EMPLOYER SOLICITATION OF SEXUAL FAVORS FROM EMPLOYEES: SEX DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Women have traditionally been underrepresented in the managerial labor force. Whereas approximately one man out of seven occupies an administrative position, only one woman out of twenty holds a similar job.[1] In the workplace hierarchy, a man will often be the supervisor and a woman will be his subordinate.[2] If unsolicited sexual advances are made by the man and rejected by the woman, he will frequently have the authority to deny a promotion or to effect a discharge or transfer.[3] In *Williams v. Saxbe*,[4] the District Court for the District of Columbia held that sex discrimination under Title VII of the Civil Rights Act of 1964[5] occurs when an employer retaliates against an employee because she refuses to comply with his demands for sexual favors.

Plaintiff, a female civil service employee, brought an action under Title VII alleging that her supervisor terminated her employment because she declined his sexual advances.[6] Affirming the hearing offi-

1. DEP'T OF LAB. 1974 HANDBOOK ON WOMEN WORKERS, (WOMEN'S BUREAU BULL. No. 294) at 86.

2. The composition of the Federal Civil Service mirrors this trend. Approximately 96.5% of all white collar civil service employees assigned to a general schedule grade higher than 13 are male. Grades 10-13 are comprised of a population that is 90.6% male. Included in grades 5 and below are 67 men and 33 women for every 100 employees. U.S. CIVIL SERVICE COMM'N, STUDY OF WOMEN IN THE FEDERAL GOVERNMENT, 1972, Table II-B, at 163.

3. Barnes v. Costle, 15 FEP Cases 347 (D.C. Cir. 1977); Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976); *contra*, Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976); Miller v. Bank of Am., 418 F. Supp. 223 (N.D. Cal. 1976); Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975). Interview with Susan Spiegel, Ass't Director of the Employment Rights Project, St. Louis University School of Law, St. Louis, Mo.

4. 413 F. Supp. 654 (D.D.C. 1976).

5. 42 U.S.C. §§ 2000e-2000e-15 (1970), *as amended*, The Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17 (Supp. IV 1974).

6. 413 F. Supp. at 655-56.

cer's finding[7] that her discharge was motivated by non-employment related factors,[8] the court held that "willingness to furnish sexual consideration" when imposed as a condition of employment for persons of one sex can create "an artificial barrier to employment" which operates to discriminate against such persons.[9] The employee's charge was sustained and back pay was ordered, though reinstatement was denied.[10]

The result reached by the court in *Williams* is contrary to decisions rendered by other federal courts in sexual harassment cases.[11] It is instructive, therefore, to review the language of Title VII and its judicial interpretation to determine whether the analysis made by the *Williams* court was based on proper authority.[12]

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7. *Id.* Initially an Equal Employment Opportunity officer investigated the complaint pursuant to 5 C.F.R. § 713.216 (1977) (regulations of the Civil Service Commission). The Civil Service Commission then sent the transcript of the Hearing Officer's decision to the Complaint Adjudication Officer of the Department of Justice, pursuant to 5 C.F.R. 713.222 (1977). The case was remanded to reallocate the burden of proof. The claimant had to present a prima facie case of sex discrimination in order to shift the burden to the government to affirmatively establish the absence of discrimination by a clear weight of the evidence. Williams v. Saxbe, 413 F. Supp. at 656, *citing* Hackley v. Johnson, 360 F. Supp. 1247, *aff'd sub nom.* Hackley v. Roudebush, 520 F.2d 108 (D.C. Cir. 1975). On remand, the Hearing Officer found that the agency did not meet its burden and rendered judgment for the complainant. The Complaint Adjudication Officer concluded, however, that the charge did not constitute sex discrimination as defined by Title VII and reversed. The District Court for the District of Columbia, on review, determined that the Complaint Adjudication Officer's decision was erroneous because he did not establish what standards he relied upon, nor how the burden of proof was allocated.

8. 413 F. Supp. at 655-68. Upon review of the administrative record the district court found proof implying discrimination. Although the record produced little more than a prima facie case of sex discrimination, this was sufficient for sustaining the plaintiff's motion for summary judgment. The defendant failed to establish by a clear weight of the evidence that the alleged causal connection between the plaintiff's poor work performance and the subsequent discharge was not a mere pretext for an action that was motivated by arbitrary class prejudice. Thus, the court denied the defendant's motion for summary judgment. *Id.*

9. 413 F. Supp. at 657.

