claim, and review any proposed settlements.[284] Although the attorneys will not be acting in their traditional, adversarial role, their presence is important "[b]ecause an informed and educated client has a much higher success rate in mediation."[285]

Although it might be argued that presence of counsel cannot help overcome these power imbalances sufficiently in a mediation session, there is no evidence that litigation helps to better overcome the imbalance of power.[286] In fact, at least one scholar argues that, even without counsel, there is no reason that a litigator can better "help" a client transcend the power imbalance than a mediator.[287] Representation of the victim by counsel will help even the playing field for all parties so that they can reach a successful resolution.

H. *Remedies (Section II.8)*

The policy invites the parties to consider non-monetary settlements, or combinations of monetary and injunctive relief. Part of what makes mediation an attractive alternative to litigation or arbitration is the spectrum of settlements open for consideration,[288] and this provision directs parties to avail themselves of this benefit.

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280. *See* Ross, *supra* note 128, at 1454.

281. *See* Gadlin, *supra* note 81, at 149-50.

282. *Id.* at 149.

283. Elaine A. Wohlner & John A. Rymers, *Civil Mediation: Where, When and Why It Is Effective*, 24 Colo. Law. 2161, 2162 (1995). "The mediation process is successful only when controlled by the parties and not by the mediator or legal counsel." *Id.*

284. *Id.*

285. *Id.*

286. Gadlin, *supra* note 81, at 151.

287. Rifkin, *supra* note 208, at 30. In addition, a survey of women in past sexual harassment mediations indicates that many women have felt that the mediation process itself altered the power aspects of the controversy in their favor. Deborah G. Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 Wash. & Lee L. Rev. 1183, 1212 (1990).

288. *See supra* notes 215-26 and accompanying text.

I. *Selection of a Mediator (Section III)*

The choice of the mediator is of paramount importance in the mediation, often serving as the decisive factor to the mediation's success.[289] As such, the contractual provision devotes significant attention to the selection of the mediator. The contract requires first that the mediator be "neutral and impartial." While all mediators will bring internal biases to the mediation,[290] an effective mediator works toward impartiality, avoiding any conduct indicative of partiality.[291] A good mediator is inclusive, and can communicate with a wide variety of individuals regardless of their gender, economic status, race, or other characteristics.[292] Overcoming internal biases to build the trust of the parties in a sexual harassment dispute can be a serious challenge for the mediator, as "mediators must seek to build trust—and more trust—in an environment customarily viewed as male-dominated and formalistic."[293] As such, it is often a good idea to select a mediator with significant experience dealing with situations involving an abuse of power, which is a key element of a sexual harassment dispute. Overall, the goal of the mediator is to level the playing field so that even the un-represented or under-represented claimant can participate in the mediation and reach a fair agreement.[294]

It is also important that the mediator be familiar with the substantive law in the area of sexual harassment. Ultimately, mediators "ought to value intrinsic merits above advocacy skills."[295] The mediator may be able to facilitate an agreement by conveying potential bad news about the possibilities of success in court to one or both parties. Some working knowledge of sexual harassment law will be necessary for the mediator to make such a judgment call.[296] In this way, too, the parties can get something from mediation that they cannot get from a jury trial: a mediator/expert, who is more qualified to evaluate the legal sufficiency of a harassment claim than is a lay jury.[297]

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289. Shacter, *supra* note 244, at 31.

290. Rifkin, *supra* note 208, at 26. "[T]he mediator inevitably brings to the process, deliberately or not, certain ideas, knowledge, and assumptions." *Id.*

291. Model Standards of Conduct for Mediators, *supra* note 244, § II cmt. 1 ("A mediator shall avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.").

292. Sam Leonard, Mediation: The Book: A Step-by-Step Guide for Dispute Resolvers 84 (1994).

293. Winograd, *supra* note 114, at 40.

294. Tia S. Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, Disp. Resol. J., June 1994, at 48, 50.

295. *Id.*

296. The earlier the parties can determine the merits of their respective cases, the more likely a settlement will be reached, and "this process is accelerated through the use of a mediator." Aswad, *supra* note 5, at A-9.

297. Ettingoff & Powell, *supra* note 179, at 1143-44.

The third mediator qualification requires certification by some ADR organization. This certification is necessary to ensure that an organized body is reviewing the conduct of the chosen mediator. Furthermore, the organization will provide that the mediator is formally trained.[298] Such an organization must require that the mediator agree to abide by a code of ethics, such as the Model Standards of Conduct for Mediators.[299]

The contract requires the ADR organization who certifies the mediators to make a list of appropriate mediators available for review by the parties. If the parties can agree on one of the mediators on this list, that person will mediate the dispute. Otherwise, any party can then make alternative suggestions, provided the proposed mediator meets the qualifications in the provisions. The other parties must then agree on the suggested mediator. Because one of the principal benefits of mediation is its ability to save time, the parties have fourteen days to agree on the mediator. After that time, the organization from which they are drawing the mediator will suggest an appropriate candidate, and the parties can only strike the suggestion for bias.

Absent from the suggested contractual provision is a designation of the mediator's gender. Similarly, the American Arbitration Association does not require the mediator of a sexual harassment dispute to be of a particular gender.[300] Although there have been arguments made against allowing men to mediate sexual harassment cases,[301] this position is largely based on a gender stereotype, namely that men are incapable of understanding what a "reasonable woman" would find offensive in the workplace.[302] Any mediator must maintain gender neutrality[303] in much the same way he might be required to maintain racial neutrality in a mediation regarding racial discrimination. Just as a male judge can be an appropriate adjudicator in sexual harassment litigation, a man can be an effective mediator in such a case.

