

## RECENT DEVELOPMENTS

### WHEN COUNSELING IS NOT ENOUGH: THE NINTH CIRCUIT REQUIRES EMPLOYERS TO DISCIPLINE SEXUAL HARASSERS

*Intlekofer v. Turnage*, 973 F.2d 733 (9th Cir. 1992).

With more men and women working side-by-side than ever before, the modern workplace increasingly has become a source of both welcome romances<sup>1</sup> and unwelcome sexual harassment.<sup>2</sup> Employers who do not recognize the difference between the two potentially face liability under Title VII<sup>3</sup> for their employees' sexual harassment.<sup>4</sup> In fact, the Ninth

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1. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 854 (1988) ("The increasing importance of work has meant that, for many people, there is no longer a sharp distinction between their social life and their working life."); Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 357 (1990) ("Office romances are commonplace, especially now that women increasingly populate the workforce.").

2. See BARBARA A. GUTEK, *SEX AND THE WORKPLACE* 47-48 (1985) (acknowledging that fifty-three percent of working women have encountered sexual harassment). Clarence Thomas' confirmation hearings have produced a greater awareness of sexual harassment. In 1992, approximately 10,552 people filed complaints of sexual harassment with the Equal Employment Opportunity Commission, a significant increase from the 6,883 people who filed complaints in 1991. Nancy E. Roman, *Harassment Headlines Help Muddy Definition of Crime*, THE WASH. TIMES, Dec. 13, 1992, at A6.

3. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 provides:

It shall be an unlawful employment practice for an employer—to fail or 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. . . .

42 U.S.C. § 2000e-2(a) (1988).

There is no legislative history to guide courts in determining what is "sex" discrimination. The word "sex" was added to Title VII at the last minute in an effort to defeat the entire Civil Rights Act. See 110 CONG. REC. 2577-84 (1964) (remarks of Reps. Smith, Green, Tuten, Andrews, and Rivers); See generally Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 441-42 (1966).

In 1980 the Equal Employment Opportunity Commission (E.E.O.C.) established Guidelines on Discrimination Because of Sex [hereinafter "Guidelines"] which declared that sexual harassment violates section 703 (a)(1) of Title VII. 29 C.F.R. § 1604.11 (1992). The definition of sexual harassment in the Guidelines states:

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.

Circuit recently decreed that employers who discover hostile environment sexual harassment must do more than simply counsel an employee if the employee continues the harassment.

In *Intlekofer v. Turnage*,<sup>5</sup> the Ninth Circuit held the Veteran's Administration (VA) liable under Title VII for failing to discipline an employee after repeated counselling sessions with the employee did not end the sexual harassment.<sup>6</sup> The court accepted, but did not address, the district court's finding that the employee's behavior, while "not overtly sexual,"<sup>7</sup> constituted hostile environment sexual harassment.<sup>8</sup> The court, however, reversed the district court's ruling that the VA had responded promptly and reasonably to the complaints.<sup>9</sup>

This Recent Development addresses the standard that emerges from *Intlekofer* for employer liability under Title VII<sup>10</sup> for co-worker,<sup>11</sup> hos-

29 C.F.R. § 1604.11(a) (1992). The Supreme Court upheld the determination that sexual harassment violates Title VII in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). See *infra* notes 13-34 and accompanying text.

4. Title VII does not require an asexual workplace. Only "unwelcome" sexual conduct that affects a term or condition of employment is prohibited. E.E.O.C. Compliance Manual (CCH) § 615 ¶3114, at 3267 (1990). Employers often find distinguishing between legitimate and wrongful sexual conduct difficult. See, e.g., Paul, *supra* note 1, at 358.

5. 973 F.2d 773 (9th Cir. 1992).

6. 973 F.2d at 779.

7. The proper inquiry under Title VII is whether the behavior would have occurred but for the plaintiff's sex. The behavior does not need to be "overtly sexual." *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Boyd v. Hayes Living Health Care Agency*, 671 F. Supp. 1155 (W.D. Tenn. 1987).

8. 973 F.2d at 779 n.7. Judge Hall argued that because the VA did not appeal the finding, it was not properly before the court. *Id.* Judge Keep agreed. *Id.* at 781. Judge Wiggins did not believe that sexual harassment had occurred, but admitted that the court may be required to accept the finding because it was not appealed. *Id.* at 783.

9. *Id.* at 779. The Ninth Circuit remanded the case for a calculation of damages, attorney's fees and costs. Because the plaintiff prevailed on appeal, the court granted her request for attorney's fees under section 706(k) of Title VII. *Id.* at 781 n.10. See 42 U.S.C. § 2000(e-5)(k).

10. This Recent Development addresses only an employer's liability under Title VII of the Civil Rights Act of 1964. For proposals for, and discussion of, other theories of liability, see Tina Kirstein-Ezzel, Note, *Eradicating Title VII Sexual Harassment by Recognizing an Employer's Duty to Prohibit Sexual Harassment*, 33 ARIZ. L. REV. 383 (1991) (arguing that sexual harassment should be included within an employer's duty to maintain a safe workplace); Paul, *supra* note 1 (proposing tort remedy against harasser similar to intentional infliction of emotional distress); Terry M. Dworkin, et al., *Theories of Recovery for Sexual Harassment: Going Beyond Title VII*, 25 SAN DIEGO L. REV. 125 (1988).

11. The terms "co-worker" and "co-employee" are used interchangeably throughout this Recent Development to refer to an employee who is not a supervisor of the victim.

Catherine MacKinnon defines sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power" in her ground-breaking book on sexual harassment. CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WOMEN: A CASE OF DISCRIMI-*

tile environment sexual harassment.<sup>12</sup> Part I discusses the key caselaw leading up to the *Intlekofer* decision. Part II examines the unique facts and three separate opinions in *Intlekofer*. Part III discusses the questions raised by the majority opinion and the impact *Intlekofer* may have on employer responses to workplace relationships in the future.

## I. CO-EMPLOYEE HOSTILE ENVIRONMENT SEXUAL HARASSMENT

Several courts have addressed co-employee hostile environment sexual harassment. The Supreme Court acknowledged that such harassment is capable of violating Title VII in *Meritor Savings Bank v. Vinson*.<sup>13</sup> In *Ellison v. Brady* the Ninth Circuit expanded on *Vinson* by creating a "reasonable woman standard" which measures whether such harassment violates Title VII.<sup>14</sup> In *Ellison* the Ninth Circuit also expounded on other circuits' analysis by beginning to devise a framework for testing remedial action by an employer.<sup>15</sup> Sexual harassment that creates a hostile work environment violates Title VII,<sup>16</sup> whether or not such harass-

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NATION 1 (1979). Ellen Paul criticizes MacKinnon's definition as not accurately reflecting the reality of hostile environment sexual harassment between co-employees "unless one accepts the added, debatable and more global assumption that males occupying any position in the workplace enjoy more power than women." Paul, *supra* note 1, at 335. The E.E.O.C. and courts today recognize that the conduct of employees with equal job power can create an abusive environment which constitutes sexual harassment. In addition, in *Cronin v. United Services Stations, Inc.*, 809 F. Supp. 922 (M.D. Ala. 1992), a federal court recognized a case of sexual harassment by a subordinate. This Recent Development focuses on sexual harassment between employees of essentially equal power at work.