10. 12 EMPL. PRACTICE DEC. 4763 (D.D.C. 1976). In a subsequent hearing held to consider the question of remedies, the plaintiff was found to be entitled to full monetary relief. Reinstatement was denied on the grounds that her former position no longer existed. *Id.* at 4764. Refusal to grant reinstatement because the internal structure of the agency has been reorganized "is the way you fire people in the government" according to Washington, D.C. attorney Linda Singer. *See* Bralove, *Cold Shoulder-Career Women Decry Sexual Harassment by Bosses and Clients*, WALL ST. J., Jan. 29, 1976, at 18, col. 1.

11. *See* cases cited note 3 *supra*.

12. The *Williams* court distinguished *Geduldig v. Aiello*, a case that held that the California Unemployment Insurance Code, which did not extend protection to pregnant employees, was not in violation of constitutional standards. Williams v. Saxbe, 413 F.

Title VII of the Civil Rights Act of 1964[13] established a comprehensive federal law to assure equality of employment opportunity[14] by making unlawful those employment practices that discriminate on the basis of race, color, sex, national origin, or religion.[15] Discrimination on the basis of sex is forbidden by the terms of the Act except where an employer can prove that "sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business enterprise."[16]

Although the Act proscribes sex discrimination, it does not define its parameters.[17] One of the threshold questions in Title VII sex discrimi-

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Supp. at 660. *Geduldig* was not relied upon because it arose under the equal protection clause of the fourteenth amendment to the Constitution and because there was "no risk from when men are protected and women are not." *Id.* at 666, *citing* Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974); Barnes v. Costle, 15 FEP Cases 353 n. 68 (D.C. Cir. 1977).

13. 42 U.S.C. §§ 2000e-2000e-15 (1970).

14. Federal employees were drawn within the scope of the Act by a series of amendments known as the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-2000e-17 (Supp. IV 1974).

15. *Id.* at § 2000e-2(a) (1970).

> (a) It shall be an unlawful employment practice for an employer—
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> (1) 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 or employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

16. *Id.* at § 2000e-2(e) (1970). The Supreme Court has not defined the scope of the "bona fide occupational qualification" exception. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). The lower courts, however, have interpreted it narrowly. *E.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). Under the terms of the Act, the bona fide occupational qualification defense is available to employers only for decisions involving the refusal to hire and employ. 42 U.S.C. § 2000e-2(e) (1970).

17. Therefore, the courts must analyze the scope of the statutory prohibition on a case-by-case basis. Considerable deference has been given to the guidelines of the Equal Employment Opportunity Commission. *E.g.*, Trafficante v. Metropolitan Life Ins. Co., 407 U.S. 205, 210 (1972). *Contra*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). Standards developed in race discrimination cases are often applied. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971). Furthermore, there is little reliance on legislative history. *E.g.*, Diaz v. Pan Am. Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1972). *See generally* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Development*, 20 ST. LOUIS U. L.J. 225, 276-77 (1976); Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971); Note, *Classification on the Basis of Sex and the 1964 Civil Rights Act*, 50 IOWA L. REV. 778, 791-92 (1965). It is unclear whether, and

nation cases is whether a term or condition of employment is applied only to persons of one gender.[18] The most obvious case of sex discrimination occurs when gender is the primary variable in the classification made by the employer.[19] Such a case occurs when an employer refuses to hire any woman for a certain position. Similarly, sex discrimination exists when an employer makes a decision to hire, discharge or impose a condition of employment contingent on a characteristic peculiar to one sex.[20] The refusal to hire a pregnant woman is illustrative of this form of discriminatory treatment.[21] In short, *per se* unlawful employment practices occur whether an employer bases his actions upon unsubstantiated sexual stereotypes[22] or upon valid factual data based on the intrinsic differences between men and women. Thus, employment opportunities that would be the same but for a person's gender constitute Title VII violations.[23]

When a non-gender related factor is applied only to employees of one sex, it may operate as a smokescreen for discriminatory employ-

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under what circumstances, courts will look to standards developed in cases that arose under the fourteenth amendment to the Constitution. *E.g.*, General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

18. Prior to the Supreme Court ruling in Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), some courts distinguished between employer practices that discriminated solely on the basis of sex and those practices that incorporated non-gender related factors as well. *E.g.*, Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969), *aff'd per curiam*, 400 U.S. 542 (1971); Cooper v. Delta Airlines, Inc., 274 F. Supp. 781 (E.D. La. 1967).

