UNEMPLOYMENT COMPENSATION BENEFITS FOR THE VICTIM OF WORK-RELATED SEXUAL HARASSMENT

Introduction

Sexual harassment is one of the most serious occupational hazards faced by working women. Sexual harassment is no longer an acceptable "custom" but instead is both illegal and unacceptable. Except for the severity of the problem, little is known about sexual

1. Numerous efforts to define sexual harassment have been made. One proposed definition includes as sexual harassment:
any repeated or unwarranted verbal or physical sexual advances, sexually-explicit discriminatory remarks made by someone in the workplace which are offensive or objectionable to the recipient or which cause the recipient discomfort or humiliation or which interfere with the recipient's job performance.


[S]exual harassment is any unwanted physical or emotional contact between workers or supervisors and workers, which makes one uncomfortable and/or interferes with the recipient's job performance or carries with it either an implicit or explicit threat of adverse employment consequences.

See also the definition of sexual harassment proposed by the Michigan Task Force on Sexual Harassment in the Workplace, cited in CLUW News, Winter 1980, at 3, col.3:

[Sexual harassment includes] the continual or repeated verbal abuse of a sexual nature, including but not limited to, graphic commentaries on the victim's body, sexually suggestive objects or pictures in the workplace, sexually degrading words used to describe the victim, or propositions of a sexual nature. [Sexual harassment also includes] the threat or insinuation that lack of sexual submission will adversely affect the victim's employment, wages, advancement, assigned duties or shifts, academic standing, or other conditions that affect the victim's "livelihood."


On October 23, 1979, November 1, 1979 and November 13, 1979, the Subcommittee on Investigations of the House Committee on Post Office and Civil Service held hearings on sexual harassment in the federal government. An official copy of the testimony has not yet been published. Copies of statements are on file for inspection at the Harvard Women's Law Journal office.

3. See note 12 infra and Editor's Note at the conclusion of this Note.

4. Sexual Harassment Hearings, supra note 2 (statement of Subcommittee Chairman James M. Hanley).

5. No comprehensive statistical study of the incidence of work-related sexual harassment yet exists. See C. Mackinnon, Sexual Harassment of Working Women (1979) for a survey of preliminary data which suggest that 50% to 90% of working women have experienced sexual

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harassment. Preliminary evidence, however, clearly suggests that sexual harassment undermines the integrity of the workplace by debilitating morale, interferes with work productivity, and assaults the dignity of its victims. It is closely tied to women's inferior status within the workplace: "Sexual harassment is a phenomenon associated with the subordination of women. It is directly inverse to the degree [to which] women are accepted as peers in employment situations and in the society generally."

Because it is difficult or impossible to make the victim of sexual harassment psychologically and emotionally "whole," national attention is now focused on eliminating the problem itself from the workplace. In the meantime, litigation instituted by women who have experienced sexual harassment has proliferated. Legal action has been brought under Title VII of the Civil Rights Act of 1964 on the theory that sexual harassment at work amounts to a discriminatory condition of employment.

See also Sexual Harassment Hearings, supra note 2 (statement of Dorothy Nelms, National President, Federally Employed Women) (67% of the federal employees surveyed preliminarily had experienced some form of sexual harassment); Sexual Harassment Hearings, supra note 2 (statement of Helen S. Lewis, Executive Director, D.C. Commission for Women).

Congress has funded the Merit Systems Protection Board (the successor agency to the U.S. Civil Service Commission) to undertake a massive study of sexual harassment in the federal work force. Comprehensive statistics therefore will be forthcoming.


8. Id.

9. Id.

10. Id.

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

12. See Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (company regulation which prohibits supervisor from making sexual advances to employees will not relieve employer of Title VII liability); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977); Garber v. Saxon Business Products, 552 F.2d 1032 (4th Cir. 1977); Tomkins v. Public Service Elec. & Gas Co., 568 F.2d 1044 (3rd Cir. 1977); Rinkel v. Associated Pipeline Contractors, 17 FEP Cases 224 (D. Ala. 1978); Heelan v. Johns-Manville Corp., 451 F.Supp. 1382 (D. Colo. 1978); Stringer v. Pennsylvania Dep't of Community Affairs, 446 F. Supp. 704 (M.D. Pa. 1978); Munford v. James T. Barnes & Co., 441 F. Supp. 459 (E.D. Mich. 1977). But see Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979) (no cause of action under Title VII where female plaintiff alleged sex discrimination in termination of employment but failed to allege that chairman who demanded sexual favors had input into termination decision or that other defendants condoned, knew of, or should have known
Breach of contract actions have been instituted. Commentators have suggested that relief for the victims of work-related sexual harassment be sought under alternative Title VII theories of "constructive discharge" or "work environment" discrimination.

For many women subjected to repeated, unwanted sexual pressure at work, the only real escape from harassment lies in leaving their jobs. Legal action, with its attendant expense and publicity, may not be a practical or attractive alternative. Instead, some sexual harassment victims who have quit their jobs in response to the harassment have, in recent years, sought state unemployment compensation benefits to maintain them while they search for alternative work.

As recent testimony offered before the National Commission on of the chairman's alleged sexual advances); Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975); Neeley v. American Fidelity Assurance Co., 17 FEP Cases 482 (W.D. Okla. 1978) (no Title VII liability where employer was unaware of alleged sexual harassment, had policy against such harassment and no employment benefits were conditioned on acquiescence in sexual demands); Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975).


14. Under a theory of constructive discharge, an employee's decision to quit is actionable as a discharge where the employer's conduct was so extreme as to leave the employee virtually no other choice but to quit. The only case to make successful use of a constructive discharge theory in the Title VII context involved an allegation of religious discrimination. See Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975).

Where a woman quits work rather than submit to sexual advances, the theory of constructive discharge would supply the element of retaliation for her refusal to submit to sexual advances. A retaliatory measure, such as a discharge, has been demonstrated in all successful Title VII sexual harassment cases. See note 12 supra.


