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# Sexual Harassment and Violence Against Women: Developments in Federal Law

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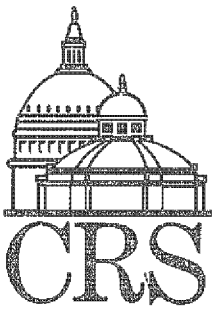


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# SEXUAL HARASSMENT AND VIOLENCE AGAINST WOMEN: DEVELOPMENTS IN FEDERAL LAW

## SUMMARY

Gender-based discrimination, harassment, and violence against women in the home, workplace, and society at large have received increasing legislative and judicial attention in recent years. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement, and other sexually offensive workplace behaviors resulting in a "hostile environment," continue to evolve from judicial decisions under Title VII of the 1964 Civil Rights Act and related federal laws. The earlier judicial focus on economic detriment or *quid pro quo* harassment--making submission to sexual demands a condition to job benefits--has largely given way to Title VII claims alleging harassment that creates an "intimidating, hostile, or offensive environment." The courts and EEOC have interpreted Title VII to protect both men and women against workplace sexual harassment by the opposite sex. It has not been definitely resolved, however, whether the Act's prohibitions apply when the harasser and the victim are of the same sex. The addition of monetary damages to the arsenal of Title VII remedies has rekindled inquiry into the liability of employers for harassment perpetrated by supervisors and nonsupervisory employees, and of the personal liability of individual harassers. The lower courts usually hold employers legally responsible for *quid pro quo* sexual harassment committed by supervisors. Generally, however, employers are not automatically liable for a hostile environment created by supervisors or co-employees unless they knew or should have known about the harassment and failed to take prompt corrective action. In 1994, Congress broke new legal ground by creating a civil rights cause of action for victims of "crimes of violence motivated by gender." The new law also made it a federal offense to travel interstate with the intent to "injure, harass, or intimidate" a spouse, causing bodily harm to the spouse by a crime of violence.

Earlier this term, the U.S. Supreme Court in *Lanier v. United States* reversed a Sixth Circuit decision which had set-aside the conviction of a state judge in Tennessee under 18 U.S.C. § 242 for harassment and sexual assault perpetrated by the judge upon several female court employees and litigants. Section 242, the criminal equivalent of 42 U.S.C. § 1983, penalizes the willful "deprivation of any rights. . .protected by the Constitution" committed by any person "under color of law." Federal prosecutors claimed that the defendant's acts were committed in his capacity as a judge and that his acts deprived the victims of liberty and bodily integrity protected by the Constitution. The prosecution theory was rejected by the appeals court on the grounds that no right to be free from sexually-motivated physical assault had ever been recognized by a Supreme Court decision involving similar facts. This principle of interpretation was rejected by a unanimous Supreme Court which remanded the case for additional proceedings. The High Court refrained from deciding the central question, however, of whether it is a federal "constitutional crime" under § 242 for state officials or persons acting under "color of law" to deprive another of "bodily integrity" through acts of forcible sexual assault.

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## INTRODUCTION

Gender-based discrimination, harassment, and violence against women in the home, workplace, and society at large have received increasing legislative and judicial attention in recent years. Legal doctrines condemning the extortion of sexual favors as a condition of employment or job advancement, and other sexually offensive workplace behaviors resulting in a "hostile environment," continue to evolve from judicial decisions under Title VII of the 1964 Civil Rights Act and other federal equal employment opportunity laws. In 1994, Congress broke new legal ground by creating a civil rights cause of action for victims of "crimes of violence motivated by gender." The new law also made it a federal offense to travel interstate with the intent to "injure, harass, or intimidate" a spouse, causing bodily harm to the spouse by a crime of violence.[1]

Sexual harassment has also arisen in other legal contexts. The recent military conviction of a drill sargeant at the Army's Aberdeen training facility for rape and sexual harassment of female recruits, and charges of harassment lodged against that branch's highest ranking Sergeant-Major, have focused the public's attention once more upon sexual harassment in the military. Issues surrounding the legal responsibility of school districts or other educational authorities for sexual harassment within the schools are highlighted by judicial decisions and several recently alleged incidents of sexual abuse or unwanted displays of affection involving public school students.

Earlier this term, the U.S. Supreme Court in *Lanier v. United States* reversed a Sixth Circuit decision which had set-aside the conviction of a state judge in Tennessee under 18 U.S.C. § 242 for harassment and sexual assault perpetrated by the judge upon several female court employees and litigants. Section 242, the criminal equivalent of 42 U.S.C. § 1983, penalizes the willful "deprivation of any rights. . .protected by the Constitution" committed by any person "under color of law." Federal prosecutors claimed that the defendant's acts were committed in his capacity as a judge and that his acts deprived the victims of liberty and bodily integrity protected by the Constitution. The prosecution theory was rejected by the appeals court on the grounds that no right to be free from sexually-motivated physical assault had ever been recognized by a Supreme Court decision involving similar facts. That basis of decision was rejected by a unanimous Supreme Court which remanded the case for additional proceedings. The High Court refrained from deciding the central question, however, of whether it is a federal "constitutional crime" under § 242

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1 18 U.S.C. § 2261(a)(1).

for state officials or persons acting under "color of law" to deprive another of "bodily integrity" through acts of forcible sexual assault. Final resolution of that issue must now await further judicial consideration and possible appeals following remand.

## FEDERAL EQUAL EMPLOYMENT OPPORTUNITY LAW

Title VII of the 1964 Civil Rights Act does not mention sexual harassment but makes it unlawful for employers with 15 or more employees to discriminate against any applicant or employee "because of. . .sex."[2] Federal law on the subject is, therefore, largely a judicial creation, having evolved over nearly a three-decade period from federal court decisions and guidelines of the Equal Employment Opportunity Commission (EEOC) interpreting Title VII's sex discrimination prohibition.[3] Two forms of sexual harassment are forbidden by current Title VII caselaw and EEOC administrative guidelines. The first, or "*quid pro quo*" harassment, occurs when submission to "unwelcome" sexual advances, propositions, or other conduct of a sexual nature is made an express or implied condition of employment, or where it is used as the basis of employment decisions affecting job status or tangible employment benefits. As its name suggests, this form of harassment involves actual or potential economic loss--*e.g.* termination, transfer, or adverse performance ratings, *etc.*-- as a consequence of the employee's refusal to exchange sexual favors demanded by a supervisor or employer for employment benefits. The second form of actionable harassment consists of unwelcome sexual conduct which is of such severity as to alter a condition of employment by creating an "intimidating, hostile or offensive working environment." The essence of a "hostile environment" claim is a "pattern or practice" of offensive behavior by the employer, a supervisor, co-workers, or non-employees so "severe or pervasive" as to interfere with the employee's job performance or create an abusive work environment.

In 1980, the federal agency responsible for enforcing Title VII issued interpretative guidelines prohibiting both *quid pro quo* and hostile environment sexual harassment. The EEOC guidelines focus on sexuality rather than gender--in terms of job detriments resulting from "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical behavior of a sexual nature"--and require that a "totality of the circumstances" be considered to

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2 42 U.S.C. § 2000e-2(a)(1).

3 42 U.S.C. 2000e *et seq.* Sexual harassment in federally assisted education programs is also prohibited by Title IX of the 1972 Education Amendments, 20 U.S.C. §§ 1681 *et seq.* (*Franklin v. Gwinnet County Public Schools*, 503 U.S. 60 (1992)). While Title VII and Title IX are the primary sources of federal sexual harassment law, relief from such conduct has also been sought, *albeit* less frequently, pursuant to § 1983 of Title 42, the Federal Employees Liability Act, and the Equal Protection and Due Process Clauses of the U.S. Constitution. *E.g. Doe v. Taylor Independent School District*, 975 F.2d 137 (5th Cir. 1992)(holding that s student has a firmly established equal protection and due process right to be free form sexual molestation by a state-employed school teacher).

determine whether particular conduct constitutes sexual harassment.[4] In addition, judicial developments in hostile environment law were anticipated by elimination of tangible economic loss as a factor and by providing that unwelcome sexual conduct violates Title VII whenever it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." According to the EEOC guidelines, an employer is liable for both forms of sexual harassment when perpetrated by supervisors.[5] The employer, however, is liable for harassment perpetrated by coworker or nonemployees only if the employer knew or should have known of the harassment and failed to "take immediate and appropriate corrective action."[6] They also recommend that employers take preventive measures to eliminate sexual harassment[7] and state that employers may be liable to those denied employment opportunities or benefits given to another employee because of submission to sexual advances.[8]

On March 19, 1990, the EEOC issued "Policy Guidance on Sexual Harassment" to elaborate on certain legal principles set forth in its interpretative guidelines from a decade before.[9] First, the later document reasserts the basic distinction between "quid pro quo" and "hostile environment" and states that an employer "will always be held responsible for acts of '*quid pro quo*' harassment" by a supervisor while hostile environment cases require "careful examination" of whether the harassing supervisor was acting in an 'agency capacity'".[10] On the "welcomeness" issue, the policy guide states that "a contemporaneous complaint or protest" by the victim is an "important" but "not a necessary element of the claim." Instead, the Commission will look to all "objective evidence, rather than subjective, uncommunicated feelings" to "determine whether the victim's conduct is consistent, or inconsistent, with her assertion that the sexual conduct is unwelcome."[11] In determining whether a work environment is hostile, several factors are emphasized:

> (1) whether the conduct was verbal or physical or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged

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4 29 C.F.R. §1604.11(a)(1995).