12. The E.E.O.C. recognizes two forms of sexual harassment: (1) *quid pro quo* sexual harassment, and (2) hostile environment sexual harassment. See E.E.O.C. Compliance Manual (CCH) § 615, ¶ 3114, at 3267 (1990). *Quid pro quo* sexual harassment occurs when the victim's submission to unwelcome sexual conduct is made "a term or condition of an individual's employment," 29 C.F.R. § 1604.11 (a)(1), or "is used as a basis for employment decisions affecting the individual." 29 C.F.R. § 1604.11 (a)(2). Hostile environment sexual harassment occurs when unwelcome sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11 (a)(3). For a discussion of the different standards of employer liability under the two types of sexual harassment, see Katherine S. Anderson, Note, *Employer Liability Under Title VII for Sexual Harassment After Meritor Savings Bank v. Vinson*, 87 COLUM. L. REV. 1258 (1987).

13. 477 U.S. 57 (1986). See *infra* notes 18-34 and accompanying text.

14. 924 F.2d 874 (9th Cir. 1991). See *infra* notes 35-60 and accompanying text.

15. *Id.* See *infra* notes 53-63 and accompanying text.

16. 477 U.S. at 66. *Vinson* was the first Supreme Court decision on sexual harassment. Sexual harassment was first recognized as sex discrimination prohibited by Title VII in *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978). The first case to recognize a "hostile environment" claim under Title VII was a race discrimination case. *Rogers v. E.E.O.C.*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

ment leads to tangible economic injury.<sup>17</sup> The Supreme Court, in *Meritor Savings Bank v. Vinson*,<sup>18</sup> adopted the 1980 Equal Employment Opportunity Commission (E.E.O.C.) Guidelines on Sexual Harassment,<sup>19</sup> and found that actionable sexual harassment consists of unwelcome<sup>20</sup> sexual conduct<sup>21</sup> which is severe or pervasive enough to alter an employment condition or create an abusive work environment.<sup>22</sup>

The threshold issue in *Vinson* was whether sexual harassment had occurred. *Vinson*, a female bank employee, alleged that her supervisor had sexually harassed her by repeatedly demanding sexual favors.<sup>23</sup> The district court found that no sexual harassment had occurred because if there was a sexual relationship, it was voluntary.<sup>24</sup> The Court of Appeals for the District of Columbia reversed the district court.<sup>25</sup> The Supreme

17. Drawing from the E.E.O.C. Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(a), the *Vinson* Court found that sexual harassment violates Title VII "whether or not it is directly linked to the grant or denial of an economic *quid pro quo* . . ." 477 U.S. at 65. Circuit courts prior to *Vinson* had come to the same conclusion. See *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983) (same); *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982) (recognizing hostile environment sexual harassment); *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (finding that continuous unwelcome sexual advances without threat of adverse economic consequences constituted sexual harassment).

18. 477 U.S. 57 (1986).

19. 477 U.S. at 65. The Court recognized that the E.E.O.C. Guidelines view harassment leading to non-economic injury as a possible violation of Title VII.

20. *Id.* (citing 29 C.F.R. § 1604.11(a) (1985)). See *infra* notes 27-29, and accompanying text, for a discussion of the "unwelcomeness" standard.

21. Actionable conduct includes "[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)).

22. 477 U.S. at 67. The Court stated that not all "harassment" rises to the level of Title VII. *Id.* (quoting *Rogers v. E.E.O.C.*, 454 F.2d at 238 (finding that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is insufficient to state a claim)). See *supra* note 16.

The Supreme Court recently granted certiorari in a case in which the litigants hope to determine what severity of supervisory harassment rises to the level of Title VII liability. In *Harris v. Forklift Systems, Inc.*, 976 F.2d 733 (6th Cir.), *cert. granted*, 113 S. Ct. 1382 (1993), the Court will decide whether an employee whose boss repeatedly downgraded her must prove "serious psychological injury" in order to recover under Title VII. See generally Linda P. Campbell, *Court to Decide About Sexual Harassing on Job*, CHI. TRIB., Mar. 2, 1993, at N4.

23. 477 U.S. at 60. The plaintiff brought the charges after being fired from her position as a bank teller for taking excessive sick leave. *Id.* She claimed that shortly after becoming a teller her supervisor took her to dinner and suggested that they have sexual relations. *Id.* At first she refused, but, out of fear of losing her job, she agreed to the sexual relations. *Id.* Over the next several years, the supervisor made passes and touched her in front of employees, exposed himself to her, followed her into the ladies' room, had intercourse with her, and even raped her on numerous occasions. *Id.*

24. *Id.* at 61 (citing *Vinson v. Taylor*, 22 EPD ¶ 30,708, p.14, 392, 23 FEP Cases 37, 42 (D.C. 1980)).

25. *Id.* at 62.

Court affirmed the court of appeals.<sup>26</sup> The Court held that the proper inquiry was not whether the sexual conduct was "voluntary," but whether it was "unwelcome."<sup>27</sup> The Court directed the trier of fact to look at the "totality of the circumstances" in determining whether or not the conduct was unwelcome.<sup>28</sup> Consequently, an inquiry into the plaintiff's sexually provocative speech, dress, or personal fantasies could be relevant even though consent or voluntariness is not a defense to a sexual harassment charge brought under Title VII.<sup>29</sup>

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26. *Id.* at 63.

27. *Id.* at 68 (citing 29 C.F.R. 1604.11(a) (1985)). The Court observed that simply because the sexual conduct is "voluntary," in the sense of consent, is not a defense to a sexual harassment suit brought under Title VII. *Id.*

28. 477 U.S. at 69 (citing 29 C.F.R. § 1604.11(b) (1985)). Lower courts applying the *Vinson* welcomeness standard have reached differing results. Compare *Swentek v. USAir*, 830 F.2d 552, 557 (4th Cir. 1987) (noting that plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive [her claim].) with *Loftin-Boggs v. City of Meriden*, 633 F. Supp. 1323, 1327 (S.D. Miss. 1986) (finding that the plaintiff's use of foul language and sexual jokes contributed to the offensive environment and that ceasing the activity was insufficient to show unwelcomeness.), *aff'd*, 824 F.2d 971 (5th Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988).

29. 477 U.S. at 69. Although, the Fourth Circuit had determined that such evidence "had no place in this litigation," the Court found that the evidence could not be ruled irrelevant as a matter of law. *Id.*

Some commentators have criticized the Supreme Court's reliance on the victim's dress and sexual fantasies to determine welcomeness. See Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 826 (1991); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 770 (1989) CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987); Wendy Pollock, *Sexual Harassment: Women's Experience v. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 58 (1990); Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of Meritor Savings Bank FSB v. Vinson and the Law of Sexual Harassment*, 67 B.U. L. REV. 445, 469 (1987).