16. See note 37 infra.

Unemployment Compensation\textsuperscript{18} suggests, women who have filed claims for unemployment compensation benefits after quitting their jobs in response to sexual harassment have often been denied benefits by the state agencies responsible for awarding unemployment compensation benefits.\textsuperscript{19} Many of these denials are at odds with the standards which have been elaborated for evaluating unemployment compensation claims and reflect a lack of familiarity with recent developments in employment discrimination law. This Note will analyze the nature of a claim to unemployment compensation benefits based on work-related sexual harassment and will propose an approach to adjudicating these claims which is consistent with both traditional concepts of unemployment compensation jurisprudence and the changing national standards in sex discrimination law under Title VII.

First, the various forms which sexual harassment may take at the workplace will be considered and the nature and the shortcomings of the relief presently available under Title VII for the victim of work-related

\textsuperscript{18} The National Commission on Unemployment Compensation is a 13-member advisory body created in 1976 by Congress to study the unemployment insurance program in the United States and to recommend changes. See Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976). In the course of its hearings, the National Commission on Unemployment Compensation took testimony on the issue of sexual harassment and the eligibility for unemployment compensation of women who have quit work in response to such harassment. Several witnesses urged the Commission to recommend the adoption of a federal regulation providing that sexual harassment be deemed "good cause" for quitting, thus entitling the victims of sexual harassment to receive unemployment compensation benefits. See Consideration of the Issue of Sexual Harassment and Disqualification: Hearings Before the National Commission on Unemployment Compensation (June 28, 1979) [hereinafter cited as National Commission Hearings] (statement of Jane Pinsky, Working Women, National Association of Office Workers).

The Commission's final report to Congress and the President is due on July 1, 1980. Although the testimony has not been officially published yet, a transcript is available for inspection at the offices of the National Commission on Unemployment Compensation, Arlington, Virginia. The statements bearing on the issue of sexual harassment and unemployment compensation are on file at the Harvard Women's Law Journal.

\textsuperscript{19} According to one study, 58% of those women who applied for unemployment compensation benefits and who listed sexual harassment as the reason they were currently unemployed were denied benefits. See Statement Regarding Proposed Amendment to New York State Unemployment Insurance Law Related to Sexual Harassment, Oct. 30, 1979 (Working Women's Institute, 593 Park Ave., N.Y., N.Y.). Compare National Commission Hearings, supra note 18 (testimony of Jan Leventer, Women's Justice Center, Detroit, Michigan):

It appears . . . that women who have been sexually harassed can obtain unemployment benefits in Michigan if they can establish their credibility through additional indicia of veracity: i.e. that they had medical problems because of the harassment, that they complained to management, or that there was retaliation against them for refusing to submit to [a] supervisor's advances. Thus, there was an implicit "corroboration" standard applied to women who leave work because of sexual harassment. This is similar to the recently abolished "corroboration" requirement in rape cases which required the woman's story to be corroborated by another witness.
sexual harassment will be explored. Second, this Note will offer an overview of the unemployment compensation system and will focus specifically on the entitlement to employment compensation benefits of employees who have quit work for "good cause." Finally, a framework for placing claims for unemployment compensation benefits based on sexual harassment within the context of the "good cause" standard will be provided.

I. TITLE VII AND THE NATURE OF WORK-RELATED SEXUAL HARASSMENT

Defining and identifying sexual harassment is a difficult task. A distinction must be drawn between discriminatory, sexist behavior tantamount to harassment and socially desirable interpersonal contact. Too broad a definition might inhibit intimate human behavior. Too narrow a definition, however, would fail to protect the rights of women who are often reluctant to file a complaint — out of embarrassment or fear of reprisals — against unwanted sexual pressures. Though much of the law in this area has developed by analogy to racial harassment, this definitional problem is unique to sexual harassment, since "complimentary" or "welcome" racial remarks are virtually unknown.

In order to simplify the definitional inquiry, sexual harassment may be viewed as a function of three basic components: the perpetrator of the harassment, the form of the harassment, and the impact of the harassment on the victim. One preliminary study suggests that co-workers rank as the most common perpetrators of sexual harassment, followed by supervisors, people outside the work area and supervisors above the level of immediate supervisor. Sexual remarks or jokes directed at women constitute the most prevalent form of harassment, followed by petting and/or touching a woman's body, sexual proposi-

20. See text at notes 65–86 infra.
21. See note 1 supra.
22. Sexual Harassment Hearings, supra note 2 (statement of Dorothy Nelms, National President, Federally Employed Women).
23. Id. Federally Employed Women, a Washington, D.C.-based organization representing women employed by the federal government mailed questionnaires to 1000 female federal employees in the Washington, D.C. metropolitan area. Two hundred questionnaires were returned, of which 150 had been analyzed by the time the organization's testimony was offered at the Sexual Harassment Hearings, supra note 2.
24. Id.
tions with promises of special treatment, sexual propositions demanded in exchange for promotions or special treatment, and sexual assault. The impact of sexual harassment on its victims ranges from personal effects (such as illness or emotional distress) to firings, demotions or loss of opportunities for advancement.

Title VII relief is not presently available for the most common types of sexual harassment: harassment by co-workers and harassment in the form of sexual remarks or physical contact. Under current Title VII doctrine, a woman charging that sexual harassment amounts to illegal sex discrimination must demonstrate that:

1. submission to sexual advances of a supervisor was a term or condition of employment;
2. her employment was thereby substantially affected;
3. employees of the opposite sex were not affected in the same way.