5 *Id.* at § 1604.11(c).

6 *Id.* at § 1604.11(d)-(e) (1995).

7 *Id.* at § 1604.11(f).

8 *Id.* at § 1604.11(g).

9 BNA, FEP Manual 405:6681 *et seq.*

10 *Id.* at 405:6695.

11 *Id.* at 405:6686.

> harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.[12]

However, because the alleged misconduct must "substantially interfere" with the victim's job performance, "sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment."[13] In addition, "the harasser's conduct should be evaluated from the objective standard of a 'reasonable person.'"[14]

## *QUID PRO QUO* HARASSMENT

The earliest judicial challenges involving tangible benefit or *quid pro quo* harassment claims--filed by women who were allegedly fired for resisting sexual advances by their supervisors--were largely unsuccessful. The discriminatory conduct in such cases was deemed to arise from "personal proclivity" of the supervisor rather than "company directed policy which deprived women of employment opportunities." Until the mid-1970's, federal district courts were reluctant either to find a Title VII cause of action or to impose liability on employers who were neither in complicity with, nor with actual knowledge of, *quid pro quo* harassment by their supervisory employees. An historic turning point came when the federal district court in *Williams v. Saxbe*[15] held for the first time that sexual harassment was discriminatory treatment within the meaning of Title VII because "it created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[16] Echoing earlier opinions that an employer is not liable for "interpersonal disputes between employees," the court nonetheless refused to dismiss the complaint since "if [the alleged harassment] was a policy or practice of plaintiff's supervisor, then it was the agency's policy or practice, which is prohibited by Title VII."[17]

Appellate tribunals in several federal circuits soon began to affirm that *quid pro quo* harassment violates Title VII where "gender is a substantial factor in the discrimination," reversing contrary lower court holdings. For example,

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12 *Id.* at 405:6689.

13 *Id.*

14 *Id.*

15 413 F. Supp. 654 (D D.C. 1976).

16 *Id.* at 657-58.

17 *Id.* at 660-61.

Judge Spotswood Robinson, writing for the D.C. Circuit in *Barnes v. Costle*[18] disagreed with "the notion that employment conditions summoning sexual relations are somehow exempted from the coverage of Title VII" as implied by the decision below. Finding that it was "enough that gender is a factor contributing to the discrimination in a substantial way," Judge Robinson ruled that differential treatment based upon an employee's rejection of her supervisor's sexual advances violated the statute. Similarly, in *Tomkins v. Public Service Electric & Gas Co.*, the Third Circuit reversed the trial court's denial of Title VII protection to all "sexual harassment and sexually motivated assault," finding that where an employee's "status as a female was a motivating factor in the supervisor's conditioning her continued employment on compliance with his sexual demands," actionable *quid pro quo* harassment had occurred. "[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."[19] And while the loss of a "tangible employment benefit" has most often meant dismissal or demotion, *quid pro quo* claims may also arise from denial of career advantages--job title, duties or assignments--of less immediate economic impact upon the employee. The Seventh Circuit, for example, ruled recently that a tenured professor who was allegedly stripped of her job title and removed from academic committees because she rebuffed the sexual advances of the university provost may have a claim for *quid pro quo* sexual harassment under Title VII.[20]

## HOSTILE ENVIRONMENT HARASSMENT AND THE COURTS

The earlier judicial focus on economic detriment or *quid pro quo* harassment--making submission to sexual demands a condition to job benefits--has largely given way to Title VII claims for harassment that creates an "intimidating, hostile, or offensive environment." The first federal appellate court to jettison the tangible economic loss requirement and recognize a hostile environment claim of sexual harassment was the D.C. Circuit in *Bundy v. Jackson*.[21] The plaintiff there charged that several supervisors made continual sexual advances and propositions, questioned her about her sexual proclivities, ignored her complaints, criticized her work performance, and attempted to block her bid for promotion. The appeals court ruled that actionable sex discrimination is not limited to gender-based conditions resulting in a tangible job consequence, but occurs whenever sex is a motivating factor in treating an employee in an adverse manner. Despite the plaintiff's failure to prove *quid pro*

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18 561 F.2d 983 (D.C.Cir. 1977).

19 *Karibian v. Columbia University*, 14 F.3d 773, 777 (2d Cir.), *cert. denied*, 114 S.Ct. 2693 (1994).

20 *Bryson v. Chicago State University*, 1996 U.S. App. Lexis 24652 (7th Cir. 9-18-96).

21 641 F.2d 934 (1981).

*quo* harassment--she was not fired, demoted, or denied a promotion--the court was unwilling to adopt a rule that would permit an employer to lawfully harass an employee "by carefully stopping short of firing the employee or taking any other tangible actions against her in response to her resistance."[22] Another decision important to the judicial development of sexually hostile environment law was *Henson v. Dundee* where the Eleventh Circuit rejected a claim of *quid pro quo* harassment but found that the employee had a right to a trial on the merits to determine whether the misconduct alleged made her job environment hostile.[23]

*Meritor Savings Bank v. Vinson*[24] ratified the consensus then emerging among the federal circuits by recognizing a Title VII cause of action for sexual harassment. Writing for the Supreme Court in 1986, then-Justice Rehnquist affirmed that a "hostile environment," predicated on "purely psychological aspects of the workplace environment," could give rise to legal liability and that "tangible loss" of "an economic character" was not an essential element. This holding was qualified by the Court with important reservations drawn from earlier administrative and judicial precedent. First, "not all workplace conduct that can be described as 'harassment' affects a term, condition, or privilege of employment within the meaning of Title VII." For example, the "mere utterance" of an "epithet" engendering "offensive feelings in an employee" would not ordinarily be *per se* actionable, the opinion suggests. Rather, the misconduct "must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[25]

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22 *Id.* at 945.

23 682 F.2d 897 (11th Cir. 1982). In an oft-quoted passage from its opinion, the court stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets. A pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. There is no requirement that an employee subjected to such disparate treatment prove in addition that she suffered tangible job detriment. *Id.* at 902

24 477 U.S. 57 (1986).

25 *Id.* at 62 (quoting *Henson v. Dundee), supra* n. 21 at 904. In *Vinson* the complainant alleged that her supervisor demanded sexual relations over a three-year period, fondled her in front of other employees, followed her into the women's restroom and exposed himself to her, and forcibly raped her several times. She claimed she submitted for fear of jeopardizing her employment. During the period she received several promotions which, it was undisputed, were based on merit alone so that no exchange of job advancement for sexual favors (*quid pro quo* harassment) was alleged or found.

Second, while "voluntariness" in the sense of consent is not a defense to a sexual harassment charge,

> [t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . .The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[26]

Accordingly, "it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant."[27]

Finally, turning to the issue of employer liability, the *Vinson* majority held that the court below had "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors."[28] The usual rule in Title VII cases is strict liability, and four Justices, concurring in the judgment, argued that the same rule should apply in the sexual harassment context as well. The majority disagreed, impliedly suggesting that in hostile environment cases no employer, at least none with a formal policy against harassment, should be made liable in the absence of actual or constructive knowledge.[29]

The Supreme Court's failure to clearly define what constitutes a hostile environment in *Meritor Savings* led to frequent conflict in the lower courts. For example, three federal Circuit Courts of Appeals--the Sixth, the Seventh, and the Eleventh--concluded that in a sexual harassment case, a plaintiff must not only prove that the conduct complained of would have offended a reasonable victim and that he or she was actually offended, but also that the plaintiff suffered

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26 *Id.* at 68 (citing 29 C.F.R. § 1604.11(a)(1985)).