19. Note, *Sex Discrimination in Employment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964*, 1968 DUKE L.J. 671, 688-94; Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1170 (1971).

20. 413 F. Supp. at 658.

21. During the past decade there have been many Title VII cases concerning the way employers treat women who are pregnant. Among the types of policies challenged are those that exclude pregnancy from company disability benefit plans. In a recent decision the Supreme Court held that exclusion of pregnancy from such plans does not violate Title VII. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

22. Traditional characterizations about female workers are often not supported by factual data. One common stereotype is that a woman's primary commitment is to her family and not to her job. On the basis of this belief, employers often conclude that women have a high rate of absenteeism. *See, e.g.*, U.S. CIVIL SERVICE COMM'N, unpublished data, *cited in* U.S. DEP'T OF LABOR, WAGE AND LABOR STANDARDS ADMINISTRATION; WOMEN'S BUREAU, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER 6 (1969); U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, VITAL AND HEALTH STATISTICS CURRENT ESTIMATES FROM THE HEALTH SURVEY, Tables 8 and 16 (May 1969). Older studies point out the purported role that the menstrual cycle plays in determining female behavior patterns. *E.g.*, L. ISCARD, LA FEMME PENDANT LA PERIOD MENSTRUELLE (1890).

23. *See* note 14 *supra*.

ment practices.[24] Sex-neutral traits such as parental[25] or marital status[26] ostensibly can be used as non-discriminatory criteria for making employment decisions, even though applied only to persons of one sex. Conduct such as criminal activity[27] and heterosexual[28] or interracial fraternization[29] can also be weighed as neutral components of an employer's decision.

The theory, often referred to as "sex-plus," that discrimination on the basis of sex does not occur when sex-neutral criteria in addition to gender provide the basis for employment decisions,[30] has generally been rejected. In *Phillips v. Martin Marietta Corp.*,[31] the Supreme Court, in a per curiam decision, held that a policy that prohibited the hiring of women with pre-school age children violated section 703(a).[32]

24.
> It is abundantly clear that one purpose of the Civil Rights Act of 1964 is to guarantee equal job opportunity for males and females. Much has been written upon the subject of so-called "sex-plus" discrimination. In the final analysis, isn't this but a shorthand way of saying that the national purpose cannot be circumvented by lip service adherence to the Civil Rights Act while thwarting its purpose through the application of employment standards, to male and female alike, which, in application deny employment to one sex or the other?

Smith v. Liberty Mut. Ins. Co., 10 EMPL. PRAC. DEC. 5884, 5886 (N.D. Ga. 1975).

25. Sometimes parents of illegitimate children are excluded from jobs. This usually has a more burdensome effect on mothers, as fathers can easily conceal the fact of fatherhood. Statistics show that such policies have a disproportionate effect on Black women. EEOC Dec. No. 71-562, 3 FEP Cases 233 (1970); EEOC Dec. No. 71-332, 2 FEP Cases 1016 (1970).

26. *See, e.g.*, Edwin Wiegand Co. v. Jurinko, 414 U.S. 970 (1973), *vacated and remanded*, 497 F.2d 403 (3d Cir. 1974), *remanded*, 528 F.2d 1214 (3d Cir. 1975); Sprogis v. United Air Lines, Inc. 308 F. Supp. 959 (N.D. Ill. 1970), *aff'd*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971). *But see* Gerstle v. Continental Airlines, Inc., 358 F. Supp. 545 (D. Colo. 1973); EEOC Dec. No. 72-0037, 4 FEP Cases 253 (1971).

27. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); EEOC Dec. No. 73-0257, 5 FEP Cases 963 (1972).

28. EEOC Dec. No. 71-2678, 4 FEP Cases 24 (1971) (charging party was terminated for having an "affair" with a male employee. The latter was not even disciplined).

29. EEOC Dec. No. 71-1902, 3 FEP Cases 1244 (1971) (Caucasian woman allegedly fired because she was suspected of engaging in criminal activities. The Equal Opportunity Commission Hearing Officer determined that the fact that she was dating a Black employee was at least a factor in the discharge.). EEOC Dec. No. 71-909, 3 FEP Cases 269 (1970) (Caucasian complainant alleged and proved that he was discharged because he fraternized with Black employees.).

30. *See* note 17 *supra*.

31. 400 U.S. 542 (1971).