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298. Wohlner & Rymers, *supra* note 283, at 2164 n.16.

299. Model Standards of Conduct for Mediators, *supra* note 244.

300. A Model Sexual Harassment Claim Resolution Process § V(B) (American Arbitration Association 1994) (providing that the mediator may be of either gender).

301. For example:

> In some instances, male mediators may find themselves at a loss for words, if not understanding, in dealing with the passions that have brought the disputants into conflict. In other instances, men may wonder if they, too, have offended others, perhaps unintentionally, thereby jeopardizing or questioning their own neutrality.

Winograd, *supra* note 114, at 40.

302. Indeed, one might well argue that if gender standards like the "reasonable woman" standard run the risk of entrenching negative gender stereotypes, *see supra* note 35 and accompanying text, so too does a refusal to allow men to mediate sexual harassment cases. In addition, it is curious that special criticism is reserved for male mediators, who cannot force a settlement on the parties, but critics make no mention of male arbitrators or judges, whose rulings—presumably also reflecting their internal biases—are final and binding.

303. Winograd, *supra* note 114, at 41.

In response to the argument against men mediating sexual harassment cases, some scholars have suggested the use of a two-person, bi-gender mediation team.[304] This co-mediation solution, however, also has its drawbacks. Most importantly, the presence of two mediators can alter the dynamics of the mediation sessions.[305] If the mediators are unaccustomed to working together, the division of labor may be unclear to both the mediators and the parties.[306] Further, both the harasser and the employee, usually being of different sexes, might feel prejudiced by a mediator of the opposite sex when two mediators are present.[307] If accurate, this suggests that each party in a mediation presided over by a bi-gender panel would somehow feel a connection with the mediator of their gender. Rather than focusing on reaching agreement with the other party, the parties might focus their energy on convincing the "partial," same-sex audience of the merits in their position. This would create an awkward triangulation where each party seeks to "win" one mediator. Further, co-mediation has the added shortcoming of doubling the cost of the mediation session, when reduced expense is one of the reasons mediation is so desirable as a dispute resolver. For these reasons, the gender of the mediator is unspecified by the provisions.

J. *Costs (Sections IV.1, IV.2)*

The contractual provisions attempt to balance the economic concerns of the employer and employee. They require that the employer and employee divide the cost of mediation.[308] Otherwise, if the employer pays the entire cost, it seems the mediation is "owned" by the employer.[309] On the other hand, if the mediation option was free, no victim could claim that money kept her from pursuing the mediation course to resolve her dispute. As such, the provision provides for a payment plan if the victim is unable to pay the 10% up front. If both

304. *Id.*; Grover, *supra* note 120, at 55; Levak, *supra* note 210, at 35.

305. Folberg & Taylor, *supra* note 147, at 144-46.

306. This lack of control on behalf of the mediators is problematic.

> Politeness or deference may create a hesitancy to intercede or to cover a point that appears to be in the other mediator's territory. Important points may slip through the mediation team like a tennis ball landing between new doubles partners. One mediator may fail to read the other's clues. The other, failing to see where the discussion is heading, may interrupt or divert the mediation.

Id. at 145.

307. Levak, *supra* note 210, at 34. Indeed, the requirement of a bi-gender panel implies that a single mediator of either gender would be incapable of mediating sexual harassment cases. If the parties did not feel a prejudice prior to the mediation, the very fact that both genders must be represented on the mediation panel might well give parties needless cause for alarm.

308. *See Prototype Agreement on Job Bias Dispute Resolution*, 91 Daily Lab. Rep. (BNA) E-12 (May 11, 1995) ("Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator.").

309. Denenberg & Denenberg, *supra* note 294, at 50.

parties contribute something to the mediation process, both feel as if they have invested something in it, thus increasing its likelihood of success.[310] In the end, the most each party has risked is the cost of the mediation session and some nominal attorney's fees.[311]

The second provision in Section IV requires that the employer provide the employee with counsel. In a litigation, the employer would be responsible for the attorney's fees of a successful claimant employee.[312] Because the presence of counsel for the victim goes so far in compensating for the inherent power imbalances in a sexual harassment dispute[313] and facilitates a better agreement, it is in the employer's best interest to provide counsel to its employees. The contract allows the employee to choose the counsel, allowing her further latitude in sculpting the mediation process. Although this does require a further cost to the employer, the cost is greatly outweighed by the eventual savings that can result from a successful mediation.

K. *Settlement (Sections V.1, V.2, V.3, V.4)*

The contract requires that any settlement agreement upon which the parties agree must contain a liquidated damages clause. The aim in mediating the sexual harassment dispute is to avoid unnecessary litigation. Thus, agreeing on a liquidated damages amount reduces the possibility that the parties will enter into litigation regarding the settlement agreement itself. Settlement agreements should also explicate the remedies as specifically as possible, so that there is no confusion over the responsibilities of each party under the contract.

Once the parties have reached an agreement, either the mediator or one of the parties will be designated to memorialize the agreement. If a party other than the mediator drafts the agreement, the mediator must review the draft to ensure that it comports with what the parties agreed upon during the mediation. A written draft should be circulated to all the parties, reviewed, changed if necessary, and executed. The provision provides that the draft can be amended if, for whatever reason, the draft does not accurately reflect the settlement agreed upon during the mediation. The executed settlement agreement is binding on all parties.