27 *Id.* at 69.

28 *Id.* at 72.

29 On the issue of employer liability, *Meritor* states:

> [While] declin[ing] the parties' invitation to issue a definitive rule on employer liability. . .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, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. *Id.* at 72-73.

serious psychological injury as a result of the conduct.[30] On the other hand, three other Circuits, the Third, the Eighth, and the Ninth, held that the Title VII plaintiff need demonstrate only that he or she was actually offended by conduct that would be deemed offensive by a reasonable victim.[31]

*Harris v. Forklift Systems, Inc.*,[32] revisited and offered some clarification of *Meritor Savings*. The Supreme Court granted certiorari in *Harris* to resolve the conflict among the circuits over whether harassing conduct must produce severe psychological harm to create an actionable hostile environment under Title VII. A company president had subjected a female manager to sexual innuendo, unwanted physical touching, and insults because of her gender. After two years, she left the job. Despite its determination that demeaning sexual comments by the employer had "offended the plaintiff, and would offend the reasonable woman," the trial court ruled against the plaintiff since the conduct alleged was not "so severe as to be expected to seriously affect plaintiff's psychological well-being" or create an "intimidating or abusive" environment. The Sixth Circuit upheld the trial court ruling in a three-paragraph unpublished opinion.

The Supreme Court reversed, deciding in 1993 that hostile environment sexual harassment need not "seriously affect psychological well-being" of the victim before Title VII is violated. *Meritor Savings*, wrote Justice O'Connor, had adopted a "middle path" between condemning conduct that was "merely offensive" and requiring proof of "tangible psychological injury." Thus, a hostile environment is not created by the "'mere utterance of an . . . epithet which engenders offensive feelings in an employee.'" On the other hand, a victim of sexual harassment need not experience a "nervous breakdown" for the law to come into play. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."

*Harris* also addressed the standard of reasonableness to be applied in judging sexual harassment claims, an issue dividing the lower federal courts then and now. Justice O'Connor opted for a two-part analysis, both components of which must be met for a violation to be found. First, the conduct must create an objectively hostile work environment--"an environment that a reasonable person would find hostile and abusive." Second, the victim must subjectively perceive the environment to be abusive. The "totality of circumstances" surrounding the alleged harassment are to guide judicial inquiry, including "the frequency of the discriminatory conduct; its severity; whether it is physically

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30 *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986); *Scott v. Sears Roebuck*, 798 F.2d 210 (7th Cir. 1986); and *Brooms v. Regal Tube*, 830 F.2d 1554 (11th Cir. 1987).

31 *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir 1990); *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559 (8th Cir. 1992); and *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

32 114 S. Ct. 367 (1993).

threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Significantly, however, *Harris* did not explicitly resolve a fundamental issue raised by several lower courts regarding the appropriate "gender perspective" to consider in assessing sexual harassment claims.[33]

An increasingly broad range of hostile environment harms--frequently as concerned with lewd comments, inquiries, jokes or displays of pornographic materials in the workplace as with overt sexual aggression--have occupied the federal courts in recent years. *Robinson v. Jackson Shipyards, Inc.*[34] was among the first reported decisions to impose liability for sexual harassment based on the pervasive presence of sexually oriented materials--magazine foldouts or other pictorial depictions--and "sexually demeaning remarks and jokes" by male co-workers without allegations of physical assaults or sexual propositions directed at the plaintiff. Some of the pictures were posted on walls in public view, but included in the category of sexually harassing behavior were incidents where male employees were simply reading the offending magazines in the workplace or carrying them in their back pockets. The district court in *Robinson* rejected the suggestion that sexually oriented pictures or comments standing alone cannot form the basis for Title VII liability, stating that "[e]xcluding some forms of offensive conduct as a matter of law is not consistent with the factually oriented approach" required by Title VII.

Consistent with *Vinson* and *Harris*, however, most courts have limited recovery to cases involving repeated sexual demands or other offensive conduct.[35] Claims involving isolated or intermittent incidents have frequently

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33 *Compare, e.g. Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986)(holding that barrage of "nudie" pictures and litany of degrading comments were "annoying," but would not be sufficiently offensive to a *reasonable person* so as to interfere with the person's work performance), *cert. denied*. 481 U.S. 1041 (1987) with *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D Fla. 1991)(applying *reasonable woman* standard to determine that pervasive pornographic pictures. sexual comments, verbal harassment, abusive graffiti, and unwelcome touching of some of plaintiff's female co-workers created a hostile working environment) and *Spenser v. General Electric Co.*, 697 F. Supp. 204, 218 (E.D. Va.1988)(finding that sexual comments and suggestive behavior of plaintiff's superior, such as sitting on female workers' laps and talking about private parts, would have seriously affected the psychological well-being of reasonable female employee), *aff'd*, 894 F.2d 651 (4th Cir. 1990). *See also Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991)(adopting reasonable woman standard).

34 760 F. Supp. 1486 (M.D.Fla. 1991).

35 E.g. *Highlander v. K.F.C. Nat'l Management Co.*, 805 F. 2d 644 (6th Cir. 1986)(holding that one instance of fondling and one verbal proposition were not sufficient to establish "hostile environment"); *E.g. Waltman v. Int'l Paper Co.*, 875 F.2d 468, 475 (5th Cir. 1989)("focus is whether [plaintiff] was subjected to recurring acts of discrimination, not whether a given individual harassed [plaintiff] recurrently."); *King v. Board of Regents*, 898 F.2d 533, 537 (7th Cir. 1990)("although a single act can be enough. . .generally repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident"). *But cf. Vance v. Southern Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (llth Cir. 1989)("the determination of whether the defendant's conduct is sufficiently 'severe or pervasive' to constitute racial harassment does not turn solely on the

been dismissed as insufficiently pervasive.[36] For example, the Seventh Circuit recently concluded that while an Illinois state employee "subjectively perceived her work environment to be hostile and abusive" the paucity of sexually oriented comments complained of--three suggestive comments by a co-worker over a three-month period--"were not sufficiently severe that a reasonable person would feel subjected to a hostile working environment."[37] Moreover, except for cases involving touching or extreme verbal behavior, courts are often reluctant to find that sexual derision--or claims against pornography in the workplace--when unaccompanied by sexual demands, is sufficient to create a hostile environment.[38] However, conduct need not be overtly sexual; other hostile conduct directed against the victim because of the victim's sex is also prohibited.[39] Finally, in line with *Vinson*, evidence of a sexual harassment claimant's own provocative behavior or prior workplace conduct has generally been deemed relevant to a judicial determination of whether the defendant's conduct was unwelcome.[40]

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number of incidents alleged by plaintiff.").

[36] *Chamberlin v. 101 Realty*, 915 F.2d 777 (1st Cir. 1990)(five mild sexual advances by a supervisor, without more, were insufficient); *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3d Cir. 1990)(a claim must demonstrate a "continuous period of harassment and two comments do not create an atmosphere."); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir. 1995)(handful of offensive remarks without any physical touching, without any invitations to go out on a date, and without any exposure to pornographic pictures did not constitute sexual harassment); *Ebert v. Lamar Truck Plaza*, 878 F.2d 338 (10th Cir. 1989)(use of foul language and infrequent touching of employees at 24-hour restaurant was not pervasive or severe and management promptly took corrective action whenever complaints were made).

[37] *McKensie v. Illinois Department of Transportation*, 92 F.3d 473 (7th Cir. 1996).

[38] For example, in *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1017 (8th Cir. 1988), having found that defendants' conduct had gone "far beyond that which even the least sensitive of persons is expected to tolerate," the Eight Circuit nonetheless felt compelled to add that "Title VII does not mandate an employment environment worthy of a Victorian salon. Nor do we expect that our holding today will displace all ribaldry on the roadway." *See also Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986)(holding that two requests for sexual contact plus one incident of bare-breasted mermaids as table decorations for a company party were insufficiently pervasive to create hostile environment), *cert. denied*, 479 U.S. 1065 (1987); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)("Title VII is not a clean language act, and does not require employers to extirpate all signs of centuries-old prejudice.").