32. *Id. See generally*, 22 CATH. U.L. REV. 441 (1973). The case was remanded for an evidentiary hearing to give the company an opportunity to show that the causal relationship could be established between conflicting family obligations and a woman s job performance. In allowing the employer to show that this was a circumstance where sex was a bona fide occupational qualification, the Court avoided a resolution of the proper

The Court determined that where an otherwise valid criterion is applied only to persons of one sex, the anti-discrimination provisions of Title VII are triggered.[33]

Although the Supreme Court discredited the sex-plus theory, some courts still adhere to it in sexual harassment cases.[34] The sexual advances are deemed to be neutral criteria used in making employment decisions. These courts allow the employer to rely on the sex-neutral criteria in order to negative the existence of a prima facie case of sex discrimination.[35] In *Tomkins v. Public Service Electric & Gas Co.*,[36] the New Jersey District Court determined that when a female employee is sexually harassed by a male supervisor, the gender of the employee is "incidental to the claim of abuse."[37] Thus, the court determined that sexual advances made by a male supervisor towards persons of one gender do not fall within the ambit of Title VII.[38]

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issue. The Court relied on stereotypes of women as mothers, rather than on the requisite standards for job performance for individual applicants. The impact of the *Phillips* case is weakened, because the Court found that an exception could be made, even though discrimination was proven.

In a concurring opinion, Justice Marshall stated: "I fear that in this case . . . the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination." 400 U.S. at 545.

33. The Seventh Circuit recognized that a no-marriage policy that was applied exclusively to female stewardesses constituted discriminatory treatment based on gender rather than on marital status as male employees had the freedom to marry. The case, however, was remanded for consideration of whether the employer policy came within the bona fide occupational qualification exception to the Act. 400 U.S. at 544. *See* Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971).

34. Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976); Barnes v. Train, 13 FEP Cases 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 15 FEP Cases 345 (D.C. Cir. 1977).

35. Belton, *supra* note 17 at 254-57. Relief is available only if the plaintiff makes a prima facie showing that the employer has engaged in an unlawful employment practice. If the complainant does not make a prima facie showing that discrimination has occurred, the inquiry is over. Upon a sufficient showing the burden shifts to the employer to articulate a legitimate, non-discriminatory motive for his actions. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04(1973). Business necessity is a judicially created defense that must be affirmatively pleaded and proven by the defendant. An exception can be made to the anti-discrimination provisions of Title VII when there is a high correlation between a particular employment practice and the efficient running of a business. Belton, *supra* note 17, at 254-57.

36. 422 F. Supp 553 (D.N.J. 1976).

37. *Id.* at 576.

38. In Barnes v. Train, 13 FEP Cases 123 (D.D.C. 1974), the District Court for the District of Columbia suggested that the abolition of the plaintiff's position and her

The holding of the court in *Williams* is consistent with the rejection of the theory that sex-neutral criteria applied to persons of one gender may negative charges of sex discrimination.[39] The court found that the employee had rejected the sexual advances of her supervisor and that her subsequent discharge was a retaliatory measure.[40] Judge Richey held that a requirement of "willingness to furnish sexual consideration" comes within the purview of the statutory proscription against sex discrimination.[41]

The court in *Williams* was unwilling to limit the scope of sex discrimination to "sexual stereotyping" because neither the statutory language nor the legislative history indicated a congressional intent to do so.[42] Furthermore, it was not necessary under section 717(a)[43] of the Act to establish that a discriminatory policy was contingent upon a characteristic peculiar to one sex.[44] In addition, the court rejected the defendant's theory that the primary variable in the allegedly discriminatory classification must be the employee's gender, rather than the sexual preference of the employer.[45] Judge Richey pointed out that although "a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria [sic] [of willingness to furnish sexual consideration] to both genders," this result would not preclude the conclusion that sex discrimination could not occur when

subsequent transfer did not constitute Title VII sex discrimination. However, the court of appeals reversed the district court and held that defendant's conduct constituted sex discrimination under Title VII. Barnes v. Costle, 15 FEP Cases 345 (D.C. Cir. 1977).

39. Barnes v. Costle, 15 FEP Cases 345, 353 (D.C. Cir. 1977).

40. 413 F. Supp. 654, 657 (D.D.C. 1976). The United States Department of Justice, maintained that the employee's discharge was the result of her inadequate work performance, rather than a retaliatory measure. *Id.* at 656.

41. *Id.* at 659.