Additional types of sexual harassment may become actionable under Title VII if the courts endorse the "work environment" theory of Title VII discrimination currently advanced by the Equal Employment Opportunity Commission. Under this theory, harassment by co-employees (rather than simply by a supervisor) would be actionable under Title VII on the grounds that an employee has the right to a work environment free of unwanted sexual pressures and that the employer has a corresponding obligation to prevent one group of employees from depriving others of that right.
Even with an expansive theory of work environment discrimination, Title VII has inherent limitations for the victims of sexual harassment. Its statutory language explicitly focuses on discrimination by the employer,\(^{32}\) thereby limiting its applicability to harassment by co-employees. The plaintiff in a Title VII action must prove that the employer knew of the harassment and did not take reasonable steps to eliminate it.\(^{33}\) Title VII litigation is itself a long and expensive process which places a woman in the public light. The plaintiff in Williams v. Bell\(^{34}\) discovered that her personal privacy and that of her family has been "seriously invaded"\(^{35}\) in the course of the Title VII action she instituted in response to unwanted sexual pressure at work:

[M]y family has been brought directly into the controversy. My mother, who has been deposed as a witness by the Government, now must also function as my alibi to attest to the fact that I could not have had and did not have an affair or any other type of personal relationship with my former supervisor.\(^{36}\)

Because of the difficulties involved in pursuing the public, tort-like relief available under Title VII, the only realistic alternative for many victims of sexual harassment is to seek other employment.\(^{37}\) For a

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\(^{32}\) The "work environment" theory has been repeatedly litigated in the context of racial and ethnic discrimination. See, e.g., Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (6th Cir. 1972); Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). But see Silver v. KCA, 586 F.2d 138 (9th Cir. 1978); Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978); Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978); Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87 (8th Cir. 1977); Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975).


\(^{34}\) See, e.g., Fisher v. Flynn, 598 F.2d 663 (1st Cir. 1979); Causey v. Ford Motor Co., 516 F.2d 416 (5th Cir. 1975) (employer not liable under Title VII where he sought to stop hazing of female plaintiff by male employees); Neeley v. American Fidelity Assurance Co., 17 FEP Cases 482 (W.D. Okla. 1978) (no Title VII liability absent showing that employer was aware of alleged sexual harassment).

\(^{35}\) Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976), rev'd and remanded sub nom. Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978) (former Justice Department employee alleged that she was fired in retaliation for declining supervisor's sexual advances). Williams is illustrative of the slow pace of Title VII litigation. Williams filed a formal charge of sex discrimination with the EEOC on September 13, 1973. Summary judgment for the plaintiff was granted on April 20, 1976 but was reversed by the D.C. Circuit on September 19, 1978. The case has been remanded for trial de novo.

\(^{36}\) Sexual Harassment Hearings, supra note 2 (statement of Diane Rennay Williams).

\(^{37}\) Id.
woman who has left her job in response to sexual harassment, unemployment compensation benefits offer a substitute source of income for 26 to 39 weeks. Unlike Title VII, the unemployment compensation system operates without the necessity of invoking a tort-like public judgment against the employer. Furthermore, unemployment compensation can cover a much broader range of conduct than Title VII. In order for a claimant to be awarded benefits, most state unemployment compensation statutes do not require the claimant to prove that the employer was the party responsible for the harassment. Nor must the claimant prove that the effects of the harassment were linked to her hiring or promotion. A closer examination of the history and structure of the unemployment compensation system suggests its potential significance for the victims of work-related sexual harassment.

II. HISTORY AND STRUCTURE OF THE UNEMPLOYMENT COMPENSATION SYSTEM

A. The Basic Framework of Unemployment Compensation

Unemployment compensation was first introduced into the United States during a period of economic depression to provide workers with economic security and to help stabilize the economy. It is a state-administered program which provides a substitute source of income from a state public fund to any eligible unemployed person.


40. See notes 69–76 and accompanying text infra.

41. See notes 72–86 and accompanying text infra.


43. In many states, unemployment compensation benefits are paid out of an unemployment compensation fund financed through a tax on the employer which is based on the employer’s employment record. See, e.g., Mass. Gen. Laws Ann. ch. 151A, §§ 13 and 14 (West). If a state’s unemployment compensation law has been approved by the U.S. Secretary of Labor, any contribution paid by an employer under the state unemployment compensation law may be credited against the tax imposed by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301, 3302 and 3304 (1976). States with an approved unemployment compensation law are eligible to receive supplemental federal funding. See 42 U.S.C. §§ 502, 503 (1974).

Unemployment compensation is a statutory right which derives from the contractual relation between an employee and his or her employer. It is not based on a means test. It is designed to maintain the worker at subsistence level until he or she finds substantially equivalent work as well as to exert a stabilizing influence on the economy. The economic purposes of the unemployment compensation system do not override its remedial purposes. Unlike Title VII, unemployment compensation law does not attempt to guarantee job opportunities or modify employer behavior. Instead, it attempts to provide a prompt, temporary source of substitute income so that the worker can quickly re-enter the ranks of the employed.

To establish eligibility for unemployment compensation benefits, an employee must demonstrate that he or she had an adequate work record in covered employment, that he or she left work under certain conditions, and is ready and willing to accept new work. An employee who is fired for misconduct, who gives up his or her job voluntarily without “good cause,” or who fails to apply for and accept suitable employment is disqualified from receiving benefits.

The process by which benefits are awarded or denied varies from state to state but is subject to due process requirements. Generally, the award process begins with an initial interview of the claimant by a claims examiner who assesses the reasons for the termination of the claimant’s employment. The claims examiner checks the claimant’s facts

45. Id. at 131.
46. Id. at 132.
48. Because an employer’s contribution to the state unemployment compensation fund is experience-rated, there may be a small incidental incentive to the employer to avoid layoffs and voluntary terminations for “good cause.” One set of commentators, however, describes the tax paid by an employer as only “imperfectly responsive to the claims made by that employer’s former employees.” LIEBMAN, CONNER & FREEDMAN, supra note 38, at 57–58.
49. See, e.g., MASS. GEN. LAWS ANN. ch. 151A, § 24 (West).
50. Id.
51. Id.
52. Id. at § 25(e)(2).
53. Id. at § 25(e)(1):

[N]o benefits shall be paid to an individual under this chapter . . . after he has left work (1) voluntarily without good cause attributable to the employing unit or its agent. It should be noted that the general rule is that an employee who has quit work without “good cause” is ineligible for unemployment benefits. It is only by a negative inference from the statute that an employee who has quit for “good cause” is eligible for benefits.
54. See note 51 supra.
against the information provided by the employer.\textsuperscript{56} If denied benefits, a claimant receives a notice of denial which also states his or her right to appeal the claim.\textsuperscript{57} An appeal can then be taken to an informal hearing examiner, a more formal board of review\textsuperscript{58} and, finally, to the state courts.\textsuperscript{59}