[39] *See Andrews v. City of Philadelphia*, 898 F.2d 1469, 1485 (3d Cir. 1990)("The Supreme Court [in *Vinson*] in no way limited this concept to intimidation or ridicule of an explicitly sexual nature."); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985)(holding that valid claim could be based on "threatening, bellicose, demeaning, hostile, or offensive conduct by a supervisor in the workplace because of the sex of the victim"); *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C.Cir. 1985)(district court erred in assuming that incident of physical force could not constitute sexual harassment unless "explicitly sexual").

[40] *See, e.g., Jones v. Wesco Investments Inc.*, 846 F.2d 1154 n.5 (8th Cir. 1988)("A court must consider any provocative speech or dress of the plaintiff in a sexual harassment case."); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 556 (4th Cir. 1987)(affirming trial judge's determination to permit testimony that the plaintiff was "a foul-mouthed individual who often talked about sex,"

Of course, a single incident may be actionable if it is linked to a granting or denial of an employment benefit (*quid pro quo* harassment),[41] or if the incident involves physical touching of the employee in an offensive manner under circumstances that preclude her escape.[42] The EEOC policy statement also states that the agency "will presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII."[43]

## SAME-SEX HARASSMENT

While the courts and EEOC have interpreted Title VII to protect both men and women against workplace sexual harassment by the opposite sex, it has not been definitely resolved whether the Act's prohibitions apply when the harasser and the victim are of the same sex. The *Meritor* Court found that Congress intended "to strike at the entire spectrum of disparate treatment of men and women" in employment and read Title VII to prohibit discriminatory harassment by a supervisor "because of the subordinate's sex." Although Title VII does not prohibit direct discrimination by an employer based on an employee's sexual orientation[44]--whether homosexual, bisexual, or heterosexual--the EEOC[45]

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that the plaintiff had placed a "dildo in her supervisor's mailbox" and once grabbed the genitals of a male co-worker and sexually propositioned him).

41 *Neville v. Taft Broadcasting Co.*, 857 F. Supp. 1461 (W.D.N.Y. 1987).

42 *Barrett v. Omaha National Bank*, 726 F. Supp. 424 (D.Neb. 1983).

43 BNA, FEP Manual at 405:6681.

44 *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985).

45 The EEOC Compliance Manual states that the respective sexes of the harasser and the victim are irrelevant in determining whether Title VII has been violated:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from member of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (not on the victim's sexual preference) and the harasser does not treat the employees of the opposite sex the same way.

EEOC Compliance Manual, § 615.2(b)(3). While EEOC interpretations of Title VII are not binding on the courts, they are frequently accorded judicial deference. *See Meritor*, 477 U.S. at 65.

and the District of Columbia,[46] Seventh,[47] Eighth[48] and Ninth Circuits[49] have all indicated in dicta that same-sex harassment may be actionable in some circumstances. An apparent majority of federal district courts to consider the issue have also allowed such claims where the alleged harassment is "because of" the victim's sex.[50] The rationale is that Title VII bars disparate treatment based on the sex or gender of the employee, without regard to whether the harasser is male or female.

The Fifth Circuit in *Garcia v. Elf Atochem North America*[51] denied a claim of same-sex harassment under Title VII. *Garcia* held without any analysis that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination."[52] For its conclusion, the Fifth Circuit cited and apparently relied on *Goluszek v. Smith* involving claims by a male that he had been harassed by several male co-workers and that the employer failed to remedy the situation after repeated complaints. The *Goluszek* court refused "a wooden application of the verbal formulations created by the courts" to salvage same-sex harassment claims, instead focusing on Title VII's concern for "imbalance" and "abuse" of power in the workplace, and the sense of inferiority and "degradation" that results from attacking the sexuality of a "discrete and vulnerable group." Title VII harassment claims are limited, said the court, to the "exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Because the plaintiff was a male in a "male-dominated" work environment, the harassment in question was not "anti-male" or of a kind which treated males as "inferior." *Garcia* and *Goluszek* have been followed by other courts holding that "same-sex harassment is not

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46 *Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir. 1977)(acknowleging the possibility of actionable Title VII claim where "a subordinate of either gender" is harassed "by a homosexual superior of the same gender.").

47 *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)(In a heterosexual harassment action, the court noted parenthetically that "sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not be actionable in appropriate cases.").

48 *Quick v. Donaldson Co.*, 71 FEP Cases 551 (8th Cir. 1996)(evidence that male employees were the sole targets of other heterosexuals who practices "bagging" co-worker testicles could lead to finding that such treatment was based on sex).

49 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994)(commenting that "we do not rule out the possibility that both men and women. . .have viable claims against [a male supervisor] for sexual harassment"), *cert. denied* 115 S. Ct. 733 (1995).

50 *See Gerd v. United Parcel Service, Inc.*, 1996 U.S. Dist. LEXIS 12180 (D.Colo. 8-19-96) and cases cited therein.

51 28 F.3d 449 (5th Cir. 1994).

52 *Id.* at 451-52 (quoting *Giddens v. Shell Oil Co.*, 12 F.3d 208 (5th Cir. 1993).

actionable under Title VII" because the statute "is aimed at a gender-biased atmosphere; an atmosphere of oppression by a 'dominant' gender."[53]

A distinction was drawn by the Fourth Circuit between same-sex harassment predicated on heterosexual and homosexual conduct. In *McWilliams v. Fairfax County Board of Supervisors*,[54] the appeals court refused to recognize same sex harassment under Title VII where neither party was alleged to be homosexual. The opinion focused on Title VII requirement that the discrimination occur "because of the [victim's] sex." This causation requirement could not be met, in the court's view, where the conduct complained of was between heterosexual males because it was not based on the employee's sex. The denial of relief was limited to heterosexual males in hostile environment cases, however, and "does not purport to reach any form of same-sex discrimination claims where either victim or oppressor, or both, are homosexual or bisexual." To the contrary is the Eighth Circuit's recent decision in *Quick v. Donaldson Co.*[55] which reversed a determination by the district court that the alleged harassment involving heterosexual male employees was not gender-based because the underlying motive was personal enmity or hooliganism.

On the opening day of its 1996-97 Term, the U.S. Supreme Court left the lower federal courts adrift over the legal status of same-sex harassment when it denied review in *McWilliams*, [56] and in another case from the Sixth Circuit involving the dismissal of a male-on-male harassment claim because the facts alleged failed to demonstrate actual or constructive knowledge on the part of the employer.[57] The Court also refused the appeal of a third ruling, *Hopkins v. Baltimore Gas and Electric Co.*,[58] where the Fourth Circuit ruled that the same-sex misconduct alleged was not of such severity as to create a hostile work environment under Title VII.

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53 *Vandevanter v. Wabash Nat'l Corp.*867 F. Supp. 790 (N.D. Ind. 1994). See, also *Hopkins v. Baltimore Gas & Electric Co.*, 871 F. Supp. 822 (D.Md. 1994).

54 72 F.3d 1191 (4th Cir. 1996).

55 90 F.3d 1372 (8th Cir. 1996).

56 *McWilliams supra n. 55, cert. denied* No. 95-1983, 65 U.S.L.W. 3240 (S.Ct 10-8-96).

57 *Fleenor v. Hewitt Soap Co.* 81 F.3d 48 (6th Cir.), *cert. denied* No. 96-47, 65 U.S.L.W. 3241 (S.Ct 10-8-96).

58 77 F.3d 745 (4th Cir. 1995), *cert. denied* No. 95-1961, 65 U.S.L.W. 3239 (S.Ct 10-8-96).

## REMEDIES

One major aspect of the 1991 Civil Rights Act[59] of particular importance to sexual harassment claimants was the extension of jury trials and compensatory and punitive damages as remedies for Title VII violations. Previously, Title VII plaintiffs had no right to a jury trial and were entitled only to equitable relief in the form of injunctions against future employer misconduct, reinstatement, and limited backpay for any loss of income resulting from any discharge, denial of promotion, or other adverse employment decision. Consequently, victims of alleged sexual harassment were often compelled to rely on state fair employment practices laws,[60] or traditional common law causes of action for assault, intentional infliction of emotional distress, unlawful interference with contract, invasion of privacy, and the like, to obtain complete monetary relief.[61] Section 102 of the 1991 Act[62] altered the focus of federal EEO enforcement from reliance on judicial injunctions, where voluntary conciliation efforts fail, to jury trials, and compensatory and punitive damages, in Title VII actions involving intentional discrimination.