42. *Id.* at 658. The legal standard articulated by the Equal Employment Opportunity Commission requires that women be considered on an individual basis and not according to characteristics generally attributed to one group. 29 C.F.R. § 1604.2(a)-(1)(ii) (1976).

43. 42 U.S.C. § 2000e-16(a) (Supp. V 1975).

44. 413 F. Supp. at 658. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

45. 413 F. Supp. at 659 n.6.

> It is also notable that since the statute prohibits discrimination against men as well as women, a finding of discrimination could be made where a female supervisor imposed the criteria [sic] of the instant case only upon male employees in her office. So could a finding of discrimination be made if the supervisor were a homosexual. And, the fact that a finding of discrimination could not be made if the supervisor were a bisexual and applied this criteria [sic] to both genders should not lead to a conclusion that sex discrimination could not occur in other situations outlined above.

Id.

the supervisor was either heterosexual or homosexual.[46] In short, the court refused to adopt the defendant's theory that sexual favors solicited from women were only sex-neutral criteria, rather than employment practices that discriminate against women. The court relied on a literal reading of Title VII in holding that the retaliatory actions of a male supervisor taken because a female employee declines his sexual advances, constitute sex discrimination under the Act.[47]

The scope of Title VII is limited to discriminatory practices that are effected by an employer or his agent.[48] Although there is a consensus of opinion that an employer is responsible for the acts of his supervisor,[49] the courts that have considered the issue of Title VII discrimination within the context of sexual harassment have disagreed about whether such actions are employment related.[50] For example, in *Corne v. Bausch and Lomb, Inc.*,[51] the Arizona District Court reasoned that sexual advances made by male supervisors toward female subordinates merely represented the personal proclivities of the individuals involved.[52] Thus, under this line of reasoning sexual advances do not constitute a violation of Title VII since such actions are found not to be employment related.

Another subject of dispute in Title VII cases centers on whether the sexual harassment of an employee is part of a company policy. In *Miller v. Bank of America*,[53] the District Court of Northern California held that the employer was not responsible for the actions of its supervisor because the bank had a policy of discouraging such misconduct. The court reasoned that because the supervisor's conduct arose

46. *Id.*

47. The only words in the statute related to the definition of sex discrimination are "sex" and "bona fide occupational qualification." Congress did not intend to limit discrimination on the basis of sex to those employer practices based *solely* on sex. Senator McClennan proposed an amendment to Title VII on June 15, 1964, whereby the work "solely" would have been inserted before the proscribed categories of discrimination. This proposal was rejected. 110 CONG. REC. 13838 (1964).

48. 42 U.S.C. § 2000e (1964).

49. *See* note 3 *supra*. The great weight of Title VII cases hold that an employer is responsible for the acts of supervisory personnel. *E.g.*, Ostapowicz v. Johnson Bronze Co., 369 F. Supp. 522, 537 (W.D. Pa. 1973); Fekete v. United States Steel Corp., 353 F. Supp. 1177 (W.D. Pa. 1973).

50. Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556 (D.N.J. 1976); Williams v. Saxbe, 413 F. Supp. 654, 660 (D.D.C. 1976).

51. 390 F. Supp. 161, 163 (D. Ariz. 1975).

52. *Id.*

53. 418 F. Supp. 233 (N.D. Cal. 1976).

outside the scope of his employment the bank could not be held liable.[54]

By focusing on the question of whether sexual harassment is employment related and part of a company policy, many courts are sidestepping the critical issue of whether the economic coercion accompanying an implicit threat by a supervisor to terminate employment applied to persons of one sex because of a failure to provide sexual favors, constitutes sex discrimination.[55] While Title VII may afford legal protection to men in the event that such a condition of employment is imposed upon them,[56] a brief survey of the employment market place leads to the conclusion that the consequences of conditioning employment on a willingness to furnish sexual consideration weigh more heavily on women.[57] In the context of the tradition of relations between men and women, sexual favors will most likely be requested by a male. Since men generally occupy positions of authority, women who decline to furnish sexual favors frequently suffer economic disadvantages.[58]

Many of the courts hearing sexual harassment cases refuse to find Title VII violations because they are concerned with opening up the floodgates of litigation to admit insubstantial claims which might leave employers defenseless against spurious charges of sex discrimination.[59] Judge Stern in *Tomkins* stated that an "invitation to dinner

54. The court's reasoning was influenced by the fact that the plaintiff had not availed herself of the personnel service in the bank which would have investigated the matter. *Id.* at 235-36. The inference was that the bank, had this been undertaken, would have had the opportunity to discipline the wrongdoer and prevent the occurrence of adverse employment consequences. *Id.*

55. Tomkins v. Pub. Ser. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976).

56. *See, e.g.*, Utility Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970).