The scope of review by the state courts of the decision by the state agency to grant or deny benefits depends on whether the court considers the eligibility determination to be a question of "fact" or of "law".\textsuperscript{60} The determination of whether the claimant has quit voluntarily without "good cause" is often held to be a question of "law" or "ultimate fact" so that little deference may be accorded the findings of the state agency.\textsuperscript{61}

If the employer asserts that the claimant is ineligible for benefits because he or she was fired for deliberate misconduct or quit work without "good cause," the burden of proof usually rests on the claimant to establish eligibility.\textsuperscript{62}

A claimant who receives unemployment compensation benefits may still pursue other forms of legal redress.\textsuperscript{63} Similarly, the institution of a Title VII action does not bar an application for unemployment compensation benefits.\textsuperscript{64} Unemployment compensation benefits and Title VII are therefore concurrent, not preclusive avenues of relief.

\textbf{B. Voluntary Termination for "Good Cause"}

Like any employee who quits work and then applies for unemployment compensation benefits, a woman who leaves her job in response to

\textsuperscript{56} For an extensive discussion of the claims process, see \textsc{Liebman, Conner \& Freedman}, \textit{supra} note 38, at 57–58.

\textsuperscript{57} \textsc{Mass. Gen. Laws Ann.} ch. 151A, § 40 (West).

\textsuperscript{58} \textit{Id.} at § 41.

\textsuperscript{59} \textit{Id.} at § 42.

\textsuperscript{60} For a thorough discussion of the scope of judicial review in the context of unemployment compensation decisions, see \textsc{McPherson v. Employment Div.}, 285 Or. 541, 545–50, 591 P.2d 1381, 1384–86 (1979).


\textsuperscript{62} \textit{See}, \textit{e.g.}, \textsc{Marx v. Department of Employment Services}, ___ Minn. ___, 256 N.W.2d 287 (1977).

\textsuperscript{63} \textit{See} \textsc{Diaz v. Pan American World Airways, Inc.}, 348 F. Supp. 1083 (S.D. Fla. 1972) (Title VII relief and unemployment benefits may be pursued jointly but back pay award under Title VII must be reduced by benefits received).

\textsuperscript{64} \textit{See} \textsc{Alexander v. Gardner-Denver Co.}, 415 U.S. 36, 48 (1974) (rights under Title VII and other applicable state and federal statutes may be independently pursued).
sexual harassment and files a claim for benefits will be confronted with the allegation that she quit "voluntarily without good cause." In order to establish her eligibility, the claimant bears the burden of showing that her quitting was indeed for "good cause." 66

The underlying purpose of the unemployment compensation system is to provide relief for the involuntarily unemployed. The eligibility of a claimant who has voluntarily quit his or her job is therefore an exception to that general principle. But it is premised on the theory that "an employee who voluntarily leaves work with good cause is involuntarily unemployed." 66 As an exception to the general principle, the "good cause" standard is narrowly construed. 67

Each state unemployment compensation statute has its own "good cause" provision to cover the eligibility for benefits of an employee who hasquit his or her job. The statutes generally fall into one of the three following categories:

(1) the claimant is disqualified from receiving benefits if he or she voluntarily left work without good cause attributable to his or her employer; 68

(2) the claimant is disqualified from receiving benefits if he or she voluntarily left work without good cause connected with the work; 69

(3) the claimant is disqualified from receiving benefits if he or she voluntarily left work without good cause. 70

65. See note 62 supra.
66. See note 47 supra.
68. FLA. STAT. ANN. § 443.06(a) (West); IOWA CODE ANN. § 96.5(1) (West); MINN. STAT. ANN. § 268.09 (West); N.C. GEN. STAT. § 96-14(1); N.D. CENT. CODE § 52-06-02(1); W. VA. CODE § 21A-6-3(1). It should be noted that in requiring a nexus between the employer and the "good cause" these statutes are similar to Title VII.
69. ARIZ. REV. STAT. ANN. § 23-775(1); ARK. STAT. ANN. § 81-1106(a); COLO. REV. STAT. § 8-73-108; CONN. GEN. STAT. ANN. § 31-236(2)(a); DEL. CODE ANN. tit. 19, § 3315(1); GA. CODE ANN. § 54-610(a); IND. CODE § 22-4-5-1; I. A. REV. STAT. § 23: 1601(1) (West); MD. ANN. CODE art. 95A, § 16; MASS. GEN. LAWS ANN. ch. 151A, § 25(e)(1) (West); MICH. COMP. LAWS ANN. § 421.29(1)(a); MONT. REV. CODE ANN. § 87-106(a); N.J. STAT. ANN. § 43: 21-5(a) (West); N.M. STAT. ANN. § 51-1-7(a); OKLA. STAT. ANN. tit. 40, § 215A (West); TENN. CODE ANN. § 50-1324(A); TEXAS LAB. CODE ANN. tit. 83, art. 5221b-3(a) (Vernon); VT. STAT. ANN. tit. 21, § 1344 (a)(2)(A); WIS. STAT. ANN. § 108.04(7)(b) (West).
70. ALASKA STA. § 23. 20.380(2); CAL. UNEMP. INS. CODE § 1256 (West); D.C. CODE ENCYCL. § 46-310 (West); HAWAII REV. STAT. § 383-30(1); IDAHO CODE § 72-1366(c); ILL. ANN. STAT. ch. 48, § 431 (Smith-Hurd); KAN. STAT. ANN. § 44-706; KY. REV. STAT. § 341.370(2); MISS. CODE ANN. § 71-5-513(A)(1); NEB. REV. STAT. § 48-628(a); NEV. REV. STAT. § 612.380; N.H. REV. STAT. ANN. § 282-A(A)(1); N.Y. LAB. LAW § 593 (McKinney); OHIO REV. CODE § 4141.29 (Page); OR. REV. STAT. § 657.176(2)(c); PENN. STAT. ANN. tit. 43, § 802(b)(1); R.I.
A few states explicitly specify that illegal sex discrimination and/or sexual harassment constitute "good cause."71

The unemployment compensation laws of most states fall into the second and third categories. These statutes are potentially of greatest significance to sexual harassment victims since they offer much broader protection than Title VII: they do not require that the claimant establish a nexus between the employer and the "good cause." Since wholly personal reasons for quitting, unrelated to events which occur at the workplace, are irrelevant to the following discussion, this Note will focus on statutes in the second category and on cases of workplace-related quits arising under statutes in the third category.