Compensatory damages under the 1991 Act include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[63] The compensatory and punitive damages provided by §102 are "in addition to any relief authorized by Section 706(g)" of the 1964 Civil Rights Act.[64] Therefore, plaintiffs may recover damages in addition to equitable relief, including backpay. Punitive damages may also be recovered against private employers where the plaintiff can demonstrate that the employer acted "with malice or reckless indifference" to the individual's federally protected rights. Punitive damages are not recoverable, however, against a governmental entity.[65] In cases where a plaintiff seeks compensatory or punitive damages, any party may demand a jury trial.[66]

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59 Pub. L. 102-166, 105 Stat. 1071.

60 *E.g., Wirig v. Kinney Shoe Corp.*, 448 N.W. 2d 526, 51 FEP Cases 885 (Minn. Ct.App. 1989), *aff'd in part and rev'd in part on other grounds*, 461 N.W.2d 374 (Minn. Sup.Ct. 1990).

61 *See e.g. Rojo v. Kliger*, 52 Cal.3d 65, 901 P.2d 373 (Cal. Sup,Ct. 1990); *Baker v. Weyerhauser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Syndex Corp. v. Dean*, 820 S.W.2d 869 (Tex. App. 1991).

62 105 Stat. 1072, 42 U.S.C. § 1981a.

63 42 U.S.C. § 1981a(b)(3).

64 *Id.* at § 1981a(a)(1).

65 *Id.* at § 1981a(b)(1).

66 *Id.* at § 1981a(c).

The damages newly available under the Act are limited by dollar amount, however, according to the size of the defendant employer during the twenty or more calendar weeks in the current or preceding calendar year. The sum of compensatory and punitive damages awarded may not exceed: $50,000 in the case of an employer with more than 14 and fewer than 101 employees; $100,000 in the case of an employer with more than 100 and fewer 201 employees; $200,000 in the case of an employer with more than 200 and fewer than 501 employees; and $300,000 in the case of an employer with more than 500 employees.[67] In jury trial cases, the court may not inform the jury of the damage caps set forth in the statute.

This expansion of Title VII remedies may dramatically affect the level of relief available in cases of intentional sex discrimination, where plaintiffs for the first time have the prospect of federal compensatory and punitive damage recoveries and the right to a jury trial. In particular, the Act now provides a monetary remedy for victims of sexual harassment in employment not tied to lost wages.[68] Since harassment of the hostile environment type often occurs without economic loss to the employee, in terms of pay or otherwise, critics of the prior law charged that the sexual harassment victim was frequently without any effective federal relief. Title VII plaintiffs may now seek monetary compensation for emotional pain and suffering, and other pecuniary and nonpecuniary losses, caused by sexual harassment. Moreover, federal claims may be joined with pendent state-law claims for damages unlimited by the caps in the federal law or an election made between pursuing state and federal remedies.

Legislation was introduced during the 104th Congress in both the House and Senate to remove the damage caps under the 1991 Act.[69] The Equal Remedies Act of 1995, identical to bills first proposed two years earlier, calls for elimination of the compensatory and punitive damage ceiling for plaintiffs charging intentional discrimination under Title VII and the Americans with Disabilities Act, thereby affording the same remedies to those claiming sex, religious, and disability discrimination as race discrimination claimants under the Civil Rights Act of 1866.[70] The legislation had earlier been approved by

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67 *Id.* at § 1981a(b)(3).

68 Substantial damage awards in sexual harassment cases brought under state law have recently been reported. For example, in *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D.Fla. 1992), a sexually harassed film-studio employee was held entitled not only to front pay and back pay but also to $ 250,000 in damages for a variety of torts and a $ 1 million punitive damage award against the dominant owner of the studio. A jury award of $ 315,000 in damages and attorneys fees was obtained by a sexual harassment plaintiff asserting a claim of assault and intentional infliction of emotional distress in *Syndex Corp. v. Dean*, 820 S.W.2d 869 (Tex.App. 1991). Of course, the amount of such awards under federal law would be subject to the caps currently imposed by the 1991 Act.

69 H.R. 96, 104th Cong., 1st Sess. (1995) ; S. 296, 104th Cong., 1st Sess. (1995).

70 42 U.S.C. § 1981.

the Senate Labor and Human Resources Committee, but failed to reach the Senate floor. No House action occurred on the measure in either the 103d or 104th Congress.

## LIABILITY OF EMPLOYERS AND SUPERVISORS FOR MONETARY DAMAGES

The addition of monetary damages to the arsenal of Title VII remedies has rekindled inquiry into an employer's liability for harassment perpetrated by its supervisors and nonsupervisory employees, and of the personal liability of individual harassers. The lower courts have uniformly declared employers vicariously liable for *quid pro quo* sexual harassment committed by supervisors.[71] By definition, only those with actual authority to hire, promote, discharge or affect the terms and conditions of employment can engage in *quid pro quo* harassment and are held to act as agents of the employer, regardless of their motivations. *Quid pro quo* harassment is viewed no differently than other forms of discrimination prohibited by Title VII, for which employers have routinely been held vicariously liable. Because Title VII defines employer to include "any agent" of the employer, the statute is understood to have incorporated the principle of *respondeat superior*, in effect holding "employers liable for the discriminatory [acts of] . . . supervisory employees whether or not the employer knew, should have known, or approved of the supervisor's actions."[72] However, the suggestion in *Meritor Savings Bank* that courts look to agency law in developing liability rules for hostile work environment cases has resulted in a rejection of vicarious liability by most circuit courts confronting hostile work environment claims.

Most courts before and after *Meritor* have made an employer liable for a hostile environment only if it knew or should have known about the harassment and failed to take prompt remedial action to end it. They reason that, unlike *quid pro quo* cases, in which a supervisor exerts actual authority to affect the terms, conditions, or privileges of a subordinate's employment, the supervisor is cloaked with no actual or apparent authority to create a hostile environment. In other words, the employer is directly liable for its own wrongdoing in not stopping harassment of which it was or should have been aware but is not automatically or "strictly" liable for supervisory misconduct.[73] A minority view,

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71 See *Horn v. Duke Homes*, 755 F.2d 599, 604 (7th Cir. 1985)(noting that all circuits reaching the issue have held employers strictly liable for *quid pro quo* harassment).

72 *Meritor Savings*, 477 U.S. at 70-71.

73 *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); Bouton v. BMW of North America, Inc., 29 F.3d 103 (3d Cir. 1994); *Waltman v. International Paper co.*, 875 F.2d 468 (5th Cir. 1989); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Burns v. McGregor Elec. Indus.*, 995 F.2d 559 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

however, recognizes vicarious liability when the harasser is a supervisor[74] and creates a hostile environment through threats and intimidation.[75] Similarly, an employer without actual or constructive knowledge is generally not liable for co-worker harassment since the discriminatory conduct is not within the scope of employment and the employer usually has conferred no authority, real or apparent, to facilitate the harassment.[76]

Similar divisions exist, again because "agent[s]" are included within the Title VII definition of "employer," as to the personal liability of individual supervisors and co-workers for hostile environment harassment or other discriminatory conduct. A majority of federal circuit courts to address the question--the Second,[77] Fifth,[78] Seventh,[79] Ninth,[80] Tenth[81] and Eleventh[82] and District of Columbia[83]--have interpreted agents in the statutory definition as merely incorporating *respondeat superior* and refused to impose personal liability on agents. These courts also note the incongruity of imposing personal liability on individuals while capping compensatory and punitive damages based on employer size, as the statute does, and exempting small businesses that employ less than 15 persons from Title VII altogether. Of the Courts of Appeals, only the Fourth Circuit[84] has extended Title VII liability to supervisors in both their personal capacity where the supervisor exercised significant control over the plaintiff's hiring, firing, or conditions of

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74 *Kaufman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992).

75 *E.g.Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir. 1994)(actions of a "supervisor at a sufficiently high level in the hierarchy would necessariy be imputed to the company").

76 *See e.g. Baker v. Weyerhauser Co.*, 903 F.2d 1342 (10th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987).

77 *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995).

78 *Grant v. Loan Star Co.*, 21 F.3d 649 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994).

79 *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995).

80 *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994).

81 *Haynes v. Williams*, 88 F.3d 989 (10th Cir. 1996).

82 *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

83 *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 569 (1995).