CONCLUSION

When sexual harassment pervades a workplace, no one wins; the employer loses money in employee hours and may be exposed to legal liability, and the victim suffers the harassment and often a long, ex-

310. Grover, *supra* note 120, at 55-56.

311. *See* Miller, *supra* note 235, at 163.

312. Under Title VII § 706(k), a successful sexual harassment plaintiff can recover her attorney's fees. *See generally* Holzman, *supra* note 201, at 246 (exploring informal dispute resolution and subsequent recovery of attorney's fees under Title VII).

313. *See supra* part V.G.

pensive battle to obtain a remedy. Employers should integrate mediation, a partial solution to the sexual harassment problem, into their sexual harassment policies. The best time for employers to form such a policy, including a reconsideration of their workplace dispute resolution methods, is *before* complaints are filed.

After an incident of harassment occurs, mediation provides maximum benefits to the parties involved. All parties save time, money, and damage to their reputations. The employer is able to meet its legal obligations by providing a dispute resolution system for employees. Mediation allows the alleged harasser access to one of the few forums where he has the opportunity to respond directly to the allegations, and perhaps offer an apology. Mediation empowers the victim, with remedies available that litigation could never hope to provide.

In the end, the parties risk very little by choosing to mediate, and gain a quick and relatively amicable resolution to their conflict. This peaceful resolution is essential for sexual harassment claims where some, if not all, of the parties to the complaint will want to continue their relationship after the conflict is resolved. Mediation allows the parties to jointly fashion a remedy responsive to the unique contours of their dispute, vesting ultimate control in the parties, without barring them from pursuing other alternatives if the mediation is not successful. While mediation is not a panacea, it is the most promising and effective alternative to litigation for resolving sexual harassment disputes.

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Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?

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Sexual harassment has become a major social, legal, and mental health problem because of its high prevalence and its negative consequences for victims. These consequences can include decreased productivity, loss of job, decreased income, and impaired psychological and physical well-being. Despite evidence from empirical studies that victims often exhibit posttraumatic stress disorder (PTSD) symptoms, some have argued that sexual harassment does not constitute legitimate trauma. We argue that many forms of sexual harassment meet the diagnostic Criteria A1 and A2 of PTSD. Finally, the *DSM-IV* trauma criterion is explicated, and its relationship with sexual harassment and its effects are discussed.

KEY WORDS: sexual harassment; PTSD; trauma; physical integrity.

Sexual harassment has become an increasingly important issue over the past two decades. Over 10,000 people made complaints of sexual harassment in 1992, and complaints by women have nearly more than doubled from 5,603 in 1989 to 14,420 in 1994 (Andrew & Andrew, 1997; Simon, 1996). Sexual harassment occurs in many different settings: 51% of family practice female resident physicians, 64% of females in the U.S. military, 70% of female office workers, and 88% of female nurses report having experienced sexual harassment (Dan, Pinsof, & Riggs, 1995; Piotrkowski, 1998; Pryor, 1995; Vukovich, 1996).

Despite the prevalence of sexual harassment, there are many unanswered questions. Some of the more pressing questions regarding harassment include defining it; predicting its effects on victims, harassers, and organizations; investigating it; preventing it; rehabilitating sexual harassers; and treating its victims (O'Donohue, 1997). While scholars have made attempts to address these questions, Fitzgerald, Gelfand, and Drasgow (1995) have described the current state of knowledge as rudimentary. For example, although there is literature that explicates both legal definitions of sexual harassment that are general, formal and institutional, and psychological definitions that are more idiosyncratic, informal, and personal, it is not clear how these two definitional strategies should intersect and influence responses by business, the legal system, and the mental health field (Fitzgerald et al., 1988; Fitzgerald, Swan, & Magley, 1997). Furthermore, although sexual harassment prevention programs are common, little is known regarding their effectiveness (O'Donohue, Penix, & Brunswig, 1999). Finally, there are controversies concerning the proper use of mental health diagnoses in this area (Frances, First, & Pincus, 1995). Questions include the following: Can sexual harassers meet the criteria for some kind of paraphilia?, and Can victims meet the criteria for trauma-related diagnoses?

Definitions of Sexual Harassment

Legal and Regulatory Definitions

The law proscribing sexual harassment derives from Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination "with respect to . . . terms, conditions, or

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privileges of employment . . ." because of an individual's sex, race, religion, and so forth. (Title VII, Civil Rights Act §2000-2(a). Although sexual harassment is not explicitly mentioned in the Act, courts later interpreted sexual harassment to be subsumed because it is gender-related.

According to the U.S. Equal Employment Opportunity Commission (1980), sexual harassment is defined as

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature; when cooperation or submission was an implicit or explicit condition of employment; was used as a basis for the employment-related decisions; or when the conduct has the purpose or effect of unreasonably interfering with a person's work performance or creating an intimidating, hostile or offensive working environment. (p. 74676)

These guidelines have been interpreted to define two types of sexual harassment: (1) behaviors, such as remarks or advances, that are unwanted or unwelcome and therefore create a hostile environment or (2) behaviors that are quid pro quo (this for that) in nature in which workplace consequences are made contingent upon sexual favors. Thacker and Gohmann (1996) further described quid pro quo sexual harassment as "the conditional form of harassment; that is, the target is expected to grant sexual favors in return for either promised benefits (e.g., a raise or a promotion) or removal of a threat to do harm (e.g., termination or demotion)" (p. 431).