1. "Good Cause" Defined

"Good cause" for quitting work can include an illegal work contract,72 work that is too heavy in a work area that is unreasonably cold,73 losing one's transportation so that it is no longer possible to get to work,74 family problems,75 arbitrary discrimination,76 and personal abuse.77

Whether in any given instance an employee had "good cause" for quitting is a subjective determination that is left to the claims examiner


71. See e.g., Cal Unemp. Ins. Code § 1256.2 (West) (deprivation of equal employment opportunities on the basis of race, color, creed or sex as "good cause"); Wis. Stat. Ann. § 108.04(7)(i) (West) ("good cause" where employer makes employment, compensation, promotion or job assignment contingent upon employee's consent to sexual contact or sexual intercourse). Similar legislation is pending in New York. See A.7614, S.5215, N.Y. State Legislature, 1979–1980 Sess. (introduced April 16, 1979) (sexual harassment as "good cause"). The N.Y. legislation includes within the definition of "harassment" "conduct engaged in by the employer or by another employee designed to elicit the claimant's consent to sexual contact or sexual intercourse by making or implying that the [claimant's] compensation, promotion, job assignment or other condition of employment is contingent upon the claimant giving such consent."


75. Wade v. Thornbrough, 231 Ark. 454, 330 S.W. 2d 100 (1959) (claimant's five children contracted measles and required her care).


without further statutory guidance in most states. In making that determination, the case law suggests that the claims examiner is to apply a "reasonable person" test which balances the state's desire to discourage workers from quitting work or fabricating claims against the recognition that the worker who has quit for "good cause" has earned a right to benefits and needs the financial security which they offer in order to seek new employment.

"Good cause" is determined in terms of the "average," not the "supersensitive" employee. It includes "cause as would reasonably motivate the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the compensated unemployed."

Working conditions which a "reasonable person" would not endure include both conditions that arose from a substantial change in the original employment conditions and conditions which existed ab initio but of which the claimant was either unaware or for which he or she would not have contracted. Under the "reasonable person" standard, the claimant has the responsibility of showing that the conditions under which he or she was expected to work were unreasonable. The claimant need not, however, show that they were impossible. In reviewing cases in this area, the courts have displayed a tendency to balance their desire to respect the original terms of employment against their recognition that an employee can only be subjected to terms of employment to which he or she could or would have reasonably agreed.

The worker is not expected to wholly sacrifice his or her personal integrity by remaining on the job. In Colorado, the court of appeals allowed a white woman and a black man to quit work and receive unemployment compensation benefits rather than endure the cold, curt treatment to which their co-employees subjected them when they began dating. Similarly, the Oregon Supreme Court has held that the Oregon unemployment compensation statute:

78. See notes 68–70 supra.
84. Gray Moving I, supra note 82, at 485.
85. Gray Moving I, supra note 82 (female claimant granted unemployment benefits); Gray
does not impose upon the employee the one-dimensional motivation of Adam Smith's "economic man." The workplace is the setting of much of the worker's daily life. The statute does not demand as a matter of law that he or she sacrifice all other than economic objectives, and, for instance, endure racial, ethnic or sexual slurs, or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits. How far "good cause" encompasses such non-economic values is left to the agency in the first instance.86

The "reasonable person" standard, therefore, places a heavy responsibility on the unemployment compensation adjudicators: claims examiners, hearing examiners, boards of review and reviewing courts. The adjudicator must determine whether the average worker would and should be made to continue to work under the alleged unreasonable conditions, not simply whether work under such conditions is possible. This determination is to be made from the perspective of contemporary standards for worker behavior. To that extent, the unemployment compensation adjudicator becomes the guardian of a reasonable work environment.

By contrast, Title VII decisions involve a very different type of determination. In a Title VII action, it is the employer rather than the employee who is asked to live up to certain normative standards of behavior. While it is true that the normative standards for the employer's conduct under Title VII also must reflect contemporary workers' expectations,87 the ultimate issue is still whether the employer acted in a discriminatory fashion.

III. SEXUAL HARASSMENT AND UNEMPLOYMENT COMPENSATION: APPLYING THE "GOOD CAUSE" STANDARD

The basic premises of the unemployment compensation system and the "good cause" standard suggest that the eligibility for unemployment


benefits of women who quit work in response to sexual harassment is entirely consistent with established unemployment compensation doctrine. Sexual harassment is now widely viewed as an unreasonable employment practice. Furthermore, it has been acknowledged that the only realistic alternative for many victims of sexual harassment is to seek other employment. The victim of sexual harassment is therefore precisely the type of claimant unemployment compensation benefits are designed to assist: a worker who is committed to working yet finds her present working conditions intolerable.

Unemployment compensation adjudicators, however, have given sexual harassment cases inconsistent and often arbitrary treatment. Neither the state agencies which administer the unemployment compensation system nor the reviewing courts have formulated clear criteria to guide their adjudication of these claims. Utilizing the following two-pronged analysis will avoid doctrinal inconsistency:

1. Claims in which the sexual harassment alleged is tantamount to illegal sex discrimination under Title VII should be considered in accordace with the line of unemployment compensation cases which hold that illegal discrimination is "good cause" and entitles the employee who quits to benefits;

2. Claims in which the sexual harassment alleged does not rise to the level of sexual harassment which is currently actionable under Title VII as illegal sex discrimination should be adjudicated by analogy to unemployment compensation cases which hold that personal harassment of a non-sexual nature is "good cause."