Susan Estrich compares the "unwelcomeness" standard to the former "consent and resistance" evidentiary standards in rape law. Estrich, *supra*, at 826-27. According to Estrich, the welcomeness standard is subject to the same abuses as an inquiry into a rape victim's dress or sexual history. She argues: "Given the additional prerequisites for establishing sexual harassment . . . the unwelcomeness requirement is unnecessary even as a means to protect what some would consider legitimate, consensual sex in the workplace." *Id.* However, Estrich's criticisms are made in the context of *Vinson*, where the perpetrator was a supervisor. She argues that Rehnquist's comments on the welcomeness standard, like the district court's reliance on "voluntariness," ignore the supervisory position of the harasser.

Estrich's criticisms are less tenable in the context of a sexual relationship between co-employees. Where both the plaintiff and the alleged harasser are non-supervisory employees, the danger that a relationship may be "voluntary" but not "welcome" is substantially less. The plaintiff would be less fearful of losing job benefits by not entering the relationship. Inquiry into how the plaintiff demonstrated that the alleged harasser's conduct was unwelcome becomes even more relevant.

Furthermore, differences between sexual harassment and criminal rape may justify greater scrutiny of the sexual harassment victim's actions. In one case the victim is a party seeking damages and in the other the victim is not even a party. The burden of proof is already easier for a civil plaintiff than for the state in a criminal rape case. Therefore, it may be necessary to require the civil plaintiff

The *Vinson* Court refused to go beyond recognizing a cause of action and formulate a definite rule regarding employer liability for hostile environment sexual harassment by supervisors.<sup>30</sup> The Court agreed with the E.E.O.C. that Congress intended general agency principles to guide addressing supervisor liability issues.<sup>31</sup>

The *Vinson* Court did not address employer liability for a non-supervisory co-worker's sexual harassment because *Vinson* involved sexual harassment by a supervisor.<sup>32</sup> Since *Vinson*, most courts have adopted the E.E.O.C.'s constructive notice standard for both supervisor and non-supervisor liability.<sup>33</sup> Under the constructive notice standard, employers are liable for co-worker sexual harassment if they knew or should have known of the harassing conduct, unless they took prompt and appropriate remedial action.<sup>34</sup>

The Ninth Circuit addressed Title VII liability for co-worker hostile environment sexual harassment in *Ellison v. Brady*.<sup>35</sup> *Ellison* addressed two issues: (1) what constitutes "severe and pervasive" sexual harass-

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seeking damages to prove "unwelcomeness" in light of her actions, in order to protect against false claims.

30. 477 U.S. at 72. For a discussion of the positions of each of the parties, the E.E.O.C., the lower courts, and the *Vinson* Court, see Anderson, *supra* note 12, at 1265-75.

31. 477 U.S. at 72. In its *amicus* brief, the E.E.O.C. distinguished between *quid pro quo* and hostile environment claims. It argued that in a *quid pro quo* claim, employers are liable for their supervisors' actions, because when a supervisor makes an employment decision based on submission to sexual conduct, the supervisor is acting under the express or apparent authority of the employer. The employer is liable whether or not the employer had actual or constructive knowledge. In the hostile environment claim, on the other hand, the E.E.O.C. argued that liability should depend on whether the employer had enacted a policy against sexual harassment which provided an accessible means for the plaintiff to bring her dispute. *Id.* at 70-71 (citing United States and E.E.O.C. *amicus curiae* brief). This aspect of the E.E.O.C. brief differed from its 1980 Guidelines on Sexual Harassment, which made an employer liable for the acts of its supervisors regardless of the type of claim. See 29 C.F.R. § 1604.11(c). As Katherine S. Anderson argues, apparently the E.E.O.C. believes "a supervisor is not acting within his delegated authority when he creates an offensive work environment." Anderson, *supra* note 12, at 1268.

32. Relationships involving supervisors enter the "murky area where power and caring converge" which Catherine MacKinnon calls "coerced caring." MACKINNON, *supra* note 11, at 54. But finding sexual harassment in relationships not involving supervisors can be still more difficult. As one commentator observed, "[w]hen no significant disparity in power exists between the parties in the sexual relationship . . . the likelihood of both sexual harassment and favoritism declines." Chamallas, *supra* note 1, at 856.

33. *E.g.*, Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir. 1992); *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991); *Sapp v. City of Warner Robins*, 655 F.Supp. 1043, 1049 (M.D. Ga. 1987); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3rd Cir. 1990).

34. 29 C.F.R. § 1604.11(d) (1990).

35. 924 F.2d 872 (9th Cir. 1991).

ment necessary to support such a claim; and, (2) what constitutes an "immediate and appropriate" employer response.<sup>36</sup> Addressing the first issue, the court held that the alleged sexual harassment should be evaluated from the perspective of the "reasonable woman."<sup>37</sup> Addressing the second issue, the court held that an employer must take action reasonably calculated to end the harassment.<sup>38</sup>

In *Ellison*, the plaintiff, Kerry Ellison, alleged that Sterling Gray, a male co-worker at the Internal Revenue Service (IRS) in San Mateo, California, harassed her with unwelcome sexual propositions. Gray loitered unnecessarily at Ellison's desk, constantly asked Ellison trivial questions, and invited Ellison out to lunch despite her persistent refusals.<sup>39</sup> When Ellison refused Gray's invitations, Gray handed Ellison a bizarre note expressing his dismay.<sup>40</sup> Ellison showed the note to her supervisor. The supervisor agreed that it was sexual harassment. Ellison, however, asked her supervisor not to take any action.<sup>41</sup> The next week, while out of town for training, Ellison received a second, even more strange, and sexually-conative letter.<sup>42</sup> She immediately telephoned her supervisor and

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36. The Ninth Circuit first addressed which remedial actions can shield an employer from Title VII liability in *Ellison*. *Id.* at 881.

37. 924 F.2d at 879. The court acknowledged that if a man brings a claim for sexual harassment, the perspective would be that of a "reasonable man." *Id.* at 879 n.11. *But cf.* *Hannah v. Philadelphia Coca-Cola Bottling Co.*, 53 Fair Empl. Cas. (BNA) 9 (E.D. Pa. 1991) (holding that a reasonable man could not be offended by coarse language on the job).

The court's "reasonable woman" standard has been widely discussed. *See, e.g.*, Stuart L. Bass, *The "Reasonable Woman" Standard: The Ninth Circuit Decrees Sexes Perceive Differently*, 1992 LABOR L.J. (July) 449 (1992); David I. Gedrose, Note, *Workplace Sexual Harassment: The Ninth Circuit's Reasonable Woman Standard and Employer Remedial Actions In Hostile Environment Claims Following Ellison v. Brady*, 28 WILLIAMETTE L. REV. 151 (1991); Lynne A. Reinders, Note *A Reasonable Woman Approach to Hostile Environment Sexual Harassment: Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), 41 J. URBAN & CONTEMP. L. 228 (1992).