Quid pro quo sexual harassment was first recognized as an illegal work condition in *Williams v. Saxbe* (1976). The court ruled that the act of firing a female employee for refusing sexual demands was discriminatory because it was applied to one gender and not to the other (Fitzgerald, Swan, et al., 1997). It is potentially more severe than other kinds of sexual harassment because there are threats of workplace and economic consequences that can be quite significant for the victim.

Hostile environment sexual harassment was not legally recognized until a decade after quid pro quo harassment. In *Meritor Savings Bank v. Vinson* (1986), the U.S. Supreme Court ruled that creating a sexualized work environment is prohibited under Title VII. Displaying sexual materials, sexual leering, and unwanted sexual comments (e.g., jokes, teasing, remarks) that interfere with the employees' work performance create a hostile environment.

Gender harassment is also covered under the laws proscribing hostile environment sexual harassment. Gender harassment is the most prevalent form of sexual harassment (Fitzgerald et al., 1988; Fitzgerald, Drasgow, Hulin, Gelfand, & Magley, 1997). Gender harassment is not aimed at eliciting sexual cooperation, but instead involves misogynistic, offensive, and hostile attitudes regarding gender (usually women). Gender harassment will not be further considered in this paper, because our focus will be on the question of whether harassment that *sexually* victimizes properly constitutes trauma.

Psychological Definitions of Sexual Harassment

A psychological definition does not focus on the incident itself but rather, attends to the victim's evaluation of the situation such that the victim's evaluation is influenced by factors like ambiguity, perceived threat, and loss (Fitzgerald, Swan, & Fischer, 1995). Fitzgerald, Swan, et al. (1997) defined sexual harassment psychologically as "unwanted sex-related behavior at work that is appraised by the recipient as offensive, exceeding her resources, or threatening her well-being" (p. 15). These authors describe three elements that influence the victim's appraisal: Stimulus factors, contextual factors, and individual factors. Stimulus factors refer to the objective aspects of the sexually harassing behavior and include frequency, duration, and intensity. Studies reported that greater frequency is rated as more severe and related to more serious outcomes (Fitzgerald & Shullman, 1993; Gutek & Koss, 1993). Contextual factors refer to organizational tolerance and permissive management such as refusal to take complaints seriously, heightened retaliation for reporting, and lack of substantial sanctions for the harasser (Naylor, Pritchard, & Ilgen, 1980; Pryor, LaVite, & Stoller, 1993). Finally, individual factors refer to previous victimization, personal resources, attributions, and attitudes (Fitzgerald, Hulin, & Drasgow, 1995).

The investigation of how these definitional strategies are associated with the frequency of harmful effects is an important set of research questions. Because most of the existing research has used legal definitions, these will be used for the purposes of this paper. However we recognize that the use of legal terms entails limitations, because these more nomothetic definitions are not directly tied to the psychological processes involved in sexual harassment.

DSM-IV Criteria for Posttraumatic Stress Disorder (PTSD)

Harassment victims have been described as suffering from a "posttrauma syndrome" (Hamilton, Alagna, King, & Lloyd, 1987). A PTSD model of the sequelae of sexual harassment has been used to attempt to account for effects such as flashbacks, sleep disturbances, and emotional numbing (Gutek & Koss, 1993; Koss, 1990). Clinical researchers have reported that sexual harassment victims are frequently meeting the symptom criteria for PTSD (Dansky & Kilpatrick, 1997). The Diagnostic and

Statistical Manual of Mental Disorders (*DSM-IV*; American Psychiatric Association, 1994) criteria for PTSD are

> (A) The person has been exposed to a traumatic event in which both of the following were present:
> (1) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others;
> (2) the person's response involved intense fear, helplessness, or horror (pp. 427–428);
> (B) Reexperiencing the event and severe distress;
> (C) Avoidance of associated stimuli; and
> (D) Hyperarousal.

Sexual harassment can produce PTSD symptoms in nearly a third of its victims (Dansky & Kilpatrick, 1997; Fitzgerald, Drasgow, et al., 1997; Glomb, Munson, Hulin, Bergman, & Drasgow, 1999; Wolfe et al., 1998). Psychological effects may be multiply determined by events surrounding the sexual harassment (e.g., problematic sexual harassment investigations) and not solely caused by the harassment itself. Other implicated factors include stress related to gossip around the harassment, retaliation, and financial losses (Gutek & Koss, 1993).

The question becomes, given the kind of events experienced by sexual harassment victims and the kind of reactions victims have as a result of these experiences, is a *DSM-IV* diagnosis of PTSD justified? That is, does sexual harassment sometimes legitimately constitute trauma (Criterion A1) as envisioned in the *DSM-IV* or is sexual harassment something that is insufficiently severe, unusual, or threatening that it does not properly constitute trauma? Second, do victims react to these with "intense fear, helplessness, or horror" (Criterion A2)? We will now focus on these questions.

Can Sexual Harassment Constitute a Trauma According to the *DSM-IV*?

The *DSM-IV*'s frequent failure to adequately operationalize the specific conditions necessary for meeting diagnostic criteria is fairly pervasive. The *DSM-IV* Task Force acknowledges that this is a problem with Criteria A of PTSD stating, "The wording of the *DSM-IV* stressor criterion is dense enough to require a bit of explication and a lot of clinical judgement" (Frances et al., 1995, p. 261). The lack of clarity allows different interpretations and discrepant decisions about what kind of events legitimately constitute trauma. Some agreement regarding whether or not sexual harassment fulfills this criterion is important for determining legal responsibility, assessing damages, and assessing and treating victims of sexual harassment victims.