84 *See Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *rev'd in part, aff'd in relevant part*, 900 F.2d 27 (4th Cir. 1990 (*en banc*).

employment. The First Circuit, the Third Circuit, the Sixth Circuit, and the Eight Circuit have yet to decide the issue, leading to contradictory results among the district courts in those jurisdiction.[85]

Several recent federal circuit court rulings strongly suggest that the most effective defensive strategy for employers to avoid liability for a hostile work environment may be a proactive approach. As noted, even where the conduct of a supervisor or co-workers creates a hostile environment, the courts will generally not hold the employer responsible unless he or she knew or should have known of the situation and failed to take prompt corrective action and disciple the alleged harasser. Thus, in *McKenzie v. Illinois Department of Transportation*,[86] the "prompt and remedial action" taken by the state employer in barring further workplace contacts between the allegedly harassing co-worker and the complainant was held to prevent recovery on a hostile environment claim. Conversely, a federal jury recently awarded $2 million to a former Wal-Mart clerk who claimed that the retailer fostered a hostile work environment by ignoring her reports of sexual harassment by a follow employee who attacked and threatened her. The compensatory damages, which included recovery for extensive treatment for post-traumatic stress suffered by the employee after the attack, will be reduced to $300,000 in conformity with the "cap" imposed by the 1991 Civil Rights Act.[87]

In addition, the courts are generally reluctant to impose Title VII liability on employers who act "prophylactically" to stem harassing conditions before they begin. This is illustrated by *Gary v. Long*[88] where the D.C. Circuit dismissed a hostile environment lawsuit against the Washington Metropolitan Area Transit Authority (WMATA) as the result of repeated verbal and physical harassment, and eventual rape, of a female employee by a supervisor. Claims of *quid pro quo* harassment were rejected due to lack of economic detriment. Moreover, WMATA escaped liability on the hostile environment claim because it had an "active and firm" policy against the sexual harassment which it publicized through staff notices, seminars, and EEO counselors, and because it maintained detailed grievance procedures for reporting acts of discrimination. Perhaps the most practical lesson for employers is to formulate and communicate to employees a specific policy forbidding workplace harassment; to establish procedures for reporting incidents of harassment that bypass the

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85 *See Hernandez v. Wangen*, 1996 U.S. Dist. LEXIS 11533 (D.P.R. 8-1-96) and cases listed therein.

86 92 F.3d 473 (7th Cir. 1996).

87 *Holmes v. Wal-Mart Stores Inc.*, F. Supp. (M.D.Fla. 1996). *See also Varner v. National Supermarkets Inc.*, F.3d (8th Cir. 1996)(Supermarket chain liable for compensatory damages of $30,000 to female employee harassed by co-worker because supervisor took no corrective action and company policy dictated referral of complaints to human resources department, "in effect requir[ing]. . .supervisor to remain silent notwithstanding his knowledge of the incidents.").

88 59 F. 3d 1391 (D.C. Cir 1995).

immediate supervisor of the victim if he or she is the alleged harasser; to immediately investigate all alleged incidents and order prompt corrective action (including make-whole relief for the victim) when warranted; and to appropriately discipline the harasser.

## SEXUAL HARASSMENT IN THE SCHOOLS

Issues surrounding the legal responsibility of school districts or other educational authorities for sexual harassment within the schools are highlighted by recent media reports of disciplinary proceedings against students for alleged sexual abuse or unwanted displays of affection directed at their peers. On October 7, 1996, the U.S. Supreme Court denied review of an appeal from *Rowinsky v. Bryan Independent School District*[89] where the Fifth Circuit refused to award damages or injunctive relief against a local school district under Title IX of the 1972 Education Act Amendments for an alleged hostile environment resulting from the misconduct of students. In *Rowinsky*, male students "physically and verbally abused" two eighth grade daughters of the petitioner by "swatting" and "grabbing" them by various private body parts. Despite repeated complaints by the girls to their bus driver, and by the parents to numerous school and district officials, no investigation or corrective action was taken. In denying relief, the Fifth Circuit disapproved of incorporating the hostile environment concept from Title VII into a peer harassment Title IX case. It pointed to the lack of an agency relationship between the school and the harasser and to its view that there is no "power relationship" between the harasser and the victim, so that "[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer, or co-worker."[90] The Court's refusal to hear the *Rowinsky* case may exacerbate differences of opinion that have emerged to date from lower federal court rulings on the issue of school district liability for student-to-student or so-called "peer" sexual harassment.

Title IX provides that "[no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[91] Under the statute, student victims of any form of sex discrimination, including sexual harassment, may file a written complaint with the Office of Civil Rights (OCR)[92] for administrative determination and possible imposition of sanctions--including termination of federal funding--upon the offending educational institution. OCR interprets Title IX as imposing liability on a recipient educational institution if the institution knew, or should

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89 80 F.3d 1006 (5th Cir. 1996), *cert. denied* No. 96-4, (10-9-96).

90 80 F.3d at 1015 n. 11.

91 20 U.S.C. § 1681 (a).

92 34 C.F.R. § 100.7(d)(1)(1995).

have known, that a student was being subjected to hostile environment sexual harassment by other students and fails to take appropriate corrective action. OCR had applied this interpretation in the course of its enforcement activities on numerous occasions since at least 1989, as confirmed on August 14, 1996 when it issued a Title IX policy guidance regarding peer sexual harassment.

Title IX also provides student victims with an avenue of judicial relief. In *Cannon v. University of Chicago*,[93] the Supreme Court ruled that an implied right of action exists under Title IX for student victims of sex discrimination who need not exhaust their administrative remedies before filing suit. However, the availability of monetary damages under Title IX remained uncertain until *Franklin v. Gwinnett County Public Schools*.[94] In *Franklin*, a female high school student brought an action for damages under Title IX against her school district alleging that she had been subjected to sexual harassment and abuse by a teacher. The Supreme Court held that damages were available to the sexual harassment victim if she could prove that the school district had intentionally violated Title IX. Since *Franklin*, there has been general agreement among the courts that Title IX prohibits both *quid pro quo* and hostile environment teacher-student harassment and that schools may be held liable on the basis of agency principles applied in the Title VII context, discussed above. There is less judicial consensus, however, regarding legal standards for holding an educational institution liable for a sexually hostile educational environment created by student misconduct of which the institution was or should have been aware.

First, the federal circuit courts disagree as to the obligation on school officials to take prompt and appropriate corrective action to halt student-to-student or "peer" hostile environment harassment. In the first appellate ruling on point, *Davis v. Monroe County Board of Education*,[95] the Eleventh Circuit concluded that peer harassment in an educational setting may be compared to co-worker harassment and applied Title VII principles to hold a school district potentially liable for its failure to respond adequately to a student-created hostile environment of which it knew or should have known. Several other courts of appeals appear to have aligned themselves with the Eleventh Circuit by assuming, without directly deciding, that Title IX, like Title VII, requires schools to take prompt corrective action in response to known hostile environment harassment by students or other third parties.[96] In apparent

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93 441 U.S. 677 (1979).

94 112 S. Ct. 1028 (1992).

95 74 F.3d 1186 (11th Cir. 1996).

96 *Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248-50 (2d Cir. 1995)(discussing Title VII standards in analyzing Title IX sexual harassment claim); *Brown v. Hot, Sexy and Safer Products, Inc.*, 68 F.3d 525, 540 (1st Cir. 1995)(applying Title VII principles to Title IX hostile environment sexual harassment claim), *cert. denied* 116 S. Ct. 1044 (1996); and *Clyde K. v. Puyallup School Dist.*, 35 F.3d 1396, 1402 (9th Cir. 1994)("school officials might reasonably be concerned about liability for failing to remedy peer sexual harassment that exposes female students to a hostile educational environment).

conflict with these courts is *Rowinsky* decision which the Supreme Court refused to hear this Term. The Fifth Circuit there held that a school is not liable for mere inattention to peer sexual harassment claims unless it treated male and female harassment victims differently. Rejecting the Title VII standard based on actual or constructive knowledge, the *Rowinsky* court concluded that there must be an act of discrimination by the school itself--beyond condoning the sexual harassment by students--in order to sustain a school's liability for peer sexual harassment. Thus, the court dismissed the eighth grade students' claims that their school's persistent failure to curtail other students repeated sexual assaults, touching and harassment violated Title IX.