A. Sexual Harassment Amounting to Illegal Sex Discrimination

It is well-established doctrine that discrimination against an employee in violation of state or federal fair employment law is "good cause" for quitting. In particular, illegal discrimination on the basis of race or sex has been held to constitute "good cause." Thus, a woman who quits

88. Sexual Harassment Hearings, supra note 2.
89. See note 57 supra; Sexual Harassment Hearings, supra note 2 (statement of Eleanor Holmes Norton, Chair, Equal Employment Opportunity Commission).
91. Marz v. Department of Employment Services, Minn. 256 N.W.2d 287 (1977)
work because she is paid less than a man for equal work or whose employer violates EEOC guidelines regarding maternity leave will be deemed to have quit work for "good cause" and be entitled to benefits.

Some forms of sexual harassment have been held to constitute an illegal form of sex discrimination under Title VII. At a minimum, a proven allegation of sexual harassment that amounts to sex discrimination under current Title VII doctrine should be deemed to satisfy the "good cause" standard. Where the claimant successfully demonstrates, for instance, that she quit rather than submit to sexual advances of a supervisor which amounted to a term or condition of employment, the claimant should be deemed to have acted reasonably and to have satisfied the "good cause" requirement. By taking note of the federal standards of sexual harassment and illegal sex discrimination under Title VII, the unemployment compensation adjudicator can expedite the reasonableness determination in at least some sexual harassment cases: illegal work conditions are _per se_ unreasonable.

**B. Sexual Harassment Beyond Illegal Sex Discrimination**

1. The Challenge of McPherson

A determination that the quantum of sexual harassment alleged lies outside the scope of what is actionable as sex discrimination under federal or state law, however, ought not preclude the claimant from eligibility for unemployment compensation benefits. Much confusion has been generated in this area by _McCain v. Employment Division_, a decision by the Oregon court of appeals. In _McCain_, the claimant alleged that her employer's "sexist attitude" toward women constituted "good cause" for her quitting her job. The claimant alleged that her employer's "sexist attitude" toward women constituted "good cause" for her quitting her job. The claimant alleged that such

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“sexist attitudes” were evidenced by a cartoon posted in the lunchroom captioned “THE PERFECT WOMAN” and depicting a naked woman’s legs, hips, buttocks and pubic area. She offered evidence that the plant manager displayed a postcard of a bare-breasted woman on his desk and that a poster hung on the office wall showing a woman in a revealing bikini. In denying benefits, the court held:

Generally, offensive character habits of fellow workers, however distasteful they may be to claimant, will not constitute “good cause” for claimant to leave. . . . Thus, claimant must at least establish that the prevailing sexual attitudes of her employer, or of her fellow employees, were such as amounted to sexual discrimination, harassment or some other cause of reasonable foundation sufficiently grievous to compel a reasonably prudent person to quit under similar circumstances.97

The McCain decision was notably ambiguous. On the one hand, the court stated that offensive character habits of fellow employees would not meet the “good cause” standard. On the other hand, however, the court left open the possibility that cause “of reasonable foundation” could lead to an award of benefits. It was unclear whether the court considered that what it described as “sexist attitudes” could not as a matter of law constitute “good cause” or whether it simply had applied a reasonableness judgment to those alleged “sexist attitudes” and had found that the claimant had not acted reasonably under the circumstances in quitting.

Subsequent decisions interpreted McCain as holding that sexist attitudes could not, as a matter of law, constitute “good cause.” But in McPherson v. Employment Division,98 the Oregon Supreme Court overturned that interpretation of McCain as reflecting too narrow a view of “good cause.” The McPherson court reproached the unemployment compensation hearing examiner for assuming that the “good cause” must be attributable to the employer or that it must arise out of the economic, physical or other directly occupational aspects of the job. The court suggested that it was enough if the “good cause” was work-related in a broad sense.99 It noted that “the purpose of the [unemploy-

97. Id. at 445–46, 522 P.2d at 1210.
98. 285 Or. 541, 591 P.2d 1381 (1979). Throughout her period of employment as a maintenance worker, the plaintiff in McPherson experienced problems with her two male co-workers. They made clear to her their disapproval of a woman working in a maintenance position. Her relationship with one co-worker worsened when she refused to date him.
99. Id. at 556–57, 591 P.2d at 1390.
ment compensation] statute is to provide a means of living for an unemployed worker, not to compensate her for a wrong done by the employer."100

The McPherson court relied on Stevenson v. Morgan101 for guidance in determining what types of "sexist attitudes" might give rise to benefit eligibility under a "reasonable person" standard of "good cause." In Stevenson, the Oregon court of appeals was confronted with the issue of whether the claimant was barred from receiving benefits by her failure to attempt to informally resolve her grievance of personal harassment by her supervisor.102 The Stevenson court had recognized that the difficulties in complaining about harassment might influence the way in which a reasonable person would respond to the harassment. The Stevenson court asked, in effect, "What would the reasonably prudent person have done under similar circumstances?"

The hearing examiner in McPherson, however, made no findings as to how the reasonable person should have reacted to "sexist attitudes." As the Oregon Supreme Court noted:

he [the hearing examiner] made no findings of what the average reasonably prudent woman does under circumstances when she meets one or another kind of male hostility, ostracism, noncooperation, or offensive personal comments and behavior in different employment situations in an office, in a school or college, or in a maintenance shop or industrial plant.103

The McPherson court challenged the hearing examiner, on remand, to develop criteria for "good cause" within the overall policy and provisions of the state unemployment compensation law, bearing in mind that the statute "does not demand as a matter of law that [the employee] sacrifice all other than economic objectives and, for instance, endure racial, ethnic or sexual slurs, or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits."104

100. Id.
102. Case law in the unemployment compensation field traditionally imposes a duty on the claimant to make an effort to informally resolve his or her grievance at the workplace before quitting. See, e.g., Glennen v. Employment Div., 25 Or. App. 593, 549 P.2d 1288 (1976). For a discussion of this duty and the special problems it raises for sexual harassment claimants, see text at notes 128–36 infra.
103. 285 Or. 541 at 552 n.10, 591 P.2d at 1387–88 n.10.
104. Id. at 556, 591 P.2d at 1389.
McPherson is a landmark case in the area of sexual harassment and unemployment compensation. It clearly establishes that sexual harassment claims must be analyzed under their own standard of reasonableness in light of the special difficulties associated with reporting those claims, the compensatory purpose of unemployment compensation law, and the non-economic values implicit in unemployment compensation doctrine.