Some who oppose diagnosing victims of sexual harassment with PTSD argue that the typical harassment victim cannot meet diagnostic criteria, because sexual harassment rarely is life threatening. The Task Force recognizes this debate and has stated, "The major question in defining Posttraumatic Stress Disorder is whether or not to include reactions to the numerous stressors that are upsetting but not life threatening" (Frances et al., 1995, p. 259). Common examples of life-threatening events that are generally accepted as meeting the trauma criterion are natural disasters, automobile accidents, war, child physical abuse, and completed and attempted rape. However, according to Criterion A1 as defined in the *DSM-IV* the event does *not* have to be life threatening to be a trauma. Any event can meet this criterion if it threatens the victim's physical integrity.

Malmquist (1996) discussed the confusion surrounding the diagnostic appropriateness of PTSD for sexual harassment.

> The significance lies in a shift away from the nature of the stressor to the reaction of the person. Some have gone so far as to propose omitting the stressor requirement altogether and simply viewing PTSD as a symptom complex without any reference to etiology. The confusion is a byproduct of no one knowing what should be excluded or included as a stressor. (p. 153)

One can employ post hoc reasoning to argue that because certain types of sexual harassment give rise to certain cardinal symptoms of PTSD, and these are the symptoms that result when someone experiences trauma, that therefore sexual harassment should be considered legitimate trauma. The Task Force agrees with Malmquist's observation (Malmquist, 1996) in stating "Some clinicians describe seeing a pattern of Posttraumatic Stress Disorder-like symptoms emerging after less severe stressors and would have preferred to increase the coverage of this category and reduce false-negatives by toning down Criterion A or eliminating it altogether" (Frances et al., 1995, p. 262).

The PTSD field trials found that there was only slight variations in the prevalence of PTSD across more restrictive and more liberal definitions of Criterion A (Kilpatrick et al., 1998). The authors suggest that these findings indicate

> (1) few people develop PTSD symptoms unless they have experienced such extremely stressful life events, (2) irrespective of whether or not the definition included a requirement for subjective emotional reactions of fear, helplessness, or horror, . . . people who experience these

> events and develop PTSD are also likely to have subjective emotional reactions of distress on exposure to this class of events . . . (3) the decision concerning which criterion A to select for *DSM-IV* can be made on the basis of instructional utility and clarity to the mental health field rather than on the basis of what happens to PTSD prevalence with different criterion A definitions. (p. 831)

Therefore, although decisions regarding what types of events properly constitute a trauma are currently made by committees, it appears that the fear that more inclusive definitions of Criterion A will vastly increase the frequency of the diagnosis of PTSD is false. An important reason why this fear is unrealized is that more "minor" events do not result in the other diagnostic criteria for PTSD (e.g., reacting with horror, reexperiencing, avoidance, hyperarousal). Thus the trauma criteria are functionally balanced by the psychological symptoms criteria.

Although not all sexually harassing incidents constitute a trauma, many "severe" forms of sexual harassment clearly meet the diagnostic Criterion A1 as they are examples of rape or physical assault—commonly recognized trauma. Although other forms of sexual harassment may not involve "actual or threatened death or serious injury," many forms pose a "threat to the physical integrity of self or others"—which is part of Criterion A1 (*DSM-IV*, 1994, pp. 427–428). Below we will explicate this part of Criterion A1 through the relevance of financial threats or worries, violation of physical boundaries, and realistic concerns regarding the unpredictability of harasser's future behavior.

Explication of the Threat Criterion

Because of the vagueness and ambiguity of the terms used by the *DSM-IV*, explication of the dictionary definitions for the terms "threat," "physical," and "integrity" are needed. According to *Webster's New World College Dictionary*, (3rd ed., 1996), *threat* is defined as "A(1) an expression of intention to hurt, destroy, punish, etc. as in retaliation or intimidation; (2) an indication of imminent danger, harm, evil, etc. and (2b) a potential source of harm" (p. 1394). *Physical* is defined as "(5a) of the body as opposed to the mind; (5b) preoccupied with bodily or sexual pleasures; carnal; (5c) of or marked by aggressive or rough play, activity, etc." (p. 1019). Finally, *integrity* has been defined as "(1) the quality or state of being complete; unbroken condition; wholeness; entirety; (2) the quality or state of being unimpaired; perfect condition; soundness; (3) the quality or state of being sound moral principle: uprightness, honesty, and sincerity" (p. 702).

Harassment Behaviors Relevant to Criterion A

The types of sexual harassment that will be addressed are those illegal behaviors that result in a significant impact for the victim. Researchers have found that harassment victims experience the symptoms described by PTSD criteria B, C, D, and E (Dansky & Kilpatrick, 1997). The question now becomes, Are sexually harassing behaviors also traumas as defined by Criterion A? We argue that sexually harassing behaviors can be considered to fall into three categories. The first category is the least severe and constitutes behaviors such as a single inappropriate remark (e.g., "nice tight sweater"). These sexually harassing behaviors because of their minor nature rarely are traumatic. On the other end of the continuum are the more severe forms of sexually harassment such as workplace rape or battery. These kinds of behaviors have already been accepted as traumatic. The point of this paper is to point out that there is another kind of behavior found between these two extremes that can be traumatic. Examples of this kind of behavior include repeated threats to fire unless sexual favors are granted (even when no sexual contact occurs); and severe hostile environments in which there are repeated instances of sexual comments, jokes, and materials. We will discuss below the means by which this second class of harassing behaviors can be traumatic.