57. *See* notes 1-2 *supra* and accompanying text.

58. The plaintiff in *Williams* was employed at the Community Relations Service of the United States Department of Justice. In that department, 100% of the supervisors are male and the overwhelming majority of the support staff is female. Memorandum in Opposition to Defendant's Motion to Dismiss at 10, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976). The plaintiff alleged that there was a policy at the Community Relations Service "of imposing a condition of sexual submission on the female employees." *Id.* at 660 n.8.

59. In general, women are thought to be prone to lying in matters of sexual concern. H. DEUTSCH, THE PSYCHOLOGY OF WOMEN, 132 (1944); H. SAUL, EMOTIONAL MATURITY, 92 (1942); Bartlett, *Social Factors in Recall*, in READINGS IN SOCIAL PSYCHOLOGY 69, 75 (T. Newcomb & L. Hartley ed. 1947); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 61 CALIF. L. REV. 919 (1973); Note, *Rape and Rape Laws: Sexism in Society and Law*, 43 IOWA L. REV. 140 (1974). Women are said to silently solicit sexual

could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at a later time."[60] These courts would be justifiably concerned with affording adequate protection to employers if the Act did not already provide a means for doing so.[61] For example, in the case of a refusal by an employer to hire, transfer or discharge an employee, the employer has the opportunity to prove that the decision was based on the employee's poor work performance or on the applicant's lack of job qualifications.[62] Simply put, it appears that the courts are placing more weight on possible judicial inconvenience than on the stated purpose of Title VII.[63]

The result reached in *Williams v. Saxbe* supports the right of all employees to work and receive financial compensation without having to provide sexual favors. The District Court for the District of Columbia has determined that sexual harassment of a female employee by a male supervisor constitutes sex discrimination within the scope of Title VII.[64] It is important that courts construe Title VII in this manner so that employers and supervisors will know that sexual misconduct

advances while verbally denying them. M. AMIR, PATTERNS IN FORCIBLE RAPE (1971); Slovenko, *A Panoramic View: Sexual Behavior and the Law*, in SEXUAL BEHAVIOR AND THE LAW 551 (R. Slovenko ed. 1965). Amir, *Victim Precipitation—Forcible Rape*, 58 CRIMINOLOGY & POLITICAL SCI. 493 (1968); Fox and Scherl, *Crisis Intervention and Victims of Rape*, 1972 SOC. WORK 42.

The rationale behind the assumption that false accusations of sex crimes are more frequent than untrue charges of other crimes underlies the belief that women will falsely accuse their employers of retaliatory motives for their discharge. Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967).

60. 422 F. Supp. 553, 557 (D.N.J. 1976).

61. *See* note 15 *supra*.

62. In *Williams*, however, the bona fide occupational qualification defense and the judicially created business necessity exception were not available. In legitimate business concerns it would not be possible, for example, to draw sexual advances into the business necessity exception. This would be equivalent to requiring the government in all future employment notices to include the following postcript:

> NOTE—To all applicants—In addition to job requirements cited above, you are informed that you may be required as a condition of any promotions or advancements, or to your continued employment, that you submit to all sexual advances made by your supervisor on his request and at his request.

Memorandum in Opposition to Defendant's Motion to Dismiss, Oct. 10, Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).

63. *See* note 14 *supra*.

64. *See* note 3 *supra*.

occurring during the course of employment will not be judicially condoned.[65]

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65. Title VII is the exclusive judicial remedy for federal employment discrimination to which Title VII extends. But in areas not covered by Title VII other remedies are not affected. Brown v. Gen. Servs. Admin., 425 U.S. 820 (1976). Other theories may provide the basis for litigation in sexual harassment cases. The New Hampshire Supreme Court held that there was a breach of an employment contract for an indefinite period of time when an employer, acting through his agent, maliciously discharged a female employee. Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). In addition, sexual harassment may give rise to a civil action in tort, where the employer uses physical force. Lastly, the penal statutes of the relevant jurisdiction may be found to be applicable. Tomkins v. Pub. Serv. Elec. & Gas Co., 422 F. Supp. 553 (D.N.J. 1976).