2. Sexual Harassment as Personal Harassment

Unemployment compensation cases in the personal harassment area are an important source of case law for guiding the analysis of a claim where the sexual harassment alleged does not amount to sex discrimination currently actionable under Title VII. Claimants have been eligible for unemployment compensation benefits where they have substantiated allegations of abuse of a verbal, physical, racist or sexist nature involving both job-related and wholly personal effects. Taken together, these cases suggest that "good cause" for quitting is shown where:

(1) a particular employee is singled out for abuse which need not be of a racist or sexist nature: employees who have been made the object of insults or repeated outbursts of temper have in some instances been found eligible for benefits;

(2) the work conditions have become intolerable, though not necessarily impossible;


108. See supra note 106.


111. Associated Utility Services, Inc. v. Board of Review, 131 N.J. Super. 584, 331 A.2d 39 (1974) (claimant subjected to undue scolding by supervisor who telephoned her at home late at night "to give her hell").


113. Gray Moving II, supra note 85.
(3) the claimant responded to the abuse in a reasonable manner by quitting;\textsuperscript{114}

(4) the alleged incident was in fact the reason for the claimant’s having quit and not a pretext.\textsuperscript{115}

These requirements of reasonableness, good faith and credibility serve to guarantee that the harassment was serious enough to satisfy the “reasonable person” standard of “good cause,” that the claimant quit in good faith and demonstrated a real commitment to work, and that the claim was not fabricated. Claimants who have failed to establish “good cause” after alleging personal harassment have usually failed to satisfy one of the four factors noted above. In addition, either a claimant’s failure to make an effort to resolve the alleged problem informally before quitting\textsuperscript{116} or the claimant’s failure to quit shortly after the abusive incident\textsuperscript{117} indicate that the claimant was an uncommitted worker searching for a pretext to quit.

Personal harassment cases are an important precedent for claims to benefits based on sexual harassment. They suggest the potential availability of benefits for a far broader range of harassing behavior than that proscribed by fair employment laws. In making the analogy between personal harassment and sexual harassment cases, however, the special problems which the victim of sexual harassment faces\textsuperscript{118} must be borne in mind. The basic requirements of reasonableness, good faith and credibility need to be evaluated somewhat differently in the sexual harassment context than in the personal harassment context.

In personal harassment cases, the determination of the reasonableness of the claimant’s response to abuse is frequently quite difficult. The courts have therefore held as a rule-of-thumb that “resentment of a reprimand, absent unjust accusations, abusive conduct and profane

\textsuperscript{114} Uniweld Products, Inc. v. Indus. Relations Comm’n, ___ Fla. App. ___, 277 So.2d 827 (1973) (reasonable person must have modicum of tolerance for screaming).


\textsuperscript{117} See note 115 supra.

\textsuperscript{118} See Sexual Harassment Hearings, supra note 2 (statement of Eleanor Holmes Norton, Chairperson, Equal Employment Opportunity Commission):

[Sexual harassment] is, for some, a constant threat, yet one that the victim feels powerless to confront. The woman who insists on pressing the issue often finds herself ostracized, written off as thin-skinned or a trouble-maker.
language do not constitute ['good cause'].” \(^{119}\) Such a standard is inappropriate in the sexual harassment area. Instead, a standard of harassing conduct is needed which reflects the current view as to the implicit unreasonableness of work-related sexual harassment\(^ {120}\) and which is capable of encompassing not only the most overt forms of sexual harassment but its more subtle manifestations. Furthermore, because sexual harassment is not only personal in nature but also impinges on the acceptance of women in the workplace in general\(^ {121}\) and constitutes a pervasive threat to all working women,\(^ {122}\) it calls into play both the economic and non-economic values that the unemployment compensation adjudicator is charged with protecting. Thus, were unemployment compensation adjudicators to declare sexual harassment to be an unacceptable and unreasonable practice, they would be providing women a tool to protect their right to personal integrity established by case law in the personal harassment context as well as their right to reasonable employment conditions — twin rights that McPherson committed to the unemployment compensation adjudicator’s vigilance.\(^ {123}\)

Unemployment compensation adjudicators have not attempted to define sexual harassment and have deceptively mislabeled the behavior by using the term “sexist attitudes” rather than “sexual harassment.”\(^ {124}\) In McCain,\(^ {125}\) this mislabeling was critical because it allowed the court to overlook the fact that the claimant was really complaining about actions which stemmed from the sexist attitudes, rather than the sexist attitudes themselves. Those actions, if adequately characterized, would have fallen within the purview of the definitions of sexual harassment proposed above\(^ {126}\) insofar as they involved repeated comments of an unwelcome, sexual nature — conduct which is clearly unreasonable in the workplace.

Categorizing the alleged actions in McCain as sexual harassment, however, would not have disposed of the question of whether the


\(^{120}\) See Sexual Harassment Hearings, supra note 2 (statement of Eleanor Holmes Norton, Chairperson, Equal Employment Opportunity Commission).

\(^{121}\) Id.

\(^{122}\) See note 5 supra.

\(^{123}\) 285 Or. at 556–57, 591 P.2d at 1390.


\(^{125}\) See notes 96–97 and accompanying text supra.

\(^{126}\) See note 1 supra.
claimant was entitled to benefits. The unemployment compensation adjudicator would still have had to determine whether the claimant had acted in good faith and was not fabricating a reason for quitting. Evidence indicated that the claimant had responded to the sexual harassment by tearing down the offending poster.¹²⁷ Was that a reasonable response? Does it suggest that she was an uncommitted worker who did not deserve benefits? Those questions are difficult and would have had to have been addressed in the context of the entire case. By simply labeling the conduct as “sexist attitudes” and not unreasonable “sexual harassment,” the unemployment compensation adjudicator side-stepped the critical issues.