Proscribed Behavior

There is often some sense of wrongness associated with trauma. Car accidents, battle experiences, death of loved ones, and rape are events that we consider to be unwanted, wrong, unjust, harmful, and to be avoided. With sexual harassment the proscription can either be a legal or an institutional one—but it is clear that it is proscribed behavior. Thus, an element that contributes to trauma of sexual harassment is that the victim experiences these events as unwanted, wrong, harmful, and to be avoided.

Slippery Slope

Moreover, the experience of wrongness is not confined to the immediate experience of the index improper event. The wrong treatment can lead the victim to legitimately worry that additional wrong treatment may be forthcoming. The victim can worry, "Since he is doing this to me, what else is he capable of?" The victim may be legitimately worried whatever is occurring now will increase in severity. Victims can worry that if a perpetrator is capable of the norm violation of, for example, comments

about breasts, then he might also be capable of touching her inappropriately.

Threat to Physical Integrity

There are three ways in which sexual harassment poses a threat to physical integrity: (1) by threatening the victim's financial well-being, (2) by threatening the victim's physical boundaries, and (3) by threatening the victim's control over situations that she should legitimately be able to have some control.

Financial Threat

Sexual harassment threatens to be "a potential source of harm" for its victims by possibly "impairing the soundness" of the victim's physical condition. By creating a sexualized environment that is unwelcome, either by making explicit sexual requests of a victim or by subjecting the victim to sexual language, sexual harassment potentially creates a context that impairs the victim's ability to work efficiently and productively. Decrements in work performance and productivity could result in loss of employment. Moreover, sexual harassment may cause the worker to voluntarily leave her work environment, and this could result in financial losses that threaten her well-being.

Research has shown that sexual harassment is associated with financial losses for the victim. Sexual harassment victims report being transferred or fired, receiving lowered evaluations, and being denied promotions (Loy & Stewart, 1984). Additionally, sexual harassment victimization is related to absenteeism, tardiness, and reduced productivity (Glomb et al., 1999; Livingston, 1982; Schneider, Swan, & Fitzgerald, 1997). Glomb et al. (1999) found that victims report an increase in work withdrawal (e.g., behavioral attempts to escape work and work tasks).

Boundary Threats

Sexual harassment, as sexual practices that are unwanted and unwelcome, constitute a violation of personal values and boundaries and consequently endanger the victim's physical integrity. Leeser and O'Donohue (1997) identify a duty-based code of ethics.

> It is important to recognize that persons, being what they are, deserved to be treated in some favorable ways and deserve not to be treated in some unfavorable ways. The ways in which persons are to be treated are governed by the fundamental ethical principles of showing respect for persons and treating people as ends in themselves rather than merely as means. (p. 46)

This statement articulates the kind of conduct that should be practiced in and out of a professional setting. The exposure of an individual to a noxious environment in which they are treated mainly as a sexual object generates inappropriate attention to the victim's body and thereby is a threat to the victim's physical integrity. For example, quid pro quo sexual harassment constitutes "a threat to physical integrity" as it explicitly delineates the particular punishment that will be imposed if the victim does not permit her body to be treated in a certain manner. Quid pro quo sexual harassment specifies harmful action on the victim's body if the victim complies and other harmful physical consequences if the individual refuses to comply. Observing and respecting the individual's belief system would entail that others respect her sexual principles, and not coerce her to act contrary to the principles the individual has consistently chosen to guide her actions (Leeser & O'Donohue, 1997).

Threats to Legitimate Control

There are three major ways that victims lose control over events they ought to legitimately be able to control: (1) they lose control in the harassing event itself (e.g., someone touches their body), (2) victims may find that their assertive attempts to terminate the harassment does not stop the behavior, and (3) victims often experience retaliation (e.g., being fired, being denied promotion) in direct response to their actions (Livingston, 1982; Loy & Stewart, 1984) which they cannot control.

Formal complaints of sexual harassment are infrequently made (Fitzgerald et al., 1988; Gruber & Bjorn, 1982; Gutek, 1985; Livingston, 1982). Female victims of sexual harassment commonly do not make a formal complaint because they believe no corrective action will be or can be done about it (Fitzgerald, Swan, et al., 1995; Gutek & Koss, 1993; Martindale, 1990). These women also report experiencing fear of not being believed, being retaliated against, having their career damaged, or being humiliated (Fitzgerald et al., 1988; Gutek, 1985; Gutek & Koss, 1993; Martindale, 1990). Victims may experience a state of "learned helplessness" whereby "sexual harassment can be seen as a situation during which victims learn that all attempts (passive/avoiding or active) to end the harassment are futile and that the harassment will nonetheless continue. Experiencing no connection between responses and outcome leads victims to tolerate harassment, feel helpless. . . ." (Dansky & Kilpatrick, 1997, p. 155). The loss of control experienced by victims of sexual harassment influences their perception of the harasser's behavior as potentially increasing in degree and severity.

Future Directions

Future research should systematically evaluate the extent to which the various legal and psychological taxonomies of sexual harassment result in perceived threat to physical integrity and result in reactions of intense fear and helplessness. We expect that Fitzgerald, Swan, et al.'s variables of contextual factors, stimulus factors, and individual factors (Fitzgerald, Swan, et al., 1997) will interact with these taxonomic categories. We argue that some forms of sexual harassment can give rise to a number of psychological issues related to perception of physical integrity that to date have been insufficiently investigated. Perceptions of "wrongness," "slippery slope," a "just world," "efficacy," "financial well-being," and "boundaries," among others, also need to be investigated to better understand the full constellation of how sexual harassment can harm its victims. We hypothesize that although some individuals experiencing some forms of sexual harassment will be minimally affected, that others will display an array of reactions in which Criteria A1 and A2 are met.