38. *Id.* at 881.

39. 924 F.2d at 873. Before the harassment began, on a day when no one else was in the office, Gray and Ellison had gone to lunch together. Gray had to pick up his son's forgotten lunch, so he gave Ellison a tour of his house. After this, the harassment began. Ellison refused to go to lunch alone with Gray ever again. Once Gray even reported to work dressed in a three-piece suit and asked Ellison to lunch to no avail. *Id.* at 873-74.

40. *Id.* at 874. The note read: "I cried over you last night and I'm totally drained today. I have never been in such term oil (sic). Thank you for talking with me. I could not stand to feel your hatred for another day." *Id.*

41. *Id.* Ellison wanted to handle the harassment on her own. Ellison asked a male co-worker to tell Gray to leave her alone.

42. *Id.* The second letter read in part:

I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't

expressed her shock and fear.<sup>43</sup> Her supervisor counseled Gray and repeatedly reminded him not to contact Ellison. Gray was transferred to San Francisco just prior to Ellison's return from training. After only three weeks in San Francisco, Gray filed a union grievance seeking to return to San Mateo. The IRS agreed to allow him to return, provided he did not disturb Ellison. Ellison subsequently filed a formal complaint and obtained a temporary transfer to San Francisco.<sup>44</sup>

The Ninth Circuit admitted that under the traditional "reasonable person" standard, Gray's actions could appear as nothing more than the well-intentioned appeals of a "modern-day Cyrano de Bergerac."<sup>45</sup> But the court found that even well-intentioned conduct may be sexual harassment.<sup>46</sup> The court argued that men and women perceive things differently.<sup>47</sup> What may seem harmless to a man may be offensive to a woman.<sup>48</sup> Women have greater reason to fear conduct such as Gray's

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you think it odd that two people who have never even talked together, alone, are striking off such intense sparks. . . . I will [write] another letter in the near future.

924 F.2d at 874.

43. *Id.* Ellison testified: "I just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened." *Id.*

44. *Id.* Gray wrote another letter to Ellison while she was in San Francisco in which he suggested that they had a relationship. *Id.*

The IRS investigator responding to Ellison's complaint agreed that Gray's action constituted sexual harassment. However, the Treasury Department rejected the claim, arguing that the conduct did not rise to the level of pattern behavior covered by the E.E.O.C. guidelines. The E.E.O.C. found that the IRS had taken appropriate action and affirmed the Treasury Department's decision. 924 F.2d at 875.

45. 924 F.2d at 880. The court stated that "[e]xamined in this light, it is not difficult to see why the district court characterized Gray's conduct as isolated and trivial." *Id.*

46. 924 F.2d at 880. *See also* Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988).

47. *Id.* at 878. As one commentator argues:

The controversy generated by Anita Hill's allegations of sexual harassment . . . dramatize[s] the problem caused by differing perceptions from men and women as to what constitutes offensive conduct. In general, men have expressed confusion, while women exhibit indignation over what they perceive as the insensitivity of men.

Nell J. Medlin, Note, *Expanding the Law of Sexual Harassment to Include Workplace Pornography: Robinson v. Jacksonville Shipyards, Inc.*, 21 STETSON L. REV. 655, 675 n.119 (1992).

*See also* Yates v. Avco Corp., 819 F.2d 630, 637 n.2 (6th Cir. 1987).

48. The reasonable woman standard has produced a split among feminists. Many were arguing for its adoption before the *Ellison* case. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Nancy S. Ehrreich, *Pluralistic Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990). However, some argue that the reasonable woman standard is a setback for feminism because it trivializes the injury and implies women are not reasonable persons. *See* Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 LAB. LAW. 203, 204-06 (1992); Wendy Pollack, *Sexual Harassment: Women's Experience v. Legal Definitions*, 13 HARV.



because they are more often the victims of sexual crimes.<sup>49</sup> Thus, the court held that a female employee states a cause of action when she alleges conduct which a reasonable woman would consider sexual harassment.<sup>50</sup> A reasonable woman could conclude that Gray's conduct constituted sexual harassment in violation of Title VII.

The court then addressed what remedial actions may shield an employer from liability for co-employee, hostile environment sexual harassment.<sup>51</sup> The court adopted the Fourth Circuit's requirement that the employer must choose a remedy "reasonably calculated to end the harassment"<sup>52</sup> after the employer is notified of the harassment. The court held that the proper inquiry is not what a "reasonable employer" would do because a reasonable employer might be reluctant to punish certain employees.<sup>53</sup> Instead, the reasonableness of the employer's action, depends on the action's ability to stop the harasser.<sup>54</sup> The court also stated that employers should "educate and sensitize" employees about appropriate workplace conduct.<sup>55</sup> The education should enable the employees to internalize proper attitudes toward workplace sexual conduct.

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WOMEN'S L.J. 35, 83 (1990). Kenealy also argues that a male judiciary is likely to abuse a reasonable woman standard by applying stereotypical norms of womanhood. Kenealy, *supra*, at 204. *But cf.* Medlin, *supra* note 47, at 677 (the reasonable woman standard is necessary because neutrality in the male judiciary is an unrealistic ideal).

49. 924 F.2d at 879 n.10.

50. The court retained an objective "reasonableness" standard "[i]n order to shield employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee." 924 F.2d at 879. *Cf.* Sheryl Hahn, Note, *Evolution of the Hostile Workplace Claim Under Title VII: Only Sensitive Men Need Apply*, 22 GOLDEN GATE U. L. REV. 69, 91 (1992) (goal of sensitizing employees to the appropriate standard of behavior is balanced against the goal of ensuring employers that they will not have to dismiss employees because of personality conflicts).

At least one commentator has argued for a "subjective" rather than "objective" standard in sexual harassment law. *See* Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005 (1992). Blackwood argues:

If a woman suffers insult, indignity, and job discrimination because of her supervisor's or co-worker's harassment of her as a woman, she should be compensated and the behavior should be stopped. It does not matter whether she is particularly sensitive or insensitive.

*Id.* at 1024.

51. 924 F.2d at 881. *Ellison* was the first time the Ninth Circuit addressed the issue. *Id.*

52. *Id.* (quoting *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983)).

53. *Id.* at 882 n.17. *But cf.* *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989) (looking to "whether the employer's total response was reasonable under the circumstances as they existed").

54. 924 F.2d at 882.