Another judicial fault line divides the circuits as regards the nature of proof required to show "intentional discrimination," justifying Title IX monetary damage awards under *Franklin*. One approach is that taken by the Eleventh Circuit in *Davis*[97] which appears to infer motive or intent sufficient to establish damages liability from a school's failure to respond to student complaints of hostile environment harassment. A stricter intent standard was imposed by *Rowinsky*, however, in effect requiring a plaintiff to prove subjective discriminatory motive on the part of educational officials in order to obtain damages for a failed institutional response to charges of peer sexual harassment.[98]

## VIOLENCE AGAINST WOMEN ACT

The Violence Against Women Act (VAWA) was enacted by Congress in 1994 "to protect the civil rights of victims of gender-motivated violence." It creates a private cause of action under federal law against persons who perpetrate "crime[s] of violence motivated by gender."[99] Specific "crimes of violence" triggering statutory coverage include "State or Federal offenses" that would constitute "a felony against the person. . .or a felony against the property," as recognized by federal law,[100] and which pose "a serious risk of physical injury to another," whether or not the misconduct alleged ever resulted in actual charges or a prior criminal action. To be actionable under VAWA, however, the complainant has to show that the offense was "motivated by gender," i.e., that the predicate crime was committed "because of gender or on the basis of gender,"[101] and was at least partially due to "an animus based on the victim's gender." In other words, no cause of action will lie for injury resulting from mere

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97 74 F.3d at 793. *See also Murray supra* n. 94, 57 F.3d at 248-49.

98 80 F.3d at 1016.

99 42 U.S.C. § 13981.

100 18 U.S.C. § 16. In effect, the bill incorporates the existing federal criminal code definition of "crime of violence" as predicate for a civil rights violation under VAWA.

101 *Id.* at § 13981(e)(1).

"random" acts of violence, regardless of the gender of the victim, where it is not proven that the perpetrator was gender-motivated.[102]

The enforcement mechanism provided for this new right to be free of gender-related violent crime is a private civil action in federal (or state) court. The prevailing plaintiff in a judicial action may obtain compensatory and punitive damages, injunctive relief, and "such other relief as the court deems appropriate." While predicated upon conduct that is made criminal by other federal and state law provisions, the statute does not require a prior criminal complaint, prosecution, or conviction to establish the elements of a cause of action. No federal administrative scheme is authorized for VAWA enforcement,[103] nor are additional criminal penalties provided, but parallel civil and criminal proceedings for conduct which constitutes a VAWA offense are not precluded.

VAWA may to some extent overlap and provide supplemental protection to Title VII for women victimized by gender-motivated violence and harassment in the workplace. Title VII applies only to employment but even there excludes the large segment of the national workforce employed by companies and firms with fewer than 15 employees. A condition precedent to a Title VII judicial action is that the complaining employee or applicant first resort to the EEOC administrative process for voluntary negotiation and conciliation of the matter between the parties. Moreover, while the 1991 amendments added provisions for jury trials and compensatory and punitive damage awards in Title VII actions, such relief is limited by monetary "caps" that find no parallel in later law. The element of "violence," however, is not a requisite of the offense under either the Title VII or Title IX.

The new law's statement of purpose anchors the civil rights remedy for gender-motivated violent crime to the "affirmative" power of Congress under the Commerce Clause of the U.S. Constitution and § 5 of the Fourteenth Amendment. Congressional power to prohibit or remedy equal protection or due process violations has historically been limited by judicial construction of the Fourteenth Amendment to "state action" or private conduct actively supported by the state or its agents. The scope of Congress' authority to regulate purely private conduct pursuant to its §5 enforcement powers is constitutionally unsettled, as is the corollary question of the status of purely private action for purposes of application of equal protection and due process safeguards.[104] Consequently, the Commerce Clause is frequently invoked to support civil rights

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102 Under evidentiary standards prescribed by § 13981(e)(1), the complainant must prove gender motivation "by a preponderance of the evidence."

103 This is in contrast to the voluntary negotiation and conciliation procedures of the Equal Employment Opportunity Commission which must be pursued before filing a federal lawsuit seeking relief from sexual harassment in the workplace under Title VII of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000e *et seq.*

104 *See e.g. U.S. v. Guest*, 383 U.S. 745 (1966); *U.S. v. Price*, 383 U.S. 787 (1966).

laws like VAWA that protect persons against discriminatory conduct by private persons unaided by the state. However, judicial developments following from the Supreme Court' 1995 decision in *United States v. Lopez*[105] have raised new questions concerning the scope of Congress' authority to regulate non-economic activities "affecting commerce" by imposition of federal criminal penalties.

In the *Lopez* case, the Supreme Court invalidated, as exceeding Congress' commerce powers, the Gun-Free School Zones Act of 1990[106], which made a federal offense of possessing a firearm within 1,000 feet of a school. As traditionally applied, the Commerce Clause permits Congress to regulate "use of the channels" and "instrumentalities" of interstate commerce, as well as activities that "substantially affect" its flow. Despite the absence of congressional findings, the Government in *Lopez* claimed that the statute regulated an activity which substantially impacted interstate commerce because possession of firearms in a school zone may result in an increase in violent crime. Criminal violence, in turn, affects the national economy by increasing insurance costs, reducing the willingness of persons to travel to areas of the country perceived as unsafe, and by diminishing productivity due to impaired student learning environments. The Supreme Court concluded, however, that the regulated activity--firearm possession within a school zone--was beyond Congress' constitutional reach since it had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[107] The Court rejected the Government's "cost of crime" argument as an overexpansive theory which would permit Congress to "regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[108] Were this argument successful, the Court reasoned, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[109]

Two federal district courts have reached opposite conclusions regarding the constitutionality of VAWA's civil rights provision based on *Lopez*. In *Doe v. Doe*,[110] the plaintiff alleged a pattern of "systematic and continuous" physical and emotional abuse at the hands of her spouse over a seventeen year period resulting in severe emotional distress, trauma, and depression. The defendant spouse moved to dismiss, claiming that Congress lacked authority under either the Commerce Clause or the Fourteenth Amendment to enact the WAVA remedy

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105 115 S.Ct. 1624 (1995).

106 18 U.S.C. § 922(a)(1)(A).

107 *Id.* at 1631.

108 *Id.* at 1632.

109 *Id.* at 1632.

110 929 F. Supp. 608 (D.Conn. 1996).

for gender-based violence. The federal district court rejected the motion, however, finding support for Congress' judgment that violence against women was a "national problem with substantial impact on interstate commerce." A "rational basis" for the legislation was found in "statistical, medical, and economic data before the Congress" that was lacking in *Lopez*. The Senate Report, for example, indicated that 50% of rape victims leave the work force involuntarily and that "fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."[111] Moreover, VAWA was found to "complement" rather than encroach upon state procedures because it remedied "deficiencies" in existing state and federal legal protections against gender-based violence while preserving traditional state tort remedies. The federal safeguards were further justified, said the *Doe* Court, given the special harm, community unrest, and likelihood of retaliation, provoked by bias-inspired crime.

Conversely, the VAWA claim of a female student at a state university who had allegedly been raped by two male students was rejected in *Brzonkala v. Virginia Polytechnic and State University*.[112] The district judge there ruled that the "totality of circumstances"--including vulgar statements made by the defendants concerning the assaults and the "gang rape" aspect of the case--was sufficient to establish the required "gender animus." Since the law was concerned with neither the channels of interstate commerce, nor commodities moving therein, however, the court applied *Lopez* to analyze the conduct prohibited by the statute in terms of its "substantial effect" on commerce. Such effects were found lacking by *Brzonkala*. First, like the *Lopez* statute, VAWA regulated "non-economic intrastate activity" and there was no requirement that an interstate connection be shown in each individual case. The congressional findings and legislative history relied upon by the *Doe* court were insufficient to supply the missing nexus since "[s]howing that something affects the national economy does not suffice to show that it has a substantial effect on interstate commerce." The court noted that family law issues and most criminal issues "affect the national economy substantially" and have "some effect" on interstate commerce, but to equate the two and "extend Congress' power to these issues would unreasonably tip the balance away from the states."