Implications

This paper explicates Criterion A1 in the *DSM-IV* diagnosis of PTSD. Threats to physical integrity are argued to involve perceptions of wrongness, financial threats, boundary threats, threats to legitimate control, and that the wrongness may spread on a kind of a "slippery slope." These dimensions ought to be further evaluated. One manner in which they can is to see to what extent they form dimensions that capture the harm sexual harassment victims experience. These may be useful in guiding the development of assessment instruments in this field and partially evaluated by factor analytic techniques.

This paper also attempts to illuminate the need for researchers, therapists, organizations, and judiciaries to evaluate whether individual victims of sexual harassment can be appropriately diagnosed with PTSD. Our argument explicates how certain forms of sexual harassment meet the trauma criteria for PTSD. To date, there is some evidence to suggest that the mental health profession does not consider sexual harassment to legitimately constitute trauma unless it is a rape or battery. The refusal to do so can impede the delivery of appropriate treatment to a population of victims. Also, if the direct link of sexual harassment as a viable event that results in PTSD is widely supported, this can be reflected in judicial decisions regarding the appropriate monetary compensations for victims of sexual harassment. Victims can be seen as legitimately suffering from a serious mental disorder and be compensated appropriately for this.

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EDITORIAL

Sexual harassment

Tarana Burke was shocked when a 13-year-old girl revealed she had been sexually abused by her mother's boyfriend. Tarana said: 'I didn't have a response or a way to help her in that moment, and I couldn't even say "me too." It really bothered me, and it sat in my spirit for a long time'. In 2006, Tarana formed Just Be Inc., a not-for-profit organisation to help victims of sexual harassment and assault. She also formed a movement which she called Me Too. It was not until the following year, 2007, that the use of hashtags to denote groups became fashionable in social media. Tarana is an African-American woman. Her campaign had relatively little impact for 10 years. But in October 2017, over 80 women accused US film producer Harvey Weinstein of sexually abusing them. In response, actress Alyssa Milano posted a message on her Twitter account saying: 'If all the women who have been sexually harassed or assaulted wrote "Me Too" as a status, we might give a sense of the magnitude of the problem'.

Social media has the ability to amplify social messages (1 → 2 → 4 → 8 → 16 → 32, etc.) in a similar way to how the polymerase chain reaction amplifies nucleic acid messages. This gives the term 'to go viral' a particular poignancy for an infectious disease physician. More than a million women in the USA, Europe and elsewhere have used the #MeToo hashtag to post their experiences. In Spain, they tweeted #YoTambien (me too) and in France #balancetonporc (expose your pig). Facebook says that within 24 h of Alyssa Milano's post, 4.7 million people around the world participated in the #MeToo conversation, and there were over 12 million posts, comments and reactions. Many women have expressed how cathartic they found it to have an avenue to share their experiences with other victims. An important question is whether or not this will lead to real change.

Over 20 years ago, Yale psychologist John Bargh conducted a research which identified men who scored high on an anonymous questionnaire regarding their likelihood to use their power over women to extract personal favours.[1] If these men were primed by word-association with words like 'authority', 'boss' and 'power' they were more likely to find a woman attractive than if primed with neutral words. Priming with power words had no effect on men who scored low on the questionnaire. Bargh views sexual harassment from the perspective of general misuse of power.[2]

The relevance to paediatricians is that sexual harassment is rife in the medical workforce. In a survey of over a thousand US academic medical faculty, 30% of women but only 4% of men reported having personally experienced sexual harassment.[1] Of the 150 women who reported any harassment, the most common were sexist remarks or behaviour (92%), but women also reported unwanted sexual advances (41%), coercive advances (9%) and subtle bribery (6%) or threats (1%) to engage in sexual behaviour.[3] In a commentary on the relevance of #MeToo to medicine, Reshma Jagsi commented that none of the medical women who contacted her had previously revealed the abuse they suffered. Some had questioned their self-worth and wondered if they brought it on themselves. Women who do report sexual harassment experience marginalisation, retaliation, stigmatisation 'and worse'.[4] When women do complain, their careers suffer. It is not surprising women keep quiet about abuse. Women who report sexual harassment should be listened to and offered support. Sexual harassment is a toxic form of workplace bullying, and victim-blaming is a common theme in bullying.[5] The culture of victim-blaming in sexual harassment and in bullying complaints needs to end.

Jagsi describes how academic astronomers have developed a formal rescue system, whereby senior female astronomers at national meetings wear buttons identifying them as 'astronomy allies'. Their attention is to be readily available to rescue any

Fig. 1 A teal ribbon, an awareness ribbon for sexual assault. Created by MesserWoland (Available from: https://commons.wikimedia.org/w/index.php?curid=1681993).

woman feeling unable to extricate herself from the unwanted attentions of a man.[4] While this helps individual women, it does not address the underlying problem, which is men's behaviour (Fig. 1).

Around 75% of men who sexually harass women persistently deny wrongdoing.[1] Thus, it seems unrealistic to think we can help offenders gain insight into the unacceptably abusive nature of their sexual harassment. In that case, we need to change the culture. Women will have different levels of tolerance of male behaviour: some will be able to shrug off or deflect behaviour that others find outrageous. The solution is not for women to grow thicker skins. The solution is for everyone to recognise that sexual harassment is an abuse of power and is bullying. What we need is not more chivalrous men but more mutual respect between all people.