55. 924 F.2d at 880 (citing 29 C.F.R. § 1604.11(f) (1990)). *See also* Gedrose, *supra* note 37, at 163. Gedrose argues:

Employers who seek only to understand what the "law demands" will miss the point of *Ellison*. After *Ellison*, employers shield themselves most effectively when they strive to

The *Ellison* court refused to conclude that the IRS' response was reasonable. The IRS told Gray to stop harassing Ellison, but Title VII requires more.<sup>56</sup> Even though the harassment stopped while Gray was in San Francisco, the IRS' decision to allow Gray to return was not reasonable.<sup>57</sup> Furthermore, granting Ellison's request for a transfer was not a proper remedy because it essentially punished the victim.<sup>58</sup>

Although the *Ellison* court's adoption of the reasonable woman standard received much attention from commentators,<sup>59</sup> the Ninth Circuit's analysis of appropriate remedial measures left questions unanswered.<sup>60</sup> After *Ellison*, whether an employer would be liable for failing to discipline an alleged harasser was unclear.<sup>61</sup>

change attitudes about workplace sexual conduct, not when they attempt formal corrective actions.

*Id.*

56. 924 F.2d at 882 ("Employers should impose sufficient penalties to assure a workplace free from sexual harassment.").

57. *Id.* at 883. The court acknowledged that in some cases a harasser's mere presence may create a hostile work environment. *Id.* (citing *Paroline v. Unisys Corp.*, 879 F.2d 100, 106-107 (4th Cir. 1989)). In such a case, an employer may be liable for failing to remove the harasser either by re-scheduling work assignments or, in rare cases, by dismissal. *Id.*

In *Ellison*, Gray was allowed to return to San Mateo as part of a settlement with the union. 924 F.2d at 874. As David Gedrose points out, if a court, arbitrator or agency ordered an employer to reinstate a discharged harasser, the employer's liability would be uncertain. See Gedrose, *supra* note 37, at 166.

The Supreme Court recently denied a petition for certiorari from a Seventh Circuit decision upholding an arbitrator's reinstatement of an alleged harasser. In *Chrysler Motors Corp. v. Int'l Union*, 959 F.2d 685 (7th Cir.), *cert. denied*, 113 S. Ct. 304 (1992), Chrysler immediately suspended and then fired an employee who had grabbed the breasts of his co-worker. In a subsequent grievance proceeding, the arbitrator ruled that Chrysler did not have just cause for firing the alleged harasser and ordered his reinstatement. The Seventh Circuit upheld the arbitrator's ruling. *But see Stroehmann Bakeries, Inc. v. Int'l Brotherhood of Teamsters*, 969 F.2d 1436 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 660 (1992); *Newsday Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1992) (finding that the arbitrator's order to reinstate a sexual harasser violated public policy).

58. 924 F.2d at 882 (citing EEOC Compliance Manual (CCH) § 615.4(a)(9)(iii), ¶ 3103, at 3213 (1988)). *But cf.* *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990) (refusing to rule for the plaintiff on grounds that alleged harasser should have been transferred instead of plaintiff).

59. See *supra* note 37.

60. See Gedrose, *supra* note 37, at 166. ("[E]mployers may remain uncertain about the specific remedial actions, beyond the general categories of 'prevention' and 'internalization,' necessary to avoid liability.").

61. Caselaw from other circuits was also unclear. See generally Hope A. Comisky, "Prompt and Effective Remedial Action?" *What Must an Employer Do to Avoid Liability for "Hostile Work Environment" Sexual Harassment?*, 8 LAB. LAW. 181 (1992). Some courts held that a bona fide investigation was enough to prevent liability. *Carrero v. New York City Housing Authority*, 890 F.2d 569 (2d Cir. 1989); *Barrett v. Omaha Nat. Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (finding investigation and 90 day suspension sufficient); *Sapp v. City of Warner Robins*, 655 F. Supp. 1043 (M.D. Ga. 1987). However, some courts required more than an investigation or warning. *Baker v.*

## II. THE *INTLEKOFER* DECISION

In *Intlekofer v. Turnage*,<sup>62</sup> the Ninth Circuit<sup>63</sup> held that an employer would be liable under Title VII for failing to take more severe disciplinary measures after learning that counseling had not ended the sexual harassment.<sup>64</sup> The court reversed the district court's finding that the Veteran's Administration (VA) had promptly and reasonably responded to a case of sexual harassment.<sup>65</sup>

Between April 1987 and January 1988, Joyce Intlekofer filed ten separate complaints with the VA management concerning the behavior of her co-worker, Norman Cortez.<sup>66</sup> The district court found that Intlekofer and Cortez had been involved in an intimate, mutually desired sexual relationship during the two years prior to 1987.<sup>67</sup> Intlekofer's first complaint alleged "touching" and pressure to enter an "unwanted relationship." Her supervisor questioned her about the incident, but Intlekofer refused to elaborate.<sup>68</sup> After the first complaint, the supervisor told Cortez that he would be disciplined if there were additional complaints.<sup>69</sup>

The other nine complaints alleged a variety of incidents.<sup>70</sup> Cortez called Intlekofer at home, screamed at her in front of patients and co-workers, monitored her telephone calls at work, watched which direction she drove when she left work, and on one occasion chased her out of the hospital.<sup>71</sup> Intlekofer also filed a complaint against the Chief of Medical

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Weyerhaeuser Co., 903 F.2d 1342 (10th Cir. 1990); *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989). *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989), *superseded by*, 900 F.2d 27 (4th Cir. 1990) demonstrates how far some courts required employers to go to shield themselves from liability. In *Paroline*, the employer, upon learning of the harassment, denied the harasser security access, delayed his promotion and pay increase, and warned him that a reoccurrence would result in termination. However, the court found that the denial of security access actually increased the contact between the plaintiff and the harasser, causing the plaintiff to resign. The court held that these findings prevented a summary judgment for the employer.

62. 973 F.2d 773 (9th Cir. 1992).

63. A three-member panel comprised of Circuit Judges Hall and Wiggins, and Chief District Judge Keep, sitting by designation, decided the case. Judges Hall and Keep, both women, wrote for the majority, while Judge Wiggins, a man, dissented.

64. 973 F.2d at 779.

65. *Id.* at 781.

66. *Id.* at 775-76. Intlekofer and Cortez were non-supervisory co-workers at the VA Medical Center.

67. *Id.* at 775, 784.

68. *Id.* at 775.

69. 973 F.2d at 775.

70. *Id.* at 775-76.

71. *Id.*

Administrative Services, who allegedly met with Intlekofer and accused her of "leading Cortez on."<sup>72</sup> Three additional complaints alleged that Cortez was talking to other employees about her.<sup>73</sup> Throughout this time, Cortez' supervisors periodically warned him that his actions could lead to discipline.

In December 1987, Intlekofer filed an informal complaint with the E.E.O.C.<sup>74</sup> After reviewing the situation, the E.E.O.C. counselor recommended four courses of action: (1) that Cortez obtain counseling; (2) that Cortez and Intlekofer work different shifts; (3) that Cortez stop talking about Intlekofer with other workers; and, (4) that both employees limit their contact to business.<sup>75</sup> The VA reluctantly instituted the last three recommendations, but said that it did not have authority to require the first.<sup>76</sup> After the VA adopted the E.E.O.C. proposals, Intlekofer filed three more complaints against Cortez.<sup>77</sup> The VA continued to investigate each complaint and to warn Cortez not to talk to or about Intlekofer. However, despite threatening to take more severe disciplinary measures, the VA never did.<sup>78</sup>

Each of the three judges wrote separately in *Intlekofer*.<sup>79</sup> Judge Hall wrote the court's opinion. After deciding that the standards announced

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72. *Id.*

73. *Id.* at 776. In one of these complaints, Intlekofer alleged that Cortez told another employee that Intlekofer was "dumb." The final complaint alleged that Cortez continued to talk to other employees about her. Intlekofer concluded that Cortez had ruined her reputation because other co-workers had began asking her out. 973 F.2d at 775.