The issues of good faith and fabrication of claims must also be addressed with special sensitivity to the situation in which a victim of sexual harassment finds herself. In the personal harassment context, a claimant’s failure to file a company grievance before quitting is often viewed as evidence that the claimant did not really wish to resolve the problem or that the alleged harassment was not his or her actual reason for quitting.¹²⁸ In the sexual harassment context, alternative explanations of the failure to file a grievance must not be overlooked. Filing a formal grievance or even an informal complaint may entail significant personal hardship that a claimant ought not be expected to undergo before quitting.¹²⁹ In Stevenson v. Morgan,¹³⁰ the court recognized that it was unreasonable to expect a claimant to make a formal complaint to her employer where a complaint against her supervisor could not be made privately.¹³¹ It must therefore be recognized that a sexual harassment victim may indeed be a committed worker who is unable to endure the additional personal humiliation involved in filing a formal or informal grievance.

Another reason that must be explored in considering why a victim of sexual harassment may have failed to invoke the company grievance procedure is the futility, under some circumstances, of making such a

¹²⁸. See cases cited in note 116 supra.
¹²⁹. Sexual Harassment Hearings, supra note 2 (statement of Diane Rennay Williams), Statistics compiled by the Equal Opportunity Commission indicate that only 0.6% of the complaints of sex discrimination made by federal employees involved allegations of sexual harassment. Eleanor Holmes Norton, chairperson of the EEOC, noted that reliance on the complaint processing system in sexual harassment cases “places an unfair and totally unrealistic burden on women to come forward in a situation that is extremely difficult for the average person.” Sexual Harassment Hearings, supra note 2 (statement of Eleanor Holmes Norton).
¹³¹. Id.
complaint. The Stevenson court explicitly noted that the claimant acted reasonably in not invoking the complaint mechanism in light of her knowledge that similar prior grievances had been futile.

Another factor often weighed by the courts in the personal harassment context in order to evaluate good faith and to detect possible fabrication is the length of time which elapsed between the alleged incident of harassment and the date on which the claimant left his or her job. Waiting several months to quit after an alleged incident of harassment can be viewed as evidence that the reason alleged was not the claimant’s actual reason for quitting. In the sexual harassment context, alternative interpretations must again be considered. Evidence suggests that women often do not complain about sexual harassment because they are embarrassed about complaining, are afraid of reprisals and are fearful of not being believed. Although these factors were found to explain why, in many instances, victims of sexual harassment took no action at all in response to sexual harassment, they could also explain why a claimant may have delayed in filing a claim for unemployment benefits. Thus, the unemployment compensation adjudicator needs to consider why the claimant delayed in filing rather than assume that the alleged sexual harassment could not have been the claimant’s real reason for quitting.

Conclusion

In reviewing the unemployment compensation eligibility of sexual harassment victims, unemployment compensation adjudicators must con-

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132. The study conducted by Federally Employed Women found that the majority of women surveyed chose not to complain about sexual harassment by formally invoking the available grievance procedure because they were afraid of reprisals, too embarrassed to complain or because they believed their complaint would receive no support. See note 23 supra.
133. See note 130 supra.
134. See note 115 supra.
135. See note 132 supra.
136. See, e.g., Hogan v. Schenectady Discount Corp., 50 A.D.2d 650, 374 N.Y.S.2d 457 (1975) where the court failed to consider possible explanations of why the claimant waited three months before voluntarily leaving work. Although no firm line can be drawn as to what is a reasonable length of time to wait before leaving work and filing for unemployment compensation, it is useful to remember that Title VII allows a plaintiff 180 days after the occurrence of the alleged unlawful employment practice in which to file a charge with the EEOC (300 days if the plaintiff first pursues her state law remedy). See 42 U.S.C. § 2000e-5(e) (1976). A six month hiatus between an incident or series of incidents of sexual harassment and the decision to quit and file for unemployment compensation benefits, therefore, cannot be considered an unreasonable amount of time per se. What motivated the claimant to postpone quitting remains the relevant consideration.
sider work-related sexual harassment within the context of evolving legal standards under Title VII and changing national perceptions of unacceptable workplace conduct.

Unemployment compensation adjudicators are now faced with the responsibility of developing consistent, clear criteria for considering these claims, taking into account both the economic and non-economic values which deserve protection at the workplace. Although the general criteria of reasonableness, good faith and credibility which have evolved from traditional unemployment compensation jurisprudence remain appropriate considerations in these cases, these criteria must be applied with special sensitivity to the unusual characteristics of sexual harassment, bearing in mind the unemployment compensation system's special responsibility to shield employees from unreasonable working conditions and to facilitate their transition to new employment.

EDITOR'S NOTE

While this Note was at the printer, the Equal Employment Opportunity Commission published an immediately effective amendment to its Guidelines on Discrimination Because of Sex which provides that sexual harassment at work is a Title VII violation. See 45 Fed. Reg. 25,025 (1980) (to be codified in 29 C.F.R. § 1604.11).

The amendment, which is subject to comment for a 60-day period, provides in pertinent part:

(a) . . . 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 substantially interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

(c) . . . [A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained
of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.

(d) With respect to persons other than those mentioned in paragraph (c) of this section, an employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

The amendment's broad definition of sexual harassment, encompassing "unwelcome . . . verbal or physical conduct of a sexual nature . . . [which] . . . has the effect of creating an . . . offensive working environment" is of especial significance to unemployment compensation claimants who are the victims of sexual harassment. The amendment effectively expands the scope of sexual harassment actionable as illegal discrimination and thus alters the scope of what constitutes "good cause" in jurisdictions which hold that illegal discrimination is "good cause" entitling the employee who quits in response to the discrimination to unemployment compensation benefits. The analysis offered above in Part III A of this Note should therefore be read with this amendment in mind.

Readers should also be advised that by subjecting an employer to liability where the employer or its supervisors knew or should have known of the harassment, the amendment would seem to impose Title VII liability on the employer for harassment by co-workers and may thus affect the case law summarized in Part I above.