Although it is uncomfortable for a man to comment about this highly sensitive issue, failure to comment could be interpreted as ignoring the issue. As a man, I find it shameful that women need to be rescued, and that the onus falls on women to seek avenues of rescue. Jagsi's harassed female colleagues describe workplaces dominated by men who openly engage in lewd conversation.[4] My own female colleagues describe a similar culture of toxic masculinity. 'Boys will be boys' was always a highly suspect aphorism and 'men will be men' is no excuse at all. 'Blokiness' has gone unchallenged for far too long. Too many of us have ignored sexist or racist jokes, for fear of being ridiculed for having 'no sense of humour'. Well, finding offensive talk humourless is no crime, quite the opposite. Medical men need to confront other men who engage in 'locker-room' talk, and must say it is not acceptable. And managers need to stop their tacit complicity with senior staff who harass colleagues.

There is a moral onus on men to do something to stop sexual harassment of women. Many women experience sexual harassment throughout their careers and the power imbalance will not change unless we men accept that we need to change. And we do need to change. Men must stand up and be counted as being truly opposed to sexual harassment in all its forms.

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Workplace Sexual Harassment
Thomas A. Kernodle
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Workplace Sexual Harassment

There are two main forms of workplace sexual harassment: (1) hostile work environment and (2) quid pro quo. *Quid pro quo* sexual harassment deals with sexual favors in exchange for an employment outcome; the term is derived from Latin meaning “something for something” or “this for that.” A hostile work environment occurs when an employee’s work performance, psychological well-being, or work environment is affected by offensive conditions with a sexual undertone. A hostile work environment can be created by supervisors, coworkers, or nonemployees, such as customers.

A hiring manager’s refusal to hire an applicant unless the applicant performs a sexual favor is an example of quid pro quo harassment. Apart from hiring, quid pro quo harassment can also involve other benefits, such as promotion, job security, or more favorable work duties. Examples of a hostile work environment include a colleague making sexual advances toward a coworker or employee by repeating offensive jokes of a sexual nature in the workplace. While quid pro quo is more direct and can cause long-lasting damage, a hostile work environment is much more common, and its severity can range from subtle to extremely harsh. While the two are separate types of workplace sexual harassment, the differences are sometime unclear, and each type can occur at the same time.

While most cases involve a male harassing a female, workplace sexual harassment can involve a female harassing a male, a male harassing another male, or a female harassing another female. It is also possible to harass more than one person at a time. Oftentimes, the person initiating the harassment is in a position of power or authority over the individual from whom sexual favors are being solicited; thus, a power imbalance may exist.

This entry reviews the legal history and effects of workplace sexual harassment and discusses prevention strategies.

Legal History

While sexual discrimination became illegal with the passing of the Civil Rights Act of 1964, quid pro quo and hostile work environment were not recognized as forms of sexual harassment until *William v. Saxbe* in 1976 and *Meritor Savings Bank v. Vinson* in 1986, respectively. Quid pro quo cases, as well as hostile work environment cases, are investigated by the Equal Employment Opportunity Commission, a government agency that enforces discrimination laws. Between the years 1990 and 2015, between 10,000 and 15,000 sexual harassment cases were filed each year. Approximately 10% of these were quid pro quo cases.

For a sexual harassment case to be considered quid pro quo in a court of law, the plaintiffs must prove that sexual advances were made against them and their response would affect their terms of employment, which can be difficult. Therefore, in many instances, potential plaintiffs of quid pro quo do not file complaints.

Prevention

Individuals, managers, and organizations may take several precautions to help prevent workplace sexual harassment. If employees experience sexual harassment, they are advised to reject the perpetrator's advances and report the incident immediately to their supervisor or to the department of human resources. Managers are instructed to take each complaint seriously and investigate each complaint thoroughly. In addition, companies are advised to Page 1853 | Top of Articlehave a policy stating that sexual harassment will not be tolerated and that anyone who violates the policy will be reprimanded with disciplinary action. Organizations are also advised to have mandatory sexual harassment prevention training. This training explains to employees what sexual harassment is, how to identify it, and what to do if they are harassed. The training also communicates the organization's policy and raises the awareness of sexual harassment.

Effects

Although a person of any gender can harass a person of any gender, the vast majority of sexual harassment cases involve a man harassing a woman. Women who have been victims of workplace sexual harassment have reported experiencing several health issues, such as neck and back pain, hypertension, and sleep problems. These symptoms are similar to those of women who have posttraumatic stress disorder, which include both severe and minor depression, as well as suicide.

Women in the workplace also face the challenge of the glass ceiling, which is the invisible barrier of sexist perceptions that prevents them from advancing to higher-level jobs. Some women may feel that it is not in their best interest professionally to report workplace sexual harassment. Others may feel that succumbing to workplace sexual harassment is the best way to advance their careers.

Men have reported that they are confused about the boundaries that exist with women in the workplace due to changing societal roles and gender norms. Some feel that women have the power to falsely threaten men with a workplace sexual harassment charge and that companies employ policies in which female sexual harassers are not as closely scrutinized.

Thomas A. Kernodle

See also Affirmative Action ; Equal Employment Opportunity ; Equal Pay for Equal Work ; Gender Discrimination ; Women in Corporate Positions, Experiences of ; Workplace and Gender: Overview

Further Readings

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