74. *Id.*

75. *Id.* Prior to making the recommendations, the E.E.O.C. counselor investigated the report for two months. The E.E.O.C. counselor concluded that Intlekofer had been the victim of sexual harassment. 973 F.2d at 775.

76. *Id.* The VA changed both Intlekofer's and Cortez' work schedules to have the least possible overlap. Intlekofer testified that it would have been impossible to create a schedule in which both employees were never on duty at the same time. *Id.* at 785 (Wiggins, J., dissenting).

77. 973 F.2d at 776. In February 1988, Intlekofer alleged that Cortez "throws keys at me, gives me looks that could kill, and does not give any report as to what is happening at the hospital." *Id.* In June and July 1988, Intlekofer filed reports stating, respectively, that Cortez had made an obscene gesture at her in the parking lot, and that Cortez drew an obscene picture on her locker door. *Id.* The obscene gesture was "the finger." The obscene picture was a portrayal of a dildo. *Id.* at 776 n.4.

78. *Id.* at 776.

79. The Ninth Circuit reviewed de novo the district court's finding that the VA took prompt and appropriate action. 973 F.2d at 777. The ruling was reviewed de novo because it required a consideration of "legal concepts in the mix of fact and law." *Id.* (quoting *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984)). The appropriateness of the employer's response was the only issue before the court because the VA did not appeal the district court's finding of sexual harassment. *Id.* at 774 n.1.

in *Ellison* applied retroactively,<sup>80</sup> the court held that the VA did not take action that was likely to end the harassment.<sup>81</sup> While the VA repeatedly warned Cortez to change his behavior and threatened him with more severe discipline, the court held that such counseling is sufficient only as a first resort.<sup>82</sup> If the harassment continues, Title VII requires more severe discipline.<sup>83</sup> Judge Hall rejected the VA's argument that the duty to take remedial action did not arise until the E.E.O.C. counselor concluded that sexual harassment had occurred.<sup>84</sup> The district court's finding that the sexual harassment began in April 1987 precluded the VA's argument since the VA knew of Cortez' conduct at that time.<sup>85</sup>

Judge Hall then considered the VA's remedial actions and concluded that the VA had not met the duty enunciated in *Ellison*.<sup>86</sup> According to Judge Hall, *Ellison* required an employer's remedy to be disciplinary.<sup>87</sup> Additionally, Judge Hall adopted four factors for determining the appropriateness of the remedy: (1) the seriousness of the harassment; (2) the employer's ability to stop the harasser; (3) the likelihood of the remedy

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80. *Id.* at 777-79. The court applied the three-part retroactivity standard of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971). To satisfy *Chevron*, a court must show: (1) that the standard sought to be applied retroactively does not announce a new rule of law; (2) that retroactive application will further the standard's operation; and, (3) that the standard's retroactive application will not produce inequitable results. *Chevron*, 404 U.S. at 106-107.

The VA argued that *Ellison* announced a new rule of law because *Ellison* required discipline beyond a simple request to stop. The Ninth Circuit disagreed, stating that *Ellison* was foreshadowed by *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989), which held that an employer is liable if he fails to remedy the harassment. 973 F.2d at 778. The court quickly disposed of the other two requirements and concluded that *Ellison* applied retroactively. *Id.* at 779.

81. 973 F.2d at 779.

82. *Id.* at 780.

83. *Id.*

84. *Id.* at 779.

85. *Id.*

86. 973 F.2d at 779.

87. *Id.* Judge Hall relied on the statement in *Ellison* that "[e]mployers send the wrong message to potential harassers when they fail to discipline employees for sexual harassment." *Id.* (quoting *Ellison*, 924 F.2d at 882). Judge Hall further stated that "[i]f the employer 'fail[s] to take even the mildest form of disciplinary action' the remedy is insufficient under Title VII." 973 F.2d at 779 (quoting *Ellison*, 924 F.2d at 882).

In determining the retroactivity of *Ellison*, Judge Hall interpreted the phrase "appropriate corrective action" in the E.E.O.C. Guidelines "to require some form, however mild, of disciplinary measures." *Id.* at 778 (citing 29 C.F.R. § 1604.11(d)). Judge Hall argued that because discipline is more likely to reduce the chance of repeat offenses discipline is "corrective" within the meaning of the Guidelines.

Judge Keep, in her concurrence, disagreed with Judge Hall to the extent that Judge Hall interpreted *Ellison* to require punitive rather than remedial measures. 972 F.2d at 781. See also *infra* note 96.

ending the harassment; and, (4) the remedy's ability to deter future harassment.<sup>88</sup> Judge Hall then tempered her argument<sup>89</sup> by rejecting the plaintiff's argument that counseling can never be "disciplinary."<sup>90</sup> According to Judge Hall, counseling is sufficient if it ends the harassment.<sup>91</sup> However, once an employer learns that the counseling has not ended the harassment, the employer must take more severe disciplinary measures.<sup>92</sup>

Judge Keep's concurrence agreed with Judge Hall's opinion that the VA's response to Intlekofer's complaints was inappropriate.<sup>93</sup> However, Judge Keep wrote separately to distance herself from Judge Hall's ambiguous suggestion that Title VII requires discipline.<sup>94</sup> According to Judge Keep, Judge Hall's definition of 'discipline' did not clarify whether punishment is required after the first finding of harassment.<sup>95</sup> Judge Keep's concurring opinion emphasized the remedial rather than punitive purpose of Title VII.<sup>96</sup> Judge Keep refused to hold that Title VII always

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88. *Id.* at 779 (citing *Ellison*, 924 F.2d at 882).

89. Judge Hall may have thought it necessary to soften her earlier language on discipline because Judge Keep had written separately to emphasize that Title VII does not require punitive measures. *See id.* at 780 n.8.

90. *Id.* at 779. Judge Hall explained that "[a]t the first sign of sexual harassment, an oral warning in the context of a counseling session may be an appropriate disciplinary measure if the employer expresses strong disapproval, demands that the unwelcome conduct cease, and threatens more severe disciplinary action in the event that the conduct does not cease." *Id.* at 779-80.

91. 973 F.2d at 780.

92. *Id.*

93. *Id.* at 781 (Keep, J., concurring).

94. *See supra* note 87. Judge Keep argued that *Ellison* was consistent with the remedial purposes of Title VII but did not create an absolute rule requiring punitive measures.