As noted, Congress is also granted specific power to enforce civil rights remedies pursuant to §5 of the Fourteenth Amendment. Under § 5 Congress has power independent of the courts to identify equal protection and due process violations and to prescribe remedies for constitutional wrongs. The scope of this legislative authority remains undetermined, however, insofar as congressional regulation of private conduct that is unsupported by state action is concerned. The district court in *Brzonkala* read the Supreme Court rulings in *Morgan* and *Guest supra* to preclude extension of Congress' § 5 power to gender-based violent crime not attributable to the state or its agents. Since the remedy

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111 S.Rep. 138, 103d Cong., lst Sess. 54 (1993).

112 1996 U.S. Lexis 10766 (W.D.Va. 7-26-96).

prescribed by VAWA runs against the private individual who commits a criminal act, rather than the state criminal justice system, it could not be justified as a remedy for state inaction or inadequate action in prosecuting gender-based violent crime.

> While remedying the state criminal system's deficiencies is a legitimate Fourteenth Amendment concern, VAWA does not address this concern, because VAWA provides no remedy for the deficiencies. It does not provide a remedy to the victim for the denial of the victim's equal protection rights by either undoing or stopping the specific equal protection violation or by compensating the victim for the violation, nor does it provide a remedy against the equal protection violator.

In short, because VAWA provides a remedy against private persons who commit gender-based violence, but does nothing to address deficiencies in state criminal processes regarding prosecution for rape or other violent crimes against women, it was not a proper exercise of Congress' § 5 authority, according to the *Brzonkala* court.

To date, no federal appellate tribunal has addressed the legal and constitutional issues raised by the VAWA civil action provisions. Such appeals may be anticipated, however, and a ruling by the Supreme Court this term in the *Lanier* case may provide additional guidance.

## UNITED STATES V. LANIER

On March 31, 1997, the U.S. Supreme Court vacated a ruling by the Sixth Circuit U.S. Court of Appeals which had reversed the conviction of David Lanier, a Tennessee Chancery Court judge, for willful deprivation of federal constitutional "rights, privileges, or immunities" under color of law in violation of 18 U.S.C. § 242. The charges against Lanier stem from allegations that he raped, assaulted, or harassed eight women in his chambers who either worked for the judge, worked with him, or had cases pending before his court. The "right, privilege or immunity" allegedly violated was identified as a Fourteenth Amendment due process guarantee of "bodily integrity"--specifically, the right to be free of sexual assault by a state official. After a trial, Lanier was convicted on two felony and five misdemeanor counts of violating § 242 and was sentenced to a total of 25 years in prison. A panel of the Court of Appeals for the Sixth Circuit affirmed the conviction and sentence, but the full court overturned the decision and granted rehearing *en banc*.[113]

Invoking established rules of construction for criminal statutes, and the Supreme Court ruling in *Screws v. United States*,[114] the *en banc* majority set-

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113 43 F.3d 1033 (6th Cir. 1995).

114 325 U.S. 91 (1945).

aside the conviction on the grounds that existing § 242 precedents failed to adequately notify the public that simple or sexual assault crimes invaded a constitutional right or liberty protected by the statute. To avoid unconstitutional vagueness, a plurality of the *Screws* Court had construed the statute to require proof of "specific intent" to deprive the victim of a right "made specific either by the express terms of the Constitution. . .or by decisions interpreting them." The federal government had argued that a due process right to be free of unwarranted assault recognized by lower court decisions in other contexts provided adequate notice of criminal conduct to be punished. But due to the statute's "abstract" nature, and discrepancies among the circuits and federal district courts in their recognition of "new" constitutional rights, Chief Judge Merritt felt that "[o]nly a Supreme Court decision with nationwide application can make specific a right that can result in § 242 liability" and only when the right had been made to apply in "a factual situation fundamentally similar to the one at bar." The *en banc* court conceded the "outrageous" nature of Judge Lanier's conduct, but found that since the Supreme Court had not so ruled in a "fundamentally similar" situation, the supposed right to be free of sexual assault could not form the basis for a federal prosecution.

Writing for a unanimous Supreme Court, Justice Souter faulted the Sixth Circuit for applying too restrictive a standard and for concluding that § 242 could never incorporate "newly-created constitutional rights." The "fair warning" requirement in *Screws* was not a "categorical rule" excluding from the universe of §242 safeguards any right not specifically identified by prior Supreme Court decisional law. To interpret the statute so restrictively, said the Court, was "unsound," contradicting both the legislative and judicial history of the criminal civil rights provisions and decisional law governing the corollary "clearly established" qualified immunity standard applied by the courts to determine civil liability of state officials under 42 U.S.C. 1983. The "touchstone" for imposing § 242 criminal liability is whether the statute, either standing alone or as construed by the courts at all levels, "made it reasonably clear at the relevant time that the defendant's conduct was criminal." According to Justice Souter, "general statements of the law" could provide "fair and clear warning" and may apply "with obvious clarity," in at least some situations, even though the particular conduct in question had not previously been held unlawful in precisely the same circumstances.

The Supreme Court's disposition of *Lanier* avoided decision of the main substantive issue in the case--that is, the constitutional status of the right to be free from sexual harassment and abuse at the hands of state officials. Other aspects of the ruling, however, and its contemporary legal background may suggest the probable legal outcome of the case on remand. First, in a concluding footnote, the Court rejected "as plainly without merit" several arguments--including the unavailability of § 242 to enforce due process rights--made by Judge Lanier and relied upon by the Sixth Circuit to reach its earlier decision. This will presumably complicate the task of defending Judge Lanier's position on remand. In his background discussion of the case, Justice Souter also quotes with seeming approval from the trial judge's instruction to the jury that the Fourteenth Amendment protection of bodily integrity includes "the right to be

free from certain sexually motivated physical assaults and coerced sexual battery. This instruction appears to conform to the weight of existing lower federal court precedent, including a Sixth Circuit decision since *Lanier*,[115] making it difficult for the appeals court to reiterate its earlier finding that Judge Lanier did not have "fair warning" that his conduct violated constitutional rights.[116] In addition, Congress has enacted legislation based on the assumption that § 242 punishes sexual assaults.[117] Finally, the U.S. Justice Department brief in *Lanier* notes that it prosecutes 30 cases per year under § 242, many based on a due process right to bodily integrity. Since 1981, the Civil Rights Division of DOJ has prosecuted at least 29 § 242 cases involving sexual assault by public officials, most involving a woman who was sexually assaulted by a jailor, police officer, or border patrol agent. However, three other cases besides *Lanier* involved sexual assault by state judges--two resulting in guilty pleas, the third in acquittal.

In sum, *Lanier* questioned the fundamental nature of "constitutional crimes" prohibited by § 242, a statute notable for its definitional vagueness and described by the court of appeals as "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code." Since the federal "rights, privileges, or immunities" whose official invasion may be the predicate for a § 242 prosecution are not plainly spelled out by statute, its scope has traditionally been determined by the courts according to contemporary constitutional understanding of those terms. Justice Souter, in his opinion, appears largely unmoved by respondent's argument that to permit a § 242 prosecution of Judge Lanier would encroach upon the traditional police powers of the state and impermissibly "federalize," by judicial decree, state offenses like rape and sexual assault into a federal "common law" of crime. Nonetheless, as noted earlier, solicitude for federalism and our dual system of government was a factor limiting Congress' commerce power to enact the Gun-Free School Zones Act in *Lopez* and could inform judicial review of the corollary issue posed by *Lanier*. To what extent, if any, such objections may influence renewed judicial consideration of the case can only be speculated. At this point, however, *Lanier* appears to expand the general availability of § 242 as a safeguard against official deprivation of federal constitutional rights and, in addition, may constitutionally

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115 *Doe v. Claiborne County*, 1996 WL 734583 (12-26-96).

116 *See, e.g. Doe v. Taylor Independent School District*, 15 F.3d 443, 451 (5th Cir.), *cert. denied*, 115 S. Ct. 70 (1994)(teacher's sexual abuse of a student "deprived [the student] of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment"); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 479 (9th Cir. 1991)(plaintiff's constitutional right were violated in a § 1983 case when she was raped by a state welfare official); and *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990)("the constitutional right. . .to freedom from invasion of. . .personal security through sexual abuse, was well established" by the early 1980's).

117 In the Violent Crime Control and Law Enforcement Act of 1994, Congress required enhanced punishment for several crimes in aggravated circumstances, including sexual violence. That enhancement provision applied to violations of § 242. *See* P.L. 103-322 § 320103(b)(3), 108 Stat. 2109.

buttress the civil remedy for gender-motivated violence in VAWA, at least as applied to acts of violence by governmental agents or others acting under color of law.