95. 973 F.2d at 781 (Keep, J., concurring). Although Judge Hall's opinion stated that remedial actions must be disciplinary, the opinion cited cases holding that an employer's verbal warning was sufficient. *See id.* at 777 (citing *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Barret v. Omaha Nat'l. Bank*, 726 F.2d 424 (8th Cir. 1984)). *See also Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993) ("Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee."). In *Landgraf*, the employer reprimanded the harasser after the first complaint. Though the harassment continued, the plaintiff did not report the subsequent incidents. The Fifth Circuit upheld the lower court's determination that the employer took steps reasonably calculated to end the harassment. *Id.* at 430, 433. The Supreme Court recently granted certiorari in *Langraff* to determine whether the 1991 Amendments to the Civil Rights Act allowing compensation and punitive damages in Title VII cases applies retroactively to cases pending when the amendments were enacted. *Landgraf*, 113 S. Ct. 1250 (1993).

96. 973 F.2d at 782. Judge Keep relied on Supreme Court cases interpreting Title VII as a "remedial" statute. *See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Transworld Airlines v. Thurston*, 469 U.S. 111 (1985); *Firefighters Local Union v. Scotts*, 467 U.S. 561 (1984).

requires disciplinary measures.<sup>97</sup>

Judge Wiggins dissented. Unlike his colleagues, Judge Wiggins considered whether sexual harassment had actually occurred.<sup>98</sup> He argued that when the consensual sexual relationship between Intlekofer and Cortez ended, hard feelings existed on both sides and harsh words were exchanged.<sup>99</sup>

According to Judge Wiggins, the VA acted reasonably to diffuse the difficult situation resulting from a relationship gone sour.<sup>100</sup> The VA demoted Cortez to the mail room, told him not to talk to Intlekofer, and separated their work schedules as much as possible.<sup>101</sup>

Judge Wiggins also agreed with Judge Keep that Title VII does not always require punitive measures.<sup>102</sup> He feared that requiring punishment would impose strict liability on employers who do not recognize harassment immediately.<sup>103</sup> Employers would be inclined to punish all accused harassers, regardless of guilt, exposing the employer to liability from the accused harasser.<sup>104</sup>

### III. THE IMPACT OF *INTLEKOFER*

*Intlekofer* sends employers the message that courts are less willing to defer to their judgement when it comes to responding to a sexual harassment claim.<sup>105</sup> The *Intlekofer* decision is flawed for six reasons because

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97. 973 F.2d at 783 (Keep, J., concurring). Unlike Judge Hall, Judge Keep did not conclude that disciplinary measures are always more likely to put an end to the harassment. *Id.*

98. *Id.* at 783 (Wiggins, J., dissenting). Judge Wiggins argued that "[w]hile this court may be required to find that there was in fact sexual harassment because the VA did not appeal the finding, I nevertheless believe that an employer has no duty to remedy nonexistent harassment" *Id.*

Judge Wiggins argued that Cortez' conduct did not meet the E.E.O.C. definition of sexual harassment because the conduct did not "constitute a sexual advance, request a sexual favor, or constitute verbal or physical conduct of a sexual nature." *Id.* at 784. The Ninth Circuit had never declared that individual conflicts between members of the opposite sex constituted sexual harassment. *Id.* Only Intlekofer's first complaint of "touching" approached the definition of sexual harassment, and Judge Wiggins questioned the complaint's veracity because Intlekofer refused to elaborate on the incident. 973 F.2d at 784 (Wiggins, J., dissenting).

99. *Id.* at 785. Cortez testified that Intlekofer, who was in charge of work assignments, scheduled Cortez for the most undesirable hours. After their break-up, Cortez alleged that Intlekofer threatened "that he would never be able to ignore her." *Id.*

100. *Id.*

101. *Id.* Intlekofer testified that it would have been impossible to totally separate their work schedules. *Id.*

102. *Id.* at 786.

103. 973 F.2d at 786 (Wiggins, J., dissenting).

104. *Id.*

105. Judge Wiggins' dissent argued that the court should give the employer some deference in

it: (1) imposes an impossible 20-20 hindsight standard on employers; (2) requires employers to play a role in educating employees about values; (3) emphasizes discipline over fairness; (4) leaves open the question of from whose perspective to measure the disciplinary measures; (5) may stifle attempts at alternative dispute resolution; and, (6) fails to recognize the presence of legitimate sexual contact in the workplace. Although courts have cautioned against requiring perfect 20-20 hindsight in sexual harassment cases, the Ninth Circuit in *Intlekofer* did just that.<sup>106</sup> Although the *Intlekofer* test is worded loosely enough to sound prospective, the test is actually backwards-looking because it focuses on results rather than objectives.

Recently, courts have taken an active role in requiring employers to implement policies that not only punish wrongdoers and enable victims to voice their complaints, but also make the employer responsible for educating and sensitizing employees to the standard of appropriate behavior.<sup>107</sup> Proponents of the reasonable woman standard argue that it

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responding to individual circumstances because the definition of sexual harassment is constantly evolving. *Id.* at 786 n.2 (Wiggins, J., dissenting). *Cf.*, *Dornhecker v. Malibu Grand Prix*, 828 F.2d 307 (5th Cir. 1987). In *Dornhecker* an employee complained of sexual harassment while on a business trip. The employer assured the victim that she would never have to work with the harasser again after the trip ended in two more days. *Id.* at 308. The court deferred to the employer's judgment and found that the employer's response was appropriate under the circumstances. *Id.* at 309.

106. Comisky, *supra* note 61, at 199.

107. The recent Florida district court case of *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991), demonstrates a willingness among courts to ensure that employers institute sexual harassment policies aimed at eliminating the threat. In *Robinson*, the plaintiff was subjected to a male-dominated work environment filled with graphic pin-ups, calendars, and posters depicting nude and scantily clothed women. *Id.* at 1493. The offensive material was pervasive and openly displayed in common work areas with the knowledge of management. *Id.* at 1494. The *Robinson* court heard and accepted expert testimony explaining the detrimental effects of sexual stereotyping on the workplace and linking the sexually explicit pin-ups to the abusive and demeaning attitudes of the other workers. *Id.* at 1504. The court found that a reasonable woman would have considered this environment hostile in violation of Title VII. *Id.* at 1524.

The *Robinson* court did more than expand hostile environment sexual harassment to include pornography in the workplace. The court ordered the defendant to adopt a comprehensive sexual harassment policy which had been substantially drafted by the plaintiff's counsel, the National Organization of Women's Legal Defense and Education Fund. 760 F. Supp. at 1537. The policy included a specific schedule of penalties graduated by the offense and the harasser's status. *Id.* at 1543. *See generally*, Dana S. Connell, *Effective Sexual Harassment Policies: Unexpected Lessons from Jacksonville Shipyards*, 17 EMP. REL. L. J. 191 (1991).

Nevertheless, courts give more weight to a company's actions than to the company's established policy. In *Kaufman v. Allied Signal, Inc.*, 970 F.2d 178 (6th Cir. 1992), the Sixth Circuit found that an employer's response was adequate even though none of the employees knew the company had a sexual harassment policy. Although the employer did not have formal procedures for handling sex-



sensitizes employees while ensuring that employers will not have to dismiss employees because of individual personality conflicts.<sup>108</sup> *Intlekofer* challenges the proponents' argument. *Intlekofer's* message to employers is when in doubt, treat the behavior as sexual harassment and discipline the harasser accordingly.

Judge Hall's suggestion that Title VII requires some form of discipline raises the issue of from whose perspective the disciplinary measures should be judged. The Ninth Circuit in *Ellison* held that the proper standard for measuring the employer's remedial response should not be what a "reasonable employer" would do<sup>109</sup> because a reasonable employer might not severely discipline a valued employee. Yet measuring the proposed discipline from the victim's perspective, like the threshold question of whether sexual harassment has occurred, is also unsatisfactory. Suppose an employer transfers an alleged harasser to a location that the harasser finds less satisfactory, but that the victim views as a promotion. If the employer's response is measured from the victim's perspective, the victim would still have a Title VII claim, even if the harassment ended, because from the victim's perspective, the harasser is being rewarded.

Another problem in the *Intlekofer* decision, which the dissent addressed,<sup>110</sup> is that Judge Hall's dicta may encourage some employers to discipline first and ask questions later. However, employers that discipline first and ask questions later may be liable to the accused harasser.<sup>111</sup>

*Intlekofer* may also discourage employers from allowing employees to

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ual harassment complaints, the employer shielded itself from liability by immediately terminating the alleged harasser. *Id.* at 184.

108. See Hahn, *supra* note 50, at 91.

109. *Ellison*, 924 F.2d at 882 n.17.

110. 973 F.2d at 786 (Wiggins, J., dissenting).

111. See generally, Comisky, *supra* note 61, at 195-201. Alleged harassers have brought numerous suits, though not always successfully, on the following grounds:

*Defamation*: Garziano v. E.I. DuPont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987) (holding that a qualified privilege applied to employee statements concerning alleged harasser); Scherer v. Rockwell Int'l Corp., 766 F. Supp. 593 (N.D. Ill. 1991) (stating that a qualified privilege protects statements made during bona fide investigation); Stockley v. AT&T, 687 F. Supp. 764 (E.D. N.Y. 1988) (same); Gonzalez v. CNA Ins. Co., 717 F. Supp. 1087 (E.D. Pa. 1989) (allowing a claim for defamation); Oetzman v. Ahrens, 427 N.W.2d 421 (Wis.App. 1988) (finding for an employee in a defamation claim against union representative);

*Employment Discrimination*: Elrod v. Sears, Roebuck & Co., 939 F.2d 1466 (11th Cir. 1991) (age discrimination claim unsuccessful); Valdez v. Church's Fried Chicken, Inc., 683 F. Supp. 596, 627-28 (W.D. Tex. 1988) (finding that an employee discharged for sexual harassment was discriminated against on the basis of national origin); Marsh v. Digital

pursue alternative means of dispute resolution. Mediation, for example, has become a popular means for employees to resolve their complaints about sexual behavior at work.<sup>112</sup> After *Intlekofer*, an employer may fear liability if the mediation does not immediately end the objectionable behavior.

Finally, *Intlekofer* does not offer employers any guidance on the larger question of how to respond to sexual relations between employees who are co-workers.<sup>113</sup> With more women in the workforce than ever before, many people have found the workplace to be a valuable source of new relationships. Although the goal of Title VII is not a sterile, de-sexualized workplace,<sup>114</sup> *Intlekofer* may encourage employers to develop poli-

Equip. Corp., 675 F. Supp. 1186 (D. Ariz. 1987) (finding for an employee in a claim that a discharge for sexual harassment was merely a pretext for race discrimination);

*Wrongful Discharge*: Williams v. Maremount Corp., 875 F.2d 1476 (10th Cir. 1989) (unsuccessful claim); Downes v. Federal Aviation Admin., 775 F.2d 288 (D.C. Cir. 1985) (successful claim); Kestenbaum v. Pennzoil Co., 766 P.2d 280 (N.M. 1988), cert. denied, 490 U.S. 1109 (same);

*Breach of Contract*: Anderson v. Hewlett-Packard Corp., 694 F. Supp. 1294 (N.D. Ohio 1988) (unsuccessful).

Additionally, after *Robinson*, *supra* note 109, in which the court found a hostile environment because of the pervasive use of pornography, sexually explicit pin-ups and calendars, and off color jokes and language in the workplace, commentators raised First Amendment questions. See Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 501-09 (1991) (arguing that hostile environment sexual harassment law has a chilling effect on speech); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992); Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 448 (1991) (arguing that the *Robinson* analysis is limited to traditionally male-dominated jobs).

For guidance in developing preventive procedures for investigating sexual harassment charges, see Cheryl Blackwell Bryson, *The Internal Sexual Harassment Investigation: Self-evaluation without Self-incrimination*, 15 EMP. REL. L.J. 551 (1990).

112. See 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).

113. As *Ellison* and *Intlekofer* demonstrate, sexual harassment is possible at both ends of the relationship. An employee's pathetic attempts to "woo" a co-employee may be perceived by a reasonable woman as sexual harassment. *Ellison*, 924 F.2d at 880. Or, as in *Intlekofer*, the break-up of a workplace relationship may lead to charges of sexual harassment. See Chamallas, *supra* note 1, at 857 n.303 (observing that "[i]n addition to disrupting normal working patterns, employers find that 'one of the more threatening aspects of the breakup of an affair is that the incident can degenerate into charges of sexual harassment.'") (quoting L. WETHOFF, CORPORATE ROMANCE 103 (1985)). Distinguishing between sexual harassment and legitimate sexual relations can be difficult for employers. See Paul, *supra* note 1, at 357-58.

114. See Gedrose, *supra* note 37, at 161; E.E.O.C. Compliance Manual (CCH) § 615 ¶ 3114, at 3267 (1990).

cies prohibiting sexual relationships between employees rather than risk liability.<sup>115</sup>

#### CONCLUSION

Even though *Intlekofer's* holding is limited to its facts, the ruling sends employers the message that courts are less willing to defer to their decisions on how to discipline sexual harassers. The full ramifications of *Intlekofer* may not be seen until employers, faced with an increasing number of suits from disciplined harassers, seek to limit sexual freedom among co-employees.

*Thomas D. Brown*

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115. *E.g.*, Margaret Mead, *A Proposal: We Need Taboos on Sex at Work*, in D. Neugarten & J. Shafritz eds. *SEXUALITY IN ORGANIZATIONS: ROMANTIC AND COERCIVE BEHAVIORS AT WORK* 54 (1980) (reprinted from *REDBOOK MAGAZINE* April 1978). Margaret Mead suggests that sexual harassment will not end until there are taboos on sexual relationships between employees. *Contra* Chamallas, *supra* note 1, at 857 n.306. Chamallas argues that Mead's proposal unnecessarily stifles sexual freedom at work.

